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Recommended Citation

Roger Williams University School of Law, "Newsroom: Margulies on Habeas Corpus Bill" (2010). *Life of the Law School (1993-)*. 71.

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Newsroom

Margulies on Habeas Corpus Bill

Professor Peter Margulies' analysis of Sen. Lindsey Graham's new bill on habeas corpus and detention is featured on the Lawfare national security blog.

Professor Peter Margulies analyzes Sen. Lindsey Graham's new bill on habeas corpus and detention, in a pair of in-depth postings on the new national security blog, [Lawfare: Hard National Security Choices](#). The blog is maintained by Robert Chesney of the University of Texas, Jack Goldsmith of Harvard and Benjamin Wittes of the Brookings Institution. An excerpt:

Sept. 14, 2010: Peter Margulies, author of [Law's Detour: Justice Displaced in the Bush Administration](#), who previously offered these comments on S. 3707 and future dangerousness weighs in on the bill's transfer provisions as well. He largely defends the provision but suggests clarifying language to make sure it is not read to preclude bringing detainees cleared in habeas cases to the United States for criminal trial. [...]

[Margulies argues], "Section h(1)(B) of S. 3707 appropriately limits judicial authority to order detainees' release into the United States, but creates ambiguity because it does not address whether the government can bring detainees to the United States for criminal prosecution. An earlier appropriations bill expressly preserved this option. That is the better course to remove ambiguity, promote sound counterterrorism policy, and preserve the separation of powers..."

Read the full blog [here](#).

Also, a preview of Margulies' upcoming article, "**Changing of the Guard: The Obama Administration, National Security, and the Ethics of Legal Transitions**," was previewed this week on the website of the [Journal of National Security Law & Policy](#). Margulies writes:

"Expressions of disappointment in the Obama administration's national security policies have become a familiar trope in progressive legal discourse. This article argues that both the administration and its critics underestimate the difficulty of transitions from periods of overreaching such as the immediate aftermath of 9/11, which I have analyzed in a new book, [LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION](#) (NYU Press 2010). Efforts at transition confront powerful narratives of foreign threats, the pull of patronage for national security consultants and facilities, and a legitimate fear that today's transition from overreaching will subject former officials to the armchair inquisitions of hindsight bias.

"Transitions from overreaching in the American context succeed with the same virtues as transitions abroad: inclusion, institutional repertoire, and redress. Inclusion requires consultation with stakeholders, both inside and outside the executive branch, as well as the provision of notice that ensures continuity and fairness. Institutional repertoire allows the lawyer to consult a range of sources of legal authority. For example, a government lawyer providing advice after September 11 should read customary international law in light of United Nations resolutions passed after the attacks. The lawyer may also cite customary national security law's canon of presidential actions ratified by Congress, including the World War II destroyer deal with Britain authorized by then Attorney General Robert Jackson. Redress contemplates a remedial pragmatism that blends formal and informal sanctions, as in the South African truth and reconciliation commissions.

"To illustrate the transitional legal ethics paradigm, the article analyzes the enduring presence of Guantanamo, the refusal to seek professional discipline for lawyers like John Yoo who supplied advice to the previous administration, and the proliferation of Predator drone attacks in Pakistan. By a narrow margin, the new administration has avoided emulating Yoo's negative example. However, its management of the transition from overreaching is very much a work in progress."

See original posting [here](#).