
THE ROLE OF LAWYERS IN THE GLOBAL WAR ON TERRORISM

Michael B. Mukasey

Abstract: The following article is edited remarks from Attorney General Mukasey’s Commencement address at Boston College Law School on May 23, 2008. His remarks focus on the role and ethics of lawyers in the Global War on Terrorism. Attorney General Mukasey contends that lawyers must faithfully adhere to the law, especially in the national security context where the questions are complex, the stakes are high and the pressures to do something other than adhere to the law are great. Attorney General Mukasey argues that political and public pressure on national security lawyers can lead to “cycles of timidity and aggression,” and that scrutiny of their work, given the threats facing the country following September 11, 2001, must be conducted responsibly, with an appreciation of its institutional implications.

SYMPOSIUM ARTICLES

INTRODUCTION: LAW, TORTURE, AND THE “TASK OF THE GOOD LAWYER”—MUKASEY AGONISTES

Daniel Kanstroom

Abstract: Following September 11, 2001, there was a challenge to the role of law as a regulator of military action and executive power. Government lawyers produced legal interpretations designed to authorize, legitimize, and facilitate interrogation tactics widely considered to be illegal. This
.raises a fundamental question: how should law respond to such flawed interpretation and its consequences, even if the ends might have seemed necessary or just? This Symposium examines deep tensions between competing visions of the rule of law and the role of lawyers. Spurred by a controversy over the selection of then-Attorney General Michael Mukasey as commencement speaker, the goal was to examine such basic and challenging questions. What is the optimal relationship among policy, legal interpretation, and ethics? What ethical norms should guide government lawyers? Attorney General Mukasey agreed to publish his commencement address as part of the Symposium. Participants were asked to read it and, if they wished, to use it as a touchstone for their analyses of the questions it raised.

**ON “WATERBOARDING”: LEGAL INTERPRETATION AND THE CONTINUING STRUGGLE FOR HUMAN RIGHTS**

*Daniel Kanstroom*

[pages 203–222]

**Abstract:** While some aspects of the “waterboarding” debate are largely political, the practice also implicates deeply normative underpinnings of human rights and law. Attorney General Michael Mukasey has steadfastly declined to declare waterboarding illegal or to launch an investigation into past waterboarding. His equivocations have generated anguished controversy because they raise a fundamental question: should we balance “heinousness and cruelty” against information that we “might get”? Mr. Mukasey’s approach appears to be careful lawyering. However, it portends a radical and dangerous departure from a fundamental premise of human rights law: the inherent dignity of each person. Although there is some lack of clarity about the precise definition of torture, all is not vagueness, or reliance on “circumstances,” and *post hoc* judgments. We have clear enough standards to conclude that waterboarding is and was illegal. Official legal equivocation about waterboarding preserves the potential imprimatur of legality for torture. It substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That is precisely what the rule of law (and the best lawyers) ought not to do.
ATTORNEY GENERAL MUKASEY’S DEFENSE OF IRRESPONSIBILITY

Kent Greenfield

[pages 223–230]

Abstract: Attorney General Mukasey’s commencement speech at Boston College Law School did a disservice to the institution. First, it gave a platform to one whose position on torture is contrary to the humanitarian values of the school. Second, by encouraging students to divorce their own morals from their legal reasoning and simply “say what the law is,” it reduced the practice of law to a mere exercise in research, devoid of any of the principles for which the school (and legal education in general) stands. This Article addresses two issues surrounding Attorney General Michael Mukasey’s invitation to speak at Boston College Law School. First, his invitation undercut what we teach about the role of the lawyer. Second, the speech he gave was insulting to our graduates and unhelpful to our pedagogical goals.

A TRANSATLANTIC DIVIDE ON THE BALANCE BETWEEN FUNDAMENTAL RIGHTS AND SECURITY

Lorenzo Zucca

[pages 231–240]

Abstract: The lawyers of the Bush Administration have taken criticism for giving legal advice that some commentators have argued was unethical. In prosecuting the war on terror, the reaction within the United States was different than that of many European countries. In comparing the belief systems underlying the different reactions, this Article argues that the European response, which is due in part to their longer experience with terrorism and a greater commitment to international law is the healthier one. Ethical lawyers need to use good faith in giving their advice and be prepared to justify their decisions or perhaps be criminally or civilly liable.
**GOING FORWARD: IMPROVING THE LEGAL ADVICE OF NATIONAL SECURITY LAWYERS**

*William J. Dunn*

[pages 241–274]

**Abstract:** Attorney General Mukasey was correct when he noted that national security lawyers traditionally oscillate between aggression and timidity. Debates about which extreme is “better,” however, miss the larger point; namely, that these cycles are driven by factors that the competent national security lawyer has a duty to understand. Such a thorough knowledge allows lawyers in this field to dampen the harmful oscillation and render the best legal advice possible. After identifying factors that affect the rendering of such counsel, the author makes several specific policy recommendations that will assist lawyers—who are “uniquely suited to bear this responsibility”—in this critical task.

**THE ROLE OF THE CLIENT: THE PRESIDENT’S ROLE IN GOVERNMENT LAWYERING**

*Gabriella Blum*

[pages 275–288]

**Abstract:** Discussions of whether Bush and Clinton administration lawyers have acted ethically have missed a fundamental point about the attorney-client relationship. It is the client—in this case, the government—who is ultimately responsible for making policy decisions, not the attorney. Too often, the question of what is “legal” has been substituted for what should actually be done, especially in the United States, where “legal” and “desirable” have become so intertwined. Governments should consult with attorneys, but should also be prepared to implement whatever policies they believe are “right,” and if necessary to explain any departures from what is “legal” to the public, to whom they are ultimately accountable.
THE INTERNATIONAL PROSCRIPTION AGAINST TORTURE AND THE UNITED STATES’ CATEGORICAL AND QUALIFIED RESPONSES

Christopher B. Shaw

[pages 289–304]

Abstract: Although the prohibition against torture is a *jus cogens* and proscribed by multiple international treaties and United States law, such bans did not prevent the torture of detainees in United States’ custody. For a state truly to protect people from torture, it must rely less on definitions and prohibitions and turn to leadership and policy; proscriptions by themselves cannot stop torture—only leadership and policy can. In the case of detainees held by the United States during the war on terror, presidential leadership created an environment that allowed torture, and it was not curtailed until presidential leadership stopped it.

A LAMENT FOR WHAT WAS ONCE AND YET CAN BE

Hon. William G. Young

[pages 305–330]

Abstract: In the wake of 9/11, the American people showed unwavering faith in justice, fairness, and the rule of law through their steadfast service to the legal system. Yet one of the Bush administration’s first orders in the new “war on terror” was effectively to strip the courts and the juries of their role in the “trials” of our enemies, instead creating streamlined military tribunals. This diminished role of the judiciary is unfortunately just the latest feature in a disturbing trend in the federal district courts, which has seen the process of fact-finding in open court exchanged for a reflective in-chambers review of written submissions, and the trial of actual disputes replaced with “litigation management.” Most shocking is that the diminishment of the traditional American trial has been facilitated by the judiciary’s own institutional policies. Judge William G. Young of the United States District Court for the District of Massachusetts makes a plea to all branches of government and the American people to halt the erosion of the judiciary and return to the founding principles of our democracy.
NOTES

FROZEN OBLIGATIONS: RUSSIA’S SUSPENSION OF THE CFE TREATY AS A POTENTIAL VIOLATION OF INTERNATIONAL LAW

Adam Collicelli

[pages 331–352]

Abstract: As the world witnesses renewed displays of Russian military aggression, the importance of multilateral arms treaties is illuminated. This Note argues that Russia’s suspension of the Treaty on Conventional Armed Forces in Europe was likely an illegal act, violating both the explicit terms of that treaty and the law governing international treaties, generally. The United Nations, NATO, and other world leaders must act carefully to redress this wrong without pushing Russia into a full withdrawal from this significant treaty. This Note highlights the variety of dispute resolution mechanisms available and concludes that formal public scrutiny and condemnation of Russia’s suspension are crucial to ensure that illegal treaty suspension does not become a reasonable option for Russia or any other international actors in the future.

A FRAMEWORK FOR CLOSING GUANTÁNAMO BAY

Matthew Ivey

[pages 353–376]

Abstract: The treatment of the detainees Guantánamo Bay has caused an uproar both domestically and internationally. Specifically, scholars, politicians and the international community have expressed disdain with allegations of torture and the lack of process afforded to detainees at Guantánamo. As a result, the call for the closure of the prison facility at Guantánamo Bay has seemed virtually unanimous. This Note evaluates the proposed solutions to problems associated with closing Guantánamo. The author offers elements of a comprehensive plan to close Guantánamo Bay that attempts to balances the security needs of the free world with a respect for international law and human rights.
STATE OF UNCERTAINTY: CITIZENSHIP, STATELESSNESS, AND DISCRIMINATION IN THE DOMINICAN REPUBLIC

Stacie Kosinski

Abstract: The phenomenon of statelessness is a grave and growing problem. Millions of stateless individuals are among the least visible but most vulnerable populations in the world. They are not recognized as citizens by any government and thus are forced to function at the edges of society. Without citizenship, people often have no effective legal protection, no ability to vote, and limited access to education, employment, health care, marriage and birth registration. This Note examines the root causes and overall impact of statelessness on a global scale. It also takes a closer look at the history and impact of the systematic, discriminatory denial of citizenship for Dominicans of Haitian descent in the Dominican Republic in light of the 2005 Inter-American Court of Human Rights landmark decision against the Dominican Republic affirming nationality as a human right.

WILL THE “BUSH DOCTRINE” SURVIVE ITS PROGENITOR?
AN ASSESSMENT OF JUS AD BELLUM NORMS FOR THE POST-WESTPHALIAN AGE

Christian Westra

Abstract: The election of President Barack Obama has generated enormous goodwill abroad. Many have come to anticipate a sharp departure from the foreign policy of President George W. Bush. There is no question that President Obama has broken with his predecessor in important ways, especially in terms of his emphasis on multilateralism and strategic dialogue. Nevertheless, he is unlikely to jettison two core principles associated with what has become known as the Bush Doctrine: state responsibility and anticipatory self-defense. This Note asks whether there is support for these principles under customary international law. It concludes that there is, and that the use of force provisions in the United Nations Charter—at least as originally interpreted in 1945—no longer accurately reflect international legal norms on the use of military force.
COMMENTS

ARMS AND ARMS: AN EXAMINATION OF THE LOOTING OF THE NATIONAL MUSEUM OF IRAQ

Courtney Campbell

Abstract: In April 2003, the National Museum of Iraq was extensively looted. At the time, the United States was an occupying power of Iraq and subsequently bore the brunt of considerable international press speculation that the United States was, at best, ill-prepared to protect the museum and, at worst, indifferent to the devastation wrought upon the considerable number of priceless artifacts. Beyond international dismay, however, lay the possibility that the United States was bound by both custom and treaty to protect Iraq’s cultural property. Though the damage to the artifacts may be irreparable, there are solutions available to the United States that serve to both remedy past and protect against future destruction and loss of cultural property.

CYBERWARFARE AND THE USE OF FORCE GIVING RISE TO THE RIGHT OF SELF-DEFENSE

Matthew Hoisington

Abstract: Cyberwarfare represents a novel weapon that has the potential to alter the way state and non-state actors conduct modern war. The unique nature of the threat and the ability for cyberwar practitioners to inflict injury, death, and physical destruction via cyberspace strains traditional definitions of the use of force. In order to clearly delineate the rights of the parties involved, including the right to self-defense, the international community must come to some consensus on the meaning of cyberwarfare within the existing jus ad bellum paradigm. After examining the shortcomings inherent in classifying cyberattacks according to classical notions of kinetic warfare, this Note argues that international law should afford protection for states who initiate a good-faith response to a cyberattack, especially when the attack targets critical national infrastructure.
Abstract: This Comment seeks to understand the relative legal risk facing over-the-counter derivative contracts in London and New York by analyzing the approach each city’s legal system took in deciding to regulate total return swaps. It argues that regulators on both sides of the Atlantic should devote equal attention to the implementation of financial regulation as the specific regulations themselves when it comes to limiting legal risk in the financial marketplace and maintaining a jurisdiction’s competitiveness.

Taking “Blind Shots at a Hidden Target”: Witness Anonymity in the United Kingdom

Abstract: Witness intimidation has become an increasing problem in the United Kingdom, and as a result, British courts have allowed witnesses to testify anonymously in cases where they are fearful of testifying. Recently, the House of Lords overturned a murder conviction based on anonymous witness testimony on the grounds that it rendered that trial unfair. Parliament responded by codifying the power to grant witness anonymity as it existed before the Law Lords’ decision. The use of anonymous witnesses raises questions about the right of a defendant to confront the witnesses before him or her, a right that has its history in English common law and is guaranteed by the European Convention on Human Rights. This Comment argues that the use of anonymous witness testimony violates a defendant’s right to confrontation, and proposes possible alternatives.
THE ROLE OF LAWYERS IN THE GLOBAL WAR ON TERRORISM

MICHAEL B. MUKASEY*

Abstract: The following article is edited remarks from Attorney General Mukasey’s Commencement address at Boston College Law School on May 23, 2008. His remarks focus on the role and ethics of lawyers in the Global War on Terrorism. Attorney General Mukasey contends that lawyers must faithfully adhere to the law, especially in the national security context where the questions are complex, the stakes are high and the pressures to do something other than adhere to the law are great. Attorney General Mukasey argues that political and public pressure on national security lawyers can lead to “cycles of timidity and aggression,” and that scrutiny of their work, given the threats facing the country following September 11, 2001, must be conducted responsibly, with an appreciation of its institutional implications.

Boston College Law School has a history of inviting commencement speakers who reflect diverse views on important legal and public policy issues. Of course, this has meant speakers with whom some faculty members and students have strongly disagreed—including, most recently, me. That history is consistent with what elevates American legal education above mere indoctrination and makes it worthy of being called higher education; that history includes a hearty welcome to open discourse on vital questions of the day.

Many of those questions in today’s world revolve around the terrorist threat to the civilization we all treasure. It should be no surprise that questions about how we should confront that threat have generated vigorous debate at this law school, and at others around the country. Those questions are among the most complex and consequential that a democratic government can face. How we as a nation should seek to protect ourselves; whether the steps we take are proportional to the threat and consistent with our history and principles; where the legal lines are in this new and very different conflict; and,

* The author delivered the Commencement address at Boston College Law School on May 23, 2008. Attorney General Michael B. Mukasey served as a federal district judge in the Southern District of New York from 1988 until 2006, and served as Chief Judge from 2000 until 2006. In 2007, he was confirmed as the eighty-first Attorney General of the United States.
as a matter of policy, how close to those legal lines we should go, and whether the lines themselves should be redrawn—these are questions that, understandably, trigger passionate debate.

Whether or not you pursue national security law as a vocation, and whether or not you go into other kinds of public service, all of you, as lawyers, will have a special role in that debate—as you will in many others. This is not only because, as Alexis de Tocqueville famously observed, political questions in the United States often turn into legal questions, but also because, as lawyers, you have developed a set of tools that enable you—and assumed a set of commitments that require you—to conduct dispassionate and reasoned analysis, to distinguish what is legally relevant from what is not and, most important, to distinguish legal questions from political questions.

Answering legal questions often involves a close reading and a critical analysis of text—the Constitution, statutes, judicial decisions and the like. Regrettably, that elementary point—elementary at least to those of you in this graduating class—is far too often lost in public discourse. Newspapers and commentators, for example, often discuss legal questions with barely any acknowledgement of the fact that the answers may depend on the language of, say, the Constitution or a statute. And critics of a policy decision far too rarely draw the distinction between whether that course of action is prudent as a matter of policy and whether it is permitted as a matter of law.

That is a critical distinction; indeed, it is a distinction that goes to the heart of what it means to live in a society governed by the rule of law. I don’t mean to suggest that lawyers can or should approach legal questions with no regard for their own values or moral commitments. Nor do I mean to suggest that a lawyer should express no opinion about matters of policy—although policy opinion should be expressed without disguising it in the language of the law.

A lawyer’s principal duty is to advise his client as to the best reading of the law—to define the space in which the client may legally act. If you do your job well, there will be times when you will advise clients that the law prohibits them from taking their desired course of action, or even prohibits them from doing things that are, in your view, the right thing to do. And there will be times when you will have to advise clients that the law permits them to take actions that you may find imprudent, or even wrong.

This nation’s well-proved commitment to the rule of law is what sets it apart from many other countries around the world and throughout history. If that commitment is to persist—if we are to remain, as we often say, “a nation of laws, not of men”\(^2\)—then we must insist that law matters, that the law is something other than a hollow vessel into which a client, or a policymaker, may pour his or her personal views or preferences. And whether you go into public service (as I hope many of you will) or into the private sector (as I did initially and have more than once since); whether you pursue the public interest in some other way or enter the legal academy, you, as lawyers, must do law.

You must do law even—you must do law especially—when the stakes are high and the pressures to do something else are tremendous. Nowhere are the stakes higher and the pressures greater than when the subject is national security, where, as I said earlier, the questions are as complex and as consequential as they come.

The questions are complex because, in this area, the limits of executive power are not clearly defined by the Constitution or by well-settled precedent; because the laws Congress has enacted often speak in general terms and do not provide clear answers to the novel questions we confront; and because there are few judicial markers to guide the conscientious lawyer.

The questions are consequential because the stakes are anything but academic. Lives, economic prosperity—our way of life—may hang in the balance.

As if that weren’t enough, every national security lawyer knows that decisions made in the heat of crisis may be second-guessed under radically different conditions: in the comparative calm of a hearing room or an editorial board room, with the well-known but rarely acknowledged benefit of perfect hindsight.

Consider the aftermath of the attacks on September 11, 2001. I was a federal judge in New York City that day; my courtroom was not far from Ground Zero. I can personally attest to the bravery and hard work of many people—government employees and civilians alike—in response to the attacks; but I cannot describe from any personal experience what that day, and the days that followed, were like inside the executive branch, for those with the duty and the responsibility of protecting the country.

\(^2\) Marbury v. Madison, 5 U.S. 137, 163 (1803).
But I do recall the very public scrutiny that followed in the months after the attacks. The 9/11 Commission and congressional committees, among other bodies, conducted thorough investigations into whether the attacks could have been prevented, and how our government could be better equipped to prevent future terrorist strikes.

The narratives produced by these investigations were, in many instances, stories of missed opportunities. The subtext of these narratives—in fact, at times, the text—was that risk-aversion can have grave costs. The 9/11 Commission report, for example, tells of operations against Osama bin Laden that were contemplated but not executed; of surveillance considered but not requested; of information not shared; of so-called “dots” not connected.3

Understandably, and reasonably, government lawyers were not immune from that public scrutiny. For example, lawyers in the Justice Department and in our intelligence agencies were criticized for interpreting the law as establishing a “wall” between intelligence collection and law enforcement4—an interpretation that the federal appeals court responsible for reviewing foreign intelligence surveillance would later conclude was wrong.5 Others asserted that this interpretation was too cautious, and impeded information-sharing about threats.6

Complaints about risk-averse national security lawyers were commonplace in the first few years following the September 11 attacks. About a year after the attacks, one prominent senator said:

[W]e are not living in times in which lawyers can say no to an operation just to play it safe. We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes.7

A few years later, another blue-ribbon commission made a similar observation, noting that many people in our intelligence agencies

4 See id. at 270–71.
7 Hearing Before the Select Committee on Intelligence, U.S. Senate, 107th Cong., on the Nomination of Scott W. Muller to be General Counsel to the Central Intelligence Agency, S. 107–814 (Oct. 9, 2002) (Statement of Senator Bob Graham).
claimed that their efforts to protect our country were hampered by risk-averse lawyers. In the words of that commission’s report, “quite often the cited legal impediments ended up being . . . myths that overcautious lawyers had never debunked . . . . Needless to say, such confusion about what the law actually requires can seriously hinder the Intelligence Community’s ability to be proactive and innovative.”

In short, the message sent to our national security lawyers in the aftermath of the September 11 attacks was clear; it was bipartisan; and it was all but unanimous. This message was that the legal culture in our intelligence agencies, and in the Justice Department, was too risk-averse. It needed to be more aggressive, it needed to push to the limits of the law, to give policymakers and operators the most flexibility possible to confront the existential threat of international terrorism.

As Professor Jack Goldsmith, a former Assistant Attorney General in the Justice Department who now teaches at Harvard Law School, put it in what I regard as his indispensable recent book, The Terror Presidency: “The consistent refrain from the [9/11] Commission, Congress, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse.”

As of now, we have gone seven years without another terrorist attack within the United States, and we are now hearing a rather different refrain. Today, many of the senior government lawyers who provided legal advice in support of the nation’s most important counterterrorism policies have been subjected to relentless public criticism. In some corners, one even hears suggestions—suggestions that are made in a manner that is almost breathtakingly casual—that some of these lawyers should be subject to civil or criminal liability for the advice they gave. The rhetoric of these discussions is hostile and unforgiving.

The difficulty and novelty of the legal questions these lawyers confronted is scarcely mentioned. Indeed, the vast majority of the criticism is unaccompanied by any serious legal analysis. Additionally, it is rarely acknowledged that those public servants were often working in an atmosphere of almost unimaginable pressure, without the academic luxury of endless time for debate. Equally ignored is the

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9 Id.
fact that, based on all the evidence I have seen and heard, those lawyers reached their conclusions in good faith based upon their best judgments of what the law required.

Those of you who may be students of national security issues—or those who have simply been around long enough—know that we have, as the saying goes, “seen this movie before.” For decades, we have witnessed what Professor Goldsmith calls “cycles of timidity and aggression” among political leaders, and the public, in their attitudes towards the intelligence community.11

As Professor Goldsmith explains, political leaders—and he might as well have added opinion leaders outside the government, including academics, to that list as well—in his words:

pressure the community to engage in controversial action at the edges of the law, and then fail to protect it from recriminations when things go awry. This leads the community to retrench and become risk averse, which invites complaints by politicians that the community is fecklessly timid. Intelligence excesses of the 1960s led to the Church committee reproaches and reforms of the 1970s, which led to complaints that the community had become too risk averse, which led to the aggressive behavior under William Casey in the 1980s that resulted in the Iran-Contra and related scandals, which led to another round of intelligence purges and restrictions in the 1990s that deepened the culture of risk aversion and once again led (both before and after 9/11) to complaints about excessive timidity.12

That is the political pendulum as Jack Goldsmith describes it. The pendulum is swinging back once again; indeed, it is safe to say that this latest swing began some time ago. No doubt this cycle, or something like it, is healthy in some sense. The sometimes competing imperatives to protect the nation and to safeguard our civil liberties are undoubtedly worthy of public debate and discussion. Oversight and review of our intelligence activities—by Congress, the executive branch, and, where possible, by the public—is vitally important.

But it is equally important that such scrutiny be conducted responsibly, with appreciation of its institutional implications. In evaluating the work of national security lawyers, political leaders and the

11 Id. at 163.
12 Id.
public must not forget what was asked of those lawyers in the days and months following the attacks of September 11. We cannot afford to invite another “cycle of timidity” in the intelligence community; the stakes are simply too high.

For the good lawyer who understands that there will be such scrutiny of his or her decisions in the future, there is no alternative except to do law. Hard though it may be, the good lawyer must be indifferent to the fact that he may well be criticized, whatever he may decide. It is the task of the good lawyer to tune out this white noise, to give the best reading of what the law is—and not to confuse what the law is with what that lawyer, or someone else, thinks the law ought to be.

If the lawyer’s best reading of the law permits some policy, he has a professional obligation to say that it would be lawful—even if he personally disagrees with it, or recognizes that it may one day prove politically controversial. Just as important—perhaps more important—if the lawyer believes that some policy would be unlawful, he has a professional and ethical obligation to say no—even if some people think that the policy is critical. The rule of law, and the oath every public servant takes to support and defend the Constitution, depend on it.\textsuperscript{13}

Although only a few of you are likely to become national security lawyers and face these precise dilemmas, the responsibility to do law applies to each of you. The lawyer in private practice must not confuse his client’s interest with the law; he has an obligation to say no if no is the right answer, even if the client doesn’t want to hear it. The lawyer pursuing what he believes to be the public interest must not confuse personal views on what the law ought to be for what the law is. And the lawyer in robes (as I once was, and as some of you no doubt will be), like the image of Justice blindfolded, must decide cases, as the judicial oath says, without respect to persons; that is, not based on who the parties are or what outcome may be well received in any particular quarter, but based on his or her best reading of what the law requires.\textsuperscript{14}

In becoming lawyers, you are becoming the custodians of a trust—a trust whose assets are the rule of law and the justice that results from that rule of law. Being a custodian of that trust carries with it solemn responsibilities. But it is also a great privilege because you

\textsuperscript{13} See U.S. Const., art. VI, cl. 3.

\textsuperscript{14} See 28 U.S.C. § 453.
will play a large role in the most essential debates of our times. I urge you to play it well; much hangs in the balance.
LAW, TORTURE, AND THE “TASK OF THE GOOD LAWYER” —MUKASEY AGONISTES

Daniel Kanstroom*

Abstract: Following September 11, 2001, there was a challenge to the role of law as a regulator of military action and executive power. Government lawyers produced legal interpretations designed to authorize, legitimize, and facilitate interrogation tactics widely considered to be illegal. This raises a fundamental question: how should law respond to such flawed interpretation and its consequences, even if the ends might have seemed necessary or just? This Symposium examines deep tensions between competing visions of the rule of law and the role of lawyers. Spurred by a controversy over the selection of then-Attorney General Michael Mukasey as commencement speaker, the goal was to examine such basic and challenging questions. What is the optimal relationship among policy, legal interpretation, and ethics? What ethical norms should guide government lawyers? Attorney General Mukasey agreed to publish his commencement address as part of the Symposium. Participants were asked to read it and, if they wished, to use it as a touchstone for their analyses of the questions it raised.

States face immense difficulties in modern times in protecting their communities from terrorist violence. . . . That must not, however, call into question the absolute nature of [the prohibition against torture and inhuman or degrading treatment or punishment].

—The European Court of Human Rights¹

History will not judge this kindly.

—Attorney General John Ashcroft²

“What security,” wrote Justice Robert Jackson, “is like liberty in that many are the crimes committed in its name.”³ What if the same were

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true of law? Consider this simplified scenario: John Smith is a lawyer with experience in criminal and tax matters. A former client comes to him and says that he has just lost his job. He is in absolutely desperate circumstances: he is about to lose his home; his children need new clothes; his wife is pregnant with another child. He has just realized that, in addition to everything else, he must pay $1000 with his income tax return. Smith tells the client that he does not actually have to pay the taxes and he writes a long, well-cited legal memorandum explaining why. “In fact,” says Smith, “you should file a return that claims a $1000 refund and pocket the money. Consider it a loan from the government.” “Is that legal?” asks the client, “I don’t want to do anything illegal.” “Don’t worry,” says Smith, “I am your lawyer. I know tax law in all its complexities and I am telling you, in writing, that it’s legal. Furthermore, you need to do it in order to protect your family. So it is not only legal; it’s right and necessary.”

When the client gets prosecuted, do you think the case should be dismissed? If not, should he be able to argue to a jury that he was misled so profoundly that it renders him not guilty? And what of Smith? Should he be ethically sanctioned? Prosecuted?

One immediate consequence of the September 11, 2001 attacks was a challenge to the role of law—especially international humanitarian and human rights law—as a regulator of military action and executive power. This challenge targeted both the law’s ability to punish transgressions, as well as the law’s role in conceptualizing the limits of power. Indeed, a mere three days after the attacks, Stewart Baker, the former general counsel of the National Security Agency, said, “We have judicialized more aspects of human behavior than any civilization in history, and we may have come to the limit of that.”

Soon thereafter, Colonel Charles J. Dunlap, Jr., provocatively asked whether so-called “lawfare” and the norms of international law were, “undercutting the ability of the U.S. to conduct effective military interventions?” He further questioned whether law was, “becoming a vehicle to exploit American values in ways

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that actually increase risks to civilians,” and whether law might be, “more of the problem in modern war instead of part of the solution?”

One possible solution, it turned out, was to maintain the form of legality while using complicated interpretations to achieve results that seemed consonant with the executive’s conception of security needs. These methods, along with remarkably broad assertions of executive authority, became dominant aspects of politico-legal discourse in the following seven years of the Bush administration. They supported many of the Bush administration’s tactics in the “War on Terror,” including the designation and detention of so-called unlawful or enemy combatants, the establishment of “black sites” for detention outside the United States, the military tribunals at Guantánamo Bay, unlawful rendition, and the use of harsh interrogation methods such as waterboarding.

Some, including former Vice President Dick Cheney, are unrepentant; indeed, they are proud. As he recently stated,

> When we get people who are more concerned about reading the rights to an al Qaeda terrorist than they are with protecting the United States against people who are absolutely committed to do anything they can to kill Americans, then I worry . . . . If it hadn’t been for what we did—with respect to the . . . enhanced interrogation techniques for high-value detainees . . . we would have been attacked again.  

Others, like President Barack Obama, argue that what is at stake is not only national security, but a fundamental clash of values that undergird legal and constitutional questions. As President Obama put it in March, 2009, “I think that Vice President Cheney has been at the head of a movement whose notion is somehow that we can’t reconcile our core values, our Constitution, our belief that we don’t torture, with our national security interests . . . .”

This is a powerful way to frame the dispute, but it is not completely accurate. The troubling reason why is that some lawyers in the Department of Justice’s (DOJ) Office of Legal Counsel (OLC) apparently did seek to reconcile core values and the Constitution with national security. Jay Bybee, John Yoo, and others produced a superficially plausible

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6 Id.
legal interpretation that sought to authorize, legitimize, and facilitate a range of interrogation tactics widely considered to be illegal torture.\(^9\) This raises a fundamental question: how should law respond to its own transgression by flawed interpretation and reckless advice? Put another way, how should law respond to the misuse of legal reasoning to authorize unlawful actions even if the ends might seem necessary or just?

