

**The Federalist Society for Law
and Public Policy**

presents

**ARE WE OVER-LAWYERING INTERNATIONAL
AFFAIRS?**

2006 National Lawyer's Convention

November 18, 2006

PANELISTS:

Professor Philip C. Bobbitt, University of Texas School of Law

Dean John D. Hutson, President and Dean, Franklin Pierce Law Center

Professor John C. Yoo, University of California, Berkeley, Boalt Hall
School of Law

Dr. Philip D. Zelikow, Counselor of the Department, United States
Department of State

Hon. Edwin D. Williamson, Sullivan & Cromwell, LLP (moderator)

JUDGE WILLIAMSON: Good morning. Although this panel is entitled, "Are We Over-Lawyering in International Affairs?," I think the better way to describe it is: What is the role of lawyers in making legal policy? As you've heard from several of the panel discussions at this Convention, the global war on terror has raised, not only serious and difficult legal questions, but serious and difficult legal policy issues—such as whether terrorism should be addressed as a matter of criminal law or as a matter of the laws of war, and whether it presents a new paradigm that must be addressed by a new set of rules, and what those rules should be.

This panel will discuss the role of lawyers—particularly government lawyers—in addressing questions of legal policy. We will discuss fundamental questions such as: Should lawyers decide legal policy? Or, is that

best left to the policymakers? Should lawyers give advice as to legal policy, or should they stick to providing answers as to what the law is? How should lawyers respond to what a policymaker thinks is the legal question, but is really a question of legal policy? If lawyers find the law vague or lacking, should they fill in the gaps, advising as to what the law should be? Was Secretary of State Rice right when she warned the American Society of International Law that lawyers should not stretch laws, such as the Geneva Conventions, to apply to circumstances they were not designed for? Did the Office of the Justice Department's opinions on interrogation techniques stretch in the other direction when they held that laws did not restrict the President's authority? Should lawyers indicate the quality of the response to a question? For example, should they say how a court would, or should, decide, or is it just enough to say that this is a reasonable answer and others may differ? What should a government lawyer do after losing an intra-governmental policy argument on a legal issue? Is the answer different if the argument was over a legal policy issue?

We have a distinguished panel to discuss these issues. Our first speaker will be Phil Zelikow. Phil is currently the Counselor of the State Department. This is not a legal position, but a very serious policy position, from which he advises the Secretary of State on a wide range of issues. He was the Staff Director of the 9/11 Commission, and in the past he has been a trial and appellate lawyer. He has been a Foreign Service officer and served on the NSC staff. Prior to becoming Counselor, he was the White Burkett Miller Professor of History and Director of the Miller Center of Public Affairs at the University of Virginia. He will provide the insight of a policymaker on the role of lawyers in making legal policy.

John Yoo will follow Phil. John needs no introduction to this group. His latest book, *War by Other Means*,¹ has just been released and John will be signing copies of it this afternoon. Whether you agree with John, it is a great book. Just look at the table of contents: War, the Geneva Conventions, assassination, the Patriot Act, the NSA and wiretapping, Guantánamo Bay, interrogation, military commissions. It sounds almost like the agenda for this Convention. John is currently a professor at the University of California at Berkeley Law School. From 2001 to 2003, he served as Deputy Assistant Attorney General in the office of Legal Counsel. He played a prominent role in the formulation of the legal opinions addressing many of the key issues that have arisen in the war on terror.

John will be followed by Admiral Dean John Hutson. John is President and Dean of the Franklin Pierce Law Center in New Hampshire. He is a career naval officer and, in 1997, became the Judge Advocate General of the Navy. Dean Hutson can, I believe, present the views of the career (particularly the uniformed) government lawyer.

¹ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

2008]

Are We Over-Lawyering International Affairs?

411

Our final speaker will be Philip Bobbitt, who holds the A. W. Walker Centennial Chair at the University of Texas Law School in Austin. Philip has served in the government in both policy and legal positions. He was in the White House Counsel's Office in the Carter administration. He served on the Senate Iran Contra Committee, and served as Director for Intelligence, Senior Director for Critical Infrastructure, and Senior Director for Strategic Planning at the National Security Council during the Clinton administration. I had the good fortune of inheriting this lifelong Democrat as my counselor for international law when I served as legal advisor in the George H. W. Bush administration.

