International Law in US Courts Talk

Jules Lobel, US Center for Constitutional Rights
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Michelle Storms: [0:08] So, I am going to go ahead, actually, and get us started. And I'm just going to say a couple of words. Yeah, it's OK to get your coffee. This is kind of an informal group, and we're just happy to have you guys here.

[0:20] This was kind of an extra bonus, like an extra opportunity that we got, because Jules Lobel was going to be here in town. He said he'd be willing to stop by and talk with some students, if our students would be interested. We had a feeling that some of you might be, and so we said, "Yes, please do come." So, we're very fortunate.

[0:40] Professor Lobel is a professor at the University of Pittsburgh Law School. But, he's also an attorney with the US Center for Constitutional Rights, and he's been there for 25 years. He's currently the vice president there. Come on in and have a seat.

[0:53] And he's been litigating a lot. In addition to teaching law students, he's been litigating, consistently, many issues relating to the application of international law in the United States courts. He's advised governments of other countries, including the Nicaraguan government regarding the development of its first democratic constitution, similarly with the Burundi government on constitutional-law issues.

[1:17] So, he has expertise along a wide range of issues, and I feel really fortunate that we could get a little bit of his time today. So, I'm going to go ahead and let you do your thing.

Professor Jules Lobel: [1:28] Well, thank you, Michelle, for that nice introduction, and thank you for inviting me.

[1:32] I don't know how many of you here today have seen Steven Spielberg's science-fiction movie "Minority Report." For those of you who haven't, in that movie, the Justice Department hits upon a scheme to stop all crime in Washington, DC. Through the enslavement of psychic visionaries who can predict who is going to commit a crime in the future, the Justice Department can then go out and arrest and convict, under pre-crime laws, people who would commit crimes in the future before they actually commit the crimes. And Tom Cruise plays the leading actor. And I won't tell you what happens, but the whole scheme, as in many science-fiction movies, goes awry.

[2:22] Now, President George Bush doesn't claim to have any psychic powers, and he doesn't claim to have any psychic visionaries in his administration - certainly now that Karl Rove is no longer in the administration. But, in fighting its War on Terror, the administration has adopted essentially the same scheme as Steven Spielberg puts forth in the movie "Minority Report."

approach to fighting the War on Terror is what he called "the preventive paradigm." And in both the movie " Minority Report" and in the administration's basic, underlying strategy, the theory is you can't wait till terrorists or criminals do something bad, because then it's too late. You have to move aggressively, coercively, to prevent those terrorist actions from occurring.

[3:26] So, whereas the normal rule of law requires that, before you lock somebody up, you have to have objective evidence that they've done something wrong, before you invade another country, you have to have objective evidence or you have to show that they are attacking you, the administration says we now have to use preventive detention, preventive wire-tapping, preventive war - most dramatically - and preventive torture to obtain information, to lock people up, to invade people's privacies, and to attack other countries before they attack us, as a preventive measure.

[4:06] So, underlying the whole War on Terror, in our view, is this shift from the normal rule of law, which requires that somebody has done something wrong first before you use coercive force, to a preventive paradigm, which says we have to use force against people, or coercion against people, before they do something.

[4:31] Now, there is nothing wrong with prevention. We use it all the time: preventive medicine. I assume all of you brush your teeth daily to prevent tooth decay. What you don't do is engage in random root canals, because if you did that, if you said every time we have some suspicion that a tooth is going to go bad you do a root canal, you wind up with no teeth.

[4:56] And so, the problem is the marriage of prevention with coercion. Prevention on its own is fine. Coercion, the state can use, under the rule of law, if the person has done something wrong or the country has attacked you. It's taking coercion and wedding it to prevention and putting the two together.

[5:19] Now, I would like to talk about a case that I'm currently litigating, which really illustrates this preventive paradigm at work. It's the case of Maher Arar. Maher Arar is a 36-year-old Canadian citizen, married with two children. He's a technology expert, a consultant. He was working for a Canadian company, and he was on vacation, and the company asked him to return home. He took a flight from Switzerland and stopped at JFK Airport in New York, just to change planes to go back to Canada.

[5:59] While he was at Kennedy Airport, the INS officials pulled him over, said, "We want to question you," based on a tip they had gotten from the Canadian Royal Mounted Police that he had some association or he had some meeting with somebody who was a terrorist. They interrogated him quite harshly, quite vigorously, for a couple of days, and then sent him to the Metropolitan Detention Center in New York City, where they kept him in solitary confinement and questioned him again for two weeks.