The problem is greater than the Bybee and Yoo “torture memos.” Indeed, as I write this Introduction, the revelations come faster than ever. An April 2009 New York Times article, contradicting prior assertions of the rarity of waterboarding, reports that waterboarding was in fact used \textit{hundreds of times} on two terrorism suspects.\(^10\)

One cannot overstate the concern caused by such practices across the ideological spectrum. Professor Douglas Kmiec, former head of the OLC during the Reagan and George H.W. Bush administrations, is now calling for:

\begin{quote}
[A] Nuremberg-style citizen-conducted ethics inquiry in which all of the opinion writers—and the opinion demanders in the Pentagon and former White House—would be required to self-critique why the Nation they most assuredly would say they love is today embarrassed if not appalled by what was authorized.\(^11\)
\end{quote}

Many others demand criminal prosecutions of the lawyers. As David Cole argues, “These documents are irrefutable evidence that government officials, including [OLC] lawyers . . . set out to manipulate the law to reach repugnant, illegal results . . . .”\(^12\)

The concern is not just about torture; it is about a pattern of legal advice given by those described by Prof. Kmiec as, “either too young to have perspective, too academic to have practical wisdom, or too political to be capable of judgment.”\(^13\) It has now been widely reported that other secret memos issued to the CIA in 2003 and 2004 endorsed waterboarding and a range of other harsh techniques.\(^14\) The concern at

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\item[13] Kmiec, supra note 11.
\end{footnotes}
the CIA, as one lawyer put it, was, “whether we had enough ‘top cover.’”15 This is a critical point: many in the Bush administration, ranging from the interrogators themselves all the way up to Secretary of State Condoleezza Rice, were deeply concerned about whether the harsh measures were lawful. The resulting legal analyses were designed to put their minds at ease on that score, and to encourage them to go forward with the program.16 This required exceptionally detailed and convincing legal work, because many in the Bush administration had deep qualms. As ABC News reported, after the capture of Abu Zubaydah, George Tenet proposed to combine certain “enhanced” techniques in a single interrogation plan. Vice President Cheney reportedly approved, but Attorney General John Ashcroft argued that while the tactics may have been legal, senior advisers should not be involved in the grim details. As he rather presciently worried, “History will not judge this kindly.”17

A report by the International Committee of the Red Cross, obtained by Mark Danner,18 calls even Attorney General Ashcroft’s legal conclusions into question. It graphically describes a range of brutal—and arguably illegal—interrogation tactics undertaken by the CIA.19 The report documents not only waterboarding (described as “suffocation by water poured over a cloth placed over the nose and mouth”) but also:

- Prolonged stress standing position, naked, held with the arms extended and chained above the head.
- Beatings by use of a collar held around the detainees’ neck and used to forcefully bang the head and body against the wall.
- Beating and kicking, including slapping, punching, and kicking to the body and face.
- Confinement in a box to severely restrict movement

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15 Id.
16 See id.
• Prolonged nudity . . . last[ing] for periods ranging from several weeks to several months.
• Sleep deprivation . . . through use of forced stress positions (standing or sitting), cold water and use of repetitive loud noise or music.
• Exposure to cold temperature . . . especially via cold cells and interrogation rooms, and . . . by the use of cold water poured over the body or . . . held around the body by means of a plastic sheet to create an immersion bath with just the head out of water.
• Prolonged shackling of hands and/or feet.
• Threats of ill-treatment to the detainee and/or his family.
• Forced shaving of the head and beard.
• Deprivation/restricted provision of solid food from 3 days to 1 month after arrest.20

Precious few, if any, credible legal scholars now seek to defend the reasoning of the torture memos. Indeed, the authors may be called upon to defend their work in courts far more serious and formal than those of public and scholarly opinion.21 Criminal proceedings have begun in Spain against six former Bush administration officials, including Jay Bybee and John Yoo,22 for torturing detainees in Guantánamo Bay. Baltasar Garzón, known as a “counter-terrorism judge,” has reportedly referred the case to the chief prosecutor.23 Though the latter seems disinclined to proceed as of this writing, court documents allege that, without the legal advice given in internal administration memos, “it would have been impossible to structure a legal framework that supported what happened [in Guantánamo].”24

Further, the chair of the U.S. Senate Judiciary Committee, Patrick Leahy, has recently called for a “non-partisan commission of inquiry” to investigate, “how our detention policies and practices . . . have seriously

20 Id. at 8–9.
21 It is quite possible that similar work product still remains hidden from public scrutiny.
23 Id.
24 Id.
eroded fundamental American principles of the rule of law.”25 As Leahy piquantly noted, “We cannot turn the page unless we read the page.”26

This Symposium, which took place at Boston College Law School in October 2008, aimed to examine these deep underlying tensions between two competing visions of the rule of law and the role of lawyers. It was spurred by a controversy that had engulfed the law school over the selection of Attorney General Michael Mukasey as commencement speaker. That controversy mostly involved Attorney General Mukasey’s legal positions regarding torture and waterboarding, subjects that I have addressed in a separate article that is being re-published as part of this Symposium.27 The main goal of the Symposium was not to re-visit the controversy surrounding the selection of Attorney General Mukasey as a speaker. The hope, rather, was to engage—on the merits—some of the most basic and challenging questions of legal ethics and lawyering raised by the Attorney General:

- What is the optimal relationship among policy, legal interpretation, and ethics?
- What does (or should) it mean to be an “aggressive” lawyer in this context?
- What ethical norms should guide government lawyers in particular?
- What message should a law faculty send to our students?

Attorney General Mukasey was cordially invited to attend, with assurances that the aim of the Symposium was to engage—as dispassionately, rationally, and respectfully as possible—with the range of questions described above.28 Unfortunately, he declined. Nevertheless, he did agree to publish a version of his commencement address as part of the Symposium. Participants were asked to read it and, if they wished, to use it as a touchstone for their analyses. To help situate the reader, what follows is a very brief exegesis of what I believe are the major points raised by the Attorney General.

26 Id.
27 See generally Kanstroom, supra note 9.
28 The organizers also sought, without success, to invite speakers who would defend the OLC interpretations.
Attorney General Mukasey made two related, basic jurisprudential assertions about the nature of law. First, that there is a clear divide between morality and the law. As he put it, echoing many legal positivists: “It is the task of the good lawyer to tune out all this white noise, to give the best reading of what the law is—and not to confuse what the law is with what that lawyer, or someone else, thinks the law ought to be.”

Second, that a good lawyer can, and should, “separate what are legal questions from what are political questions.” Attorney General Mukasey’s concern in this regard was largely with unnamed critics of certain policy decisions who, he asserted, conflated legality with policy preference. As he put it, “critics of a policy decision much too rarely draw distinctions between whether a course of action is permitted as a matter of law, and whether that course of action is prudent as a matter of policy.”

This concern was supported by a dialectical historical vision. Attorney General Mukasey adopted a meta-theory, derived from Jack Goldsmith, of “cycles of timidity and aggression,” which, he said, are misunderstood by the public. As he stated, “The narratives produced by [post September 11th] investigations were, in many instances, stories of missed opportunities. The subtext of these narratives—in fact, at times, the text—was that risk-aversion can have grave costs.”

The key message about legal culture that Attorney General Mukasey believed was sent to national security lawyers in the immediate aftermath of September 11 was clear, bipartisan, and “all but unanimous.” The message was that legal culture, “was too risk-averse. It needed to be more aggressive, it needed to push to the limits of the law, to give policymakers and operators the most flexibility possible to confront the existential threat of international terrorism.” Although it is not entirely clear from his commencement address whether Attorney General Mukasey actually endorsed this message at the time, one can

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30 Id. at 180.
31 Id.
33 Mukasey, supra note 29, at 182.
34 Id. at 183.
35 Id.
discern from other speeches and writings that he did, and probably still does.36

Attorney General Mukasey went on to state that many critics simply do not appreciate the unique difficulties faced by government lawyers.37 As he said, “Today, many of the senior government lawyers who provided legal advice supporting the nation’s most important counter-terrorism policies have been subjected to relentless public criticism.” He worried that, “decisions made in the heat of crisis may be second-guessed under radically different conditions: in the comparative calm of a hearing room or an editorial board room, with the well-known but rarely acknowledged benefit of perfect hindsight.”38

Finally, Attorney General Mukasey argued that the boundaries of law are not sufficiently well-defined to provide definitive answers to certain hard questions (implicitly including waterboarding). He explained that:

The questions are complex because, in this area, the limits of executive power are not clearly defined by the Constitution or by well-settled precedent; because the laws Congress has enacted often speak in general terms and do not provide clear answers to the novel questions we confront; and because there are few judicial markers to guide the conscientious lawyer.39

Taken together, this is obviously quite a complex package to unravel. How, for example, does one reconcile the assertion that the job of the good lawyer is simply the workmanlike task of determining “what the law is,” while at the same time conceding that the constitutional boundaries are unclear, and the guiding “judicial markers” are few?40 Where, exactly, does policy end and law begin? Is there some sure way to determine when a critic is merely disagreeing with policy rather than disagreeing with the legality of a particular policy choice?

Moreover, cyclical views of history are easily manipulated to achieve whatever outcome one seeks to justify. In his well-known poetic representation of a cyclical vision, Yeats described, “[t]urning and turning in

37 This included a particular view of the lawyer/client relationship even in the government context: “A lawyer’s principal duty is to advise his client as to what the best reading of the law is—to define the space in which the client may legally act.” Mukasey, supra note 29, at 180.
38 Id. at 181.
39 Id.
40 Id.
the widening gyre.”\textsuperscript{41} A loosening, uncentered, anarchic cycle follows where “the falcon cannot hear the falconer,” and finally, “Things fall apart; the centre cannot hold.”\textsuperscript{42} In the legal realm, we must ask hard questions: what is the “centre” and how, exactly, should it “hold?” Yeats’ dark vision of a “second coming,” we should recall, was not one of glory but that of a “rough beast” that “slouches to be born.”\textsuperscript{43}

The legal and ethical questions are neither hypothetical nor trivial. The stakes remain high. The efforts of the Obama administration to abjure the “enemy combatant” label and find a way to close Guantánamo Bay signal as much the beginning of a legal and ethical discussion as the end of an era.

This Symposium took place, and appears in print, at a particularly good moment to examine all of these questions. Although we are still at war in Iraq and Afghanistan, we are perhaps able to view the threat of domestic terrorism with more calmness and clarity than was possible for the first few years after September 11. Also, after years of litigation, we finally have some definitive guidance from the Supreme Court—in the \textit{Boumediene}, \textit{Hamdan}, and \textit{Hamdi} cases—about the extent of the rule of law, the flexibility of due process, the strength of the norms of the Geneva Conventions, and the profundity, breadth, and power of the writ of habeas corpus.\textsuperscript{44} We also have considerable guidance from other courts, especially those in Europe, and much recent scholarly work.

Ultimately, what was at stake when John Yoo first put fingers to keyboard were many of the deepest values of our legal system. Thus, the assertion that the “task of the good lawyer” is to determine “what the law is” invokes deep normative and politico-legal questions.\textsuperscript{45} As Chief Judge of the Southern District of New York in 2004, then-Judge Mukasey wrote that, “We are now in a struggle with an extremism that expresses itself in the form of terror attacks, and in that we face what is probably the gravest threat to this country’s institutions, if not to its physical welfare, since the Civil War.”\textsuperscript{46}

\begin{footnotesize}
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\item W.B. Yeats, \textit{The Second Coming}, in \textit{Harold Bloom, Yeats} 318 (1972).
\item \textit{Id.}
\item \textit{Id.}
\item Mukasey, \textit{supra} note 29, at 185.
\item Mukasey, \textit{The Spirit of Liberty, supra} note 36 (emphasis added). In his conclusion, then-Judge Mukasey also wrote, “[T]he hidden message in the structure of the Constitution—is that the government it establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt.” \textit{Id.}
\end{enumerate}
\end{footnotesize}
There is no question that many shared such sentiments. As a result, they tended to defer to the executive on a wide range of issues that could require legal analysis. Many others found such assessments puzzling and troubling, both as a matter of empirical fact and because of where they could lead us. The basic political disagreement is essentially the same as that seen by Hannah Arendt in the context of totalitarianism: “The greatest danger of recognizing totalitarianism as the curse of the century would be an obsession with it to the extent of becoming blind to the numerous small and not so small evils with which the road to hell is paved.”

Attorney General Mukasey would likely view such sentiments as naïve. Clearly, if one defines al Qaeda as a graver threat to the United States than were the forces of Nazi Germany, Imperial Japan, and the former Soviet Union, then one might well countenance waterboarding. One might even thank those who were involved, and support their right to raise a “necessity defense” if prosecuted. Is this the same as interpreting waterboarding and other such practices as legal?

It was to such questions that our panelists turned their attention. The articles published herein reflect a wide range of approaches. Major Christopher Shaw, a Judge Advocate with the U.S. Marine Corps, ana-

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47 See Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts 43 (2007) (invoking Carl Schmitt to argue that, in times of emergency, the executive must curtail liberty to ensure security and the courts should not interfere.)

48 As David Cole and Jules Lobel have argued:

Our long-term security turns not on “going on offense” by locking up thousands of “suspected terrorists” who turn out to have no connection to terrorism; nor on forcing suspects to bark like dogs, urinate and defecate on themselves, and endure sexual humiliation; nor on attacking countries that have not threatened to attack us. Security rests not on exceptionalism and double standards but on a commitment to fairness, justice and the rule of law. The rule of law in no way precludes a state from defending itself from terrorists but requires that it do so within constraints. And properly understood, those constraints are assets, not obstacles.


50 Andrew Tarsy, the former New England Regional Director of the Anti-Defamation League, Dean John Hutson of Franklin Pierce Law School, former Judge Advocate General of the Navy, and Professor George Brown of Boston College Law School also participated in the Symposium, though they were not able to submit articles for publication. Additionally, Professor Allan Ryan, a former Marine Corps judge advocate and professor at Boston College Law School, served as a moderator.
lyzes the clear prohibitions against torture in both domestic and international law. He argues that a lack of leadership and clear policy allowed legal violations to occur. As he writes, “Although definitions are significant, leadership, policies and ultimately a nation’s commitment to humane treatment are primary.” More broadly, Professor Lorenzo Zucca of King’s College London suggests that, “Europe has something to teach the United States.” He writes that, “ethical lawyers should seek to strike a balance between these competing interests in good faith. They should be prepared . . . to face judicial scrutiny and . . . justify their decisions. They must believe in the rule of law at any cost.”

Professor Kent Greenfield suggests that “we live in a time in which ethical rationalization deserves close scrutiny.” In this regard, he disagreed strongly with Attorney General Mukasey. As he writes, “our problem . . . is not that we don’t understand but that we understand all too well the illegal conduct that has been perpetrated in our name.” This is not because law is simple, but because it is complex. That very complexity, however, demands that, “when gaps must be filled, there is no neutral way to fill them that avoids the need for political, philosophical, or moral justification.”

William J. Dunn, an attorney with an extensive background as an intelligence analyst, offers a wide-ranging and thoughtful analysis of the role of government lawyers. Questioning how much that role ought to change in various “cycles,” Dunn writes that the, “overarching lesson [is] to moderate governmental action through counsel at all stages . . . to eliminate the unnecessary peaks of aggression and the perilous valleys of risk-averse action.” Indeed, he concludes that, “it is the tough questions and the courageous answers that define our profession.”

U.S. District Judge William G. Young, who presided over the “shoe-bomber” case in Boston, writes passionately about the declining role of the jury in American law. As he puts it, “the justice of the many cannot

54 Id. at 227.
55 Id. at 228.
57 Id. at 272.
be left to the judgment of the few.” Although he does not conclude that the authors of the torture memos should face juries and make their best arguments there, he does decry the “massive drift away from rigorous fact-finding in open court.”

Finally, in a thoughtful and provocative article, Professor Gabriella Blum develops an occasionally complementary, but also somewhat contrary vision. She suggests that lawyers have assumed or have been given too much authority by governments. Further, she argues that, “without inquiring about the responsibility of the client receiving the legal advice, our normative and prescriptive view of government lawyering is seriously lacking.” In a sort of critical homage to Alexis de Tocqueville (albeit with a German phraseology), Professor Blum writes that in our über-legalistic culture, “if a lawyer advises her client that a policy is illegal, the client hears ‘it is evil.’ No one wants to be an evil-doer.” Upon reading this, I was reminded of Jürgen Habermas’s assertion regarding the invasion of Iraq:

There have been, since [the acceptance of the UN Charter], no more just and unjust wars, only legal or illegal ones, justified or unjustified under international law. One must bear in mind this enormous advance in the rights revolution in order to realize the radical breach that the Bush administration has wrought. . . . In the rhetoric of legitimation, there is in no ‘realistic’ redemption of ‘idealistic’ notions.

Professor Blum’s argument is not that law is irrelevant. Indeed, she notes critically how, “Bush administration lawyers . . . felt they had to justify any government action under legal terms, for fear of tying the government’s hands. By doing so, they legalized illegal actions.” Her point is not even that law should not matter or not matter much. It is out of deep respect for law that she ultimately asserts that elected government officials may sometimes decide, for reasons they believe to be good and sufficient, to violate the laws. In those rare cases, however,

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59 Id. at 315.
61 Id. at 285.
63 Blum, supra note 60, at 285.
they are not absolved of responsibility. They should, “make the decisions and face the consequences.”

**CONCLUSION**

*God, when he gave me strength, to show withal  
How slight the gift was, hung it in my hair:*

—John Milton

One of the most important purposes of law is to restrain the power and violence over which the state, as Weber argued, has a legitimate monopoly. To accomplish this, law must be both retrospective (by juries and judges) and predictive. The discipline of law is simultaneously a rhetorically constructive and an analytically de-constructive enterprise. It can be grandly eloquent and maddeningly technical as it helps to “constitute” the social order, to provide the bones and sinews around which the blood of society may flow and upon which a civilization may rest with at least a modicum of value-laden stability. Ronald Dworkin once famously described law as a sort of chain novel, written by many authors over time. Its narrative must be coherent, even as its narrators come and go. Of course, much more then mere coherence is required. The “constitution” of law is inevitably situated within a considerably less fluid system, from which it derives much of its legitimacy and against which its use and its misuse may be tested.

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64 Id. at 287.  
65 JOHN MILTON, SAMSON AGONISTES 16 (John Churton Collins ed., 1883) (1671).  
67 Metaphors abound to describe this aspect. The word “constitution” captures its essence quite simply, as John Marshall understood perfectly well when he linked that ambiguous noun to the verb “expounding.” See M’Culloch v. Maryland, 17 U.S. 316, 407 (1819).  
68 See generally RONALD DWORKIN, LAW’S EMPIRE (1986).  
69 See M’Culloch, 17 U.S. at 407. One does not necessarily have to argue for an ultimate “moral” criterion of legitimacy to recognize that social sources may make moral standards part of the law. See generally JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press 1984) (1981) (highlighting the emancipatory potential of linguistic communication, but remaining grounded in a universalist position.). Some legal positivists would accept that the law may contain moral criteria for its validity, though as an abstract matter, it perhaps need not do so. See generally JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIC APPROACH TO LEGAL THEORY (2001); H.L.A. HART, THE CONCEPT OF LAW (1961). Others might argue that morality cannot be incorporated into the law at all. See generally JOSEPH RAZ, AUTHORITY, LAW, AND MORALITY, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS
Law is also analytic: much of its function is to parse words, to elucidate and manipulate fine distinctions. This necessary, but secondary and often tedious enterprise puts obvious pressure on the grander constructive legal ideal. It is often disparaged. Indeed, the dangers of formalistic analysis, if unmoored from value-based discourse or if used to mask values, are a staple of modern legal realist thought. Too insular a deductive method risks what Felix Cohen famously called “transcendental nonsense.” It is underlying principles and policies, “practical questions of value or of positive fact,” not abstract linguistic formulations that must inform our analysis.

The ultimate problem is how far one can go in this direction without abandoning the very idea of law as an autonomous or even a semi-autonomous category of thought. The current torture debate, however, does not push this far if one sees a consonance between the legal and normative principles at issue. We can and we must maintain a richer theory of interpretation, which takes into account pre-interpretive legal traditions, social norms, and moral concepts. It is from these sub-strata that we can write the best contemporary versions of our constantly evolving legal novel. To be sure, this method, if too loosely undertaken, may render legal interpretation a rather shaky enterprise. When it

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(1996); Joseph Raz, Legal Positivism and the Sources of Law, in The Authority of Law: Essays on Law and Morality (1979). My point is simply that the best legal analysis is never a value-free enterprise, and the more transparent legal actors are about those values, the better it is for us all.


71 Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 810 (1935) (noting that the question of whether a Pennsylvania corporation can be sued in New York is not properly understood as whether a corporation can “be in two places at once”; such a question is akin to enquiring “How many angels can stand on the point of a needle?”).

72 As Cohen aptly noted,

[I]n every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in “legal problems” which can always be answered by manipulating legal concepts. . . . Corporate entity, property rights, fair value, and due process are such concepts. So too are title, contract, conspiracy, malice, [and] proximate cause. . . . Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law.

Id. at 820 (emphasis omitted from original).
comes to the role of judges, one runs the risk of being thrashed by Richard Posner as advocating rule by “enlightened despots.” 73

Attorney General Mukasey has maintained that “[r]easonable people can disagree, and have disagreed, about these matters.” 74 That may be true, depending upon which matters are at issue, but he surely would not suggest that all interpretations are equally sound. Some of his public agonies 75 seemed to derive in part from professional role tensions, though he has denied this, saying, “I wear one hat. It says attorney general of the United States. There are a number of duties under that, but as far as I’m concerned, there is no divided responsibility or divided loyalty. There is one responsibility.” 76

One need only read the mission statement of the DOJ 77 however, to see why the “one hat” model is potentially problematic. On the one hand, the agency’s role is executive and protective. But consider the statement’s very first lines: “To enforce the law and defend the interests of the United States according to the law,” and its ending, “to ensure fair and impartial administration of justice for all Americans.” Indeed, an inscription on the side of the DOJ building in Washington, D.C. states the ultimate duty still more clearly: “No free government can survive that is not based on the supremacy of the law.” This may tell us something profoundly important about how to respond to apparent criminal violations of law by U.S. agents, how to analyze legal questions regarding torture, and how to define the “task of the good lawyer.” 78

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75 As the Attorney General engagingly put it, “[I]t is my job as Attorney General to do what I believe the law requires and what is best for the country, not what makes my life easier.” Id.


77 The mission statement is as follows:

To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.


78 Mukasey, supra note 29, at 185.
ON “WATERBOARDING”: LEGAL INTERPRETATION AND THE CONTINUING STRUGGLE FOR HUMAN RIGHTS

Daniel Kanstroom*

Abstract: While some aspects of the “waterboarding” debate are largely political, the practice also implicates deeply normative underpinnings of human rights and law. Attorney General Michael Mukasey has steadfastly declined to declare waterboarding illegal or to launch an investigation into past waterboarding. His equivocations have generated anguished controversy because they raise a fundamental question: should we balance “heinousness and cruelty” against information that we “might get”? Mr. Mukasey’s approach appears to be careful lawyering. However, it portends a radical and dangerous departure from a fundamental premise of human rights law: the inherent dignity of each person. Although there is some lack of clarity about the precise definition of torture, all is not vagueness, or reliance on “circumstances,” and post hoc judgments. We have clear enough standards to conclude that waterboarding is and was illegal. Official legal equivocation about waterboarding preserves the potential imprimatur of legality for torture. It substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That is precisely what the rule of law (and the best lawyers) ought not to do.

This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its un-

[Editor’s Note: This article appeared originally in volume 29, issue 2, of the Boston College Third World Law Journal. Its publication coincided with Mr. Mukasey’s commencement address. Because of the article’s obvious affinity with this symposium, the Third World Law Journal kindly permitted us to reprint it in this issue. We gratefully acknowledge that permission and offer our thanks to Eleanor Downes, the article’s original editor.]

* Director, Boston College Law School Human Rights Program; Associate Director, Boston College Center for Human Rights and International Justice, and Clinical Professor of Law. This essay is the first part of a larger attempt to analyze the deep legal and ethical issues raised by the waterboarding debate. I am deeply grateful to Ellen Downes for encouraging me to undertake this project, and to Kent Greenfield, David Hollenbach SJ, and Zyg Plater for helpful critique.
derstanding of security. At the end of the day, they strengthen its spirit . . . .

Introduction: What is “Waterboarding”?

The selection of Attorney General Michael Mukasey as this year’s commencement speaker has prompted serious, thoughtful, respectful, and wide-spread discussions at Boston College Law School and beyond. As the Director of Boston College Law School’s Human Rights Program, I was pleased to be asked to write a short analysis of what I believe to be at stake in this debate. Although it is clearly not intended to be a complete treatment of all the complex legal issues, I hope this brief review will be of some use and may help focus future conversations.

The questions are basic: Is “waterboarding” torture? Is it “cruel” and “inhuman treatment”? Does it “shock the conscience”? If the answer to any of these is yes then what ought we to do about it? While some of the debate surely derives from political disagreements, the waterboarding questions also involve core ideas and methodologies of human rights and law.

Let us be clear about what we are discussing. Although the word, “waterboarding,” is of recent vintage, the practice is one of the oldest and most widely recognized forms of torture. This is its essence: a person is forcibly seized and restrained. He or she is then immobilized, face up, with the head tilted downward. Water is then poured into the breathing passages. The exact methods recently used by the Central Intelligence Agency (CIA) are still unknown, but likely have involved placing a cloth or plastic wrap over or in a person’s mouth.


4 See William Safire, On Language; Waterboarding, N.Y. Times, Mar. 9, 2008, (Magazine), at 16 (“If the word torture, rooted in the Latin for ‘twist,’ means anything (and it means ‘the deliberate infliction of excruciating physical or mental pain to punish or coerce’), then waterboarding is a means of torture. The predecessor terms for its various forms are water torture, water cure and water treatment.”).

then pouring the water.\textsuperscript{6} As you first think of it, the practice might seem rather mild compared to other forms of torture. But the effects are dramatic and severe. The inhalation of water causes a gag reflex, from which the victim experiences what amounts to drowning and feels that death is imminent.\textsuperscript{7}

Waterboarding is a viscerally effective, coercive interrogation technique designed to overcome the will of the individual. It causes severe physical suffering in the form of reflexive choking, gagging, and the feeling of suffocation. Indeed, if uninterrupted, waterboarding can cause death by suffocation. The victim immediately realizes this on the most basic level. By producing an experience of drowning, and eliciting a visceral panic response, it causes severe mental pain and suffering, distress, and the terror of imminent death. A medical expert on torture has testified that waterboarding “clearly can result in immediate and long-term health consequences. As the prisoner gags and chokes, the terror of imminent death is pervasive, with all of the physiologic and psychological responses expected . . . . Long term effects include panic attacks, depression and PTSD.”\textsuperscript{8}

Waterboarding has long been understood as torture, from its earliest incarnations during the Spanish Inquisition through its systematic use by the Khmer Rouge.\textsuperscript{9} It has been called torture by modern authorities ranging from the tribunals that tried Japanese war criminals in the aftermath of the Second World War to Senator John McCain, who has stated that waterboarding a detainee is torture—“no different than holding a pistol to his head and firing a blank.”\textsuperscript{10} Similarly, former Secretary of Homeland Security Tom Ridge has said, “There’s just no doubt in my mind—under any set of rules—waterboarding is torture.”\textsuperscript{11}

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\textsuperscript{6} See id.
\textsuperscript{7} See id.
\textsuperscript{9} See George Ryley Scott, The History of Torture Throughout the Ages 171–72 (2003) (describing the “torture of water” (“[s]ometimes referred to as tormento de toca”) which was used “when the racking, in itself, proved ineffectual. The victim . . . was compelled to swallow water, which was dropped slowly on a piece of silk of fine linen placed in his mouth. . . . A variation of the water torture was to cover the face with a piece of thin linen, upon which the water was poured slowly, running into the mouth and nostrils and hindering or preventing breathing almost to the point of suffocation.”); Dana Milbank, Logic Tortured, Wash. Post, Nov. 2, 2007, at A2.
\textsuperscript{11} Former Bush Official: Waterboarding is Torture, MSNBC, Jan. 18, 2008, available at http://www.msnbc.msn.com/id/22735168/. “One of America’s greatest strengths is the
The vast majority of experts in the field concur in this view—and by this I do not only mean human rights scholars and activists, among whom I am sure there is unanimity. Waterboarding is explicitly barred by the new Army Field Manual. Indeed, in a November 2007 letter to the Senate, four retired U.S. Judge Advocates General stated: “Waterboarding is inhumane, it is torture, and it is illegal. . . . [I]t is not, and never has been, a complex issue, and even to suggest otherwise does a terrible disservice to this nation. . . . This must end.”

However, CIA director, General Michael Hayden, has admitted that the CIA used waterboarding on three prisoners during 2002 and 2003. As is now well-known, the CIA had been advised by the Justice Department Office of Legal Counsel (OLC) that the practice was not illegal. We now know that certain OLC lawyers, responding to immense political pressure and engaging in shockingly poor legal technique, gave incorrect legal advice to interrogators. Depending on soft power of our value system and how we treat prisoners of war, and we don’t torture. . . . And I believe, unlike others in the administration, that waterboarding was, is—and will always be—torture. That’s a simple statement.” Id.


Letter from Donald J. Guter et al., Retired Judge Advocate General, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Nov. 2, 2007), available at http://leahy.senate.gov/press/20071111/110207RetGeneralsOnMukasey.pdf. In 2006, the Senate Judiciary Committee held hearings on the authority to prosecute terrorists. Id. The sitting Judge Advocates General of the military services were asked to respond to a series of questions regarding “the use of a wet towel and dripping water to induce the misperception of drowning (i.e., waterboarding).” Id. They unanimously and unambiguously agreed that such conduct is inhumane and illegal and would constitute a violation of international law, particularly Common Article 3 of the 1949 Geneva Conventions. Id.


See generally Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration (2007). As Jack Goldsmith reports being told by David
how one interprets the Nuremberg precedents, this could amount to what Jack Goldsmith has called “get-out-of-jail-free cards” for the interrogators.\textsuperscript{18} Perhaps that is fair. But the lawyers themselves may not escape unscathed.\textsuperscript{19}

I. Is Waterboarding Legal?

Mr. Mukasey has maintained a strikingly equivocal approach to waterboarding. He has admitted that he would view waterboarding as torture, were it done to him.\textsuperscript{20} He properly has criticized the disgraceful “Bybee Memo” of August 2002—which, among other flagrant errors, redefined the legal standard for torture as: “equivalent to the pain that would be associated with serious physical . . . injury so severe [as to cause] death, [or] organ failure. . . .”\textsuperscript{21} He called it “worse than a sin.”\textsuperscript{22} Perhaps more to the point, he said it was “a mistake” and “unnecessary.”\textsuperscript{23}

\textsuperscript{18} Id. at 97; see Report of the International Law Commission to the General Assembly, 5 U.N. GAOR Supp. (No. 12), at 11–14, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 375, U.N. Doc. A/CN.4/34 (Principle IV provides that “the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”); United States of America v. Alstötter et al. (The Justice Case) 6 L.R.T.W.C. 1 (1948) (trial of sixteen defendants, from the Reich Ministry of Justice or People’s and Special Courts, raising the issue of what responsibility judges have for the enforcement of alleged war crimes and crimes against humanity that were authorized by arguably binding laws); In re Yamashita, 327 U.S. 116–17 (1946) (recognizing the doctrine of command responsibility, under which commanding officers are liable if they exercised effective control over subordinates who engaged in torture in violation of the law of nations or knew or had reason to know of their subordinates’ unlawful conduct but failed to take reasonable measures).

\textsuperscript{19} See Press Release, Sen. Sheldon Whitehouse, Durbin and Whitehouse: Justice Department is Investigating Torture Authorization: Senate Judiciary Democrats Called for Inquiry into DOJ’s Role in Overseeing CIA’s Use of Waterboarding (Feb. 22, 2008). In February 2008, the Justice Department revealed that its internal ethics office was investigating the department’s legal approval for waterboarding by the CIA. See id.

\textsuperscript{20} Jan. 30, 2008 Hearing, supra note 3. “Would waterboarding be torture if it was done to you?” Senator Kennedy asked. “I would feel that it was,” Mr. Mukasey answered. Id.


\textsuperscript{23} Oct. 17 Nomination Hearing, supra note 22.
But he still has declined steadfastly to declare waterboarding illegal. He sometimes has adopted a sophisticated judicial posture, befitting his past role as a well-respected judge: “one should refrain from addressing difficult legal questions in the absence of concrete facts and circumstances.”\footnote{Letter from Michael B. Mukasey, Att’y Gen. of the United States, to Patrick Leahy, Chairman, S. Comm. on the Judiciary (Jan. 29, 2008) at 2, \url{http://www.usdoj.gov/ag/speeches/2008/letter-leahy-013008.pdf}; see also Nomination of Michael Mukasey to be the Attorney General of the United States: Hearing of the S. Comm. on the Judiciary, Fed. News Serv. (Lexis), Oct. 18, 2007 (“I don’t know what’s involved in the technique. If waterboarding is torture, torture is not constitutional.”).} He finds the legality of waterboarding to be a “difficult” legal question “about which reasonable minds can and do differ.”\footnote{Letter from Michael B. Mukasey to Patrick Leahy, supra note 24, at 2.} He says that “it is not an easy question” and that assessing the legality of the practice depends upon an evaluation of “circumstances.”\footnote{Id. At times, though, his tone has been more that of the executive branch and notably consequentialist: “any answer that I could give could have the effect of articulating publicly and to our adversaries the limits and the contours of generally worded laws that define the limits of a highly classified interrogation program.” Id.} 

As to the consequences of past waterboarding, Mr. Mukasey has said that because Justice Department lawyers concluded that the CIA’s use of waterboarding was legal, the department cannot investigate whether a crime had occurred.\footnote{See Justice Department Oversight: Hearing of the H. Comm. on the Judiciary, Fed. News Serv. (Lexis), Feb. 7, 2008 [hereinafter Feb. 7 Oversight Hearing].} “That,” he stated, “would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice.”\footnote{Id. He also opined, “For me to use the occasion of the disclosure that that technique was once part of the CIA program, an authorized part of the CIA program, would be for me to tell anybody who relied, justifiably, on a Justice Department opinion that not only may they no longer rely on that Justice Department opinion, but that they will now be subject to criminal investigation for having done so. That would put in question not only that opinion, but also any other opinion from the Justice Department. . . . And that’s not something that I think would be appropriate, and it’s not something I will do.” Id.} Before the Senate, Mr. Mukasey put it this way: “I start investigations out of some indication that somebody might have had an improper authorization. I have no such indication now.”\footnote{Jan. 30, 2008 Hearing, supra note 3.} But one might well ask, if the 2002 memo was “worse than a sin” and “a mistake” how can it not have been an “improper authorization?”\footnote{Id.; Oct. 17 Nomination Hearing, supra note 22.} The answer, as we shall see, is that Mr. Mukasey apparently does not believe that waterboarding necessarily was or would be illegal. He likely believes that clarity is a simplistic virtue—indeed only one among many professional virtues required of an Attorney General—and that
he has powerful ethical and institutional constraints in this matter, including OLC morale, and protection against civil lawsuits and criminal prosecutions.\footnote{See Pedro Ruz Gutierrez, Mukasey Shoring Up Morale at Main Justice, \textit{Legal Times}, Apr. 21, 2008, \textit{available} at http://www.law.com/jsp/article.jsp?id=1208774503039.} There is surely truth to this, but I do not think it is the deepest truth.

