



# National Security Law Report

*Editor's Note: In this issue we present commentary on a range of interesting developments in the field of national security law. First, we have **Professor Julian Ku** of Hofstra University School of Law and **Professor Stephen I. Vladeck** of the University of Miami School of Law debating the merits of a little-noticed but immensely important recent opinion. In *Arar v. Ashcroft*, 414 F. Supp.2d 250 (E.D.N.Y. 2006), the court dismissed a civil suit brought by a Canadian citizen who alleged that the U.S. government caused him to be transferred to Syria in order to undergo torture and other forms of coercive interrogation; the court held among other things that national security and foreign policy considerations foreclosed consideration of Arar's constitutional claims. We also present the views of **Professor Tung Yin** of the University of Iowa College of Law regarding developments in the case of Jose Padilla, whose petition for certiorari recently was denied by the Supreme Court. Finally, we present an edited version of a speech titled "Legal Policy in the Twilight of War," delivered by **Dr. Philip D. Zelikow**, currently Counselor at the State Department and formerly Staff Director of the 9/11 Commission, at a recent Standing Committee breakfast event.*

## Why Constitutional Rights Litigation Should Not Follow the Flag

Julian Ku

Since the onset of the global war on terrorism in 2001, non-U.S. citizens have repeatedly asked U.S. courts to recognize and enforce their rights under the U.S. Constitution. Such claims have been brought by aliens detained by the U.S. at overseas bases or in Guantanamo Bay, Cuba. They have also been brought by non-U.S. citizens alleging they have been "rendered" to foreign countries for inhumane interrogation or detained in secret CIA prisons. Such claims raise a difficult but absolutely essential legal question for the ongoing prosecution of the global war on terrorism: Can U.S. courts entertain lawsuits alleging that the U.S. government's foreign policy actions violated the constitutional rights of non-U.S. citizens?

One of the best efforts to resolve this difficult question can be found in U.S. District Court Judge David Trager's recent decision in *Arar v. Ashcroft*, *et. al.* In that case, Judge Trager dismissed a complaint by a non-U.S. citizen seeking damages for violations of his constitutional rights when he was subject to an "extraordinary rendition" to a foreign country.

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## Rights Without Remedies: The Newfound National Security Exception to *Bivens*

Stephen I. Vladeck

Few stories—that we know of, anyway—are as depressing a reminder of just how much the world has changed since September 11 as is the tale of Maher Arar. According to the preliminary fact-finding of the official inquiry conducted by the Canadian government (the final report is due out later this year), Arar was detained in September 2002 while changing planes on his way home at New York's Kennedy Airport, and after thirteen days of incommunicado detention under unpleasant conditions in New York, was removed to Syria, where he had not lived since he was a teenager, so that he could be detained and tortured by the Syrian government at the direction and behest of U.S. authorities. In Syria, he spent over ten months in custody, suffering from mistreatment that makes the reported Abu Ghraib transgressions sound positively humane.

And yet, when all was said and done, Arar was released and sent home; the U.S. government, it would seem, no longer saw him as a threat.

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## Constitutional Rights Litigation...

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Judge Trager could not have chosen a more difficult set of facts, however, in which to take this position. Unless he is a remarkable liar, Maher Arar, the plaintiff, has suffered a terrible injustice. Arar, a dual citizen of Syria and Canada, has alleged that he was wrongly detained as a suspected terrorist during his transit through the U.S. and purposely handed over to the Syrian government for interrogation. Arar then charges that he was tortured and abused during ten-month confinement before he was finally released to the custody of the Canadian government. Arar has become a public symbol of the abuses resulting in the unofficial U.S. government policy of “extraordinary rendition.” His case was taken up by the Center for Constitutional Rights which sued various U.S. government officials charging they are responsible for his abuses.

The power of Arar’s case, both as a story of individual suffering and as a potent challenge to a highly controversial U.S. government policy, only highlights how difficult it must have been for Judge Trager to dismiss Arar’s lawsuit. Although Arar filed claims under a federal statute, the Torture Victim Protection Act (TVPA), the bulk of his claims allege that his treatment violated his constitutional right to substantive due process under the Fifth Amendment to the U.S. Constitution.

These constitutionally-based claims were invoked by Arar pursuant to the Supreme Court’s decision in *Bivens v. Six Unknown Agents* to create private causes of actions for plaintiffs to bring claims that their constitutional rights had been violated. Crucially for Arar, *Bivens* permits such private lawsuits to be brought even if Congress has not passed legislation specifically authorizing such a private constitutional claim.

Because *Bivens* claims displace Congress’ traditional power to control the creation private causes of action under federal law, however, the Supreme Court has asked courts to consider “special factors

counseling hesitation” where a *Bivens* remedy would trammel on a matter best decided by either the Congress or the President. The traditional dominance of Congress and the President over the conduct of foreign policy, as Judge Trager correctly recognized, represents exactly the kind of special situation where a judicially-created *Bivens* remedy would be inappropriate.

For instance, the policy of “extraordinary renditions” that Arar is seeking to challenge is not even officially acknowledged by the U.S. government. The merits of such a policy to render suspected terrorists to foreign countries involves a wide variety of difficult considerations such as the likelihood of gleaned information about a future terrorist attack, the coordination of law-enforcement efforts, and the relationship of the U.S. with a variety of foreign governments. Even defending such a policy in a domestic litigation (a policy which is supposedly a secret) could undermine the efficacy of the U.S. government’s foreign policy goals.

Arar and his attorneys might respond by arguing that any U.S. government policy, no matter how important, must comply with the restrictions imposed by the U.S. Constitution. The protection of the Constitution, it might be said, should follow the

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flag, at least where the violation of fundamental constitutional rights is alleged.

This argument is powerful, but it is not irrefutable. First, the right of aliens to invoke the Constitution against U.S. actions overseas has never received unqualified, or even qualified, support from the Supreme Court. As a pragmatic matter, this is hardly surprising given the traditional notions of a country's laws being limited to the territory of that country.

