

DSJ Lecture – 11/26/01

CF: Good evening, ladies and gentlemen. Welcome to the Democracy, Security and Justice Lecture and Discussion Series. I'm Cynthia Farrar and John Gaddis and I, together, organized this series of lectures in collaboration with a group of Yale students and with considerable input from our colleagues. Before we begin tonight, a few announcements. Next week we will be meeting on Monday again—not Sunday as has been the case in the past. That's Monday, December 3rd at 7:00, back in Battell Chapel. We'll be hearing Fareed Zacharia, Editor of *Newsweek International* and former Editor of *Foreign Affairs*. The title of his talk is "Why Do They Hate Us, America in a New World." There will also be a Master's tea in conjunction with his visit. We don't know the details of that yet but there will be information on our web site which you can find on the Yale Home Page. As to the remainder of this term, on December 9th, we will be hosting a debate between Professors Paul Kennedy and Charles Hill on America's role in the world after 9/11. That, too, will be at 7:00 and that's on a Sunday night. And on December 12th, we're delighted that we're going to be hosting a panel of Muslim students at Yale. This panel has been organized by the students. There will be more information about all these events, and about our plans for next term on the web site but also in the *Yale Daily News*, in the *Bulletin and Calendar*, in the *Register*. It's a pleasure to introduce this evening's speaker to you. She and I are just about equally handicapped in speaking from this height with this mike to this large an audience. A graduate of Harvard University and Yale Law School, Ruth Wedgwood has been Professor of International Law at Yale since 1986. However, she has traveled to be with us tonight. She's on her sabbatical this year and serving as the Edward Burling Professor of International Law and Diplomacy at the Johns Hopkins University School of Advanced International Studies in Washington, D.C. She has also taught at the U.S. Naval War College in Newport. Professor Wedgwood writes on the use of force, on peacekeeping, international tribunals, Security Council politics, international crimes, and American power in foreign affairs. Ruth Wedgwood has a deep, extensive and first hand understanding of the difficulty of implementing systems of international governance. She visited and conducted research on the international law and policy problems arising in U.N. and regional peace keeping operations and civil reconstruction efforts in locations such as Bosnia, Croatia, Kosovo, the former Yugoslav Republic of Macedonia, Haiti, East Timor and Georgia. She recently guest edited a symposium on Post-conflict Reconstruction in the January, 2001 issue of the *American Journal of International Law*. She was Study Director of the Council on Foreign Relations Task Force Report on American National Interest and the United Nations, which has been widely distributed in the American Foreign Policy community. Please join me in welcoming Ruth Wedgwood. [applause]

RW: Thank you for coming out on an evening when most of us are still thinking about Thanksgiving and bucolic feelings of family and home and hardly want to re-enter the real world of foreign policy and foreign problems. My own involuntary insertion into 9/11, I guess, was on the first day I was going down to Hopkins to teach. I took the little puddle jumper that comes out of Tweed Airport and the train had lost my baggage the week before so, when I got on the plane and it left on time, I was really quite chipper and then, as we came into National, the pilot said, "Sorry, we're being diverted to Baltimore," and I said, "Oh, it's one damned thing after another! Who can trust the airlines?" And we had no idea, of course, what was happening. We got to Baltimore and only when we hit the ground were we told that there had been an attack on

the World Trade Center. At first, I was utterly disbelieving. I had done a small piece on bin Laden in 1999, after the embassy bombings, against the embassies in Tanzania and Kenya, and had had a wonderful debate here, actually, with a Muslim politics scholar from Georgetown on whether, for example, we should, at that point, have disclosed to the Security Council all the data we had about bin Laden's involvement as the justification for our use of force, or whether we should have waited, indeed, until Louis Freeh(?), the FBI Director had finished every last 302 report and filed it before we undertook any kind of defensive retaliatory action. And it was a good debate. And it seemed I was earnest, he was earnest. It seemed rather academic at the time. I hoped that bin Laden wouldn't be quite so dangerous. But the more I read about bin Laden, when we wrote up that debate, the most concerned I became because it was quite clear, even then, that he was earnestly shopping for nuclear weapons and was approaching Chechens and looking for some of the suitcase bombs or the nuclear artillery that the Soviet Union had in its plans for a Western advance in the Cold War. So he really, clearly, was a very dangerous person. A friend of mine was on the National Security Council at the time and his full time job, really, was to track bin Laden, to take the intel he could gather from every agency of government, the DIA, the CIA and try to integrate it every night on a real time basis to avert things that might happen. Successful for a time, obviously, but not ultimately. I think the feeling of chagrin that I had when the attacks occurred was that it was, I thought, rather pitiful to have our own virtues turned into vulnerabilities—a liberal society that values privacy, that glories in being multi-ethnic, where no one looks like they don't belong—everyone does belong, where increasingly the distinction between citizen and alien has seemed superfluous, kind of a worldwide Shengen(?) agreement where we're all free to go and travel wherever we wish—and have that all turned on its head and made into a source of vulnerability to attack. It seemed a rather sad misuse of a liberal political culture.

And the nature of the adversary, as well, seems quite daunting. We're used to nation states who have many different kinds of interests and linkages, who want to be members of financial institutions and want access to the capital market and have reputations they care about and are utterly detestable because of their own population and land mass. Instead, fighting a network where there is no other set of interests, seemingly; where martyrdom might be a cult and seen as a glorious fate, is a much more difficult proposition, particularly because it violates the most fundamental tenet of the law of war and of the protection of civilian society, and that is that combatants should always distinguish themselves from civilians. The reason why Napoleonic land battles with their bright red uniforms were, in fact, not so humorous as they sound now is that it was the wearing of the uniform that allowed us to tell who was fair game, who was dangerous and who was to be protected. The 19th century, 20th century idea that you should try to have continuity of civil society, even in the middle of war, turned fundamentally on that willingness of combatants to self identify and make a distinction. And all of that was, again, exploited as a source of vulnerability.

But on what the international community is doing or can do, let me, before we get to the inevitably controversial issue of what kind of tribunals one might use, let me first talk a little about what the U.N. has done and can do in fighting terrorism. There's actually a long history to this. If any of us remember the 1970s when aircraft were being hijacked and bombed, and you couldn't use a locker at LaGuardia Airport anymore because there were bombs left in the lockers. In the '70s, the U.N. began its career of trying to put together a framework that would

rule certain kinds of tactics out of order—just too dangerous to commerce, too dangerous to civil society. And in the '70s, it began the process of crafting anti-terrorist conventions—first on aircraft hijacking, on aircraft bombing, a convention to also protect diplomats, a convention against torture, which had the lawyers' feature of saying that any country that encountered an offender had the duty of either prosecuting him or extraditing him—what lawyers call “universal jurisdiction.” People made the analogy to pirates in the 18th century—so dangerous to commerce that they were seen to be enemies of all mankind. So that career in treaty writing began in the '70s. It had an interruption but it regained steam in the late '90s, partly in response to the ethnic conflicts of Rwanda and Bosnia, Kosovo, in treaties that tried to both forbid terrorist bombing, broadly defined, and the financing of terrorism. And all of these treaties were interesting because they put to rest the 19th century idea that political motivation should be an excuse. We're all republicans, we're all romantics, and in the 19th century, the fight against the Ottoman Empire, the fight against Austria in Italy was such that any good Englishman wanted to be part of the republication movement. So in earlier court-made law, there had been a shelter created for politically motivated crime that it should not be ever the subject of a surrender to another country—in the famous cases of King's Bench.