To my mind, perhaps the most interesting testimony given by Mr. Mukasey was the following rather simple exchange:

SEN. BIDEN: When you boil it all down ... it appears as though whether or not waterboarding is torture is a relative question, where it’s not a relative question whether or not you hung someone by their thumbs from, you know, or you stuck someone, you know, hung them upside down by their feet. 

ATTY GEN. MUKASEY: With respect, I don’t think that that’s what I’m saying. I don’t think I’m saying it is simply a relative issue. There is a statute under which it is a relative issue. 

[\textit{Essentially} a balancing test of the value of doing something as, against the cost of doing it.

SEN. BIDEN: When you say against the cost of doing it, do you mean the cost in—that might occur in human life if you fail to do it? Do you mean the cost—

ATTY GEN. MUKASEY: No.

SEN. BIDEN: —in terms of our sensibilities, in what we think is appropriate and inappropriate behavior as a civilized society? What do you mean?

ATTY GEN. MUKASEY: I chose—I chose the wrong word. I meant the heinousness of doing it, the cruelty of doing it balanced against the value.

SEN. BIDEN: Balanced against what value?

ATTY GEN. MUKASEY: The value of what information you might get.\footnote{Jan. 30, 2008 Hearing, \textit{supra} note 3.}

Why have Mr. Mukasey’s equivocations generated such anguished controversy, even though the practice is, according to him, not “authorized for use” in the current CIA interrogation program?\footnote{Letter from Michael B. Mukasey to Patrick Leahy, \textit{supra} note 24, at 2 (explaining that the CIA Director, Attorney General, and President would all have to approve use of a currently unauthorized technique).} The answer, I believe, is revealed by the above dialogue. Waterboarding implicates the very deepest values of our legal system. This includes a basic meth-
odological question: do we balance “heinousness and cruelty” against information that we “might get”? Or should we demand forceful and clear statements of principle about certain practices? Do we rely on the hidden judgments of OLC lawyers, on *post hoc* assessments by reviewing courts after a future detainee is waterboarded, or can we put the issue to rest once and for all?

Certain legal words, such as genocide, slavery, and torture, carry unusually deep resonance and weight. They are the embodiments, the crystallizations and, one would hope, the points of repose of once contentious but now settled political, legal, and moral disputes. Thus, much is at stake when Mr. Mukasey states that he believes there are circumstances in which waterboarding would not be torture and could be legal: “There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question.”

I respectfully, but fundamentally, disagree. On first blush, Mr. Mukasey’s approach might appear to be the prudent reasoning of a careful lawyer, steeped as we all are, in the broad realist tradition. However, to many observers, and especially to a human rights lawyer such as myself who has counseled and represented many torture victims, it appears to be something quite different. It portends a radical and dangerous departure from the fundamental premises of human rights law: the inherent dignity of each person and the basic ideal of inalienable rights. It therefore implies a deep disagreement over what Felix Cohen once called “the social ideals by which the law is to be judged.”

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35 Letter from Michael B. Mukasey to Patrick Leahy, *infra* note 24, at 2.
36 Mr. Mukasey also said that he has concluded that other current methods used by the CIA to interrogate terror suspects “comply with the law.” *Id.* at 2. Elisa Massimino, Washington Director of Human Rights First, responded, “If Attorney General Michael Mukasey thinks there are circumstances under which waterboarding is legal, that’s all the more reason Congress should not defer to his judgment on the legality of any other interrogation technique used in the CIA’s enhanced interrogation program.” Press Release, Leading Rights Group Rejects AG’s Testimony On Waterboarding, Legality of CIA Program (Jan. 30, 2008), *available at* http://www.humanrightsfirst.org/media/usls/2008/alert/411/.
II. THE ICONIC ABHORRENCE OF TORTURE

To see why this is so, we must understand that torture is a special case, iconically abhorred by our law.39 The nascent idea of the modern legal system, the rule of reason in law—and indeed the very idea of rights—were all linked to the abolition of torture.40 Rejection of torture has been accurately described as “a distinguishing feature of the common law,” admired by authorities ranging from William Blackstone to Voltaire.41 Lord Hoffmann has recently noted that “the rejection of torture by the common law has a special iconic significance as the touchstone of a humane and civilised legal system.”42

The objections to torture were always of two types. First, in the Anglo-American tradition, torture came to be seen as “‘totally repugnant to the fundamental principles of English law’” and “‘repugnant to reason, justice, and humanity.’”43 Many also abhor it on moral grounds. As Bishop Thomas G. Wenski has written, “the question of how we treat detainees” is a “profound moral question” that “has a major impact on human dignity. [P]risoner mistreatment compromises human dignity.
A respect for the dignity of every person, ally or enemy, must serve as the foundation of security, justice and peace.”

Torture was also frequently viewed as forensically unreliable, though this argument was generally linked to the fundamental condemnation. We should also, perhaps recall, in light of recent debates about the power of the U.S. president, that the abolition of torture in English history was part of the struggle to determine the limits of Royal prerogative as against the common law. This connects to yet another concern about torture: its tendency to spread; what Henry Shue has called its “metatastic tendency.” As William Holdsworth wrote, “Once torture has been acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it.”

In this broad tradition, I hold to a view about torture that is rather simple, straightforward and, I believe, apolitical and non-ideological. To paraphrase Justice Robert Jackson, if there is any fixed star in our constitutional and human rights constellation, it is that torture is illegal. There are simply no exceptions to this rule under the corpus of human rights law. There can be no balancing, no utilitarian calculus, no “torture warrants,” and no “ticking bomb” hypotheticals. We


45 See, e.g., Beccaria, supra note 41, at 57–69. There is a potential distinction between the use of torture evidence in judicial-type proceedings versus its use for security-based or investigative purposes. David Hume once described the latter practice as “a barbarous engine.” 2 David Hume, Commentaries on the Law of Scotland Respecting Crimes 324 (Edinburgh, Bell & Bradfure 1844).

46 William Holdsworth, A History of English Law 194–95 (2d ed. 1937). For a time, torture—even though illegal under the common law—was “justified by virtue of the extraordinary power of the crown which could, in times of emergency, override the common law.” Id. at 194. Coke, who initially accepted the existence of this power, later saw it as “incompatible with the liberty of the subject” and concluded “that all torture is illegal.” Id.


48 Holdsworth, supra note 46, at 194 (citation omitted).


50 Space limitations preclude complete repetition of the persuasive de-bunking of this facile trope here. As Jeremy Waldron has pointed out, among other defects,
simply do not legally torture people under any circumstances. As Jeremy Waldron writes, “We can all be persuaded to draw the line somewhere, and I say we should draw it where the law requires it, and where the human rights tradition has insisted it should be drawn.”

Fortunately, the rejection of torture, grounded in a respect for human dignity, has long been a foundational legal principle for the United States. Although U.S. statutory and constitutional law may use different phrasing than certain international legal instruments, I believe that the ultimate rule is and must be the same.

To cite just a few brief examples, Common Article 3 of the Geneva Conventions, long accepted by the United States, clearly prohibits “cruel treatment and torture” as well as “outrages upon personal dignity.” Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, which the United States has ratified, each state simply and absolutely that: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” And of course there is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States has ratified.

Waldron, supra note 43, at 1716; see also David Luban, Essay, Liberalism, Torture, and the Ticking Bomb, 91 Va. L. Rev. 1425, 1440 (2005) (“The idea is to force the liberal prohibitionist to admit that yes, even he or even she would agree to torture in at least this one situation. Once the prohibitionist admits that . . . all that is left is haggling about the price.”); Ass’n for the Prevention of Torture, Defusing the Ticking Bomb Scenario: Why We Must Say No to Torture, Always (2007).

52 Id. at 1715.
53 See Wallach, supra note 5.
The CAT not only prohibits torture but it also requires states to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,” and to “ensure that all acts of torture are offences under its criminal law.” 57

Let us pause on this point for a moment. Not only is torture definitively rejected under any circumstances, but states are affirmatively obliged to prohibit it, to punish it, and to prevent it. 58 As the former U.N. Special Rapporteur on Torture observed more than twenty years ago, “If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.” 59 To carry out the United States’ obligations under the CAT, Congress enacted the Torture Convention Implementation Act (the Torture Act) which provides that:

[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. 60

Thus, if the waterboarding, now admittedly conducted by CIA agents, was “torture” and was committed outside the United States there are very serious potential criminal consequences. 61

The prohibition against torture is also widely recognized as jus cogens (that is, a “peremptory norm”) and a “non-derogable” principle, as fundamental a rule as law can sustain. 62 It is clearly an obligation of the

57 Id. arts. 2(1), 4(1).
62 See Vienna Convention on the Law of Treaties, supra note 55, at 53; see also Restatement (Third) of the Foreign Relations Law of the United States § 102 & n.6 (1987); Erika de Wet, The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law, 15 Eur. J. Int’l L. 97, 98 (2004). This means it is a principle of international law so fundamental that no nation may ignore it or attempt to contract out of it in any way. A treaty that violates jus cogens is void. Id.
type recognized by the Nuremberg Tribunals as the “very essence,” pursuant to which “individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”\(^{63}\)

Human rights law recognizes that certain rights may be suspended by governments during a “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”\(^{64}\) But the prohibition against torture—like those against slavery and genocide—is exempted from this provision.\(^{65}\) Such actions may never be done to anyone under any circumstances. Article 2 of the CAT provides: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”\(^{66}\)

Article 15 of the CAT makes clear that statements made as a result of torture are inadmissible in any proceedings.\(^{67}\) Put simply, these principles are the clear embodiment of what many deem the most important achievement of human rights law: the crystallization of legal norms to protect the basic dignity of the individual. At base, we do not torture because:

> torture’s object is precisely not just to damage but to destroy a human being’s power to decide for himself what his loyalty and convictions permit him to do . . . to reduce its victim to a screaming animal for whom decision is no longer possible—the most profound insult to his humanity, the most profound outrage of his human rights.\(^{68}\)

As one court has noted, “the torturer has become like the pirate and slave trader before him, hostis humani generis, an enemy of all mankind.”\(^{69}\)

If an Attorney General endorses or fails to clearly condemn the use of torture, we are on the dangerous road described so well by Justice Jackson in his Korematsu dissent.\(^{70}\) The rationalization of such con-

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\(^{64}\) International Covenant on Civil and Political Rights, supra note 2, art. 4.

\(^{65}\) See id. arts. 4, 6–8 (barring derogation from prohibitions on genocide, torture, and slavery).

\(^{66}\) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 56, art. 2.

\(^{67}\) See id. art. 15 (except “against a person accused of torture as evidence that the statement was made”).


\(^{69}\) Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

\(^{70}\) See Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).
duct “to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that [it] sanctions such an order, [validates the principle which then] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

For all these reasons, Mr. Mukasey has vigorously and properly condemned torture in the abstract. This is where the complexity arises. The clarity with which torture is rejected is not matched by similar clarity in its definition. Indeed, there is a well-recognized definitional problem regarding torture, the full complexities of which are beyond the scope of this short essay. Still, all is not vagueness and reliance on “circumstances” and on post hoc judgments. If that were the case, then the abhorrence of torture would be meaningless. We have clear enough definitions for many purposes, including to conclude that waterboarding, even if perhaps not the worst of tortures, is and was clearly illegal.

III. THE INTERPRETATION DILEMMA: UNDERLYING VALUES AND THE “SHOCKING” OF CONSCIENCE

*I think it would be very difficult to be a Kantian and to have any responsibility in the government.*

Torture is formally defined by the CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession . . . .”

The Torture Act defines the term “severe mental pain or suffering” in relevant part as “the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; . . . [or] (C) the threat of imminent death . . . .”

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71 Id.
How should these standards be interpreted? The disgraceful and now repudiated outer limit of the interpretive exercise regarding torture was the so-called “Bybee Memo” of August 1, 2002. Written by John Yoo, the memo argued that torture required that “[t]he victim experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in loss of significant body function will likely result.” This interpretation was expressly reversed by a memo written by Daniel Levin on December 30, 2004, which concluded that “severe” pain under the statute is not limited to such “excruciating or agonizing” pain. But the OLC still declined to conclude that waterboarding was torture.

It is beyond the scope of this essay to consider why OLC lawyers may have acted as they did. However, as one reviews the description of waterboarding with which this essay begins, recall that the ultimate question is not only whether waterboarding is torture. It is whether it is clearly illegal. As to this, I do not think there can be any doubt.

Consider the War Crimes Act (WCA), which criminalizes “war crimes” whether they occur inside or outside the United States. From 1997 until 2006, the WCA defined “war crimes” to include grave breaches of any of the Geneva Conventions or conduct that constituted a violation of Common Article 3 of the Geneva Conventions. The Supreme Court’s Hamdan decision made clear that Common Article 3 of the Geneva Conventions apply to suspected al-Qaeda detainees, requiring that they be “treated humanely,” and prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment.” The 2006 Military Commissions Act (MCA) retroactively

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77 Bybee Memo, supra note 21, at 13; see Goldsmith, supra note 17, at 142.

78 Levin Memo, supra note 76, at 2.

79 See id. at 2 n.8. Levin further determined that the statute also prohibits certain conduct specifically intended to cause “severe physical suffering” as distinct from “severe physical pain.” Id. at 10–12. In a footnote, however, Levin maintained, that “we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” Id. at 2 n.8.


81 Id.; see Geneva Convention Relative to the Treatment of Prisoners of War, supra note 54, art. 3.

narrowed the WCA to a “grave breach” of Common Article 3.\textsuperscript{83} The category, however, still includes both torture and “cruel or inhuman treatment.”\textsuperscript{84} Indeed, under the MCA, mental harm need not be “prolonged” as required by the Torture Act, but may be “serious and non-transitory.”\textsuperscript{85}

“Cruel, inhuman or degrading” conduct that does not quite rise to the level of “torture” is also prohibited by the CAT.\textsuperscript{86} The Detainee Treatment Act of 2005 (DTA) specifically prohibited “cruel, unusual and inhuman treatment or punishment” against any individual in U.S. custody regardless of location or nationality.\textsuperscript{87} The DTA, however, states that “the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States . . . .”\textsuperscript{88}

It was in regard to this statute that Mr. Mukasey testified: “There is a statute under which it is a relative issue . . . which is a shocks-the-conscience standard, which is essentially a balancing test of the value of doing something as, against the cost of doing it.”\textsuperscript{89}

One may well differ about how far this balancing test can legitimately go. But note, first, that the shocks-the-conscience analysis only becomes necessary if one concludes that waterboarding is not necessarily

\textsuperscript{84} §6 (b)(1)(B)(d)(1)(A)–(B), 120 Stat. at 2633. The definition is essentially the same as that of the Torture Act, except that the WCA requires that the act be “for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.” See §6 (b)(1)(B)(d)(1)(A), 120 Stat. at 2633.
\textsuperscript{85} § 6(b)(2)(E), 120 Stat. at 2634–35. The MCA also authorized the potential admission of coerced testimony (but not torture evidence) in military trials. § 3(a)(1), 120 Stat. at 2607. Put simply, it is now possible that Guantánamo defendants could receive the death penalty based on evidence obtained from witnesses who were subjected to waterboarding, if it is not considered to be torture. Therefore, in that regard at least, the question of whether waterboarding is torture could have profound significance. See §3 (a)(1), 120 Stat. at 2607.
\textsuperscript{86} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 56, pmbl.
\textsuperscript{88} Id. The United States added the following to its instrument of ratification of the CAT: “The United States understands the term, ‘cruel, inhuman or degrading treatment or punishment,’ as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.” S. Treaty Doc. No. 100–20, at 15–16.
\textsuperscript{89} Jan. 30, 2008 Hearing, supra note 3.
torture. Further, we might recall that the very DTA language relied upon by Mr. Mukasey to invoke the shocks-the-conscience test was part of an amendment offered by Senator John McCain, who has specifically called waterboarding a form of torture and clearly illegal.\textsuperscript{90} The shocks-the-conscience test is one formulation of a due process standard. It is sometimes—incorrectly, in my view—cited by supporters of harsh interrogation tactics as authorizing a utilitarian balance between the nature of the conduct and the government’s interest in doing such things.\textsuperscript{91} Clearly, the test tends towards the subjective and the retrospective. But can it be, when applied to waterboarding, “essentially a balancing test of the value of doing something as, against the cost of doing it”? I do not think so. Indeed, I believe that this balancing approach is as fundamental an error as one can make in this setting because it replaces what should be primarily a “dignity-based” analysis with an impermissible and dangerously utilitarian one.\textsuperscript{92}

The shocks-the-conscience test (in this context) derives from the 1952 case of \textit{Rochin v. California}, in which the police had unsuccessfully attempted to remove suspected capsules of morphine from a suspect’s mouth.\textsuperscript{93} They later took him to a hospital and ordered doctors to pump his stomach. In his majority opinion for the Court, Justice Frank-

\textsuperscript{90} See infra note 11. Indeed, Senator McCain has taken a clear position on the relationship between the DTA standard and waterboarding:

\begin{quote}
[T]he President and his subordinates are . . . bound to comply with Geneva. That is clear to me and all who have negotiated this legislation in good faith . . . .

. . . We expect the CIA to conduct interrogations in a manner that is fully consistent not only with the Detainee Treatment Act and the War Crimes Act but with all of our obligations under Common Article 3 of the Geneva Conventions.
\end{quote}


\textsuperscript{91} See, e.g., Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). In a substantive due process analysis, a court must first determine if a statute infringes upon a fundamental right and then whether such infringement is “narrowly tailored to serve a compelling state interest.” In \textit{County of Sacramento v. Lewis}, the Court stated that “conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.” 523 U.S. 833, 834 (1998) (emphasis added). More recently, in \textit{Chavez v. Martinez}, Justice Thomas, in a plurality opinion, wrote “the need to investigate whether there had been police misconduct constituted a justifiable government interest . . . .” 538 U.S. 760, 775 (2003). However, as Justice Kennedy wrote, “[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear.” Id. at 789–90 (Kennedy, J., concurring in part and dissenting in part).


\textsuperscript{93} 342 U.S. 165, 166, 172 (1952).
furter noted that the due process question implicated “‘canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.’” The Court derived from this a resonant holding that explicitly used the prohibition against torture as its touchstone: “the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism . . . . They are methods too close to the rack and the screw to permit of constitutional differentiation.”

The *Rochin* Court also specifically recognized the role played by human dignity in its analysis: noting that its decision related to “force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.” Although there have been intimations by some justices in recent cases that a review of all the circumstances is required before a court declares a particular practice to shock-the-conscience, this is not necessary or proper as to waterboarding. The inquiry always requires a determination of what the United States has traditionally considered to be out of bounds. In short, there are—indeed, there must be—some acts that are prohibited regardless of the surrounding circumstances. Imagine if the question were whether cutting off the toes of a detainee shocks-the-conscience. Do we balance? Does it depend upon the circumstances? To be sure, none of these definitions and standards are completely clear nor generally thought to be immutable. The question is: to which principles should one turn to as interpretive guides? And, in the waterboarding context, do those principles counsel vagueness and reliance on *post hoc* judgments or prophylactic clarity? Justice Frankfurter’s reasoning appears to be vastly superior in this regard to that of John Yoo. Let us look to canons of decency and fairness, to abhorrence of torture, and to human dignity.

**Conclusion**

Official legal equivocation about waterboarding is not merely a technical matter. It is wrong and it is dangerous. It preserves the imprimatur of legality for torture and it shields the wrongful conduct of the past from proper scrutiny and judgment. Perhaps even worse, it

94 *Id.* at 169 (citing *Malinski v. New York*, 324 U.S. 401, 417 (1945)).
95 *Id.* at 172.
96 *Id.* at 174 (emphasis added).
97 See infra note 92.
substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That, in my view, is precisely what the rule of law (and the best lawyers) ought not to do.

Even if one were inclined to quibble about the precise definition of torture, surely there can be no doubt—and surely a responsible government official ought to be able to say—that waterboarding is illegal.98 As the editors of the Los Angeles Times put it: “[Mukasey’s] statements . . . set a dangerous and hypocritical standard of convenience for torturers. Such repugnant equivocation will be mimicid and distorted in dark corners around the world . . . .”99

I would never presume to interpret for others the deep values that I believe have long sustained Boston College and its law school. I certainly do not think that those values mandate or support any kind of ideological litmus test. I am completely comfortable with the general proposition that a range of ideological viewpoints among commencement speakers is a healthy and necessary practice. But, in my view, this matter of waterboarding is not an essentially political question. Nor is it an especially close call as a matter of law. It does, however, cut to the heart of the most profound legal and ethical questions of our time.

98 See Ken Gormley, Archibald Cox: Conscience of a Nation 338–58 (1997); Bilder & Vagts, supra note 38, at 693.
ATTORNEY GENERAL MUKASEY’S DEFENSE OF IRRESPONSIBILITY

KENT GREENFIELD*

Abstract: Attorney General Mukasey’s commencement speech at Boston College Law School did a disservice to the institution. First, it gave a platform to one whose position on torture is contrary to the humanitarian values of the school. Second, by encouraging students to divorce their own morals from their legal reasoning and simply “say what the law is,” it reduced the practice of law to a mere exercise in research, devoid of any of the principles for which the school (and legal education in general) stands. This Article addresses two issues surrounding Attorney General Michael Mukasey’s invitation to speak at Boston College Law School. First, his invitation undercut what we teach about the role of the lawyer. Second, the speech he gave was insulting to our graduates and unhelpful to our pedagogical goals.

As a member of the faculty, I welcome and encourage debate and discourse at Boston College Law School, both inside and outside the classroom. In furtherance of such debate, individual professors and students need not be neutral about legal controversies.1 Moreover, in celebrating debate within an institution, the institution itself need not refrain from taking a strong position.2

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1 See, e.g., An Examination of the Constitutional Amendment on Marriage Before the Subcomm. on the Constitution, Civil Rights and Property Rights, 109th Cong. (2005) (statement of Scott Fitzgibbon) (BCLS professor arguing that expanding definition of marriage to allow gay couples to marry degrades institution of marriage and family unit); Ray D. Madoff, Dog Eat Your Taxes?, N.Y. Times, July 9, 2008, at A23 (BCLS professor arguing “there should be a limit . . . on the estate tax charitable deduction” so that U.S. taxpayers are not “subsidiz[ing] the whims of the rich and fulfill[ing] their fantasies of immortality.”); John H. Garvey, State Putting Church Out of Adoption Business, Boston Globe, Mar. 14, 2006, at A15 (Dean of BCLS arguing that religious institutions that refuse to place children in homosexual households should be allowed to participate in Massachusetts adoption services).

2 See Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 60 (2006) (“The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds.”); Transcript of Oral Argument at 25, Forum for Academic & Institutional Rights, 547 U.S. 47 (No. 04-1152) (Solicitor General acknowledging that law
One reason I opposed the invitation to Attorney General Mukasey was because of what the invitation itself said about, and for, BCLS. Implicit in every invitation to be a graduation speaker is the notion that the invitee should be a role model for the graduates. There are a number of people with a wide range of views who can fit that bill. I could not, however, support the selection of Attorney General Mukasey as such a role model. I have every reason to believe that the Attorney General is a man of utmost personal integrity, and certainly his career has been exemplary. I do not, however, think that success alone, even a rise to the top of our profession, merits an invitation to speak at commencement.

At the time of his invitation, Attorney General Mukasey had become the chief apologist for the illegal and immoral interrogation practices of the Bush administration. Perhaps he believed that the duties of this office required him to play such a role. Personally, I do not think the position of Attorney General requires such ethical gymnastics, but even if it does, he could have refused the post, just as any lawyer can decline to take a case. It is not unfair to hold Attorney General Mukasey accountable for the views and practices of an administration when it was part of his job to defend those views and practices.

This is why his invitation was a mistake for this institution. One of the things I cherish about BCLS is that it stands for the notion that lawyers cannot uncouple what they do at the office from who they are as human beings and members of society. This is not to say that it is

3 See Philip Shenon, Mukasey Offers View on Waterboarding, N.Y. Times, Jan. 30, 2008, at A15 (“Attorney General Michael B. Mukasey said Tuesday that the harsh C.I.A. interrogation technique known as waterboarding was not clearly illegal, and suggested that it could be used against terrorism suspects once again if requested by the White House.”); see also At Senate Hearing, Attorney General Michael Mukasey Refuses to Say if Waterboarding is Torture, Illegal, Democracy Now, Jan. 31, 2008, http://www.democracynow.org/2008/1/31/at_senate_hearing_attorney_general_michael (last visited Feb. 8, 2009) (“[Whether waterboarding is torture] is an issue on which people of equal intelligence and equal good faith and equal vehemence have differed . . . .”).

4 See, e.g., Boston College Law School, Profile 2 (2008–2009) (quoting Dean John H. Garvey: “We teach legal skills within a context of moral values, preparing our students not only to be good lawyers, but also to lead good lives.”); id. at 3 (quoting Professor Kent Greenfield: “[T]he school and the people in it take seriously a collective commitment to using the law to achieve justice.”); Boston College Office of Marketing Communications, Boston College Law School Admissions Brochure 2 (2008–2009) (“Strike the image of the stereotypical corporate counsel from your mind. Boston College lawyers are a different breed—considerate, confident, well-rounded, respected. Above all, no matter
impossible to be a good person within an imperfect system. I simply believe that we live in a time in which ethical rationalization deserves close scrutiny. BCLS should have erred on the side of avoiding any appearance of congratulating and honoring the kind of moral distancing that we usually oppose.

Another reason that the invitation was a mistake was that a graduation should be a celebration, not a debate. Certainly we might choose to invite someone who differs from us or challenges our opinions, but it is not a violation of free speech to omit from the list of potential celebrants those who have become identified—or who have identified themselves—with policies that are antithetical to our core principles. This is a point that has been largely misunderstood in the debate over Attorney General Mukasey’s invitation. The free speech interest cut in favor of rescinding the invitation because BCLS had a right to decide who would lead us in our celebration.\(^5\) The Republican National Convention did not have to include Reverend Al Sharpton on its list of potential speakers. The NAACP is not required by free speech principles to include a white supremacist on its list of speakers at its annual convention. We did not have an obligation to invite the Bush administration’s chief apologist for torture onto our graduation dais.

A related reason why the invitation was a mistake is that graduation invitations are not only for the benefit of the schools and their graduates. They are prized opportunities for the invitees, who get the chance to address a captive audience with free media attention.\(^6\) Moreover, an

what their chosen field, BC Law graduates are prepared to succeed."); id. at 3 ([W]e place a premium on personal, moral, and spiritual growth, and on service to your community. We emphasize public service and a commitment to seeking justice as essential parts of a comprehensive legal education. Social responsibility . . . is as important to us as class rank."); Press Release, Boston College, University Names Garvey as Law School Dean (Apr. 8, 1999), available at http://www.bc.edu/bc_org/rvp/pubaf/99/garvey.html (quoting Dean John H. Garvey: “BC Law is a place for serious scholarship that also cares about educating the whole person. The BC Law faculty are committed to their students and dedicated to both scholarship and social justice.”).

\(^5\) See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (“Since all speech inherently involves choices of what to say and what to leave unsaid . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say . . . . [The] general rule, that the speaker has the right to tailor the speech, applies . . . to expressions of value, opinion, or endorsement . . . .”) (citations and internal quotations omitted).

invitation from a school like BCLS serves as a psychological and political validation for the speaker. In inviting him to address our graduation, we at BCLS extended our institutional goodwill not only to Attorney General Mukasey, but also to his office and the Bush administration’s illegal activities. If our invitation comforted him or his colleagues, or emboldened them in their efforts to subvert the law and human rights, then it was a truly unfortunate use of our institution’s fine name.

Once it became clear that the Attorney General was indeed coming, I hoped against hope that perhaps he would deliver a benign speech extolling the virtues of community service, sunscreen or calls to your mother. 7 Instead, he used the bully pulpit of our graduation to offer a substantive, deeply troubling, message.

Attorney General Mukasey went beyond the waterboarding controversy to offer a full-throated defense of those government lawyers who “provided legal advice supporting the nation’s most important counterterrorism policies” after September 11. 8 He included in his defense those Department of Justice (DOJ) attorneys who authored the infamous 2002 “Torture Memo,” which told the Bush administration that it was not bound by federal or international anti-torture law and defined torture so narrowly that it justified all but the most heinous interrogation techniques. 9

The villains in the Attorney General’s speech were opinion leaders outside the government—including academics—who have offered “relentless,” “hostile,” and “unforgiving” criticism of the Torture Memo authors and the Bush administration. 10 He said that critics had been taking advantage of “perfect hindsight” and failed to recognize the “difficulty and novelty” of the legal questions facing the government at the...
time. Attorney General Mukasey concluded that most criticisms were “unaccompanied by any serious legal analysis” and that some were “breathtakingly casual.” With a patronizing pat on our heads, he told us that we just don’t understand.

Our problem, however, is not that we don’t understand, but that we understand all too well the illegal conduct that has been perpetrated in our name. We understand that the legal arguments advanced in the Torture Memo were blatantly wrong. They were the product of shoddy research and thin analysis that failed to grapple with relevant authorities, let alone the principles that ground law and maintain its legitimacy. Rather than being the target of only “casual” critiques, the Torture Memo and others like it have been subject to withering analysis from virtually every legal scholar who has looked at them, including our own Daniel Kanstroom. Harold Koh, the Dean of Yale Law School and a former senior State Department official, referred to the Torture Memo as “perhaps the most clearly legally erroneous opinion I have ever read.” The memo was withdrawn by the very office that issued it, and the DOJ Office of Professional Responsibility is investigating whether its “legal advice . . . was consistent with the professional standards that apply to [DOJ] attorneys.”

In addition to defending overly aggressive DOJ attorneys, Attorney General Mukasey offered a second lesson for our graduates that was more subtle, but just as distressing. The task of a government lawyer, indeed any lawyer, is to “do law.” Lawyers must give a “close reading” and “critical analysis” of text, and they must “tune out [the] white noise” of criticism and second-guessing. He urged our graduates to filter out their own moral and political views when they “do law,” so they can “advise clients that the law permits them to take actions that you may find imprudent, or even wrong.” So the message

11 Id.
12 Id.
16 Mukasey, supra note 8, at 185.
17 Id.
18 Id. at 180.
of the Attorney General of the United States to our law graduates: be a technocrat. Once the law is articulated, your job is done.

John Yoo, the Torture Memo’s primary author, has defended his work by saying that “the lawyer’s job is to say ‘this is what the law says.’” Attorney General Mukasey used our graduation ceremony to defend Yoo and his cohorts with the same simplistic notion. In doing so, he implicitly held up as an example some of the worst instances of professional irresponsibility by government lawyers since the DOJ infamously lied to the Supreme Court about the need for Japanese internment during the Second World War. In the early years of the Bush administration, senior government lawyers took fairly easy legal questions—whether waterboarding is torture—answered them incorrectly using political ideology as their guide, and then avoided responsibility by saying that they were merely “doing law.”

