

SALZBURG GLOBAL SEMINAR

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THIRD ANNUAL LLOYD N. CUTLER LECTURE
ON THE RULE OF LAW

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MONDAY

NOVEMBER 12, 2012

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The lecture convened in the Courtroom of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C., at 6:00 p.m., Associate Justice Sandra Day O'Connor (Ret.), Host, and Adam Liptak, Moderator, presiding.

PRESENT:

SANDRA DAY O'CONNOR, Associate Justice (Ret.),
Supreme Court of the United States, Host

ADAM LIPTAK, Supreme Court Correspondent, The
New York Times, Moderator

BARONESS HELENA KENNEDY, Member, House of
Lords

ANNE-MARIE SLAUGHTER, Bert G. Kerstetter '66
University Professor of Politics and

International Affairs, Princeton University

STEPHEN L. SALYER, President, Salzburg Global
Seminar

1 P-R-O-C-E-E-D-I-N-G-S

2 (6:08 p.m.)

3 JUSTICE O'CONNOR: I'm Sandra

4 O'Connor and I am very happy to welcome all of
5 you tonight to the Court to hear the lecture
6 that we are going to have and to be able to
7 honor the Salzburg Seminar. How many of you
8 have ever been over to the Salzburg Seminar?
9 I raise a hand, too. Most of you have. And
10 it is just an unforgettable experience. It is
11 fabulous. And if there are a few of you who
12 haven't, make sure you have an -- invite them
13 now so they can go. Find out who hasn't
14 because it is a wonderful experience and I
15 really think that it has helped us in so many
16 ways in our understanding, our consensus
17 building, if you will, around the world on
18 some very important issues. And I applaud the
19 work of the Salzburg Seminar very much. It
20 has been wonderful.

21 And I welcome them here to the
22 Court. It is on a holiday. I don't think we

1 thought about that when we set this date but
2 it is some kind of a national holiday and that
3 has caused things to be kind of quiet around
4 here, but that is all right. We will liven it
5 up a bit tonight. And I welcome all of you
6 and I am so pleased to do something at the
7 Court that is in honor of the Salzburg
8 Seminar.

9 So who is going to be emcee up
10 here and get things going from here on? Are
11 you?

12 MR. LIPTAK: Yes.

13 JUSTICE O'CONNOR: Okay. So come
14 on. I will hand you the microphone and turn
15 it over to you.

16 MR. LIPTAK: Thank you very much,
17 Justice O'Connor.

18 (Applause.)

19 MR. LIPTAK: Well thank you so
20 much, Justice O'Connor. It is a special
21 privilege to be introduced by you in a setting
22 where you made history and where your work

1 endures. I am delighted to welcome you to
2 this year's Cutler Lecture and to introduce
3 you to two participants who really need no
4 introduction, of course, and your materials
5 have the extensive biographical materials on
6 them.

7 But let me give you just the
8 briefest of overviews. On my far right is
9 Baroness Helena Kennedy, who is a member of
10 the House of Lords, a leading barrister and
11 expert in human rights law, civil liberties,
12 and constitutional issues. She was Chair of
13 the Charter88 from 1992 to 1997, the Human
14 Genetics Commission from 1998 to 2007, and the
15 British Council from 1998 to 2004.

16 She has received honors for her
17 work on human rights from the governments of
18 France and Italy and has been awarded more
19 than 30 honorary doctorates.

20 BARONESS KENNEDY: Thirty-six on
21 the last count.

22 MR. LIPTAK: Thirty-six, okay.

1 (Laughter.)

2 MR. LIPTAK: And for all we know,
3 we will get reports of even more as the
4 evening progresses.

5 Anne-Marie Slaughter, I am sure,
6 is well-known to many of you. She is
7 currently the Bert G. Kerstetter '66
8 University Professor of Politics and
9 International Affairs at Princeton University.
10 That must require an extra-large business
11 card.

12 From 2009 to 2011, she served as
13 Director of Policy Planning at the State
14 Department, the first woman to hold that
15 position. And before her government service,
16 Professor Slaughter was Dean of Princeton's
17 Woodrow Wilson School of Public and
18 International Affairs from 2002 to 2009.

19 So I can think of no one better
20 than our two conversant participants tonight
21 to think about the issue that most engaged the
22 man whose legacy we honor tonight, Lloyd

1 Cutler, which is the commitment to the rule of
2 law and to try and understand what that
3 commitment means, whether it is an empty
4 abstraction or whether it gives rise to
5 meaningful constraints. And that question, I
6 think has gotten only more difficult since the
7 September 11 attacks and the widely but not
8 universally accepted view that those attacks
9 put the United States on a perpetual war
10 footing and on a battlefield without
11 geographic limits and technical advances in
12 the last decade have only complicated matters.

13 I wanted to start with a question
14 for Professor Slaughter and to try to bring
15 some of these abstractions vividly to life.
16 The question of drone warfare. The Obama
17 administration says that it is faithful to the
18 rule of law in deciding whom it targets for
19 assassination. But critics say it is hard to
20 trust a system that is secret, that takes
21 place wholly within one branch of the
22 government, and that seems accountable to

1 neither scrutiny nor oversight.

2 What is the right way to think
3 about this issue?

4 PROFESSOR SLAUGHTER: Thank you.
5 Well, I have to start, first of all, by saying
6 how pleased I am to be here but second just to
7 say how amazing it feels to be sitting where
8 the justices sit, looking out at all of you.
9 I am pretty certain I will never, ever be
10 formally in this position but it is good --

11 BARONESS KENNEDY: You will.

12 PROFESSOR SLAUGHTER: I don't
13 think so. Not after what I am about to say.

14 (Laughter.)

15 PROFESSOR SLAUGHTER: So this may
16 not cause a great deal of debate but I think
17 we are not following the rule of law with
18 respect to drone warfare in the sense that
19 ultimately there cannot be a system for an
20 indefinite period targeting individuals all
21 over the world, including quite possibly
22 American citizens but even independently, that

1 has no formal checks on it, other than what is
2 essentially a system that says trust me.

3 I do trust President Obama. I do
4 trust the lawyers that I know are very
5 conscientiously applying their standards, but
6 I haven't seen those standards. I haven't had
7 a chance to vet them. I haven't had a chance
8 to debate them and I don't at all,
9 necessarily, trust all the people who could
10 apply them. So I actually think we are sowing
11 a harvest we are going to be very unhappy to
12 reap. That this is a way of warfare that is
13 going to continue for a very long time and
14 that doing it all within the executive branch
15 is not going to be the rule of law as we will
16 want to uphold it.

17 MR. LIPTAK: What is the
18 perspective from across the Atlantic on this
19 issue?

20 BARONESS KENNEDY: Well, this is a
21 really interesting one because at this very
22 moment in time in Britain, a case has been

1 launched, it is called Noor Khan versus the
2 Secretary of State for the Foreign Office and
3 the attempt is to have a declaration as to the
4 unlawfulness of intelligence operatives in the
5 United Kingdom providing locational
6 intelligence to the United States for the
7 purposes of having drone attacks.

8 And it has been quite interesting
9 because the initial hearing allowed for an
10 application to be made and we are now waiting
11 to see whether the courts will allow this to
12 proceed or whether they will accept the
13 argument that it is not justiciable.

14 And so the non-justiciable
15 argument is that this has to do with the
16 policy of another country and, therefore, it
17 is impossible to have it litigated in Britain.
18 Whereas, what is being argued by the lawyers
19 for Noor Khan whose father was killed by a
20 drone in Northern Waziristan and he, Noor
21 Khan, lives in Britain and his elderly father
22 was killed. And his argument is that his

1 father was a civilian. He had no part in any
2 jihadist or Taliban activities or any links to
3 anything to do with terrorism and that he was
4 one of the civilians who remain -- there is a
5 question always on the numbers of civilians
6 killed by drones but we do know that
7 significant numbers of civilians are killed.
8 And it is claimed that as many as 178 children
9 have been killed by drones in drone attacks.

