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Living Within the Law: Next Steps in the War on Terror

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I begin by thanking the Commonwealth Club of California for inviting me to speak tonight on an issue that now pervades the daily lives of all Americans: What is the proper balance between national security and individual freedoms? Put differently, will our government preserve our cherished freedoms in the fight against terrorism?

September 11, 2001, made clear to all of us that we have real enemies, bent on our destruction, who pose new threats to which our government must respond. The most fundamental responsibility entrusted to the Executive Branch under our Constitution is to safeguard the nation. But the people have a right to expect that the Executive Branch, no less than the other two branches of our government, will also safeguard our freedoms.

Our military, our intelligence community, and other public and private institutions must continually adapt to the new realities of asymmetrical warfare at home and abroad. It is a daunting and unforgiving task, one that demands great vigilance, flexibility, and expertise. The men and women who heroically defend our nation's security deserve our utmost respect and gratitude, and our strongest support.

The American Bar Association, in a series of policy recommendations adopted in the months and years following September 11, has expressed full support for the Administration's efforts to pursue terrorists and deter future attacks, but in a manner that is consistent with the freedoms guaranteed by the U.S. Constitution. During the past five years the American Bar Association has called repeatedly on our government to stay within the parameters of our enacted laws and Constitution in protecting our national security.

Threats of terrorist attacks have led the Administration to restrict the freedoms and sense of openness that define our democracy, and until now the majority of Americans and members of Congress – and the media – with a mixture of patriotism, trust, and fear – have given the Administration wide leeway. But the American people increasingly are coming to the view that the Administration is not adequately balancing national security and freedom.

History should guide us.

While foreign terrorism in America is new, grave threats to our national security are not. In the past, faced with such threats, we have managed to prevail against enemies while preserving our freedoms and our adherence to the rule of law. At times, however, our government abandoned the ideals and principles on which our republic was founded, and in the process we brought shame on ourselves. Some of the sorriest chapters of American history were written when our Constitutional freedoms were ignored in times of peril: the internment of Japanese Americans during World War II; the Communist scares of the 1920s and 1950s.

In time, we came to our senses -- we came to realize that we had made serious mistakes in ignoring the protection afforded to all of us by the U.S. Constitution – perhaps the greatest (non-biblical) document ever produced. In plain terms, we must demand that our nation strike the proper balance between security and liberty -- so that we do not add to the worst chapters in our history.

Many of the Administration's responses to 9/11 have led to widespread concern that civil liberties are being compromised in the name of protecting national security.

There is now growing evidence that more and more Americans are alarmed about what is happening to the principles and values that have defined America throughout our history; are troubled, even ashamed, at reports that detainees and prisoners have been abused and tortured; and are worried that their privacy has been invaded by secret government surveillance programs.

More Americans now are rejecting fear-mongering and scare tactics as the means of persuasion and basis of decision-making by our government. Since 9/11 Americans repeatedly have been given a choice that the American Bar Association, and I personally, reject as a false choice – that Americans must sacrifice freedom in order to gain security. We must firmly insist that our government protect both freedom and security, as it has throughout our nation's history.

No one questions the Administration's sincere desire to protect Americans from harm, but history has taught us that governments are made of fallible humans.

As the great jurist Louis Brandeis warned,

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent...The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

As the national voice of the legal profession, the 400,000 member American Bar Association – the largest voluntary professional association in the world -- takes very seriously its responsibility to speak out on fundamental issues affecting the rights and liberties of all Americans.

I, like many of us here, have a deep faith in the rule of law. It is my belief that the law can protect our rights at all times, even perilous ones. We should be suspicious of those who say otherwise. I believe that the law is resilient enough to resolve conflicting needs. And when individual laws fail, in our democracy we work together to change them. This, in fact, is more than just faith. It is our nation's history. And it is a road map to how we, as a nation, can maintain the rule of law in America as we fight terrorists.

That road map was given to us by the Founders of our country, the drafters of our Constitution, and it has been followed by presidents, members of Congress and our Courts for more than two centuries—in peace and in war. Our government—the greatest and longest-lasting democracy in history —was formed as a response to runaway, unchecked power. The first Americans were forced to pay taxes without representation, and to endure searches of their homes without warrants.