But even the Brits had their limits. You recall, of course, Joseph Conrad's novel—the secret agent with the attempted attack by an anarchist on pure mathematics, trying to blow up the Greenwich clock tower. And that was reflected in British case law. When anarchists were sought by France, the Brits decided that anarchists had no politics and so they were subject to being turned over as well. But the trend in the last two decades has been to say that some things are so heinous or so damaging to commerce that they should not be sheltered, even by republicanism, even by our whiggish English feeling that governments should be counterbalanced. So the U.N. has been useful there in standard setting and in stigmatizing certain kinds of techniques. In the immediate response to the events of September 11th, there also was quite a robust response by the Security Council, the 15 countries that are elected to treat threats to peace and security. And they did two things. First, they said, in a resolution of September 12th, that any act of international terrorism would be considered a threat to peace and security. And that was quite something because it didn't require systematics, it didn't require a ten year campaign, any single act, recognizing as well, in the Council's language, our right to engage in self defense, unilateral or collective. But then, on September 28th, they went much farther and really overturned existing international case law and said that any country that gave safe harbor to terrorists, financed terrorism, provided weapons to terrorists, aided and abetted in any fashion, was, in itself, an international criminal actor. And that really, in a way, ended the era of the Cold War because twenty years ago, when both sides had surrogates, there was much more tolerance for superpowers that acted through surrogates in some of the ideological battles of the '60s and '70s. And there was much more indulgence of indirect support for actions that were not always reputable. But now, the Council has spoken, under Chapter 7. It is a binding decision, that any state that harbors, gives succor to terrorists, is, itself, acting illegally. I think also, really, the U.N.'s role, in a way, was—a third aspect was as a kind of suffering fellow victim. When Osama bin Laden decided that Kofi Anan was also to be the subject of a fatwa and was also to be considered a combatant, this utterly peaceable man, this tri-continental leader who is both beloved in Ghana and Africa and in Europe by dint of his relation to the Wallenberg family and his deeply American sensibility and who has been really very solicitous of the south in United Nations affairs, to castigate him as a target of opportunity, I think, in a way, was the

beginning of Osama's plunge over the edge of respectability in any quarter, in any avenue of society.

The U.N.'s other role, of course, is going to be in the immediate aftermath of the Afghanistan conflict, to do a lot of the repair work, to handle refugees—formerly done by Mrs. Ogata, now done by Mr. Lubers; to handle relief operations through the World Food Program and the Food and Agriculture organization; or to handle IDPs, Internally Displaced Persons who have been taken over by the High Commissioner for Refugees. And, as well, to provide a . . . I don't want to say a façade of legitimacy, but rather a marker of legitimacy in the transition of Afghanistan before there really is a settled politics to decide who will control Kabul. When Pakistan is concerned about the possible takeover by Uzbeks and Tajiks and, in turn, the Northern Alliance is concerned that the Pashtun people who were the supporters of the Taliban should not, *de facto*, remain in hegemonic power. The U.N. will be a very useful mediator and place holder as they try to work out a multi-ethnic alliance in the transitional period before there are—strange as it sounds to say in Afghanistan—elections, fair and free elections. But this is a role that the U.N. took in Cambodia when the peace settlement there was worked out and you had three utterly, mutually despising factions. And it's a role that they've taken also in Timor and Kosovo. So I think, for the purpose of avoiding the appearance of avoiding the appearance of American hegemony or colonialism, the U.N. will be a very, very useful place holder as well.

But I think my several years of floating around the U.N. community has taught me one thing, which is to be utterly realistic about what the U.N. can't do, what it's incapable of doing, what it knows it can't do. It can't mount military campaigns. It can't provide intelligence information. And, quite arguably, in this circumstance of difficult conflict, it may be incapable of providing a criminal forum to try any of the cases that arise out of the Afghan conflict.

The major debate, in Washington and, I think, worldwide, has been whether to consider terrorism as a modality of crime or as a form of warfare. And in the past decade, Washington has resorted to the metaphor of crime, I think, for several different reasons. It's more comforting. It creates a feeling of normalcy. I think Washington believed it would stigmatize the actors and not allow them the dignity of being politicians or combatants, but really simple common criminals. And I think also, frankly, we didn't want to be jarred out of our sense of comfort. There's a sense that, as we control most forms of crime, so, too, if this is crime, it must be deterrable. But the scope of the attack on 9/11, I think, shows the limits of the metaphor and the self intoxicating dangers of the metaphor. The talk of Washington at the moment is the news report by Bart Gelman on October 8th in the *Washington Post*, which said on apparently good authority that, in 1996, Sudan had offered to give up Osama bin Laden either directly to the U.S. or to Saudi Arabia, if the Saudis would try him. They were content to expel him in some form or other. And the reportage in the *Washington Post* says that the National Security Adviser, upon advice by the FBI Director, declined to take custody of bin Laden because, at the time, according to Louis Freeh(?), there was not admissible proof that would show beyond a reasonable doubt that bin Laden had committed a crime under American law. The standards are court room admissibility. None of you, I hope, has ever suffered through a course in evidence. But what judges do for a living, in large part, is rule on very technical questions of what's allowable, what's not allowable. And most of what goes on in a court room is quite different from the basis on which we make our decisions. A jury in the traditional suspicion in Anglo-American law, which distrusted the

jury—the jury is not allowed to hear anything that is in any way removed from direct, eye-witness observation. So in the easiest example, if you had Osama bin Laden calling his mother before September 11th, saying, “Mom, I’m going to lie low because the big one is coming,” and if you had Mom confiding in her best friend, and the best friend was willing to testify as to this extraordinary conversation, this extraordinary admission by bin Laden, a Federal District Judge could not, under any circumstance, admit that into evidence because it’s hearsay—even though, if he were an intelligence analyst or political analyst, he would give that statement great weight. So the standard of what is admissible in court is quite different from what historians use, operatives use, politicians use, ordinary laypeople use in their lives. But the metaphor of crime, I think, is part of what beguiled us in the ‘90s into not taking sufficiently, seriously, the opportunities for countering bin Laden’s network.