So, Phil, why don't you start things off.

DR. ZELIKOW: Thanks. I am happy to have the opportunity to address this group today. I want to cover three major points: (1) the paradigm of armed conflict we are in now, (2) the challenge of making legal policy, and (3) the way in which we are adjusting our understanding of legal policy.

First: the paradigm of armed conflict as it applies to the conduct of the war on terror. I said in remarks to an ABA committee earlier this year that, before 9/11, we had a criminal justice approach to combating terrorism. In 1998, we indicted Osama bin Laden, for example. But the criminal justice approach to fighting Al Qaeda was not effective. So, therefore, after 9/11, we shifted to an approach of conducting armed conflict. For a variety of reasons, I think that was a fundamental and necessary shift in approach. The paradigm of criminal justice is inadequate in dealing with a large transnational phenomenon like Al Qaeda, for a number of reasons—and, armed conflict, I should mention, is not simply a metaphorical term. It is real. It is a real war in Afghanistan. It is a real war in Iraq. The government engages in actions under the law of armed conflict in other parts of the world that are effectively ungoverned. And, it partners with local governments' antiterrorism efforts—for example, in places like Northern Pakistan. Of course, the law of armed conflict is supplemented by criminal justice procedures, when people are captured under the legal regimes of different states, and inside the United States. But the law of armed conflict has to be an essential part of the legal approach to the war on terror. That is an argument I made at greater length in my remarks. Frankly, I think that it will be hard for any administration, Democratic or Republican, that succeeds the Bush administration, to say: "We are going to discard this approach altogether and go back to criminal justice: Article III courts and indictments in the Southern District of New York." When people look back on this period, whatever the controversies, they will see the importance of this paradigm shift.

That said, you have to interpret and manage the law of armed conflict and make policy decisions in a way that allows that paradigm to be sustain-

able and effective. If you want other countries to accept that you are operating under the law of war, it helps to interpret the law of war in a way they can understand and accept. If you choose to interpret the law of war in ways they cannot live with, it is very difficult to get them out of the criminal justice paradigm with which they feel more comfortable—you cannot build an international consensus around your new approach. That complicates the way you do business around the world.

I should note that this is not just a matter of deferring to world opinion. I know that this is a red flag to some conservatives. But this is not a matter of scoring well in a world opinion poll. Getting the cooperation of other countries is actually quite important to the effectiveness of the war on terror; and, if you want countries to cooperate with you in the international rendition of terrorist suspects, certain things need to be available; if you want them to make their airspace available for flights of government aircraft, certain things need to be true; if you want their police and soldiers to help you in a variety of ways, their governments have to be able to live with what you are doing. If the circle of cooperating governments gets narrower and narrower, the reach and effectiveness of our ability to conduct a global war shrinks commensurately.

So, it is a legitimate goal to build an international coalition that shares our basic principles; and our goal should be to persuade our international partners to understand that the law of armed conflict has to be an essential part of our approach to the war on terror. But this is fundamentally a policy argument, not a legal argument. I have not said, for example, that we are bound, as a matter of law, to apply a particular interpretation of the Geneva Convention or common Article III. I said that it is prudential, as a matter of policy, to apply legal principles that other countries can understand and accept, whether or not you believe that you are bound to make that choice. In fact, this was one reason why the 9/11 Commission recommended that, as a matter of policy, the U.S. government apply common Article III as a floor on its behavior, without engaging the issue of whether we are bound by that principle. This position has now effectively been decided for the Administration and the United States by the Supreme Court.²

Let me turn to my second point, then: legal policy. If I asked how many of you believe judges should make public policy from the bench, I doubt many would reply in the affirmative. That is my view, too. In general, I am reluctant to have judges make policy. Why is that? Because they are not trained to do it. They are not democratically empowered to do it. Thus, their legal reasoning seems forced when they are trying to achieve a public policy objective. Likewise, lawyers should not make public policy in the Executive Branch through interpretation of law. If they interpret the law in ways designed to make public policy, they are engaging in the same

² *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796–97 (2006).