Second, even if such constitutional protections extend overseas to non-Americans, the decision as to whether and how to enforce those rights is not solely a question for the U.S. judicial branch. When and whether an individual can bring a private cause of action in U.S. courts has traditionally been a question for Congress, not the courts, and *Bivens* represents a limited departure from this standard rule.

Finally, when the U.S. government takes actions abroad that involve non-U.S. citizens, it already faces a panoply of legal constraints. First and foremost, any U.S. activity occurring in another country must satisfy the requirement of that country's domestic laws. Moreover, U.S. government actions are also constrained by its obligations under treaties it has entered and the various forms of customary international law to which it is bound. Finally, in many instances, the U.S. government's activities abroad are governed by the requirements of federal statutory law. In other words, when the U.S. government acts abroad, it is hardly unconstrained by laws—not to mention its political relations with other countries.

Adding constitutional limitations on U.S. actions abroad via a judicially created *Bivens* action, however, is radically different from these other legal constraints. Unlike the other kinds of legal limitations on U.S. foreign policy, constitutional requirements cannot be repealed, abrogated or modified by a decision of the political branches of the U.S. government. Congress can repeal its own earlier statute or abrogate the domestic effect of a treaty or

even customary international law. But it has no power to modify or adjust constitutional rights recognized by domestic U.S. courts. Such rights are the sole province of the courts.

The judiciary's supreme position in the interpretation and development of constitutional rights would also require courts to inject themselves directly into the supervision of certain aspects of U.S. foreign policy. If courts recognized the right of aliens to bring claims for constitutional violations for actions occurring overseas, courts would have no choice but to sit in judgment on decisions of the most delicate and complex nature. Once recognized, constitutional rights cannot be repealed.

For example, Arar appears to have a very strong case for arguing that his constitutional rights were violated. But because Arar was in transit and never officially entered United States territory, finding that Arar has enforceable constitutional rights would also mean extending constitutional rights to all aliens outside of the United States, including suspected terrorists that the U.S. is currently attempting to capture or kill. One might imagine that U.S. policymakers would reasonably want the freedom to act more aggressively in some circumstances free from the supervision of courts. But even if the executive and legislative branches agreed, for instance, to attack individuals such as Osama Bin Laden or Abu al Zarqawi, U.S. federal courts would always be in a position to overrule their decisions on the basis of the Constitution.

All of these reasons suggest that Judge Trager was right to refuse to permit Arar to enforce claims to protection under the U.S. Constitution for actions taken by the U.S. government abroad. The U.S. government may very well decide that allowing aliens to challenge U.S. government actions in U.S. courts is the best way to oversee and regulate the conduct of the global war on terrorism. But such a momentous decision to subject almost all foreign policy activity to constitutional litigation should, as Judge Trager recognized, be made by Congress.

*Julian G. Ku is a law professor at Hofstra University School of Law.*

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### I. *Bivens*

Rewind, for a moment, to 1971. In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, the Supreme Court held that in certain situations, the Constitution itself provides a cause of action for damages based on violations of constitutional rights by federal officers acting under color of their authority. That is, where Congress has not provided a statutory remedy, victims of unconstitutional governmental misconduct may nevertheless sue for damages, as long as certain conditions are met. *Bivens* itself only so held with respect to the Fourth Amendment, but later Supreme Court decisions expanded *Bivens* to include suits for violations of the Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment, and suggesting *Bivens* would also apply to the First Amendment.

At its core, *Bivens* is the manifestation of one of the most revered and hallowed norms of American law: *Ubi jus, ibi remedium* — where there is a right, there is a remedy. In the context of *Bivens*, the theory goes that Congress cannot deprive individuals of a remedy for violations of their constitutional rights simply by refusing to create one; the Constitution is self-executing and privately enforceable, at least with respect to some of the individual rights it bestows.

But *Bivens* is not just about making victims of constitutional violations whole. Indeed, because of the qualified immunity doctrine, federal officers are seldom held directly liable even where courts *do* find a *Bivens* remedy. Instead, as Chief Justice Rehnquist observed just two months after 9/11, *Bivens*'s true purpose "is to deter individual federal officers from committing constitutional violations."

Notwithstanding its principled roots, *Bivens* has been controversially received and consistently narrowed. As Justice O'Connor explained in 1988,

the Court has since understood *Bivens* to "include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." That is, where "special factors counseling hesitation" are present, a *Bivens* has generally been held to be unavailable.

### II. *Arar*

Relying largely on *Bivens*, Arar brought suit in federal district court in Brooklyn, alleging that both his detention within the United States and his removal to (and subsequent abuse in) Syria violated his rights under the Due Process Clause of the Fifth Amendment. Whether Arar's allegations would state a violation of the Fifth Amendment if true is, to be fair, not entirely obvious. Much would turn on a question currently pending in the Guantánamo detainee cases — do aliens detained outside the territorial United States (or "at the border," as Arar was) have constitutional rights, particularly under the Fifth Amendment?

But in dismissing Arar's suit, the district court did not even consider the merits. Instead, it assumed (without deciding) that Arar *did* have Fifth Amendment rights that were violated, but held that, with respect to the Syria-based claims, *Bivens* was categorically unavailable in light of the national security concerns at stake. In Judge Trager's words, "whether the policy be seeking to undermine or overthrow foreign governments, *or rendition*, judges should not, in the absence of explicit direction by Congress, hold officials who carry out such policies liable for damages . . ." (emphasis added).

On its face, *Arar* holds that, where amorphous national security concerns are invoked, courts should never infer a *Bivens* remedy, no matter how egregious and shocking the alleged governmental misconduct may be. It's up to Congress, and Congress alone, to provide a remedy. In what will surely become known as the "national security

exception” to *Bivens*, the district court concluded that the secrecy surrounding the government’s “extraordinary rendition” program was the very type of “special factor counseling hesitation” identified in *Bivens* and its progeny.