[6:32] At the end of the two weeks, they said, "We're going to deport you." And he said, "Fine. Send me back to Canada. I'm still holding a ticket." They said, "No. You were born in Syria, so you have dual nationality, and we're going to send you to Syria." Mr. Arar objected, saying, "You know that if you send me to Syria, they'll torture me. I left Syria early, when I was 17, with
my family, and never went into the military, number one." And number two, the state Department reports show that Syria routinely tortures many of their prisoners.

[7:07] Nonetheless, they put him on a CIA jet, lying to the Canadians, lying to his lawyer about his whereabouts, and sent him to Jordan and then to Syria.

[7:19] When he got to Syria, he was put in what he termed "the grave cell," because it was three feet wide, six feet long, and seven foot high. He was tortured. He was beaten with electric cables. He was threatened with putting in a tire, which they used to immobilize people for questioning. Rats and cats ran across the top of his cell. He was listening to the screams of other prisoners being tortured. And he was kept there virtually all the time, 24 hours a day, for a year - for a year, in that situation - until the Canadians finally...

[8:03] The Canadians, at first, didn't know where he was. They found out, and they finally put pressure on the Syrians, and the Syrians released him, saying that they had no evidence that he was a terrorist of any kind. They didn't charge him with anything. They released him.

[8:17] The Canadians, then, launched into a two-year investigation, which resulted in a 1500 page report compiled by a very prominent judge in Canada, which concluded unequivocally, that Mr. Arar had nothing to do whatsoever with terrorism. He was not a terrorist. He had no association with terrorism. This was all a mistake. And the report urged the Canadian government to apologize for its role, which was just simply providing this information and to pay him compensation, which they now did to the tune of $11 million.

[8:49] Meanwhile, the Center for Constitutional Rights, as represented Mr. Arar, we've sued in Federal District Court in New York City. And the Bush administration has taken the dramatically opposite view than the Canadians and has stonewalled, refused to apologize, refused to make any compensation to Mr. Arar.

[9:07] Now, if you look at this case, I think it shows both the preventive paradigm and how it is in tension with the fundamental rule of law. The United States government has been engaged in a program of rendition for many years, before this administration.

[9:25] The first Bush administration did it. Clinton did it. And originally, it was up until September 11, it was designed to get people who were outside the rule of law, who could not be extradited, and kidnap them - in my view, illegally kidnap them. And bring them to a country where they could be tried.

[9:47] But, the purpose of it, as illegal as it was, was not preventive, but was to try somebody for a crime they had allegedly committed in Egypt, in the United States, or wherever. After September 11, the Bush administration dramatically changed the nature of the program, which has now ensured over 150 people.

[10:12] The question we asked is: Why would the United States government send somebody who they had suspicion was a terrorist to Syria, which is considered a rogue state, part of the axis of evil, which we think is not helpful in the war on terror, instead of our ally, Canada, which is one
of our strongest supporters in the war on terror?

[10:41] There is only one reason that we can come up with. And that is that they wanted to send them to Syria, because they believed that Syria would use coercive measures (torture, if you call it what you should call it) and that they would detain them preventively.

[11:00] And Canada told the United States officials that they could not do that, because they told the United States officials that all we have is suspicions. We'll put them under surveillance. But, we cannot detain them. And certainly, we can't use harsh interrogation methods on them. We can't torture them.

[11:18] Syria could do what neither Canada or the United States could. And that's precisely why we sent them to Syria. We sent them to Syria to be tortured. You know, I was just testifying in Congress on Thursday. And one of my co-panelists was the legal advisor to the State Department. And I said, "Well, why did you send this guy to Syria? Why do you think so?" He said, "Well, we could, because he was a Syrian national."

[11:44] I said, "Well, you could. But, that doesn't explain why you did. Why wouldn't you send him to Canada?" And the Bush administration has never answered that question. But, the only plausible answer is a preventive one. Is that they wanted to get information from him, which they thought might help them prevent future terrorist crimes. And the only way they could do that would be to detain him and use torture or harsh measures.

[12:09] Nobody, of course, justifies torture as a method of punishment or as a method of... You know, just for sadistic purposes. The only rationale that anybody gives for it is preventive. Namely, it'll get us information, which will prevent future terrorist crimes.

[12:31] That's what happened to Mr. Arar. And I think, it illustrates the transformation of the rendition program from an illegal program designed to bring people to justice illegally (and I always opposed it) to a program not designed to bring people to justice or to bring people within the rule of law, but designed instead for a preventive measure, to get information to prevent future terrorist crimes.