2008]

Are We Over-Lawyer International Affairs?

413

problematical behavior (that is, unless the lawyers are explicitly acting as policymakers, using the criteria and approach policymakers use, considering the full range of prudential political and international considerations as a policymaker would, from formal training or experience). We are not trained in policing and public order. A course in criminal procedure—even advanced criminal procedure, or mastery of Fourth Amendment law—is not the same as a course in policing and how to maintain public order in developing societies. Nor is it a course in how to practice effective counterterrorism, or a course in how intelligence collection works in the counterterrorism or counter-insurgency world. Lawyers do not necessarily receive much formal training in the kind of political analysis of international policy issues that is likely to arise in this twilight war in which we are now engaged.

This is not a partisan comment. It was true in the Clinton administration; it is true in the Bush administration (to some degree). I am just stating it as a matter of course. What happens, for one reason or another—either, because someone asked for it, or because it came from below—is an agency will develop a proposal about something they want to do. Let us suppose that proposal also involves highly sensitive intelligence issues; as in, for instance, the context of covert action. That proposal then usually goes to an interagency lawyers group. The key interagency meetings tend to be dominated by lawyers, who are mostly arguing about whether this is legal. Then, there are intense debates on how to describe the appropriate authorities—in which, again, the primary drivers are the lawyers. Finally, the document is finished, and the policymakers come back into the process, usually at the level of Cabinet principles. At this point, the cake is already pretty well baked.

I would argue that this is not an ideal way to make decisions about legal policy in the war on terror. John Yoo, I think, was an important policymaker in this regard. It is hard to read his book and not come away with that impression. Indeed, many of the major characters in his book are lawyers who worked with John in fashioning these policies. Without taking a side on his decisions, step back and notice the way policies are made and who the critical participants at the sub-Cabinet level are making them. There are exceptions—some of the internal DOD procedures, and so on—but I think what I am describing occurs commonly enough.

What then, are issues that surface when you bring full policy analysis to bear, as opposed to the simple question of what can I do and what can I not do? Basically, it is a balance of effectiveness against moral issues. Moral issues are not the same as legal issues. I need to stress that point. So, for instance, considering the effectiveness of detention and interrogation procedures, you can look at the experience of the French in Algeria. John cites the effectiveness of French techniques, for example, in the Battle of Algiers. But those same techniques caused an enormous reaction in France that helped shorten France's ability to conduct the war—not for le-

gal reasons, but for larger political reasons.

I wrote two case studies on the conduct of policing in Northern Ireland about fifteen years ago, spending a lot of time in Belfast. It has been a tortuous process of trial and error in British policing and interrogation methods. The question is not just one of effectiveness. It is a question of the sustainability of certain procedures over time. They are learning, in this painful process, what is both politically, internationally, sustainable and effective. It is a similar story with Israel and the United States. We have a lot of history in these matters. In the interrogation procedures, for instance, much had not been thoroughly analyzed at the time decisions were made—understandably, as they were made under great stress. Even today, we have an almost laboratory case of the way we handle terrorists outside of Iraq—and the way we handle terrorists inside Iraq under the law of armed conflict, who are just as dangerous.

Another issue is sustainability—both in the domestic and in the international sense. The most effective policies will be those that survive from one administration to the next, regardless of party affiliation; regardless of who is in control of Congress. The people carrying out these policies need to feel that they are not going to be whipsawed back and forth, as in the Church committee period and after. Late this summer, the President made a series of announcements that really moved us into a different legal phase in the war on terror. He was already moving into this phase before the Supreme Court decision, despite the controversy over the Military Commissions Act. He is building a sustainable partnership, working with the Congress and foreign countries for what he called “a common foundation.” He is using the military commissions for the major war criminals who helped carry out the 9/11 attacks—accepting that the way those people are treated will come out. It is more important to bring them to justice. This means a relatively limited role for some of the secret CIA procedures. But it fences off the things we have to be able to do in that realm that are invaluable. We need a durable legal framework in which to provide necessary policy guidance for the conduct of this conflict, and we need to be able to obtain broad durable support for the way we conduct it. I think, in other words, despite what you may read, we are moving in a reasonably healthy direction—moving forward in a way that will allow us to sustain the fundamental paradigm shift that occurred after 9/11.