The Attorney General did a disservice when he implied that law is a simple, straightforward, technical enterprise. Of course there are easy legal questions (which include, by the way, whether waterboarding is torture—it is), but as our students learn in the first week of law school, the most important questions are unlikely to have answers that spring, fully formed, from some text. Good lawyering does not simply require mining a range of authorities to determine the best reading of various texts (though even this minimum standard was apparently not applied in the Torture Memo). It is also necessary to acknowledge that when gaps must be filled, there is no neutral way to fill them that avoids the need for political, philosophical, or moral justification.

Of course there is always a moral or ethical side of what we do as lawyers, even when the so-called technical legal issues are straightforward. But moral, political, and ethical difficulties often increase as legal questions grow more complex. And as legal issues become less determined by some self-defining text, it grows more likely that the

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20 See Korematsu v. U.S., 584 F. Supp. 1406, 1417 (1984) (finding that “there was critical contradictory evidence known to the government and knowingly concealed from the courts” and that “the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case.”).

21 See Matthew Lippman, The Development and Drafting of the United Nations Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 17 B.C. Int’l & Comp. L. Rev. 275, 301 (1994) (interpreting Convention’s definition of torture as “acts which are reasonably likely to cause intense pain to a reasonable person as well as acts which cause severe pain to the particular victim who is subject to abuse.”).
legal question itself will turn on political, philosophical, or moral determinations.

We here at Boston College Law School understand this and try to teach our students accordingly. I would hope that anyone graduating from this fine institution would realize that “doing law” is hardly a straightforward and ethically-free task. We are not plumbers or bookkeepers. For Attorney General Mukasey to think that he could get by with the argument that “lawyers just do law” at our graduation ceremony was an insult to this faculty’s teaching and to our graduates’ understanding.

What I wish our graduates had heard from the nation’s leading attorney was the importance of personal responsibility for not only the technical part of lawyering but the moral side as well. It is sad that a graduation message by our Attorney General at this stage of our national history was essentially a call to the avoidance of personal responsibility. I respect our students enough to believe that they did not take the message to heart.
A TRANSATLANTIC DIVIDE ON THE BALANCE BETWEEN FUNDAMENTAL RIGHTS AND SECURITY

LORENZO ZUCCA*

Abstract: The lawyers of the Bush administration have taken criticism for giving legal advice that some commentators have argued was unethical. In prosecuting the war on terror, the reaction within the United States was different than that of many European countries. In comparing the belief systems underlying the different reactions, this Article argues that the European response, which is due in part to their longer experience with terrorism and a greater commitment to international law is the healthier one. Ethical lawyers need to use good faith in giving their advice and be prepared to justify their decisions or perhaps be criminally or civilly liable.

Introduction

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape till custom make it
Their perch, and not their terror.1

Angelo’s words in Shakespeare’s Measure for Measure have much the same meaning as those of Attorney General Michael Mukasey in his 2008 commencement address at Boston College Law School.2 Measure for Measure is known as a problem play, in which Shakespeare explores themes of “justice and mercy, authority and the abuse of power.”3 Angelo, to make it clear from the outset, is the villain in this story. Much like Attorney General Mukasey, he was made responsible by his country’s ruler for the strict enforcement of the laws while the ruler pre-

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1 William Shakespeare, Measure for Measure act 2, sc. 1. For an analysis of the play from a legal viewpoint, see Erika Rackley, Judging Isabella: Justice, Care and Relationships in Measure for Measure, in Shakespeare and the Law 65, 65–79 (Paul Raffield & Gary Watt eds., 2008).


3 Rackley, supra note 1, at 66.
tended to be on a diplomatic trip. Angelo decided to be tough on crime and to apply the law without any sense of “measure.”

The question presented to this symposium concerns how ethical lawyers ought to weigh the competing imperatives of national security, civil liberties, and human rights. My answer is simple: ethical lawyers should seek to strike a balance between these competing interests in good faith. They should be prepared at any point to face judicial scrutiny and present evidence to justify their decisions. They must believe in the rule of law at any cost.

There is at the moment a clear transatlantic divide on this issue. The Bush administration put security first and suspended constitutional and criminal guarantees for terrorism suspects. Contrastingly, Europe just reiterated its commitment to the rule of law, even, if not especially, in times of crisis.⁴

The two positions reflect two worldviews. One believes in unilateralism and emergency powers, while the other embraces multilateralism and the enforcement of criminal law. The former may end up compromising human rights and civil liberties, while the latter preserves those same rights and liberties. My belief is that Europe has something to teach the United States. First, a proper understanding of the rule of law necessitates a greater respect for international law. Second, deviating from the established criminal justice system does not help in the fight against terrorism. Third, we cannot compromise on our commitment to the rule of law and human rights.

Attorney General Mukasey’s rhetoric demonstrates a poor understanding of the problems at hand. His speech, to European ears, rings as tragicomic as Angelo’s. The epilogue, however, need not be as tragic, for there is much we can learn from each other. President Obama faces important challenges that he cannot solve alone. As such, the three aforementioned lessons from Europe must be taken seriously. Once they are, we will be able to address the gross violations of human rights that have occurred.

I. THE RULE OF LAW AND INTERNATIONAL LAW

The two competing worldviews can be differentiated by their perception of international law. Attorney General Mukasey’s conception of the rule of law ought to be called the rule of national law. Europe is much more inclined to take international law, and in particular inter-

national human rights law, very seriously. To be blunt, the rule of law must incorporate international law. From a European viewpoint, Attorney General Mukasey’s idea of the law is parochial and nationalistic. He proudly states that, “this nation’s well-proved commitment to the rule of law is what sets it apart from many other countries around the world and throughout history.” Under such a view, law begins and ends within the confines of the United States. There is no concern for international law, and security really means national security, as if terrorism was not a problem of global resonance.

The Attorney General’s statement to the class of 2008, that “you, as lawyers, must do law,” is reminiscent of Angelo’s “scarecrow” line. It speaks to the strict letter of the law, and stresses the responsibility of each lawyer to define the scope of what is legally permissible. Unfortunately, U.S. law, as Attorney General Mukasey acknowledges, is deeply indeterminate when it comes to issues of national security. The limits of the executive are not clearly defined by the constitution or by legal precedent. Legislation does not provide clear answers to novel questions, and judicial decisions do not abound in this area.

Within this context, the Attorney General’s command, that lawyers “must do law,” rings hollow because doing law is different from engaging in matters of policy. “Doing law” according to Attorney General Mukasey means to closely read the language of the constitution or other legislative acts. If those very acts are indeterminate, however, you can read as much as you wish without finding an answer. You will have to appeal to something else. What then? It is not policy, it is not the text, and, based on recent Executive actions, it cannot possibly be principle.

Doing law in these cases must boil down to unfettered discretion or sheer deference to power. Attorney General Mukasey’s understanding of the rule of law is comic when applied to things like the Geneva Conventions. The Attorney General’s principal client is the President, and his advice and that of his predecessors to that client with respect to the Geneva Conventions was to trash the law.

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5 Mukasey, supra note 2, at 181.
6 Id. (“A lawyer’s principal duty is to advise his client as to what the best reading of the law is—to define the space in which the client may act consistent with the law.”).
8 See generally David Cole, Justice at War: The Men and Ideas That Shaped America’s War on Terrorism (2008) (noting Attorney General Ashcroft’s position that foreign nationals are not protected by international human rights treaties and that the Geneva Conventions are “quaint” as applied to the current conflict).
The U.S. Supreme Court’s decision in *Hamdan v. Rumsfeld* expresses a deep disagreement with the Bush administration’s understanding of the rule of law. As David Cole points out, “the *Hamdan* case stands for the proposition that the rule of law—including international law—is not subservient to the will of the executive, even during wartime.” In contrast, most Europeans do not question whether international law is part of the rule of law, as there are major sanctions for its violation. If a government used torture to gather information, an individual would have a claim under Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhuman and degrading treatment. If a national court ruled in favor of a government regulation allowing torture, the individual would have the ability to challenge the domestic decision before the European Court of Human Rights. This court has, for example, already ruled that certain U.K. interrogation practices in Northern Ireland were unlawful.

Some countries have made their commitment to human rights even more explicit by incorporating the ECHR into their domestic system. The ECHR, however, is not the only standard of human rights in Europe. The European Union, through its Court of Justice (ECJ), has developed a substantive body of human rights law since the late 1960s. It did so to complement the creation of a supranational space, the European Community. Its first fundamental rights cases were decided in response to the demand of the German Constitutional Court, which was not prepared to recognize the legitimacy of the ECJ’s decisions so long as they did not display a genuine commitment to human rights (“Solange principle”). Today, the ECJ’s commitment to human rights in an age of terrorism is exemplary.

A commitment to the rule of law, including international law, sends an important message to the whole world about the values for which a society is prepared to stand. While it is necessary, however, it is

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not sufficient. The Bush administration attempted to carve out locations where the rule of law would not apply; Guantanamo Bay is the most glaring example. In *Boumediene v. Bush*, the U.S. Supreme Court made clear that such internal limitations were not justified. Guantanamo Bay is part of the United States for constitutional purposes.\(^\text{16}\) Needless to say, this interpretation of the law belongs to the more outward-looking, European, worldview. It is no coincidence that Justice Kennedy, someone who has spent many years researching at the European Court of Human Rights joined the majority opinion.\(^\text{17}\)

In conclusion, Attorney General Mukasey’s admonition, “you must do law,”\(^\text{18}\) can only make sense if the concept of law to which one subscribes is underlined by a robust and extensive conception of the rule of law that knows no internal or external limitations.

## II. The Rule of Law and the Criminal Model

The years following September 11 can be characterized with varying degrees of fear and hysteria in the United States. In contrast, after a number of terrorist attacks in London and Madrid, life resumed as usual with only a few minor changes in the legal system.\(^\text{19}\) These opposite reactions correspond to the different models on how to deal with the threat of terrorism. The United States opted for the emergency model, while Europe stuck to its criminal model of investigation.\(^\text{20}\)

Attorney General Mukasey’s rhetoric is more direct and disturbing in the second part of his speech. On eight occasions he scorns those lawyers who are risk-averse and exceedingly timid, praising instead, “aggressive lawyers who give sound, accurate legal advice.”\(^\text{21}\) Attorney General Mukasey describes the bravery of many people he personally witnessed at Ground Zero. An appeal to emotions, however, in order to create aggressive lawyers, risks playing down the faculty of reason. That reason is most essential when attempting to provide accurate legal advice.

Attorney General Mukasey’s words are akin to Angelo’s line, “we should not set up [the law] to fear the birds of prey.” In raising their voices against timid and moderate people, both men aim to raise the

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\(^{17}\) See *id.*

\(^{18}\) Mukasey, *supra* note 2, at 181.


\(^{20}\) See *id.*

\(^{21}\) Mukasey, *supra* note 2, at 182.
level of fear by suggesting that the community will perish if it does not respond aggressively. Once fear is instilled, the response to any threat is amplified. The strategies put forward are the result of collective hysteria rather than calm deliberation.

Both sides of the political spectrum have been caught up in this hysteria. To borrow Conor Gearty’s words, “[it is] depressing . . . how compliant to power liberal intellectuals can be even when they think they are being brave and radical.”

What is really depressing is to observe brilliant constitutional lawyers arguing in support of side-stepping the constitution. Their fear is so great that it outweighs the document that symbolizes the United States itself.

Europeans have reacted very differently to these recent terrorist threats, largely as a result of their long history with terrorism. Terrorist attacks in Italy, the United Kingdom, Spain, and France have been fairly regular since World War II. The United Kingdom, for example, was confronted by terrorists in Northern Ireland; Italy was plagued by right- and left-wing extremists in the 1970s; and Spain suffered numerous terrorist attacks by Basque separatists. This long history has helped shape European counter-terrorism policies in recent years.

Another important difference is that terrorism in Europe is largely a threat from within. In the United States, it is perceived as an external threat. David Cole suggests that a threat from within is like a cancer, the remedy for which is to cure the illness and preserve the host. This is not the case for an external threat, for which the correct response is to obliterate both the disease and the host that nurtured it.

A particularly interesting comparison is the United Kingdom’s response to al Qaeda following its experience with the Irish Republican Army. Decades of conflict, which brought condemnation by the European Court of Human Rights, taught the United Kingdom that terrorism should be addressed within the established criminal justice system. In other words, the rules of the game cannot be changed. It is only through meticulous gathering of information and accurate criminal investigation that terrorism can be fought. This strategy proved itself when British police caught and brought to trial the people responsible for the London bombings of July 7, 2005. Like the United Kingdom, other European states relied on their existing criminal justice systems in the wake of terrorist attacks.

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23 See Cole, supra note 19, at 71.
The fear created during the Bush administration has hindered such a response in the United States. The only way forward is to trust the institutions already in place. This includes criminal prosecution and all of the guarantees it provides for defendants. This may indeed create burdens for the government. Those burdens, however, exist for a reason, and great nations should be able to overcome them and not sidestep them by altering the laws. If the United States is able to do so, it will send a crucial message to the world: that in order to be a leader, one has to embrace the most difficult challenges.

III. Self-Defeating Rule of Law and the Fundamental Right to a Fair Trial

The Bush administration weakened and limited the rule of law by disregarding international treaties and advocating emergency powers. Having addressed the transatlantic divide regarding international law and the use of different legal models against terrorism, we can finally weigh competing imperatives of national security, human rights, and civil liberties. In order to do so, one must first distinguish between civil liberties and human rights, and then analyze each with respect to national security. The right balance is a matter of different variables; however, there is one human right that cannot possibly be lost in the balance: the right to a fair trial.

A. Human Rights and Civil Liberties

It is fairly common to distinguish between human rights and civil liberties. The latter guarantees that when the state regulates public or private life, it will respect individual freedoms. On this point the United States and Europe have divergent positions. Europe, for example, is far more restrictive of speech than the United States, especially when it expresses religious or racial hatred. The reasons for this divergence are a matter of history and local preference. European history shows that racial and religious hatred can become contagious and extremely dangerous, whereas the United States believes that free speech is the essential ingredient of democracy.

Human rights are not about how the state can regulate certain human activities; they are about how people should be treated. Generally, we say that humans should be treated with dignity. Although many disagree on a definition of dignity, it is not difficult to identify violations. Without providing a comprehensive list of human rights, one can intuitively say that they are important and therefore weigh heavily in the balance with national security and civil liberties.
Thus, while both civil liberties and human rights are very important, only human rights are universal and absolute, while civil liberties are relative and can be regulated. The way a state protects or curtails human rights and civil liberties sends a powerful message to other countries about the values for which it stands. It is in this context that it is possible to weigh national security vis-à-vis human rights and civil liberties.

B. National Security vs. Human Rights and Civil Liberties

Attorney General Mukasey states that issues of national security are critically important, explaining, “Lives, economic prosperity—our way of life—may hang in the balance.” While this may be so, information about threats to national security is often kept secret, making it difficult for the ethical lawyer to accurately weigh the competing imperatives of national security and civil liberties.

There are two principles that an ethical lawyer must follow in balancing the competing imperatives. First, the good faith requirement is the *conditio sine qua non* of any legal advice. Without it, the advice of a lawyer is at best unprofessional, and at worst criminal. When acting in good faith, lawyers can recommend actions that at first may seem objectionable from a legal and moral viewpoint. For example, some lawyers would—in good faith—prioritize national security in a way that restricts civil liberties.

The second principle is that the rule of law cannot be ignored, even in good faith. In other words, one cannot deny the most fundamental requirement of any legal system: the right to a fair trial. This does not mean that courts will automatically conclude that human rights should be prioritized over national security. It simply means that such a decision, made by the government, must be examined by a court of justice. When this is the case, the government and the lawyers who advised the government will have to produce the evidence that led them to reach that decision. It may well be that the decision is fully justified, in which case the individual petitioner will have to accept that in certain circumstances national security does trump human rights and civil liberties. In many other circumstances, however, it will be hard to justify such a decision, and it may well be that legal advice was given in bad faith.


25 *See generally* Kadi, 2008 ECJ EUR-Lex LEXIS 1954 (holding in part that the ECJ will itself review decisions for violations of human rights).
The idea is that the balance between national security and civil liberties is the prerogative of the government, which must have some leeway as only it has the benefit of intelligence. If we are serious about civil liberties, we have to accept that they might be limited on grounds of national security. What we cannot accept is when the government limits those liberties on the basis of information that can never be scrutinized in a courtroom. Even if the government has a reason to limit civil liberties, it cannot possibly disregard the right to a fair trial, according to which the government has to present evidence to justify such restrictions. If it cannot provide such evidence, it has acted beyond its powers and should be held responsible for its unlawful restriction of human rights.26

Conclusion

Attorney General Mukasey acknowledges that criminal responsibility is a spectre looming over the Bush administration, stating, “one even hears suggestions—suggestions that are made in a manner that is almost breathtakingly casual—that some of these lawyers should be subject to civil or criminal liability for the advice they gave.”27 Since President Bush has left office, the question of civil or criminal liability remains a very important one. It is deeply ironic that Attorney General Mukasey condemns those who want law to take its normal course. He implored good lawyers to be aggressive. Accordingly, if they believe that major breaches of the law were carried out, then they should argue for serious punishment.

Legal advice is unprofessional when it justifies the violation of legitimate individual interests protected by legal rights. In such cases, the government should redress the situation and pay damages. Furthermore, legal advice is criminal when legitimate individual interests protected by human rights are unjustifiably violated. In these cases, lawyers and officials who justified those practices should be found criminally responsible.

Let me return to Angelo, who applied the law as strictly as possible in order to combat sexual decadence in his city, only to fall himself into sexual temptation. Can we reasonably argue that his enforcement of the law was done in good faith? I believe that his behavior shows that it was not, and as such, he should be held responsible for the evils im-

27 Mukasey, supra note 2, at 183.
posed on other people. *Mutatis mutandis*, is it possible to justify an administration that breaches the law while pretending to uphold it? The answer is no. As lawyers you must do law, indeed. And you must be aware that if you breach the law and human rights you might be civilly and criminally responsible.
GOING FORWARD: IMPROVING THE LEGAL ADVICE OF NATIONAL SECURITY LAWYERS

William J. Dunn*

Abstract: Attorney General Mukasey was correct when he noted that national security lawyers traditionally oscillate between aggression and timidity. Debates about which extreme is “better,” however, miss the larger point; namely, that these cycles are driven by factors that the competent national security lawyer has a duty to understand. Such a thorough knowledge allows lawyers in this field to dampen the harmful oscillation and render the best legal advice possible. After identifying factors that affect the rendering of such counsel, the author makes several specific policy recommendations that will assist lawyers—who are “uniquely suited to bear this responsibility”—in this critical task.

Introduction

The commencement remarks of Attorney General Michael Mukasey at Boston College Law School stirred debate about the proper role of a government lawyer in providing legal advice regarding complex, challenging, and gravely important issues of national security.1 Attorney General Mukasey provided his vision of how lawyers should “do law” in this environment.2 The premise underlying his vision is that lawyers partake in and contribute to “cycles of timidity and aggression,” where the national security community oscillates between periods of controversial, aggressive energy and risk-averse retrenchment.3 The lesson drawn by the Attorney General and the advice he imparted on

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1 See, e.g., Peter Schworm, Some at BC Seek to Uninvite Mukasey from Commencement, Boston Globe, Mar. 23, 2008, at B5.
the graduating class is that the threat posed by terrorism today raises
the stakes too high for national security lawyers to fall back into the role
of risk-averse and obstructionist actors.4

The Attorney General provides a valid lesson to aspiring lawyers. Lawyers in all capacities must counsel clients, and the indispensable in-
gredient of sound counsel is the ability to render a judgment that not
only sets out, but seeks to resolve the balance between the costs and
benefits of a particular action.5 A lawyer who advises a client solely based
on a worst case scenario does not achieve this balance. In the context of
national security issues, the failure to provide sound counsel leads un-
necessarily to constraints on governmental actors in the pursuit of le-
gitimate and necessary aims.6

These constraints carry costs, as demonstrated by the tragically
flawed legal opinions rendered by the Federal Bureau of Investigation’s
(FBI) National Security Law Unit. In these opinions, FBI lawyers pre-
vented an investigation into Khalid al-Mihdhar by relying on a fictional
legal wall between intelligence and criminal agencies that purportedly
did not allow the sharing of information.7 Mihdhar had connections
with the terrorist bombings of the U.S. embassies in Africa and the at-
tack against the U.S.S. Cole.8 He later assisted in the hijacking of
American Airlines Flight 77 that was flown into the Pentagon.9

The problem with the Attorney General’s analysis lies not with his
description of the proper role of a lawyer as counselor, or even his con-
clusion that lawyers cannot recoil in the face of public scrutiny or legal
uncertainty into an obstructionist, ultra-conservative position regarding
national security law. The Attorney General errs by not looking criti-
cally at both the crests and troughs of the “cycles of timidity and aggres-
sion.”10 More specifically, the Attorney General myopically focuses on
the reactive, dependent side of that historical pendulum without con-
sidering the equally—if not more—important lessons that must be
drawn from the independent, causation side of governmental over-

4 See generally Mukasey, supra note 2.
5 See Lorie M. Graham, Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Le-
6 See Goldsmith, supra note 3, at 163.
7 See The 9/11 Commission Report, Final Report of the National Commission on
8 Id. at 151.
9 Id. at 231–40.
10 In his remarks, the Attorney General focuses almost exclusively on the risk-averse
side of the “pendulum.” See Mukasey, supra note 2, at 184.
reaching.\textsuperscript{11} He errs because he sees the retrenchment of the intelligence community and presumably the growth of risk-averse counsel as a choice, rather than an atmosphere forced upon them by a public seeking to right a listing governmental vessel and to recapture rights ceded to claims of necessity.\textsuperscript{12}

When considering both sides of this cycle together, governmental overreaching to achieve temporal objectives reveals itself as shortsighted. By overreaching, the government may address a risk it perceives to be genuine.\textsuperscript{13} If it is accomplished, however, through the use of illegal or unduly aggressive means, the resulting public backlash may not only strip away the excess but also incapacitate the agency or agent.\textsuperscript{14} In that resulting anemic atmosphere, national security threats continue, but the government is less capable of addressing them.\textsuperscript{15} As a result, by taking a comprehensive view of this cycle of action and reac-

\textsuperscript{11} “We cannot afford to invite another ‘cycle of timidity’ in the intelligence community; the stakes are simply too high.” \textit{Id.} at 185.

\textsuperscript{12} In fact, the Attorney General advises that a good lawyer should “tune out all this white noise” and does not address the fact that the public, in response to egregious overreaching asserts its constitutional voice through demands on its representatives. \textit{Id.} at 185.

\textsuperscript{13} Furthermore, history often demonstrates that such risks were not as dire as perceived. “After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.” William J. Brennan, Jr., \textit{The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis}, 18 Isr. Y.B. Hum. Rts. 11, 11 (1988). Some noteworthy examples of perceived risks that, with the benefit of hindsight, may be viewed as overreactions include Andrew Jackson’s suspension of habeas corpus and the arrest of Federal District Judge Dominick Hall after the Battle of New Orleans, President Abraham Lincoln’s suspension of habeas corpus on April 27, 1861, despite little actual threat to Washington D.C., and the now infamous internment of Japanese-Americans after Pearl Harbor where the government argued, among other reasons, that the Japanese-Americans were sending signals to Japanese submarines. See Matthew Warshauer, Andrew Jackson and the Politics of Martial Law 35–36 (2006) (describing circumstances surrounding the arrest of Judge Hall); Malick W. Ghachem & Daniel Gordon, \textit{From Emergency Law to Legal Process: Herbert Wechsler and the Second World War}, 40 Suff. U. L. Rev. 333, 340 (2007) (discussing military justifications for internment of Japanese-Americans); David Greenberg, \textit{Lincoln’s Crackdown}, SLATE, Nov. 30, 2001, http://www.slate.com/id/2059132 (detailing Abraham Lincoln’s suspension of habeas corpus).

\textsuperscript{14} See Goldsmith, \textit{supra} note 3, at 163. The risk-averse nature of legal advice criticized by the 9/11 Commission was, in many respects, a reaction to the aggressive posturing of William J. Casey—lawyer and President Ronald Reagan’s first Director of the CIA—who went so far as to literally move the Office of the General Counsel for the CIA outside of the headquarters. He followed up this symbolic move with a philosophical and practical shift in President Carter’s anemic intelligence policy. See Dorian D. Greene, \textit{Ethical Dilemmas Confronting Intelligence Agency Counsel}, 2 Tulsa J. Comp. & Int’l L. 91, 105–06 (1994).

\textsuperscript{15} See Goldsmith, \textit{supra} note 3, at 163–64.
tion, governmental overreaching leads in the long run to periods of less security.\footnote{See Peter Margulies, Risk, Deliberation, and Professional Responsibility, 1 J. Nat’l Sec. L. & Pol’y 357, 369 (2005).}

While overreaching is correctly criticized on both national security and civil liberties grounds, this must not translate into a similar error of wholesale criticism of aggressive action. Instead, such criticism must validate the Attorney General’s point regarding the need to avoid obstructionist counsel that would hinder the government’s ability to neutralize threats to national and public safety. The September 11, 2001 terrorist attacks are evidence of the very real security threats that this nation faces. The legal landscape that governs many of the issues relative to national security is complex, and those issues arise during moments of great stress and much uncertainty, often with incomplete information. Those who promote an inflexible view on civil liberties, and who would promote them at all costs over security needs, are just as dangerously wrong on this topic as those who espouse deference to unchecked executive power.

The overarching lesson, therefore, is not simply to avoid trenchment into a system of poor counsel; it is to moderate governmental action through counsel at all stages of the historical cycle to eliminate the unnecessary peaks of aggression and the perilous valleys of risk-averse action.\footnote{See Margulies, supra note 16, at 360 (describing the government lawyer’s role in overreaching).} Such counsel considers and balances the broader values at stake. It looks to the law as written to determine the full scope of legally permissible action, but it understands holistically the other constitutional, institutional, and values-based limits that exist and apply.\footnote{As Lorie Graham argues, a lawyer must not be simply an “able advocate,” but also a “responsible advisor” who “considers the legal, moral, economic, social and political factors of the situations.” Graham, supra note 5, at 43–44.} It also considers the effect of such counsel beyond the urgencies of the moment and views the needs of national security as a constant imperative, fully served only through the avoidance of the backlash and entrenchment that result from governmental overreaching.\footnote{This perspective of the need for moderation in policy is analogous to Aristotle’s writing on ethics where he concludes that “virtue is a mean in the sense that it aims at the median.” Aristotle, Nicomachean Ethics 42–43 (Martin Ostwald trans., 1962) (“[B]ad men have many ways, good men but one.”). Though legal decisions in many ways remains binary—there is a right and a wrong for most actions—a general ethical approach where the decision maker aspires to experience specific emotions “at the right time, toward the right objects, towards the right people, for the right reason, and in the right manner,”}
This presents a difficult task because law is written in universal terms, and national security questions push the envelope of exceptions in the most complex, ambiguous, and dangerous situations. Additionally, recognition that these difficult issues must be considered and judged with respect to a long-term, historical focus does not alleviate the challenges faced by those making real-time decisions. To that end, universal, necessary premises provide little practical assistance in this area. A dialectic, however, on the pragmatic aspects of the balance that an ethical lawyer must address when facing a choice between national security imperatives and civil liberties begins with a reasoned investigation into these issues on which generalizations may soundly rest. Lawyers, by training, skill, access, and rules of professional conduct, are uniquely situated to bear this responsibility. The sections that follow cannot address all such factors, but they seek to begin the dialectic and reasoned investigation by addressing the key elements that affect the rendering of sound counsel. This Article concludes with suggestions on how to implement practical and pragmatic solutions for the problems facing the national security community.

I. FACTORS THAT AFFECT COUNSEL ON NATIONAL SECURITY LAW MATTERS

Extolling an imperative for national security lawyers to provide sound, holistic counsel does not suggest that those who fail in this regard do so for lack of good faith. Instead, those failures are often the result of systemic, institutional, and process factors that impede the application of sound judgment. In no area of law are such factors more prevalent than in national security law, where information and time provides a useful framework to handle these difficult questions. See id. at 43; Theodore P. Seto, The Morality of Terrorism, 35 Loy. L.A. L. Rev. 1227, 1248 (2002) (recognizing Aristotle’s contribution to ethics with regard to terrorism, but stating that it provides little in the form of practical assistance once a terrorist is caught).

20 See Aristotle, supra note 19, at 141 (“[A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms.”).

21 See Graham, supra note 5, at 48 (citing philosopher Amelie Oksenberg Rorty).

22 See id.

23 See id. The value of such ethical standards is best described by Michael Ignatieff, who writes, “Ethics matter, not just to constrain the means we use, but to define the identity we are defending and to name the evil we are facing.” Michael Ignatieff, The Lesser Evil 167 (2004).

24 See generally Louis D. Brandeis, Business—A Profession 313–27 (1914) (noting that legal training leads to the development of judgment); James B. Comey, Intelligence Under the Law, 10 Green Bag 439 (2007) (discussing legal skills and their relevance to working in the intelligence community).
may be in short supply, while stress and responsibility are abundant. Likewise—and for the same reasons—in few areas of law are such decisions more important.\textsuperscript{25}

\textbf{A. Slowing Decisional Velocities}

On critical issues of national security, lawyers who must provide counsel on key aspects of governmental action participate in a decision-making process similar to that which occurs in a crisis.\textsuperscript{26} Again, lawyers must overcome barriers to effective decision-making, such as incomplete information, unreliable predictions about the consequences of various courses of action, and a lack of fixed criterion upon which an option may be tested.\textsuperscript{27}

Every crisis includes three driving factors or “velocities” that shape the decision-making process.\textsuperscript{28} They include the velocity of events, the velocity of response, and the velocity of assessment and decision.\textsuperscript{29} The first requires a factual understanding of the events that have occurred, the steps, progression, and speed of the events that are unfolding, and a conclusion as to what events are considered unacceptable. The second velocity is shaped by the possible responses, the factors affecting those responses, and the amount of time provided to respond before unacceptable events occur. The third velocity is both the most critical and the most dependent on the other two, because the time allocated to reach a decision is shaped by the understanding and management of the first two velocities.\textsuperscript{30}

Actors in this process must seek to identify, isolate, and decelerate the first two velocities to the greatest extent possible. This process reduces the need to reach a decision before sufficient information is gathered, options are explored, and deliberation occurs.\textsuperscript{31} Where the first two velocities are not understood or managed, the velocity of decision unduly accelerates and results in rushed judgment.


\textsuperscript{28} See Keegan, \textit{supra} note 25, at 348–49.

\textsuperscript{29} See id.

\textsuperscript{30} See id.

\textsuperscript{31} See id. at 349.
One famous example of applying a rational, multi-pronged approach to decision-making occurred during the Cuban Missile Crisis. On October 14, 1962, a U.S. U-2 reconnaissance aircraft revealed that Soviet medium-range ballistics missile sites were being built in Cuba. President John F. Kennedy learned of this development two days later, and immediately organized a group of advisors termed the Executive Committee of the National Security Council (ExComm). President Kennedy defined the outer limits of the first velocity by determining that Soviet nuclear armed ballistic missiles in Cuba would not be acceptable, but provided ExComm the freedom to deliberate openly on response options and to advise suggested strategies by consensus. Despite a vociferous opinion by the military advisors, including the entire Joint Chiefs of Staff, for a comprehensive military response, ExComm spent the first day gathering facts about the threat.

Marshall Carter, Deputy Director of the Central Intelligence Agency (CIA), helped define the second velocity by noting that the Soviet missiles could be fully operational within two weeks, thus marking the outermost boundary for a response. Deliberations continued, each side drawing up detailed plans for action and vetting those plans against the others. Government lawyers played an integral role in these deliberations, creatively interpreting international law to provide the flexibility to institute a quarantine against Cuba. This option proved valuable, since it avoided using the term “blockade,” an action that, under international law, could be considered an act of war. The President finally approved the quarantine on October 21, 1962, a decision that many conclude defused a potentially catastrophic emergency.