So, at the moment, the problem that is faced by Washington is twofold: one is what to do with anybody that we might meet on the battlefield who surrenders. Should you take them into custody or should you let them go free? And politics will enter here as well as law. But the law has something to say. And secondly, should you, if ever, try the more senior of the leadership of Al Qaida or the Taliban, for the kinds of crimes that were committed, either in Afghanistan or in New York and Washington?

Now, on detention, which is an issue that has gotten very little attention in the course of Washington debate. . . It’s kind of a difficult one for us to think about because, in criminal law in the U.S., there’s no such thing as preventive detention. Well, maybe, in the 18th century, you’d have somebody bound over for good behavior in a small New England town. But in the ordinary standards of bail in American law, you can’t detain somebody just because they’re dangerous. And you certainly can’t detain them unless you’re going to charge them with a crime. So there, at least, I think one has to resort to the paradigm of war because, in a war, as we all know from every World War II movie, after you defeat somebody or capture them, you are allowed to restrain them safely, humanely, in good circumstances until the war is over. German prisoners of war picking cotton in South Carolina in World War II. You’re not required to simply take their word for it when they say they won’t fight anymore. Until the conflict is over, they can be detained. And part of what Attorney General Ashcroft, I think, meant to accomplish by the Executive Order that was rather hastily, by necessity, hastily drafted and issued, was to simply make clear the legal basis for having the right to detain someone that was found in Afghanistan, who’s a member of the Taliban or Al Qaida for the duration of the conflict. There are difficulties here, to be sure. No one’s going to know quite when the conflict is over. It may seem rather unattractive to suppose you’re going to lock someone up for life, just for having been a combatant in a war. But nonetheless, for the duration of the emergency—which I do, honestly, as a New York liberal, nonetheless believe to be an emergency—there really is no alternative but to hold the Al Qaida members, *aldi cumba*, by detaining them until we’re sure that the network is disentranced and disempowered.

But the other question that has arisen is what to do about possibly trying Osama bin Laden, or some of his cohort, for the actions of September 11th, in part to put to rest the rather fanciful anti-Zionist legends that are going around Egypt—this was, somehow, the work of the Mossad(?) or the Americans, to blow up their own symbols of commerce. And here, there are four choices. It’s become the pet topic among international lawyers. And I think often has been approached

without much realism about institutional capacity. One idea has been to do what we did in Yugoslavia and Rwanda and create another *ad hoc* tribunal through the actions of the Security Council. It takes a Chapter 7 Resolution. You have to get China and Russia to concur, but they would. So would France. So would England. So you could do that. But there are some rather awkward facts that get in the way. In real life, it took the Rwanda and Yugoslav Tribunal several years to get up and running. In 8 years of existence, the Yugoslav Tribunal, sitting in the Hague, has tried 31 defendants at a cost of \$400 million. So if you did have a significant number of surrenders of Al Qaida people who had been involved in the conspiracy, you could not try any of them very fast. Security is a huge problem. Even in the trial of the Lockerbie defendants, who were turned over voluntarily by Kadafi to be tried by Scottish judges sitting in the Hague, the U.S. had to prepare a military base over the course of a year—Camp Zeist—to make sure that the trial was secure and here, with a conflict ongoing, with a network that is orders of magnitude more dangerous, it's hard to know where you could conceivably try them in an international tribunal. I don't want to fly air cover over the Hague or over New York or over Washington to make such a trial secure. And finally, it's a rather delicate fact, because many of my best students are wonderful international students and many of my dearest friends are international lawyers of foreign citizenship, but in sharing intelligence with foreign judges, there's also a problem. Most intelligence agencies won't do it, foreign judges can be subject to pressures that we're not even aware of. I think, in the case of Islamic judges—because one idea has been to have countries volunteer their own Chief Justices—very few Arab states or even Muslim states could afford to turn over a judge for his service without facing irrepressible pressure from their own street. The extent of anger among young men on the Arab street is something that Fuad Ajame has described with great incomprehension and regret, but it's there. So very few governments could do that. And finally, there's the rather awkward question of Israel because the fatwa that Osama bin Laden issued was not only to kill all Americans but to kill all Jews. So if you're trying for a kind of regional impartiality and you have, say, ten Muslim states serving but not Israel, you surely haven't achieved your purpose of impartiality. If Israel sits, however, Aaron Barach is the wonderful Chief Justice of Israel who visits the Yale Law School frequently, every September. And if Justice Barach was assigned to such a court, no Arab state would sit. So the ideal of this pan-Islamic, pan-Judaic, pan-American courts, I think, is rather a pipe dream.

The thought of a permanent court. That's interesting but, I think, also theoretical. There are negotiations, as you know, for a permanent international criminal court. And at the beginning of those talks in the early 1990s, there was some thought of having that court be an anti-terrorist court, to sit for the cases of aircraft hijacking and bombing and attacks on diplomats. But it was quickly dismissed at the time because the system of cooperation between nation states seemed to work pretty well and people didn't want the court to become an excuse for the withholding of cooperation by other countries. But in any event, the ICC doesn't yet exist. It's going to be prospective only—only future crimes, not past crimes. And it would be subject to all the problems that I've mentioned about the *ad hoc* tribunals.

The third idea, which I think is most familiar and most comforting to Americans, is the idea of trying cases in federal district court. It's what we all know. We've all watched "Law and Order" and cop shows. Many folks on the Internet have learned a lot of law from watching television. But there are some problems there, too. It's true that, in the last decade, we've tried two cases in Manhattan in the southern district of New York, arising from the embassy bombings of East

