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## Tough Foreign Policy Issues and Why Washington Can't Solve Them

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It's an honor to be here today as the featured speaker for the 30th Iden Lecture.

In 2005, while serving as the Senior Democrat on the House Intelligence Committee, I spoke at Georgetown Law School on the topic of "Intelligence Gathering in the Fog of Law." Apologies to General Clausewitz and his famous term "Fog of War"—the association is deliberate.

In that lecture, I decried the inability of Congress and the executive branch to debate fully and explain to the American people a post-9/11 legal framework to address many of the same issues that I intend to raise, again, today. Issues like cybersecurity, foreign versus domestic intelligence gathering, targeted killing, and preventive detention.

Seven years ago, I said:

We live in an era of terrorism. Our laws were created for a different era, when the enemies of the United States wore uniforms, the battlefields were clearly defined, and wars ended with the surrender of one nation to another. In this era, the enemy doesn't wear uniforms, the battlefield is the entire globe . . . and the war is potentially

never-ending. Our legal system has not yet adapted to this new era. The enemy is digital, but our legal system is analog.

I could have said those words seven minutes ago.

Although we have reorganized our intelligence structure—an effort in which I played a major role—and a hallmark of President Obama's first term has been his aggressive approach to fighting terrorism, we still have never had a real debate in Congress or in the public square about the intersection of our values and our requirements for gathering intelligence.

The result is a hodge podge of internally inconsistent policies, an outsized role for the courts in interpreting and, in some cases, striking down those policies, and huge gaps in what the public knows and has been told. Recent questions raised about the nature of the NYPD's surveillance of mosques are but one example.

This afternoon, I will highlight policies and discuss some of the tough issues that, more than a decade after 9/11, Washington still hasn't solved (and perhaps can't solve). I will also try to define a way forward.

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I suggested back in 2005 that the threats of the 21st century required Congress to create a new legislative and oversight framework because, without such guidelines, the actions of our government were gradually being pulled off of their constitutional moorings. Previously solid lines—like no torture, no detention without a legal status, no warrantless surveillance of U.S. persons—had become dotted lines.

I called for the country's best legal minds to come together, perhaps in the form of a national commission, to help Congress and the Administration create, and the American people to understand, a new legal framework for confronting 21st century threats.

This lack of legal clarity breeds other problems: when we fail to enumerate clear policies, those expected to implement them either become risk averse or feel enabled to commit abuses. Think Abu Ghraib, or the more recent example of Koran burnings in Kabul. Granted, that awful episode had more to do with cultural insensitivity than intelligence gathering—but have we learned nothing in 10 years in Afghanistan?

As Former CIA Director Michael Hayden put it, think of clear rules and policies like the lines on a football field: intelligence officers need to be able to get “chalk on their cleats.” But in order for that to happen, those chalk lines need to be bright and well-defined.

Sadly, all these years later—and with often unanticipated political upheaval accelerating around the world as the backdrop—these matters are still far from resolution—and we have mostly only ourselves to blame.

One of the biggest reasons we've made scant progress is Congress' ongoing and exquisite dysfunctionality. I served in the House for 9 terms, and I've seen up close and personally how the toxic paradigm of finger-pointing instead of bipartisan problem-solving has created almost total legislative gridlock. What passes for serious debate occurs within a tiny bandwidth, leaving little chance to raise the tough issues—let alone resolve them.

The destructive partisanship is palpable and pervasive. It is a major main reason I decided to leave

Congress last year to become Director, President and CEO of the Wilson Center—a safe, nonpartisan space where members of the House and Senate can do deep dives on issues, and talk about them in a way that's hardly possible anymore on Capitol Hill.

Here's a humorous aside, but one that's a good illustration of how “inconvenient” the last President considered legislative branch attempts at oversight.

I happened to find myself in a White House hallway, face-to-face with then Chief of Staff to Vice-President Cheney, David Addington. One makes the most of such moments, and I told him I believed that the Constitution's Article I Section 8 “capture clause,” which states that “Congress shall have power to . . . make rules concerning captures on land and water” gave legislators like me the authority to make policy regarding U.S. treatment of detainees and enemy combatants. The always gracious Addington simply smiled and said such authority only applied to “piracy.”

Now, we're deep into the 2012 election cycle, and that makes action on such topics by the President or Congress highly unlikely. Discussion of these issues must be high on the agenda for the next president, no matter who he—gender seems the only given at this point—may be. America's leaders have an obligation—indeed, a very heavy burden—to tackle them. Here are my top four:

### 1. The Prison at Guantanamo Bay

The entire notion of Gitmo was cynical from the outset: the Bush Justice Department believed that *habeas corpus*—the fundamental right to ask a judge for release from unjust imprisonment—did not apply to a location not considered “U.S. soil.” Hundreds of detainees and enemy combatants were flown there, especially during the early days of the Afghanistan war—before a prison was even constructed.

