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Cover Page Footnote

International Law; Commercial Law; Law

Keynote Speech: A Judge Asks Questions About the Extraordinary¹

David B. Sentelle[†]

I am thankful today for the opportunity to come to North Carolina. In fact, when you work in [Washington] D.C. you're thankful for the opportunity to go to any state. I have a theory that those people that work in D.C. everyday should visit the United States on occasion and I'm proud to be out here today doing so.

There is a comfortable and an uncomfortable part about the role that I'm playing here today. The comfortable part is I came down here today to keynote rather than to deliver an academic address, and therefore I have decided that all I had to do was to ask a series of questions about extraordinary rendition rather than to try to provide any answers. However, what I did not anticipate is that the keynote speech came after the first panel and that the first panelists, especially Robert Chesney from Wake Forest, would ask and then answer virtually all the questions that I had prepared to ask today. So if I were to use my prepared remarks, I would be repeating a great deal of what Robert Chesney said and doing so with less completeness that he already had, not to mention the ones that he didn't get to that John Radsan generally did.

So although I'm going to come back to it, it's an old political trick to say I had some prepared remarks I was going to give today, but I'm instead going to speak directly from the heart. I'm not tricking you this time. I'm largely throwing down the prepared remarks and speaking to you directly from what's been

¹ Chief Judge Sentelle was the keynote speaker for the *North Carolina Journal of International Law and Commercial Regulation's* symposium entitled "Extraordinary Rendition: The State Secrets About the War on Terror," held November 17, 2007. The *Journal* would like to thank Chief Judge Sentelle for his permission to print this transcription of that speech.

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already said today, although I'm going to come back to the questions I had prepared as I get close to the end of my time.

But rather than going with the thoughts I had prepared about questions on extraordinary renditions, I'm going to move to some thoughts inspired by the first panel this morning but beginning with a different schematic set of questions, a different schematic basic question. And that is whether the term "war on terror" is an apt or inapt term and what are the dangers in the whole idea of conducting the thought of the war on terror. I would say at the outset that there is no difficulty with this being an undeclared war. You know all through Vietnam you had opponents of the war of Vietnam saying, "well, this is unconstitutional." Only Congress can declare war. There's been no declaration of war. All through Korea you had Republicans saying that Truman was ignoring the Constitution by fighting an undeclared war. I'm not going to take you back through each instance but all the way back through John Adams during the Quasi-War, the naval war with France, you had political opponents saying, "this is unconstitutional, it's an undeclared war." That was actually taken to the Supreme Court during the John Adams administration and then in *Bas v. Tingy* you had the Supreme Court ask the question, essentially, whether war could exist without a declaration of war and still be constitutional. The Supreme Court had no difficulty and this is, by the way, one of those few significant cases that occurred before John Marshall was on the court. You know it was a long way back. Bushrod Washington wrote the principle opinion and in those days, before Marshall, we had not instituted the custom of having an opinion for the court, but there was an opinion by each justice who wanted to write. This is becoming the habit again, I think partly because of word processing equipment today, but in those days it was the norm.

In any event Washington's opinion was the principal opinion and he adopted terms from international law. We think again of international law being something new, but it's not at all. He had before him a few texts on international that he does not cite by name but they were out there, Pufendorf and Vattel and one or two others that had already written on international law, and they had written in terms of the concept of perfect and imperfect wars. Both were wars. He didn't cite those authors by name. They didn't do that in those days, but he dealt with the perfect and

imperfect war, and that for Congress to declare a war it becomes a perfect war. The whole nation is committed to it. If it's a limited war, it can be an imperfect war but it's nonetheless a war. So in that context he was able to hold that France was an enemy for purposes of the salvage statute because a war could be constitutional and still be a limited war. There's still a role for war even if we don't declare it. But what we sometimes forget is that even at the time of the Constitution the idea of an undeclared war was the norm rather than being something abnormal. Congress can declare the perfect war, the total war, but when the Framers were meeting, the Europeans had for decades and even centuries already been fighting wars without declaration, and the Framers were aware of that. These were the educated men of their time. They had those international law texts and they were familiar with European events, and Hamilton in Federalist #25 alluded to the fact that nations of late had been of the custom of fighting wars without a declaration. So the Framers, when they said Congress could declare war, were by no means meaning that war could not be made without a Congressional declaration.

