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SPECIAL LECTURE

National Security and the Loaded Weapon

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I'm delighted to have been invited to participate in this symposium on "Future-Proofing Law."

My talk today — which is perhaps more of a polemic than the scholarly contributions you've been enjoying all morning — could be said to represent the antithesis of the conference's "future-proofing" theme. Its title, of course, is a nod to Justice Jackson's landmark

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dissent in the *Korematsu* case, in which the Court's majority upheld the exclusion of Japanese-Americans from designated areas on the west coast.

Jackson wrote:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.¹

The "loaded weapon" that I want to talk about today is not any particular policy, or even any particular doctrine, but rather the broad concept of "national security." Defining "national security" turns out to be difficult, so let me begin by making clear what I *don't* mean when I use the term.

I am not referring to "national defense," which we might define as a nation's use of military power and intelligence assets to maintain its survival. Nor am I referring to "public safety," which we might define as the use of police powers to protect the public from crime or other non-existential or non-territorial dangers. I am referring to something much more nebulous and elusive, a kind of civic religion that has arisen in the decades since President Truman signed the National Security Act² and has enshrined itself as the nation's paramount and defining interest.

This religion has its own priesthood in the high offices of the defense and intelligence communities, its clergy members in the halls

¹ *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

² National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. § 401 (2012)).

of the Capitol, and its deacons and altar boys spread around think tanks and academies.

And the theology of National Security is predicated on a series of foundational myths — or articles of faith — that, I will argue, are highly questionable, yet rarely questioned. These baseline assumptions are so commonly accepted that we've become desensitized to how truly extreme and anti-democratic they are. My hope today is to begin to re-mystify them.

I will explore some of these myths in detail, and explain why I think they are so consequential. By allowing this category error to metastasize without clear boundaries, we dignify a perpetual state of constitutional exception. Collectively, these tenets diminish our democracy by fundamentally weakening critical oversight mechanisms.

And in a time of genuine constitutional crisis — such as the one we may be experiencing now — they leave us with fewer tools of resistance at precisely the moment when those tools are needed most. But first I'll turn to what I described earlier as the foundational myths of the National Security Priesthood, beginning with the most important.

I. MYTH #1: WE LIVE IN UNIQUELY DANGEROUS TIMES

An alternate formulation of this core tenet is that “we face an unprecedented threat.” Despite the presence of words like “unique” and “unprecedented,” this tenet would appear to be evergreen. It is exemplified by Senator Lindsey Graham's remarkable (but also typical) statement in May of 2015: “We have never seen more threats against our nation and its citizens than we do today.”³

Let's paraphrase:

The Framers of the Constitution may have had certain ideas about the need to restrain government, but they never faced a threat like Al Qaeda, or ISIS, or cyber attacks by state or non-state actors. We saw the same kind of thinking in White House counsel Alberto Gonzales's dismissal of the Geneva Conventions as “quaint” and “obsolete.”⁴ These statements, to be charitable, are absurd. Relative to population,

³ Lindsey Graham (@GrahamBlog), TWITTER (May 22, 2015, 8:03 AM), <https://twitter.com/GrahamBlog/status/601765234940846081>.

⁴ Memorandum from Alberto R. Gonzalez, White House Counsel, Exec. Office of the President, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.01.25.pdf>.

the casualty figures for the Revolutionary War were staggering compared to more recent conflicts. Indeed, that war represents the very definition of an existential national struggle. Moreover, the authors of the 1949 Geneva Conventions had just emerged from total war in which fifty million people, most of them civilians, had been killed.⁵ To call those people naïve really is the height of narcissism.

Let's engage in a brief thought exercise.

What would the Framers of the Constitution, or the drafters of the Geneva Conventions, have made of a society in which only one in four million people was likely to die in terrorist attack,⁶ but the government nonetheless routinely frightened the public with color-coded threat alerts?

Somehow I don't think they would be impressed.

A corollary of this myth is that today's terrorists are uniquely lethal super-villains. Ordinary prisons can't hold them, and of course they can never be released.

And so we heard the nation's top uniformed military officer warn us in 2002 that Guantanamo housed the "worst of the worst";⁷ the sort of "people who would gnaw through hydraulics lines in the back of a C-17 [transport plane] to bring it down."⁸

In New York City, we saw the deeply cynical protests by local elected officials who opposed holding the trial of the alleged 9/11 perpetrators in federal court in Manhattan. The result of that effort is that more than sixteen years after the 9/11 attacks, the trial of the alleged perpetrators has not even begun⁹ — something that should be a source of shame for all Americans.