PROFESSOR YOO: I would like to thank the Federalist Society for inviting me to speak twice in two days. And, in particular, I would like to say that I am not plugging my book again. I am going to plug Phil’s book. He has a great book on the Cuban missile crisis,³ which I read a long time

³ THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS (Ernest R. May & Philip D. Zelikow eds., 1997).

2008]

Are We Over-Lawyering International Affairs?

415

ago, about how interagency process is an important factor in how we make policy, and how sometimes interagency processes take over and decide things that the elected leaders of the government does not actually intend or want to happen. I also learned a lot from Phil Bobbitt's book—which I highly recommend—*The Shield of Achilles*,⁴ which is sort of a bigger-picture analysis of the changes in the world and the place of the United States in that world, and how we, in some ways, have to confront the dangers of proliferation of WMD and terrorism. From both of those books I have learned quite a bit in thinking about these issues.

First, let me say that, as regards the question of the panel, has there been an over-lawyerization or a change in the amount of lawyering in the way we conduct foreign affairs? I think it is undeniable that there has been. You could look at the war on terrorism and some of the wars before that for evidence of this fact. We have accounts of our military leaders, our civilian leaders, going up even to the President of the United States, choosing bombing targets in Kosovo and Afghanistan with lawyers sitting right next to them, evaluating on-the-fly, on an *ad hoc* basis, whether selection of this or that target would be legal or not under international law.

There is a well-known story about a convoy leaving Kandahar, that our commanders thought about attacking because it was believed to have a large number of Taliban leaders. But, because their families were in the convoy, a military lawyer in the command center vetoed the strike. I cannot tell whether that was a good decision or a bad decision, but it gives you a sense of how powerful lawyers have become in the fighting of war. It is hard to imagine this happening in the other major conflicts that we have waged, such as World War II or the Civil War. You do not see any accounts of lawyers playing that significant a role, sort of day-to-day operations of the military.

This also takes place at much broader policy levels. Here, I disagree with what Phil just said, that there is a line between law and policy. My sense from working in the government is that, actually, lawyers tend to confuse that line—they think that a lot of what most people think of as policy is actually governed by law. One of the jobs of the Justice Department while in the Administration, oddly enough, was to stress that, in fact, the law does not decide these questions—that it really is a more difficult decision for policymakers to make. I quite agree with Phil, that, as lawyers, we may not be the most competent people to make those policy decisions, because we are not trained in how to make decisions about the effectiveness of different procedures, the effect they have on our ability to cooperate with other countries, and the effect they have on support for the United States in other areas. Those are all very important things that people are trained to do in public policy schools, through experience in the bureaucracies.

⁴ PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002).

Take, for example, the Geneva Convention debate, which you have all likely heard about. Even to say, as I thought—and, I think the Administration thought—that the Geneva Conventions did not cover the war with al Qaeda, that does not tell you as a policy matter whether we ought to do so at all. There are important reasons you could argue, as Secretary Powell did at the time, in favor; but there are also reasons against it. Philip mentioned this interagency process of lawyers and said that I was going to have posttraumatic stress syndrome, because one thing I thought I would never have to hear again after I left the government was another interagency process. But, let me relive it for you to show you how painful it can be.