10 And so the argument that is being
11 mounted by the Noor Khan litigation is that
12 this involves our intelligence operatives at
13 GCHQ, which is the headquarters where we have
14 listening in and where we gain intelligence on
15 people living in parts of the world usually
16 through intersect of satellite contact.

17 And so the argument is that our
18 personnel there who are civilians and not
19 military are noncombatants and, therefore,
20 they would not be able to claim that they were
21 covered by international humanitarian law and
22 that they in fact are at risk of being

1 prosecuted in the domestic courts for being
2 accessories to unlawful killing. And,
3 therefore, there should be a declaration as to
4 the unlawfulness of this to protect our own
5 intelligence officers.

6 And so it is a very interesting
7 argument.

8 PROFESSOR SLAUGHTER: That is --
9 many different --

10 BARONESS KENNEDY: Yes, what is
11 being argued, though, which is important, is
12 there was no attempt here to prosecute our
13 intelligence officers. What they are saying
14 is we have to have, if you will, light shone
15 on this kind of conduct. And one of the ways
16 of doing it is to have a declaration made or
17 to call upon the court to make a declaration
18 as to the legal position of those who are
19 supplying locational intelligence.

20 PROFESSOR SLAUGHTER: Well I mean
21 --

22 BARONESS KENNEDY: So go back to

1 Anne-Marie's point, which is what do we feel?
2 And it is obviously a way of flushing out the
3 issue of lawfulness of the use of drones and
4 the risks which people could argue about
5 proportionality. That the proportionate,
6 there are highly high risks of a
7 disproportionate nature when it comes to
8 civilian loss of life. And so that is the
9 argument.

10 PROFESSOR SLAUGHTER: But it does
11 raise something that gets to the indefinite
12 nature of this because our courts have done
13 the same thing. When the estate of the son of
14 Anwar al-Aulaqi tried to sue here, essentially
15 it was a political question. It was pushed
16 off. And that is perfectly understandable for
17 courts in the middle of a traditional war.
18 But if you get this kind of a case when there
19 is a hot battle in the middle of World War II
20 or the Korean War or Vietnam, you can push it
21 off because there will be an end and after
22 that end, then you can take that case and you

1 can declare the law. There is no end here.
2 There is no end in sight.

3 So at some point, the courts have
4 to adjudicate. There has to be some law that
5 governs these kinds of actions, whether it is
6 international or national and what source.
7 But it can't be that it is just a no-law zone
8 forever.

9 BARONESS KENNEDY: I agree.

10 MR. LIPTAK: But the very question
11 of unlawful killing suggests there is a body
12 of law that we should look to and I'm not sure
13 what body of law that is.

14 BARONESS KENNEDY: Well Anne-Marie
15 is the person who would help you better on
16 international humanitarian law. I am a lawyer
17 who practices in the criminal courts of the
18 United Kingdom and in the European Court of
19 Human Rights, occasionally in the European
20 Court of Justice.

21 And so international humanitarian
22 law is not part of my normal daily run. Of

1 course I have to know about it and understand
2 it because as well as being a practitioner, I
3 sit in the House of Lords and I am involved in
4 the legislative process and these issues are
5 coming up for us really fairly constantly.
6 And I think there is a very strong feeling in
7 Britain of unhappiness about the business of
8 drones. We for the first time now have the
9 capacity ourselves to launch drones. We have
10 been able to, if you like, piggyback on the
11 expertise here in the United States but the
12 actual sort of, if you like, direction, the
13 direction that comes I think from Oregon here,
14 we were relying on Oregon to do that for us
15 and now the capacity has been moved to the
16 United Kingdom.

17 So the debate has become quite a
18 hot debate in Britain and I think that the
19 general public are very uneasy about the use
20 of drones because of the risk to civilian
21 life.

22 PROFESSOR SLAUGHTER: I'm uneasy

1 because of the risk to civilian life. But
2 more generally I mean this goes to your
3 question of what kind of law. This is smack
4 in-between traditional law of war and the
5 criminal law. Right? And these are
6 individual cases planning individual attacks.
7 That sounds a lot like criminal cases for
8 terrorism. We know how to do that. We've
9 prosecuted them in domestic courts. On the
10 other hand, at least until now where we are
11 finding people in Afghanistan or Pakistan,
12 that is still a hot war zone that is
13 controlled by the law of war because it is a
14 declared initial war. Now shift that to
15 Somalia where you have, say a member of al-
16 Shabaab. Al-Shabaab is a jihadist terrorist
17 group. It is not part of al-Qaeda. In fact,
18 its leadership has debated whether or not to
19 be part of al-Qaeda. We have thus not
20 declared war on them, nor have they declared
21 war on us. And they are in Somalia, not
22 Afghanistan or Pakistan. Now, at that point,

1 it is not the same physical battlefield and it
2 is not the same enemy but it has to be subject
3 to some law. It is not, in my view, subject
4 to our domestic law authorizing the attack on
5 Afghanistan. The question I would probably
6 start with international humanitarian law
7 because I think it forces a global dialogue
8 and ultimately that is what we need. But the
9 first stage is to force the recognition that
10 there has to be some rules. Because you can
11 use drones and so can the Chinese. Can you
12 imagine if China decided that a Uyghur
13 terrorist group located in Northern Virginia
14 was mounting a threat against them and used a
15 drone? Or many other countries.

16 BARONESS KENNEDY: One of the
17 other things, of course, is that international
18 humanitarian law is about the law of war in
19 war.

20 PROFESSOR SLAUGHTER: Yes.

21 BARONESS KENNEDY: And so if you
22 are sitting at a computer bank in Oregon and

1 you are a member of the CIA, then you are not
2 covered by international humanitarian law. It
3 is domestic law that would cover you.

4 And so I think that people who are
5 in that position should be made aware, as
6 indeed this litigation in Britain currently is
7 seeking to do, of the risks because of
8 domestic law being the area of law that would
9 cover your activity.

10 And so that is the point, you see.
11 If you are not directly engaged in war, then
12 you are not covered by international
13 humanitarian law and if you are a member of
14 the CIA or you are sitting as a security
15 services agent at GCHQ, which is the general
16 communications headquarters in Britain, then
17 you would not be covered by international
18 humanitarian law but you would be by domestic
19 law and you could be considered to be aiding
20 and abetting murder.

21 PROFESSOR SLAUGHTER: Exactly.

22 And you could have seen a civilian who then

1 triggers an attack that results in the killing
2 of another civilian. So at that point that
3 does look like murder. Right?

4 BARONESS KENNEDY: It is very
5 tempting for government, and I have great
6 sympathy with this, you can understand we in
7 Britain like you here in the United States,
8 although you in much greater numbers, are
9 seeing our soldiers being killed in
10 Afghanistan. Families are bereft. There is
11 grieving of a real kind, over the loss of
12 young life, particularly young life. And how
13 tempting it is that you actually can engage in
14 warfare which is actually at a distance.

15 And we may be looking at the
16 future nature of war.

17 PROFESSOR SLAUGHTER: Oh, we are.

18 BARONESS KENNEDY: And therefore,
19 we have to start thinking about the kind of
20 law that we have to put together to deal with
21 that. And that is a big challenge for us,
22 particularly in the advanced world where you

1 can be sure that if we don't take a lead on
2 the rule of the law, they are going to be
3 nations who care less about the rule of law
4 who are going to have this kind of technology
5 in their hands, too, as Anne-Marie has said.

6 PROFESSOR SLAUGHTER: Would you
7 oppose -- I mean, so we may have a little of
8 this. Would you oppose the use of drones in
9 warfare, if it were up to you?