My law firm's office in Boston is a stone's throw away from the site of the Boston Tea Party -- the response of Americans to the king's taxation without representation which became a catalyst of the American Revolution. Outrage and disgust of Americans with warrantless searches and invasions of privacy by the king was the match that ignited the American Revolution. Our Founders were acutely suspicious of power that could not be checked.

James Madison, one of the leading drafters of the Constitution, bluntly warned his colleagues and us:

All power in human hands is likely to be abused. The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.

Yet Madison and others also recognized that a weak government posed dangers as well.

Their solution was nothing less than genius. They created a strong national government, but separated its powers among three branches—Congress, the Executive Branch, and an independent Judiciary. Each branch was given discrete powers, and each was given ways to check and balance the powers of the other two. Today, the brilliant design of our Founders faces an unprecedented threat. For those of you who remember the character Pogo – who said “We have met the enemy and it is us” – you may see deeper meaning now in those words.

Take the issue of electronic surveillance, for example – today’s version of the warrantless searches that led our Founders to start a revolution. The question today is not whether the government can lawfully eavesdrop on Americans to protect our security. It can.

The real issue is whether the Executive Branch, on its own, can authorize and conduct long-term, secret, electronic surveillance without the checks and balances from the Judiciary or Congress that is required by our Constitution. It cannot.

Moreover, the successful prosecution of the war on terror—which is a war of ideas and values, not just of weapons—demands that we steadfastly adhere to the rule of law. Secret prisons, the torture and extraordinary rendition of prisoners, and secret invasions of privacy of American citizens simply do not reflect our nation’s values. These examples, among others we could add, are an affront to this nation’s core values, and to the moral fiber of all Americans.

Where does the American Bar Association stand?

Since 9/11, the ABA House of Delegates has adopted nine major policy positions to balance the necessity for anti-terrorism measures with the need to protect civil liberties. In many of these policies, the ABA has firmly rejected the Administration’s claim that it can take virtually any action to fight terrorism without any oversight or limits by either Congress or the courts.

Let us take one example: the treatment of the detainees held at Guantanamo Bay and other prisons, who have been accused by an unidentified someone, but never charged, or tried, of aiding terrorist causes. The Administration at times has argued that our cherished federal court system – the envy of every nation in the free world, which has seen us through every crisis since the founding of our country – lacks jurisdiction over these cases, that the detainees have no right to civilian counsel, and, even, that they can be held secretly and indefinitely, as if they are not human beings.

The ABA's policy position regarding detainees is firmly grounded in the Constitution: that everyone in America is guaranteed fundamental fairness and due process, that everyone is guaranteed the right to be represented by counsel, to be charged specifically or released from incarceration, and to have any charges reviewed by a civilian court.

The ABA has filed "friend of the court", or amicus, briefs in cases such as *Hamdi v. Rumsfeld* (2004) in the Supreme Court of the United States, and *Padilla v. Rumsfeld* (2003) in the United States Court of Appeals for the Second Circuit. In these cases, the ABA has argued that U.S. citizens and residents detained within the United States as "enemy combatants" should have access to a lawyer and meaningful judicial review of their status. We have argued that our courts cannot simply be brushed aside by the Administration or Congress, especially on matters that deprive detainees of their rights, because in time such deprivation may be visited on others in America. The ABA was pleased in June 2004 when the Supreme Court in the *Hamdi* decision affirmed the ABA's policy position.

The issues presented in the *Hamdi* and *Padilla* cases speak directly to the crucial role that our courts have – and that they must continue have – in protecting the fundamental rights guaranteed by our Constitution. These cases and many other situations that have arisen in the past four plus years also have serious implications for the lawyer's role in providing effective counsel to individual clients and assistance to the court in making decisions based on all of the relevant facts and law.

The Administration's insistence on the use of military tribunals to try suspected terrorists and enemy combatants also raises a host of legal issues. The ABA adopted a policy on military tribunals in February 2002 – just months after 9/11 – urging that such tribunals be used, if at all, only in limited circumstances; and that defendants facing military tribunals should be afforded basic due process rights, including legal representation by civilian defense counsel.

