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Legal Issues in the War on Terrorism

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Introduction

During the past year, I have had an intensive and ongoing dialogue with European government officials about U.S. counterterrorism laws and policies, especially those relating to the detention, questioning, and transfer of members of al Qaida and the Taliban. During this same period, the U.S. legal framework governing the detention and treatment of detainees has evolved significantly, through the passage of the Detainee Treatment Act last December, the Supreme Court's decision in the Hamdan case in June, the transfer of 14 al Qaida leaders to Guantanamo in September, the announcement of new DOD detention policies in September, and the enactment of the Military Commissions Act earlier this month. It has been vexing to us that so many myths and misunderstandings about United States policies have proliferated. My dialogue with European governments during the past year has helped to clear up some of these myths and to address issues that are troubling to Europeans. Tonight, I want to provide a comprehensive public

explanation of our legal views and policy decisions with respect to the detention and treatment of terrorists, as these have evolved in the United States since September 11th.

And let me say up front, there's a lot to cover here [not recorded]… am happy to take questions on these issues.

As I explain our position, I would ask you to consider four things. First, if the legal requirements applicable to the detention of international terrorists are as clear as some critics believe, I would ask you to consider why our critics are unable to agree among themselves whether we should treat detainees as combatants under the law of war or as suspected criminals under human rights law. In my discussions in Europe, I have found that our critics often assert the law as they wish it were, rather than as it actually exists today.

Second, while you may not agree with our analysis on every issue, I hope you will see that we have thought hard about these issues and that we have a solid legal basis for our views. We have not ignored the existing rules or made up new rules. Third, where you question our approach, I would ask you to consider whether a realistic alternative approach exists and how that approach would work better in practice. And finally, I would ask you to think about whether the existing legal frameworks contained in the Geneva

Conventions of 1949 and domestic criminal laws are well-suited to deal with international terrorism in the 21st century. Let me be very clear: I am not advocating that we discard our existing rules, which still serve a critical role in dealing with the situations for which we developed them. Nor am I suggesting that the United States sees a current need to negotiate a new instrument on these issues. I am suggesting, as your Secretary of Defense John Reid did earlier this year, that we must ask serious questions about whether further developments in the law are needed.

I. War is an Appropriate Paradigm for the Conflict

Now, the first question I want to address is whether it was appropriate and lawful in the first place for the United States to detain members of al Qaida and the Taliban, some of whom are now in Guantanamo. The majority of the detainees in Guantanamo were captured in late 2001 or early 2002 in or near Afghanistan by U.S. forces or our allies. It should be clear that U.S. and allied operations in Afghanistan during this period constituted a use of military force as part of an action in legitimate self-defense, as opposed to a massive law enforcement operation. We were in a legal state of armed conflict with al Qaida and the Taliban, which was governed by the law of war.

Why did we have a right to use military force? We were justified in using military force in self-defense against the Taliban because it had allowed al Qaida to use Afghanistan as an area from which to plot attacks and train in the use of weapons and it was unwilling to prevent al Qaida from continuing to do so. We knew from intelligence that Osama Bin Laden, his senior lieutenants, and numerous other members of al Qaida were in various al Qaida camps in Afghanistan. We gave the Taliban an opportunity to surrender those it was harboring, and when it refused, we took military action against its members.

We were also clearly justified in using military force in self-defense against al Qaida. Al Qaida is not a nation state, but it planned and executed violent attacks with an international reach, magnitude, and sophistication that could previously be achieved only by nation states. Its leaders explicitly declared war against the United States, and al Qaida members attacked our embassies, our military vessels, our financial center, our military headquarters, and our capital city, killing more than 3000 people in the process. Al Qaida also had a military command structure and world-wide affiliates. In our view, these facts fully supported our

determination that we were justified in responding in self-defense, just as we would have been if a nation had committed these acts against us.