It's important to qualify: this view of terrorists as super-villains is not shared by everyone in the security state, and you hear very different things in private.

In 2007, I was invited to a dinner with a senior military official — one who would go on to serve on the Joint Chiefs of Staff. I said to

⁵ See generally *World War II Fast Facts*, CNN (Aug. 17, 2017, 3:21 PM), <http://www.cnn.com/2013/07/09/world/world-war-ii-fast-facts/index.html>.

⁶ A study from the Cato Institute puts the exact risk at 1 in 3.6 million. Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO INST. (Sept. 13, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf.

⁷ See Jackie Northam, *Freed from Gitmo, Where Do Detainees Go?*, NPR (July 30, 2007, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=12344597>.

⁸ *Shackled Detainees Arrive in Guantanamo*, CNN (Jan. 11, 2002, 11:28 PM), <http://edition.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html> (quoting General Richard Myers).

⁹ See *About the 9/11 War Crimes Trial*, MIAMI HERALD (Oct. 16, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1928877.html>.

him at that dinner: “If you closed Guantanamo today, and offered each detainee the weapon of his choice, and dropped each off on the battlefield of his choice, they would collectively do less harm to the country than you’re doing by keeping the prison open.”

His response: a high five.

But the fact that this person would never acknowledge that view in public is the consequence of a perverse, upside-down politics of national security.

Our prevailing political discourse rewards those who inflate the terrorist threat and marginalizes those who accurately describe it.

Thus, those who proclaim that today’s Muslim terrorists represent an unprecedented threat to our way of life; that our existing laws, courts, and institutions — even our prisons — are inadequate in the face of this threat; that we have no choice but to dispense with core principles — including even the prohibition against torturing prisoners — to defeat this ruthless enemy; that, in short, “9/11 changed everything” — are extolled as hard-nosed realists, warriors who are willing to “take the gloves off.” By contrast, those who defend the vitality and viability of our constitutional system; who insist that our existing institutions are equal to the challenges posed by transnational terrorism; who demand that we abide by core principles, including fair trials for and humane treatment of prisoners, even if that means that terrorism suspects must be released and political leaders must be prosecuted; who, in short, do not believe that the threat of terrorism requires us to abandon our core principles — are dismissed as weak and naïve, afflicted by a “pre-9/11 mindset.”

This insistence on the language of war says less, I believe, about the nature of our enemy, and more about the identity needs of our own would-be warriors.

It’s necessary to ask: Is it possible that Lindsey Graham is right, and that terrorism is in fact the existential threat that he would have us believe it is, and that but for the wars and aggressive counter-terrorism policies that people like me have criticized, we would have seen dozens of catastrophic attacks in these last sixteen years?

It’s possible.

As a noted philosopher once said: “Absence of evidence is not evidence of absence.”¹⁰

This line of argument recalls the old joke: A man is standing in the middle of Times Square with a sign that says “Tigers: Keep Out.” A

¹⁰ Donald Rumsfeld, U.S. Sec’y of Def., NATO Press Conference (June 6, 2002), www.nato.int/docu/speech/2002/s020606g.htm.

passerby asks him: "What's with that sign? There are no tigers in New York City." The man nods knowingly. "It's working."

This is the difficulty. We can't say what the world would be like if we didn't throw hundreds of billions of dollars at this problem. But if a *lack of attacks* is evidence that our strategy is working, and *more attacks* are evidence that we need even more counter-terrorism resources, then we seem to be trapped in a one-way ratchet.

I would add that if our intelligence community were routinely thwarting deadly attacks, it would be in their nature to boast about it.

Recall that Attorney General John Ashcroft interrupted a visit to Moscow in 2002 to announce to the world in a grainy video that the United States had captured José Padilla, who was allegedly involved in a plot to detonate "dirty bombs" in U.S. cities. Even at the time, the evidence for that assertion was thin; we now know it was more fantasy than threat.¹¹

And government officials have made similarly breathless announcements about the thwarting of comically inept terrorist plots, real or imagined.

One of my favorites was the so-called "Sears Tower Plot," a terrorist plot to knock down the iconic tower so that it would fall into Lake Michigan and create a tsunami.¹² At the time Vice President Dick Cheney described that one as a "very real threat."¹³

The truth is, as the security expert Bruce Schneier has stated: "There aren't a lot of terrorists out there."¹⁴ America is full of big guns and soft targets. If it were also full of sleeper cells, we would know by now.

This leads us to an uncomfortable question:

How have the leaders and defenders of the security state persuaded the citizens of one of the safest and most secure societies in human history that the Huns are perennially at our doorstep?