Africa and from the 1993 World Center Attacks. But I think it's only ironic that Osama bin Laden then chose to carry out another bombing of far more catastrophic nature six blocks from the Federal Court House in Manhattan. And even now, one of my young friends went down for a clerkship interview with a judge in the southern district and said that, even now, the air is acrid, there are guards with semi-automatic weapons at the front door and the lower portion of Manhattan, in every real sense, is destroyed. If you were to try to conduct a trial in Federal District Court, you'd have several problems. Number one, there may be kinds of evidence, such as the hearsay I mentioned, that are reliable, at least to an ordinary lay understanding, but not admissible. Number two, in trying to protect intelligence information, you're quite limited in your options. The American Constitution, in peace time, is a very demanding document. It says, you'll have an open trial. The Confrontation clause says you have a right to confront every witness. So the kind of hearsay that a European court will admit, that an international court will admit, that Nuremberg would admit as worthy of consideration, cannot come in in a Federal District Court trial. We're so sparing in what we consider, I think, out of the belief that most citizens won't commit heinous crimes and that most people are willing to testify. But when operating abroad, with very few witnesses available and at the point of a dagger if they dare to testify, you may not have quite such a sumptuous banquet from which to choose your evidence. So, in Federal District Court, no hearsay could come in and, therefore, you'd have a very spare proof. Third, security—try to think of where this trial would be held. The NIMBY problem—not in my back yard—is one that would certainly present itself. You can't do it in Lower Manhattan. You sure can't do it at Ground Zero, in Washington. I volunteer Dallas, Texas, but my friends there have also thought this was a poor idea—to try to have the kind of security you would need for that number of trials and that quality of threat. There's something kind of funny in the phrase “the Federal District Court for the District of Afghanistan,” or “for the District of Diego Garcia.” I mean, it's been done. Once upon a time, when there was a hijacking in Berlin and the hijacking convention was brand new, the Germans could not bring themselves to try someone who was escaping from the Warsaw Pact Eastern Bloc. They imported a Federal District Judge to sit in a U.S. District Court for the District of Berlin. And the trial kind of worked. They swore in some bewildered Germans. They got a conviction. And the Federal Judge, who was an Article 3 Judge, which to you non-lawyers, means an independent, life-tenure, don't tread on me kind of judge. He basically tried the case as if it was an ordinary Article 3 federal case. But that was in utterly benign circumstances where it really didn't matter if you convicted or acquitted, where no German was intimidated on the jury, and where there was no security problem. But here, to airlift 800 Al Qaida members from Kabul to Dallas to be tried 4 by 4, 10 by 10. Joinder, for example, severance. A Federal District Judge doesn't like to try more than about 8 people at a time, maximum. It's not designed for warfare.

So the third option, which is the controversial option is military commissions and I think, to many people, this sounds like a jack bootied alternative. We all know about the abuse of military commissions in many countries around the world. People worry about Miss Berenson in Peru, they worry about the colonels in Argentina. I worry about that, too. But, in fact, the traditional way of trying violations of the law of war was in military courts. It's military courts that have made that law over centuries. In every international law treatise, military law is recognized as one of the two kinds of law. There's an international law of war and an international law of peace. And the tenets that, again, are so important—the ethical tenets and legal tenets of discrimination between targets, never to deliberately endanger a civilian, and the idea of

proportionality—the idea that, even when you’re trying to hit a military target, you owe it to civilians not to cause disproportionate danger. Those are both ideas that were developed initially by military lawyers as part of the law of armed conflict. And it’s a dialogue and conversation that’s had lots of input now over the last 60 years—from Geneva, from the Red Cross, the ICRC, from international humanitarian groups as well. But nonetheless, the ordinary way of enforcing that law is in military courts. The Geneva Conventions themselves, the great innovation after the Holocaust, the four 1949 Geneva Conventions say that, at the end of a conflict, it’s your duty as a state to search the battlefield for your own offenders, for offenders from the other side, to put them on trial to prevent any repetition. So the sense that this is a usurpation of civilian authority or a usurpation of the ordinary way of trying war crimes, I think, is simply an historical mistake. Until 1996, in fact, federal courts had no jurisdiction whatsoever over war crimes. In 1996, after having seen Yugoslavia and Rwanda, a new kind of supplementary jurisdiction was created. But I do think that people have, in some ways, assumed the worst about what military commissions mean. There have been, as you know, three kinds of trials—or three famous examples of commission trials in the past, that have made it all the way to the Supreme Court—the famous German saboteurs case where four saboteurs landed off Long Island in a submarine, and four off Florida, and FDR decided to convene a military commission on the Seventh Floor of the Justice Department. The very famous Yamashita case—the Japanese commander who beat MacArthur in the Philippines and MacArthur, perhaps out of pique, in part, put him on trial at the end of the war for the atrocities that were committed by Japanese troops. And then, finally, a trial of some Germans in China who were passing intelligence information to the Japanese, even after Germany had surrendered, which was not permitted under the law of war. There are acquittals in war crimes trials held in military commissions—five acquittals in the Germans and China case, for example. So the assumption that these are result oriented, make it easy on yourself kinds of courts, I think, is also misplaced. I don’t think that necessarily the Department of Defense or the Department of Justice have done an optimal job in explaining themselves, in explaining what it means or doesn’t mean. The Executive Order was framed in a way that was bare bones. It was meant to be a floor, not a ceiling. It did not sketch out many of the most important questions about such a commission, like what the standard of proof will be, or who can be chosen as a defense lawyer by defendants. And some of the language, I think, was just awkwardly put. So that it sounded like every principle that we hold dear of Anglo-American *juris prudencia* could be set aside. But the military lawyers that I’ve come to know in my wanderings from Yale are actually very principled people. They take their duties seriously. They often have acquittals. I will cite one notorious example—the Aviano Air Base incident where an American pilot took down the ski gondola and the command authority would have loved to get a conviction. But the military fact finders brought an acquittal. So I think the assumption that this is going to be a political form of justice, a show trial, a hanging jury, is misplaced. And if one needs guarantees against that, then the best way to do it is in the conversation, to urge that the trials be as open as possible, that as much latitude be allowed as possible in choice of defense council, but not simply to switch gears to a modality that doesn’t make any sense.

And the alternative would have been—if you do a thought experiment—what could you have done otherwise. Try to invent a new civilian court that would allow in more evidence or protect intelligence more broadly but, for better and for worse, the American Reform Movement in the ‘60s and ‘70s largely constitutionalized American criminal procedure. The hearsay rule, which sounds like a rather technical rule, is, in fact, now all intertwined with the confrontation clause of

the 6th Amendment. So, to change the kind of civilian trial you might conduct, would require a very, very long _____, or a long, long conversation with the Congress, even potentially, Constitutional amendments. So, in a way, you're faced with a rather stark choice. You can gussie up your military commission and make it look as liberal as you want, or you can go for the full tilt—Federal District Court trial.

Let me just give you two examples of what the problem was in 1993 when the trial was held in the Southern District. Number one, they introduced engineering testimony about the stability of the World Trade Center Twin Towers—never supposing anybody would try it again. So whether it would take a 707 or a 757 to knock over the buildings was something that was carefully sketched for the jury in the World Trade Center trial in 1997. But also, since you can't close that trial, the same facts were made palpable for every Al Qaida conspirator. Secondly, one of the more interesting exhibits in the trial was the Al Qaida operating manual, translated into English, which describes a number of things. It describes their cryptographic methods. It describes how you should separate explosives from the detonators. It describes the legal opinions from several Imams, saying that Al Qaida members would have the right to take hostages or to torture prisoners to obtain information. But that kind of operating manual—if you were Winston Churchill in the Second World War, with the dilemma of the enigma description machine, there are times when you don't want your adversary to know what you know about them because he'll change his method of operation, he'll change his method of concealment. And a number of times, bin Laden has done that. He's changed his cell phone systems, he went to e-mail, and then he went to couriers. So the transparent tradition in which I was reared as a trial lawyer before I came back to teach at Yale—open files, open court, no secrets—is not something that suits the middle of a war very aptly.