We are not alone in our view that our actions against al Qaida and the Taliban were justified under international law as an act of self-defense. The UN Security Council recognized the right of the United States to act in self-defense in response to the September 11th attacks, as NATO did by invoking, for the first time in its history, the provisions of collective self-defense in the North Atlantic Treaty.

Moreover, if we did not have the right to use force against al Qaida and the Taliban, then we would have had no acceptable way to defend our citizens after the most devastating attack against the United States in history. Given the Taliban's unwillingness to cooperate with the international community to bring the perpetrators of the September 11th attack to justice, it cannot reasonably be argued that the only recourse the United States had was to file diplomatic protests or extradition requests with Mullah Omar.

This is my first point: Despite assertions that some Europeans do not believe the United States is in a war, it is clear that as a matter of

international law, the United States and its allies were engaged in an armed conflict – not a police action -- against al Qaida and the Taliban in Afghanistan as part of a lawful action in self-defense against an armed attack, and the law of war applied to these actions.

Because the United States was in an armed conflict with al Qaida and the Taliban, it was proper for the United States and its allies to detain individuals who were fighting in that conflict. One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities. It cannot reasonably be argued that the United States and its allies had the right to use force in Afghanistan but did not have the right to detain individuals as part of that use of force unless we planned to charge them with a crime. Our Supreme Court explicitly affirmed that the U.S. had the right to detain enemy combatants as part of our right to use force.

Some of our critics agree that we were in a war with the Taliban and al Qaida in Afghanistan in 2001 and 2002, and that our detention of at least some of the detainees was justified under the law of war. But they argue that the conflict ended in June 2002 with the establishment of

Afghanistan's new government and that our legal basis for holding any detainees ended at that time. But this assertion is not consistent with the facts on the ground. The Taliban, which was the same group we were fighting against initially, continues to fight U.S. and coalition forces in Afghanistan. We see the Afghanistan conflict as a continuing conflict that began in 2001, and we believe that the United States is not obligated to release any Taliban detainees we currently hold in Afghanistan or Guantanamo, only to see them return to kill U.S. or coalition forces. Anybody who disputes that this conflict continues should consider that combat operations over the past few months have resulted in the deaths of several hundred Taliban fighters and a number of European and Canadian forces.

Equally important, however, we believe that the United States was and continues to be in an armed conflict with al Qaida, one that is conceptually and legally distinct from the conflict with the Taliban in Afghanistan. It cannot reasonably be argued that the conflict with al Qaida ended with the closure of al Qaida training camps and the assumption of power by a new government in Afghanistan. Al Qaida's operations against the United States and its allies continue not only in and around Afghanistan but also

in other parts of the world. And because we remain in a continued state of armed conflict with al Qaida, we are legally justified in continuing to detain al Qaida members captured in this conflict.

Now, I am aware that many Europeans do not agree that we are in a war with al Qaida at all, much less a "Global War on Terrorism." So let me pause here briefly to explain what we mean by the "Global War on Terrorism," because I know that this term is troubling to Europeans. We do not believe that we are in a legal state of war with every terrorist group everywhere in the world. Rather, the United States uses the term "global war on terrorism" to mean that all countries must strongly oppose, and must fight against, terrorism in all its forms, everywhere around the globe. When used in this sense, I do not think that anyone in Europe would disagree with this objective.

We do, however, believe that we are in a legal state of armed conflict with al Qaida, for the reasons I have already described. And here I also want to respond to two arguments I often hear as to why it is not correct to characterize this conflict as a war. **First, some argue that a legal state of armed conflict can only occur between two nation states and that a**

state may not use force against an entity that is not a state. This contention is incorrect. Civil wars, which occur between a state and a non-state actor, have been among the bloodiest conflicts in recent history. The international rules regarding the right to use force, including those reflected in Article 51 of the UN Charter, do not differentiate between an armed attack by a state and an armed attack by another entity. This makes logical sense: The principle of self-defense permits a state to take armed action to protect its citizens against external uses of force, regardless of the source. It is true that most wars of the past were between states, or existed within the territorial limits of a single state, but this is because of the technological limits of military conflict, not because of the legal rules.