In this interagency process, you have lawyers who say: “We should give people Geneva Convention protections, because we are worried about how the Conventions will be honored in future conflicts against the United States.” That is a perfectly valid concern. But, to me, it sounds like a policy consideration. We felt that this kind of enemy was not covered by Geneva because of the nature of the organization, that that ought to be taken into account when we think about whether to engage this war. Concerns about future compliance with Geneva by other nation-states should not influence what we decide now, in this particular situation. It is not a question about whether the Geneva conventions, and their text and history, really cover the war on terrorism; it is an argument about policy considerations and the debate over whether to follow them or not. What I found in the interagency process debates is that, lawyers in favor of following the Geneva Conventions with Al Qaeda would make the argument as though it were a strict legal matter how those conventions ought to be interpreted, rather than a policy argument about what to do once you know what the law is.

The other thing is, we are all trained in law school to understand that the law we have today and the law we are making in the future is subject to policy; that it is an expression of policy. Legal scholarship over the last thirty or forty years has shown how often legal rules are actually policy choices. I found in the government that there was a curious inability to understand international law in that way. In some respects, the people we train to work on international law issues and to think about international law bring this very oddly formless perspective to it. It is the thought that international law is very clear; that it can be applied with great clarity; that it does not embody policy choices; and that it ought to be obeyed in all circumstances, without regard to thinking about how to change it. Those of us (or common-law lawyers) understand that the common law is an evolutionary system, and that you can change it through time over practice. There is an important component of that in international law. But, we had people in these arguments who thought that it was quite clear what international law required, and how it applied to something which a common law lawyer would typically think of as protean—as in, here is a new situation, the war on terrorism; and we have to think about how to apply and adapt these older rules drafted for a different situation to this new circumstance.

2008]

Are We Over-Lawyer International Affairs?

417

A third thing that really struck me in these interagency processes is that there are people who firmly believe that international law is not just as secure and firm as domestic law, but that, in fact, it is federal law. There are people who would say that, if we think this is international law, the President is constitutionally bound to enforce it as though it were on a par with a statute or a treaty. That was just striking, how much that view—which I have always thought of as a fairly aggressive view promoted in the academy—had really seeped into the teaching of international law in our government. I just do not think there is much historical or textual basis for that proposition. There is no international law part of federal law in the Constitution itself, aside from when Congress decides to make something a criminal offense. We have historical examples, for example, of people like President Washington, who tried to prosecute people for violating his proclamation of neutrality in the absence of a congressional statute, though the courts refused to go along. But I have often thought this fails to think about how international law is an extension of international politics, and that taking some of these positions really does advance a certain kind of foreign policy or not.

The United States often promoted a view of international law that sought to constrain British interests, when we were a weaker country and they a stronger country. And, if you think about it, that is exactly what is going on today in reverse. Weaker countries, particularly in Europe, are using international law to constrain policy options that the United States should have in the war on terrorism. So, if France wants to play a bigger role in international affairs, but does not want to invest the military and diplomatic resources required, international law affords itself as a convenient way to constrain the larger power in the world—which, at this time in history, happens to be us.

What we have to do is decide whether we are going to decide on policies that might be effective, and balance it against what the effects might be—which Phil described quite well—in harming cooperation between the United States and other countries in fighting the war on terrorism. Those policies might be inconsistent with the way other countries view international law; but I do think that the United States' views are often downplayed. And, we are a country that is providing a public good: international stability. Our views on international law, I think, ought to be taken into account more seriously and heavily—particularly in the laws of war. A lot of other countries just don't fight wars and aren't responsible for conducting military and intelligence operations designed to protect the West.

DEAN HUTSON: Good morning. I, too, want to thank the Federalist Society for inviting me here. It is a real honor. I am a little embarrassed to admit to you that I have not actually written any books. I have read a number over the years—none of those that have been touted thus far, though, I have to admit. But it is an honor to be with this distinguished group, whose

careers I have watched over the years.

In answer to the question, I would echo John with a resounding, "Yes." But, also agreeing with John, I am not sure that really answers the question. We in the United States over-lawyer an awful lot. This is part of it, to be sure. But, the other way of looking at it, is that we often hide behind law and lawyers. We let them do the dirty work for us. One of the things I discovered, after being a lawyer for thirty-five years or so, is that the law itself is less important than I thought. The lawyers are more important. Clever lawyers, perhaps too clever by half, can get around the laws. And so, lawyers have become increasingly important; but that creates the problem of over-lawyering.

