

## Fair Trial Initiative

October 27, 2011

I am honored to be here, to see these awards given to Jonathan, Kara, and Bob. I am honored to be someplace called "fair trial," for reasons I will discuss.

Jonathan, I am going to embarrass you. I am going to talk a bit about your father. But that relationship is important. After all, if your parents did not have any children, then you probably won't have any either.

Ken Broun has written a magnificent book about the trial of African National Congress leaders in 1963 and 1964. I like to think that some of the ideas for this book originated during the time that Ken and I and others spent in South Africa during the apartheid period. You may remember the basic facts. Nelson Mandela and others hid out at Littleleaf Farm in Rivonia. They were arrested in 1963. Now the South African government might simply have sent a missile in to kill all these terrorists, or commandos to shoot them to death. But it did not. The trial cannot be considered fair, but it was a trial. There was counsel. The defendants, because they were still alive, could testify about their motivations and actions. Nobody thought there would be an acquittal. But the minimal degree of transparency that the apartheid regime was willing to tolerate, and the international focus on the trial, led to sentences other than death.

And then thirty years later, President Nelson Mandela swore in the members of the new Constitutional Court for South Africa. Their first case addressed the constitutionality of capital punishment. President Mandela reminded everyone that the last time he had been in court was to find out whether he was to receive the death penalty. The Justices understood what he was saying.

Now Jonathan, and Kara and Bob and almost everybody else in this room knows that although people might vote for the death penalty as an abstract matter, a well-tryed case greatly enhances the chances of a life verdict. That has been the guiding principle of the Fair Trial Initiative.

Those convicted of bombing the Kenya and Tanzania embassies, alleged conspirators with Osama Bin Laden, were spared the death penalty by New York jurors. Terry Nichols was spared by a federal and then a state jury. In Nichols federal case, after an FBI investigation that amassed 80,000 witness statements and more than 100,000 pieces of physical evidence, Mr. Nichols was acquitted of arson, acquitted of use of a weapon of mass destruction and acquitted of murder. Zeccaria Moussaoui got a life sentence. In a country that executes more people every year than almost any other in the world, a country that has stood against the tide that has brought more than 100 nation-states into the abolitionist camp, these verdicts tell us that fairer trials make a difference.

After the United States killed Osama bin Laden, commentator Jeffrey Toobin wrote that bin Laden did not deserve a trial. Perhaps not. But we deserved that he

have one. After the Second World War, the Allied leaders initially thought that the German leaders should be rounded up and shot. Justice Robert Jackson among others pointed out that this would be a mistake. So we got Nuremberg. We got enduring principles of human rights law. We got trials that despite their defects gave us an evidentiary picture of the Nazi holocaust. We got a trial record that to this day merits our study. We placed beyond the reach of all but the most captious critic the historical truth.

How is that this lesson has evaded our leaders? How is it that the fair trial initiative is more important today than ever? It used to be that if you killed somebody, without a judicial trial and based on rumors and reports, it was called lynching. Today it is called national security. Even when the police and prosecutors have amassed evidence they claim will convince a jury, it often happens that the jury finds a reason for doubt -- about guilt or about punishment. How much more doubt may we have when the evidentiary standards of the intelligence community are the ones being observed.

A couple of weeks ago, visiting Professor Charles Dunlap, of the Duke Law School Center for Law, Ethics and National Security was on PBS about the drone missile killing of Anwar Al-Awlaki in Yemen. He said:

I think that the Supreme Court, for our domestic concerns, said in 1942 that an American citizen who becomes a belligerent against the United States suffers the consequences of that belligerency. And, so, accordingly, people can be targeted if they are part of the enemy force as any other belligerent.

I do think that international law needs to be scrupulously adhered to. From what we know in the public record, it appears that that was the case. And it is certainly permissible under international law to strike an individual who is part of an armed -- organized armed group engaged in violence against the United States.

In fact, the leaders of the United States have an obligation to defend the people against that kind of a threat.

The 1942 case is *Ex parte Quirin*. The Supreme Court upheld military commission trials of German saboteurs who had been landed on our shores by submarine during a war declared by Congress against an identifiable nation-state. The trials were no doubt less than perfect, but they featured at least the degree of due process one finds in a court martial. *Quirin* is not a precedent for the use of lethal force everywhere in the world without any sort of trial based on an indistinct definition of war fashioned in secret by the Executive branch, and against someone who is indisputably an American citizen. If the intelligence reports are correct, Mr. Al-Awlaki committed a crime under American law, and the constitution is clear that all crimes are to be tried in accordance with certain procedures. The United States has the power, under dozens of bilateral treaties, to obtain custody of those thought to

have violated American law. Indeed, one of the defendants in the Kenya/Tanzania case was rendered from South Africa.