### III. A National Security Exception?

To be blunt, I have three major concerns with the “national security exception” to *Bivens* for which *Arar* may ultimately come to stand.

First, as Justice O’Connor explained in *Schweiker v. Chilicky*, in every case wherein the Supreme Court has refused to infer a *Bivens* remedy, “the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration.” (emphasis added). That is to say, the relevant inquiry is whether Congress, as the branch of government generally empowered to create (and define the scope of) remedies, has acted.

Emblematic of this understanding are cases such as *Bush v. Lucas*, wherein the Court rejected a *Bivens* remedy for a First Amendment claim by a government employee terminated (but later reinstated) for making public remarks critical of his agency, largely because “the administrative system created by Congress ‘provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies.’” And in *Chappell v. Wallace*, the Court declined to infer a *Bivens* remedy for enlisted military personnel injured by unconstitutional actions of their superior officers, again emphasizing the importance of Congress in creating and policing the military justice system.

In contrast, there is no argument that, in *Arar*’s case, Congress “has provided what it considers adequate remedial mechanisms for constitutional violations that may occur.” To whatever extent “extraordinary rendition” is a governmental program, and not just a series of isolated incidents, there is no suggestion that Congress has authorized it, let alone provide “remedial mechanisms.” And

where Congress has not acted at all, let alone remedially, the Supreme Court has never suggested that *Bivens* should be foreclosed; in those cases, *Bivens* is *most* appropriate, as the only serious check on unconstitutional governmental action.

Second, even assuming that Congress can be cut out of the *Bivens* analysis altogether (a rather significant assumption in its own right), the Court has also never hinted that simple deference to the Executive is sufficient to vitiate any *Bivens* remedy. Nor would such a holding make sense, for the point of *Bivens* is to provide a remedy for constitutional violations, and it should be axiomatic that the Executive has no discretion to violate the Constitution.

Finally, and perhaps most significantly, if amorphous “national security concerns” are sufficient to preclude courts from creating a *Bivens* remedy, then *Bivens*’s role as a deterrent will be effectively eviscerated in any case even tangentially implicating the security of the nation. What is to stop the next federal officer from detaining the next Maher Arar and rendering him to the next Syria? Again, that is why *these* are the cases where *Bivens* is the most important — where Congress, as the instrument of popular sentiment, is the least likely to look out for the rights of those swept up in the proverbial dragnet, and is the least willing to create remedies for constitutional violations to the news of which we have become too accustomed.

### IV. Conclusion

In short, there is a fundamental contradiction implicit in any national security exception along the lines recognized by *Arar*, for *Bivens* is meant to provide a remedy for violations of the very constitutional rights that, as the Supreme Court suggested in 1967, “make defense of the nation worthwhile.” To conclude, as *Arar* does, that *Bivens* is nevertheless unavailable in national security cases is to effectively lend a judicial sanction to even the most shocking governmental conduct in the name of the national defense. What would the limit be, then?

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It is one thing to vigorously debate, as many do on both sides, the constitutionality of the Bush Administration's conduct of (and in) the war on terrorism; it is something else altogether to conclude that, even where the unconstitutionality of the actions are assumed, as in *Arar*, victims of the government's shockingly unconstitutional conduct have no remedy — it is, for lack of a better word, un-American.

*Stephen I. Vladeck is a law professor at the University of Miami School of Law.*

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### Dodging the Jose Padilla Case

Tung Yin

Four years ago, President Bush declared Jose Padilla, an American citizen arrested in the United States, an “enemy combatant.” Unlike nearly all of the other enemy combatants in the war on terrorism, who were mostly captured in Afghanistan or Pakistan, Jose Padilla was “captured” in a federal holding cell in New York. He had been held there pursuant to a material witness warrant. Two days before the district court was to hear a challenge to Padilla's status as a material witness, President Bush declared him an enemy combatant and ordered him to be transferred to South Carolina into military custody. He was denied counsel much of that time, and the government asserted the right to detain him indefinitely, without charges and without any forum in which to challenge the basis for his detention.

Despite the undeniable significance of the constitutional issues presented by Padilla's military detention, the Supreme Court has twice refused to rule on the merits of his case. In *Rumsfeld v. Padilla* (2004) [*“Padilla I”*], the Court reversed a Second Circuit decision granting Padilla's habeas petition, not because of disagreement about Padilla's

substantive entitlement to the writ, but rather, because the proper venue for his habeas petition was the District of South Carolina, not the Southern District of New York.

Padilla then filed a new habeas petition in the District of South Carolina and naming the commander of the navy brig as the respondent. Had he used the habeas petition to seek a hearing in which to challenge his designation as an “enemy combatant,” Padilla would have prevailed. In *Hamdi v. Rumsfeld* (2004), decided the same day as *Padilla I*, the Court held that an American citizen captured in Afghanistan as a purported member of the Taliban was entitled to such a hearing, as well as assistance of counsel. The major difference between Padilla's case and Hamdi's was that Padilla was captured inside the United States, which, if anything, would call for more due process for Padilla.

But Padilla did not seek such a hearing. Instead, he brought a summary judgment motion arguing that, even if he had fought U.S. forces or was an al Qaeda member, he still could not be placed in military custody, due to 18 U.S.C. § 4001(a), which prohibits the detention of American citizens except by Act of Congress. The district court agreed and ordered Padilla released or charged with a crime. The Fourth Circuit reversed, holding that Congress's joint resolution authorizing the President to use military force authorized the detention of U.S. citizens who fit its statutory definition of the “enemy.” Padilla's stipulation to the government's version of the facts was crucial to the Fourth Circuit's opinion, because the court was able to equate Padilla's actions to Hamdi's: “Padilla took up arms against United States forces in [Afghanistan] in the same way and to the same extent as did Hamdi.”