[12:59] Now, as I've said, we've sued in Federal Court. And I think this case illustrates some of the key characteristics of a preventive paradigm and why it's inconsistent with the rule of law. The first is that the whole preventive paradigm is based on substituting suspicion, hunches, inferences for objective evidence. And you can see that in Mr. Arar's case.

[13:30] The regional INS director concluded that Mr. Arar was unequivocally an Al Qaeda member, despite the fact that Canada told them, "We have our suspicions. But, we have no evidence." And by the way, his deportation rendition to Syria was signed off by the acting Attorney General and not just by lower level officials.

[13:55] This was a high-level program. This isn't some rogue soldiers in Abu Ghraib or something like that. So, the first key element of this new approach is to substitute suspicion for objective evidence.
Ron Suskind, a journalist, wrote a book called "The One Percent Doctrine." The title of the book comes from a quote that Cheney purportedly made, in which he said, "If there is a one percent chance that somebody is going to commit a terrorist crime or a nation is going to commit a terrorist crime, you have to act as if it's a certainty." That's the very nature of this preventive paradigm.

If there's some slight change... They claim we're in a period where we cannot allow that chance to occur. And we have to act as if it's a certainty. That's what gets you Arar being sent to Syria. It doesn't just do that. It gets you the war in Iraq.

You know many people say, and I think they have very good reason to say that, that all the Bush folks were lying. The Bush administration was just lying on this. Rumsfeld, when he said, "We know where the weapons are," Bush said, "We're certain that there are weapons." Powell said, all of them said, "We're certain that there are weapons."

They didn't say we have some suspicions that there are weapons. They said that they were certain that there were weapons. And people say that they were just lying. And if you look at the problem of this war, it's that you have a lying administration, which got us into war based on lies. And I think that's a reasonable conclusion.

But, I think underlying it is something more fundamental, which is the notion that in crisis times, people move to this preventive paradigm, which in the war model is preventive war, and that we have to go to war to prevent another nation from attacking us. We can't wait for them to attack us and then respond, because as Condoleezza Rice said and Bush said, "Then, we might see the mushroom cloud upon us." So, we've got to act first.

And it's the same basic approach that gives us the Arar case. It's the substituting of suspicion for something objective happening. And that's what fundamentally, I think, brings us the Iraq war.

Many, many people had suspicions about what Iraq was doing and whether they were developing weapons of mass destruction. They turned out to be wrong. The rule of law requires that you can't attack them based on those suspicions. That's what international law says.

They told us, "We can't wait. And therefore, we have to attack them first." And if you look at what that has brought us in history, it's not just this Iraq war. World War I, the German high command said, "We can't wait for Russia and France to get stronger, because if they get stronger, they'll attack us. We have to attack them now." Preventive war.

The Peloponnesian War, we have a chapter. This talk is somewhat based on a book I've done: "Less Safe, Less Free" with David Cole. For a chapter on the history of preventive war, one of the earliest instances of preventive war is the Spartans arguing that Athens was getting too strong and that they were suspicious that they were going to attack Sparta.

They attacked first, leading to the Peloponnesian War, which almost destroyed Greek
World War II, the Japanese thought that the United States might eventually attack Japan, which was not an unreasonable suspicion, and therefore, launched the attack at Pearl Harbor to prevent war being brought upon them.

And probably most dramatically, a preventive war that didn't occur was the Joint Chiefs of Staff and most of Kennedy's advisers urged him to attack Cuba when the Soviets were putting nuclear missiles in Cuba. And Robert Kennedy, in the conversations at the White House, was said to have once said, "I now know how Tojo felt planning the Pearl Harbor attack." And they rejected that option, moving towards a coercive but less-forceful blockade. But, there, again, the idea was "We can't wait. We cannot wait till the Soviets armed these missiles in Cuba. We've got to attack first."

So, in all these cases, the same thing.

And finally, right after September 11th, the United States locked up over 5000 people, Muslim aliens, on suspicions that they were terrorists - a preventive detention scheme. Many of them spent two, three months in jail, in very harsh conditions.

One case, case of Ali Al-Maqtari, who was a Yemeni man who was accompanying, on the day after September 11th, his wife, who was an American soldier - was Muslim, but an American soldier - to her base in Kentucky. And while they were traveling to Kentucky, a number of people in Kentucky noticed a very suspicious couple, and the FBI came and they arrested him. His wife eventually was discharged from the military. He spent two or three months in a federal penitentiary, until he was finally released.