I'm afraid I don't have an answer to that one.

¹¹ See Adam Taylor, *The CIA Claimed Its Interrogation Policy Foiled a 'Dirty Bomb' Plot. But It Was Too Stupid to Work*, WASH. POST (Dec. 9, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/the-cia-claimed-its-interrogation-policy-foiled-a-dirty-bomb-plot-but-it-was-too-stupid-to-work/?utm_term=.547dc5ab4f82.

¹² Simon Montlake, *Jury Deadlock Ends Terror Trial in Miami*, CHRISTIAN SCI. MONITOR (Dec. 14, 2007), <https://www.csmonitor.com/2007/1214/p99s01-woam.html>.

¹³ Joshua Micah Marshall, *Toying with Terror Alerts?*, TIME (July 7, 2006), <http://content.time.com/time/nation/article/0,8599,1211369,00.html>.

¹⁴ Bruce Schneier, *Why Aren't There More Terrorist Attacks?*, SCHNEIER ON SECURITY (May 5, 2010, 7:09 AM), https://www.schneier.com/blog/archives/2010/05/why_arent_there.html.

II. MYTH #2: SECURITY IS OUR PARAMOUNT NATIONAL INTEREST

This view is widely held and often stated. Even the Supreme Court of the United States, which should know better, has written that “it is ‘obvious and unarguable’” that “the security of the Nation” is its preeminent interest.¹⁵

Is that so? It’s certainly not clear that the Framers of the Constitution would agree.

As the journalist Bart Gellman has observed, the Preamble to the Constitution identifies not one, but “six basic purposes that we, the people, intend our government to advance. *Fourth* among them is to ‘provide for the common defence.’ (. . . Union, Justice and Tranquility precede that goal; Welfare and Liberty follow.)”¹⁶

As Gellman says, “There is a tone of catholicity here. We the People care a lot about the common defense, but defense has peers in our Pantheon.”¹⁷

It is now entirely common to refer to the president as “Commander in Chief” of the nation, not the armed forces — a formulation that misperceives the president’s constitutional role, even as it makes all of us “soldiers” as we sit at our computers, scrolling through tweets and deleting emails.

A corollary of this myth is that “if it makes us safer, we should do it.”

All too often in post-9/11 conversations about terrorism, it has seemed that the only question we should be asking is whether a proposed (or exposed) government action “keeps us safe.”

But we know from other, non-national-security contexts that this framing is at best incomplete. We knowingly reject all manner of policies and regulations that would demonstrably make us safer. We could reduce deaths from automobile accidents quite significantly if we used technology to strictly enforce speed limits. We could require that every new car be fitted with a breathalyzer device that links to the ignition, so no car could be started by someone under the influence. We could have sobriety checkpoints every few miles.

Some of you may be nodding and thinking that these are good ideas. Great! You can use the political process to advocate for policies like these. If and when they’re proposed, there will be voices on the other

¹⁵ Haig v. Agee, 453 U.S. 280, 307 (1981).

¹⁶ Barton Gellman, Senior Fellow, Remarks at the Woodrow Wilson School: Secrecy, Security and Self-Government: An Argument for Unauthorized Disclosures (Sep. 3, 2013) (emphasis added), <https://tcf.org/content/commentary/secrecy-security-and-self-government-an-argument-for-unauthorized-disclosures>.

¹⁷ *Id.*

side arguing that the increases in road safety are not worth the cost in liberty of being issued automatic speeding violations every time we exceed the posted limits, or of having TSA-level security on our roads and highways.

The real question is:

How much safer do you want to be? And how much are you willing to give up in exchange for that increase?

We are already pretty safe from terrorists. We should be wary of political rhetoric that leaves little room for other core constitutional values.

A second corollary of this myth allows the high priests of the security state to position *themselves* as the real defenders of civil liberties and human rights. I often hear arguments like this one:

“If you think *these* policies are bad, just wait until there’s another attack. The public will demand much worse!”

The implied takeaway is that we should gratefully allow the erosion of rights in order to prevent erosion of still *more* rights.

This formulation is an unhelpful straw-man. It’s a straw-man because no one is arguing that our police, military, and spies should unilaterally disarm; virtually all of us support targeted counter-terrorism measures that are proportional to the threat. And it’s unhelpful because it tells us nothing about *where* difficult lines should be drawn.

III. MYTH #3: WE SHOULD DEFER TO THE EXPERTISE OF NATIONAL SECURITY OFFICIALS

This anodyne-sounding principle has been at the heart of the security state’s successful efforts to neuter constitutional oversight by the courts and Congress.

