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Legal Policy in the Twilight War

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MR. ZELIKOW: I want to talk to you a little bit about what I call "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 and privilege of trying to put my shoulder to the wheel. I've tried to do my part to address what I think we'll all agree are some very tough challenges. And I want to talk to you a little bit about those challenges today.

I want to cover three things. 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.

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 regard the administration of justice. That's different from saying what the interpretation of the law is. It's a policy task: What do we think the law should be, how do we think the administration of justice should be developed? There is actually an Office of Legal Policy at the Department of Justice. Actually the name was recently returned to that name from other names that it's had over the years. It spends a lot of time on judicial nominations, but also I think concerns itself with certain administration of justice issues like tort reform and the like.

Step back and just think about 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 who are asked to address these problems are trained in habits of thought that, to use a philosophical term, are extremely positivist. They tend to look for the legal answer. And the legal answer tends not to be an answer of what *should* you do; lawyers tend often to 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, build on a lot of existing foundations and principles, but think about how to construct *new* legal frameworks.

So I just 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 simply the question of what is lawful or unlawful.

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 like to 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.

But we did not regard ourselves 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 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 group of a relatively small number of individuals -- 10, 20, 40, 60, 80, you know, you figure out the numbers -- a relatively finite group of individuals whom you can reach out to in certain ways, gather evidence in certain ways, and bring to justice in certain ways. But with Bin Ladin and al Qaeda 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, which tend to be more of the national list of state sponsors of terrorism. Unusual problems of scale.

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, where essentially just from objective things or things we could gather without actually going at the core of the criminal conspiracy or the principal conspirators we were, nonetheless, able to gather significant evidence that we could present in an Article III court. 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 that, on the nature of that war. The issue of whether we were 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 Afghanistan 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 governed under the law of armed conflict 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 have said so many, many times.

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 a host of different ways.

But part of the controversy about war is that 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 which he plainly talks about the non-state entities we're dealing with, the transnational nature of the struggle, and the central nature of ideas in this. And he has specifically said we are dealing with a certain kind of Islamist ideology that perverts a wonderful and 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, basically a criminal justice plus paradigm which had some of the challenges and limitations that I described. Those problems became manifest to the entire world in as traumatic a way as possible on 9/11. 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 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. A lot of other countries in the world are still basically where they've always been in criminal justice plus, in part, because that's where their comfort zone is. And in part because 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 conflict.

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 a variety of different ways, using all instruments of national power, depending on the circumstances that you confront your ability to work with local governments, and use more traditional means.

Second, you need to have some capacity, either the United States or its local partners -- and preferably local partners, always preferably local partners -- needs to have some capacity to detain people and question them. If you catch them, you have to be able to hold them and you have to be able to 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 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. Doing so, 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, you can bring them to trial. You have a choice. You have an Article III court cases. You have a military commission or 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. These are the kind of policy questions you encounter. These are very difficult policy problems. And they arise in scores of different settings all over the world.

The United States has uniquely had the 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 actually 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 from which they benefit so significantly.

What we're trying to say to our critics: look, these are hard problems. We think you actually want us to shoulder some of these problems. And if you see a way that you can help shoulder some of these problems with us, please come along. We welcome the help. If you think there are some things that you can do, join the party. But if you can't, at least understand what we're trying to do and work with us in fashioning constructive 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 very 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, even sometimes in the editorial places. 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, kind of the default mode. And I go to my lawyer and I say, lawyer, what can I do? I want to do A, B, and C. What can I do? 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.

It's important to talk to you about these issues in this way because we're, by no means, at the end of this problem or these sets of issues. And a lot of you here in this room, either directly or indirectly, as citizens, are going to be involved in reflecting and being asked for advice on these issues.

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 and learned

lessons. Hopefully we're going to see the U.S. Government get to the point where we developed good, sustainable approaches that enjoyed sufficient international support so that they could be functional around the world, in order to carry forward the counterterrorism policy objectives that we need to attain.

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. Now it may be that my memory is too short, and I've only been in the government for a little while, but 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 then went up through the European courts on appeal and then was sustained by the European courts, because there wasn't a good formal extradition process to bring Carlos back from Sudan to France.

Renditions are a way the United States facilitates, or some other government facilitates, the transfer of someone from one place to another place for some kind of longer-term detention or questioning in that other place. The local government may not want them anymore, or can't handle them.

Usually, these people are not citizens of their country. 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, it's effectively unusable. Either because the judicial system won't work adequately in their view or because 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.

Then we have a legal obligation to make sure that if we 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 that.

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 is not: "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, for various reasons, incapable of dealing with the problem. You let that person just continue to stay in that country where they're usually not plotting attacks in that country or against that country; they're plotting attacks against us or Europeans either in another country or in our installations in that country.

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, we don't send them to Egypt. 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 -- you know, let's say Burma, to take a fictional example, to do whatever he'll do in Burma. Or you say, "Okay, if you don't like Egypt, then that's just one more prisoner at Guantanamo." But then that has tradeoffs.

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

MR. ZELIKOW: That's a good question. Then that's the issue of what's the long-term disposition of that person, are you going to bring them to trial at all. Let me come to that, but first I just want to deal with the issue of renditions and what renditions are. Then you can have a discussion; "No, we need to actually 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. And actually, the Iraqi case is an interesting one I want to draw on for a moment. Because actually, in Iraq, there are thousands of people who are held in American-run facilities in Iraq 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 is just the kind of thing that an ABA committee might have helped advise them to draft. It's got the right procedural protections and so forth. And of course, what the Iraqis have discovered is that that formal constitutional system is effectively unworkable for addressing the problem that they actually face now in Iraq.

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.

But the effect of what will happen is if you only rely on the formal constitutional process people will simply turn to extralegal means to protect themselves. I wish to offer you an iron law about security. It is this. One way or another, communities will attempt to provide themselves with security. This has been true for thousands of years. And if they can't use legal processes to provide themselves with security, they will use extralegal processes to provide themselves with security.

This has happened all over the world, on many occasions, in many places. It happens now in a number of different parts of the world where, basically, you have vigilantes, if you want to call them death squads, or whatever you want to call them, that people will create. Therefore, it's very important, if you believe in the rule of law, which I do and which the Administration does, to devise some legal framework that is workable, given the policy challenges you face as a matter of legal policy. If you don't find a workable legal framework, people will simply solve their problem through extralegal means.

Working on such an 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 if they're war criminals, by any standard under 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 cops. And hundreds of thousands of soldiers and security personnel operating in a war environment are not trained as cops, cannot be expected to be cops, and cannot gather evidence using the traditional rules that we would expect of cops.

I have talked to a lot of soldiers in Iraq about this. A number of them actually are cops, because we have National Guardsmen who are cops in civilian life who are now working as soldiers. They have a lot to say about these issues

I believe 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 numbers 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 they're enemy combatants.

Then the question arises, well, how do you keep that from becoming a completely arbitrary and capricious process? That's a legitimate question because the United States does want to try to sustain the rule of law. So you have to find some way, using various kinds of norms and principles, to develop some kind of legal framework. But it may not be an existing 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 is it right to keep this person in custody at all, has our 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 says I'm confident I know the legal answer to this question, my instinctive reaction is you're 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 a bright-line legal principle to guide you. 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.

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