This principle is no less true when a non-state actor launches attacks from outside the territory of a state into that state. Over a century of state practice supports the conclusion that a state may respond with military force in self-defense to such attacks, at least where the harboring state is unwilling or unable to take action to quell the attacks. This includes the famous 1837 case of the *Caroline*, in which British forces in Canada entered the United States and set fire to a vessel that had been used by private American citizens to provide support to Canadian rebels, killing

two Americans in the process. Even law of war treaties that govern the treatment of detainees in armed conflict contemplate conflicts between state and non-state actors. Indeed, any country that is party to Additional Protocol I of the Geneva Conventions, which governs certain conflicts with groups engaged in wars of national liberation, has implicitly acknowledged that a state may be in a conflict with a non-state actor.

The second argument I hear is that the United States may have been justified in using force against al Qaida, and in detaining members of al Qaida, in Afghanistan, but it is not lawful for us to use military force against or detain members of al Qaida outside Afghanistan. This argument seems motivated more by a fear of the implications about the possible scope of the conflict than by actual legal force or logic. We would all be better off if al Qaida limited itself to the territory of Afghanistan, but unfortunately, that is not the reality that we face. There is no **principle of international law that limits a state's ability to act in self-defense to a single territory, when the threat comes from areas outside that territory as well.** Let me be very clear here: I am not suggesting that, because we remain in a state of armed conflict with al Qaida, the United States is free to use military force against al Qaida in any state where an al

Qaida terrorist may seek shelter. The U.S. military does not plan to shoot terrorists on the streets of London. As a practical matter, though, a state must be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat.

To those who might disagree, I would ask you to **consider the alternatives**. If terrorists intent on harming civilians are being harbored by another state that is unable or unwilling to act against them, what choices does the state whose civilians are in jeopardy have? If we determine the location from which Bin Laden has been planning attacks against the United States, and the state in which he is operating is unable or unwilling to act against him, what would you have the United States do? If terrorist attacks were being planned and launched against Britain from outside British territory from a state that would not or could not act to restrain the terrorists, what action would Britain take?

One reason our critics have so vigorously refused to acknowledge that we have been and continue to be in a legal state of war is that they fear such

an acknowledgement would give the United States a blank check to act as it pleases in combating al Qaida. Recognizing a state's right to take certain actions in self-defense is not to give a state carte blanche in responding to the terrorist threat. A state acting in self-defense must comply with the UN Charter and fundamental principles of the laws of war. And whether a state legitimately may use force will depend on a variety of factors, including the nature and capabilities of the non-state actor; the patterns of activity of that non-state actor; and the level of certainty a state has about the identity of those it plans to target. It also will depend on the state from which a non-state actor is launching attacks – specifically, whether that state consents to self-defense actions in its territory, or whether the state is willing and able to suppress future attacks. Rather than suggest that the use of force against al Qaida, including the detention of al Qaida operatives, is illegitimate, it makes more sense to examine the conditions under which force and detention may be used.

Law enforcement insufficient

I would also ask you to consider whether there is a realistic alternative to relying on the basic rules developed for armed conflict to guide a conflict with terrorists that requires a state to use military force to defeat their

attacks. For instance, some critics say that the right model is the law enforcement model. But would reliance on law enforcement personnel and traditional law enforcement cooperation alone really have stopped al Qaida from planning and executing its attacks around the world and in the United States, especially given the lack of a functioning government in Afghanistan? If we relied on a law enforcement model alone, we could not have used force against the Taliban and al Qaida in Afghanistan. And if we were justified in using force, as we believe we were, it would not have been workable to detain only those members of the Taliban and al Qaida immediately suspected of a crime.