10 BARONESS KENNEDY: No. I can see
11 very good reason why in more you would. But
12 Pakistan has remained very silent on this. I
13 mean what you have now is the use of drones in
14 another sovereign territory and it would be
15 interesting if litigation were to be created
16 by Pakistan over the use of drones in parts of
17 Waziristan which is not Afghanistan, and that
18 is where the big complaint is. And that is
19 why the Noor Kahn case is taking place in the
20 British courts.

21 MR. LIPTAK: So each of you has
22 described a problem, I guess, and one on which

1 there is not a lot of daylight between you
2 that is crying out for a solution and yet it
3 is very hard to know what that solution is,
4 except for what sounds like a somewhat round
5 about judicial declaration that might put
6 someone on notice that they might want to do
7 something different.

8 Is there any more direct way to
9 get at this?

10 BARONESS KENNEDY: Well, I think
11 that Anne-Marie was right in saying that what
12 one has to do is we all know the antiseptic of
13 sunlight in dark places. And the idea I think
14 of sometimes bringing a case is about shedding
15 that kind of light, about there being a public
16 debate. So that the public are themselves
17 alert and aware of what is happening.

18 And I think that is one of the
19 purposes of that litigation that is currently
20 taking place is to have a bigger debate about
21 the law of war, about how there are new things
22 happening in our world around technology which

1 actually are challenging some of the
2 traditions and we have seen that around the
3 Geneva Conventions and the arguments that they
4 are aware around whether they are applied in
5 Guantanamo. We should be looking with care at
6 how law should be dealing with these new
7 challenging issues.

8 PROFESSOR SLAUGHTER: And I mean
9 one way to get at this is actually something,
10 Adam, you have written about, as have I, which
11 is a kind of conversation of courts. So that
12 if the point is you have to crystallize the
13 case or controversy by bringing a case and
14 this is extremely difficult to do, and as you
15 have just said, the courts right now don't
16 want to weight in but they are going to have
17 to weight in. But if you imagine cases
18 brought in Britain, cases brought in the
19 European Court of Human Rights, probably it
20 would be the European Court of Human Rights.
21 Here, a number of other regional courts and
22 national courts, then what you will get are

1 multiple legal authorities who have the
2 capability of declaring their area of law
3 weighing in and listening to each other. That
4 may be -- I mean, if I could waive a wand, I
5 would probably invite the signatories to the
6 Geneva Conventions to come together and
7 address this. There are any number of
8 difficulties with that and, indeed, many human
9 rights lawyers don't want that to happen
10 because they are afraid that the people would
11 go backwards on the protections that the
12 conventions now actually afford. So even
13 those great supporters of the conventions do
14 not want a conference to extend them. And
15 needless to say, many countries don't either.

16 So absent that, absent some kind
17 of rational debate among the nations of the
18 world who are going to be affected, the best
19 we may be able to do is a conversation among
20 courts that then actually informs a public and
21 possibly legislative debate.

22 BARONESS KENNEDY: It is very

1 interesting that you should raise that
2 question of how internationally human rights
3 lawyers are anxious that because of the, if
4 you like, febrile state of our world, that
5 this might not be the great opportunity or
6 moment to have discussions about how we can
7 advance law. Because the fear is that we will
8 retreat and we will go backwards.

9 And in fact, we are having that
10 discussion in Britain just now where we don't
11 have a constitution like you do. And for my
12 part, I came here as a young lawyer to the
13 United States and I have always looked with
14 envy on the fact that you had a written
15 Constitution and a Bill of Rights and that is
16 why I became a great campaigner for those
17 things in Britain.

18 Well, we incorporated the European
19 Convention into domestic law. We had signed
20 up for it back in the '50s but didn't make it
21 part of our domestic law until the year 2000.
22 It was 1998 when we passed the legislation

1 through and by that time I was in the House of
2 Lords but we made it part of our domestic
3 legislation. And now there is talk about
4 shouldn't we have a Bill of Rights. That
5 instead of just having a European Convention
6 on Human Rights, that we should actually have
7 a sort of tailor-made British Bill of Rights
8 which would protect things like jury trial.
9 However, there is a great fear in the human
10 rights community in Britain that if we open up
11 that door, we will actually go back. Because
12 in fact some of the things that people might
13 want to do is they would like to be able to
14 return people to countries where people might
15 be tortured. And at the moment, there is a
16 reservation on doing that.

17 MR. LIPTAK: Well we have been
18 looking to the courts mostly for a solution
19 the problem the two of you have sketched out.
20 Are there other places to look?

21 I mean, you have said that the
22 administration has standards, it just won't

1 tell us what they are. The legislative branch
2 could force the executive to describe aspects
3 of what is going on, but chooses not to. Is
4 it really only the courts we can look to?

5 PROFESSOR SLAUGHTER: I thought of
6 course you were going to say we should look to
7 the writings of publicists as international
8 lawyers always do, so the professors would
9 provide the answers, but no.

10 You know, I again, I think
11 actually Congress can, even if it is taking up
12 legislation, either of its own sort of broad
13 framework within which these decisions had to
14 be made or to ask the executive to make these
15 things clear, it would actually be an ounce of
16 prevention worth a pound of cure. Because
17 these issues are going to be leaked. There
18 are going to be killings that are going to
19 either, again, American citizens, civilians in
20 ways, or simply at some point a connection
21 that is so tenuous to the original war in
22 Afghanistan and the original attack on 9/11,

1 that it's going to come out but it is not
2 going to come out in a good way. It is not
3 going to come out in a rational way. It is
4 not going to come out with time to debate it.
5 It is going to be sort of leaked and then
6 immediately the subject of probably a much
7 more febrile discussion that might not take us
8 backwards but these are really important
9 questions.

10 So yes, I would actually hope that
11 this President, as a constitutional lawyer,
12 does not want to leave as part of his
13 historical legacy the equivalent of suspending
14 habeas corpus when you are Abraham Lincoln,
15 except the Civil War never ends.

16 MR. LIPTAK: Let's turn the topic
17 to another post-9/11. It is not a new
18 development but it seems to be new instances
19 of it and Guantanamo is the prime example, but
20 detention without charge on the theory that
21 these are soldiers in some sort of war that
22 goes on forever.

1 Baroness Kennedy, you and I talked
2 briefly and you mentioned the British
3 experience with the IRA and how that might
4 have informed your thinking on the topic.

5 BARONESS KENNEDY: Well when I was
6 a younger lawyer, in the late '70s we started
7 seeing bombing campaigns in Britain and I
8 started doing those cases. And all through
9 the '80s and in fact into the early '90s until
10 the peace process really got underway, I did
11 many of the big Irish cases that came out of
12 the Troubles.

13 And if I have learned anything, it
14 was that the challenge of terrorism to
15 governments, to states, it is so easy for us
16 to respond to it by seeking to somehow almost
17 surrender to the very things that terrorists
18 are wanting of us. You end up giving up the
19 very values that they are attacking and which
20 are the things that we are proud of.

21 And in the '70s we in Britain
22 introduced internment in Northern Ireland,

1 basically detention of people suspected of
2 perhaps having links to the IRA and it was a
3 recruiting sergeant for the IRA. It actually
4 worked in the very opposite ways in which
5 people would have wanted it to work. It
6 actually, instead of acting as a deterrent, it
7 actually fired up even greater antagonism
8 towards the British state.

9 And so I have always firmly been
10 of the view that you have to hold true to your
11 core values. Which isn't to say, and I always
12 quote Aharon Barak who was one of the judges
13 in the Supreme Court of Israel who said in one
14 of the judgments around the use of torture,
15 that sometimes you have to protect democracy
16 with one arm tied behind your back. And that
17 is what it feels like.

