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## Civil Liberties and the Grave Danger of Terrorism: Speech before the Cuyahoga County Bar Ass'n Bd of Trustee

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Arthur Landever, Cleveland Marshall College of Law. Speech before the Cuyahoga Cty Bar Ass'n Bd of Trustee. 2/20/02.

**Thesis:** Supporters and Opponents endorse Lincoln's caution that the "dogmas of the quiet past are inadequate to the stormy present. We must think anew." All sides also agree that "eternal vigilance is the price of liberty." But what do such words mean in the world following 9/11? Supporters and Opponents of the National Government's anti-terrorism policies have starkly different perceptions. This is so as to a) the crisis we face, b) the need for particular policies, and c) the impact upon civil liberties and upon our Constitutional system. Clearly lawyers have a special duty to understand those differing perceptions in order to make up their own minds as to how best to protect the rule of law in this "Post 9/11 Age."

**Supporters:**

a) **We are in a war and a war in our own homeland.** The Crisis is unprecedented and deadly: Given the events of 9/11 the previous statement is neither hyperbole nor speculation. There are continuous sleeper-cell threats in our own homeland and throughout the world, with perhaps hundreds of persons (apparently overwhelmingly Moslem) willing to sacrifice their lives for their God, in order to kill Americans. Such individuals have demonstrated their capability of killing thousands of Americans. We are in a race to uncover the plots against us, to ferret out the plotters before they carry out other WTC, Pentagon, USS Cole, East African bombings or other means of mass destruction such as the spreading of poisons. Our borders are porous; weapons of mass destruction are potentially available to terrorist networks; there are foreign governments willing to provide sanctuary and assistance; many schools in the Islamic world spread hatred about the evil America. The challenge we face is an almost impossible one given the openness of our society and the innumerable points of vulnerability.

b) In this race against time, our national officials must act swiftly to uncover the plots and render harmless the culprits, and to do so constantly. **The national government's first responsibility in this war is to protect America from attack and its innocent citizens from death at the hands of the conspiratorial network.** Without that protection, it is foolhardy to speak about protecting our Constitution. The President's actions, along with the legislation passed, reflect necessary responses: We have no choice but to assume the good faith and competence of the President, the Congress, and Administration subordinates. The paradigm of investigation to thwart the plots before they can be carried out must replace the earlier one of investigation in order to prosecute crime after the terrorist acts take place. Since the threat comes from young, male Moslem immigrants, particularly those who are illegal immigrants, as well as apparent accomplices throughout the world, it makes eminent good sense to focus upon that group. It would be foolhardy to do anything else. It is necessary to gain intelligence from the internet, to employ roving wire taps, to engage in surveillance, and to detain those in the profiled group for questioning. The government must be pro-active in questioning individuals arguably having relevant information. In a war, secrecy in confinement and at trial, especially as to the Al Qaeda leadership, is vital. The enemy being held must not communicate with each other, have the means to harm agents in the field, intimate jurors and judges, endanger the lives of their guards, or impose constant delaying tactics.

c) **The actions taken reflect measured responses fully consistent with the obligations of our national officials under the Constitution. History and Supreme Court precedent support their actions.** It has only been five months since the events of 9/11. The national government has shown itself quite ready to reevaluate its positions asserted earlier and to scale down some of its policies. The 1200 detained individuals have shrunk to 600. Persons detained now have access to their families and to lawyers. There are indications that the military trial option presumably will be carried out only as to alleged top-echelon Al Qaeda overseas, requiring unanimous verdicts in the case of death sentences. Only a handful of the most dangerous Al Qaeda members in custody have had their conversations with their attorneys eavesdropped upon. The Geneva Convention requirements is to apply to the Taliban forces. Al Qaeda do not qualify since they are illegal combatants. If they were to be accorded treatment pursuant to that Convention, they doubtless would turn anything they receive from the outside world (e.g. "musical instruments") into deadly weapons, and, if repatriated, they surely will pose a deadly threat once again..