This approach to decision-making in the face of dire threats to national security is applicable to a lawyer’s efforts to provide sound counsel. The same three velocities exist in and affect every request for le-
gal advice. Where the velocities of events and the need for a response are identified and understood, the velocity of decision may be assessed and addressed with maximum allowance for factual review, deliberation, consideration, and creativity. This may still result in decisions rendered without the full benefit of time and complete information, but this organizational plan provides a framework that seeks to manage these factors and attempts to avoid any unnecessary acceleration of the decision-making process.

B. Systemic Biases

Axiomatic to any attempt at thoughtful and well-considered counsel is the need for a true balancing of imperatives. The famous Middle Eastern scholar and jurist Ibn Khaldun wrote about how systemic bias affects the standard of evidence required to accept particular claims. As used in this context, a systemic bias is an inherent tendency to favor a particular outcome by raising or lowering the standard of evidence required to support that claim. Khaldun wrote that the result of such systemic biases is an intrusion upon accurate historical analysis because the conclusions drawn are not based upon a rational and objective weighing of facts. Instead, a thumb is placed on one side of the scale.

Though Khaldun looked at this problem through a macro, historical lens, he identified a problem that affects all balancing tests—namely the predisposition of a decision maker to value one side of an argument or some contributing claims more than others. In the context of national security law, the systemic bias is held by advocates on both

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41 See Keegan, supra note 25, at 348.
42 See Margulies, supra note 16, at 371.
43 See Keegan, supra note 25, at 348–49 (“Pace is, indeed, the crux.”).
45 See Khaldun, supra note 44, at 24–26, 35–39.
46 See id.
47 See id. Also integral to Khaldun’s criticism is the reliance on transmitters—or what could be considered unreliable secondary sources today—to draw historical lessons without regard to the factual inaccuracy inherent to such a process. Id. at 35–36.
48 See id.; see also Matthew J. Festa, Applying a Usable Past: The Use of History in Law, 38 Seton Hall L. Rev. 479, 484 (2008) (discussing history and law’s mutual goals of establishing facts in order to provide a workable understanding of the truth).
sides of the debate. As Aristotle wrote, “people’s characters take their bias from the steady direction of their activities.”

1. The War Imperative

Through the eyes of an intelligence analyst or policymaker, threats are everywhere. Potential threats appear in shopping malls and on trains, and they color the vision of commercial aircraft taking off near vacant, unguarded lots and of tankers meandering their way through city harbors. Threats come through message traffic submitted by attaché officers, valid and false informants looking for a steady stream of money, collection assets that capture images or signals, and from analytical models that seek to predict action. Not only do intelligence analysts and policymakers live in this atmosphere of constant threats, but the burden of responsibility for eliminating them sharpens their importance and urgency.

Governmental actors at all levels in this atmosphere are susceptible to a systemic bias that is unduly deferential to a “war imperative,” with the term “war” broadly including any military action taken to protect

49 There may even be a psychological bias in favor of hawkish or aggressive behavior that supports the adoption of a war imperative. See Daniel Kahneman & Jonathan Renshon, Why Hawks Win, FOREIGN POL’Y, Jan. 1, 2007, at 34. See generally DOMINIC D. P. JOHN-  

50 Graham, supra note 5, at 47.


52 Intelligence analysts are inundated with raw information. It must be noted, however, that information is not intelligence. Intelligence requires a further step, where analytical methods, corroboration, and experience are brought to bear to shape that information into usable and accurate judgments. Bruce Berkowitz, The Big Difference Between Intelligence and Evidence, WASH. POST, Feb. 2, 2003, at B1, B5.

53 See PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY 87–90, 114 (2003). These threats are not fully known and may not be exaggerated. The U.S. State Department maintains a list of over 100,000 names of persons potentially linked to terrorists and before the invasion of Afghanistan, al Qaeda may have trained over 70,000 people. See PAUL ROSENZWEIG, CIVIL LIBERTIES AND THE RESPONSE TO TERRORISM, 42 DUQ. L. REV. 663, 677 (2004); see also Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (SOUTER, J. concurring in part) (“T]he responsibility for security will naturally amplify the claim that security legitimately raises.”).
against situations of extreme danger.\textsuperscript{54} The war imperative is an assertion of necessity that leverages the fear of dire consequences for the security of the country and the lives of its citizens in support of a particular course of action.\textsuperscript{55}

At times, the assertion of a war imperative is justified. The Founders recognized the need for the government to respond quickly and decisively to imminent threats.\textsuperscript{56} The vesting of the executive power in one individual attests to the Founders’ belief that such threats may require presidential action without the benefit of congressional deliberation.\textsuperscript{57} As Justice Jackson said in Terminiello v. Chicago, the Constitution is not a “suicide pact,” and its structure must accommodate the ability of the government to act in self-preservation.\textsuperscript{58}

The problem with a war imperative is that it is usually presented with urgency, generality, and secrecy. The extreme urgency of its assertions seeks to supplant countervailing values, policies, and interests.\textsuperscript{59} The generality fails to differentiate among various types and levels of

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  \item \textsuperscript{54} In the infamous Supreme Court decision Korematsu v. United States, the Court adopted such language when justifying the relocation and detention of Japanese-Americans during World War II. See 323 U.S. 214, 218–19 (1944). The Court referred to the “military imperative[s]” that justified the relocation and detention without substantive reference to the intrusion on the rights of the affected people. See id.; see also Heymann, supra note 53, at 15 (“Public fears and anger are immediate and powerful; threat to civil liberties or divisions within the society or among allies are more remote and far less urgent or demanding.”); Eugene Gressman, Korematsu: A Melange of Military Imperatives, 68 Law & Contemp. Probs. 15, 19–21 (2004). In many ways, the “war imperative” is analogous to what is termed the “crisis thesis” that motivates the courts to adopt a jurisprudence that allows for a greater curtailment of rights and liberties. See Geoffrey R. Stone, Perilous Times 547 (2004); Lee Epstein, Daniel E. Ho, Gary King & Jeffrey Segal, The Supreme Court During Crisis: How War Affects Only Non-War Cases, 80 N.Y.U. L. Rev. 1, 11–12 (2005).
  \item \textsuperscript{55} See Heymann, supra note 53, at 87, 114–15. This is not to say that such fear may not be genuinely perceived as likely to occur. See Goldsmith, supra note 3, at 165 (discussing how the original torture memoranda were issued in an atmosphere of fear).
  \item \textsuperscript{56} Louis Fisher, Presidential War Power 8–9 (2d ed., rev. 2004). The key discussion in this regard at the Constitutional Convention occurred between James Madison, Roger Sherman, and Eldridge Gerry where the term “declare” was used to describe Congress’s war powers to ensure the ability of the President to “repel and not commence war.” James Madison, Notes of Debates in the Federal Convention of 1787, at 475–77 (1966). Additionally, one need look no further than the Preamble to the U.S. Constitution to see the emphasis the Founders placed on the role of the government to provide security to the new nation. See U.S. Const. pmbl.
  \item \textsuperscript{57} See Fisher, supra note 56, at 8–9; Madison, Notes, supra note 56, at 475–77.
  \item \textsuperscript{58} 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963); Edmond v. Goldsmith, 183 F.3d 659, 663 (7th Cir. 1999).
  \item \textsuperscript{59} Heymann, supra note 53, at 114 (“The very notion of “war” is intended to suggest urgency and a priority that supervenes most other claims for attention in our domestic and foreign policy.”).
\end{itemize}
threats and obstructs a careful analysis of its merits.\textsuperscript{60} Secrecy limits deliberation and quiets many who would otherwise probe or possibly object.\textsuperscript{61} Each of these aspects of a war imperative makes it difficult, if not impossible, to conduct a true balancing of the costs and benefits of its recommended course.\textsuperscript{62} It also provides an attractive vehicle to insulate arguments from debate or criticism or to hide illegal or problematic actions.\textsuperscript{63}

National Intelligence Director Mike McConnell recently provided an example of an appeal to a war imperative in an attempt to prevent public debate on amendments to the Foreign Intelligence Surveillance Act (FISA).\textsuperscript{64} McConnell stated, “The fact we’re doing it this way means that some Americans are going to die . . . .”\textsuperscript{65} This statement was a general, urgent assertion that sought to squelch public hearings on modifications to the protective statutory scheme that governed domestic electronic surveillance.\textsuperscript{66} What McConnell’s statement lacked, however, were details on the type or level of threat posed. If the concern was the release of sensitive information to the public, limited closed sessions

\begin{itemize}
\item See \textit{id.} at 87 (“The metaphor of war makes [balancing imperatives] more difficult. It tends to obscure the differences among the threats we face and to distract attention from a careful analysis of . . . what we can do.”). Some have even argued that reporters embedded with the military in Iraq develop this systemic bias. Jack Shafer, \textit{Full Metal Junket: The Myth of the Objective War Correspondent}, \textit{Slate}, Mar. 5, 2003, http://www.slate.com/id/2079703.
\item See \textit{Barton Gellman, Angler: The Cheney Vice Presidency} 142–43 (2008) (detailing the small group of policymakers in the Bush administration who had knowledge of the secret foreign intelligence surveillance program following 9/11).
\item See \textit{Heymann}, \textit{supra} note 53, at 87.
\item See \textit{id.} at 114; Margulies, \textit{supra} note 16, at 361. The war imperative is similar to an appeal to national security to prevent further discussion or investigation. Such appeals have been famously used to cover up illegal or embarrassing actions, such as President Nixon’s role in Watergate. See \textit{Gellman}, \textit{supra} note 61, at 100. The government tried to assert the state secrets evidentiary privilege to prevent the introduction of damaging evidence in \textit{United States v. Reynolds}. See 345 U.S. 1, 4–5 (1953); see also Appendix of Docket Entries Subsequent to the Original Record, \textit{available at} http://www.fas.org/sgp/othergov/reynoldspetapp.pdf. State secrets were also used to justify the imposition of martial law and suspension of habeas corpus in New Orleans by Andrew Jackson during the War of 1812. See \textit{Warshauer}, \textit{supra} note 13, at 19, 35–36. \textit{But see} \textit{Herring v. United States}, 424 F.3d 384, 386–87 (3d Cir. 2006) (dismissing fraud upon the court action, which had been brought after the disclosure of documents originally withheld by government because of national security concerns).
\item \textit{Id.} Justice Scalia, in dissent in \textit{Boumediene v. Bush}, used similar language when describing the consequences of allowing detainees at Guantanamo Bay to challenge the legality of their detentions through habeas corpus: “It will almost certainly cause more Americans to be killed.” 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting).
\item See \textit{Gellman}, \textit{supra} note 61, at 142–43.
\end{itemize}
could been used. If it was the need to prevent a complete stoppage of
the surveillance program, that would counsel quick and decisive action,
but would not prevent public hearings. Instead, McConnell used a gen-
eral threat of unverifiable dire consequences as an attempt to win an
argument.67

The approval and likely practice of torture with the consent of law-
yers highlights the effect and negative consequences of a war impera-
tive. As former Assistant Attorney General for the Office of Legal Coun-
sel (OLC) Jack Goldsmith asked, “How could this have happened?”68
The likely answer, according to Goldsmith, is that the atmosphere dur-
ing the Summer of 2002 was thick with threat reporting and the policy-
makers, as well as the intelligence analysts, were convinced that another
attack loomed.69 In addition, the United States had several senior al
Qaeda leaders in custody, including Abu Zubaydah.70 Though it is un-
clear, it may be presumed that war imperatives motivated the authoring
of the “Torture Memo,” leading the OLC lawyers to approve actions
that, upon reflection, carried grave costs without overriding security
benefits.71

National security lawyers must be conscious of the systemic bias
that favors war imperatives and combat their distortion of legal counsel.
To do so, a lawyer must reject general assertions of necessity and insist
upon further facts regarding the type and level of threat.72 One must

67 See Interview with Mike McConnell, supra note 64.
68 GOLDSMITH, supra note 3, at 165.
69 Id. at 165–66.
70 Id. at 166.
72 Margulies, supra note 16, at 360–61 (discussing the need for governmental lawyers to insist on particularity in support of governmental assertions of need); see HEYMANN, supra note 53, at 87. As Aharon Barak argues in the context of judging, a lawyer should not view “security considerations” as magic words, but should instead insist on specifics to ensure that any such assertion is not pretext. In discharging this duty, a lawyer should neither be naive nor cynical. See Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16, 157–58 (2002). Ironically, lawyers can find guidance on how analytically to attempt such a narrowing by looking to a similar effort applied to understanding the contours of arguments that entail individual, constitutional rights. For example, the paradigm of qualified immunity decisions shares the qualities of a national security decision by requiring a definition of individual rights to be adjudged within a balancing test that measures it against a governmental need. See, e.g., Scott v. Harris, 550
deliberate with other lawyers as a check on his or her reasoning and perception of the problem.\textsuperscript{73} In an intelligence community that requires compartmentalization of information, this may require the courage to demand information or access that is not normally provided.\textsuperscript{74} This must all be done with recognition that other values, such as civil liberties and civil rights, may challenge and even trump some security imperatives.\textsuperscript{75} This is especially necessary when the nation is facing what the executive branch considers an open-ended war on terrorism.\textsuperscript{76} In the end, combating a war imperative may come down, as James Comey states, to the ability to say “‘No . . . into a storm of crisis, with loud voices all around, with lives hanging in the balance.’”\textsuperscript{77}

2. Rejecting Civil Liberties Absolutism

Just as a lawyer must have the ability to say “no” under pressure, a national security lawyer must have the ability to say “yes” when the balance favors security.\textsuperscript{78} The principle duty of a national security lawyer is to protect the common good.\textsuperscript{79} This requires the synthesis of security

U.S. 372, 383 (2007). Additionally, as in the case of Fourth Amendment analysis, it has been argued:

To create a workable framework, one must look at the countless instances where the Fourth Amendment has application and ask how reasonableness can have any coherent meaning across that range of intrusions. The methods by which the courts address this challenge will largely determine how much liberty we have and how much the government can intrude. Courts and commentators could throw up their arms at such a task and decline to look beyond the specifics of each case. But such case-by-case analysis is inimical to individual freedom and fails to develop coherent standards to guide government agents.


\textsuperscript{73} The imposition of secrecy and the prevention of deliberation with other agencies are two reasons why the legal analysis supporting many of the Bush administration’s policies has been so widely criticized. See Gellman, \textit{supra} note 61, at 136 (describing David Addington’s practice of preventing the circulation of OLC memoranda).

\textsuperscript{74} See Greene, \textit{supra} note 14, at 99 (discussing the compartmented nature of information in the intelligence community).

\textsuperscript{75} Ignatieff, \textit{supra} note 23, at 136–37; Comey, \textit{supra} note 24, at 443.


\textsuperscript{77} Comey, \textit{supra} note 24, at 444.

\textsuperscript{78} See id.

\textsuperscript{79} See Greene, \textit{supra} note 14, at 103–05.
concerns and the protection of civil rights because the absence of ei-
ther, in the long run, would undermine the democracy that the lawyer
serves.\textsuperscript{80} Though civil rights contribute to this aspect of the common
good, their principle function is to protect the individual from some-
one else’s understanding of what constitutes the good of society.\textsuperscript{81} As a
result, without minimizing this contribution to the development of
dignity and respect for individuals—especially as a countermajoritarian
force—the absolutism of rights as a trump card against all security con-
cerns must be rejected by those responsible for the good of the collect-
ive.\textsuperscript{82}

Terrorism presents an amorphous and asymmetric threat with few
conventional indications and warnings.\textsuperscript{83} The difficulty of detecting
terrorist threats is compounded by the magnitude of the potential con-
sequences of failure. The destruction wrought by the terrorist attacks
on September 11 pale in comparison to the very real threats of a nu-
clear detonation or a radiological dispersal attack.\textsuperscript{84} The countervailing
aspect of the terrorist threat is its undeterminable duration.\textsuperscript{85} When
considering the degree to which civil liberties must flex to accommo-
date these threats, the inability to declare victory raises concerns that
the ceding of rights for wartime imperatives may be permanent.\textsuperscript{86}

In light of these countervailing concerns, a distinction must be
drawn between imminent and programmatic threats.\textsuperscript{87} Civil liberties

\begin{itemize}
\item \textsuperscript{80} See Richard A. Posner, Not A Suicide Pact: The Constitution in a Time of Na-
tional Emergency 31 (2006) (providing a framework for how one could define a parti-
cular right and balance it against the needs of security); Hoffman, supra note 76, at 934
(“History shows that when societies trade human rights for security, most often they get
neither.”).
\item \textsuperscript{81} Chris Brown, Universal Human Rights: A Critique, in Human Rights in Global Poli-
\item \textsuperscript{82} See Richard A. Posner, Law, Pragmatism, and Democracy 303–04 (2005); Brown,
supra note 81, at 110; Ronald Dworkin, Liberalism, in Public and Private Morality 136
\item \textsuperscript{83} See Goldsmith, supra note 3, at 73 (discussing President Roosevelt’s visits to the
“map room” during World War II so that he, quoting historian Doris Kearns Goodwin,
“could visualize the progress of the war.”).
\item \textsuperscript{84} See Gellman, supra note 61, at 160 (quoting Wayne Downing’s concern with al
Qaeda’s interest in chemical weapons, radiological dispersion devices and nuclear weap-
ons); Ignatieff, supra note 23, at 146; National Intelligence Council, National Intelligence
releases/20070717_release.pdf.
\item \textsuperscript{85} Hoffman, supra note 76, at 940.
\item \textsuperscript{86} See Ignatieff, supra note 23, at 145–46; Hoffman, supra note 76, at 940.
\item \textsuperscript{87} See Paul Rosenzweig, Principles for Safeguarding Civil Liberties in an Age of Terroris,


must flex more in response to the former because the latter allow more
time for reflection and deliberation on how best to address a particular
action. Additionally, the urgency of an imminent threat may lead to a
greater intrusion than necessary to ensure success, but the resulting
intrusion is a limited one that will cease once the threat expires.

The Supreme Court, in City of Indianapolis v. Edmond, grappled with
this division when holding unconstitutional a highway checkpoint. The Court held that the checkpoint violated the Fourth Amendment
where the primary purpose was general crime control. The Court stated, however, that “the Fourth Amendment would almost certainly
permit an appropriately tailored roadblock set up to thwart an immi-
nent terrorist attack or to catch a dangerous criminal who is likely to flee
by way of a particular route.” The same intrusion would occur through
the surgical use of a highway checkpoint, but the type of threat would
limit the duration and extent of its use.

Additionally, the division between imminent and programmatic
threats instructs how the Bush administration should have approached
the need for increased foreign intelligence surveillance after Septem-
ber 11. Few would likely criticize the President’s use of the increased

order to determine from a legal and policymaking perspective what measures in response
to the terrorist threat are “too much”). Just War theorists often talk about this point within
that context as whether a “positive danger” exists. See Maryann Cusimano Love, Globaliza-
A further division may even be required between imminent threats that constitute emer-
gencies that require extreme action and those that may be reacted to with a more moder-
ate approach. Cf. Igor Primoratz, A Philosopher Looks at Contemporary Terrorism, 29 Cardozo
L. Rev. 33, 49 (2007) (discussing the merits of just war theorist Michael Walzer’s argu-
ments on imminent threats).

88 See City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000); cf. Grundgeset für die
Bundesrepublik Deutschland art. 80a (noting the German Basic Law’s allowance for a
“state of defense” for imminent attacks); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)
(per curiam) (allowing the government to punish inflammatory speech where it is “di-
rected to inciting or producing imminent lawless action and is likely to incite or produce
such action.”).

89 For example, the International Covenant on Civil and Political Rights provides a
comprehensive framework for the protection of human and civil rights. It recognizes,
however, that certain public emergencies may require a narrow and temporary deviation
from that framework. The deviation must be only to the extent “strictly required by the
exigencies of the situation.” International Covenant on Civil and Political Rights, Dec. 19,
1966, 999 U.N.T.S. 171, art. 4. Further, some derogations are expressly not allowed under
that provision. Id. art. 4(2).

90 531 U.S. at 46–48.
91 Id. at 44.
92 Id.

93 See id.; see also Bell v. Wolfish, 441 U.S. 520, 559 (1979) (viewing the Fourth Amend-
ment’s reasonableness standard in light of the exigency of the governmental need).
surveillance capabilities of the National Security Agency (NSA), even if technically outside of the strictures of FISA, had it been necessary to thwart an imminent attack and employed for a limited duration.\textsuperscript{94} The use of the NSA assets was not, however, so limited.\textsuperscript{95} Instead, the President sought to employ this surveillance program as a programmatic response to general terrorist threats.\textsuperscript{96} Both a limited and protracted use of these assets resulted in intrusions on privacy rights, but while those rights properly flexed in light of imminent need, they were unduly infringed upon once time allowed for deliberation on the consequences of the governmental action.\textsuperscript{97}

Drawing the distinction between imminent and programmatic threats is easier said than done. Many threats seem imminent, but are later revealed to be based upon unreliable information.\textsuperscript{98} The costs of these errors are significant when the means employed result in restrictions on civil rights. Lawyers will never meaningfully reduce the errors made in deciphering intelligence, nor should they be engaged in that process. Lawyers, for all their skill, are not intelligence analysts, and determinations about credibility and likelihood of attacks should be left to the experts.\textsuperscript{99} Lawyers can require, however, a response narrowly tailored to the threats faced.\textsuperscript{100} Where imminent threats exist, a lawyer may sanction activity that pushes the envelope of legality and challenges civil liberties, but only with assurances that aggressive actions will cease once the threat is over.


\textsuperscript{95} See Gellman, supra note 61, 145–46; Goldsmith, supra note 3, at 181–82.

\textsuperscript{96} See Gellman, supra note 61, 145–46.

\textsuperscript{97} In this example, even after the disclosures of the secret Terrorist Surveillance Program, the Bush administration was still able to negotiate with Congress for the needed reforms to the FISA. In the White House Press Release after President Bush signed recent amendments to the bill, the President stated, “The bill will allow our intelligence professionals to quickly and effectively monitor the communications of terrorists abroad while respecting the liberties of Americans here at home. The bill I sign today will help us meet our most solemn responsibility: to stop new attacks and to protect our people.” Remarks on Signing the FISA Amendments Act of 2008, 44 Weekly Comp. Pres. Doc. 975 (July 10, 2008).

\textsuperscript{98} See Philip Bobbitt, Terror and Consent 291–92 (2008) (discussing the speculative aspect of intelligence and the need to act upon that evidence).

\textsuperscript{99} This expertise is, however, rightly challenged after the inaccurate judgments on the credibility of various intelligence sources leading up to the war with Iraq. See Paul R. Pillar, Intelligence, Policy, and the War in Iraq, FOREIGN AFFAIRS, Mar. 1, 2006, at 15.

\textsuperscript{100} In some ways, there were attempts to narrow the Terrorist Surveillance Program’s intrusion by restricting it from capturing and analyzing the “content” of communications. See Gellman, supra note 61, at 149.
The necessary question that arises from this discussion is whether any rights are indeed absolute, even in the face of an imminent terrorist threat. This properly focuses on the use of torture—a topic garnering much criticism after the disclosures of its use on at least three detainees. The use of torture and its damage to the human dignity of an individual is different from all other types of intrusions. First, it is irreparable. Wounds to human dignity cannot heal; the scars they leave both to the target and the society that allowed it to occur are lasting. This prohibition corresponds with the Kantian ethical framework that human beings never be treated as a means for some other ends. Some means are inherently so corrupt that no matter the intention, they cannot be justified.

Second, it is fundamental to society in general, and to democracies in particular, that the entire purpose of collective action is to protect each other against our worst tendencies. The thread that binds this...
society is not economic or simply enlightened self-interest, but the common values of life and law.\textsuperscript{108} As citizens, we give up power to the government to ensure order, but the price of such sacrifice has a limit.\textsuperscript{109} The price that cannot be paid for security is the violation of that which is most sacred—our own human dignity and the respect we have for that value in others.\textsuperscript{110}

The use of torture results in such extreme costs that even the most serious national security imperatives would likely fail to justify it.\textsuperscript{111} This falls short of an absolutist position because it is impossible to condemn its use in the recently abused, yet still problematic, hypothetical “ticking time bomb” situation where other values could take precedence.\textsuperscript{112} The
use of torture must remain, however, categorically prohibited, subject only to potential affirmative defenses of necessity or duress.113

Absolutists on civil liberties enjoy reciting Benjamin Franklin’s quote, “Those who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”114 The key word in this quotation is the modifier “essential.” Lawyers must be able to draw lines where essential liberties are at stake and where even imminent threats cannot justify certain actions. That said, lawyers must also be capable of making the tough and unpopular decisions that encroach on liberties, but they must only do so in response to an imperative that must be addressed. If done through limited and circumscribed means, the temporary encroachments will realign once security is assured.115

C. The Criminalization of the Laws of War

Mostly due to the “cycles of aggression” in the 1960s–1970s and the mid-1980s, as well as growth of international law governing the laws of war, Congress has passed a myriad of domestic statutes that expose civilian governmental officials, politicians, and former military personnel to criminal liability.116 National security lawyers are often placed in a position to render legal opinions that will guide policymakers and op-


115 As President Lincoln wrote, “Nor am I able to appreciate the danger apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and habeas corpus throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life.” See Abraham Lincoln, Letter to Erastus Corning and Others, in Abraham Lincoln: His Speeches and Writings 699, 705 (Roy P. Basler ed., 1946).

operators on how to perform their duties without exposing themselves or their clients to criminal punishment.\textsuperscript{117}

The criminalization of war is both an understandable reaction to previous abuses and a severe hindrance to the collection of intelligence and the prevention of future terrorist attacks.\textsuperscript{118} On one hand, there are many benefits to maintaining such domestic criminal laws. First, it is the right of the people, through their legislature, to define what actions are so repugnant to the conscience of society that they will be deemed criminal regardless of the motivation or intention of the actor. Second, some statutes, like the War Crimes Act, are intended to comply with international obligations.\textsuperscript{119} Finally, applying such standards to government actors allows the United States to argue for similar standards and treatment, and to pursue international terrorists through obligations imposed on other countries.\textsuperscript{120}

\textsuperscript{117} See Gellman, supra note 61, at 169 (noting the advice given by Navy general counsel Alberto Mora to “Protect your client.”); see also Comey, supra note 24, at 443 (discussing the ramifications of providing a legal blessing to policymakers and operators).

\textsuperscript{118} See Goldsmith, supra note 3, at 64–65, 163–64.


The negative side of this development is that lawyers and other government agents who must act in times of crisis fear that they will be subject to criminal liability.\textsuperscript{121} The increasing number of CIA agents who take out professional responsibility insurance to protect themselves against lawsuits evidences this fear.\textsuperscript{122} This is a major—if not primary—cause of risk-averse action.\textsuperscript{123} Lawyers become reluctant to sanction creative legal actions due to their inability to state with full certainty whether such actions will result in criminal exposure, especially with a change in administrations and the benefits of hindsight.\textsuperscript{124} This fear is acute in cases where the criminal laws at issue include relativistic and ambiguous standards.\textsuperscript{125} As the Attorney General correctly identified in his remarks, the closing off of these avenues by lawyers places the United States in a vulnerable security position, especially with regard to a growing and amorphous threat like international terrorism.\textsuperscript{126}

Still, despite the propensity for this development to cause risk-averse conduct, the decriminalization of the intelligence community is incomprehensible after the Bush administration’s rampant disregard for the rule of law. Ironically, their attempts to avoid potential criminal exposure not only heightened the calls for such prosecutions, but also affirmed the need to restrict specific aspects of executive conduct.\textsuperscript{127}

A realization of the negative effect that potential criminal liability has on the creativity and aggressiveness of government actors should

\textsuperscript{121} The laws of war, instead, allow for a balance between considerations of humanity and military necessity not found in criminal law. See Payam Akhavan, Reconciling Crimes Against Humanity with the Laws of War, 6 J. INT’L CRIM. JUST. 21, 36 (2008). The fear of civil liability is also present and affecting government employees. See, e.g., Idema v. Rice, 478 F. Supp. 2d 47 (D.D.C. 2007); Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).


\textsuperscript{124} See Pines, supra note 123, at 131–32.

\textsuperscript{125} See R. Jeffrey Smith, War Crimes Act Changes Would Reduce the Threat of Prosecution, Wash. Post, Aug. 9, 2006, at A01 (discussing the relative terms “degrading” and “humiliating” as used in the War Crimes Act).

\textsuperscript{126} See Mukasey, supra note 2, at 183.

\textsuperscript{127} See Gellman, supra note 61, at 175–76 (rejecting the application of Geneva rules for detainees to avoid the application of the War Crimes Act); see also id., at 355 (noting that the effort to expand Presidential powers has resulted in a net decrease of those powers).
spurn a narrowing of applicable criminal statutes. The goals of such a review should be the following: substitute civil liability for criminal liability where possible; narrow ambiguous standards to precise actions with specific definitions; include a statutory defense for a reasonable belief that the actions taken were lawful; and require the federal government to provide counsel and indemnify government actors for all judgments except where intentional illegal conduct is proven. This review will not alleviate all concerns over the promotion of risk-averse action, but will address its root causes without losing the desired deterrent effect.

D. Retaining Objectivity and Independence Through Distance

When addressing legal questions that balance national security imperatives against civil liberties, a lawyer must also recognize institutional factors that affect judgment. Nothing is more important to the role of a counselor than the need for distance from the client. A lawyer must always be aware that an ability to remain objective when considering a client’s needs, values, and demands is necessary. This ability challenges private lawyers, but is much harder in the national security arena, where the dual roles of a lawyer as counselor and contributor to policy decisions are blurred.

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129 Examples would include entrapment by estoppel or innocent intent. See, e.g., Cox v. Louisiana, 379 U.S. 559, 568 (1965).

130 See Greene, supra note 14, at 91; Margulies, supra note 16, at 366.

131 “[I]t is essential that the general counsel and lawyers on [staff at intelligence agencies] be independent, strong-minded and conceive of the office in a broader role than merely serving as the personal legal counsel to the agency head.” Daniel B. Silver, The Uses and Misuses of Intelligence Oversight, 11 Hous. J. Int’l L. 7, 13 (1989). Aristotle argued that objectivity is also a necessary ingredient to ethics. See Graham, supra note 5, at 26.