18 But at the same time, I think
19 there is a really vital importance of holding
20 true to the standards that really are at the
21 heart of the rule of law. And we, for
22 example, in the late '70s we were brought by

1 the European Court of Human Rights, taken to
2 that court by Ireland, by southern Ireland,
3 for the way in which we interrogated people.
4 We made all the mistakes that governments
5 make. We hooded people. We held them in
6 stress positions. We deprived them of food,
7 of sleep, and so on. And we were found guilty
8 of conducting interrogations using inhumane
9 practices.

10 And I think that unfortunately I
11 would have liked the United States to have
12 learned from our experiences because we got it
13 wrong. But let me assure you we didn't learn
14 from the past because as soon as 9/11
15 happened, we, too, detained people without
16 trial. We detained non-citizens whom we
17 suspected might have links to terrorism. And
18 they were people who were already in Britain
19 and we detained 16 people without limit. We
20 would have liked to have deported them but we
21 couldn't deport them to places where they
22 would be tortured or face a death penalty.

1 And so we then locked them up in Belmarsh
2 Prison.

3 And it took a number of years
4 before the case came before our own highest
5 court, the House of Lords Appellate Committee
6 and our most senior judges found that it was
7 an affront to human rights on the basis that
8 we were discriminating against non-citizens.
9 And that human rights are vested in people
10 because of their humanity and not because of
11 citizenship.

12 And the temptation for government
13 might have been to lock everybody up, citizens
14 and non-citizens alike. But in fact we then
15 introduced a process called control orders,
16 which was like house arrest.

17 But we really hadn't learned. We
18 hadn't learned from the Irish experience. And
19 I think that we have to learn that it doesn't
20 work. And I think we have alienated the
21 Muslim community in Britain considerably and
22 we are having to work very hard to recover

1 their confidence in institutions of government
2 and of the state.

3 PROFESSOR SLAUGHTER: So let me
4 just ask. So the final disposition of those
5 16 is they are now under house arrest?

6 BARONESS KENNEDY: Well in fact
7 eight of them are free and eight of them
8 continue to be under sort of -- it was a
9 control order allowed people to be detained
10 for up to, in fact up to 18 hours a day. They
11 were only allowed out for short periods of
12 time. They were not allowed to use computers
13 or the internet or mobile cell phones. There
14 people who were prescribed that they couldn't
15 have contact with.

16 And then eventually a case was
17 brought saying that such stringent conditions
18 was tantamount to loss of liberty and,
19 therefore, there had to be a reduction.

20 And so it has been a complex set
21 of responses to the problem of what you do.

22 PROFESSOR SLAUGHTER: Yes. I mean

1 this is exactly again this in-between the
2 criminal law and the international law of war.

3 And the people that we picked up
4 who are in Guantanamo still now, we have been
5 trying prisoner by prisoner to find countries
6 that would take them to reduce the population,
7 to deport them. You know they were people who
8 were picked up in ways I don't think will ever
9 stand the test of a criminal law. They now
10 have military commissions that I still don't
11 think probably would meet our best standards.
12 But that is a case that resulted from a time
13 before we thought through these issues.

14 Now it seems to me you have got to
15 back it up. If you know that you can capture
16 someone and detain them indefinitely with no
17 review and real due process, I mean absolutely
18 why are you being held and here is the
19 evidence and here is the evidence against you,
20 then unlike previous wars, capturing becomes
21 a weapon of war. The individuals who are on
22 our list are on a capture/kill list. And

1 traditionally, you didn't go into battle to
2 capture your opponents. You went in to defeat
3 them and when they gave up, you captured them.
4 But you didn't go in with the idea that your
5 goal was to snatch them and interrogate them
6 and keep them. It is as good -- capturing
7 somebody and interrogating them is just as
8 good as killing them from the point of view of
9 a war where we need intelligence.

10 So unless we have got real
11 standards, just as we have standards for
12 police who aren't going to coerce evidence
13 because they know that evidence isn't going to
14 be used. I'm not saying we should use the
15 exclusionary rule. But unless we have clear
16 standards, what is the disincentive simply to
17 have a sweep and round up whoever you think
18 might be useful and then just keep them?

19 BARONESS KENNEDY: It is one of
20 those interesting things about doing these
21 cases in the courts and I have done them
22 through the Irish cases. I was involved in

1 representing a woman who was acquitted at
2 halftime by the judge because in the bombing
3 of the Israeli Embassy, very, very
4 unsatisfactory evidence.

5 Then cases more recently arising
6 out of this wave of Islamic terrorism. So I
7 have got a lot of experience of doing these
8 cases. So that people might understand, we
9 take great pride in Britain that senior
10 lawyers do cases that are difficult and where
11 there is going to be huge unpopularity. And
12 we do it as a matter of principal, it is
13 called the cab rank principle and we do it
14 with a fair amount of pride in the fact that
15 maintaining high standards mean that there is
16 less likely to be miscarriages of justice and
17 so on and that it is actually about keeping
18 our system true.

19 And so while my mother used to say
20 why can't you get nicer clients, that didn't
21 quite meet her test. But it is about the
22 importance of the rule of law, of due process,

1 of testing evidence in the proper way, and
2 when people are convicted, that they are
3 convicted rightly on proper evidence.

4 And all my experience has taught
5 me that every so often, there are people in
6 those sweeps who are not what you think they
7 are. They are people's younger brothers.
8 They are people who hang around the periphery
9 of groups but who are not by any means
10 involved in terrorist activities. And so
11 there are people who end up in court who are
12 innocent. And having proper processes is
13 absolutely vital and that is all my experience
14 has taught me that.

15 All I would say that is that the
16 United States, and I'd like to say Britain,
17 too, have been beacons to the world on the
18 rule of law. And it is so important that we
19 maintain that status as being nations built on
20 law where we see law as being one of the
21 pillars of our systems and that we hold true
22 to very, very high standards, and that you

1 don't suddenly jettison them because we are
2 being tested because they are not worth it if
3 they can't survive the test.

4 And so I was very critical of the
5 kind of changes that Britain sought to make
6 and I have to say that I feel rather proud of
7 our highest court because there were two
8 really major decisions our Supreme Court made
9 and we now call it a Supreme Court. It used
10 to be the Judicial Committee.

11 MR. LIPTAK: So you are getting a
12 Bill of Rights and you have a Supreme Court.
13 You are catching up to us like crazy.

14 BARONESS KENNEDY: We are actually
15 catching up with you guys. It is coming back
16 in.

17 One of the things that the judges
18 did was that they decided that detention
19 without trial was unacceptable. And
20 government didn't like it. And courts
21 sometimes, you know, judges and independent
22 lawyers are the control function in all of

1 this. And our judges also decided that it was
2 unacceptable to use evidence in courts if
3 there was a likelihood that it had been
4 produced from torture.

5 I feel very proud that our courts
6 took those stands, I really do. And I think
7 I would like to see the United States doing
8 it, too. And it is very tempting, I know.
9 And we didn't pass the test in the Irish
10 situation. We, who did terrible things to
11 people we interrogated but all I would say is
12 we have learned from experience that it
13 doesn't work and that, in fact, it is
14 abhorrent. And it actually, in a way, it
15 debases us and who we are.

16 MR. LIPTAK: I wonder more than a
17 decade after 9/11 what the answer to the hope
18 you expressed was. The hope was that we are
19 looked to as a beacon for the rule of law
20 around the world.

21 How do you think, Professor
22 Slaughter, the rest of the world views us

1 across that dimension?

2 PROFESSOR SLAUGHTER: Mixed, I
3 think. I do think we have regained some of
4 the ground that I think we really lost
5 terribly after 9/11, although many people here
6 understood some of the choices we were making.
7 I remember Mary Robinson saying every time we
8 diverge this much from our own values and our
9 own standards, it was allowing other
10 governments to diverge this much, because of
11 course they could say, look the U.S. does
12 this. We can do this as well.