After Padilla again sought review by the Court, the government indicted Padilla on terrorism-related charges and then argued that Padilla's certiorari petition was now moot. The Supreme Court then denied certiorari [*“Padilla II”*]. Justice Kennedy (joined by Justices Stevens and Breyer) concurred in the denial of certiorari in part because “[e]ven if

the Court were to rule in Padilla's favor, his present custody status would be unaffected." Justice Ginsburg dissented from the denial of certiorari, arguing that the government remained free to reassert military custody over Padilla following the conclusion of the criminal proceedings and that the government's voluntary cessation of allegedly unconstitutional behavior did not moot the case.

The Court's decisions are perhaps doctrinally sound if viewed in a pure vacuum. *Padilla I* was an application of the general rule that the habeas petitioner must name the immediate custodian as the respondent and that the district court have territorial jurisdiction over that person. Padilla's immediate custodian was Commander Marr, not Defense Secretary Rumsfeld. Similarly, *Padilla II* was technically correct in dismissing the certiorari petition, since Padilla had, for the moment, obtained the relief that he sought.

On the other hand, *Padilla I* was in some tension with *Rasul v. Bush*, which held that aliens detained at Guantanamo Bay not only had a statutory right to habeas corpus but also could name the Secretary of Defense as their ultimate custodian. Had those detainees been held to the same standard as Padilla, they would have had to name the commander of Camp Delta as the immediate custodian. Such a requirement would have forced the Court to confront the possibility that *no* district court had territorial jurisdiction over the base commander, leaving the detainees at the complete discretion of

the Executive Branch. While *Rasul* was not without analytic flaws, it can perhaps be defended as an acknowledgment of reality: although the majority opinion in *Rasul* did not explicitly accuse the Bush Administration of misconduct, it is not hard to believe that the Court was motivated in part by a perception that the Executive Branch was playing fast and loose with the legal rules. In particular, the government no doubt chose Guantanamo Bay precisely because it was a location previously deemed to be outside United States territory, yet one for all intents and purposes under complete United States control.

*Padilla I* can be distinguished from *Rasul* in that, unlike the Guantanamo Bay detainees, Padilla did have a single United States district in which he could have filed his habeas petition properly. Yet, the Court's decision seems to ignore some of the salient underlying facts of the situation: Padilla's lawyer filed the petition in the Southern District of New York because that was where he had been detained, and the transfer to military detention occurred just as the district court was to rule on Padilla's challenge to his material witness detention. The government's decision to transfer Padilla to the military appears to have been aimed at preventing a federal court from ruling on the legality of his initial detention.

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Similarly, the government's decision to indict Padilla in the face of his certiorari petition could be seen as an attempt to evade Supreme Court review of the authority to detain as an enemy combatant a U.S. citizen captured in the country. That the government chose to indict him on charges unrelated to the alleged conduct underlying his military detention provides further ammunition for such a conclusion.

This is not to suggest, however, that the Court has abdicated any role in policing the conduct of the Executive Branch. From a vote-counting perspective, Justice Kennedy has emerged as the key member of the Court in these cases. In *Padilla I*, he concurred in the majority opinion but wrote separately to explain, among other things, that the government had not manipulated the forum and jurisdictional rules in an effort to frustrate Padilla's ability to litigate his constitutional rights. For example, the government had not hidden Padilla's location from his lawyers.

Similarly, in defending the Court's denial of Padilla's certiorari petition in *Padilla II*, Justice Kennedy acknowledged that Padilla had "a continuing concern that his status might be altered again." In other words, even if Padilla were acquitted in the criminal proceedings, the government might well transfer him back to military custody. This is particularly true because the alleged conduct for which he is being prosecuted is unrelated to the alleged conduct for which he had been detained as an enemy combatant.

In short, Justice Kennedy has accepted the notion that the government is not limited to using the criminal justice system to fight the war on terrorism. One consequence of Justice Kennedy's view is that the government might be able to deal with a suspected terrorist either as a criminal defendant, or as an enemy combatant. As a result, "Padilla's change in location and his change of custodian reflected a change in the Government's rationale for detaining him." Because the government now believed that the criminal justice system was the appropriate forum in which to handle Padilla, it was free to transfer him there; and in doing so, the government mooted Padilla's claim.

At the same time, however, Justice Kennedy appears to recognize that there is a limit to the government's authority to choose between the criminal justice system and the law of armed conflict. Thus, court action would be warranted if the government were to manipulate a detainee's location in an effort to frustrate the detainee's ability to seek judicial review, via a habeas petition, of the legality of that detention. Similarly, in *Padilla II*, he was willing to give the government the benefit of the doubt as to its reasons for transferring Padilla to the civilian court system, but at the same time, expressed confidence in the ability of the federal courts to preserve Padilla's constitutional rights if the government were "to seek to change the status or conditions of Padilla's custody...."

Justice Kennedy did not elaborate how exactly the courts would go about protecting Padilla, but he can hardly be blamed for not expanding dicta into an advisory opinion. The important point is that there are proper and improper reasons for altering Padilla's custody status, and that the courts have doctrines to enable them to make distinctions. Thus, in the short-term, *Padilla I* and *Padilla II* are victories for the government. In the long-term, they are a mixed verdict.

*Tung Yin is a law professor at the University of Iowa College of Law.*

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## Legal Policy in the Twilight War

Philip D. Zelikow

My topic is "legal policy in the twilight war." In doing this, I'm venturing into an area that I know is intensively controversial and in which emotions can run high. And indeed, I've been part of those controversies and my emotions have even spiked from time to time. I only joined the Administration a little more than a year ago. Before that I was involved in investigating the Administration and at the time I had certain criticisms about it. I don't want to present to you the image of a person who was full of stormy feelings about the Administration policy and, after he entered the Administration, he comes out with this beatific smile, he has little



stitches on his forehead, and has just kind of a happy, calm feeling about everything. I don't want to imply that that's the case.

But on the other hand, I do want to say that, having been involved in critiquing these policies, I accepted the honor of trying to help. These are tough challenges.

I want to talk about "legal policy" as a term. I want to talk about a historic shift that's occurred in the United States policy and legal approach to problems of transnational conflict. And I want to talk about some of the historic challenges we face in dealing with that shift.