My job this morning is sort of unique and narrow. I am supposed to talk about the military and military lawyers, because they have been thrust into the forefront recently. They have become of great interest to people, and I think they have acquitted themselves nicely. In that context, let me talk for a moment about the law of war. (I should credit Colonel Bill Eckhart at the Army War College for what I am about to say, because I have grievously stolen a lot of his ideas). I view the law of war as a sort of continuum, with law at one end and war at the other end. There is a great deal of tension in that continuum. The law values the system, the means. War glorifies the end, the results. The armed forces fear that they are going to lose the necessary means by which to achieve the end. The lawyers worry about loss of jurisdiction (yet another tension). The law restricts power. War uses power. The law tries to limit disorder and violence. War thrives on disorder and violence.

There are some great similarities, though, too. Both are vital to the success and security of the country. And, to some extent, one is a means to the end, in that there are lawyers involved with the military mission trying to facilitate it and make it work. The military mission is to fight and win the nation's wars. But that is all the military can do. We need to keep this in mind in the present situation. All the military can do is provide the time and space necessary for the real solutions to take place. The military is not the solution in and of itself. The real solutions are economic, cultural, social, religious and legal; so that, the lawyers involved in the war-fighting aspect, providing the time and space necessary, become part of the solution in the sense of providing the law of war. The military, and the lawyers in the military, are not very good, honestly, at peacekeeping. They can do it at the point of a bayonet, but, when you sheath the bayonet, all hell can break loose again. And, they are particularly unsuited for nation-building. That is somebody else's responsibility. The Judge Advocates understand and respect the chain of command and the mission of the military. They also are very good generally at protecting their superiors from making mistakes, protecting them oftentimes from themselves.

It is absolutely necessary that the military lawyers understand that the four-star general or presidential appointee sitting across the table from

them is not their client. Their client is the United States of America. It is not the individual. It is very easy for lawyers in the government and in the military—particularly in the military, where chain of command and loyalty are so vitally important—to forget that. When I was a young lawyer in the Navy—and, this was during Vietnam, and we were all essentially avoiding the draft and becoming lawyers because it seemed cleaner—we spent a lot of time debating whether we were lawyers first or naval officers. What was our primary responsibility? To whom did our allegiance lie? To what profession did we owe fealty?

But this was a red herring. Nobody asked the pilots whether they were pilots or naval officers first. Nobody asked the submariners where their loyalty lied. It is the same thing for JAGs. The United States Armed Forces demands of them that they be the very best lawyers they can possibly be. That is all that they have to do, be the best lawyers that they can possibly be. I say with some pride that we have seen that in the last few years. We have seen it with the lawyers that have been defending people on military commissions. People come to me and say, “John, are you surprised that they have been so vigorous?” like we expected the lawyers in uniform to just lay over and play dead because defending alleged terrorists was not the thing to do. The answer is no: I was not surprised at all. In fact, I expected it.

I testified at the Senate Armed Services Committee a few months ago about the military commissions, and sat next to the JAGs of the various services. They testified honestly and forthrightly about where they thought the military and the administration had made mistakes, and what they thought was the way ahead. I thought they showed a great deal of courage in doing that. But, again, I was not surprised. I think it is important for all lawyers—particularly lawyers in the military—to lead from the rear. Whether you are trying to get some junior enlisted person to understand that it is not in his or her best interest to take the stand, or whether you are trying to convince the four-star of what he ought to be doing, it is necessary for lawyers to lead from the rear. If you do that, you will find yourself—not directly, but very effectively—in the policymaking position; because lawyers have the unique position of advising the people who make policy. It is easy to get lost in that. It is easy to hide and say, “Well, it is not my decision; all I did was give advice.” But, good lawyers know the law, and great lawyers know about life. Law is not practiced in a vacuum; it’s practiced in real life. The military lawyers I have seen have demonstrated that in great abundance. And, I am awfully proud of them. Thank you.