133 See Goldsmith, supra note 3, at 129–30 (describing the extraordinary influence that government lawyers had over war policy in the Bush administration); see also Greene, supra note 14, at 105 (discussing how lawyers constitute part of the intelligence agency’s operational team); David Luban, Lawfare and Legal Ethics in Guantanamo, 60 Stan. L. Rev. 1981, 2002 (2008) (noting the professional responsibility requirements that JAG attorneys retain their independence). In addition, a public lawyer arguably serves a public interest
Consider the role of David Addington in the Bush administration. As counsel and then Chief of Staff to Vice President Dick Cheney, Addington played a central role in many of the most important and criticized events of the past eight years.\textsuperscript{134} Addington’s professional association with Cheney reaches back to the 1980s when he was counsel to the House Permanent Select Committee on Intelligence.\textsuperscript{135} Cheney, as a representative from Wyoming, sat on that panel.\textsuperscript{136} They remained colleagues and friends, and, importantly, shared an ideological view of executive power that became a linchpin in policy decisions after the 2000 election.\textsuperscript{137} Though Addington’s role in the Bush administration was as a legal counselor, he regularly attended strategy sessions on issues such as how to discredit Joseph Wilson after his public criticism of the Bush administration.\textsuperscript{138} To this date, there is no solid evidence that Addington broke the law, but his relationship with Cheney suggests a role devoid of the distance necessary to remain objective.\textsuperscript{139} Though it remains speculation, it is reasonable to surmise that this closeness hindered Addington in the provision of solid counsel.\textsuperscript{140}

To provide sound counsel, a lawyer must avoid such excessive intermingling.\textsuperscript{141} Policing such boundaries is undoubtedly difficult, but it may be achieved through an awareness of the costs from such a rela-

\textsuperscript{135} See Milbank, supra note 134; see also Gellman, supra note 61, at 40–41; Goldsmith, supra note 3, at 77.
\textsuperscript{136} See Milbank, supra note 134.
\textsuperscript{137} See id.
\textsuperscript{139} Former Solicitor General Ted Olson described David Addington as Dick Cheney’s “eyes, ears, and voice.” Goldsmith, supra note 3, at 77. One former high-ranking lawyer for the Bush administration stated that “Addington was more like Cheney’s agent than like a lawyer.” See Mayer, supra note 134. Though the legality of the advice remains questionable, historian Arthur Schlesinger, Jr. described Addington’s legal advice in defense of torture as “No position taken has done more damage to the American reputation in the world—even.” See id.
\textsuperscript{140} See Gellman, supra note 61, at 355.
\textsuperscript{141} See Greene, supra note 14, at 91; Margulies, supra note 16, at 366.
tionship.\textsuperscript{142} Government lawyers must avoid being placed in the position of a policymaker,\textsuperscript{143} just as any lawyer must avoid deciding legal issues for his or her client.\textsuperscript{144} While a lawyer may and must provide legal advice, it is essential that he or she avoid intruding upon the province of decision-making—an exercise of power that is reserved to a client.\textsuperscript{145} Where a lawyer fails to self-monitor, the role between lawyer and client disappears and the quality of objective counsel diminishes.\textsuperscript{146}

This breakdown occurs not simply because the lawyer becomes an agent of power instead of a legal advisor, but also because the admission of subjectivity reduces an important quality of counsel. Abraham Lincoln described this quality when discussing the character needed by all citizens to prevent the growth of despotism and to ensure the perpetuation of the U.S. political system.\textsuperscript{147} Lincoln stated that all citizens must foster and apply a “cold, calculated, unimpassioned reason” to see past emotional appeals that allow for the rise of a Napoleon or a Caesar.\textsuperscript{148} Lincoln was arguing for the need for objectivity.\textsuperscript{149}

Reason and objectivity, while important for all citizens, are most important for lawyers charged with guiding policymakers on the proper balance between national security and civil liberties.\textsuperscript{150} The ability to leverage distance and to apply a well-developed, objective analytical approach to a problem ensures that the legal opinions accurately reflect the needed compromise between those conflicting imperatives.\textsuperscript{151} While

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\textsuperscript{142} The costs are not just bad policy and poor counsel. Some legal ethics scholars believe that Bush administration lawyers may have crossed the ethical line regarding criminal conduct for the facilitation of illegal torture methods. \textit{See} David Luban, \textit{Selling Indulgences: The Unmistakable Parallel Between Lynne Stewart and the President’s Torture Lawyers}, \textit{Slate}, Feb. 14, 2005, http://www.slate.com/id/2113447.

\textsuperscript{143} Government lawyers should never be in a position where their role is to justify rather than confront governmental policy. \textit{See} Greene, supra note 14, at 106.


\textsuperscript{145} Such a clear cut statement is, admittedly, difficult to keep in many areas of law. The difficulty of the ideal, however, does not and should not undermine the efforts to reach that state. \textit{See} Anthony V. Alfieri, \textit{Impoverished Practices}, 81 Geo. L.J. 2567, 2567–69 (1993) (discussing the difficulties of a client-centered approach when practicing poverty law).

\textsuperscript{146} “Lawyers who buy into their clients’ goals without reservation, or, worse promote their own goals or agendas as their clients’ own, limit their own professional usefulness.” \textit{Margulies}, supra note 16, at 366.


\textsuperscript{148} \textit{See id.} at 84.

\textsuperscript{149} \textit{See id.} at 84–85.

\textsuperscript{150} \textit{See} Margulies, supra note 16, at 366–67; Silver, supra note 131, at 13.

\textsuperscript{151} \textit{See} Margulies, supra note 16, at 366–67; Silver, supra note 131, at 13.
lawyers themselves must police these boundaries and ensure objectivity, organizations responsible for the resulting government policy must implement these lessons through institutional requirements. These include forced deliberation on key legal issues and the separation of functions between legal advisors and policymakers—all of which failed to occur during the Bush administration.152

E. Preparing for Crisis

A national security lawyer should understand that any balance between national security and civil liberties may be historically unique, but that in the broad view it is not without precedent. Understanding the lessons of those precedents will aid legal analysis amidst even the most stressful, immediate security imperatives.153 A lawyer in such a role must, therefore, prepare for the unforeseen crisis.

Much is made of the pressures that a lawyer must face when deciding issues of importance to national security. While pressures exist, a historically-minded individual will find commonalities that guide many of the hard choices.154 Many key legal decisions that the Bush administration faced after September 11 evidence this point.155 The Terrorist Surveillance Program is undeniably similar to the electronic surveillance conducted by the NSA from the late 1950s to the early 1970s.156 Immigration restrictions and increased surveillance for persons of Arab

152 See, e.g., Gellman, supra note 61, at 162–68 (describing how David Addington drafted a four-page memorandum that rejected Geneva protections for detainees in Afghanistan and circumvented inter-agency review and vetting before getting the President to sign the executive order authorizing the action).

153 The moderating effect of historical knowledge and context is similar to the use of precedents in judicial decision-making. See Benjamin Cardozo, The Nature of Judicial Process 20 (1921); William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & ECON. 249, 250 (1976). The use of precedent (which relies on a line of cases) as opposed to stare decisis (which may focus on one case alone) is a more accurate comparison in such a case. See Frederick G. Kempin, Precedent and Stare Decisis: The Critical Years, 1800 to 1850, 3 AM. J. LEGAL HIST. 28, 30 (1959).

154 For example, many comparisons between modern and historical terrorism demonstrate a similar relationship between the methods employed and the governmental order that existed. See Bobbitt, supra note 98, at 23–25.


descent share some racial profiling similarities to the Japanese internment following the attacks on Pearl Harbor. The Bush administration’s attempt to employ streamlined military commissions to try enemy combatants drew many parallels to the commissions used by President Roosevelt in 1942 to try eight Nazi saboteurs. Even more similarities exist with the trial of two additional German saboteurs in 1945—a process extolled by Secretary of War Henry Stimson to redress the mistakes of 1942.

The historical parallels that exist between many of the legal decisions that drove key policies during the post-September 11 attacks confound even the most strident believer in the maxim that, “what’s past is prologue.” The Bush administration, at this point in our historical analysis, has repeated history in many instances and embraced the very same disastrous and embarrassing policies. The question that must come to every person’s mind who considers this issue is why such historical guidance was ignored during the past seven years. More specifically, where were the lawyers during this process?

It is certainly possible that the lawyers who faced these situations were aware of this history but were ignored or not consulted. It is more likely that key lawyers lacked this historical focus when faced with


158 See Fisher, supra note 56, at 205–07.

159 See William Shakespeare, The Tempest act 2, sc. 1.


162 There are many reports of lawyers, including the military Judge Advocates, being shut out from the decisions affecting important legal issues. See Seymour M. Hersh, Annals of National Security: The Gray Zone, NEW YORKER, May 24, 2004, at 38 (quoting Scott Horton, former chairman of the New York City Bar Association’s Committee on International Human Rights).
time-pressured decisions. For the purposes of this Article, judgment of past actions is of little value. Instead, the point is a prospective one. If a lawyer seeks to provide counsel on key issues of national security—the defining issues of our generation—the preparation for such decisions must begin well before the need arises.

This is not simply an appeal to understanding legal precedent. It is a call to historical study of national security law in a practical and pragmatic manner, akin to Victor Davis Hanson’s call for students to study war and the inevitability of conflict rather than focusing solely on the desire for peace. It is also similar to Thucydides’ statement that he would be satisfied if his History of the Peloponnesian War was “judged useful by those inquirers who desire exact knowledge of the past as an aid to the understanding of the future, which in the course of human things must resemble if it does not reflect it . . . .” There is no denying that the challenges faced in the past will resurface. The need now is to prepare the next generation of lawyers who will be entrusted with the responsibilities of judgment.

F. Developing a Record for Judgment

Finally, the choice between competing imperatives may provide an example to one facing a similar situation in the future. The process by which important decisions are reached should operate in a manner

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164 Many lawyers in the Bush administration were allegedly given their important positions due to loyalty and religious affiliation rather than merit and independence. See, e.g., Eric Lipton, _Colleagues Cite Partisan Focus by Justice Official_, N.Y. TIMES, May 12, 2007, at A1; Charlie Savage, _Missouri Attorney a Focus in Firings_, BOSTON GLOBE, May 6, 2007, at A1; Alan Cooperman, _Bush Loyalist Rose Quickly at Justice_, WASH. POST, Mar. 30, 2007, at A15.

165 In the aftermath of the invasion of Iraq, many critics point to a lack of historical understanding as a major cause of the failures in war strategy, including second-hand accounts that President Bush failed to understand that Arabs in Iraq were divided into Shia and Sunni. See George Packer, _Dreaming of Democracy_, N.Y. TIMES, Mar. 2, 2003, § 6 (Magazine), at 64.


168 See Ben W. Heineman, Jr., _Lawyers as Leaders_, 116 YALE L.J. 266, 268 (2007) (arguing for the development of methods of thinking that prepare lawyers for leadership, including the need for breadth of mind).

169 The importance of using an accurate, well-developed record is evidenced by the _co-ram nobis_ suit that overturned Fred Korematsu’s conviction, based on documents that the government suppressed at the time of the original litigation. See Korematsu v. U.S., 584 F. Supp. 1406 (N.D. Cal. 1984); Richard Goldstein, _Fred Korematsu, 86, Dies; Lost Key Suit on Internment_, N.Y. TIMES, Apr. 1, 2005, at C13.
that allows for peer and historical judgment with a humble recognition that mistakes may be made and that the balance reached may be in error. Lawyers have a responsibility to balance these imperatives within a process that seeks openness and preserves the facts that led to and supported the legal conclusions. This not only allows the public to judge the specific action contemporaneously, but it provides an accurate and complete factual record for historical analysis and reflection upon each specific decision within a broader context. This reflection provides historical lessons that provide precedent and give guidance.

Both the need to avoid insulation of decision-making through secrecy and the need to develop an accurate factual record from which parties may judge those decisions are challenged today. The Bush administration asserted the state secret evidentiary privilege and executive privilege with unprecedented breadth. Attorney General Mukasey himself advised the President to assert executive privilege to discussions between Cheney and the FBI. The Bush administration took steps to limit the use of the Freedom of Information Act for intelligence information and to undermine the Presidential Records Act. The factual

170 See Heineman, supra note 168, at 270 (concluding with a hope that lawyers will aspire to lead “tempered by humility at the complexity, difficulty, discipline, and self-sacrifice inherent in the task.”).

171 Lawyers are governed by multiple rules of Professional Responsibility that require openness and honesty to the court and the provision of accurate, comprehensive evidence, even if that evidence is damaging to one’s case. See Brady v. Maryland, 373 U.S. 83, 88 (1963); Margaret Love, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000, 15 Geo. J. Legal Ethics 441 (2002); see also Model Rules of Prof’l Conduct R. 3.3 (discussing duty of candor to the court).

172 See Landes & Posner, supra note 153, at 250. Historiography depends upon intermediary sources, such as judicial or administrative records, to understand historical facts and draw historical lessons.


justifications for the detention of enemy combatants at Guantanamo Bay went unchallenged until the Boumediene decision due to the restriction on the collateral challenge of habeas corpus.\textsuperscript{177} The Bush administration also sought immunity for telephone companies who may have broken the law at the government’s behest.\textsuperscript{178} Immunity not only insulates the companies and possibly the government from liability, but also removes cases from the adjudicatory process, a process that serves to place such actions into a factual record and before the public.\textsuperscript{179} Finally, and perhaps most atrociously, there are reports about the destruction of evidence of interrogation techniques that could include torture.\textsuperscript{180}

Though we still operate in the realm of speculation, government lawyers drove or provided pivotal support for the policy positions on many of these issues.\textsuperscript{181} On each of these decisions, one can debate the needs of security used to justify the insulation of decisions, practices, or information from the public. The fundamental problem, however, is that such insulation prevents the proper functioning of an integral process of judgment. Regardless of the historical lessons drawn from such judgment, the value of hindsight properly based on facts cannot


\textsuperscript{181} Both Attorneys General Mukasey and Alberto Gonzales have played prominent roles in many of these decisions. See, e.g., Eggen, \textit{supra} note 175; Hersh, \textit{supra} note 163; Mayer, \textit{supra} note 134, at 2 (describing the Bush administration’s position on the applicability of the Geneva Conventions to detainees at Guantanamo); Mark Mazzetti & David Johnston, \textit{Outside Prosecutor to Investigate Destruction of C.I.A. Tapes}, Int’l Herald Trib., Jan. 2, 2008, http://www.iht.com/articles/2008/01/02/america/cia.php (noting that the investigation will look into the role of White House lawyers, including Alberto Gonzales). \textit{But see} Mark Mazzetti, \textit{C.I.A. Was Urged to Keep Interrogation Videotapes}, N.Y. Times, Dec. 8, 2007, at A1 (discussing how the decision to destroy interrogation tapes was made without consulting top CIA lawyers).
be ignored. It is only through this reflection that historical truths are developed and applied to subsequent events.\footnote{See Wertman, \textit{supra} note 176 (“But for better or worse, these records belong to the American people and should be available so that future generations can learn from the triumphs and failures of our past leaders.”). As Fred Korematsu wrote as amicus curiae in \textit{Hamdi v. Rumsfeld}, “Only by understanding the errors of the past can we do better in the present.” Brief of Amicus Curiae Fred Korematsu in Support of Petitioner at 3, 542 U.S. 507 (2004).}

The success or failure of the development of such truths can lead to serious consequences for a society. The value of the factual record developed during the Nuremberg trials is undeniable, as they stand as an intellectual and historical bulwark against Holocaust deniers.\footnote{See Leila Nadya Sadat, \textit{Judgment at Nuremberg: Foreword to the Symposium}, 6 WASH. U. GLOBAL STUD. L. REV. 491, 499 (2007); cf. Michael P. Sachar, \textit{The International Trial of Slobodan Milosevic: Real Justice or Realpolitik?}, 8 ILSA J. INT’L & COMP. L. 389, 390 (2001–2002) (discussing how a factual record developed through the trial would aid education about the atrocities that occurred).} After the end of apartheid in South Africa, the Truth and Reconciliation Committee led to an emotional healing and understanding among two sides of a bitter conflict.\footnote{See Cassandra Fox Charles, \textit{Truth vs. Justice: Promoting the Rule of Law in Post-Apartheid South Africa}, 5 SCHOLAR 81, 91–93 (2002–2003); cf. Carstein Stahn, \textit{Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor}, 95 Am. J. INT’L L. 952, 953 (2001) (noting the twin goals of the Truth Commission for East Timor as development of a record to understand the truth and to assist in national reconciliation).} In Croatia, however, a historical barrier of bitterness remains between the Croats and Serbs over the true extent of the atrocities wrought by the Ustash e. The number of deaths diverges greatly—between 60,000 and 700,000—and still remains a source of contention and a hindrance to reconciliation.\footnote{See Robert D. Kaplan, \textit{Balkan Ghosts: A Journey Through History} 5–6 (1993) (“Numbers are all that have ever counted in Zagreb. For instance, if you were to say that the Croatian Ustashe . . . murdered 700,000 Serbs at Jesenovac . . . you would be recognized as a Serbian nationalist who despises Croats as well as Albanians . . . . But if you were to say that the Ustashe fascists murdered only 60,000 Serbs, you would be pegged as a Croat nationalist . . . .”); Marcus Tanner, \textit{Croatia: A Nation Forged in War} 152 (1997).}

The point is that facts matter. They matter in understanding the atmosphere in which decisions were made and they matter in their contribution to the development of a progressive history—one that attempts to glean lessons from the past to inform decisions of the future. An ethical lawyer operating in this realm understands both the need to learn that history and to engage in a process that promotes such growth. Both elements contribute to sound legal counsel. The lawyer who applies lessons from the past moderates the instant debate through context and broader historical visions. Similarly, the lawyer who conducts
legal balancing in a manner mindful of the needs for openness and the preservation of a factual record contributes to the continued provision of moderate counsel.

II. IMPLEMENTATION

The debate over the proper role of a national security lawyer is a contentious one with passionate advocates on both sides. It is a debate that easily dissolves into the academic and esoteric, but it must translate into the practical and pragmatic or be resigned to echo in irrelevance. The need for relevance is daunting whenever a resolution must be firm enough to withstand dual and often opposing pressures, yet flexible enough to apply to unique challenges.

The factors discussed above must be internalized and applied by the individuals entrusted with national security duties. The following list, however, contains aspects of the discussion that may be implemented either institutionally or legislatively to assist legal counsel in the national security context.

• **Deliberation.** Legal counsel must be allowed and required to deliberate with peers within one’s agency and with lawyers of other government agencies. In crisis situations that require legal counsel, agencies should convene non-hierarchical committees of various agency lawyers to deliberate and propose a consensus-based opinion.¹⁸⁶

• **Access.** Legal counsel must be given the security clearance to access the intelligence reporting, intelligence sources, and analysis that provide the foundation for assertions of security imperatives.¹⁸⁷

• **Office of Legal Counsel Memoranda.** For an OLC memorandum to have binding legal effect on Executive employees, it must be reviewed and signed, though not necessarily approved, by lawyers for all cabinet-level departments.

• **Disclosure.** A bipartisan Congressional committee should review in closed session all OLC memoranda issued during the Bush ad-

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¹⁸⁶ According to James Comey, John Ashcroft regrets the certification of the Terrorist Surveillance Program and stated that the security requirements surrounding the program were so tight that he could not get the advice he needed to adjudge its legality. Gellman, *supra* note 61, at 304.

¹⁸⁷ This would prevent policy makers from dividing up the facts provided to each legal advisor to guarantee the results they desired. See Gellman, *supra* note 61, at 287 (describing Vice President Cheney and David Addington’s use of the bureaucracy to return outcome determinative decisions).
ministration. This committee should make public all memoranda not essential to current national security needs and issue the equivalent of the 9/11 Commission Report on the substance and decision-making process that led to regrettable opinions.

- **Decriminalization of War.** A bipartisan Congressional committee should review all criminal statutes that cover traditional areas of the laws of war. The committee should propose changes to the laws that incorporate the elements discussed above.

**Conclusion**

Lawyers are up to the task of moderating government action even in the most stressful, challenging times. In fact, it is the tough question and the courageous answer that define our profession. A resolute determination to do law and do it righteously, however, will by itself fail to guide one through a seemingly intractable dilemma. Instead, a lawyer must prepare for such moments by developing and putting into practice an ethical and decision-making framework that defines the competing velocities and seeks moderation. A lawyer must leverage the cultivated skill of objectivity and ensure client distance to see issues for what they are and not look through the lens of systemic bias. A lawyer must have limits; just as one must be capable of ranking degrees of threats, so too must the lawyer play the obstructionist when action entails an impermissible cost.

These qualities may appear as unobtainable ideals, and a full embrace and effectuation by any fallible person seems unrealistic. Just as our recent history raises concerns about how many in our government have handled such balancing, however, recent events also highlight the ability of many to shoulder that duty. A full account of the events that occurred within the government and military after September 11 is still in development. The story that is emerging puts lawyers at the center of many atrocious decisions, but also at the forefront of courageous actions. The military Judge Advocates have shown during this war on terrorism an unfailing commitment to civil liberties, while upholding their sworn duties to protect and serve the nation.\(^{188}\) They have suffered personal loss, including the sacrifice of careers and promotions, to follow

their convictions.\textsuperscript{189} Civilian lawyers, such as James Comey, Jack Goldsmith, Patrick Philbin, and even John Ashcroft, have demonstrated the ability to say no to programs that violated an expanded view of legal constraints in an atmosphere of immense pressure and dire responsibility.\textsuperscript{190} They did so not as mere obstructionists, but as lawyers who sought to put extralegal programs on sound legal foundations.\textsuperscript{191}

The task now is to analyze what contributed to and hindered the provision of sound legal advice during the period after September 11. It is to isolate and consider the various factors that affect the lawyer in a national security context and to reach pragmatic and practical solutions to those problems. In doing so, we provide our best chance at developing a system where proper restraints against government overreaching are imposed and a devastating backlash of risk-averse retrenchment is avoided.

\textsuperscript{189} See Yaroshefsky, supra note 188, at 571 (noting that Lt. Cdr. Swift was passed over for promotion and forced into retirement).

\textsuperscript{190} See Gellman, supra note 61, at 291–305 (describing the efforts of civilian lawyers in the Bush administration to fix the Terrorist Surveillance Program).

\textsuperscript{191} See id. at 291 (describing Jack Goldsmith’s desire to fix the Terrorist Surveillance Program and not simply stop it).
THE ROLE OF THE CLIENT: THE PRESIDENT’S ROLE IN GOVERNMENT LAWYERING

GABRIELLA BLUM*

Abstract: Discussions of whether Bush and Clinton administration lawyers have acted ethically have missed a fundamental point about the attorney-client relationship. It is the client—in this case, the government—who is ultimately responsible for making policy decisions, not the attorney. Too often, the question of what is “legal” has been substituted for what should actually be done, especially in the United States, where “legal” and “desirable” have become so intertwined. Governments should consult with attorneys, but should also be prepared to implement whatever policies they believe are “right,” and if necessary to explain any departures from what is “legal” to the public, to whom they are ultimately accountable.

The public debate over the ethical and professional conduct of the Bush administration lawyers has been a hallmark of the critique of the Bush presidency in its entirety. John Yoo, Alberto Gonzales, James Bybee, David Addington and others have consistently drawn fire on all fronts; after a while, it seemed their actions stood as a metonymy for the administration in general. By their critics they were held responsible for everything the administration was doing and, worse still, were perceived as aiders and abettors rather than gatekeepers, who should thus be indicted for complicity in the administration’s perpetration of war crimes.

The mere fact that the debate over the lawyers’ conduct has corresponded to such a large degree with the debate over the Bush administration’s policies in the war on terrorism is proof of the point I wish to make here: much of the assessment of the lawyers’ handling of their tasks assumes a direct and inevitable relationship between the legal advice provided and the administration’s subsequent actions. This assumption has not been sufficiently examined. In other words, the voluminous discussions of the role of government lawyers have

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largely neglected an inquiry into the role of the client, and, by extension, the role of law in policymaking.

To seize the point, it would be useful to turn to Attorney General Michael Mukasey’s Commencement speech at Boston College Law School last year. Like others who have attempted to account for the state of public legal practice under the Bush administration, the Attorney General claimed that any discussion of the conduct of the administration lawyers must begin with their predecessors under President Clinton. The National Commission on Terrorist Attacks Upon the United States (9/11 Commission) placed direct blame on the lawyers of the Clinton administration for preventing the Executive from taking effective action to meet the threat of terrorism against the United States. According to the report, the Clinton lawyers were too risk-averse, refrained from “going right up to the edge of the law,” and actively hindered the Executive from exercising even those powers that should have been deemed legal under a more security-minded reading of the law. In this, the government lawyers shared the responsibility for the government’s failure to preempt the attacks of September 11, 2001. Attorney General Mukasey then explained that it was this criticism that invited, indeed drove, the subsequent Bush administration lawyers to interpret the law in the most expansive way possible (and, to many minds, impossible).

If we accept this narrative, we have before us two groups: those pre-9/11 lawyers who advised the government that it could not do what it believed was necessary to fight terrorism, and those post-9/11 lawyers who advised the government that it could do whatever it thought was necessary to fight terrorism. One group limited the President more than was legally required; the other allowed him more than was legally plausible.

This discrepancy immediately begs a series of questions: where do we draw the correct line between complicity and obstruction? What considerations should lawyers take into account when offering legal advice to the executive? And, if such advice must be tipped one way or another, what type of bias should our system prefer—the overly-permissive or overly-restrictive?

1 See generally Michael B. Mukasey, The Role of Lawyers in the Global War on Terrorism, 32 B.C. Int’l & Comp. L. Rev. 179 (2009).

Past and present debates over the role of government lawyers tend to focus on the type of legal advice with which public-service lawyers should furnish their clients. Some, like Jack Balkin, have made the cheerless sophist argument that, “lawyers are rhetorical whores; their job is to confuse, obfuscate, and make unjust and illegal things seem perfectly just and legal, or, if they cannot quite manage that feat, to muddy up our convictions sufficiently that we conclude that it’s a close case.” Almost thirty years earlier, Geoffrey Hazard opined that, “If you have a client, you have to represent him and not ‘justice’ in some abstract sense.” Others, such as David Luban and Deborah Rhode, have professed an altogether different view of what lawyering, and particularly government lawyering, should be about, arguing that public service lawyers should care, “more about the means used than the bare fact that they are legal,” and, “accept personal responsibility for the moral consequences of their professional actions.”

To my mind, these debates neglect an all-important component, which is the role of the government as a client. More specifically, I wish to argue that the question of what type of advice lawyers should give the government concerns only one part of a two-way conversation between the lawyer and the client; and that without inquiring into the responsibility of the client receiving the legal advice, our normative and prescriptive view of government lawyering is seriously lacking.

To flesh out my argument, I return to a paragraph in Attorney General Mukasey’s speech:

A lawyer’s principal duty is to advise his client as to the best reading of the law—to define the space in which the client may legally act. If you do your job well, there will be times when you will advise clients that the law prohibits them from taking their desired course of action, or even prohibits them from doing things that are, in your view, the right thing to do. And there will be times when you will have to advise clients that the law permits them to take actions that you may find imprudent, or even wrong.

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7 Mukasey, supra note 1, at 180.
Attorney General Mukasey suggests that the lawyer’s task is limited to a pronunciation of what the law is, consciously excluding any extra-legal considerations. For now, I wish to sidestep the debate about whether this statement is correct or not, and focus, instead, on what Attorney General Mukasey does not say—about what the client should do with the legal advice he receives. His silence on this point, I believe, derives from an implicit assumption, which pervades the government as much as it does public discourse, that legal advice is forever an overriding consideration, the last if not the first argument to be weighed in any policy discussion.

In the United States, as Thomas Paine has said, “Law is King.”8 From its earliest foundation, this country has taken pride in being a nation ruled not by men but by laws.9 Alexis de Tocqueville commended the role of law in the United States as mitigating against majority tyranny.10 The notion of a rule of law, to which the leaders as much as any common citizen are subject, underlies our fundamental political association. The Constitution is our new Bible, our laws are our common pact. The American ideal of a city upon a hill has become dependent on following the wise restraints that keep us free. In everyday discourse we commend people for being law abiding citizens, and believe that everyone should “play by the rules.” For Americans, both past and present, the law is a metonymy for the line that separates right from wrong, inviting wrongdoers to justify their immoral behavior by arguing they have done nothing illegal, and making it difficult to justify illegal behavior as nonetheless morally just.

In this uber-legalistic culture, if a lawyer advises her client that a policy is illegal, the client hears “it is evil.” No one wants to be an evildoer. If she advises her client that the policy is legal, the client hears “it is good,” because it is compatible with the system of values on which we have chosen to found the law. If it is “good,” it follows that doing it is also worthwhile. Hence, we arrive at a confluence of legality and legitimacy, of what is permissible and what is desirable, a confluence which is often questionable both pragmatically and ethically.

Administrations are not immune to this conflation; in some ways they are more susceptible to it. In the context of the war on terrorism,

8 Thomas Paine, Common Sense 56 (W. and T. Bradford 1791) (1776).
9 See Marbury v. Madison, 5 U.S. 137, 163 (1803).
10 See Alexis de Tocqueville, Causes Which Mitigate the Tyranny of the Majority in the United States, in Democracy in America 348–58 (Francis Bowen ed., Henry Reeve trans., Sever and Francis 1899) (1862).
an administration that would not pursue an aggressive-but-lawful policy, a policy that some people in the government think could help fight our enemies, might be regarded with hindsight as incompetent or negligent its duty to protect the country, especially if another attack ensued.\textsuperscript{11} A characterization of “lawful” thus becomes an order to act. If, however, the Executive chooses to pursue a legally-dubious strategy, one that it believes is necessary to protect the country, it assumes a hefty risk of not being able to justify its actions to a legally-minded public or to an international community holding an altogether different set of values and laws.

A concrete example of the effects of legality on the public’s evaluation of policies may be found in a CNN/USA Today/Gallup poll conducted in January 2006, in which the public was asked to comment on the government’s wiretapping program (which was effected before congress amended the Foreign Intelligence Surveillance Act (FISA)). The poll showed a near-perfect correlation between those who believed the program to be illegal under the existing FISA (49\%) and those who believed the program to be wrong (50\%). Respondents who believed the wiretapping program was probably legal (47\%) corresponded to the number of people who replied to the question whether the program was also right (47\%).\textsuperscript{12}

In this kind of political climate, whether consciously or subconsciously, an administration accords substantial, and perhaps exaggerated, deference to the legal advice it receives. The legal review of any proposed policy becomes the make or break point of pursuing it. The result is that lawyers do not just give legal advice; their advice is what effectively determines government policy. The collapse of legal advice into strategy has been previously described by the former head of the Office of Legal Counsel (OLC), Jack Goldsmith:

This is why the question “what should we do?” so often collapsed into the question “what can we lawfully do?” . . . It is why there was so much pressure to act to the edges of the law. And it is why what the lawyers said about where those edges were ended up defining the contours of the policy.\textsuperscript{13}


\textsuperscript{13} Goldsmith, supra note 11, at 131.
Why is this collapse so troubling? Laws may be the first formal indicator we turn to in order to distinguish right from wrong. Both domestically and internationally, laws are enacted to anchor certain values and interests that their legislatures believe are right and just. But on a more fundamental level, we do not generally believe that law can or should exhaust our deliberation of right and wrong. Both morally and pragmatically, it is an imperfect marker. We may find an action condemnable even when there is no law against it: A person who walks by a drowning child and makes no effort to save him even at little risk to himself is reprehensible, even though only few states have bad Samaritan laws. In the same vein, we sometimes commend people (before or after the fact) for acting in violation of the law. The legacy of Rosa Parks offers a constant reminder that our notions of justice versus law are not always commensurate. In fact, the necessity defense in criminal law (which is not unique to U.S. law) is grounded in the notion that some instances of law-breaking are morally justifiable.

In the context of the war on terror, specifically, it may be that a particular act is unlawful, but should nevertheless be pursued. Numerous commentators have expressed support for the idea that the President should be allowed to employ coercive means—even torture—in the rare ticking-bomb case, even though the legal prohibition on torture is clear and absolute. In contrast, some coercive means that fall short of torture, and would therefore be lawful, may actually prove ineffective in the vast majority of interrogations of suspected terrorists.\(^{14}\)

It may equally come to pass, that an unquestionably legal act would be nonetheless better abstained from. The U.S. military’s newly-revised Counter-Insurgency Manual warns against the strategic fallout from inflicting civilian casualties in the course of counter-insurgency operations, even though the laws of war do not prescribe a zero-casualty obligation.\(^{15}\) It is the obligation of the Executive to weigh the strategic, moral, and political implications of civilian casualties, even if the military operations that inflict them fall within the scope of the law. Contrary to political rhetoric, governments should not do everything to protect their citizens in the literal sense, but only those things that are actually effective and that make ethical and practical sense.


The authority we vest in the President comes with the expectation that the President will exercise his best judgment and take responsibility for his actions when necessary. If President Clinton or his aides truly believed that employing more aggressive methods were necessary to combat the threat of terrorism, the President should have ordered these methods, or acted to change the law, even if his lawyers wavered on the legal implications of such an order. He should then have been ready and willing to justify his actions to the American public, whose reaction would have undoubtedly depended on its perception of the magnitude of the threat and the appropriate emergency responses. Indeed, public criticism of what some argued was President Clinton’s inaction grew much stronger after the September 11 attacks; public criticism of President Bush increased as threats of additional attacks remained unfulfilled. This is the political calculus the government must take into account in deciding how to react to a perceived threat; it would be irresponsible leadership to avoid any political ramifications by making law—and lawyers—the ultimate decision-makers.