More important, even if we wanted to try those we captured in Afghanistan in our civilian courts, most of the individuals now held in Guantanamo cannot be tried in U.S. courts because U.S. criminal laws did not extend to their activities in Afghanistan, with the obvious exception of those who committed specific war crimes. Nor did UK laws, which is one reason why the UK could not criminally prosecute its nationals returned from Guantanamo. In the last few years, the United States, the United Kingdom, Australia, and other countries have enacted new criminal laws with a wider extraterritorial scope. But this does not help us prosecute the

detainees in Guantanamo in our civilian courts, because criminal statutes cannot have retroactive effect.

Even where the al Qaida fighters we found in Afghanistan had violated U.S. law, there are significant procedural hurdles to trying these individuals in U.S. federal court. For example, U.S. rules of criminal procedure require a clear record of the chain of custody of evidence. We could not have required our soldiers to seize, seal, and transport evidence in Afghanistan as police officers do inside our own countries, and then pulled them off the battlefield in Afghanistan to testify in court about evidence collection. This simply is not compatible with a military mission.

Now, I am certainly aware that a number of European countries have been able to deal with terrorist groups in their countries using their domestic criminal laws, without resorting to international humanitarian law, the laws of war. But these groups were different from al Qaida: in particular, their members were physically present and operated primarily inside European countries, where they could be pursued by effective law enforcement personnel and were subject to existing criminal laws. And

relevant evidence and witnesses against them were already available inside Europe.

This is not to say that military force and the laws of war are the ONLY appropriate or legal approach to confront international terrorism generally, or al Qaida in particular. Nor is it to say that law enforcement approaches to counterterrorism should be pushed aside because they are inconvenient to implement. We recognize that other countries, like the UK, Germany, and Spain, may be able to continue to use their criminal laws to prosecute members of al Qaida. Indeed, the United States itself continues to use its criminal laws to prosecute members of al Qaida, like Zacharias Moussaoui, who we find inside our own territory. But we do believe that it was – and continues to be – appropriate and legally permissible to use military force and apply the laws of war, rather than pursue a criminal law enforcement approach, to deal with members of al Qaida in certain cases.

II. The Rules for this Conflict

As I have suggested, the international legal framework was not perfectly suited to handle the events of September 11. But the suggestion that the United States is using the war framework to avoid applying legal rules – to

put detainees into a “legal black hole” – is incorrect on several levels. Since September 11, we have developed a law of war framework that allows us to detain, question, and prosecute individuals in a manner that is fully consistent with Common Article 3 of the Geneva Conventions, which is the standard that the U.S. Supreme Court recently held to apply as a treaty law matter with our conflict with al Qaeda.

Status of Detainees

Let me explain the reasoning behind the initial U.S. legal positions concerning the status of al Qaida and Taliban detainees. Our earliest critics suggested that we failed to comply with the Geneva Conventions because we would not treat the detainees as Prisoners of War under the Geneva Conventions. This argument ignores the structure and terms of the Geneva Conventions.

The Third Geneva Convention does not require that everyone who takes up weapons on a battlefield receive POW status if captured. Common Article 2 of the Conventions limits their scope to armed conflicts between two or more High Contracting Parties. Thus, the bulk of the Third Convention protections, including POW status, are limited to belligerents

engaged in international armed conflict between States. The U.S. Supreme Court's *Hamdan* decision reflects that the conflict between the United States and al Qaida is not an international armed conflict. Thus, as a matter of treaty structure, this means that al Qaida fighters are not entitled to POW protections.

With regard to the Taliban, which was at the time the effective government of a party to the Geneva Conventions, the text of Article 4 of the Third Geneva Convention makes clear that their fighters are also not properly considered POWs. The Taliban does not meet that Article's requirements, because its fighters did not carry arms openly, wear a uniform recognizable at a distance, and respect the laws and customs of war. Instead, they are "unlawful combatants," a term which was not invented by the Bush Administration but rather has long been recognized by international law and used in European treatises.

And ironically, even if we had decided to treat the Taliban and al Qaida as POWs, as a matter of either law or of policy, the Geneva Conventions do not require us to try them or release them.