So I guess my stance, while I'm on sabbatical in Washington, has been to argue that the Commission model is the correct model, but that we can adapt it to fit our own culture and sensibility of liberal politics.

Finally, let me just say a word—not about international organization, but it's what I think are, perhaps, two failures of the academy. One is that I don't think—and I say this with profound love for mother Yale—that in the last 20 years, the academy has taken area studies sufficiently seriously. And very serious area studies scholars who do contemporary Afghanistan, contemporary Balkans, have found homes only in think tanks or in a very few universities. But the push to theory, elegant theory, formal theory, theory that shows a certain kind of rarified mind, has perhaps driven out what are equally humane and equally important areas of study of contemporary politics, contemporary history. And I do think, at this point, that—one friend of mine who was an itinerant among universities, who was told on several occasions that Afghanistan wasn't a field—that we might now rethink ourselves and understand that one can do contemporary history, contemporary politics as much as retrospective history.

And secondly, I do think that, for our own soul as well as for a gradual change in culture in the Middle East, that it's crucial that we engage Islam in an intellectually serious way—not simply as the specialty of a few people in the History Department. The ideal of Cordoba, Spain in the 12th century, which Thomas Aquinas would rely as much on _____ as on any Christian scholar, the debt that the 18th century, 19th century felt toward Arabic literature for

preserving the texts of Aristotle—that may be illusive at this point. But if we are going to mourn the failure of Arabic intellectuals to counter militant fundamentalism, the failure of a generation of European Islamic intellectuals to be more forthcoming—dangerous as it is in countering both the tyranny of their own governments, but the danger of their own street—then I do think that it needs to be a conversation that involves Islam as well as Christianity and Judaism. Europe, at this point, has an almost truculent Christian identity from time to time. The difficulty of Turkey, for example, in getting into the European Union, is not just about the Turkish labor market, or about the Armenian genocide, but rather, a kind of almost militant Christian identity that Europe sees itself as preserving. And that, I think, is a profound mistake. If you're going to make inroads into the _____, the religious schools that are rearing up generations of Muslim kids to be unequipped for the world economy and to be angry in their attitude toward the West, then there has to be a way to engage people in their own vernacular, in their own terms. And I think, to that extent, we have been quite insular. And I do hope that in the meeting of the events of September 11th, we don't just do the short-term nasty things that, perhaps, may be necessary, but regard this as a much larger, longer-term challenge to the nature of humanistic education in the West. Thank you. [applause]

CF: I'd like to invite anybody who has a question to come to one of the mikes.

Q: I enjoyed your discussion. How are you going to suggest we deal with the foreign judges who refuse to extradite members of the Al Qaida organization to military tribunals in this country? In other words, the Spanish judge, for instance, has refused to extradite 8 Al Qaida to America because they are going to be tried by a military tribunal and not by an open court.

RW: This is the well known Balthazar Garcon who is a Spanish magistrate, who has pioneered—some would say abused—but I would say “pioneered” universal jurisdiction in Spain. He was the judge who was in charge of the Pinochet investigation in Spain. He's had several views on Afghanistan. He first wrote an Op/Ed in the *Financial Times*, denouncing the military campaign as a war crime. He has since, however, encountered these 8 Al Qaida members and has arrested them. The Europeans, in general, don't like the death penalty, and that's been the major obstacle to extradition in the past. Part 6 of the European Convention on Human Rights calls upon European countries to both abolish the death penalty and the Court of Human Rights in Europe has ruled that they can't send a defendant to any country that implements the death penalty. So that's one bar. But interestingly, there's an exception for crimes in time of war. So it's possible that, if European countries choose to, they could resort to war time law and overcome the problem of death penalty. On military commissions, I think, again, the debate is not ripe. Balthazar Garcon has never shied away from a microphone. But until one sees the rules of procedure and evidence, and sees what kind of discretionary decisions are made in sending defendants to the commissions, it's hard to judge how the Europeans will react. Garcon is not the Minister of Justice, he's not the Prosecutor for Spain. He's just a _____. In addition, I think, push to shove, the other modalities are there. We still can try Federal District trials with all their obstacles. And if the Spanish or the French or the Germans will do a serious job in trying the cases themselves, all to the good. And the problem in the past has been that many European countries feel under great pressure, just as they are culturally near to North Africa, so they have very large North African populations and, from time to time, they have not always been as stalwart as one would want in keeping people

locked up, even after conviction. So, I think our concern would be that some countries might be tempted to quietly let people go, even though they still present significant threats.

Professor Gaddis: We thank you, as always, for a very clear and fresh presentation. 9/11 has shaken up a lot of assumptions and it was particularly fascinating on the same day to see you going in one direction and to see Bill Safire going in completely the opposite direction. I wanted to ask you to ruminate, in the context of what you said tonight, about the theme of this lecture series. We call this lecture series, “Democracy, Security and Justice,” and it seems to me there are two ways of looking at those three terms. One way is to see them as existing in completely separate compartments so that the principles of democracy should not be affected by the principles of security, which should not be, in turn, altered by the principles of justice. And particularly, justice itself should not be altered by the necessities of security. In other words, separate compartments for all of these. But it seems to me the direction you went tonight is to say that that’s not realistic, to say that, in fact, these are inter-related concepts, these are malleable concepts. The line that separates these concepts is permeable to an extent. So that if there is a security threat, this may require some compromise in democratic principles, some compromise in the principles of justice as we have, in more normal times, understood them. I wonder if I could just ask you to ruminate philosophically about this larger issue which, I think, really does get at the center of one of the things that we were trying to think about in the lecture series. Which of these two concepts, really, should we be embracing as we try to deal with this crisis? Should we hold this notion of compartmentalization? Or are we in a crisis which is sufficiently grave that we have to think about permeability among these concepts. Or third option—realistically speaking, have we always lived with a certain degree of permeability between these three concepts?

RW: First, on democracy—even that standing alone is problematic here—not in our own case, but as a universal ideal. Judith Miller of the *Times*, who writes about bio-terrorism and North Africa, was singing the song for years and we all pooh poohed her—that democracy in North Africa, some selected states, might look very different if you were concerned about militant fundamentalism. Even if you believed—as many do, that the anger of the Arab street comes from the lack of political opportunity in their own countries, in the long run, therefore, there has to be a creation of space for civil society and a transformation of self regarding regimes that, nonetheless, in the short run, if you were to hold a vote on the streets of Cairo tomorrow, you very well might not like what you would find, that years of virulent anti-Israeli education and the most wretched kind of school curricula that teach that Jews are the devil—the lack of a liberal culture in Cairo where the Greek community has been expelled and Copts are being, occasionally, assassinated; pan-Arabism and, now, militant Islamicism—that they don’t lend themselves to what we would think of as a liberal democratic regime.