So it doesn't trouble me at all that this war on terrorism is not declared but like the other limited wars that we have had in history, it's being fought with a Congressional authorization, specifically the authorization to use military force that was alluded to earlier. Truman did not have a direct Congressional authorization for Korea but he was acting under the United Nations treaty. Going back again to John Adams, they had the Salvage Act. Johnson in Vietnam was acting under the Gulf of Tonkin Resolution, which he said was like "grandma's nightshirt – it covers everything." So there's always been some Congressional authorization for limited war short of a declaration of war. That's not the troubling part of styling this as a war on terror.

The troubling part is: how do you define the enemy? Well this is one of the troubling parts. How do you define an enemy in a war on terror? Zbigniew Brezinski has recently, very recently, written that the problem involved is that we didn't say in World War II that we were fighting a war against *blitzkrieg*. We were fighting a war against Nazi Germany. When we say we're fighting a war against terror, terror is a tactic. It's not an enemy. Wars, particularly declared wars, but wars in general, are fought against national enemies. It was not the case with the Barbary

pirates but generally we fought against identifiable nation state enemies, not against a tactic. So is this styling of the conflict as a war on terror apt at all and is it fraught with some other dangers?

One of those dangers is illustrated and mentioned in some of the separate opinions in *Hamdi* and *Rasul*, specifically Justice Kennedy, and that is when we've taken prisoners of war in the past, it has not been a bad thing to say that they are held as prisoners for the duration of the conflict. This pre-supposes that you can tell when the conflict is over. When you're fighting with a nation state, you don't know what the ending date of the war is going to be, but you know there will be a date on which there will be a cessation of hostilities, a peace declaration, a peace treaty, a surrender. There will be a definable day on which that war ends. When we say we're fighting a war on terror, how do we know when it's over? If we're holding enemy combatants, legal or non-legal, illegal enemy combatants until the cessation of hostilities, are we holding those people for such an indefinite period of time that we may be holding them years, decades, lifetimes, without ever having a definable point at which their status as enemy combatants permits us to release them?

So there are real consequences to this, I think, inapt styling of what we are doing as a war on terror and those consequences affect some of the things we were talking about today about how we deal with the people who are taken into custody. So that brings us to the question that I think John Radsan mentioned: the proposition that there are people that you can't try, but you can't release. If the prisoner of war model [POW model] is flawed, and it is, the criminal justice model is equally flawed. The criminal justice system is not designed to deal with conflict of the sort that's going on in the styled war on terror. The criminal justice system is designed to prevent unlawful persons from killing people and breaking things. We are now in the situation where the goal of everybody in the field is to kill people and break things and they're not doing it in the individual way that the criminal justice system is designed to prevent. They're acting en masse in the way that armies are designed to function. Not always function with the insignia of the foreign armies but they are doing it in ways that the criminal justice system is just not a big enough boat to take.

So that I'm not suggesting that we have to depart from the

POW model. In fact I'm suggesting that perhaps we've gone too far already in moving away from it because I'm not at all sure that the courts are going to be equipped to deal with all the problems that are raised by the mass gathering of prisoners inherent in the kind of conflict we're undertaking, and I'm not sure what due process is when we start talking about getting due process. If you're dealing with prisoners of war, then you don't have the due process concept coming up to get in the way of what you're doing a great deal. If you're dealing with the taking of criminals, then due process is something that we have to uphold. Now judges have written, indeed I've written the phrase lots of times, that says due process is only the process that's due under the circumstances. But what processes are due? And this comes in also into the discovery problems, the informational problems that again some of the speakers alluded to, specifically Professor Hansen and others, about things like the State Secrets doctrine, and I say things like that because there are some situations that are given under the rubric of State Secrets doctrine or rise under that rubric. There are others that arise under CIPA or other cases in which classified information is at issue, and we certainly protect it as classified information without ever using the term "state secret." But the whole question of the people who can't be tried and can't be released raises practical problems of how you deal with it in the real world.