Whether justified or not, there was a real fear within the Bush administration of the legal ramifications from an admission of breaking the law. True, historically, the number of prosecutions of executive officials in cases implicating national security is very low. Indeed, Abraham Lincoln’s suspension of the writ of habeas corpus and his dismissal of the courts’ overruling of the suspension during the Civil War is generally lauded, not condemned. Moreover, for present-day practical purposes, in two separate acts—the Detainee Treatment Act and the Military Commissions Act—Congress has ensured immunity for officials from criminal liability. Other sources of immunity protect government and military officials from liability under civil lawsuits. The likelihood of anyone who followed government orders in the course of the war on terrorism actually being held to account in any U.S. court is remote.

Nevertheless, there are growing calls for the indictment of Bush administration officials for war crimes, calls that have intensified following a bipartisan report by the Senate Armed Services Committee that tied Defense Secretary Donald Rumsfeld, his legal counsel, William J. Haynes, Gonzales and Addington to the torture and abuse of
prisoners.\textsuperscript{16} Whether or not indictments are ultimately made, there are associated costs (reputation, counsel fees, etc.) that are very real.

The threat of indictment in a foreign court under a paradigm of universal jurisdiction is even greater.\textsuperscript{17} To date, lawsuits filed against Rumsfeld, former Central Intelligence Agency director George Tenet, high ranking military officers, and several former government lawyers in Germany, France, and elsewhere, alleging torture and war crimes at Abu Ghraib and Guantanamo Bay, have not materialized into any real action against those cited. After all, the United States is far better able to protect its officials from such proceedings than other countries who face similar risks.\textsuperscript{18} The threat of indictment remains, however, and Secretary of Defense Rumsfeld, fearing arrest, did have to flee from France.\textsuperscript{19}

Real or not, however, the risks of either domestic or international chastising or indictment must be regarded as an occupational hazard that comes with holding office and exercising authority—a smaller risk than that assumed by any member of the U.S. armed forces deployed to a combat zone in the war on terror. It should not, as a normative matter, account for the transfer of responsibility from decision-makers to lawyers.

Naturally, when breaking the law is not an extraordinary and exceptional imperative, but a permanent or broad change of policy (such as wiretapping thousands of individuals), the executive should prefer a strategy of changing the law to violating the law. After the public uproar that ensued when the secret wiretapping program became known, the executive acted in concert with Congress to amend FISA to allow for more wiretapping within the law. Changing the law, however, is not always possible, nor is it always desirable. At times, amending the law would make a program public even though it


\textsuperscript{19} Twice, the German prosecutor has declined to commence a criminal investigation into complaints filed by human rights activists against Secretary of Defense Rumsfeld. See Mark Landler, Twelve Detainees Sue Rumsfeld in Germany, Citing Abuse, N.Y. Times, Nov. 15, 2006, at A17.
is better kept secret for security reasons. Other times, such as in the case of torture, amending the law would normalize the exception, at a great loss to the normative and symbolic weight of the absolute prohibition. In all such cases, acting outside the law may be inevitable or preferable to amending the law so as to enable a lawful action.

Throughout the post-9/11 era, the dialogue between government lawyers and the Bush administration over counterterrorism strategies has remained predominantly legalistic. In the now-infamous OLC memos that became public, the discussion of detention, coercive interrogations, and the war on terrorism more generally were limited to an analysis of executive power and the interpretation of domestic and international law. The President, who was fearful of the political implications of acting outside the law, sought approval from his lawyers prior to any action taken in the war on terrorism. The lawyers, who did not want to be accused of inhibiting the war on terrorism, became enablers of any and all strategies. Authorizing an unprecedented expansion of executive power, dismissing international law as irrelevant, narrowly interpreting constraining domestic legislation, and consciously and explicitly excluding any moral, political, or pragmatic considerations from their analysis, these lawyers believed they were acting in the best interest of national security in enabling the President’s strategies. Jack Goldsmith, although critical of the role played by some of the Bush administration lawyers, described his own sentiment while heading the OLC in a testimony before the Senate Judiciary Committee, quoting, with endorsement, George Tenet: “You simply could not sit where I did and read what passed across my desk on a daily basis and be anything other than scared to death about what it portended.”

Once labeled merely “legal,” the more aggressive strategies became more appealing as they grew to be “just” and “right,” and to some in the Bush administration, inevitable.

This dynamic proves that the problem did not lie exclusively with the lawyers, who believed, rightly or wrongly, that they were acting in the best interest of national security (albeit under an ideological commitment to greater executive power). The problem lay instead in the type of dialogue that the administration conducted with its lawyers, according “law” near-absolute power as a determinant of policy. It is a derivative of the social, cultural, and political role of law in the United

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States; of its almost mythical power as a synonym for the distinction between right and wrong; and of the upper echelons in the government seeking legal cover to function as political cover for their actions. It is also a derivative of over-zealous lawyers who sought to please their clients, and over-deferential courts that took only hesitant, incremental steps to assert the law in the face of the government.

Christopher Kutz eloquently described the difference in attitude towards law between Presidents Lincoln and Jefferson, on the one hand, and President Bush on the other:

Certainly many Presidents in U.S. history have argued for, and acted upon, a presumption of extra-statutory authority. The most famous include Jefferson’s purchase of the Louisiana Territories, and Lincoln’s expansion of the Army and suspension of habeas corpus. Both Presidents justified their acts by reference to public necessity. But, as Jules Lobel and Daniel Farber have argued, both also accepted the authority of the law they broke, making possible post-hoc congressional ratification and opening themselves to the legal consequences should that ratification not be forthcoming. In one sense, both Presidents justified their use of extra-judicial authority post hoc, by returning to the scene of their crimes, as it were, and looking for ratification. We must therefore be careful to distinguish claims regarding what must be done from what can actually be done under principles of justified authority . . . . [T]he Bush Administration took a different tack. Rather than concede the extra-legality of its positions, the OLC put forward a striking constitutional theory of presidential authority, which rendered even very general congressional limitations on intelligence gathering themselves illegal infringements of Executive prerogative.21

The ultimate responsibility for weighing right and wrong, beyond what a particular law at a particular time prescribes, lies with the government, not its lawyers. The government should break the law if it deems it right and necessary for the good of its citizens. It should also avoid lawful policies that are immoral, irresponsible, or counterproductive. It is not the responsibility of the lawyers to make these

decisions. By having a conversation about “law,” all other considerations became absorbed by and dissolved into the legal discourse.

The lawyer’s job is neither to give an administration a get-out-of-jail-free card, nor to block national security policies that elected officials deem essential to protect the country. It is only to provide the executive with the best understanding of the legal boundaries pertaining to any proposed action. Because of the view of law as a trump card in the decision-making process, however, it is also incumbent on the lawyer to remind the client that legal advice is just that and no more. Whatever the possible ramifications of violating the law at a given moment, it is the duty of the decision-maker to weigh those ramifications in the overall calculus of the proposed strategy.

The Bush administration lawyers did not do this. Instead, they felt they had to justify any government action under legal terms, for fear of tying the government’s hands. By doing so, they legalized illegal actions. They normalized and made routine the exceptional. “Clear and present danger” became every danger; remote possibilities turned into probable events; emergency became normalcy. This behavior did a great disservice not only to their clients, but to the rule of law. The source of this malpractice was not so much that lawyers did not perform their roles; it was, in the main, that they did not, or perhaps could not, trust their clients to perform their own role of governing.

It is possible that this failure to accord law its appropriate place may call for some institutional reforms in the government lawyer-client relationship. Currently, the President and the cabinet members are the designated clients of the OLC, and some commentators have suggested that the correct view of the client must be the American people, not any particular official or decision-maker. Neal Katyal even proposed that many of the advisory functions of the OLC be turned over to an independent agency acting as an adjudicative body. Nina Pillared suggested a greater role for the Inspector General in the

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22 According to the Department of Justice website, “By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive Branch agencies.” U.S. Dept. of Justice, Office of Legal Counsel, http://www.usdoj.gov/olc/ (last visited Feb 3, 2009).

Department of Justice.\(^{24}\) Eric Posner and Adrian Vermeule have called for bipartisan appointments of lawyers to the OLC.\(^{25}\)

All of these proposals may be useful in distancing the clients from the lawyers, but none would resolve the underlying problem of both lawyers and presidents fearing the paralysis brought upon by an “illegal” characterization. If, as I believe, this problem derives from the social and cultural precedence of law in American political life, its only real remedy is courageous and wise leaders who would pick the right instances for breaking the law and be willing to defend their decisions. A modern Lincoln could restore law into its rightful place: an all-powerful, \textit{but not absolute}, guide for action.

To conclude, several clarifications are in order. First, I do not mean to suggest that the Bush administration necessarily cared about the law; it is clear that it believed that the exigencies of the day called for extreme measures, whether perfectly legal or questionably so. It did, however, care about what it could say about the law. The law was twisted and turned so as to offer the administration the legal cover for its actions. The administration sought this cover believing that it could not publicly admit to breaking the law even in the name of security exigencies. The lawyers played along out of a similar understanding of the role of law in public opinion.

Second, I wish to emphasize that, contrary to other commentators, my claim is not one of “too many lawyers.” I do not believe that lawyers should stay out of national security matters or refrain from commenting on the legal merits of contemplated policies, even when those touch on the core of the most sensitive security questions. Any time a policy or action raises legal questions, which is more often than not, a lawyer should be consulted. My claim, in contrast, is that the lawyer should serve \textit{only} as a consultant; one of many other consultants on matters of security, foreign policy, domestic policy, intergovernmental policy, etc. The Bush administration, in effect, transferred the decision-making responsibility to the lawyers. Lawyers were often the first to be consulted, before even the subject-area experts.\(^{26}\)

And again, contrary to what might be thought, it is often not the

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lawyers who infuse themselves into the decision-making process, but instead the decision-maker that de facto delegates the decision-making power to the lawyer, thus shirking responsibility.

Third, it is not that law should not matter or not matter much; it should matter a great deal and we must have a strong, though rebuttable, presumption in favor of operating within the law. It is because I have a deep respect for the law that I believe that the dialogue between the government and its lawyers should be free from the risk of making lawyers decision-makers. Lawyers should express their view of the law, together with relevant considerations of politics, morality, and strategy, without fearing that their decision will be taken by the decision-maker as the final word. For social, moral, security, and political decisions, we elected a government. It is the latter that should make the decisions and face the consequences.
THE INTERNATIONAL PROSCRIPTION AGAINST TORTURE AND THE UNITED STATES’ CATEGORICAL AND QUALIFIED RESPONSES

MAJOR CHRISTOPHER B. SHAW*

Abstract: Although the prohibition against torture is a *jus cogens* and proscribed by multiple international treaties and United States law, such bans did not prevent the torture of detainees in United States’ custody. For a state truly to protect people from torture, it must rely less on definitions and prohibitions and turn to leadership and policy; proscriptions by themselves cannot stop torture—only leadership and policy can. In the case of detainees held by the United States during the war on terror, presidential leadership created an environment that allowed torture, and it was not curtailed until presidential leadership stopped it.

Introduction

Torture, although once a widely used interrogation and punishment tool, has now largely been banned by a combination of customary and treaty law.\(^1\) The most comprehensive of these treaties is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), subscribed to by 147 member states, including the United States.\(^2\) The most significant aspects of the CAT are its definition and its complete proscription of torture. The ban on torture is so absolute that it is considered *jus cogens*: an international norm so accepted by the community of states, that no derogation of the prohibition is ever permitted.\(^3\) Yet despite this proscription, people from every continent are still subjected to systematic

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1 See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].


physical and mental victimization at the hands of governments, including some of the most progressive Western governments.\footnote{See generally CAT, \textit{supra} note 1.}

The explanation for this discrepancy is painfully simple: definitions and proscriptions, by themselves, cannot stop torture—only leadership and policy can. I experienced this reality firsthand as a Marine lawyer deployed to Iraq. There, although the definition and the ban created a framework, it was leadership and practical policies that effectively combated torture.

Few dispute that it is torture for a prisoner to be, “bound to an inclined board, with his feet raised so his head is slightly lowered, have cellophane wrapped over his face, and then have water poured over him to create an unavoidable gag reflex and terrifying fear of drowning.”\footnote{See Brian Ross & Richard Esposito, \textit{CIA’s Harsh Interrogation Techniques Described}, ABC News, Nov. 18, 2005, http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1.} Yet according to the Bush administration, this interrogation technique, known as waterboarding, did not constitute torture and was, therefore, not in contravention of international law.\footnote{John Sifton, from Human Rights Watch, explains, “the person believes they are being killed, and as such, it really amounts to a mock execution, which is illegal under international law.” \textit{Id.}} These divergent views identify a flashpoint in the torture debate: what constitutes torture?

Although definitions play a significant role in answering that question, leadership, policies and, ultimately, a nation’s commitment to humane treatment are more important. A state’s accession to anti-torture conventions is not dispositive of whether that state actually practices torture; a number of CAT signatories have, after all, been accused of it. But by investigating a state’s torture definition, one can determine if that state actually condones internationally prohibited practices. Such an investigation, however, is only a starting point. To that end, after this article examines the definitions of torture, the international proscription, and the U.S. response, it will show that for a state truly to protect people from torture, it must move beyond definitions and prohibitions and rely instead on leadership and policy.
I. DEVELOPMENT OF THE DEFINITION OF TORTURE

The definitions of torture contained in international instruments vary. Nevertheless, the wide acceptance of the CAT definition of torture reflects a consensus “representative of customary international law.” The CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The CAT definition is the most comprehensive and widely used and is, therefore, considered the international standard. It establishes a cross national norm banning any use of torture. The norm is expressed and developed in numerous international documents.

For example, it has steadily expanded since the signing of the United Nations Charter (the Charter) in 1945. One of the stated purposes of the United Nations is to, “solve international problems of a humanitarian character . . . [by] promoting and encouraging respect for human rights.” Article 55(c) of the Charter goes on to state, “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.” In Article 56, “members pledge themselves to take joint and separate action

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9 CAT, supra note 1, art. 1(1). There are, of course, competing definitions. Webster’s dictionary defines torture as the “infliction of severe physical pain as punishment or coercion.” Webster’s II New Riverside University Dictionary (1984). W.R. Kidd, a California police lieutenant during the 1920s and 1930s, explained that, “torture may consist of beatings; of long grillings by relays of interrogators under blinding lights; or locking the prisoner up in a dungeon without food or water for long periods of time.” Yale Kamisar, Torture During Investigations: A Police Manual’s Foresight, NAT’L L. J., Mar. 10, 2008, at 22.
10 U.N. Charter art. 1, para. 3.
11 Id. art. 55, para C.
in cooperation with the [United Nations] for the achievement of the purposes in Article 55.”

Although the Charter does not specifically prohibit torture, it sets an aspirational goal for all its members to promote respect for human rights—a goal that includes, by implication, a prohibition against the use of torture.

Thereafter, in 1948, the United Nations adopted the Universal Declaration of Human Rights (the Declaration), which states in part that, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Because the Declaration was a General Assembly resolution, and not a treaty, some question whether the prohibition is binding or whether it simply creates an international norm.

That question was partially answered in 1976, when the United Nations International Covenant on Civil and Political Rights (the Covenant) declared: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Covenant derives these proscriptions from an inherent sense of human dignity. In other words, the prohibition of torture is an inalienable right, and not simply a right granted by states. Nearly twenty years later, the United States ratified the Covenant with numerous reservations. The most significant reservation states that Articles 1–27 of the Covenant, which include the prohibitions against torture, are not self-executing.

Notwithstanding the limited scope of the Covenant, the CAT came into force in 1987. It was significant not only because it defines and proscribes torture, but also because it creates proactive and reactive tools that parties can use to limit the use of torture throughout the world. The CAT is comprised of thirty-three articles organized into three parts. These articles create a comprehensive approach to the issue of torture. Among other things, the CAT provides: (1) the use of torture is proscribed regardless of the situation, (2) the pro-

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12 Id. art. 56.
14 Id. art. 5.
16 Id. art. 6.
19 See id.
20 Id.
scription is applicable to all states regardless if they have become a party to the convention, (3) parties cannot extradite persons to states where there is a significant possibility that they may be tortured, (4) following the orders of a superior is not a legal defense for torture, (5) the treaty functions as an extradition treaty for a country that wishes to send a person accused of torture to stand trial in another country, (6) evidence obtained from torture cannot be used in proceedings that are adverse to the victim, and (7) parties must educate persons, who would be in a position to torture, about the prohibition to torture.  

II. The United States and Torture

To understand the United States response to the CAT, one must first understand that the United States has historically supported human rights and proscriptions against torture through legislation and policy. Although several American colonies imported forms of torture from Europe, its use in the colonies was far less widespread than in the old world. The ratification of the United States Constitution and, later, the Bill of Rights, further prohibited actions that constituted torture. For instance, the Eighth Amendment to the Constitution bans cruel and unusual punishments, and the Fourth and Fifth Amendments ban unreasonable seizures and violations of due process during interrogations. Although these amendments do not explicitly ban torture, they do so by implication. For this reason, with a notable exception, torture has never been an authorized punishment in the United States.

A. United States Actions Against Torture Prior to CAT

The significant area in which government sanctioning of torture conflicts with constitutional aspirations, of course, arises in the treatment of African Americans in the southern parts of the United States.

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22 These forms of torture included: drawing and quartering, burning at the stake, whipping, branding, dunking in water, and placement in stockades. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICA 37-44 (1994).

23 Id. But see THE READERS COMPANION TO AMERICAN HISTORY 684–86 (Eric Foner & John A. Garraty eds., 1991) (noting that African Americans were systematically subjected to torture by the southern state governments and the Ku Klux Klan as late as the mid-twentieth century).
In response to this, Congress enacted the Civil Rights Act of 1871. The most important provision of this Act is now codified in § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Even today, this statute creates a private right of action against federal and state authorities who engage in abusive conduct.

Domestically, plaintiffs can use § 1983, in conjunction with the Fourth, Fifth and Eight Amendments, to hold authorities accountable for state actions that amount to torture. By holding police departments and individual police officers liable, § 1983 discourages abusive state action. The Alien Tort Claims Act also creates a private right of action for violations of customary international law or treaties to which the United States is a party. In 1979, two foreign citizens used this act to obtain punitive damages against foreign government officials for the torture and death of relatives. In its opinion, the Second Circuit Court of Appeals wrote: “[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him, hostis humani generis, an enemy of all mankind.”

On the international front, the United States ratified the four Geneva Conventions in 1955. The Geneva Conventions prohibit the use of torture in international armed conflict. Common Article 3 states:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated hu-

27 See Filartiga v. Pena-Irala, 630 F.2d 876, 879 (2d Cir. 1980).
28 Id. at 890.
manely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.\textsuperscript{30}

The Uniform Code of Military Justice (UCMJ), which regulates the conduct of U.S. service members, criminalizes violations of the Geneva Conventions.\textsuperscript{31} Furthermore, numerous articles within the UCMJ, such as the proscriptions against maiming, assaults, and the maltreatment of prisoners, specifically criminalize acts that constitute torture. As evidence of the United States’ commitment to ending torture, after the Vietnam War, the armed forces systematically taught its members the principles of the Geneva Conventions including, significantly, the proscriptions against torture.

In sum it was among this constellation of laws that the CAT arrived. Domestically, the United States already proscribed torture via a combination of statutes and constitutional amendments. Internationally, the UCMJ and the Geneva Conventions prohibited U.S. service members from using torture in armed conflict.

B. United States Acceptance of CAT with Reservations and Reaffirmation

Although the U.N. General Assembly unanimously adopted the CAT in December of 1984, the United States did not sign it until April 1988.\textsuperscript{32} In October 1990, the Senate forwarded the CAT to the President with numerous reservations. Although some of the reservations may have been superficial, one was significant in that it changed the definition of torture to the following:

[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent

\textsuperscript{30} Id.
\textsuperscript{31} See generally The Uniform Code of Military Justice, 10 U.S.C. §§ 801–950.
death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.\(^\text{33}\)

This definition makes torture harder to prove because it requires specific, as opposed to general, intent. Furthermore, by narrowing the definition to include only the acts that cause severe physical pain and suffering or actual prolonged mental harm, the Senate left open a range of conduct, including physical assaults, which would not be actionable under U.S. law.

The Senate ratified the CAT with these reservations in 1994.\(^\text{34}\) Congress then implemented the CAT’s terms by legislating proscriptions against torture that same year.\(^\text{35}\) In doing so, it defined torture as the following:

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.”\(^\text{36}\)


\(^{34}\) Convention Against Torture, reservation made by the United States (Oct 21, 1994), ¶ II.1(a).

\(^{35}\) See Bekerman, supra note 2, at 767–68.

\(^{36}\) 18 U.S.C. § 2340 (1)-(2).
It is important to note that torture, as proscribed by Congress, can only occur outside of the United States. Furthermore, Congress has extended criminal jurisdiction over any act of torture, regardless of the offender’s location or the nationality of the offender or victim.

C. Leadership and Policy

As stated earlier, definitions and proscriptions are necessary but insufficient instruments in the prevention of torture; leadership and policy implementation are the determinative factors. One example of these elements at work is evinced in President Clinton’s 1999 promulgation of Executive Order 13107. This order directed all executive departments and agencies to, “maintain a current awareness of [the] United States’ international human rights obligations that are relevant to their functions and perform such functions so as to respect and implement those obligations fully.” President Clinton’s leadership regarding international human rights issues created an expectation within the executive branch that supported international human rights and the CAT.

In contrast, the Bush administration’s derogation of the CAT and other international agreements signaled its tolerance of a more relaxed view on enforcing international human rights. For example, the administration’s view on the United Nations and international law is exemplified by former Ambassador to the United Nations, John Bolton, who said: “There is no such thing as the United Nations. There is only the international community, which can only be led by the only remaining superpower, which is the United States.” Further evidence of the Bush administration’s views on the CAT and interrogations is found in the actions of former Secretary of Defense Donald Rumsfeld, who directed military interrogators to “take the gloves off” when interrogating John Walker Lindh, the U.S. citizen captured while fighting for the Taliban.

Perhaps the most illuminating insight into the Bush administration’s views on torture are found in Assistant Attorney General John S. Ashcroft’s comments:

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37 Id. § 2340A(b).
38 See id.
40 Roland Watson, Bush Deploys Hawk as New UN Envoy, LONDON TIMES, Mar. 8, 2005, at 31.
Yoo’s “Torture Memo.”42 This originally classified document, and a similar memo authored by Assistant Attorney General John Bybee, evidences the Bush administration’s willingness to push the limits of domestic and international law during interrogations. Mr. Bybee’s memo states:

[T]orture as defined in and proscribed by Sections 2340–2340A, only cover extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. . . . Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment, fail to rise to the level of torture.43

Interrogators implemented the Bush administration’s policy with regard to suspected Taliban and al Qaeda members, many of whom were classified as illegal enemy combatants, and detained in Guantánamo Bay, Cuba in order to render them beyond the reach of international and U.S. law.

The policies announced in the Yoo and Bybee memos created a climate in the executive branch that manifested a shift in values: the United States no longer categorically rejected torture; henceforth the rejection became qualified.44

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44 One may argue that this analysis is unfair, because the Bush administration, unlike its predecessors, had to contend with the September 11 attacks. Even before the war on terrorism, however, the Bush administration was accused of unilateralism for its, “abrupt rejection of several international treaties, such as the Kyoto Protocol on global warming, the Anti-Ballistic Missile Treaty and certain elements of an emerging agreement to stem the spread of light weapons.” All of these policies signaled a desire to not be bound by international legal norms. Alan Sipress & Steven Mufson, Powell Takes the Middle Ground, Wash. Post, Aug. 26, 2001, at A01.
III. IMPACT OF THE BUSH ADMINISTRATION’S TORTURE POLICIES

In counter-attacking al Qaeda in Afghanistan and invading Iraq, U.S. forces have captured and detained thousands of people. Some of these detentions lasted only moments; others have lasted for more than five years. Their treatment has varied from humane to cruel. Testimony regarding the conditions within Abu Ghraib Prison in Iraq is enlightening, revealing that detainees were subjected to “sodomy, pouring phosphoric liquid on detainees, beatings, threats of rape and electrocution, stripping detainees naked, forcing them to masturbate, and simulate other sex acts in public and terrorizing naked detainees with dogs.” There is also evidence of two Afghan prisoners dying from blunt force trauma while under the exclusive control of the United States. Central Intelligence Agency (CIA) Director General Michael V. Hayden publicly admitted that the CIA had used waterboarding against al Qaeda suspects. Other CIA sources described six sanctioned “Enhanced Interrogation Techniques” used against al Qaeda suspects incarcerated in isolation at secret locations around the world.

46 See Vogel, supra note 45, at A10.
47 Bekerman, supra note 2, at 769.
48 Engle, supra note 26, at 501.
50 See Ross & Esposito, supra note 5. The six techniques were:

1. The Attention Grab: The interrogator forcefully grabs the shirt front of the prisoner and shakes him.
2. Attention Slap: An open-handed slap aimed at causing pain and triggering fear.
3. The Belly Slap: A hard open-handed slap to the stomach. The aim is to cause pain, but not internal injury. Doctors consulted advised against using a punch, which could cause lasting internal damage.
4. Long Time Standing: This technique is described as among the most effective. Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions.
5. The Cold Cell: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water.
6. Water-Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.

Id.
Looking at this evidence, it is arguable whether these actions and techniques were specifically intended to inflict “severe physical or mental pain or suffering upon another person within one’s custody or control.”\(^{51}\) What cannot be argued, however, is whether these acts are humane—they simply are not, and they certainly violate the spirit, if not the proscriptions, of the CAT.

**A. Responses to the Pushing of Limits**

Reports and photos of conditions in Abu Ghraib spread throughout the world, shocking the conscience of both those in the United States and the international community. Late in 2004, President Bush made an unequivocal directive, “United States personnel do not engage in torture.”\(^{52}\) That directive was followed up with a memo written by acting Assistant Attorney General Daniel Levin, declaring: “torture is abhorrent both to American law and values and to international norms.”\(^{53}\) In 2005, Congress responded by passing the Detainee Treatment Act (DTA), which states that, “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”\(^{54}\) The DTA went on to explain:

> [T]he term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.\(^{55}\)

The Presidential directive, the Assistant Attorney General’s declaration, and the DTA’s language signaled a shift in U.S. policy, which afforded greater protection to those detained by the United States and

\(^{51}\) 18 U.S.C. § 2340 (1)–(2).


\(^{53}\) Id.


\(^{55}\) Id.
brought the United States into greater alignment with the designs of the CAT.

The U.S. military has also extended and scrupulously enforced protective measures for detainees. From 2006 to 2007, I was deployed to Iraq as a legal advisor for a Marine unit. During that time, the unit in which I served captured in excess of one hundred detainees. My duties included ensuring the well being of those detained. Detainees were photographed and given medical exams before and after their detentions, and their treatment was heavily monitored to ensure no abuse took place. Reports of abuse, no matter how minor or trivial, were rigorously investigated. Similar provisions are currently in effect throughout the Department of Defense.

This new reality highlights a pendulum swing after the end of 2004. Before the Bush administration, the United States categorically rejected torture. After September 11, the rejection was only a qualified one. Now, with the Presidential directive and the DTA, the United State once again categorically rejects torture.\footnote{This movement is similar to the process that the Israelis went through in the mid-1980s. See generally Bekerman, supra note 2. The General Security Service was publicly condemned for using force during interrogations of suspected terrorists and then lying to courts about their use of force during those interrogations. Id. After these revelations, an Israeli commission investigated the issues and opined: “where non-violent psychological pressure induced by intense and lengthy interrogations . . . d[id] not provide desired outcome[s], the application of ‘moderate physical pressure’ is acceptable.” Id. at 760. The Israeli High Court of Justice took up the issue in 1999 and held: “a reasonable investigation is necessarily one free of torture, free of cruel and inhuman treatment, and free of any degrading conduct whatsoever . . . these prohibitions are ‘absolute.’” Id. at 761.}

\section*{B. Why Torture Should Never Be an Option}

There are a number of reasons why the United States should avoid torture. Torture-derived information is unreliable. Victims of torture routinely provide specious information to limit or cease pain and suffering. Bob Baer, a former CIA officer, said, “you can get anyone to confess to anything if the torture’s bad enough.”\footnote{Ross & Esposito, supra note 5.} In at least one instance, CIA waterboarding resulted in questionable information that negatively impacted U.S. operations in Iraq.\footnote{See id.} Another reason to avoid torture is the human cost. When we think of torture, we rightly concern ourselves with the victim of the torture. The torturer, however, is also a victim and may suffer psychological harm associated with this antisocial conduct. Finally, when any country uses torture in

\footnote{\textsuperscript{56} This movement is similar to the process that the Israelis went through in the mid-1980s. See generally Bekerman, supra note 2. The General Security Service was publicly condemned for using force during interrogations of suspected terrorists and then lying to courts about their use of force during those interrogations. Id. After these revelations, an Israeli commission investigated the issues and opined: “where non-violent psychological pressure induced by intense and lengthy interrogations . . . d[id] not provide desired outcome[s], the application of ‘moderate physical pressure’ is acceptable.” Id. at 760. The Israeli High Court of Justice took up the issue in 1999 and held: “a reasonable investigation is necessarily one free of torture, free of cruel and inhuman treatment, and free of any degrading conduct whatsoever . . . these prohibitions are ‘absolute.’” Id. at 761.}

\footnote{\textsuperscript{57} Ross & Esposito, supra note 5.}

\footnote{\textsuperscript{58} See id.}
defiance of international law, it does violence to its credibility. More importantly, such actions lower the bar for international human rights norms throughout the world and put more people at risk of being tortured.

C. The Lawyer’s Role in Preventing Torture

Interpreting the law is paramount to a lawyer’s job. Former Attorney General Mukasey’s belief that, “a lawyer’s principal duty is to advise his client as to the best reading of the law,” reiterates this assumption; yet it neglects a critical aspect of the art of practicing law. Although clients and society may only want to know what is legal, they also need to know what is prudent and what is right. Lawyers must be skillful enough to advise their clients on these points.

Lawyers’ analytical skills prepares them to meet the challenges of legal interpretation. To be effective counselors, however, they must be skilled in moral decision-making as well. They should not use strict interpretations of the law to limit their advice to clients. Rather, they must allow morality to inform the advice they render, too. Law schools play a critical role in developing conscientious and effective counselors. Law students, after all, come to understand how the same legal framework that generated “all men are created equal” later came to sanctify “separate but equal.”

I found myself applying these lessons less than two years after graduating from law school, while working on the front lines of detainee operations in Iraq. Both military personnel and lawyers believe that military lawyers serve as the conscience of the armed forces. As the conscience of the military, judge advocates must provide commanders and war-fighters not only with the sound legal advice they want, but also the counsel they need. As a lawyer in Iraq, I had to determine the level of care legally mandated for captured suspected insurgents, whether undergoing interrogation or awaiting transportation. Once I determined the required level of care, I viewed it as a floor, not a ceiling, for advising what level of care service members should be provided. My moral compass led me to believe that the Marines could provide better levels of care than the law required. I briefed my commander on both the legal requirements and my aspirational goals. He, in turn, ordered a level of care for detainees that far exceeded the legal requirements and the CAT.

Conclusion

The prohibition against torture is not only a *jus cogens*, it is also proscribed by multiple international treaties and by U.S. law. These bans, however, do not, on their own, prevent the torture of detainees. Instead, presidential leadership and policies ended the inhumane treatment. It is the hand of a vigilant administration that curtails the torturer’s fist. Laws and definitions are not inconsequential; they provide necessary theory and guidance. Yet they are subordinate to leadership and policy. Leaders must affirmatively choose to adhere to the spirit of the CAT and the foundational principles that underpin human rights norms. This choice includes a firm commitment to fuse the theoretical with grounded, practical procedures, thereby categorically rejecting torture.
A LAMENT FOR WHAT WAS ONCE 
AND YET CAN BE

HON. WILLIAM G. YOUNG*

Abstract: In the wake of 9/11, the American people showed unwavering faith in justice, fairness, and the rule of law through their steadfast service to the legal system. Yet one of the Bush administration’s first orders in the new “war on terror” was effectively to strip the courts and the juries of their role in the “trials” of our enemies, instead creating streamlined military tribunals. This diminished role of the judiciary is unfortunately just the latest feature in a disturbing trend in the federal district courts, which has seen the process of fact-finding in open court exchanged for a reflective in-chambers review of written submissions, and the trial of actual disputes replaced with “litigation management.” Most shocking is that the diminishment of the traditional American trial has been facilitated by the judiciary’s own institutional policies. Judge William G. Young of the United States District Court for the District of Massachusetts makes a plea to all branches of government and the American people to halt the erosion of the judiciary and return to the founding principles of our democracy.