Now, on American democracy, the Europeans are much more forthright—perhaps dangerously so—about the kinds of traumas that democracies undergo from time to time. In every European human rights instrument, with their long and detailed catalogue of rights, they always have a provision for sort of the interregnum—the chaotic interregnum, and say that, in the case of state emergency—not defined—that almost every right can be either amended or suspended or read in a more demure way. And you have to be proportionate. The Council of Europe has to conclude that there is an emergency. Cases can still be taken to the Court of Human Rights. But they

anticipate that most constitutional democratic regimes will, from time to time, have a crisis—almost seem to be inviting it. And that kind of anticipation of the worst case scenario is not something that's been the tradition in American constitutional law. I think our Constitution has better literary quality. It just states the right in a clarion way and supposes they will always obtain. And any kind of nip and tuck is done in the course of interpretation. But we don't have any so-called derogation provisions. There's no way to suspend rights, other than by the nuclear bomb of suspending all of habeas corpus—martial law—which I think would be even far more dread an alternative here than an Executive Order that only applies to aliens, that only applies to selected cases. So, do I think the compartmentalizing . . . In ordinary times, they are mutually enhancing and they give each other meaning. But yes, from time to time. . . It IS the old dilemma of the early 1950s—that at least the more committed anti-communists felt—was that there may be things that are so threatening to the future of democracy that you don't like emergency measures you have to take to meet the threat.

One of the most interesting books that's been written recently was about liberal and illiberal states of emergency—that it's not all or nothing. It's not an antinomian free for all, or a Federal District Court with O.J. Simpson and Lance Ito and Al Derschowitz, Johnnie Cochran. There's something in between. And the question was, how do you do something that meets the occasional serious terrorist threats that even Spain was facing or the Northern Irish, and yet having either administrative safeguards or a restyled kind of civilian court that would allow you, realistically, to be able to try cases and yet, not be foolish in a kind of Weimerian vulnerability—a _____ corp marching up and down Berlin is not the model that I have of democracy. So there has to be something to meet the occasional rare emergency. And I think our sense of shock is not simply at the question of the M word, the military word, but the idea that anything could actually threaten American democracy, American security . . . Our oceanic Maginot line is so deeply entrenched in our imagination. Even now, I think, no one wants to believe that, despite the nostram around Washington of asymmetric warfare sometime in the next 25 years, no one wants to believe that time has speeded up and that not only non-state actors but state actors will have learned how to exploit that vulnerability. So it's going to be . . . In a country without identity cards, it's going to be an especially difficult task to try to, in a liberal fashion, be protective of our safety.

Q: You expressed your support for the administration's plan for military tribunals. I wonder if you could explain further why you would rule out the possibility of some sort of ad hoc civilian court being for the temporary purposes without necessarily going along with traditional federal district court rules of evidence, and so forth.

RW: An *ad hoc* civilian court. Well, our virtues or our vices, I guess, are hoisted by our own petard. We have so brilliantly succeeded in constitutionalizing all of criminal procedure in peace time that there's very little wiggle room. You have a right to the jury in peace time. You have a right to confrontation with your witnesses. So the idea of constructing an emergency court from Ground Zero—it could be done. But it would require legislation. It might well require constitutional amendments. So if you like the available source of law that's here and ready, the ready kit is the military commissions that have already been used and there were hundreds of them conducted at the conclusion of World War II in trying people for war crimes in Europe and in Asia. So it's not an odd modality at all. I think, when Senator Leahy holds hearings on

Wednesday with some of my good friends testifying in opposition to the commissions, I think the burden, in a sense, will be on him to think through what could be done constitutionally to provide the same kind of protection of intelligence and the same kind of realism about the available evidence, but do it in a civilian framework. And I don't think there's going to be an answer. And if it was, it would be months and months, if not years away. For the future, I think it's something people could think about, but part of the purpose of the Executive Order, to be frank, I think, was—to use a vulgar hunting term—to lay down scent. I mean, just to say to Al Qaida, “Look, we do mean business. We're not just going to do carpet bombing on the front lines of the Taliban, but we're going to do what we have to, to roll up the network in the US, if only for the sake of not being otherwise horrendously intrusive into everyone's life in every aspect. And that kind of deterrence through announcement, I think, is part of what he meant to do in the Executive Order, rather than saying, “We're going to start an American Law Institute Project which will typically take 5-10 years—the restatement of the law of national emergency.” That kind of _____. It's good for law professors, it's good for the future, but it would not serve the purpose here and now.

Q: I have a question and then a comment. My question was about the precedents you cited for having military tribunals to try violations of the laws of war. And I'm wondering whether there might be a difference in the kinds of military tribunals that the Executive Order contemplates because there's a difference in the kind of war we're talking about. If we're talking about trying somebody for an act of terrorism, traditionally, at least as far as I know, acts of terrorism have been tried as criminal cases—whether it was the World Trade Center bombing or Timothy McVeigh or anything like that. And I think that there are reasons why it has been tried as a criminal case, because it may not fit neatly into the framework of what a criminal case looks like. But it also does not fit neatly into the frame of what a war looks like. So I could see us having trouble, then, distinguishing, for example, the '93 bombing, if we have foreign nationals who were responsible for an act of terrorism, who are on our soil, or if there are American citizens who are on our soil who have participated in that act of terrorism—we would have a situation where the same type of action is being tried in a different kind of court, depending on the person's nationality, which is a little bit different than the kinds of military tribunals you mentioned. So I'm wondering if there's a precedent for using the military tribunal to try acts of terrorism. And the comment I wanted to make was to, first of all, thank you for your admonition that we need to engage Muslims and the Islamic world in order to have a more serious dialogue about what the threats are and what the threats aren't. But I think part of it requires us changing our rhetoric, because even your use of the word “madressa”(?) to describe a place where children are taught hate—madressa just means school. And I agree with you that there are a lot of schools where Muslim children are taught hate. But there also are a lot of madressas, a lot of schools where Muslim children are taught arithmetic and everything else.