While the United States is not required to treat these detainees as Prisoners of War, or to prosecute or release them, this does not mean that no applicable legal rules govern their detention. Over the course of the last five years, our Executive branch, our Congress, and our courts have developed a comprehensive framework of legislative rules and administrative procedures to govern the detention, treatment, interrogation, and trial of suspected members of al Qaida and the Taliban who are not covered by other laws.

First, our Executive branch has established procedures to make sure that we are detaining the right people. We recognize that critics have repeatedly asked, "How did you know that the individuals you detained were members of the Taliban and al Qaida? Many detainees claim they were simply in the wrong place in the wrong time." Admittedly, identifying members of the Taliban and al Qaida was difficult, because unlike a traditional war, the Taliban and al Qaida did not wear uniforms and insignia. Nevertheless, our forces worked hard to detain only those individuals who were actually engaged in combat or who were reasonably suspected of having been engaged in combat or of being a member of al Qaida. And when our forces pick up someone who proves after initial

screening not to be a combatant, we release that person. The same is true in any war.

To ensure that we are holding the right people, every detainee in Guantanamo has had his case reviewed by a formal Combatant Status Review Tribunal, which determines whether a detainee is properly classified as an enemy combatant. The detainee has the assistance of a military officer, may present evidence, and may appeal the determination of the CSRT to our federal courts. It is simply not correct to say that detainees have not and will not have access to our federal courts to review their detention. Some detainees have been released as a result of this process.

Detainees who the United States does not intend to prosecute by military commission also have their detention reviewed annually by an Administrative Review Board. This Board determines whether the detainee can be released or transferred without posing a serious threat to the United States or its allies. We are aware of concerns about the indefinite nature of the conflict with al Qaida and the resulting concerns about indefinite detention. Administrative Review Boards attempt to

address these concerns by balancing our authority to detain fighters so they do not come back to fight us again against our desire not to hold anyone any longer than necessary. To date, approximately 75 detainees have been released or transferred pursuant to this ARB process. And, I would ask you: does the fact that the conflict with al Qaida may go on indefinitely mean that we should simply release all the members of al Qaida?

Second, our laws and policies related to detainees dictate clear rules about standards of treatment that all detainees in our custody must receive. Last December, Congress passed the Detainee Treatment Act, enacting in law a prohibition on cruel, inhuman, and degrading treatment that applies to all U.S. officials wherever located. In June, the Supreme Court held in *Hamdan* that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaida. In September, the Defense Department announced a comprehensive new DOD detention and interrogation policy that is fully consistent with, and in many ways exceeds, the minimum standards contained in Common Article 3. For example, all detainees in Department of Defense custody receive POW protections unless and until a competent tribunal determines otherwise. Most recently, Congress enacted and the President signed into law the Military Commission Act,

which codified serious violations of Common Article 3, including torture, mutilation, hostage-taking, and other offenses.

Third, our Congress has provided a statutory framework for members of the Taliban and al Qaida to be tried for war crimes by military commission. The Military Commissions Act provides the legislative basis that our Supreme Court determined was lacking in the President's original Military Order. In addition, this Act makes numerous changes to the original military commissions to address the substantive concerns raised by the Supreme Court and by the international community, and to ensure that military commissions are consistent with Common Article 3's requirement that individuals be tried by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

For example, the accused now will have an unqualified right to hear all the evidence against him and may appeal his conviction to our independent Article III courts all the way to the Supreme Court. The accused is presumed innocent; he has the right to represent himself; has the right to military counsel; is entitled to cross-examine prosecution witnesses; and

need not testify against himself. No evidence derived from torture may be admitted, and if the accused alleges that a statement resulted from coercion, the statement may not be admitted unless the judge determines that the statement was reliable and that it would be in the interest of justice to do so. The military commission procedures provide all of the fundamental guarantees of fairness and due process and are very similar to the procedures in our civil courts and our court martials. Although I am aware that some critics continue to assert that the military commission procedures are unfair, there is no basis for these assertions, and at this point I believe the critics should focus not on the theoretical but on how the commissions actually work in practice.