13 So I think actually in many ways,
14 in terms of holding to strict rule of law
15 values, Europe is well ahead of us in the eyes
16 of the world as the countries that are
17 sticking to rule of law. You know, I think
18 though there is a different burden on us as
19 the largest military power, as the preeminent
20 military power. So, for instance, with land
21 mines, and I would love to see land mines
22 gotten rid of, we are in a different situation

1 if you look at the demilitarized zone in
2 Korea. I mean, the North Koreans could
3 overrun Seoul immediately and those land mines
4 are there. The Koreans certainly want them
5 there. I think there are good reasons for us
6 to have taken the position we took.

7 And similarly, putting myself in
8 the position of a President and lawyers that
9 I know, people like Harold Koh, my colleague
10 at State, who are trying to figure out what is
11 the path through when we are in this new world
12 of boundless war in both time and geography.

13 So what I am saying is I don't
14 think we are the beacon we once were. I'm not
15 sure we have ever been the beacon we thought
16 we were. We are very good at seeing ourselves
17 in that light. But I do think that we have
18 made up some real ground and I do think
19 countries see us grappling with these issues
20 and somebody does have to grapple with these
21 issues.

22 BARONESS KENNEDY: Well, it's

1 interesting. I have just -- every so often I
2 do broadcasting and I just made a program that
3 went out last Sunday on law and literature.
4 And one of the things I was suggesting was
5 that unlike in Britain where we are so
6 skeptical about lawyers, and I know that there
7 are a lot of bad things said about lawyers in
8 the United States, too, but you still have the
9 tradition of the heroic lawyer. We don't have
10 that in Britain. I don't think we have. You
11 know, that whole business of, you know, To
12 Kill a Mockingbird and that great Jeffersonian
13 speech.

14 We still think of American lawyers
15 as being great champions of liberty and
16 freedom. And I am not sure that lawyers -- we
17 are still stuck in the Dickensian image of
18 lawyers, which is less supportive.

19 PROFESSOR SLAUGHTER: That's true.
20 And I should say I do think -- I was actually
21 thinking that today as I was walking up from
22 Union Station, I was looking at the Thurgood

1 Marshall Courthouse and thinking exactly that,
2 of the great civil rights lawyers and the many
3 lawyers who have been champions of equal
4 justice under law sitting in the Supreme
5 Court.

6 I do think also for the world
7 watching Barack Obama be elected president and
8 be re-elected president, that is a different
9 kind of the rule of law. It is saying there
10 is equality under law, even though we have
11 departed from that in many ways through our
12 history and still do in various places. That
13 is a promise fulfilled. And so I agree with
14 you that that is a different understanding of
15 living up to your constitution that I think
16 many countries are not sure they would pass
17 the test.

18 Just as you say you are proud of
19 your high court, I feel very proud of us in
20 that connection.

21 MR. LIPTAK: So a theme that has
22 run through these two topics, drones and

1 detention, has been the right balance between
2 national security, which requires secrecy, and
3 accountability and transparency. And I know
4 it is impossible to in abstraction say where
5 to strike the balance, but what are standards?
6 And maybe as a sub-theme, what role does the
7 press play? And I think the press might play
8 very different roles in the two different
9 countries.

10 PROFESSOR SLAUGHTER: Well,
11 whatever we think the right balance should be,
12 and I think as you framed it, that's right,
13 there has definitely got to be some secrecy.
14 I mean, just think about the Osama bin Laden
15 mission. Right? If anything had been
16 breathed, it would have been torpedoed. And
17 there are many cases where lives are at stake
18 and the sense that you absolutely have to keep
19 this secret, in that balance I think is there.

20 But I would say regardless of
21 where any of you would come down, it is going
22 to be more transparent than you would like.

1 In other words, these things are going to be
2 leaked. WikiLeaks was not a one-off. It may
3 have been a one-off with Julian Assange, but
4 the idea that somebody disgruntled can -- or
5 somebody who disagrees with the policy can
6 make all that public is going to happen in
7 other governments all around the world and
8 here again.

9 You have an entire movement
10 devoted to the idea that there should be
11 complete transparency in government, which I
12 disagree with. But again, the technology is
13 such that that's going to stay one step ahead.
14 So the rule in Washington is always don't say
15 it unless you want it on the front page of the
16 Washington Post. Well, I think we are going
17 to start saying don't try to keep it secret
18 unless you have a really good plan for what
19 you are going to do when it is leaked in some
20 way.

21 BARONESS KENNEDY: I have done
22 cases involving official secrets. I

1 represented someone who was done for espionage
2 and at the time had access to material -- I
3 mean, we are now talking about over 20 years
4 ago. So what was secret then is not secret
5 anymore. But what became clear to me from
6 doing cases involving secrecy is that very
7 often the bar is set too high. I mean,
8 governments like to keep things secret that
9 are embarrassing and we have got to make sure
10 that when we talk about official secrets and
11 national security that we really are talking
12 about national security and not talking about
13 the sort of egg-on-the-faces of certain
14 people.

15 And I think there is too much
16 secrecy around and I think that we sometimes
17 use it to excuse bad behavior or to cover bad
18 behavior.

19 And we are having a problem about
20 it now. We have got a piece of legislation
21 going through the House of Lords and it is
22 about, you know, should there be closed

1 material procedures in civil litigation. And
2 this is about once courts get used to having
3 special procedures for dealing with what is
4 secure material, then it becomes very tempting
5 to government to start introducing all over
6 the place, you know? It is very hard to
7 vacuum-seal some of these things, to deal with
8 real security and you start finding it leaches
9 into other areas of law. So we are having to
10 fight that off.

11 And so I just think that we have
12 to make sure that when people are talking
13 about national security we are really talking
14 about national security and not about things
15 that are just embarrassing.

16 PROFESSOR SLAUGHTER: Yes, and if
17 I could add to that also, Admiral Stavridis,
18 the head of the European Command, actually has
19 a whole theory of what he calls open source
20 security. And his point is, of course, that
21 actually in a world where so many more people
22 have information than we do, there are few

1 secrets, but actually if you embrace that, you
2 can actually enhance your security by getting
3 more information by making it easier for
4 people to actually tell you what they know.

5 So I doubt we will ever go to a
6 complete paradigm shift but it is very
7 interesting that the head of European Command
8 is talking about open source security and
9 actually practicing it in some interesting
10 ways.

11 MR. LIPTAK: I think it's terrific
12 and sort of an example of what the Salzburg
13 Seminars do to hear the two of you compare
14 experiences from different backgrounds. And
15 it is hard to be in this setting and not ask
16 the question of whether that experience -- you
17 know, with Richard Goldstone in the audience -
18 - whether that experience of a dialogue among
19 people ought or ought not be replicated in a
20 dialogue between national constitutional
21 courts.

22 So I am sure you know that it has

1 been quite controversial on the U.S. Supreme
2 Court about the extent to which, in
3 constitutional cases, it should look to take
4 account of, cite to, foreign and international
5 law. And I wanted to get your thoughts about
6 whether that has a place in national
7 constitutional jurisprudence.

8 BARONESS KENNEDY: Well, it really
9 has been hugely beneficial to the United
10 Kingdom, and I think to the quality of our
11 highest judiciary, that we have, first of all,
12 it started with judges meeting much more
13 regularly at international events, which were
14 really about senior judiciaries from other
15 parts of the common law world. And obviously
16 now it also involves meetings with judges from
17 other judicial systems, too.