The Constitution is not a suicide document, said Justice Jackson. Any tension with the rule of law must take account of the need for national survival. President Lincoln understood that principle. The Constitution must be flexible, as it has always been in war situations; it may bend, but it will not break, able to return to full vigor in the absence of war. Indeed under Article I the privilege of the writ of habeas corpus may be suspended in case of "invasion." As to the nature of trials to be accorded this particular enemy, our own military forces are expressly not protected by grand jury indictment. It is hard to believe that unlawful enemy combatants would be entitled to the full protections of the Bill of Rights. For one reason or another, the U.S. Supreme Court has been deferential in war or foreign situations. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). There was no challenge to the 1790s Alien and Sedition acts. Lincoln carried out military trials of Southern spies. Persons in foreign countries are said not to be covered by the U.S. Constitution. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Congress has plenary power to regulate immigration, authorizing broad Presidential regulation. The Supreme Court upheld the trial and eventual death sentences of German combatants not in uniform. *Ex parte Quirin*, 317 U.S. 1 (1942). and see *Reno v. American-Arab Anti-Discrimination Committee* 525 US 471 (1999) (apparently deferring to the national government despite the apparent selective deportation of immigrant terrorists).

Furthermore, the people's elected representatives, that is, the Congress, has overwhelmingly supported the President, in its grant of full authority for him to use all "necessary and appropriate" measures in the war effort and its almost unanimous passage of the USA Patriot's Act soon after 9/11.

We cannot afford to have our national survival rest upon the sanguine assurances of the opponents of President Bush that his measures, and those of Congress, are really not necessary. We do not have the luxury of waiting to see how it all ends up and then saying we didn't have to be so strenuous in our efforts. It is too easy to shout from the sidelines. We must support those who are actually faced with the hard choices, that is, our leaders. The evidence since 9/11 is that they are employing the right balance in assuring both victory against the terrorists and the maintenance of our Constitutional rights.

### Opponents

a) **Our Constitution, the very soul of our people, must not be shouted down in the name of "our country right or wrong."** That is the challenge for us rather than

giving up on that effort. We must not cave in to those who would focus all attention on the physical dangers we face. We do not blink those dangers. Yes, we are in a war, and the very lives of our fellow citizens are at stake. But should that mean that the weak and the unpopular must be the scapegoats in that war? The claims of need to once again start with the weak and unpopular should be looked upon with a jaundiced eye. Those who would shout down protests against the Bush policies must be willing to send their own sisters and brothers into detention, to have them eavesdropped upon, to have them tried by military trials subject to a command structure and eased rules of evidence that almost guarantee conviction, to have them deported while others remain, to have them profiled because of their religion or ethnicity. We should know by now that unless we protect the weak and the unpopular under our constitution, the dragnet will next take in those who protest the government's unfair treatment, and then, the persons who associate with the protesters, and next, perhaps, political parties who speak against such excesses. Where will the dragnet stop in the name of national security?

**b) Policies that target unpopular groups in America with no known links to the Al Qaeda network not only are hurtful and erode constitutional principles, but provide little help. Indeed, they are counterproductive.** Although the President's supporters assume that the President's tactics are necessary and helpful, it is doubtful that they are. Indeed, they turn away the millions of immigrants, especially including Islamic immigrants, who would be in the best position to come upon information. Profiling, detaining persons incognito on the slimmest bases, using roving wiretaps, easing the requirements of a warrant where there is a significant foreign connection, turning upside down the presumption of openness under the Freedom of Information Act, making the Justice Department an espionage arm inside the country, threatening to impose military trials, with a "Bill of Rights be damned" attitude—all these actions undercut the President's effort to bring along reluctant members of Congress and influential members of the public as well. While President Bush has had a "free ride" for five months, that free ride may be over. Establishment groups like the ABA are bristling at the real possibility of military trials lacking rudimentary justice; newspapers join in protest over the new resistance to the use of the Freedom of Information Act and to the new efforts to spread disinformation throughout the world; attorneys are alarmed at the eavesdropping upon lawyer-client conversations, among other things; America's allies express concern about Bush's resistance to the application of the Geneva Convention as to captured Al Qaeda and Taliban. A core conservative constituency may part company with the President if it sees what is happening as a Presidential power grab for the national government. Cato Institute: "Not even the President is above the law."