If the world is to be persuaded by the Administration that these tribunals are “unbiased,” they must conform to the rules of fairness and due process set forth in the long-existing and respected Uniform Code of Military Justice.

In February 2002, the ABA also adopted policy opposing incommunicado detention by the Immigration and Naturalization Service, in which immigrants are held without access to family, friends, or a lawyer. The United States should not be in the business of subjecting U.S. citizens or foreign nationals to secret criminal or administrative proceedings. Only in the rarest of circumstances, when the government can demonstrate a distinct threat to national security, should someone be detained or tried in secret. And even then, there must be afforded the right of an appeal, to safeguard the very American principle that justice has been done.

The very credibility of our justice system and laws is built on the notion that we conduct our business in the open, where advocates, family members, journalists, and the public can observe all proceedings and vouch for their fairness – or speak publicly about shortcomings when necessary to keep the government honest. This, after all, is what has distinguished America from every communist, fascist, and other tyrannical regime throughout history that eventually was, or will be, brought down by the people.

At the least, it was a lack of openness, and a failure in oversight and training, that led to the reprehensible abuse of detainees and prisoners in U.S. custody that dominated newspaper headlines two years ago – and that made us hang our heads in shame.

Based on the fundamental principle that the United States must be the first to adhere to the rule of law in order to maintain the moral high ground and the world's respect, the ABA several times has called for an independent, bipartisan commission to examine the U.S. government's treatment of foreign detainees and prisoners, to determine what happened, why it happened, and who was responsible; to sanction those responsible; and to prevent it from ever happening again.

The ABA has condemned the use of torture and cruel, inhumane or degrading treatment of prisoners, and called on our government to ensure that its interrogation policies and treatment of detainees comply fully with the law. My predecessor as ABA president and good friend, Robert J. Grey, Jr., who spoke to you about this subject nearly two years ago, and I have written letters to the Administration. The U.S. is still grappling with the repercussions of the unacceptable treatment of detainees at Abu Ghraib and elsewhere. The Administration has not responded to letters sent by the ABA on this and related subjects.

The ABA supported the amendment offered in Congress by Senator John McCain that banned the torture of individuals in U.S. custody, and that amendment became law after the Administration's failed attempt to derail it. Such principled actions by our Congress and our courts are an absolute necessity if we are to be viewed as credible, and respected, champions of the rule of law and democratic values around the world. There was a time when no one in the world doubted the role United States as protector of human rights throughout the world. Sadly, today there is doubt.

The ABA believes that all of us, especially lawyers, must be demonstrably committed to the principle that America must protect the rule of law at home if we hope to advance and protect it abroad. We must be assured that there are no pockets anywhere – including the U.S. – where the rule of law does not apply, where the fundamental rights of men and women and children are not protected. Even a suspicion that such pockets exist undermines the rule of law.

The U.S. government is doing laudable work around the world to support the development of the rule of law and peaceful, civil societies. The ABA is also doing its part to advance the rule of law in emerging democracies around the world. But in order to maintain our credibility abroad, the U.S. must ensure that we practice at home what we preach to the world.

On a related subject, our government must also adhere to the rule of law in its intelligence-gathering activities. The disclosure last December of the Administration's secret electronic surveillance program, in which telephone calls and emails were and apparently still are being monitored, shocked Americans and constitutional scholars alike. This program, the details of which are still shrouded from view, has subjected an unknown number of persons within the United States to secret electronic surveillance without authorization by courts or Congress.

In response to the initial revelations, I appointed the ABA Task Force on Domestic Surveillance in the Fight against Terrorism. The Task Force and its advisors comprise an extraordinarily distinguished and balanced, bi-partisan group, including a former Director of the FBI, a former General Counsel to the CIA and the National Security Agency, and respected experts in constitutional law and national security law.