I first saw it when prisoners were placed in wire cages resembling large chicken coops. I have been there three more times and seen the prison evolve into a state-of-the-art facility—at a cost of almost \$600

million since January 2002. How ironic that much of the inmate hierarchy and command structure developed when barbed wire cages permitted free communication—and that none of the subsequent “improvements” has been able to disrupt that.

On his second full day in office, President Obama issued Executive Order 13492 to close Guantanamo prison within a year. He was committed, in his words, to “fixing the mess at Guantanamo.” I applauded the President’s effort and still argue that Gitmo should be closed, but the issue proved to be much tougher than he and his team anticipated. Files on individual inmates were incomplete and in many cases the “evidence tree” could not be rebuilt and was therefore inadmissible in federal court.

In March 2011, President Obama essentially abandoned his pledge to close Gitmo, issuing another Executive Order which codified the system of charge-free indefinite detention and military commissions, all but cementing the prison camp’s continuing role in U.S. counterterrorism policy.

Congress, too, has stymied the President’s original intent, by blocking transfer of any of the 171 remaining prisoners to the U.S. for civilian trials. Congress first spooked itself and then launched a politically expedient campaign to spook the American people by invoking visions of grisly terrorist killers wandering around their neighborhoods. (The notorious Willie Horton ad comes to mind for us older folks).

Congress’ ironically bipartisan behavior leaves military justice as the only way to clear the backlog of prisoners. And yet, many of you here are probably aware that military courts have secured only a handful of convictions since 9/11. In contrast, more than 400 terrorists have been convicted in Article III federal courts and are now serving long sentences in federal SuperMax prisons.

Some of those behind bars for life include Umar Farouk Abdulmutallab (the Nigerian who attempted to blow up a Detroit-bound airplane on Christmas Day 2009); Faizal Shahzad (the Times Square car bomber), and Ahmed Ghailani (a conspirator in the 1998 U.S.

embassy bombings in Kenya and Tanzania), and three individuals who plotted an attack against JFK airport in 2007.

We’ve had similar success trying homegrown terrorists in Article III courts. North Carolina’s Daniel Boyd pleaded guilty to conspiracy to provide material support to terrorists, among other offenses. And Illinois’ Michael Finton pleaded guilty to attempted use of a weapon of mass destruction in connection with detonating a truck bomb outside of a federal courthouse.

Not one of these violent extremists has ever escaped custody, and there hasn’t been a single retaliatory attack on a judicial district. And the numbers speak for themselves.

The administration estimates it costs taxpayers \$800,000 per year to keep each detainee at Guantanamo. *That’s more than 30 times what it costs to keep an inmate at a civilian prison on U.S. soil.*

President Obama issued waivers last month that would exempt broad categories of future prisoners from the requirement that foreigners suspected of being Al Qaeda operatives be held in military custody rather than proceed through the civilian criminal justice system. Without these waivers, law enforcement argued it wouldn’t be able to persuade suspects to cooperate.

That same month, Majid Khan, the very first high-value Gitmo detainee, reached a plea deal with prosecutors to serve no more than 25 years on war crimes charges if he testified against other terrorism suspects. Perhaps we can expect similar successes, and turning a captive like Khan is a success, going forward.

But the tough questions remain on hold: for Gitmo’s so-called “Final 50” detainees, where we have inadequate evidence to charge and try them but are also persuaded they are too dangerous to be released—even to other countries willing to accept them—is the answer to let them go free? And if not that, does “preventive detention” square with our Constitution and values? Should the Geneva Conventions—which specify procedures for capture and imprisonment of

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enemy combatants—be updated?

### 2. The Blurred Line between Domestic and Foreign Intelligence

Among the intelligence failures on 9/11 was an internal FBI policy that prohibited the mixing of intelligence with criminal information. Sadly, that policy prevented parts of the FBI from talking to each other, which could have revealed the identity and location of two of the hijackers—living in San Diego with an FBI informant!

After 9/11, the law enforcement community—from state and local police to federal agencies and even a few private security contractors—understandably sought to expand their capabilities to thwart terror attacks. A few police departments in this country began to operate far outside traditional jurisdictional borders, even sending officers to the Middle East.

Some, like the NYPD and LAPD, were also criticized for targeting ethnic communities—and not just because of racial profiling. Police departments deployed undercover officers into minority neighborhoods as part of a clumsily created and named “human-mapping” program. Informants even monitored sermons at mosques. Now, NYPD police commissioner Ray Kelly argues that his program is misunderstood. He may well be right, but . . .

A second concern is the rapidly growing use by domestic law enforcement—including a few federal agencies, such as U.S. Customs and Border Protection—of drone flights over the U.S. Currently, such flights are infrequent and authorities claim it's easy to keep tabs on their activities. For years, they argue, unarmed drones have flown legally over the U.S. for a variety of reasons, including disaster prediction and management, border security, and during large public gatherings like the Super Bowl and World Series.