And the basis of these suspicions were, number one, that she was wearing a hijab, which is a Muslim shaw; number two, that they were carrying box cutters, which it turned out they used for their gardening-supplies work; and number three, they were speaking a very suspicious foreign language, which turned out to be French.

[laughter]

Professor Lobel: Symptomatic of the problems we were later going to confront.

So, in all of these cases, what is done is the substitution of objective evidence, which the rule of law requires, and substituting suspicion. That's the first key element of this preventive paradigm.

Second is the rule of law requires equality. In fact, you could argue it's the main principle in the rule of law. If you go to the Supreme Court, for those of you who ever have a chance to argue or have a case in the Supreme Court, you'll notice, when you go up the gigantic steps which lead you to the exalted place, over the entrance, it says, "Equal justice under the law." The whole notion of the preventive paradigm is to get rid of equality and to treat aliens different than citizens.
[20:43] So, when we sued, the first argument the government makes is "Arar has no rights, has no constitutional rights, because the Constitution does not protect aliens. He was tortured in Syria. He was outside of our country. He never actually was admitted to the country. He was brought into jail in New York, but he was never formally admitted." So, there's the fiction that he's not in the country, and therefore, the Constitution doesn't protect him.

[21:10] And it's not just in the Arar case that we've run into this. In Guantanamo, which we represent the Guantanamo detainees, in Guantanamo, over and over again, the government argues they have no rights because they are being detained outside of the United States. In fact - erroneously, as it turns out - that's why they chose Guantanamo, because it was outside of the United States and they figured they could get away with doing whatever they wanted to.

[21:37] The ACLU has brought a case on behalf of, and we've brought cases on behalf of, Iraqi prisoners who were tortured in Abu Ghrabi. And that case was dismissed, because Iraqi prisoners, tortured in Iraq by US military soldiers, have no constitutional rights, and therefore, no right to sue in court.

[21:57] Now, this argument is based on what's known as a compact theory, or contract theory, of the Constitution - namely, that the Constitution is a compact between the government and its citizens, and therefore, people who are either citizens or who live in the United States are part of that compact. Anybody else is not part of it. And the Constitution only prescribes conduct by the government within that contract model.

[22:24] Our view, my view of the Constitution is that it's not a contract at all - that it is a code of conduct. It is a code that the citizens of the United States prescribe for what conduct is permissible and what is not. We are saying, in our Constitution, not just that we agree to do certain things, but that this is the kind of government we want and not some other kind of government. We want a government that doesn't torture people, that doesn't commit abuses. And it doesn't speak to who is being tortured, but what the conduct is.

[23:03] In short, we define who we are by what our government does and what we allow our government to do in our names. And that is an alternate theory of the Constitution. Unfortunately, we've had trouble. The courts have not been very receptive to that theory, I'd say.

[23:19] In the Arar case, as in the Guantanamo case, we've litigated this on fairly narrow grounds. In the Arar case, we say, "But, he was here. He was physically in this country, and he was sent to Syria, we allege, for the purpose of being tortured. So, the conduct that violates the Constitution occurred here - namely, the taking him here and sending him to Syria for the purpose of being tortured." In Guantanamo, we say, "Guantanamo is a US base. It's totally controlled by the US, totally under their jurisdiction."

[23:56] But, the real, fundamental question in all these cases is: does the Constitution apply wherever the government acts, or only in very limited circumstances? As I say, in Arar, in the district court, we were able to get around this problem by making that argument.
But, the government comes up with another argument, even though we've gotten around that one, which is the third basic problem of the preventive paradigm. The first one is substituting suspicion for evidence. The second one is double standards for equality. The third is no accountability, no judicial review.

The government now says, "This case, the Arar case, raises all sorts of political issues. It raises questions of what the Syrians told us." For example, they claim, "The Syrians sent us diplomatic assurances that they wouldn't torture him. That's what we think they're going to claim." They never get to this, actually, but that's what they argue.

We ask them back, "You know, you say that you don't believe the Syrians on whatever they say: what they've done in Lebanon, how they treat their own people, whether they're in league with terrorists, whether they're aiding the Iraqi insurgents. You don't believe them. The only thing you apparently believe is that they wouldn't torture Arar. That's not plausible."

But, in any event, the district court dismissed this case on the ground that there is no private cause of action, under the Bivens Doctrine - which, in the questions, I could get into - but that we don't have a private cause of action because of the diplomatic, foreign-relations, political aspect of the whole case.