Cross-border violent crime has been a problem for decades, and both the United States and the international community have many tools to deal with it. The United States has become notorious for rejecting participation in international arrangements for accountability in accordance with the shared values of the world community. Most notably we have refused to accede to the Rome Treaty that established the International Criminal Court.

The killing of Anwar Al-Awlaki was a studied insult to the constitution and to international law. The asserted justification remains largely secret, but was apparently based on a memo authored by a Harvard law professor on leave -- one David Barron, who has been a co-author with Elena Kagan of leading law review articles.

This contagion is spreading. The Senate now has before it proposals to authorize indefinite detention of any non-citizen suspected of planning violence.

General Dunlap, in that PBS interview, also said:

Well, let me just say this. I think that we should be troubled any time we have to kill another human being.

I am thankful for his concern. It reminds me of *voir dire* in a Texas capital case. Defense counsel asked a prospective juror: "How would you feel about being personally responsible for the death of another human being."

The juror replied, "Well, I work during the week, but I could get up there on a weekend and do it."

I had thought that Duke Center for Law, Ethics and National Security did not regard those as three different things.

Here is what Learned Hand said in 1950 on this issue:

All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

The wonderful thing is that amidst all these troubles there are signs of hope and progress. And these signs are the fruit of your labor. We are honoring Jonathan and Kara and Bob because they exemplify the best that is in each one of us. I was in Paris recently at a conference to celebrate the 30th anniversary of the abolition of the death penalty in France. In 1981, 63% of French people were in favor of the death penalty.

But President Mitterand and Justice Minister Robert Badinter resolved to legislate an end to it. They succeeded. And today it is not an issue. The matter is settled.

By the way, the same legislative program also abolished the special and secret courts for the "security of the state."

One of the speakers remarked that the struggle against the death penalty was a combat of advocates. And today in the United States, that is also true, if we include mitigation specialists, investigators, experts and all the trial team in our definition. The case by case struggle that gets these life verdicts, that liberates people proven to have been wrongly convicted, is shaping public opinion.

We speak sometimes of the justice system. That is a mistake. It is the system-called-justice, or the system that calls itself justice. The "system" is an abstraction, a machine for putting a name, the name "justice" or "judgment," on results. As the guillotine blade descended, it was the French tradition to say loudly, "in the name of the French people, justice is done." No, the "system" is not "justice" because the system makes "justice" into an abstraction. When I say "justice"-- when we say "justice " -- we do not mean a name-giver. I mean what Albert Camus meant in a famous letter to a German friend -- an idea that unites uniquely human values based upon compassion.

The abstraction that the state calls justice is a myth that steals language, as Roland Barthes was accustomed to say. The abstraction calls military commission proceedings "trials," and torture becomes merely an enhanced interrogation technique. It is intended that we lose our sense of common humanity in a game of words. Those whom we honor tonight know how to bring us all, and judges and jurors among, back to the human aspect of making decisions. They help us see that the law is not what it says, but what it does.

I want to share with you some words I used in a penalty phase summation: I feel now, when I think about that evidence, as though I'm standing before you and trying to sweep back a tide of anger and grief and vengeance. And I'm given pause by the fact that I feel that way, and I wonder if sometimes you might feel that way. But when I think that, then I think also of the instructions that the Judge is going to give you, because those instructions, as we contemplate this tide of anger and grief and vengeance, can get us all to higher ground, because the instructions will tell you that neither anger nor grief nor vengeance can ever be a part of a decision reached in a case of this kind. I am, when I say this, not attacking these victims. We know their sacrifice. But we know that with the centuries of our civilization piled so high that we have come a very long way from justice based on vengeance and blood feuds. And when I talk about this process, I want to say that I believe something else. And I don't want to say it in an effort to reach into a place that I'm not entitled to be but to share with you some thoughts about a concept of justice, to share

with you some thoughts that suggest that if you come to this point you would turn your face towards the future and not towards the past.

There it is: Higher ground. The words of the old hymn. The ground from which we see farther and more clearly. The ground where the waves of anger and vengeance cannot reach. Where we can examine the human being who is here, now and ask ourselves some questions about justice as a human concern, and not a bureaucratic system.

These are difficult times for the idea of fair trials, indeed for trials at all. But this battle of ours is a perpetual one, in which we neither win nor lose decisively.

The numbers of people who express reservations about the death penalty continue to grow, as do the numbers of those reclaimed from the prosecutors' death machine. We can see a prospect of people gathering on higher ground. And who has lead us there? The people we honor tonight.