However, as a recovering politician who served on all of the major security committees in Congress, I understand exactly what drones can do currently and what they're expected to do in the future. Law

enforcement agencies will tell you they're just like helicopters, but Grandma here disputes that. They have a long dwell time. Unlike loud helicopters, they hover silently.

Read the March 13 *Politico* article that describes drones as small as hummingbirds, literally, containing imaging technology that can shoot video through a window pane and thermal equipment that can “see” through walls. And, oh yes, what about the constitutional requirement of an individualized warrant to spy on a U.S. person?

Nonetheless, the Federal Aviation Administration is issuing hundreds of “certificates” to police, government agencies, research institutions, and even private citizens to allow them to fly drones of various kinds over the U.S. The FAA Reauthorization Act, which President Obama signed in February, also orders the agency to develop regulations for the testing and licensing of commercial drones by 2015.

Contrast this: in 2009, I was able to cut off congressional funding for the deceptively named National Applications Office or NAO, a Homeland Security Department program. The NAO was created by the Bush administration to permit military satellites to operate over the U.S. for law enforcement purposes. Congress rightly brought the NAO to a screeching halt. If you think drones are effective information gatherers, you can imagine what billion dollar satellites are capable of . . .

Don't get me wrong: state and local police—our cops on the beat—are more likely to identify and disrupt the next terror plot than is a bureaucrat in Washington.

And there have been many successes, including the plot uncovered in 2006 to target synagogues and military recruiting offices in my former congressional district. Clues gathered by alert local police following a string of gas station robberies led to the discovery of weapons, local maps, and jihadist materials in a suspect's apartment—and to evidence that two of the accused were radicalized in a California prison by a charismatic prisoner/imam.

Some special cases may justify domestic surveillance. But we need a clear legal framework for law enforcement to work within. And we need to have a conversation about it now.

While few disagree on the need for such a conversation, the tortured history of The Violent Radicalization and Homegrown Terrorism Prevention Act—legislation aimed at better understanding the “tipping point” between the use of constitutionally protected violent language and committing an illegal violent act—illustrates interesting obstacles still in place.

That act passed the House twice—nearly unanimously each time. It was deliberately narrow in scope, and would have done nothing more than create a nonpartisan commission to study radicalization and homegrown terrorism and then report to Congress. But certain privacy and civil liberty groups (many of which had been in the room when the bill was being drafted!) attacked the Act and those who voted for it, arguing it was a slippery slope, and bad press killed the bill before it ever came to a vote in the Senate. And so the Legislative Branch proceeds—without tools.

There is a little light peeking through the fog. President Obama has finally recommended nominees to the Privacy & Civil Liberties Oversight Board. Established by the Intelligence Reform Act of 2004 (of which I was a co-author), the Board advises the president and other senior executive branch officials to ensure that privacy and civil liberties are appropriately considered in the conception and implementation of counterterrorism laws, regulations, and policies—on the front end. This board has remained dormant for too long and will be a useful tool in reassuring an anxious public and guiding law enforcement agencies in understanding their authority and limits.

### 3. Cybersecurity

Several high-profile events over the past few years—from the infiltration of the Pentagon’s \$300 billion Joint Strike Fighter program, the Stuxnet worm that cut through Iran’s industrial controls system, even

the computer-generated assaults that preceded Russia’s 2008 hostilities with Georgia—highlight the complex threat of cyber attacks on governments. And the recent hacking of companies like Google and Western energy firms reveals how easy it is to cripple the private sector as well. That’s why we still need to get representatives from the private sector and government in the same room to talk about protective measures.

Clearly, the role of the private sector in our nation’s cybersecurity is huge. And I believe government can learn a lot from the private sector in this and other matters. But current U.S. policy relies on the voluntary participation of private industry, which is loath to allow a public airing of some of its most proprietary activities.

Without a clear framework for public and private cyber-partnerships and information sharing, corporations will continue to make decisions based more upon their individual self-interest instead of the national interest.

We must hammer out a way to balance the cybersecurity interests of corporations with the need to protect America’s infrastructure.

Wide gaps in U.S. cybersecurity policy make it hard for the public to understand what we’re doing to keep them safe—to keep the internet, the electrical grid, and the aircraft control network fully functioning, for example.

The National Security Agency proposes monitoring private computer networks in real time to prevent cyber attacks. But because people mistrust the NSA, the White House and Justice Department have so far rebuffed these efforts and, again, we fail to have the necessary conversation.