If we don't have a States Secrets Doctrine or CIPA then what do we do with information that we can't release but we cannot, consistent with due process, withhold. There were two references, one by name and one not by name to the *Younis* case during the panel this morning. Fawaz Younis was the international terrorist and I don't have to say alleged since he's been convicted and housed for several years now. Fawaz Younis is the international terrorist who was lured into international waters with the promise of a drug deal to fund terrorism and then taken down by the FBI when he got there. He was brought to trial and as is the case with CIPA, there were pre-trial proceedings before the jury was ever empanelled as to what classified information the defendant would be entitled to, and through an attorney who had a clearance, Younis was claiming access to all of the information that the FBI had gathered and that the CIA had gathered and shared with the FBI in various contexts with regard to his activities in the Middle

East. A judge not terribly versed in classified handling ordered all of it turned over to him. He said, "I've read these documents, ex parte in camera and I can't see any information in there that is of any problem to the United States' security." Well CIPA is one of those few places in the criminal law where there's a provision for an interlocutory appeal. When the government's ordered to turn over classified information they can rush right up to the Court of Appeals and it's also one of those odd circumstances in which, maybe the only one, under which we're under a time deadline when that happens, so we had to handle it very rapidly.

We got the documents for viewing in camera, and we reviewed the documents that the district judge had seen as being of no value, no danger to the security of the United States and we realized that the problem was not the information but the fact that the CIA had it. In other words, if Fawaz Younis and his terrorist connections could have seen this information and seen what the CIA had and what they didn't have, he would then have known what the sources were, what the weaknesses were in their organization, where the leaks were; they would have been better equipped to block CIA intelligence sources in the future. So it was not the content of the information but the fact of what information they had. But that is an example of the kind of information that you can't reveal and yet you may not be able to conceal it and district judges in several instances under CIPA have come to the point of saying, "well this information is necessary to the defense in this case but it's also essential to the security of the United States. I'm going to weigh those two factors and then decide that he can or can't have it." I suggest to you, that that may be a weighing that we do not want to have occur. If it's essential to the defendant's defense can we consistent with due process deprive them of that information? We didn't have to answer that question in *Younis* because we found only three small bits that were material to the defense and we gave him those three bits. But as a broader question, what do you do consistent with due process if classified information is essential to a defendant's defense, and yet you cannot consistent with national security release that information?

Again I'm in the mode of asking questions and not answering them. CIPA provides several alternatives including providing a summary, providing a striking of any count as to which that information is material, but ultimately the ultimate solution is to

order the dismissal of the case. There are some awfully important criminal cases that it might someday cause the dismissal of if we protect the classified information. It happened in *United States v. Fernandez*, a Fourth Circuit case in which they upheld the district judge allowing dismissal as the sanction for no release under CIPA, and perhaps that's necessary. But then we're stuck with one more of those prisoners that maybe we can't try, but can we release them? We know there have already been instances out of Guantanamo when the panels, status review panels or other processes, have found somebody wasn't an unlawful enemy combatant and they turned him loose, took him home, and then awhile later they picked him back up shooting at U.S. troops and planting improvised explosive devices. There are people out there that are properly handled as prisoners of war. But then we're stuck with the question of when is this war going to be over?

Hamdi brought a lot of those questions to the front; not near all of them, a lot are left out there, and *Hamdi*, with respect to John [Radsan]'s styling of it, I'm not sure that any opinion that fragmented can be treated as a great opinion. It might begin to provide us with the guidance that we need but as long as the Supreme Court is fragmented, how well guided are we? You have to add up Souter and O'Connor to get a majority, and even then you're going to be left with three outliers, with Scalia on the one side with Stevens and Thomas on the other, who are completely apart from what the majority is doing.

This also raises the question of how stupid are those professors who keep saying that Thomas is a clone of Scalia when you have polar opposites on this opinion and quite a few others between the two of them. But *Hamdi* raises more questions than it answers as well. It leaves us with that question of what do you do with the POW when you don't know when this war is going to be over and aggravating that question is what if he's not really an enemy combatant? What if he's just a shepherd? He was picked up out there where the sheep were. What if we've got some shepherds in the net when we were picking up the enemy combatants? Now granted, we have a process at the moment where under the Detainee Treatment Act and the Military Commissions Act there are tribunals that are attempting to determine if that status of enemy combatant is correctly determined with respect to any of those who are held. The tribunal let the shepherds go. But it's a

slow process and it's not perhaps the most due process laden process that we have ever had and it may not last very long. Right now the question of the Military Commissions Act's constitutionality is before the Supreme Court.

I told my class at George Mason [School of Law], where I teach a national security course, last week that I really don't want to take up the Military Commissions Act because I don't know how much of it we're going to have left by the time the Supreme Court is finished. Maybe all of it but I don't know. I gave up trying to predict the Supreme Court with any confidence a long, long time ago.