## I. Legal Policy

Let me start with the point about legal policy. I chose that term deliberately. Legal policy is a term I would define as those policies that shape the administration of justice. That's different from offering an interpretation of the law. It's a policy task: What do we think the law *should* be? How do we think the administration of justice should be developed?

Step back and consider the *way* we think about these problems. You're confronted with a variety of somewhat novel problems. And the habit of thought that's inculcated by people trained in law schools, as I was, is: What's the legal answer to this question? Then we search through case books and legal sources to try and find the legal answer to the question. This is a somewhat limiting habit of thought.

In law schools, for example, when you're asked the question of: What is right and wrong? You answer: Well, we learn what's legal and illegal. Where are the courses on moral reasoning? Answer: Well, we have courses on legal ethics. But that's a different idea.

Or, for example, if you ask: Where are the courses in American law schools or in America's elite universities on policing, on how to do policing, on how to keep public order in society? Answer: Well, I took an excellent course in criminal procedure. And what did you do in that course? Answer: I learned to master the intricacies of Fourth

Amendment law, among other things. Or I took a course on federal jurisdiction in which I learned about *Younger v. Harris* abstention and I learned how to think about habeas issues and so forth. Not the same as learning about policing.

So a lot of people who come out of the legal world and then are asked to address these problems tend to look for the legal answer. And the legal answer tends not to be an answer of what *should* you do. Lawyers instead often frame the question as: What *can* you do? Or, what *can't* you do?

And they naturally look to *legal sources* to find the answers. Then they construct whatever answers they can from the available legal sources and pronounce it as a legal opinion. But when we enter an area where the legal sources are few and fragmentary, uncertain and contested, this is a problematical mindset. When, in fact, what we need to do is think about what *should* we do, building on existing foundations and principles to construct *new* legal frameworks.

So I urge you to just reflect a little bit on the way we think about these questions. Think about the notion of legal policy in addition to the question of what is lawful or unlawful.

## II. Paradigm Shift

Now I want to turn to the issue of the historic shift. Let me talk about where we were before 9/11. Before 9/11, I'd describe the basic paradigm we had as criminal justice plus, when we were dealing with bin Laden, al-Qaida and its affiliates. Criminal justice plus, criminal justice aided by the occasional cruise missile.

We did not consider ourselves to be at war. We did not regard ourselves as being in a full dress armed conflict. So bin Laden was indicted. He was indicted in 1998. No FBI agents were sent to Afghanistan to apprehend him. There was a traditional template, that here is this man and his gang who have been involved in a criminal act. He was indicted for that. And then matters followed the

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course that we described in the 9/11 Commission Report. That was an unsatisfactory story.

Consider some of the problems with that approach. Of course, cops weren't enough to solve the problem with al-Qaida in Afghanistan, that is certainly true. But let's think analytically for a moment about what was novel about this problem.

You start with a criminal justice framework that has essentially adapted and developed for a finite, relatively small number of individuals whom you can reach out to in certain ways, gather evidence about in certain ways, and bring to justice in certain ways. But with Bin Laden and al-Qaida you're dealing with an entity that is not really a state and it's not even really a state-sponsored entity, though it has relationships with various states or relationships with the people who control ungoverned areas.

These are special problems of scale. The problem is well beyond the scale we would traditionally associate with a criminal conspiracy, even with the kind of terrorist groups that we had become used to dealing with in the 1980s.

Second, unusual problems of the level of threat. So, for instance, you can tolerate certain risks and limitations in your approach in how you deal with a terrorist group, when that terrorist group is engaged in what you might regard as more ordinary crime or more ordinary acts of violence. But now we're at the point that you're dealing with a terrorist group that has the capacity to carry out acts that can kill thousands of Americans on a beautiful fall morning and inflict probably promptly \$100 billion worth of damage on the American economy just within the first hour. We're dealing with a level of threat that is qualitatively different and that then challenges the risk thresholds you could tolerate in another paradigm.

Third, the means of apprehending people are challenged. The problem with al-Qaida in Afghanistan is a manifest example, but there are others. You clearly can't rely on asking some governments to go arrest these people and then

extradite them. In many cases, it's just beyond their capacity.

And then you also have problems even of gathering evidence. Some of the pre-9/11 indictments were a triumph of evidentiary investigation under extremely adverse circumstances. But in many circumstances, it'll be hard to overcome those limits or be able to find the resources for the fantastically labor-intensive effort that's required to construct the criminal case from so many scattered fragments, when you're dealing now with large numbers of individuals involved in many different kinds of violent acts.

I'm not saying that there are obvious solutions to these problems. But you have to use the point of view of legal policy to reach a clear understanding of these problems and then consider what the policy answers are to them.

Then came 9/11. After 9/11, the United States went to war and it remains at war today. And I want to comment on the nature of that war. The issue of whether we are in a war on terrorism is occasionally debated in Europe and elsewhere and is a lively subject. There were even some stories about this last year that mostly misunderstood what the debate was about. Partly what was going on was a debate in the Administration about how to frame its counterterrorism policy going forward, because the Administration was coming to a clearer and clearer recognition of the struggle of ideas and the larger transnational conflict that was at the core of it.

Some people thought that war was an inappropriate metaphor. But, in fact, it's not a metaphor at all. We are engaged in war in at least four ways. The first is we have a war going on in Afghanistan. That partly involves an enemy that is a transnational enemy, which is not simply a participant in an Afghan internal conflict.

Second, we have a war going on in Iraq. The war going on in Iraq has a significantly internal nature, but it clearly also has a transnational quality because transnational combatants and transnational organizations are combatants in that war and are very active in it with large numbers of foreigners

being recruited to participate in the conflict. And so there is clearly a significant transnational dimension beyond the internal conflict in Iraq that is plainly guided by the law and policies of armed conflict.