And as I've said, this isn't just what they've argued here, but they've argued in all of these cases. In the Guantanamo cases, they argued that there's no habeas, there's no judicial review. We are fighting this ongoing battle, where the preventive paradigm says, "You have to let us do this, and you can't have accountability."

We're on that issue in the Second Court of Appeals. We also have a narrow argument given back to that, which is that Congress explicitly provided for judicial review. If an alien is being sent to a country like Syria... Arar had a right to test that extradition, test that deportation or rendition, in the Court of Appeals.

They denied him that right. They held the hearing to send him there Sunday night at nine o'clock at night, from nine o'clock until three in the morning. They left a message on his lawyer's answering machine that afternoon, which of course she wasn't going to get on Sunday. They then the next day lied to his lawyer, saying he was being sent to New Jersey, when in fact he was being sent to Jordan. They were afraid his lawyer would run into court and try to get a stay - an injunction - against this. They took actions that denied him review at the time when review would have been effective. Therefore, you have to give him a private course of action later.

So far, we've lost on that. We've argued that in Second Court of Appeals, and we're awaiting decision. If we win on that, the government has its ace in the hole, which is, "This is all a state secret, and it's protected under state secrets doctrine."

Another claim was brought by a German citizen, who was seized in Macedonia - picked up, illegally taken, kidnapped - by the CIA to Afghanistan. He was kept in Afghanistan and brutalized for four months, until they realized the only connection he had with terrorism was a similar last name to somebody who's on their list. They realized it was a total mistake. They then
dropped him back off in Macedonia; they dumped him. He sued in US courts, and his lawsuit was dismissed under the state secrets doctrine. That's a look into this whole matter involving state secrets.

[28:12] We have a distinction in our case, because what happened to Arar was open and public. Everybody knows who did it. It wasn't a covert, clandestine CIA operation. It was a Justice Department operation. But, we'll see where we get... Anyway, that's the Arar case.

[28:27] I want to spend another few minutes on the following problem. The Bush Administration says, "OK, Lobel, you might be right about everything you say. But, we're doing this to make us safer. In a time of crisis, in a time of emergency, in a time of war, we have to sacrifice some of our liberties to make us safer."

[28:53] The question is, are any of these things making us safer? We've looked at that, and here's what we've concluded. First of all, in April of 2004, the State Department announced with great fanfare that the measures they were taking had reduced terrorist incidents all around the world. Two months later, Secretary of State Powell, in a grim mood, had to admit they had miscounted. They didn't have good mathematicians, apparently, at the State Department. They couldn't add up the numbers right. Not only had it not decreased, but it had doubled. The terrorist incidents from 2001 to 2004 had doubled.

[29:43] I don't know. Maybe they counted it based on eight months and not 12 months. Powell admitted there was a flaw in that calculation. Now the numbers are there for people to add. In fact, terrorist incidents around the world have quadrupled since 2001. Suicide bombings have pretty much quadrupled. I'm giving you round numbers, but they've pretty much quadrupled since 2001.

[30:10] In terms of the preventive detention measures, they detained over 5000 aliens. Does anybody know how many of them today stand convicted of any terrorist crime? Anybody want to give me a figure? We'd have a philosophical debate here. If there were 5010 people were convicted of conspiring to commit some terrorist crime, then the question would be a philosophical matter. Is the conviction of 10 people worth locking up over 5000 people who are totally innocent? That would be an interesting debate.

[30:48] How many do you think the number is?

Audience: [30:50] Just one. [crosstalk]

Professor Lobel: [30:52] The number is zero. The answer is zero.

[30:54] Not a single one of these people were ever convicted of a terrorist crime. They took 83,000 people and sent them down to a special registration program. They targeted, again, 83,000 people from countries that they were suspicious of. Again, if you look at all 83,000 individuals, not a single one was convicted of any terrorist crime.

[31:19] They're batting zero. I cannot see how that could possibly make us safer. To alienate the
Muslim community in this way and to lock up innocent people, when you're not getting a single person who is a terrorist. That can't possibly be of any use.

[31:37] But, the government says, "Out of these 5000 people, we did deport 500 of them. Over 500; 515 to be exact. So, it shows that we were doing something useful." It's true they deported 515. Almost all of them on minor visa matters. Somebody falsified their visa, or they're people shouldn't have been here. Out of those 515 people, they didn't deport any of them until they first went through a whole FBI investigation to clear them of any terrorism. They weren't going to deport somebody who was a terrorist, and send them back to Saudi Arabia to plot terrorism.