PROFESSOR BOBBITT: In 1990, the states of the world gathered in Paris to adopt the Charter of Paris. It incorporated the Moscow and Copenhagen Declarations. It was, perhaps, the most important treaty since the Charter. I had just started work then as the Counsel on International Law for the State Department. And, I tried to get IL, as it is known, to send

lawyers to Paris. The acting legal advisor said, "Why? I mean, what would they do?" His view, I think, was rather like the view of my colleagues up here. There is law, and then there is policy. That struck me as wrong then, and it does now too. It leads to all sorts of practical impossibilities, because it is hard to extricate law from policy.

In fact, it makes lawyers much more dictatorial. When they reflect policy preferences, they are forced to clothe them in the language of the compelling nature of the law. It represents a very retrograde view of how we use lawyers in this society. I agree with the premises of my colleagues here—we do need to reform international law, as well as domestic law, to appreciate the new strategic context we're entering. But I strongly disagree that the way to do that is to pretend that lawyers should be confined to reading statutes and declaring obstacles, or their removal.

For the long wars of the twentieth century, we separated law from strategy. That was good for us. It allowed us to avoid militarizing the domestic environment and politicizing the strategic environment. That, in turn, allowed bipartisanship over many decades. We won the wars against fascism and communism. But, in the period we're entering now, we need to reintegrate law and strategy; and, the failure to do that, which we have seen in abundance in the last few years in Iraq, is giving us a reputation for fecklessness and lawlessness that will make the sort of consensus that Phil Zelikow talked about very difficult to achieve—not only abroad, but also domestically.

There are, I think, three wars on terror that we are trying to prosecute simultaneously. One is a war against terrorism—a particular kind of terrorism, twenty-first century networked global outsourcing terrorism. This one will not be confined to radical Muslims; although, the market innovator of sorts was Al Qaeda. The second war against terror is a struggle against the proliferation of weapons of mass destruction for "compellence" rather than deterrence. Sometimes, these two theaters intersect; and that makes terrorism especially terrifying. But, sometimes they do not; and, progress in one dimension makes the other dimension actually worse off. The third is an effort to protect our civilians from the consequences of infrastructural failure, whether it is natural or unnatural, critical infrastructure failure or a biological attack whose origins we do not know and may never know; as, indeed, we do not know the authors of the anthrax attacks.

To win those wars, the first weapon we must deploy is law; and the way to deploy it is not to treat lawyers like closet cases. When we have learned that law is our strongest suit in this society, that there is a reason why lawyers play such a large role in Congress, we will avoid the two extremes of either pretending that a lawless approach to strategy can succeed, or lawyering in a way that makes law a kind of Trojan horse for the policy preferences of lawyers.

I was sitting here, listening and thought of a deceased friend of mine.

2008]

Are We Over-Lawyering International Affairs?

421

I wish he were here. His name was Lloyd Cutler. He was a very prominent Washington lawyer. He was not a conservative. I doubt he was a member of the Federalist Society. But, he had a very subtle and powerful view of law. Most people do not realize this, but he was the mind behind the Algiers Declaration that got our hostages back. It allowed the President much more flexibility than we otherwise would have had. He even treated being a lawyer as something like being a mechanic; like something which would have forced him to defer to policy persons. Had that happened, he would have lost his usefulness. As the dean told us, it was because Lloyd was a very great man, as well as a great lawyer, that he was so useful to the many presidents—presidents, by the way, of both parties—over such a long period of time.

I imagine that many of you are lawyers, and some of you law students. I ask you to reflect on the unique role that America has given lawyers. If you are a physicist or a mathematician and you cross a border, you still have your yellow pad with you and your chalkboard. But when a lawyer crosses the border, she becomes just another tourist. It is the jurisdiction that empowers you. And, in this country, lawyers have been given a unique role. That puts a big responsibility on you. You have become defenders of the Constitution, just as much as the 101st Airborne. To withdraw from this, or fail to appreciate the important role law and lawyers play in the wars on terror, would be a big mistake.

(Panel concluded.)