Be that as it may we have pending before our court already quite a number of cases out of Guantanamo. Many of them sound in habeas. Some of them are under the statute of the Detainee Treatment Act. Some of them were brought as habeas either before or on the assumption that the Detainee Treatment Act would be held unconstitutional. But then we have another category of cases that is again germane to the topics that we're talking about today, and that is while the Detainee Treatment Act petitions are trying to get out of Guantanamo and the habeas petitions are trying to get out of Guantanamo. We have another category of petitioners who are trying to remain in Guantanamo. Those are the prisoners whom the United States have decided we're going to send back to their own countries. They don't want to go. They're petitioning us for relief in that regard.

Now I would not tell you this except for the fact that it's appeared in the media. I will tell you that we have been dismissing those, at least the ones that you know about in the media, for lack of jurisdiction. Because of the Military Commissions Act, Congress made very clear what had been their intent in the Detainee Treatment Act and wrongly construed by the Supreme Court in *Hamdi*, and that is that they don't mean for us to have any jurisdiction. No court in the United States is to have any jurisdiction over any petitions involving the prisoners at Guantanamo Bay except for the review by my court of the Combat Status Review Tribunal decisions that somebody is an unlawful enemy combatant.

So this is a form of rendition that is extraordinary only in the sense that it does not involve the courts. That is to say they have custody. They're not running in somewhere to kidnap him.

They've already got him. Maybe they kidnapped him to begin with, but one way or the other they've already got him and now they have to do something with him and what they're planning to do is send him back to his home country, but he doesn't want that. Now he may allege that he's going to be tortured when he gets there, but the government felt that they have those diplomatic assurances, you heard that earlier, that he's not going to be tortured when he gets there. Now if you object to those diplomatic assurances, and I'm not saying you shouldn't object to them, then you're left again with that question of the same thing we said earlier: what is the alternative? Because if you can't try him and you can't turn him loose, or if you can't try him and you can't hold him, then your norm is you're going to send him home. And if that country has engaged in torture in the past, are we going to simply declare that country to be a country that we can never send anyone ever? Or are we going to accept diplomatic assurance and diplomatic communication to the effect of, "well, we don't do that anymore."

Again I'm asking more questions than I'm going to give you answers, but these are not answers that leap out at you as to what you do with a foreign national if you can't repatriate that foreign national. You may look for a third country to take him but it may be that none of them want him and maybe he doesn't want to go to any of those either.

I have hidden somewhere in these remarks the question of whether extraordinary rendition is inherently a bad thing. Now I think some of you would start with the proposition that it is not, but I also think some of you would start with the proposition that it is. Suppose a country goes into another nation with which it has no extradition treaty and it kidnaps a person living peacefully under the name of Ricardo Clement and takes him back by force to a country where he's never been, to try him for a capital crime and put him to death. Is that inherently a horrible thing? Well, suppose that that person is Adolf Eichmann and he's one of the principal architects of the Holocaust and he's been responsible for literally millions of deaths by reason of genocide. And if you don't do that he's going to live out his days peacefully as Ricardo Clement. You know that's not a hypothetical. That's how that happened. You may be prepared to sit there and condemn Israel for that extraordinary rendition. I'm not going to stand here and

condemn Israel for that extraordinary rendition.

So the question of the essentiality of kidnapping, the inherent evil, if it is, of extraordinary rendition brings me back to my format of asking questions rather than trying to give you answers today, which is the comfortable part of giving a keynote speech instead of being part of a panel. And that comes to the question that again was raised by Robert Chesney this morning, but one that's rather central to my thoughts. If the courts are not going to be involved in some renditions, does that mean that the executive is simply going to be permitted to run, as I think [Chesney] said, like a rogue elephant without limits? Let me say this: if we have a doctrine of political question, and we seem to and we seem to have had one since John Marshall, then isn't it going to be the case that in something as fraught with national security as extraordinary rendition is, then we're going to hit cases that are simply going to have political questions as to whether the national security requires extraordinary rendition or excuses extraordinary rendition? So let me say that not only did Congress take us out of a whole lot of these cases by way of the Guantanamo Bay statute, the Detainee Treatment Act and the Military Commissions Act, but there will be others that come up that we will treat as political questions as well. I think that's highly likely. That's even assuming that the Supreme Court upholds the constitutionality of everything in the Military Commissions Act or specifically that part that says we have no jurisdiction over non-habeas cases. But if I've made that complicated enough to completely lose my place, I'll come back to it to say that what I'm asking is: if the courts are out of the extraordinary rendition cases or some of them, does that mean the President runs amok? The President is able to act like a rogue elephant and I would share Chesney's approach to that: that is that the framers dealt with that a long, long time ago. They divided the government not between two branches of government, but three, and they gave almost none of the national security or international relations powers directly to the court. If you read the little Article III that creates courts, you won't find much. You can find a thing or two that might have something to do with national security but you have to find it under the Treason Clause. For the most part, national security is divided amongst the President and the Congress.