[32:23] Their theory was - and we're challenging this in another court case - that somebody who is deportable on a minor visa violation, who said, "I want to be sent back"... There's no evidence they've done anything wrong. They kept them for months and months in solitary confinement as potential terrorists, until they finally cleared them. Then, when they cleared them, they sent them back. These 515 people they deported are misses, not hits. Not one of them was a terrorist.

[32:52] I could go on, but I'll just give you one other statistic. The federal government, when it prosecutes people, generally gets a 92% conviction rate. If you learn one thing from this lecture, it's that if you're being prosecuted by the federal government, you're in trouble.

[33:11] [laughter]

Professor Lobel: [33:12] A 92% conviction rate.

[33:14] For terrorist crimes that they've been prosecuting, the conviction rate has been 29%. After Septmeber 11, one would think it would be easier for a jury to convict somebody accused of terrorism than somebody accused of armed bank robbery or something. But, in fact, the conviction rate is much lower. Case after case, they've lost. The reason they've lost is this preventive paradigm.

[33:40] They're going after people too early, before they've done anything, based on suspicions, based on potential pods. One group of folks was arrested for plotting to blow up the Sears Tower in Chicago. What they had done to further the conspiracy was purchase combat boots and get horses. That doesn't seem like a very effective way to blow up the Sears Tower, so it was a hung jury.

[34:11] All of these things, I think, lead to the conclusion that this is backfiring. From the perspective of our security, it's backfiring. Finally, on the question of it backfiring, it of course, the greatest harm that it's done in its entirety is legitimacy all around the world.

[34:35] We invaded a country, which was not attacking us falling into Bin Ladin's propaganda that what we wanted to do was control the Middle East, control Arab oil. The CIA before the invasion of Iraq predicted that if we invade, it would dramatically boast Al Qaeda recruiting. It took the country, which was not terrorist haven and created one.

[35:00] Probably, the most graphical illustration of harm toll legitimacy around the world is in
England. In 2006, they did a poll of what leaders in the world were the most dangerous and what political figures in the world. And number one in the poll was Osama Bin Laden and number two, ahead of the leaders of North Korea and Iran and all the rest of the countries, which judge George W. Bush.

[35:30] And this is the British public, not the Middle East, not you know other countries that are not our allies. And again, if you look at the whole question of torture, the army has revised its field manual to totally exclude all of these aggressive assertive techniques, like water boarding, which our Attorney General can't tell us if it's torture or not. And Lt. General John Kemmings, the Army's Chief Staff for Intelligence said when they revised this manual. He said we revised it, because no good intelligence is going to come from these abuses practices.

[36:12] Our own history and our own experience, the army's own experiences over the last five years have told us that. And, yet to this day the CIA is still permitted to use these methods and the government still defends it. I guess the Bush Administration finally claim is that they're haven't been any terrorist attacks, you know Tom Ridge, who is the Director of Homeland Security. When he left, he had a big Press Conference and he said "Under my watch, there have been no terrorist attacks on our homeland" and then he went [knocked on wood].

[36:49] Which lead the comedian, Jon Stewart on the Daily Show that night to say, "Doesn't it give you great confidence in the government that they say there's been no terrorist attacks and they knock on wood?" That doesn't give me great optimism, great confidence, and I think it's true. The fact that there hasn't been any terrorist attack is correct, there haven't been any.

[37:15] But, there weren't terrorist attacks between 1993 and 2001 on US soil. So, that's not the proof that they think it is. So, what could you do, what could be an alternative approach. The key to an alternative approach would be to separate prevention and coercion. We've coercion for the rule of law, for when somebody's done something wrong or another nation has attacked you and take preventive measures, like, screening all the cargo that comes into our ports, which could be done for a billion half dollars.

[37:56] I think, four days of the Iraq war and which they still have not done or a whole range of preventive, non coercive programs, which the September 11th committee recommended. Several years after the committee report, the committee did a report card on how they were doing with respect to these measures and it's a report card that none of you would have ever wanted to bring home, when you were a kid.

[38:31] It was a report card, which included five Fs, 12 Ds, eight Cs, two incompletes, and one A minus. I'm not sure what the A minus was on, but things like screening and checking cargo. Cargo at the ports, so that's one thing. Second, you could use much more multi lateral diplomacy and you know the Nuclear Non-Proliferation Treaty needs amendment. There's been a lot of effort to do that this administration isn't doing it.