18 But the common law, we have so
19 much in common, that it was obvious that there
20 should be some sort of discourse. And now our
21 judges, I would say over the last probably 15
22 or 20 years, there has been much more

1 willingness to hear about cases in the
2 Canadian Supreme Court, in your own Supreme
3 Court. We can invoke cases in New Zealand,
4 Australia, Hong Kong and we regularly do. I
5 mean, judges are not going to be tied to them.
6 I mean, they have no authority but our judges
7 are willing to hear how those issues were
8 dealt with and were responded to by judiciary
9 in other places.

10 And of course by meeting socially
11 with judges at seminars -- there is a
12 Cambridge Seminar, a seminar that takes place
13 with Canadian judges and often invite American
14 judges to it as well. I have met Ruth
15 Ginsburg there. And often those things
16 provide opportunities for judges to talk,
17 meet, discuss, and deal with the different
18 kinds of challenges the courts have, and then
19 opens up a willingness to actually hear cases
20 which are really on all fours with cases
21 before the court and to just have them in
22 mind.

1 And I think it has enriched our
2 processes and I don't think it has in any way
3 undermined our sovereignty. And I actually
4 think it had made for better judgment.

5 PROFESSOR SLAUGHTER: Well, as you
6 were saying this, I was thinking -- I think it
7 may be the third article I ever wrote in 1994
8 called Toward a Theory of Transjudicial
9 Conversation. Talk about a clunky way to put
10 it. You could tell I was a young law
11 professor. You know, looking at this
12 phenomenon that has then grown so much. And
13 Justice O'Connor is my hero over here as one
14 of the most articulate and, I think, prudent
15 advocates of the value of learning from fellow
16 justices around the world to inform you, not
17 ever to bind you, but to inform you and to
18 basically make you a better justice.

19 And I think there are two things
20 that are sad about this. One, the U.S.
21 Supreme Court is tying its hands behind its
22 back by so staunchly refusing to look at many

1 of these precedents -- some justices, not all
2 of these justices -- but if you do not listen,
3 other people are much less likely to listen to
4 you. Try persuading somebody if you refuse to
5 be persuaded. I do this on a regular basis
6 with my teenagers. It does not work. Unless
7 they think that I am going to hear them, they
8 are not going to hear me.

9 And so I have watched the Canadian
10 Supreme Court, the South African Supreme
11 Court, the Indian Supreme Court, the European
12 Courts. They have more influence. It used to
13 be that we were one of the first stops on the
14 transjudicial tour and we, I think, are looked
15 to less as a result.

16 But there is also something very
17 fundamental, sitting in the Supreme Court and
18 thinking about Lloyd Cutler, the idea that a
19 judge is a judge wherever she may be and that
20 she will have the same reflective qualities
21 and take her office of deliberation equally
22 seriously wherever she is, no matter how

1 different the law, is a pillar of what we mean
2 by the rule of law. We really believe in
3 judicial deliberation.

4 I spent my life as a law professor
5 doing battle against those who say it is only
6 politics. And of course the answer is, well,
7 it is not all law but it is not only politics
8 either. And if you are a judge, you really
9 feel that duty to decide on the law.

10 So there is something in this idea
11 of a global community of courts that I think
12 is actually deeply connected to the concept of
13 the rule of law.

14 BARONESS KENNEDY: It has been
15 part of the American tradition.

16 PROFESSOR SLAUGHTER: When we
17 liked the law.

18 BARONESS KENNEDY: Yes, when we
19 liked the law. I mean, often when I am
20 talking about human rights, I mean I go back
21 to the business of Eleanor Roosevelt inviting
22 jurists from around the world to her flat in

1 Washington Square for that first meeting in
2 the post-Holocaust horrors at the end of the
3 Second World War. And bringing all these
4 people from different traditions but all of
5 the jurists, all of them judges, all of them
6 people with a wealth of experience in law and
7 to say what are the values that we all share
8 and to out of that create the Universal
9 Declaration of Human Rights.

10 It came out of you guys. And it
11 seems to me that that is a proud tradition and
12 it has to be reclaimed and it has to be that
13 the fertile soil of meeting and coming
14 together has to be reclaimed. It is so
15 important.

16 And the convening power of your
17 senior judiciary is considerable. And so all
18 I would say is use it and please make the case
19 for saying this is something that has to
20 happen.

21 MR. LIPTAK: So we have reached
22 perfect agreement, at least among the two of

1 you, on this point.

2 PROFESSOR SLAUGHTER: Yes.

3 MR. LIPTAK: I wanted to turn to
4 the audience. We have a little bit more time
5 left and I see so many distinguished people,
6 I would love to get your questions for the
7 panelists tonight. John.

8 MR. BELLINGER: So, John
9 Bellinger.

10 BARONESS KENNEDY: Hello.

11 MR. BELLINGER: Nice to see you.

12 I wanted to take the first two
13 questions that you had about drones and about
14 detention. Of course, it is widely known and
15 I think you acknowledged that there has been
16 more continuity than change between the Bush
17 Administration and the Obama Administration.
18 The whole idea of a Global War on Terror, a
19 term that has been used in different countries
20 around the world; that military commissions
21 detention without trial; the idea that we can
22 use force against other countries if they are

1 unwilling or unable to do something about it.

2 And perhaps the biggest change, in
3 fact, has been the drones. Four times more
4 people killed by drone strikes than ever held
5 in Guantanamo.

6 And I guess my question is first
7 for you, Baroness Kennedy, although Anne-Marie
8 will have a view, is why has there been so
9 much silence from Europeans as there has been
10 continuity? The Europeans widely expected
11 there was going to be dramatic change. They
12 got dramatic change on day two with the
13 signing of the orders to close Guantanamo.
14 And then that was about the last time there
15 was really any major change, other than these
16 drone strikes that have been increasing.

17 And so I just wonder, and I have
18 written about this, will the Obama
19 Administration face in its second term, you
20 know, the incredible hostility that we got
21 from Europe in the Bush Administration's
22 second term or will the view be, really,

1 things like, for one, we like President Obama
2 better, or we have gotten used to some of
3 these things we used to criticize. So why so
4 much silence, and is it going to change in the
5 second term of the Obama Administration?

6 I guess, Anne-Marie, for you, do
7 you think the Obama Administration is going to
8 worry about that or are they going to just
9 feel Europeans are our natural constituency
10 they are not going to criticize us?

11 MR. LIPTAK: And just in case the
12 questions didn't project all the way back,
13 maybe as you answer you can give a little bit
14 of a sense.

15 BARONESS KENNEDY: Yes. The
16 question was really about why Europe is
17 somehow not stamping its feet more loudly over
18 the continuing existence of Guantanamo Bay,
19 over the drone policy and so on. And I
20 suppose it depends very much where you are
21 sitting as to whether you think that is right
22 or not.

1 Regularly in debates in the House
2 of Lords, for example, in the chamber in which
3 I sit, there are debates about these very
4 issues. There is great disappointment in the
5 fact that despite the promise the President
6 made that he was going to close Guantanamo Bay
7 that it is still open. And in Britain we have
8 one last -- a British resident who is still
9 there, Shaker Aamer. And the Shaker Aamer
10 case, in fact, there is still campaigning
11 around it and efforts are being made to try
12 and undo something about it because a moment
13 was reached where we all were expecting that
14 he would arrive back. His family were
15 preparing for his arrival and then suddenly
16 there was a change of heart. And we are told
17 by our Foreign Secretary that it is at this
18 end that the change of heart has taken place.

19 And so I don't think you will find
20 that it has gone silent, but what you will
21 find is that perhaps our governments still
22 want to maintain the Special Relationship

1 which we like to believe that we have with the
2 United States and that we are kind of quietly
3 hoping that somehow progress will be made.

4 And when Obama failed to close down Guantanamo
5 Bay and continue to use drones and so on, I
6 think that there was a great deal of
7 disappointment in him as a President that we
8 expected much more from.