Of all of the tenets of the National Security state, this one might have seemed most alien to the Framers. The structure of our constitutional system is predicated on *mistrust* of aggregated authority. The very purpose of divided government, and of constitutional protection for a free press, was the Framers’ belief that leaders would use their power for improper purposes — not because they were evil, but because they were human.

What the leaders of the security state call “deference” to their own expertise, the Framers would have recognized as a structural conflict of interest.

For example, when the ACLU brought suit against CIA officials and contractors for the mistaken kidnapping and brutal treatment of our client Khaled El-Masri, it was the CIA itself that invoked the state

secrets privilege and successfully pressed for the dismissal of the suit on the grounds that litigation of our claims against them would harm national security.¹⁸ Put otherwise, a torture victim's lawsuit was dismissed in deference to the "expertise" of an affidavit submitted by *the perpetrators themselves*.

Secrecy doctrines like the state secrets privilege are the method most often used to enforce this principle of deference. Executive branch officials are literally "indoctrinated" — this is their term, not mine¹⁹ — into the world of security clearance, which I prefer to call the "Deep State omertà." And the security clearance regime allows security state officials to put forward the corollary of the deference rule: "If you knew what we knew, if you saw what we saw, you'd understand why we have to do what we do."

When you hear that, be sure to keep in mind that the most grievous and damaging decisions affecting "national security" have been made by officials with access to the most closely guarded secrets.

A few years ago I had the opportunity to discuss the state secrets privilege with Aharon Barak, the former President of the Israeli Supreme Court. I asked him how he responded to government demands that courts defer to the expertise of national security officials. He recounted a lawsuit in which human rights organizations had challenged a military proposal to erect a security wall that would cut off Palestinian civilians from their farmlands. Military officials insisted that the court defer to their expertise and not second-guess the planned route of the construction. Justice Barak told them: "You are the experts in national security. But I am the expert in proportionality."²⁰ The court held that the planned wall had to be rerouted to mitigate harm to the local population.²¹

That approach has allowed the Israeli High Court to issue important precedential decisions about torture, targeted killing, and other highly sensitive security issues — even as U.S. courts have dismissed similar cases, without any adjudication of either law or facts, on the basis of government claims of secrecy.

¹⁸ *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535-38 (E.D. Va. 2006).

¹⁹ See, e.g., *Initial Security Indoctrination*, U.S. DEP'T DEF. (July 27, 2010), <http://www.secnv.navy.mil/dusnp/Security/Documents/InitialSecurityBriefing.pdf>.

²⁰ Paraphrasing Justice Barak. See HCJ 2056/04 Beit Sourik Village Council v. Government of Israel PD 1, 30 (2004) (Isr.) ("The military commander is the expert regarding the military quality of the separation fence route. . . . We examine whether this route's harm to the local residents is proportional. That is our expertise.").

²¹ *Id.* at 45.

IV. MYTH #4: NATIONAL SECURITY OFFICIALS WHO BREAK THE LAW
DO SO IN GOOD FAITH; ADVOCATES WHO SEEK TO HOLD THEM
ACCOUNTABLE DO SO IN BAD FAITH

This tenet holds that our national security officials are uniformly “honorable public servants, working under extreme pressure,” while human rights advocates who second-guess their decisions are practicing “lawfare,” a kind of asymmetric warfare waged from the safety of their Fifth Column.

The term “lawfare” has generally been defined as “the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective.”²² Remarkably, this is how the high priests of the security state and their apologists tend to view efforts to hold them accountable for grave violations of the Constitution or human rights norms.

The Brookings Institution’s Benjamin Wittes, editor in chief of the Lawfare blog — which operates as a kind of online clubhouse for the national security set — has defended the notorious Department of Justice “torture memos,” which purported to authorize interrogation techniques that the United States had long deemed criminal, as the good-faith work of lawyers who were, in his words, “addressing very hard questions under extraordinarily hard circumstances.”²³

By contrast, here is how he describes a human rights organization that criticized the Obama administration for its political decision to “look[] forward, not backward[s]” and to decline to investigate the architects of the Bush administration’s torture conspiracy:²⁴

“What Human Rights First calls ‘accountability for torture’ is, in my book, the criminalization of policy differences — *nothing more or less*.”²⁵

“Nothing more or less.”

In four words, Wittes breezily dismisses a deeply established body of domestic and international law, including treaties to which the United States is a signatory, and accuses human rights defenders of pursuing a partisan political vendetta.

This is, of course, exactly backwards: it was the torturers and their apologists who were politicizing the law, not human rights advocates

²² Charles J. Dunlap, Jr., *It Ain’t No TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT’L L. 479, 480 (2003).