Like so many other issues, cybersecurity has become too politicized. As a result, we still lack clear guidelines about how much authority the government has in the case of a cyber crisis. Outside groups have alarmed people with the idea of a “kill switch,” which would allow the President to shut down the entire internet in extreme circumstances. “Kill switch” hype has curtailed much-needed debate about other key

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aspects of cybersecurity.

### 4. Targeted Killings of Americans

Targeted killing is one of the toughest unresolved issues. While the law remains unsettlingly unclear on a number of national security matters, I applaud Attorney General Eric Holder for lifting some of the fog over this particular matter in his speech at Northwestern last week.

Targeted killing has been one of the most controversial components of President Obama's war on terror. Drone strikes in Pakistan, Yemen and elsewhere have more than tripled under his presidency. I support such use of drones, but, as on the domestic side, I believe its purposes must be transparent and publically debated.

The current controversy centers on the legal justification for the killing of American-born Anwar al-Awlaki, a dual citizen, in Yemen. It is not disputed that Awlaki was a fiery imam whose sermons and writings inspired terror acts in the U.S.—including the Fort Hood massacre and the attempted car bombing in Times Square. After 18 years in the U.S., Awlaki relocated to Yemen in 2004, where he played a prominent role in Al-Qaeda in the Arabian Peninsula.

Though he declined to address specific cases, Holder offered a detailed rationale for targeting U.S. citizens abroad that includes an imminent threat to the United States, the danger of the person in question escaping or the inability to capture that person alive.

Holder asserted that the President is not required to seek permission from a federal court before taking action against a U.S. citizen who is a senior operational leader of Al Qaeda or associated forces since “due process” and “judicial process” are not one and the same, particularly when it comes to national security. I am comfortable with General Holder's formulation, and believe he provided the necessary legal justification in language understandable to lay people and lawyers.

I assume that select members of Congress have been fully briefed and I commend the CIA for push-

ing to make the reasoning public. Congress and the American people deserve to, need to, understand the legal rationale behind these strikes and to debate their appropriateness.

### Conclusion

There are some hopeful developments. Last week, I attended a meeting of DNI Clapper's Senior Advisory Group. (I also serve on boards advising the CIA Director, and the Secretaries of Defense and State.) The DNI was created by the intelligence reform legislation I co-wrote in 2004. Eight years after the reform law was signed by President Bush, my meetings with DNI Clapper assure me that the new model is working.

Certainly credit is due the heroic NAVY SEALs for killing the world's most wanted man—Osama Bin Laden. But the information on which their mission was based came, in most part, from the “seamless” integration of people and “ints” achieved by implementation of the Intelligence Reform Act.

While Congress deserves props too for implementing almost all of the 9/11 Commission's recommendations, it has ignored the one recommendation that I always considered the most important: “Congress, reorganize thyself!” Of course, asking Congress to surrender any turf is almost unthinkable—in or outside of an election cycle. But our brave men and women in the intelligence community shouldn't be put at risk because the congressional leadership refuses to heed the commission's counsel.

Make no mistake: our failure to address and one day solve these truly complex issues has consequences. Maybe the big answer is to focus on winning the moral argument with the next generation of would-be terrorists. To do so, we must make our chalk lines bright enough for the world to see.

Thomas Jefferson was 27 years old when he penned the Declaration of Independence. Alexander Hamilton was only 30 and James Madison but 36 when they played major roles in writing our Constitution. And those amazing documents have been win-

ning hearts and minds for 236 years. Now, it's up to the young people in this room and around the country to

preserve them! That work can start right here on this campus—today. 🌻

### ABOUT THE SPEAKER

Jane Harman joined the Woodrow Wilson International Center for Scholars as Director, President and CEO in 2011.

During her long public career, she has been recognized as a national expert at the nexus of security and public policy issues. Formerly a nine-term member of Congress, she served on all the major security committees: six years on Armed Services, eight years on Intelligence, and four on Homeland Security. She made numerous Congressional fact-finding missions to locations critical to U.S. foreign policy, including North Korea, Syria, Libya, Afghanistan, Pakistan, Yemen, and Guantanamo Bay.

A product of Los Angeles public schools, Harman is a magna cum laude graduate of Smith College, where she was elected to Phi Beta Kappa, and Harvard Law

School. Prior to serving in Congress, she was a top aide in the United States Senate, Deputy Cabinet Secretary to President Jimmy Carter, Special Counsel to the Department of Defense, and in private law practice.

Harman received the Defense Department Medal for Distinguished Service in 1998, the CIA Seal Medal in 2007 and the CIA Director's Award, and the National Intelligence Distinguished Public Service Medal in 2011. She is a member of the Defense Policy Board, State Department Foreign Policy Board, CIA External Advisory Board, the Director of National Intelligence's Senior Advisory Group, and is a Trustee of the Aspen Institute and the University of Southern California. She also assumed the seat of her late husband, Sidney Harman, on the Board of Directors of the Newsweek Daily Beast Company.

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