9 But I think that when we saw the
10 color of the eyes of the alternative, we also
11 felt very anxious about what that would mean.
12 And I speak as somebody who is saying that
13 even the Conservative Party was by and large
14 wanting an Obama victory. And so it is
15 interesting that that was how it was seen.

16 I mean, for example, Obama has
17 spoken out very clearly about his opposition
18 to torture. But I think it was shocking, to
19 Britain certainly and to the rest of Europe,
20 that Mitt Romney actually wanted a revisiting
21 of the whole business of waterboarding. I
22 mean, that is shocking to us because I think

1 that -- there aren't many absolutes.

2 You see, the European Convention
3 on Human Rights does not create absolute
4 rights. The only absolute is around torture
5 and it really is the sort of non-negotiable.
6 All the rest are sort of balanced. You know,
7 the rights to free expression is balanced with
8 the risks that there might be, for example, to
9 minorities, if people were allowed to have
10 free rein in free speech. So there is all
11 this sort of balancing about interests.

12 However, when it comes to torture,
13 there is no balancing. We are seeking to stop
14 torture around the world and the United States
15 should be leading the way on that. And I am
16 afraid we have been -- it was quite shocking
17 in Britain and there was a lot of debate
18 around the fact that the Republican Party was
19 talking about still having waterboarding as an
20 acceptable thing.

21 MR. BELLINGER: This criticism --
22 I mean, a lot of what Europe did and the

1 criticism had an effect on the Bush
2 administration. And that really gets to my
3 point.

4 BARONESS KENNEDY: You think it
5 has gone quieter. And it may have gone
6 quieter. You may be right.

7 MR. BELLINGER: Do you find
8 Europeans looking the other way?

9 BARONESS KENNEDY: Well, I think
10 that -- yes. I mean, I think that there
11 hasn't been enough debate about it. And it is
12 one of the reasons why I think this case may
13 actually bring this onto the front pages of
14 our newspapers. And I think it is right. I
15 think that there has been. You are absolutely
16 right. I think there has been enthusiasm for
17 the idea of a black President in the United
18 States and what that message that that gives
19 to the rest of the world. And I think there
20 was excitement about that across the political
21 spectrum. And so perhaps it meant that we
22 have indulged the incumbent more than perhaps

1 we ever did with George Bush.

2 Please, Anne-Marie.

3 PROFESSOR SLAUGHTER: I mean, I
4 think there is -- I agree that they have been
5 quieter. But the main issue, you know, he did
6 overturn any torture/enhanced interrogation.
7 So that was a flashpoint issue and Obama did
8 end that on his second day and that was very
9 important.

10 And you are right, he promised to
11 close Guantanamo. I think it took a while,
12 but torture, I think, is a much easier issue
13 to get people passionate about than drones.
14 Drones are complicated and most people -- I
15 think we have to have rules around them but I
16 would also argue that it is better to use a
17 drone than it is to bomb a village and kill
18 all the civilians there, much less actually
19 invading a country. So it is a complicated
20 issue.

21 And I was saying, my mother called
22 the other day and said I don't think I agree

1 with you on drones. So even among people who
2 generally --

3 BARONESS KENNEDY: You probably
4 should get together on that.

5 PROFESSOR SLAUGHTER: Well, that's
6 my point. Even among people who generally
7 share their politics, it is complicated.

8 But, John, I think there is
9 something else going on. And you took an
10 extraordinary amount of that heat personally
11 and tried to fight the good fight within the
12 Administration and I think abroad.

13 But the Obama Administration has
14 been incredibly multi-lateral, right? They
15 have gone to the United Nations on every
16 single issue. They continue to do so even
17 when good liberals like me are pounding at
18 them not to do so with respect to Syria. So
19 I think that bought them a lot of margin here,
20 that Europe feels consulted. Europe feels
21 like it is part of the overall decisionmaking
22 and that that is in some ways a counterweight

1 to these specific issues.

2 That said, I would love to see the
3 Europeans pushing on this issue because I
4 think we do need a debate. And I don't think,
5 as I said, this President wants his legacy to
6 be what it is now as a constitutional lawyer.

7 MR. LIPTAK: So one question over
8 there and then we will turn here and I think
9 then we will call it a night.

10 MR. KALB: Thank you both very
11 much. My question has to do with the drone
12 and the President's right to use it.

13 At the end of World War II, the
14 big new weapon of war then was an atomic bomb.
15 It was used twice. It killed hundreds of
16 thousands of people.

17 The newest weapon that a president
18 uses today is the drone. You could argue it
19 is a more humanitarian weapon. It is
20 targeted. It is a surgical weapon. It goes
21 after specific people.

22 Not so much as a legal issue but

1 as a political issue, I cannot imagine any law
2 that would stop an American president from
3 using the weapons of war available to him to
4 protect this country, if he feels those
5 weapons should be used. It is his decision.

6 So what legal framework of any
7 realistic nature could be applied as a brake
8 on that power?

9 BARONESS KENNEDY: Well, I mean,
10 the difficulty I have, and I have had it as
11 we have had the conversation, is the business
12 of warfare.

13 You see, I know that one of the
14 things that has -- the language that has
15 changed between the administrations, is the
16 business of the War on Terror. But the United
17 States and United Kingdom are involved in a
18 conflict in Afghanistan, but we are not
19 involved in a conflict with the Pakistani
20 government. And it's that business of going
21 into Pakistani territory and using drones
22 there, and people that we feel who are

1 actively involved in activity in Afghanistan
2 and that they are seeking refuge there or
3 whatever, we have to ask ourselves the
4 question about whether we think it is
5 acceptable to be using drones there.

6 MR. KALB: Was it correct, for
7 example, if it is true, for the Iranians to
8 send the drone over Israel, the Israeli's
9 shoot it down, is that an act of war?

10 BARONESS KENNEDY: I think that it
11 raises the very issue that Anne-Marie raised
12 earlier, which is that as we look at this
13 business of the use of drones, we have to
14 expect and anticipate that drones are going to
15 be used by many other nations, which may have
16 lesser standards and less commitment to the
17 international rules than either your country
18 or mine. And I think that is one of the
19 reasons why we have to think this through with
20 some care at this stage.

21 But I don't think it is -- I'm
22 afraid -- I'm not a believer, you see, that if

1 the government says that it is okay that it `s
2 fine. And whether it is the President or
3 whether it the Prime Minister of my own
4 country, I think that everybody has to be
5 accountable and held to account; and that is
6 presidents as well as prime ministers, as well
7 as whoever. And law is a way of doing it.

8 PROFESSOR SLAUGHTER: I would just
9 say that the legal framework will follow the
10 practical reality. The reason that the
11 nuclear weapons were used only twice is
12 because the Soviet Union got one and then got
13 more. Right? So we knew that if we used one,
14 we risked having people use them against us
15 and then we developed a legal framework.

16 And I think the same will happen
17 here. That is why I used the example of China
18 with a Uighur group, but any number of
19 governments who, as we do, look to another
20 country and see individuals or groups who are
21 plotting terrorist attacks against them.

22 And if you then look at the

1 miniaturization of these things, and one of my
2 colleagues, former colleagues at Harvard Law
3 School is writing a book on the future of
4 warfare and she talks about drones the size of
5 spiders. This is not a pretty picture. This
6 is not a world we are going to want to live
7 in. And I suspect that what will actually
8 turn us around is precisely that another power
9 will use one against us or in a third party
10 and we will decide that this is a technology
11 that is ultimately going to destroy us unless
12 we have really clear rules about how and when
13 they can be used.