We believe that we have developed a legal framework that is appropriate for our conflict with al Qaida. We recognize and respect that the United Kingdom, as a party to the European Convention on Human Rights and to the Additional Protocols to the Geneva Conventions, has differing legal requirements than the United States, which is not a party to those instruments. Because we are on new terrain, we hope that others will recognize and respect that U.S. policies and practices have had to evolve significantly since September 11. These changes demonstrate the

complexity of the issues we have been forced to confront, and the self-correcting mechanisms inherent in the U.S. system of checks and balances.

III. Future of Guantanamo

In addition to working to clarify the legal rules applicable to detention, we are also working to address specific international concerns about the detention facilities at Guantanamo Bay. In his September 6 remarks, President Bush again reiterated that he would like to close Guantanamo as soon as practically possible.

But he also explained the difficulties we face in trying to persuade those countries with nationals at Guantanamo to take them back. In some cases, a state of nationality will not acknowledge that these individuals are its nationals. Other times, a state of nationality simply does not want the individual returned to it, or is willing to reclaim its nationals but cannot provide the security and humane treatment guarantees that we require before we will transfer them. Critics cannot demand that the detainees in Guantanamo must be released, but also say that they cannot be returned to the countries that they came from, without offering a realistic alternative destination for the detainees.

Simply calling for closure of Guantanamo will not help us to close Guantanamo any faster. European officials who want the U.S. to close Guantanamo should offer realistic suggestions as to how to do so, including by offering to help. One concrete step that European states could take to help us reduce the population at Guantanamo is to consider resettling those detainees who cannot be returned to their home countries. To date only Albania has taken such a step, agreeing to take five Uighur detainees who were no longer considered enemy combatants. Another step would be to help persuade countries with nationals at Guantanamo to accept responsibility for their nationals, including by urging them to provide us with adequate security and treatment assurances.

Conclusion

In closing, I hope that I have conveyed a sense of how far we have progressed in addressing the threat posed by al Qaida as a legal matter. No country, including the United States, could have been prepared on September 11th to deal with the complex problem posed by armies of transnational terrorists. After the attacks, we immediately made certain decisions and established certain policies to deal with the threat, drawing from the laws of war as the most appropriate source for guidance.

Over the last five years, and during the last year in particular, we have made numerous changes to our laws and policies. No one can credibly assert that enemy combatants captured in this conflict now face a legal "black hole." We do not assert that this legal framework is complete, or could not benefit from further refinement from our allies, but it does serve as an important point of departure for discussions with our allies on how to build a common legal foundation for future joint counter-terrorism efforts.

We must move forward. As President Bush said in his September 6 speech, as the United States strengthens and clarifies our laws at home,

now is the time for the international community to construct a common foundation to defend our nations and protect our freedoms. The bedrock of that foundation is an appreciation of the magnitude of the threat posed by al Qaida, and the need in some instances to use military force to combat that threat. Domestic criminal law does not itself adequately address the threat posed by this enemy. While military force is not the right answer against all enemies everywhere, an appreciation that it can be appropriate when facing a threat as grave as that posed by al Qaida can serve as the basis for an intensified dialogue as we move forward.

While we recognize that may of these issues remain a matter of concern in the UK, in Europe, and elsewhere, let me reiterate that we are strongly committed to engaging in continued dialogue with our European partners about these issues, just as we have had robust debates at home. These are not issues with easy answers — the questions are hard and the stakes are high. That is why I urge responsible officials and commentators in Europe to promote more balanced discussion within their own countries, among themselves, and with the United States on these issues. And I urge European governments to go a step further than just criticizing — sometimes reflexively criticizing — the United States. We need practical

suggestions and solutions, because, like you, we do not want this fight to go on forever. I am confident that the strong historic ties between the U.S. and Europe – based on shared fundamental values, including the protection of freedom and respect for rule of law – will form the basis for victory in our shared fight against terrorism.