²³ Benjamin Wittes, *Redoing the Human Rights First Report Card IV*, LAWFARE (Jan. 12, 2011, 8:47 AM), <https://www.lawfareblog.com/redoing-human-rights-first-report-card-iv>.

²⁴ *See id.*

²⁵ *Id.* (emphasis added).

who were criminalizing politics. But the sense of outraged dignity at the notion that honorable public servants who were protecting the nation could have their actions judged by naïve idealists is a common trope of national security discourse.

The result is that there is virtual impunity for any senior security state official who insists that his alleged misconduct was carried out under the banner of national security. And so, for example, all but one lawsuit brought by victims of the Bush administration's torture regime have been dismissed without any adjudication of either the law or the facts.²⁶ This of course means that the perpetrators have escaped any accountability, and the victims have been deprived of any remedy. But of equal importance, our system of justice has been deprived of a definitive adjudication of the lawfulness of the alleged conduct.

Should we be surprised when a new president feels free to re-litigate this question? Can we even call it "re-litigation," when we were never allowed to litigate it in the first place?

So, to sum up briefly: the ideology of national security has taught us that the world is always a very scary place (and that Islamic terror is on par with earlier existential threats to the nation); that security should be our primary national concern; that courts and Congress should generally defer to the expertise of the executive branch on national security questions; and that executive officials should be exempt from legal accountability because their activities — indeed, even their abuses — are carried out in service of the nation.

It's more than a little ironic that the national security actors and cheerleaders who brought us this ideology, many of whom have emerged as loud critics of President Donald Trump, seem to have no sense at all that they have spent the last several decades helping to lay the groundwork for a fear-based candidacy and advocating the weakening of the constitutional constraints that were put in place precisely to protect us from a malignant actor like Trump. They would be deeply offended by the suggestion that they had loaded Justice Jackson's proverbial weapon and handed it to a madman.

²⁶ In the summer of 2017, two CIA torture victims and the family of a detainee who froze to death in a CIA prison reached a historic settlement in a lawsuit against the psychologists who designed and implemented the agency's torture program. *CIA Torture Psychologists Settle Lawsuit*, ACLU (Aug. 17, 2017), <https://www.aclu.org/news/cia-torture-psychologists-settle-lawsuit>.

CONCLUSION

Discordant as it may seem, I want to close on a note of cautious optimism.

If nothing else, the events of the last months have made clear that national security politics are a game with serious consequences.

What would it look like to have a different kind of politics? How might we create a politics based more on courage than on fear, more on resilience than on reaction?

Is fear of terrorism as deep-seated as our leaders seem to believe it is — or is it a language we've all grown accustomed to?

I think there's reason to believe that the public might be grateful for a different kind of conversation about security and terrorism.

We saw some of this sentiment in the tens of thousands of Americans who spontaneously gathered at airports to protest the Trump administration's ban on refugees and visitors from predominantly Muslim countries.²⁷ I'm convinced that those demonstrations played a critical role in the decisions of the judges to enjoin the enforcement of Trump's executive orders. We like to think of our courts as being insulated from political tides, but the opposite is true: a frightened populace will contribute to judicial decisions upholding abusive security policies, and a courageous populace will embolden judges to stand up for rights.

Some years ago — when color-coded “terror alerts” were still the norm — I was watching CNN when the Department of Homeland Security had set the threat level at “orange.” After a few minutes of somber-sounding “experts” expounding on the latest “terrorist chatter,” CNN split the screen to show other breaking news: A dog floating on a piece of ice was being rescued by the coast guard. After a few more minutes, the terror alert disappeared, and the full screen was given over to the dog rescue.

It's hard to imagine a more perfect illustration of how much our security discourse operates as a kind of theater.

I have the sense that the American people are ready for something more substantial. I think the public would respond positively to a politics that placed courage at the center of citizenship.

²⁷ See generally Niraj Chokshi & Nicholas Fandos, *Demonstrators in Streets, and at Airports, Protest Immigration Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/protests-airports-donald-trump-immigration-executive-order-muslims.html>.

Let's remind our leaders — because they have failed to remind us — that in our national anthem, “land of the free” and “home of the brave” appear in the same clause.²⁸

Let's tell them that the only thing that truly scares us is that our leaders might burn down the village in order to save it — that is, that in the name of defending the nation, they will make it a place not worth defending.

²⁸ FRANCIS SCOTT KEY, THE STAR-SPANGLED BANNER (1814), <http://www.usflag.org/the.national.anthem.html>.