Now there are those who would stress that there are inherent

powers in the presidency that are not specified in the Constitution, and that's not totally without foundation. There was talk at the table earlier that the Granting Clauses in Articles I and Articles II are not worded the same way. Article I grants to the Congress "the legislative powers herein granted." Article II grants to the President "the executive power." There is an implication that there is an inherent executive power not residing in the Constitution *per se*. Congress has claimed a lot of the implied powers over the years but the President started out with a pretty good argument for implication.

It reached the point in the *Curtiss-Wright* case that Supreme Court Justice Sutherland somehow convinced his colleagues to sign off on an opinion in which he said that the sovereignty governs in foreign affairs and national security, and that the sovereignty had passed from the crown to the President without regard to the Constitution. He was a bit unclear on exactly where the sovereignty lay during the period between the Declaration of Independence and the creation of the Constitution since there was no President in there. I'll come back to that but I think he missed the boat on where sovereignty winds up. That view did not hold up with any strength very long, but I will say that John Yoo to this day cites Sutherland's opinion in *Curtiss-Wright* for the evidence that the repository of all the national security power is in the President without dealing with the Constitution. The Truman administration actually tried to argue that in the lower courts in the *Youngstown* steel seizure case. It was so poorly received they didn't even argue it in the Supreme Court, but in the lower court they advanced the notion that the President had all the power involving national security that the king had ever had. That view has not stuck.

Congress has enumerated powers and implied powers that deal with national security. In fact they have a lot more enumerated powers in international affairs than the President does. And if the President begins actually to act like a rogue elephant, you have the legislative branch up there with lots of power, especially keyed to the power of the purse and the power of oversight to refuse to fund what the President is doing and to call administration officials to Congress with power of subpoena to let the Congress know and view what's going on. There was a science fiction spoof a few years ago where Mars attacked and one of the first things the

Martians did was blow up the Congress. Then the President made his report to the people and he said, "two out of three branches are still going strong and that's not bad." Well, two out of three isn't bad. Even if the courts are not involved in some of the international affairs by reason of the political question doctrine or the Military Commissions Act there still are two out of three branches who are involved and the Congress is a factor. We've seen that pretty handily in the last two administrations when you've had significant times when the Congress was in the hands of the opposite party. Congress is a factor. Congress has many powers including the two mentioned of the purse and oversight, but ultimately Congress' power has a power that's even greater than that. That's the political power.

If the President is generally running beyond the bounds of propriety, the Congress can go back to the people. First they can do an impeachment in extreme cases, but more commonly they can go back and display what it is that's going wrong and ask the people to put in power somebody who will do the right thing. Some will say that may be what happened in the last congressional election. I'm not expressing an opinion one way or the other on that but we've seen a lot of times lately when the people have risen up to change the majority in Congress but not changed the party in power in the White House.

You see where I think Sutherland missed the boat on where the sovereignty lies. The sovereignty did not pass to the President. The sovereignty passed to the people of the United States. We the people of the United States formed that compact in the Constitution. That's where the sovereignty lies. We may have ceded to the President certain powers in foreign affairs. We may have ceded to the Congress other powers in foreign affairs, but the sovereignty lies with "we the people." I guess that would be us the people, to be grammatically correct, but the power lies ultimately with the people and I think it is significant that we are having this conference today. Well over two hundred years after the Declaration of Independence and somewhat over two hundred years after the Constitution we are still governing ourselves in foreign affairs with something that we call national security law. Now a great many countries in the world just have national security. They don't have national security law. Even in an area where the courts may not speak or may speak with muted voice,

we still are bound by law and even in those areas where there is great public disagreement and great commitment to the executive, none of us today have had any fear that the door is going to sweep open and storm troopers are going to come in and drag us out because of the views we're expressing on extraordinary rendition or any other matter of public policy.

We still have national security law. We're still a nation governed by the finest operative Constitution. And that brings me to the last question that I intended to close with originally and I'll close with now: is this a great country or what?