RW: I certainly accept the latter point. But I think one concern has been that, since there's no public education in so many countries, it has been left to charities to provide some kind of schooling for kids. And when the charities have not always themselves have such attractive nature, then they mis-use this vacuum and use the occasion of teaching arithmetic for the occasion of teaching hatred as well. But on the question of the paradigms that don't fit, the paradigms are awkward here from both directions. Both of these are terroristic acts—both in '93 and in 2001, but the scale is what, to my mind, would make this an act of war. It's what

persuaded the U.N. Security Council that it should consider it an armed attack for the purposes of self defense, whereas, ordinarily, if someone blows up an ash can or even kills a policeman, that's not considered an armed attack in quite the same way. So, here, the scale makes the difference. And, frankly, I think, in most of our thinking—whether we're utilitarians or deontological ethicists or situation ethicists, whether you're talking of ten deaths or 100 deaths or 100,000 deaths surely makes a difference. And in the original stated intention, to have a Hiroshima event where the buildings were supposed to fall over—not implode—where his intention was to cause quintuple, sextuple digit deaths, that makes it an act of war, not ordinary terrorism. The reason why in '93—or in '97 actually—but the '93 events that were tried in District Court, those were the tools at hand. And in the whole decade, frankly, I think there was a tendency to give it to the lawyers. I think some people in Washington felt some frustration that, even at times when a military response might have seemed a useful deterrent, it was still given to the lawyers—in Lockerbie, for example. 8 years of negotiation with Libya over whether they would consent to allow a tribunal. Ultimately Kadafi agreed that only on the quite openly stated understanding that he would not, himself, be put on trial. And then I don't know if any of you had the pleasure of reading through the opinion on the Lockerbie trial. But a fairly unusual treatment of the evidence that was presented in which, really, it was quite clearly a compromise verdict and doesn't quite have the fluidity of fact finding that an ordinary federal judge would use. But I think this was a problem throughout the decade, that it was much more convenient to call it crime. If you call it an act of war, then, presumably, you're supposed to do something about it. And in an era of peace keeping, which I was quite interested in, to be sure—in Bosnia and Rwanda and Kosovo—I think people felt they had their hands full and didn't want to use rhetoric that would create a political pressure that they would feel unable then to resist. It's like the G word. Madeleine Albright was reportedly reluctant to call Rwanda genocide at one point because she didn't want to feel she had to intervene militarily. And so, too, I think, if we'd called these acts of war, then clearly there would have been a call for more concerted action than the simple pinpricks of 1998 against Sudan and Afghanistan. I mean, I'm a Democrat but President Clinton, I think, is appropriately critiqued for not always having had as much attention to foreign policy as he should have given it and, at times, being distracted by domestic policy and by politics. And while a President has a depth of field with his advisers, somehow, we allowed ourselves to be persuaded that the '90s were a very benign. Maybe it's a symptom, simply, of the ordinary American impulse to demobilize. After every great conflict, the _____ kinds of allocations of military resources and demobilizing four army divisions. Even in the beginning of the quadrennial defense review under President Bush, one of the proposals that was put seriously in the Pentagon by civilian leadership was to demobilize two active, four reserve divisions, a Marine expeditionary force, and a carrier battle group—kind of giving up our ability to sustain ground campaigns, in favor of space, in favor of cyber space, in favor of national missile defense. And, in hindsight, I think everyone's happy that that proposal was not accepted. But I think just in our demobilization glee of wanting a peace dividend and time to recoup the economy, that no one wanted to shout the alarm.

Q: This is sort of a continuation of the last point. Earlier you spoke about how military law and the law of war has been recognized historically, but I think also that—as you went into—the nature of what war is has changed and I think part of it is that, back then, it was very clear what was a civilian issue, what was an issue of war. I guess the first thing I was going to ask is what you would define as an act of war. I think you just went into that. But I think the second point

is, who is us and who is them? That used to be clear—they're the ones with the red jackets on. But now, who is us? Who is them? Where do we draw the line?

RW: The confusion of who was a combatant and who was a civilian shoemaker in Houston is a difficult problem. It's actually one on which, in the '80s, there was some attempt by the U.S. to enforce the norm that combatants should identify themselves. There's a very interesting political history. I'll bore you only with a little bit of it. But under the old Geneva conventions—the old 1949 Geneva conventions—to even qualify as a prisoner of war, you had to take steps to identify yourself as a soldier—had to either wear a uniform or an insignia, carry your arms openly, and, yourself, follow the laws of war. There was not going to be any asymmetric obligation. If you didn't do that, you were not a POW, you were an illegal combatant, a *banditti*. And even the father of humanitarian law, Francis Lieber, in the 19th century, thought that bandits should be shot. Now, they're not shot, but you weren't qualified really as an honorable POW. In the '70s, there was a real sense in the south that wars of national liberation were different, that poor countries couldn't afford the demanding humanitarian rules, and that guerilla warfare, therefore, should be protected. But even in the legal product of 1977, Protocol 1 to the Geneva Conventions, it was required that the guerilla combatant at least identify himself as a combatant by carrying his arms openly on the way to the engagement. And even by those standards, the sort of pro-guerilla standards, if you like, bin Laden did not observe the accepted norms. So, by the law of war, his folks are unprivileged, illegal combatants. They still have human rights, to be sure, but they don't have the full protection of the law of war. When you hear Attorney General Ashcroft saying, "They don't deserve the protection of the law," what he is really referring to is that the obligations of Geneva were intended to be reciprocal protections to encourage combatants to take the steps that, in turn, protect civilians by self-identifying. So it's a very uncomfortable paradigm. I understand people who are concerned that some poor shoemaker in Houston shouldn't find himself in a Kafkaesque world where he can't get out and he's been certified, because of a spelling error, as being a member of Al Qaida, when it was somebody whose name began with IE instead of EI. Mistakes do happen. We've all had our problems with the IRS. But I think the assumption that, because it's going to be a military judge who initially looks at the case, that it's going to be treated in a ham-handed fashion is simply not realistically appreciative of the deep liberalization of the American military. Gene Rostow—he used to be Dean of this law school—he had a sort of standing joke. He said, "Why was there never a *coup de tat* in America? Why did the military never try to act out?" And his answer was, "Because they're all busy getting graduate degrees. Most officers have Masters or Ph.Ds. They all go to war colleges and they go to the LLM Program at Yale. This is not the hermetic military of Argentina where generation after generation, they live in their own communities and their own reserves. This is a highly civilianized military. I think, also, one way I would flesh out what the Executive Order says is that, as an initial threshold matter, a commission should look at the probable causes to believe that somebody is a member of Al Qaida—not simply accept the certification as final but rather subject to re-examination. But where I think people misread the order is, initially, somebody has to certify Al Qaida/non-Al Qaida, if only for the purpose of detention. This kind of combatant detention who will be not necessarily tried, but who will be taken out of circulation as an un-uniformed member of a military force. There still is habeas corpus in the USA. As long as somebody is locked up here, you can always bring a writ of habeas corpus to a court. But the relationship between the military commissions and the courts is necessarily one of some distance. I did a talk for a bunch of federal judges last Monday night.

They were pretty high level judges and they were very interested to hear about Geneva '49, Geneva '77, all the requirements to be a POW, the history of military commissions. And asked real good questions. But I think the unspoken subtext of the talk was, "Gosh, guys, this is law you know nothing about. This is law you have never dealt with. This is law that has not traditionally been the law of federal district court. And while Federal District Judges are very adaptable, brilliant people with a lot of intellectual curiosity, I think even they would appreciate that they're not necessarily going to want to have to rule on something is a war of national liberation or colonial domination. These are almost not justiciable questions. So habeas corpus is, I think, always the guarantee, stateside, that nothing obtuse will happen. Abroad, I think it has to be left to transparency. . . The politics of the region, the politics of this conflict will converge with the civil libertarian sensibility. We want to be able to persuade Muslim countries that we're acting fairly, we don't want to be seen as obtuse. So kind of like Mandeville's *Fable of the Bees*, all the incentives will tend in the same direction to make these congenial, acceptable courts that are only so close as one needs to have for the sake of safety.