**c) The Constitution must be allowed to work during this war.** Only constant vigilance-- through lobbying Congress, grass roots efforts, and filing law suits calling upon federal judges to act courageously--can make our Constitution meaningful. Admittedly, there have been times in past crises that the President, the Congress, and the courts have not adhered to the Constitution. Looking back, we condemn the Alien and Sedition Acts of the 1790s, the excesses during the Lincoln Administration, "the Palmer raids," the outrageous detention of about 70,000 American citizens of Japanese extraction during World War II, the "Red Scare" during the 1950s, the Nixon years of attacks upon Vietnam War protestors, the war against the "Contras" in the 1980s. We should not celebrate those excesses. Rather we should see them as lessons of failures of protesting groups to make middle America understand the implications of government policy. While the federal courts have generally not been protective of Constitutional rights during crises, this has not always been the case. (See *Ex parte Milligan*, 71 U.S. 2 (1866))

(Civilians could not be tried by military commission while the civil courts remained open.)

### **A Middle Ground?**

We must acknowledge the Presidency's awesome duties, and wherever possible, we must support his efforts to get victory over terrorists who threaten the lives of our citizenry and our way of life. Whatever our feelings about the actions of the President and his subordinates, we should understand that the American public, overwhelmingly supports President Bush's "war on terrorism." The public will not be persuaded by condemnatory rhetoric.

The Presidency is not the only institution that has responsibilities in this war. Other institutions do as well. These include the Congress, the federal courts, and the country's law groups committed to the rule of law.

1- The President's pattern appears to be to float "trial balloons" and then at times to rethink his proposals. Thus he has changed his mind about whether the Taliban would be protected by the Geneva Convention, and apparently put more constitutional flesh on his vague notion of military trials of terrorists. He has dramatically reduced the number of individuals being detained and apparently improved the conditions of detention, according to his Assistant Attorneys General Chertoff and Viet Ninh. Under the circumstances it appears perfectly legitimate for groups in opposition to Presidential policies to wage lobbying efforts to move him to rethink his more expansive proposals.

2- Congress, as the nation's democratically elected legislature, should be encouraged to take the lead in setting general policy with "freedom the rule and detention the rare exception." Congress should determine the rules of immigrant status and detention, eavesdropping, the internal duties of the FBI and other investigative agencies, and military trials jurisdiction and procedure. In that regard, the body should be urged to have meaningful oversight panels, to revisit its legislation, passed in the days following 9/11, to assess whether the establishment or tightening of sunset provisions is in order, and to reconsider the selective enforcement of immigration laws. Information is vital to the fulfillment of Congress' duty, indeed, to the duty of the courts as well. Accordingly, there should be a high priority in reexamining the current status of the Freedom of Information Act.

3- We must insist that federal judges give priority to the U.S. Constitution as well as to meaningful statutory protections under it. We take pride in living under the "rule of law" rather than the "rule of men." It is a basic responsibility of the courts to make the goal of fair general law applicable equally a reality. The courts traditionally defer in times of emergency. But since the new emergency is "open-ended", we must assure as much meaningful protection as possible.

4- Lawyers and law groups must be supportive of our President in this war to the extent they can, yet they bear a special responsibility to implement the rule of law and to explain to our fellow citizens why it is so important. Law groups must seek the appropriate balance. As to military trials, these should only take place only as to cases concerning the Al Qaeda leadership (with the death penalty requiring unanimity, rules of evidence similar to the UCMJ, including guilt beyond a reasonable doubt, and judicial review). As to lower-echelon "unlawful combatants" their status under the Geneva Convention should be determined by individualized hearings. Lawyers should press to learn about and assure adequate representation of persons caught in the web of detention, eavesdropping, and other surveillance. They should assure that there is meaningful enforcement of the Freedom of Information Act.

5-The general citizenry should press the national government to learn more about Islamic fundamentalism and the political-social factors at work in order to understand the nature of our challenges.