The Task Force produced a unanimous report and policy recommendations that were adopted by an overwhelming majority vote by the ABA House of Delegates this past February (there were, at most, 4 or 5 "no" votes heard among the 550 delegates). I encourage you to read the full report, which is available on the ABA website at [www.abanet.org/op/domsurv](http://www.abanet.org/op/domsurv).

This ABA Task Force unanimously agreed on a set of recommendations designed to ensure that the rule of law does not become a casualty in the fight against terrorism. The urgency of the ABA Task Force's findings was magnified last month, when USA Today reported on another massive intelligence program of the

Administration that allegedly has gathered data on purely domestic phone calls made by millions of Americans.

What did the ABA Task Force on Domestic Surveillance recommend?

First, that any electronic surveillance inside the United States for foreign intelligence purposes must comply with the provisions of the Foreign Intelligence Surveillance Act (FISA). That means that all electronic eavesdropping must be overseen by the Foreign Intelligence Surveillance Court—a court that was designed specifically to balance national security investigations with constitutional requirements to safeguard civil liberties. If the President believes that FISA is inadequate to protect national security, he should seek appropriate amendments or new legislation from Congress. It is important to note that Congress has already amended FISA four times since September 11, 2001. Why didn't the President consult congress and seek another amendment?

Second, Congress must discharge its solemn responsibility under the Constitution. It must reclaim its oversight role and conduct thorough investigations of all surveillance and data-gathering programs conducted in the United States. After many months of refusal, Administration officials finally briefed the full Senate and House Intelligence Committees last month on the NSA's electronic surveillance program. This briefing is a positive step, but it falls far short of what needs to be done.

The American people have the right to know whether any legal authority supports the President's troubling surveillance and data-gathering programs, who has been spied on, and what use has been made of the data gathered. It is impossible for Congress to reform our laws without this information, and the ABA is urging that Congress not do so until it has received it from the Administration.

The findings of the ABA Task Force are consistent with court rulings and acts of Congress over the years, specifically in the area of electronic surveillance. As the

Supreme Court said in a 1971 wiretapping case, *United States v. U.S. District Court*, the “very heart” of the Fourth Amendment, which bars unreasonable search and seizures, involves review by an independent court. The Supreme Court added,

The Fourth Amendment does not contemplate the executive officers of government as neutral and detached magistrates. ...  
The Fourth Amendment contemplates a prior judicial judgment.

Congress itself passed FISA in 1978 after several serious scandals of the 1970s showed that our government leaders could, and did, abuse personal privacy with improper domestic surveillance. The law balances security needs and privacy rights by allowing the government secretly to obtain search warrants, but with conditions. In emergencies, investigators can begin wiretapping immediately, as long as they seek a warrant within a specified time. This common-sense balancing of security and civil liberties is also consistent with public sentiment.

I am heartened by the fact that the new ABA policy on domestic surveillance reflects the views of the majority of Americans. In a national survey conducted for the ABA by Harris Interactive in February, 77% of respondents indicated that the President, on his own, should not suspend constitutional freedoms, while 25% within that total think that the President must obtain approval from Congress or the courts before constitutional freedoms are suspended.

Only 18% believe that the President alone can suspend those freedoms whenever he thinks it is necessary to protect national security.

The ABA’s policy on secret surveillance indirectly reflects, as was the case in 1776, that Americans worry about, and view with disdain, warrantless searches whether conducted by the King or the Executive. The awesome power of government to penetrate citizens’ most private communications must not be held solely in the hands of the Executive. There must be checks and balances, and oversight by Congress and the courts. All Americans want to trust that their government is protecting both their

physical security and their freedoms, but the word of one branch – the “trust us” pledge – is not good enough.

Our system guarantees accountability and adherence to the law by requiring more than one branch of government to certify the legality of actions. The crucial roles that Congress and the courts have in holding the Executive accountable cannot be ignored by the Administration, and must be protected by the American people. And while the people may not have an absolute right to know all of the details of our government’s antiterrorism efforts, the people do have the right – and the responsibility – to ensure that our government is not violating the law or the Constitution.

Congress should give the Administration the laws it needs aggressively to fight terrorism and protect the American people. But the Administration cannot be allowed to ignore the will of Congress – of the people’s elected representatives – by disregarding laws. Because in America, no one is above the law – not even the President.