[39:09] You know probably the greatest danger we face, from the terrorist operation in terms of nuclear weapons is not terrorist who build bombs, but steal them. And right now in Russia, there are over forty thousand tons of unsecured Uranium that could be easily be stolen, in fact that
Chechnyan... a prankster, a student from Russia. Who got himself in quite a bit of trouble, as a prank forged an idea of a Chechnyan terrorist and walked right into one of these sites, which holds all these nuclear materials and they let him right in.

[39:49] A 2007, government office report said we're not doing enough to secure these weapons. And finally, I think we should move from a situation when 93% of our budget for foreign matters goes into the military and only 7% goes into state department diplomacy. We should begin to reverse that. We spend as much on the military as I think the figures, as every other country in the world.

[40:19] And we could reduce it by a substantial amount and still spend as much as the top six countries in the world, which would still give us an enormous military. Last, I just want to finish with a question. Well, the administration says, what if there was, if we had a terrorist who we'd captured and we knew they were going to explode a bomb. Or if there was a country that we knew was making nuclear weapons and they were going to attack us, shouldn't we be able to do something.

[40:53] Shouldn't we be able to use these aggressive preventive measures? Shouldn't you want us to use torture or invasion or preventive war and that kind of situation? And, my first answer to that is and of course these are all hypothetical scenarios. They never come up with a real one, they're all hypothetical and the real one is there is 5000 people in the real world. Five thousand people arrested and none of them are terrorist. But, if the hypothetical really would occur, I think the answer is not to work the rule of law.

[41:24] Not to modify the rule of law and allow these exceptions, which then allows all of this, these problems that we're now seeing. But, instead do what President Jefferson, or Lincoln suggested we should do, that if in a rare unique case that there was this kind of emergency. The President would be forced to act openly and unconstitutionally to meet the emergency and then seek ratification from the public and the congress and if they thought he was acting correctly or she was acting correctly, they would do so as they did with respect to Lincoln.

[42:00] They thought not, they might treat him as a criminal or her as a criminal. But, it would be open above board, acting unconstitutionally. Not to warp the constitution and warp the rule of war to allow for this whole range of coercive preventive measures.

[42:18] Thank you and we have some time for questions, if you people have any questions on any of these cases or anything I've talked about. Ruby, go.

Ruby: [42:29] I was wondering. [off-mic question]

Professor Lobel: [42:41] Well, there was a huge amount that came out of it that was valuable. There was a whole exposure of what Canada done, number one. It was, you know they showed that not only the US, but Canada had operated based on false information, that they'd operated wrongfully. And I think, critically, it called for public apology.

[43:11] This should happen in the United States. And we've testified before Congress. There are
Congressional committees that are looking into this. The administration will never do it. But, if Congress required an investigation, it could be done.

[43:27] It's not going to happen, because even if Congress called for it, Bush would veto it. So, it really shows the disconnect between what we're doing and being able to accept some responsibility.

[43:46] You know, in this conversation I had with this former legal advisor at the State Department, even he admitted that with respect to... He supported the whole policy. But, he said that when a mistake is made, we should openly and honestly acknowledge the mistake.

[44:00] I think, this administration is unwilling to acknowledge mistakes. And that's the difference with Canada that they actually acknowledged it. So, I think, it's quite possible to do that here. I mean, the September 11 Commission was a broad report. It took a lot of doing, but it won't happen. It won't happen unless there's another administration.

[44:20] Yeah, that's why, by the way, we're going to court. That's why we're trying to do this in court.

[44:27] [off-mic question]

Professor Lobel: [44:36] Yeah, that's not elementary at all.

Woman 1: [44:37] I was just wondering.

Professor Lobel: [44:39] Sure, the State Secrets Doctrine is a doctrine which was developed, I think, in the 50s by the Supreme Court, which said that when you're suing the government or even a private party, and either a key element to your claim or a defense requires the introduction of secret information (classified information), the court should look at that classified information, see if it's really necessary.

[45:06] It was developed originally as an evidentiary principle, so that you could exclude certain evidence as being secret. And it's been used haphazardly over the last 20 years as an evidentiary principle. So, like if you sued the government that involves an airplane accident. It's a military plane. And they have some secret information that they don't want to release. The information can be kept secret. They don't have to release it.

[45:33] What's happened in the last three or four years is that the doctrine has been used much more, not to keep particular evidence out, but to dismiss a whole claim, because the claim is based on that evidence itself.

[45:46] So, for example, in the Al-Masry case, which involved the German citizen kidnapped in Macedonia, they said the only way to prove that he was kidnapped by the CIA was to show who kidnapped him, who gave the orders, how it was done, and that'll expose the whole secrecy of the CIA. Therefore, you have to dismiss the whole case.
And there is now an effort in Congress to amend or change the State Secret Doctrine. What basically it does is it says to the government, "If you can operate in secret, you can escape accountability." And I don't think that's a good message to send to the government.