Q: I'm not a law student, so forgive me if this question seems a bit naïve. But I was just wondering if there was any provision or possibility for appeals in the model that you discussed, would be based mostly on a military commission. And sort of a related question—whether there would be any possibility of civilian oversight. You mentioned a case that went to the Supreme Court and I wasn't sure whether the Supreme Court or some other mechanism, through the Department of Justice or Congress, could have some sort of oversight over these military commissions, as a way of showing that you were trying to make it as liberal and fair as possible.

RW: It's not often done, because usually they're battlefield trials, but you can have civilian judges on a military commission. I mean, Nuremberg was kind of a pooling of military commissions, where all the allies of World War II decided they would have common trials for the most senior Nazi leadership. So you could have civilian judges, you could even have foreign judges. And, in that sense, I think it would add to the perceived—I don't want to say "legitimacy"—but the perceived evenhandedness of these tribunals. Paul Kennedy for the question of questions.

PK: You've almost answered that, I think. But I was intrigued that you mentioned Nuremberg once in your talk and it disappeared. But would you give us the kind of arguments for or against an international military tribunal, as opposed to what seems, to the Europeans and others, to be the Bush administration idea of a national military tribunal. Would it help not politics better, our relations with allies better? And you've just now suggested that there are precedents and possibilities for doing this. What are the arguments against?

RW: First, let me just mention, on Nuremberg, whenever I teach that in my "War Crimes and Terrorism" course, I always teach against Nuremberg, just for fun, to goad the students. But when you read the trial record of Nuremberg, it looks nothing like what you think an ordinary trial to be. There's documentary evidence, there's hearsay by the truckload, certain kinds of defenses are ruled out. For example, the first charge at Nuremberg is "conspiracy to commit aggression and aggression." Some of us are familiar with that recent scandal in Germany—Ernst Nolte, the very distinguished historian, had his little "*histolikist reit*"(?), arguing, in a kind of macabre tone—he's gotten strange as he's gotten older—that Hitler—this is his idea, surely not

mine—that Hitler might have worried that Russia would invade Germany and use Asiatic processes in prosecuting the war. So the invasion of Russia, therefore, was anticipatory self defense. This doesn't explain Poland or France. But you may be sure that none of the judges at Nuremberg permitted that argument. So even the kind of defenses that could be presented at Nuremberg were quite limited. Nuremberg was a didactic, educational enterprise to aid the civic reconstruction of Germany and, to be sure, three people were acquitted because it had some novel theories of responsibility. But it was not really a fact finding trial. It was much more like a truth commission with several individuals sitting in a dock. So it's hard to use Nuremberg as a model if your real model is the Federal District Court because Nuremberg—'twern't a trial in the sense that we know it. Whether you should have a pooled kind of truth commission in lieu of national military commissions, well, actually, I think, there, I might revert to some of the questioners who were worrying about the possible confusion between civilians and combatants. Here, part of the problem really is going to be to figure out who's who. It's not going to be an utterly trivial matter. So I wouldn't want to simply have blunderbuss factual assumptions as one did at Nuremberg. There may have to be some quite individualized fact finding. And secondly, I guess, the problem, again, is who. International sounds great in theory. The Brits would probably serve gallantly. If you're going to say it's an allied commission, then if you include the Brits, will you include the Pakistanis. If you include the Pakistanis, can Mushrif's government withstand that, or do you really know what pressures that judge would be subject to if he's worried about the Taliban sympathies of the ISI—the Pakistani Intelligence Services. If you're going to include, again, other Islamic countries, and why not a Jewish country? So I just worry that this is not like Yugoslavia or Bosnia where very few countries had dogs in the fight, where very few countries had prejudicial stances in regard to the conflict. It's not a historical retrospective trial. It presents very different problems, therefore, I think, than Nuremberg did or the Yugoslav or Rwanda tribunals do. And finally, intelligence. Again, honorable as judges are, there's no code of ethics for international judges. We all know that judges on the ICJ, the World Court, write home. The French judge talks to the _____ and other judges phone home and are phoned from home. There are even corrupt judges. If you are in the international court gossip circles—no one likes to say these things out loud because no one wants to be derisive of the authority of international courts. But there has been at least one notorious instance—large bribes paid and taken. So it's quite hard, at times, to know who you're getting when you just ask a country to nominate a judge. And, frankly, also, in most U.N. tribunals, judges are chosen—anybody who serves on a U.N. body is chosen by the rather Manichean politics of U.N. regionalism. It's the regional caucus that chooses the candidate for Ecosoc(?) or the ICJ or the International Law Commission. So you really would have almost no control over who would be your colleague. And, finally, let me just note a small fact of life. Trial chambers really can't be bigger than 3-5 judges. You can't have a trial with 72 judges ruling on points of evidence. So that, you'd have to have some very heavy handed selection rule. You're always going to have an American, or two Americans and one foreigner? I'm not sure that that kind of choreography would be any more pleasing to people.

Q: Rather than a philosophical, more a practical or pragmatic question. I suppose where democracy really can't be compartmentalized from justice, it's surely in the area of nation building and you've implied that the U.N. has had some luck in its endeavors in Southeast Asia or in the Balkans, and the problem, as you've taught us well, the United Nations needs national security. It's not so much in going in as nation builders but, rather, in getting out. And so I

suppose, with your tremendous, first hand knowledge of these operations, I wonder if you could link the point you made with the problems of detention to not knowing when this conflict will end, as to how the U.N. might effectively formulate an exit strategy, what the conflict with eventual U.N. involvement—how it will affect the U.N.'s prospects in terms of peace keeping.

RW: The questioner is one of New Haven's great experts on East Timor and the war crimes in East Timor. The sense of modesty the U.N. has now, despite Paul Kennedy's great report, about what it can achieve, it's felt inside the house as much as it is internationally. They will do refugee work, they'll dump a lot of food. They will provide a façade for a transitional government. But no way is the 38th floor going to want to adopt Afghanistan or become responsible for its fate. It's just too daunting. If the Russians can't do it, if we can't do it . . . Even Abraham Brahini can't do it. So I don't think they're going to want more than a kind of auxiliary presence to provide some technical support to relief in the form of food and housing and refugee reception. But I certainly don't think that they're going to adopt the model that the U.N., *ala* Kosovo and Timor, will become the government, but at most, will be the instrument of a coalition.

CF: Thank you for this very lucid and learned and clear-eyed account. [applause]