If we look the other way when the law is disregarded by our leaders, we have set a terrible precedent for the future. Once our liberties are lost, it is difficult if not impossible to regain them.

President Bush and others have said that the terrorists hate us, at least in part, because of our freedoms. They resent our open society, built on tolerance for and protection of diverse viewpoints. If we forsake our freedoms and the foundations of our government in the name of expediting the pursuit and deterrence of terrorists, we may win some battles, but we will most certainly lose the most important war being waged – the war of ideas.

Since 9/11, we have witnessed a number of – too many -- disturbing developments in the U.S. government’s campaign against terrorism. We have learned about secret prisons, torture of prisoners and detainees, extraordinary rendition of detainees to nations that practice torture, abusive treatment by U.S. personnel, open-

ended imprisonment without charges or access to counsel, unauthorized intelligence-gathering on American citizens, and more. Recent news reports have now brought to light another separation of powers issue: the increasingly frequent use of “signing statements” that the President attaches to duly enacted bills that he signs into law.

This past weekend the Board of Governors of the ABA, meeting in New Orleans, unanimously approved my request to appoint the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine. This distinguished, bipartisan Task Force will examine the constitutional and legal issues arising from the use, and the effect, of these presidential signing statements.

Such statements – and according to press reports President Bush has signed more 750 of them while never vetoing a bill – have been used to indicate which bills the President does not intend to enforce because, in his view, they are unconstitutional, unsound, or interfere with his powers. A prominent example is the signing statement the President attached to the new law enacted by Congress after months of debate – banning the use of torture by U.S. military and government personnel – in which the President gave notice that he does not feel bound to enforce the law.

I appointed the Task Force because the use of presidential signing statements – which have been used by each president since President Reagan – squarely presents serious issues relating to the Constitutional doctrine of separation of powers among the three branches. The Task Force will take a balanced, scholarly look at the use and implications of signing statements, and propose appropriate ABA policy consistent with our Association’s commitment to safeguarding the rule of law and the separation of powers in our system of government.

We must insist that the fundamental principles of the separation of powers and checks and balances, which have allowed our republic to survive for two centuries, continue to guide all actions of our government. The American people have a right to it, and sooner or later they will demand it.

When any one branch of government attempts to place itself above or usurp the constitutionally-mandated roles of the other branches, our democracy is threatened. We have now reached a point where all Americans must ask themselves whether these practices of our government are isolated and unconnected, or whether they form a pattern that threatens the very foundations of the rule of law in the United States.

Defenders of the Administration maintain that these practices are legal. In several instances, however, those defenses have been offered only after the press has revealed the existence of programs and practices that were kept secret from Congress and the American people for years. Under our system of government, the Executive Branch must not be allowed to determine the legality of its actions – that is the role of Congress and the courts.

That is the very essence of separation of powers and checks and balances.

The Executive Branch enforces the laws, Congress has a responsibility to oversee Executive Branch enforcement of the laws Congress adopts, and the Judiciary has a responsibility to determine the constitutionality of the laws adopted by Congress and the Executive's enforcement (or now, we learn, non-enforcement) actions.

This Administration seems not to understand or endorse the basic principle of checks and balances.

It is time for the American people to make clear to the Administration, and to Congress, that our Constitution and laws will not be ignored or violated. The message to be delivered to elected officials is straightforward: Do not violate the law. Do not trample on our freedoms.

Delivery of this message should not depend on political affiliation or partisan politics. This is not about partisan politics. It is not about conservatives and liberals, Republicans and Democrats. It is about preserving our beloved country. It is about

maintaining the freedoms that countless Americans throughout our history have sacrificed their lives to protect. It is about reclaiming America's proud identity throughout the world as the land of the free, the land of the just.

If the people permit any Administration, now or ever, to take away our freedoms in the name of national security, we would give the enemy a victory that he could never achieve on his own.

You and I must use every power of our reasoning, every ounce of our energy, and every fiber of our being, to prevent that from happening.

Thank you for your kind attention, and I look forward to answering your questions.