Third, the United States conducts operations to target terrorists in effectively ungoverned areas of the world where there is complete state failure or effective state failure. If terrorist organizations are actively planning violent attacks against Americans in places that are effectively ungoverned, the United States then has to have some kind of way of dealing with those organizations, which are at war with the United States.

And then, fourth, the United States is actively engaged in working with local governments, advising them and partnering with them in military and paramilitary operations against terrorist organizations around the world. The local governments are carrying the brunt of the burden, but we are actively supporting them in many different ways.

So the Administration believes that we are at war, true. But it is *more* than a war. It is not *just* a war. We are at war, but that war is part of a larger global struggle that the President has discussed, notably in speeches he gave during the fall of 2005. In those addresses he plainly talked about the non-state entities we're dealing with, the transnational nature of the struggle, and the central struggle of ideas. And he has specifically said we are dealing with a certain kind of Islamist ideology that exploits a fundamentally peaceful religion for extremist ends and that we were going to have to deal with violent Islamist extremists in a variety of parts of the world. It is a war, but it is more than a war.

Now this is a historic shift. Before 9/11, we had a criminal justice plus paradigm which had some of the challenges and limitations that I described. On 9/11 those problems became manifest to the entire world in as traumatic a way as possible. Now, after 9/11, we are involved in armed conflict against a transnational enemy not centered in any one state. That enemy, a loose-knit and far-flung variety of organizations and gangs is at war with the United States and organizes individuals to conduct attacks on the United States and many other countries on a

global scale. And it is not a group of a hundred people or two hundred people or five hundred people. It has long been and remains a substantial transnational organization with many affiliates who are connected in ways that defy ready categorization.

So the United States has moved from a legal policy paradigm of criminal justice plus to a legal policy paradigm of armed conflict plus. And I think that five years from now, ten years from now, when a lot of the current arguments about particular techniques, particular procedures, have subsided, that historic shift is what will stand out as the most important qualitative change. I think it's very unlikely that any subsequent administration is likely to say: "Let's go back to criminal justice plus. That was a good paradigm and we can make it work." I think that's unlikely, until the terrorist threat is greatly reduced from what it is today.

Part of our challenge is thus to bring a lot of the world around to accepting that shift. Otherwise we end up carrying too much of the burden for the conduct of this conflict just on our shoulders. A lot of other countries in the world are still basically where they've always been, in criminal justice plus. In part, that is because it is what they know. It is where they are comfortable. And in part they stay in that paradigm because they don't need to go beyond it. They don't need to go beyond it because the United States is shouldering the burden of doing a lot of the difficult things in this global struggle.

### **III. Challenges**

Let me talk then about some of the challenges we face in this armed conflict paradigm. Again, this is from the point of view of legal policy. In this paradigm, there are several things that you need to be able to do. You need to be able to target enemy combatants in different ways, using all instruments of national power, depending on the circumstances and your ability to work with local governments.

Second, either the United States or its local partners — always preferably local partners —

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need to have some capacity to detain people and question them.

Third, you have to be able to transfer them to some place where you can either detain them and question them for longer periods of time or simply detain them for a longer period of time. And you have to be able to transfer them in a variety of ways, including circumstances where formal judicial processes of extradition are effectively unavailable--formally unavailable or effectively unavailable--while in all cases respecting the sovereignty of the local government involved, if there is one.

And then, fourth, you have to work on problems of long-term disposition of the people you catch. In some circumstances, you can bring them to trial. There you may have a choice. You have Article III court cases. You have a military commission. There may be some other sort of trial if you can conjure up an alternative, maybe in another state. Or you have to have long-term detention, either in United States hands or in the hands of some other state. Or you can say, we'll just let this person go because we decided the risk of this person returning to the fight or killing Americans or killing others again is manageable or acceptable, or we just have no other good alternative.

The United States has had a unique capacity to address these problems. But, therefore, we unfortunately have uniquely had to bear the responsibility of fashioning solutions to these problems. Many other governments of course benefit from the work we do in tackling these problems.

So, for example, the United States, through a variety of techniques, has probably contributed to preventing terrorist attacks in a number of European countries. And a number of these governments know this. If the United States was not doing some of these unpleasant tasks, those jobs would not be done by someone else. And therefore, the odds that those attacks would occur in their cities would go up because they are unable to do these jobs. And

so sometimes the United States Government finds it a little bit distressing to then have these governments criticizing what we're trying to do when they benefit so significantly.

To be constructive, what we're trying to say to our critics is this: Look, these are hard problems. We think you actually want us to take on some of these problems. And if you see a way that you can help shoulder some of these problems with us, please come along. Perhaps we can develop coalition practices. But if you can't work with us now, at least understand what we're trying to do and join us in fashioning solutions, that you think make sense to you and that you can support. That's a lot of the dialogue that we've been trying to conduct with governments.

For example, when Secretary Rice was in Europe in December, she made an important statement at the outset of that trip and then we went to European capitals. We found that the response in European governments was constructive. When we reached out to them and tried to talk more with them about what we were trying to do and the dilemmas we were facing, we found that many officials and members in the public have been responsive. Though, of course, for many people for understandable reasons, a lot of the criticisms and problems and abuses that they think they see in American policy are utterly dominant.

Now if you think about some of the challenges that I've described, then you have to find a way of answering those challenges. Here again is the danger of formal legalism. That is the habit of thought that says: "I know how to answer these questions of what I can do. I will simply go to my lawyers and say 'What's legal here?' And they'll give me the answer." This is, I'm afraid, the default mode. And what happens then is you have a very easy temptation to certain kinds of rigid legal habits of thought in which the lawyers say, "Well, I can't find any clear black-letter law that says you can't do these things. Therefore, you can." Or you find lawyers, and many of them outside the government, who say, "I can't find any legal black-letter law that says you can do these things. Therefore, you can't."

And I want to suggest that, in a way, both of these legal answers are not going to be sufficient to deal with this problem as it's evolving now as a matter of legal policy.