14 MR. LIPTAK: Let's have one last
15 question from Ted Shaw.

16 MR. SHAW: Thank you. I wanted to
17 go back to the early part of the conversation
18 in which you, I think, posited -- I think both
19 of you posited -- a scenario in the context of
20 a question about checks on the use of drones,
21 the possibility that those people who sit in
22 Oregon or wherever they sit, might be exposed

1 to some kind of liability, criminal or
2 otherwise. And I want to suggest that there
3 is no prosecutor in the United States who
4 would prosecute somebody sitting behind one of
5 their controls. No state prosecutor because
6 of the politics of doing that, and no federal
7 prosecutor for obvious reasons. So therefore,
8 I think we would be talking about civil
9 actions and --

10 BARONESS KENNEDY: In Britain we
11 have, they are very rarely ever used, but we
12 have the capacity of bringing up private
13 prosecution, criminal prosecution against
14 someone. It is possible to bring a
15 prosecution that is not a state prosecution.

16 MR. SHAW: Well, we don't have any
17 comparable mechanism, that I can think of
18 anyway. And so I just don't see that
19 happening.

20 But I wanted to also prod you a
21 little bit more with respect to how you see
22 the possibility of a civil action being an

1 effective implementation of a check because I
2 suggest a jury is unlikely to do that. And
3 then I also want to --

4 BARONESS KENNEDY: I'm sorry, I
5 couldn't hear you.

6 MR. SHAW: I suggest that civil
7 juries are unlikely to find liability also
8 under those circumstances, or even in bench
9 trials. Federal judges, the best chance would
10 be there.

11 But I also want to leave one other
12 thing on the table with you. There was an
13 extraordinary set of articles about the
14 President's involvement, this President's
15 involvement, with the decisions with respect
16 to drone strikes. And he has taken on these
17 decisions in a very personal way. I think he
18 reviews every decision. And I think that is
19 probably unlike any other executive's
20 involvement in the specifics of warfare.

21 And it's a two-edged sword. One
22 might say he takes it on and understands the

1 very weighty considerations deciding who
2 lives, who dies, when we exercise this power.
3 On the other hand, there is a question I think
4 about what, and this is one of the things I
5 want to -- the last thing I want to put before
6 you. What this does to the President or the
7 presidency, what the exercise of that power
8 and having it in his hands as opposed to in
9 the hands of a military decisionmaker, even
10 though he is always the commander in chief,
11 this is different.

12 What do you think it does to the
13 President and the presidency? Is that a
14 concern?

15 PROFESSOR SLAUGHTER: That is a
16 very interesting question. Let me give myself
17 a half-second to think about it by answering
18 the first part of your question, which is it
19 may well be that no prosecutor would prosecute
20 and no jury would find against, or judge.

21 Still you could have those young
22 men in Oregon unable to travel. If you

1 thought there was a colorable claim, they are
2 not going to risk going abroad and finding
3 themselves in a judicial system either under
4 international law or a claim that would be
5 brought, a civil claim, not a prosecution,
6 wherever they travel.

7 So I would say just as with a
8 number of parts of international and
9 humanitarian law, we don't enforce it, and
10 that was true on torture as well, but other
11 countries do.

12 So I again think actually we
13 shouldn't look to discretion of any kind to
14 protect those individuals and that is the
15 point of this British case.

16 Now your point about what it does
17 to the presidency is fascinating. I mean, my
18 immediate reaction when you started saying
19 that was well, yes, it is like governors who
20 rule on appeals for clemency from the death
21 penalty. And, you know, there are governors
22 who are merciful and then there are governors

1 who really aren't. And this is exactly why I
2 would not want to leave this up to individual
3 presidents.

4 But you are asking a different
5 question, and I hadn't thought of it that way,
6 that part of the civil control of the military
7 is precisely that the generals generally make
8 this decision. Yes, he is the Commander in
9 Chief but he is generally reviewing his
10 generals' decisions.

11 But also, again, it is the
12 individualization of warfare, that one man is
13 deciding that another man shall die, because
14 that is what this is. You know, there is
15 somebody on a list and he either says yes or
16 he says no and the drone acts. And I worry
17 about that, even though I admire this
18 President for wanting to take it on and I
19 think he sees it as his obligation and I
20 respect him for that, but I'm not sure that is
21 something we want with the presidency.

22 BARONESS KENNEDY: I think it is a

1 really interesting question, too. And
2 reflecting on it, I think it is probably -- it
3 would better if you didn't. I mean, I admire
4 the sort of moral imperative that he feels,
5 that if someone is going to have to make such
6 a difficult decision it should rest with him
7 and the buck stops there.

8 But I actually do think that
9 constitutionally it probably isn't right
10 because, as Anne-Marie says, he is supposed to
11 be the person who, in the end, if there is a
12 review of a decision, one of those sort of is
13 a bit like being the chairman or the chief
14 executive, that the actual operational stuff
15 should be the matter for the generals. And
16 that on occasion there will be, if there were
17 any sort of sense of controversy or question
18 mark against it, then it should be resolved by
19 the President rather than that he is, himself,
20 the person making the operational decision.

21 It just seems to me that -- and I
22 have never reflected on this actually. I

1 actually, like Anne-Marie, I was impressed
2 that he had taken it on as a personal burden
3 so that at the highest level these decisions
4 are being taken and it showed how serious it
5 was being taken. But in a way, I think it
6 probably would be better that it was taken by
7 generals and if there is any need for it to go
8 one up, then there is somebody to take it to.
9 Whereas in this way, there is nobody to take
10 it to.

11 MR. LIPTAK: What a fascinating,
12 provocative, and valuable discussion. Please
13 join me in thanking our two panelists.

14 (Applause.)

15 MR. SALYER: Thank you so much for
16 that really stimulating conversation tonight.
17 It has been a great pleasure to be here in
18 this place and have a Salzburg Seminar at this
19 level with such a great audience and such
20 wonderful speakers.

21 Let me thank Baroness Kennedy,
22 Anne-Marie Slaughter, Adam Liptak for their

1 wonderful contributions. I also want to thank
2 the co-chairs of our Lloyd Cutler Center for
3 the Rule of Law, Tom Mansbach and Bailey
4 Morris-Eck, for their work on behalf of this
5 and others of you in the audience who have
6 been involved in helping to advance this work.

7 Special thanks, of course, to
8 Justice O'Connor for hosting us for our third
9 Cutler Lecture. She has been such a wonderful
10 part of our family for a while and we are
11 pleased to have her and have her inviting us
12 back to this wonderful place tonight.

13 I wanted just to mention we have a
14 few students with us tonight who are going to
15 be a part of a program that we launch,
16 inaugural program, on Friday at the United
17 States Institute of Peace.

18 And this is a new activity of the
19 Cutler Center. Nine very fine American law
20 schools who are each sending five of their top
21 students who are interested in international
22 law and careers in law and public service. So

1 we are really delighted to have them here. It
2 is a small group tonight. It will be a bigger
3 group on Friday, 45 in all coming from the
4 nine schools.

5 And also I wanted to say that
6 people like Justice Goldstone and John
7 Bellinger and others who are going to be a
8 part of the faculty for that day are going to
9 make a tremendous contribution and I know get
10 us off to a great start with that program.

11 The last thing I would say is that
12 I believe if Lloyd Cutler were here with us
13 tonight, he would be very pleased with what
14 happened here, the kind of conversation, the
15 kind of thoughtfulness that was brought to
16 bear. And I think he also would be very
17 excited about the work that continues with the
18 Salzburg Seminar in his name.

19 So we are going to now move next
20 door for a reception. I hope you will all
21 join us for a few minutes.

22 JUSTICE O'CONNOR: Not next door,

1 just down the hall.

2 MR. SALYER: Just down the hall,
3 and I hope as many of you will stay as you
4 can. And thank you all for coming this
5 evening and being a part of this Salzburg
6 Global Seminar.

7 (Whereupon, at 7:24 p.m., the
8 foregoing lecture was concluded.)

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Before: Salzburg Global Seminar

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