**Woman 2:** I have a question about given the sort of jurisdictions that I don't have to release this report.

**Professor Lobel:** Right.

**Woman 2:** But, that's the minority of the . How many cases...

**[crosstalk]**

**Professor Lobel:** No, that's a terrific point.

**Woman 2:** How many strategies do you have to get this documentation?

**Professor Lobel:** And it's a broader point on our whole legal struggle, which I meant to make in the talk, but I was running out of time. There have been over 100 people - I think it's close to 150 people who have been subject to extraordinary rendition, this policy that we're all subject to.

And we know of Arar and of Al Masry and maybe a couple of others. All of the rest have just disappeared. And you don't hear of them. Now, there have been attempts to document what's going on.

There have been reporters who have done it: Jane Mayer, "The New Yorker." There have been various efforts to document what's been going on. But, it's been very, very difficult, because there's been a whole veil of secrecy on these whole preventive measures that they've been taking.

So, we're litigating Arar as the tip of the iceberg, really. And the trouble more generally, as lawyers, as public interest lawyers in our legal strategy is that it's very hard to get at the heart of the problem. OK?

What you have to do is litigate, because you have to try to win in court. You have to try to litigate a reasonable claim. We could litigate a class action on behalf of all the people who've been subject to extraordinary rendition. And we'll get bounced out of court in five minutes.

So, we try to bring a claim that's going to survive a motion to dismiss, so that we could really investigate in this one claim what's going on. What it means is you get narrower and narrower. So, in our Arar case, I gave you all the arguments we're making against the government.

It gets us narrower and narrower, because now we're saying, "Well, Arar, he has a constitutional right, because he was here." Well, 99% of the extraordinary renditions are not here. It just so happened that Arar was here. And it happened that he was released, because he was
Canadian. If Arar had been a Syrian, sent to Syria to be tortured, you could forget about it.

[48:51] In the Guantanamo case, at the Mooson, the first Guantanamo argument, which involved the Rasul case, we had a long discussion: What do you do if the judge asks you, "What about some guy being held in Bagram Air Force Base in Afghanistan in the same conditions as the Guantanamo people?"

[49:15] You could give three answers. One, you could say, "Well, they're not covered, because Guantanamo is under the exclusive jurisdiction of the United States." But, if you say that, you've given away 95% of the people who are being tortured and being detained. So, we don't want to say that.

[49:38] You could say, "They're the same situation." At that point, you might lose the Guantanamo case, because they might say, "Look, if we think this going to affect everybody all around the world."

[49:49] Or you could say, "That's not the problem you're facing here. Deal with the problem you're facing here. And get to that problem later." We took a combination of two and three, because we did say, also, that the question is jurisdiction.

[50:06] See, the original Guantanamo case was fought very narrowly at the Supreme Court, only on the question of whether the court had jurisdiction. So, our argument was: with respect to everything, the court has jurisdiction. Then, the question is, "Do they survive on the merits?" And we don't have to reach that yet.

[50:23] But, that's the constant dilemma you're in as a public interest, at least, that I faced on them, because you want to get at the broad problem. But, you are in an arena, in a forum, which is quite limiting.

[50:37] And so the task really is: How to bring a case that will survive in the courts of law, but yet be able to used in the broader arena to push for an investigation of all of these renditions.

[50:54] I guess, we have time for one or two more questions.

**Woman 3:** [50:58] Actually, we probably don't, because you can see people trying to get in for their 11:30 class. But, what I wanted to say is, "That was great."

**Professor Lobel:** [51:06] Well, thank you.

**Woman 3:** [51:07] And I know that we all really appreciated it. And the other thing that Professor Lobel had wanted to have a chance to talk folks about was a little bit more about the work of the Center For Constitutional Rights. Their role and you know what that's like. And what the opportunities there might be there. And so, he certainly has a little bit more time.

[51:25] If you don't have class, you can talk in the hall or...
Professor Lobel: [51:25] I can go outside.

Woman 3: [51:26] Or across the...

Professor Lobel: [51:28] If you want to talk about the work of the Center and what we do and how to get into public interest law, I'm happy to do that.

Woman 3: [51:33] So if that's a conversation you'd also like to continue, go across the hall. We're adjourning right now. Please join me in thanking Mr. Lobel. [applause]

Professor Lobel: [51:41] Thank you.

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