We're going to see that the U.S. Government uniquely had to try to struggle with how to shoulder this new paradigm and adapt institutions to deal with it, that it found that this was hard, and that this was a process that evolved as officials learned lessons. Hopefully we're going to see the U.S. Government get to the point where we develop good, sustainable approaches that enjoy sufficient international support so that they could be functional around the world.

#### **IV. Examples**

Let me give you a couple of specific examples of what I mean. First, let's talk about the practice of renditions. There's actually a whole fiction that's emerged that the United States has a policy called "extraordinary renditions," in which we deliver people to other countries to be tortured for us. At least in the period in which I've been involved, I have seen no such policy. There is a policy of renditions. It's been around for a very long time. It's been endorsed by the European Court of Justice, for example, in the rendition of Carlos the Jackal from Sudan to France, which went up through the European courts on appeal and then was sustained by the European courts. France used rendition because there wasn't an adequate formal extradition process to bring Carlos back from Sudan.

Renditions are a way the United States facilitates, or some other government facilitates, the transfer of

someone from one place to another place for longer-term detention or questioning in that other place. Usually, these people are not citizens of the country where they are found. The local government wants to send them away. And either they have no formal extradition process available at all, or else there is a formal process on the books but the local government determines that, for a variety of reasons, their process is effectively unusable. Either the judicial system won't work adequately in their view or the nature of the evidence that you have and that they know about is such that it can't be presented in court, but the local government is satisfied with the quality of the evidence.

If we are expected to facilitate the transfer to another country, we cannot do that if we think that person will be tortured. And indeed, if we think that person is likely to be tortured, and if we want to go ahead with the transfer, we have to seek appropriate assurances from that country that the person won't be tortured and then try to follow through on those assurances.

These are human processes. They're fraught with all the difficulties that are associated with any human process. But that is how we approach it. You also have to note that the alternative in these cases could be: "Well, let's just leave the person in the country where he is and just leave them alone." That's not much of an alternative in a situation where the local government is incapable of dealing with the problem. They're usually not plotting attacks in or against that country. They're plotting attacks against Americans or Europeans, attacks that may be

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### **Announcing the Grand Opening of the McCormick Tribune Freedom Museum!**

The McCormick Tribune Freedom Museum opened its doors on April 11, 2006. Located in Chicago on the first two floors of the historic Tribune Tower (445 Michigan Avenue), the Museum is an interactive, dynamic, and artistically compelling venue for examining our nation's commitment to freedom in general and First Amendment values in particular. More information is available at: <http://www.freedommuseum.us/>.

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launched in a totally different country, such as – to pick a hypothetical case – plotters in Burma preparing an attack to be launched in Indonesia.

So, we often find that we have a national interest in trying to move that person somewhere. If we can't move them to the third country which is their home, of which they are maybe not so proud citizens, then we have to take them into *our* custody. – Say, for example, the person is Egyptian, residing in Burma. Suppose we say to ourselves: “Don't let that Egyptian go back to Egypt.” Well, okay, what's the alternative? Then we leave him in — let's say Burma, to take a fictional example, to do whatever he'll do in Burma or some other country. Or you say, “Okay, if you don't like Egypt, then that's just one more prisoner at Guantanamo.” But then that has tradeoffs too.

**QUESTION:** Why Guantanamo? Why not try them here instead of having them tried in Egypt?

**DR. ZELIKOW:** That's a good question. Then that's the issue of the long-term disposition of that person, whether to bring them to trial at all. Let me come to that, but first I just want to deal with the issue of renditions.

You may say: “No, we should have no process of renditions at all,” which I believe would be a catastrophic change in policy. Or, in my view, you say, “We have to have a policy of renditions: It needs to have these kinds of policy objectives.” I think if you work on this, you're going to end up coming up, more or less, approximately about where we are, at least in defining our formal standards.

But I do want to come to your question by talking about my second example, which is the issue of security detentions. Guantanamo is a focus of international concern about security detentions although, by far, the largest-scale security detentions are in Iraq. In Iraq, there are thousands of people who are held in American-run facilities as security detainees and they are held under the laws of armed conflict. Most of them are Iraqis, but a

number of them are foreigners, third country nationals.

We would actually like, ultimately, for that whole custodial system to become an Iraqi system. The Iraqis have a formal constitution and their formal constitution has some noble provisions that an ABA committee might have helped advise them to draft. It has strong language to protect the accused. And of course, what the Iraqis have discovered is that their formal constitutional system is effectively unworkable for addressing the problem that they actually face.

So we believe that Iraq therefore needs to devise some kind of system of emergency regulations that will allow them to have security detentions under a lawful process that has some standards. And this is another example of combating rigidity. One could say, “Well, we're just going to handle this in the criminal justice paradigm.” And if they think that the formal constitutional process would work in Iraq, given the scales of what's involved, the evidence — you know, the kind of evidence that can be gathered by soldiers who are picking people up — and you know, I'm glad to hear those arguments. What will happen if you only rely on the formal constitutional process is people will turn to extralegal means to protect themselves.

I wish to offer you an iron law about security. One way or another, communities will attempt to provide themselves with security. This has been true for thousands of years. And if legal processes will not provide them with security, they will use extralegal processes to do it. Therefore, it's very important, if you believe in the rule of law to devise some legal framework that is workable, one that can strike a viable balance between security and civil liberties.

In time if intense internal conflict, creating an effective emergency framework leads to dilemmas that are very uncomfortable to those used only to the traditional criminal justice paradigm. This then brings me back to the question of trials; when can you bring people to trial, how can you bring them to trial. If you have an armed conflict paradigm, you can not bring people to trial just for being participants in the armed conflict. You *can* bring people to trial if they violated the laws of war, and

you can do that in a military commission. And then you have to try to adapt procedures for a military commission that you think will be functional, given the fact that soldiers and intelligence collectors are not policemen, and cannot gather evidence using the traditional rules that we would expect of professional criminal investigators.

As a policy matter, most who consider this question will come to the conclusion that you need to have a security detention procedure for enemy combatants in which some number of people are not brought to trial because you cannot prove they are war criminals or you do not have adequate evidence for other legal procedures. You simply have to judge that they are enemy combatants.

Then the question arises: How do you keep that from becoming a completely arbitrary and capricious process? That's a legitimate question because the United States must try to sustain the rule of law. So you have to use various kinds of norms and principles to develop some kind of legal framework.

So, for example in the Guantanamo case, you set up some kind of legal proceeding that reviews the information that you have about people at the intake level when you bring them in. Another process continues to review the information about them while you have them, to judge if it is right to keep this person in custody at all, or whether the view of this person changed, and also to judge risks of release.

You can make various criticisms about the particulars of these processes: what kind of information they look at, how they look at it, the quality of the people, and the quality of the administration. But again, if you wish to solve a policy problem of how to handle enemy combatants, you're going to want some kind of intake process and you're going to want some kind of continuing review process that judges risks of release. You're going to want to release people as much as you can, but then you have to make a *policy* judgment as to what risk level you, as a government, are prepared to tolerate. There's no bright-line legal answer to that question.

Now, if these were easy issues that have no drawbacks and no tradeoffs, then none of us would be wrestling with these problems and this wouldn't be nearly so controversial. This is very, very hard. Whenever anyone comes to me and confidently offers the legal answer to one of these policy questions, my instinctive reaction is that this person is too confident. Because we're dealing with a realm where there are gaps and interstices in existing legal frameworks and existing legal rules.

As a policy matter, we need to figure out what it is we should do, not just from a point of view of our security requirements but also employing moral reasoning without trusting that a bright-line legal principle will show the way. You can't just solve the moral problem by answering the question, "Is it legal?" Because you may not have a clear answer to whether it's legal. You have to figure out what it is you need to do from a policy perspective, but you also have to be armed with moral analysis of what it is we *should* do. Then we turn to policies using the foundations, the institutions, and the principles available to us, to deal with these historic challenges.

*Dr. Philip D. Zelikow was appointed Counselor of the U.S. Department of State in February 2005, where he serves as a senior policy advisor on a wide range of issues to the Secretary of State. Before his appointment as Counselor, Dr. Zelikow served as the Staff Director of the 9/11 Commission. Formerly a trial and appellate attorney in Houston, Zelikow served as a career foreign service officer overseas, in the Department, and on detail to the NSC staff. He then taught at Harvard University and at the University of Virginia, where he was, until his current appointment, the White Burkett Miller Professor of History and Director of the Miller Center of Public Affairs. A former member of the President's Foreign Intelligence Advisory Board (2001-2003), Dr. Zelikow also directed the privately-sponsored Carter-Ford Commission on Federal Election Reform, which led to the Help America Vote Act of 2002. Dr. Zelikow received his BA in history from the University of Redlands, his JD from the University of Houston, and his MA and Ph.D. degrees in international law and diplomacy from Tufts University's Fletcher School.*

## In Case You Missed It ...

*Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. “In Case You Missed It...,” featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at [rchesney@law.wfu.edu](mailto:rchesney@law.wfu.edu).*

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- On June 22, a grand jury in Florida returned an indictment against seven men on charges ranging from conspiracy to provide material support to al Qaeda to conspiracy to attack the Sears Tower with explosives. The indictment in *United States v. Batiste*, No. 06-20373 (S.D. Fla.), is posted here: [http://hosted.ap.org/specials/interactives/\\_national/documents/miami\\_indictment.pdf](http://hosted.ap.org/specials/interactives/_national/documents/miami_indictment.pdf).
  - In 2004, the Justice Department’s Inspector General released an unclassified version of a report entitled “Review of the FBI’s Handling of Intelligence Information Relating to the September 11 Attacks.” The fourth chapter of the report, which dealt with the Zacarias Moussaoui investigation, was withheld at the time pending the outcome of the Moussaoui prosecution. It has now been released, and is posted at: <http://www.fas.org/irp/agency/doj/oig/fbi-911/chap4.pdf>.
  - The GAO has issued a report concerning the management and use of private security companies in Iraq (“Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers,” GAO-06-865T): <http://www.gao.gov/cgi-bin/getrpt?GAO-06-865T>.
  - *United States v. Weiner*, (E.D. Cal.) (plea agreement with Lauren Weiner, one of three individuals charged in connection with an arson-and-explosives plot attributed to the Earth Liberation Front): <http://news.findlaw.com/ap/o/632/05-31-2006/237d000a8e52f7db.html>.
  - *Doe v. Gonzales* (2d Cir. 2006) (vacating the decision in *Doe v. Ashcroft*, 334 F. Supp.2d 471 (S.D.N.Y. 2004) (Marrero, J.), which had struck down 18 U.S.C. 2709 (national security letters) as unconstitutional on First and Fourth Amendment grounds. The case has been remanded to the district court for reconsideration in light of the intervening enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005, which among other things amended 2709 in several pertinent respects (it also added new procedures, codified at 18 U.S.C. 3511, concerning judicial review of national security letters). The opinion is posted here: [http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbNcT1BOXDA1LTA1NzAtY3Zfb3BuLnBkZg==/05-0570-cv\\_opn.pdf](http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbNcT1BOXDA1LTA1NzAtY3Zfb3BuLnBkZg==/05-0570-cv_opn.pdf).
  - *United States v. Siraj* (E.D.N.Y.). A jury has convicted Shahawar Matin Siraj on a variety of charges stemming from a plot to bomb the Herald Square subway station in Manhattan (near Madison Square Garden) during the Republican National Convention in 2004. Siraj’s co-conspirator, James Elshafay, pled guilty on this charge back in October ’04. The press release is here: <http://www.usdoj.gov/usao/nye/pr/2006may24.htm>.
  - Congressional Research Service report on “Government Access to Phone Calling Activity and Related Records: Legal Authorities” (May 17, 2006), posted here: <http://www.fas.org/sgp/crs/intel/RL33424.pdf>.