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INTRODUCTION

At what point shall we expect the approach of danger? By what means shall we fortify against it? Shall we expect some transatlantic military giant, to step the Ocean, and crush us at a blow? Never! All the armies of Europe, Asia and Africa combined, with the treasure of the earth (our own excepted) in their military chest; with a Buonaparte for a commander, could not by force, take a drink from the Ohio, or make a track on the Blue Ridge, in a trial of a thousand years.

At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide.

—Abraham Lincoln, January 27, 1838, age 27

At 8:56 AM, Tuesday, September 11, 2001, an unwanted future burst upon us. Terrorists launched a vicious attack upon Americans, unparalleled in ferocity and horror. When it was over, we had lost more people than were killed at Pearl Harbor, but unlike the Imperial Japanese Navy in 1941, the terrorists left no return address.

Yet Americans were undaunted. We had heroes aplenty. Passengers attempted to retake United Flight 93 and, at the cost of their own lives, diverted it from its intended target. New York’s firefighters ran into the doomed towers with cool professionalism even as people fled from every exit or jumped to their deaths. Some reported even when expressly told not to, and many others rushed to the crash sites directly from their own houses. President Bush immediately convened a “war council” with advisors from the State Department, Central Intelligence Agency, National Security Agency, and other key departments, and, on September 21, approved the first military plans to attack al Qaeda and Taliban targets in Afghanistan.

The federal courthouse in Boston, with its beautiful glass wall overlooking the harbor, was guarded by Coast Guard reservists in Boston.

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1 FRANCIS TREVELYAN MILLER & EDWARD BAILEY EATON, PORTRAIT LIFE OF LINCOLN: THE GREATEST AMERICAN 113 (1910).
3 See id. at 311, 552 n.188.
4 See id. at 326, 399, 554 n.6.
5 Id. at 13–14.
6 Id. at 287, 289–91, 298–302, 306–08.
7 9/11 Report, supra note 2, at 314.
8 Id. at 330–38.
whalers mounting .50 caliber machine guns. Border Patrol officers in unfamiliar green uniforms thronged the courthouse cafeteria in between shifts of screening passengers at Logan International airport. Americans stood united in a way not seen since Pearl Harbor, but our unity was not only expressed in our military response or our humanitarian outreach to the victims.\(^9\) Within the judicial branch, citizen response to jury subpoenas spiked to record levels.\(^10\) Amidst all the frenetic activity in the months following September 11, not one potential juror—not one—sought to be excused on the ground that the courthouse itself was a probable terrorist target. Americans came to serve in record numbers simply because their country called them. Still more impressive, and ultimately far more profound, in the year following September 11 the government’s conviction rate remained relatively unchanged.\(^11\) In other words, juries continued to perform their constitutional role of providing impartial, even-handed justice even in the face of a looming, inchoate terrorist threat, and never subordinated their independent judgment to that of the government.

Then, on November 13, 2001, the President promulgated an order authorizing military tribunals to try non-citizens meeting certain criteria.\(^12\) Such tribunals were not limited to theaters of active combat operations, but were authorized to sit within the United States itself,\(^13\) where federal district courts have exclusive jurisdiction over the trial of federal crimes.\(^14\) The tribunals did not have to follow the rules of evidence,\(^15\) nor were their actions subject to judicial review.\(^16\) The saddest

\(^9\) See id. at xv–xviii, 13–14, 289–311, 326–34.


\(^13\) See id. §§ 3(a), 4(c) (1).

\(^14\) Compare Ex parte Quirin, 317 U.S. 1, 1, 40 (1942) (holding that an unlawful enemy belligerent may be tried by secret military tribunal within the territorial jurisdiction of the United States District Court), with Ex parte Milligan, 71 U.S. 2, 3 (1866) (holding that absent proper declaration of martial law, a secessionist saboteur who is not himself an enemy belligerent may not be tried by military tribunal within the territorial jurisdiction of a U.S. District Court).

\(^15\) Military Order, supra note 12, § 4(c) (3).
Irony is that the government justified these military tribunals in part by conjecturing that jurors might be fearful of serving on such cases, even though Americans were turning out in record numbers for jury service.

I read this Military Order the next day while sitting in my chambers. I remember with distinct clarity looking out over Boston Harbor at the city I love, where I have spent my entire professional life, and thinking, “This cannot be. Surely this will not stand.”

How wrong I was. After some bleating about civil liberties by pundits in the media, the press quickly fell into line, blandly referring to military detention as simply a “parallel track” to being indicted in the federal court system. The creation of these military tribunals thus reduced the citizen jury from the central feature of the U.S. justice system to nothing more than a “parallel track.” This has been the most profound shift in our legal institutions in my lifetime, and—most remarkable of all—it has taken place without engaging any broad public interest.

What is even more devastating is the fact that, rather than being an excrescence on our Constitution, this dismissive view of juries, fact-finding, and judicial review may well prove the most enduring legacy of the Bush administration. This is because the policy making body for the lower level federal courts, the U.S. Judicial Conference, has little concern for any of these things.

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16 See id. §§ 4(c)(8), (7)(b)(2).
17 See Elisabeth Bumiller & David Johnston, A Nation Challenged: Immigration: Bush Sets Option of Military Trials in Terrorist Cases, N.Y. TIMES, Nov. 14, 2001, at A1 (“White House officials said the tribunals were necessary to protect potential American jurors from the danger of passing judgment on accused terrorists.”).
22 American exceptionalists (I consider myself one) can but rue the fact that jury trials for those whom the executive has characterized as terrorists apparently survived for seven years longer in Russia than in the United States. See Megan K. Stack, New Law in Russia Ends Jury Trials for “Crimes Against State”, L.A. TIMES, Jan. 2, 2009, at A3.
I. Jury Trials

This is a trial court. Trial judges ought go out on the bench every day and try cases.

—John H. Meagher, 1978

The American jury system is dying—more rapidly on the civil than the criminal side, and more rapidly in the federal than the state courts—but dying nonetheless.

For decades, our civil juries have been incessantly disparaged by business and insurance interests. These interests know what they are doing. Recent analysis has led one commentator to conclude that “a civil justice system without a jury would evolve in a way that more reliably serve[s] the elite and business interests.” What is most disturbing about this trend is that it has occurred without the courts offering any defense for the institution upon which their moral authority ultimately depends. Indeed, federal courts today seem barely concerned with jury trials. The federal judiciary has been willing “to accept a diminished, less representative, and thus sharply less effective civil jury.”


26 See Edmund V. Ludwig, The Changing Role of the Trial Judge, 85 Judicature 216, 217 (2002) (“Trials, to an increasing extent, have become a luxury . . . when cases are handled as a package or a group instead of one at a time, it is hard, if not impossible, for the lawyers or the judges to maintain time-honored concepts of due process and the adversary system.”). Judge Ludwig was at the time a member of the Court Administration and Case Management Committee of the Judicial Conference of the United States. See Comm. on Court Admin. & Case Mgmt., Judicial Conference of the U.S., Civil Litigation Management Manual, at iii (2001), available at http://www.fjc.gov/public/home.nsf (follow “Publications & videos” hyperlink; then follow “Browse by Subject” hyperlink; then follow “Case Management—Civil” hyperlink).

The predictable result is that bipartisan majorities in Congress have severely restricted access to the jury.28

On the criminal side, manipulation of the federal sentencing guidelines has had the consequence of imposing savage sentences upon those who requested jury trials, a choice guaranteed under the Constitution.29 Small wonder that the rate of criminal jury trials in the federal courts has plummeted.30

Yet in a government of the people, the justice of the many cannot be left to the judgment of the few. Nothing is more inimical to the essence of democracy than the notion that government can be left to elected politicians and appointed judges. As Alexis de Tocqueville so elegantly stated, “The jury system . . . [is] as direct and extreme a consequence . . . of the sovereignty of the people as universal suffrage.”31 Like all government institutions, our courts draw their authority from the will of the people. The law that emerges from these courts provides the threads with which all our freedoms are woven. It is through the rule of law that liberty flourishes. Yet “there can be no universal respect for law unless all Americans feel that it is their law . . . .”32 Through the jury, the citizenry takes part in the execution of the nation’s law, and in that way, each can rightly claim that the law belongs partly to him or her.33

Only because juries may decide most cases is it tolerable that judges decide some. However highly we view the integrity and quality of our judges, it is the judges’ colleague in the administration of justice—the jury—which is the true source of a court’s glory and influence. The involvement of ordinary citizens in judicial tasks provides legitimacy to all that is decreed. When a judge decides cases alone, “memories of the jury still cling to him.”34 A judge’s voice echoes the values and judgment learned from observing juries at work. Ours is not a system where

30 See id. at 68–69.
33 See de Tocqueville, supra note 31, at 273.
34 Id. at 276.
judges cede some of their sovereignty to juries, but rather one where judges borrow the jury’s fact-finding authority.\textsuperscript{35}

In recent years, many judges appear to have forgotten that the true source of their power to render legal interpretations stems from the jury—their co-equal constitutional officers.\textsuperscript{36} It is the \textit{judiciary} which has failed to place the jury trial at the very center of its operations where it belongs:\textsuperscript{37}

\[T\]hose judges who thought that, by and large, we could do without juries and we would still have the same moral authority, and our written opinions, our constitutional interpretations would still occupy the center stage of political discourse. Well, we are rather stunned that the President thought that, with respect to those people that he designated as enemies of the state, by and large, he could do without courts. And the Congress acquiesced.\textsuperscript{38}

Whenever Congress extinguishes a right which, heretofore, has been vindicated in the courts through citizen juries, there is a cost. It is not a monetary cost, but rather a cost paid in rarer coin—the treasure of democracy itself.\textsuperscript{39}

\textsuperscript{35} \textit{See Akhil Reed Amar, America’s Constitution: A Biography} 236 (2005) (“A criminal judge sitting without a criminal jury was simply not a duly constituted federal court capable of \textit{trying} cases, just as the Senate sitting without the House was not duly constituted federal legislature capable of enacting statutes.”) (emphasis added).

\textsuperscript{36} \textit{Luisi,} 568 F. Supp. 2d at 111, 114–19.

\textsuperscript{37} \textit{See generally Andrew Seigel, The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 Tex. L. Rev. 1097} (2006) (demonstrating the disdain shown by the Supreme Court for the lower courts).


II. Fact-Finding

You have to listen to the bastards, Austin. They might just have something.

—Hon. Franklin H. Ford

Over a quarter century has passed since I first came to the bench. I remember well the extraordinary emphasis that was then placed on fact-finding, and the meticulous observance of the rules of evidence, in order that we might “get it right.”

Yet as I came to learn over the next few years, fact-finding is difficult. Exacting and time consuming, it inevitably falls short of absolute certainty. More than any society in history, the United States entrusts fact-finding to the collective wisdom of the community. Our insistence on procedural safeguards, application of evidence rules, and our willingness to innovate are all designed to enhance impartial fact-finding.

Judicial fact-finding is equally rigorous. Necessarily detailed, judicial fact-finding must draw logical inferences from the record, and, after lucidly presenting the subsidiary facts, must apply the legal framework in a transparent written or oral analysis that leads to a relevant conclusion. Such fact-finding is among the most difficult of judicial tasks. It is tedious and demanding, requiring the entirety of the judge’s attention, all her powers of observation, organization, and recall, and every ounce of analytic common sense he possesses. Moreover, fact-

40 These are the words of my distinguished predecessor, Franklin H. Ford to his legendary Courtroom Deputy Clerk, Austin W. Jones. See Young, Vanishing Trials, supra note 23, at 93.

41 Hon. Raymond S. Wilkins, former Chief Justice of the Massachusetts Supreme Judicial Court. “Facts are like flint,” he used to say. I clerked for Chief Justice Wilkins, and have never met a greater proponent of careful fact-finding.


45 See Fed. R. Civ. P. 52(a) (1).
finding is the one judicial duty that may never be delegated to law clerks or court staff. Indeed, unlike legal analysis, many judges will not even discuss fact-finding with staff, lest the resulting conclusions morph into judgment by committee rather than the personal judgment of the duly constituted judicial officer.

Fair and impartial fact-finding is supremely important to the judiciary because, as Judge Robert E. Keeton has so cogently observed:

Judging is choice. Choice is power. Power is neither good nor evil except as it is allocated and used. Judging in a legal system is professional. Professionals, including judges, represent interests other than their own. One who accepts a professional role in a legal system accepts an obligation to confine the exercise of power within the limits of authority. For each professional role the limits of authority are defined by law . . . . The quality of judging in a legal system depends on commitment. It depends first on commitment to the aim of justice. Second, it depends on commitment to professionalism . . . . Third, the quality of judging depends on commitment to method. Judicial choice, at its best, is reasoned choice, candidly explained.

While trial court legal analysis is appropriately constrained by statutes and the doctrine of stare decisis, the true glory of our trial courts, state and federal, is their commitment to fair and neutral fact-finding. Properly done, facts found through jury investigation or judicial analysis truly are “like flint.”

Yet there has been virtual abandonment by the federal judiciary of any sense that its fact-finding processes are exceptional, or due any special deference. Federal district court judges used to spend their time

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46 Cf. David Crump, Law Clerks: Their Roles and Relationships with Their Judges, 69 JUDICATURE 236, 237 (1986) (acknowledging a common criticism of the “overuse” of law clerks who are not constitutionally authorized to perform judicial functions); John B. Cheadle, The Delegation of Legislative Functions, 27 YALE L.J. 892, 896 (1918) (noting that a judge cannot further delegate authority with which he himself has been delegated and entrusted).


48 Wilkins, supra note 41.

49 This is similar to what Marc Galanter calls the “jaundiced view”—that there has been a decline in faith in adjudication by the courts and their key constituencies—a “turn from law, a turn away from the definitive establishment of public accountability in adjudication” and that there exists a “very real fear of trials.” He argues that lawyers, judges, and corporate users, misled by the media, believe that America is amidst a “litigation explosion” and that trials are expensive and risky because juries are pro-plaintiff, “arbitrary,
on the bench learning from lawyers in an adversarial atmosphere, and overseeing fact-finding by juries or engaging in it themselves. This was their job and they were proud of it. Today, judges learn more reflectively, reading and conferring with law clerks in chambers. Their primary challenge is the proper application of the law to the facts—facts that are either taken for granted, or sifted out of briefs and affidavits, and, in the mode of the European civil justice systems, scrutinized by judges and clerks behind closed doors. While judges do talk to lawyers in formal hearings, these hearings can be short, and usually serve to test and confirm a judge’s understanding rather than develop it.

The major reasons for the decline in the preeminence of fact-finding are not structural but cultural. On the civil side, they result from a marked shift in emphasis from the trial of actual disputes to mere litigation management, resulting in an overuse of summary judgment and a concomitant settlement culture. On the criminal side, the sentencing guidelines ushered into judicial opinions a degree of sophistry heretofore unknown to the federal judiciary. For seventeen years, an entire generation of federal judges spoke of sentencing based on “facts” determined by a “preponderance of the evidence,” when what they had before them was manifestly not evidence, but rather “faux facts” that had neither been tested by cross examination nor presented to a jury.

In so doing, we lost our way. In 1980, the average amount of time a U.S. district judge spent in the court room was 790 hours. In 2008, the


51 See, e.g., Eugene R. Fidell, Hearings on Motions: A Modest Proposal, Nat’l L.J., Dec. 22, 2008, at 23 (bemoaning the rarity of hearings on dispositive motions in the D.C. district court: “[e]ven in this digital era, there is still a participatory and symbolic aspect to the administration of justice that remains key to its legitimacy. That interest is not served when business is transacted without human contact.”).


average was just 353 hours, of which only 189 were spent in trial. The judiciary hates it when I say this, because the immediate reaction is that we are not working very hard, and that is wrong. We are working as hard, or harder, than ever before. It took seventy-five years for the Federal Supplement, the vanity press for district judges, to fill a thousand volumes; my first published opinion was in Volume 656. My most recent opinions appear in Volume 578 of the second Federal Supplement. If I survive another year, I will have opinions spanning a thousand volumes. And what are they about? Are they great cases, findings and rulings? There are a few, but as Patricia Wald, former chief of the D.C. Circuit Court of Appeals stated, “[f]ederal jurisprudence is largely the product of summary judgment in civil cases.” If she had added motions to dismiss, she would have gotten it completely right. Page after page of carefully reasoned adjudications explaining why we don’t go to trial—and we wonder why trials are vanishing.

This massive drift away from rigorous fact-finding in open court did not happen randomly. It did not result from the personal predilections of those newly appointed to the trial bench, who are every bit as vigorous and skilled as their predecessors. The shift was instead occasioned by less-than-subtle institutional cues from within the judiciary itself. For years, newly appointed district judges have been taught that the focus of their job is primarily the “management” of their caseload, not the trial of the cases before them. “Of course, we must be skilled

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55 In 1980, the average trial time reported by federal judges who were active district judges for at least 11 months was approximately 550 hours. In 2002, the average trial time was just over 250 hours. See Federal Judicial Center, Report (based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity) [App. A]. Data for fiscal years 2003 and 2004 confirm that trial time has consistently remained lower than it was during the 1980s. See Data derived from the Reports of the Clerk, United States District Court, District of Massachusetts 2005–2008 [App. B]. There has also been a decrease in bench time and trials in the state courts. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 459–60 (2004).


57 See Open Letter, supra note 39, at 31–33.

58 The brilliant judge Richard S. Arnold cuts directly to the bone:

I think in the 20 years since I was a district court judge, we’ve seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.

Hon. Richard S. Arnold, Mr. Justice Brennan and the Little Case, 32 Loy. L.A. L. Rev. 663, 670 (1999). My colleague, Judge Nancy Gertner, has also addressed this issue:
managers. But to what end? To the end that we devote the bulk of our time to those core elements of the work of the Article III trial judiciary—trying cases.”

Yet the time spent at trial continues to fall. While courtroom deputy clerks dutifully record the time each judge spends on the bench, the results are a closely guarded secret, known only to the Committee on Judicial Resources which is adjoined to not share such information even within the judiciary. Although the Civil Justice Reform Act requires that judge-specific comparative data be published for cases over three years old and motions pending for more than six months, the central uniform measure of actual trial judging is never even mentioned, and those judges who desire to measure their efforts against the most productive courts are rebuffed by internal secrecy.

The Administrative Office of the U.S. Courts annually publishes the number of “trials” in which the federal judiciary engages, and ranks

In baby judge school, one trainer went so far as to begin a session on employment discrimination by saying, “Here’s how you get rid of these cases!” “Here’s how you get rid of these cases?” I could have sworn it was about justice, not digging for an excuse to close the case. When I was a baby judge we had more courses on case management, and mediation, than on opinion writing.


59 Open Letter, supra note 39, at 33.
60 Compare App. A with App. B.
62 See 3 Guide to Judicial Policies & Procedures § A, chap. 2, part B, § 2, Part C, para. 6 (“Access to Committee Reports and Other Material”) (on file with author) (“Reports approved by the Conference for transmission to Congress shall not be publicly released prior to their submission to Congress . . . . Background materials, files, minutes and the like, are considered working papers of the Conference . . . . and generally are not available to the public.”).
the courts accordingly. Words matter, however, and the Conference has debased the term “trial.” The term once denoted a jury or bench proceeding that led to a verdict; now it encompasses any disputed evidentiary hearing. Thus, a criminal case with a motion to suppress, a Daubert hearing, a genuine trial, and a sentencing hearing count as four “trials,” as does a civil patent case with a preliminary injunction hearing, a Markman hearing, a genuine trial, and a separate damages hearing. As a result, the Administrative Office inflates the actual number of trials by approximately 33%. However much this may impress Congress, such imprecision renders the term “trial” essentially meaningless, a result not lost on scholars and the knowledgeable press. To the judges, the message could not be more clear—trial time, indeed, any on-bench time, matters less than does “moving the business.”


71 See, e.g., Lowe, supra note 66.

72 The internal process of the Judicial Conference has real world consequences. For example, from time to time the Judicial Conference takes upon itself the authority to advise the President not to nominate judges to fill vacancies it deems superfluous. It makes this decision by fixing an arbitrary cutoff point based upon the court’s “weighted caseload,” derived by a methodology that has been sharply (and accurately) criticized by independent observers. See S. Rep. No. 110-427, at 17–19 (2008); Jenkins Statement, supra note 69, at 82–95; see also JOHN SHAPARD, Fed. Judicial Ctr., How Caseload Statistics Deceive 2–5 (1991), available at http://www.fjc.gov/public/pdf.nsf/lookup/0020.pdf/$file/0020.pdf (discussing common problems of misinterpretation with caseload statistics). While the “weighted caseload” ranking may be modified by various gestalt factors, none of them have anything to do with the
Judge Irene M. Keeley, former president of the Federal Judges Association, states:

Litigation management is our primary job, and, even with fewer trials, there is a lot of litigation to be managed. We trial judges still spend a lot of time on the bench resolving disputes, even if it is not always during trial. Discovery is a demanding—and growing—part of litigation management expense. Mediation—even when it occurs early—doesn't always succeed in resolving the case. The lawyers engage in extensive, contentious discovery that requires an enormous amount of attention both from magistrate and district judges. 73

Litigation management: hardly a shining vision. Once divorced from daily interaction with jurors, our written opinions subtly mock the very idea that democratic institutions might be made to serve the cause of justice. This leads us to prefer knowledge over hope, and the jury system is, if nothing else, our country’s finest expression of hope. We district judges are more than pint-sized court of appeals aspirants, for we have the sole and unique responsibility for our constitutionally guaranteed modes of fact-finding. Yet as judicial face time with jurors, lawyers, and litigants becomes increasingly rare, and as the federal courtrooms throughout the land go dark with disuse, the moral force of what is decreed is increasingly marginalized. Soon, society may begin to wonder why we have the lower federal courts at all.

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IIII. Where are You Going, Habeas Corpus?

James Robertson’s critically acclaimed work on habeas corpus, and the thorough analysis in Jonathan Shaw’s “The War and the Writ,” together explain the vicissitudes of the constitutionally guaranteed writ of habeas corpus in the years since September 11. It is important to note that the decline of habeas had begun well before that day, however, and that it was significantly encouraged by the judiciary. Even Chief Justice William H. Rehnquist was highly critical of our habeas jurisprudence. As a result of this and similar criticism, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which, under the guise of ordaining the jurisdiction of the lower federal courts, severely restricted access to the writ by those in government custody. AEDPA likewise restricts, perhaps unconstitutionally, the right of those lower federal courts independently to interpret the Constitution.

Congress, by adjusting the jurisdiction of the lower federal courts, can effectively strip disfavored classes from full access to justice, thereby restricting, if not extinguishing, cherished individual rights and liberties. This is known as “rights stripping,” a legislative technique that descends directly from bills proposed in the 1980s to strip federal

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75 See, e.g., Coleman v. Balkcom, 451 U.S. 949, 957–58 (1981) (Rehnquist, J., dissenting) (criticizing the habeas remedy as “endlessly draw[ing] out legal proceedings” and thus rendering the death penalty to be a virtual illusion).

76 Verbal and political attacks on an independent federal judiciary are as old as the republic, and as healthy. See generally MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005). We learn from our history, recoiling from extremism. Each generation must strike anew the balance between Congress, the President, and the Judiciary.


78 See Evans v. Thompson, 524 F.3d 1, 1–5 (1st Cir. 2008) (Lipez, J., dissenting); see also Bradley v. Henry, 428 F.3d 811, 816 (9th Cir. 2005) (implying that the AEDPA, as interpreted, places unworkable restrictions on the federal courts’ powers of review).


courts of jurisdiction over abortion and busing. As commentators have noted, “jurisdiction stripping” is, in effect, “rights stripping,” because it removed the nuanced views of the 674 federal district judges from the rich common law tradition of evolutionary statutory interpretation, leaving the matter solely to appellate courts. While society has subsequently recoiled from stripping rights from women and minorities, it has had no such hesitancy concerning felons and aliens. Sadly, resort to this technique has become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect.

So it was that at the dawn of the new millennium, with the jury sidelined and marginalized, the judiciary seemed more interested in discussing recondite issues of law than in the robust but tedious process of hammering out unassailable findings of fact. Thus, the Great Writ was great no more.


It is constitutional bedrock that “[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. There is but a single limit on Congress’ broad powers to establish and disestablish inferior courts, expand or trim their jurisdiction, and move jurisdiction from one such court to another. That limit is the American jury. See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”); Id. amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved . . . .”). These constitutional commands necessarily require the existence of jury trial courts to give them effect.

Efforts to water down the plain language of the Constitution continue to this day. See The Civil Jury, supra note 27, at 1493–1503 (discussing proposals to limit the jury’s role in complex civil cases); see also Note, The Twenty Dollars Clause, 118 HARV. L. REV. 1665, 1686 (2005) (suggesting that the United States has “outgrown” the philosophy undergirding the Seventh Amendment).

The jury, that most vital expression of direct democracy extant in the United States today, thus functions as a practical and robust limitation on congressional power. It is as crucial and central a feature of the separation of powers between the Legislature, the Executive, and the Judiciary as the Supreme Court. See Jackie Gardina, Compromising Liberty: A Structural Critique of the Sentencing Guidelines, 38 U. MICH. J.L. REFORM 345, 377 (2005) (“[T]he jury can serve . . . as a structural protection within the constitutional scheme.”). Indeed, within her proper fact-finding sphere, a juror is the constitutional equal of the President, a Senator or Representative, or the Chief Justice of the United States.
IV. And Now . . . Torture

Under the Bush administration, for the first time in the history of our republic, the torture of prisoners became an official instrument of state policy. Neither the weakening of our jury system, the judicial disdain for fact-finding, nor the restrictions on habeas corpus were solely responsible for this development. Yet taken together, the cultural desuetude into which these essential elements of our governance had fallen were all key ingredients of this truly breathtaking shift in the American identity.

In vesting the “judicial power of the United States” in our court system, the Constitution commands, “[t]he trial of all crimes, except in cases of impeachment, shall be by jury.” There was a time when we meant it. Military tribunals once encompassed only what was necessary to maintain our forces in the field, and swept within their ambit only those recognized offenses that harmed our combat operations. For over two hundred years, through the “fiery trial” of the Civil War and two cataclysmic World Wars, we survived and flourished, a beacon of hope to all humankind, without a doctrine that concerned the treatment of “enemy combatants.”

No more. Jack Goldsmith’s brilliant book, The Terror Presidency, reveals the relative ease with which legal and constitutional constraints


I am not such an American exceptionalist as to suggest that individual Americans do not torture, rape, and kill in what they conceive is the national interest; clearly, we do. See, e.g., Michael Bilton & Kevin Sim, Four Hours in My Lai 102–63 (1992) (detailing massacre of approximately four hundred civilians, and other atrocities by U.S. troops in the Vietnamese village of My Lai on March 16, 1968). General Sherman had it right when he said, “war is all hell.” See Stanley P. Hirshson, The White Tecumseh: A Biography of General William T. Sherman 372 (1997). Until today, however, our national policy has always abhorred torture, and we have prosecuted those who have conducted it. See generally Paul Kramer, The Water Cure, New Yorker, Feb. 25, 2008, at 38 (recounting the public outcry, Congressional hearings, and courts martial related to water-boarding and other atrocities committed by U.S. soldiers in the Philippines between 1899 and 1902).

U. S. Const. art. III, § 2, cl. 3 (capitalization altered from original).

Military tribunals should not be confused with military courts-martial. Although they can be used to prosecute similar things, the latter provides for trial by jury. See generally Joint Service Committee on Military Justice, Manual for Courts Martial United States (2008) (describing court martial procedures, as well as offenses that threaten success of the military mission, such as Spying, Aiding the enemy, and Espionage).

See generally Carl Sandburg, The Fiery Trial (Dell Publ’g Co. 1959) (1948).
can be swept away in a time of fear and uncertainty simply by declaring a “new” status for those whom we fear the most.90 Indeed, the heroes of our time are military lawyers such as Lieutenant Commander Charles Swift. Upon being assigned to defend one of the Guantanamo detainees he was told, “Your job is to plead him out.” Swift replied, “My job is to be his lawyer, Sir.”91 Other heroes include the free press which brought the horrors of Abu Ghraib to light,92 and the American people who, notwithstanding the equivocation of their leaders, well understood that waterboarding was torture.

This left Congress in a quandary, and it is in the resulting analysis of the laws that one can see just how far the debate has shifted, and how marginalized the lower federal courts have allowed themselves to become. Ultimately, Congress passed the Detainee Treatment Act (DTA) of 200593 and the Military Commissions Act (MCA) of 200694 with significant bipartisan majorities. These measures sought both to preserve national security by placing further limitations on habeas, and to refute the charge that we were officially engaged in the systematic torture of prisoners. Yet behind the carefully parsed language, circumlocutions, and strict limitations on judicial review,95 remains a stark and sobering fact: for the first time in our nation’s history, Congress has legislatively sanctioned the torture of prisoners.96 This is why it was necessary for President Obama, to his great credit, to issue an executive order against torture soon after taking office.97

92 One must also recognize the contributions of Al Jazeera, which, despite much overt propaganda, has displayed flashes of journalistic brilliance and brought home to us here in the United States how we are perceived in much of the world. Hugh Miles, Al Jazeera: The Inside Story of the Arab News Channel That Is Challenging the West 61 (2005) (noting that Al Jazeera has won several international journalism awards).
95 See, e.g., id.
Today, only that order stands between us and the official resumption of torture. To understand how that can possibly be, it is instructive to look at the legislative history of the DTA and MCA. Nowhere will you find mention of a jury, nor do the acts concern themselves much with rigorous fact-finding. Indeed, the fact-finding courts are totally stripped of their usual jurisdiction and review is granted only to a single appellate court without fact-finding jurisdiction or apparatus. Even this review appears to echo the administrative model in that the “facts” to be reviewed are those established by the executive. This is so despite the fact that the very essence of habeas demands that the judiciary sort out the facts. While the status of these acts was placed in limbo by Boumediene v. Bush, they may yet prove one of the enduring legacies of the Bush administration.

After all, why ought Congress exalt the American jury when the federal courts themselves seem to care so little about its contributions? There is no reason for Congress to value the fact-finding skills and procedures of the lower federal courts unless those courts themselves recognize this as their core function. Congress may reasonably wonder why habeas should matter so much for foreign detainees when it has so successfully limited it for domestic prisoners and substituted the most pallid of imitations for alien immigrants.

98 See generally 152 Cong. Rec. S10349 (daily ed. Sept. 28, 2006) (debating the MCA); 151 Cong. Rec. S12375 (daily ed. Nov. 4, 2005) (debating amendments to the DTA). I suppose this means these Acts are not intended to deal with those who have committed crimes against the United States, as “all crimes, save for Impeachment, shall be tried by jury.” U.S. Const., art. III, § 2, cl. 3. This procedure applies to all offenders, whatever their status or nationality.


101 See Boumediene, 128 S. Ct. at 2271.

102 Id. at 2274.


105 See Enwonwu v. United States, 199 F. App’x 6, 6–7 (1st Cir. Sept. 26, 2006).
CONCLUSION

So the great work is laid before each of us—the work of insuring national security and, at the same time, preserving civil liberties. In a symposium featuring leading scholars on the laws of war and the proper response to terrorism, an Article on jury size, trial hours and domestic habeas issues may seem wide of the mark. It is not. I seek here to illustrate a truth so basic it may seem banal—a rend anywhere in the social fabric weakens our shared mantle everywhere. For most of us, these issues arise not in notorious cases, writs of certiorari, or sweeping constitutional decisions. For us, rather, it is the quotidian attention to the rights, needs, and concerns of individual litigants, sometimes poised against the equal rights of society as a whole.

I have argued that the judiciary needs to get back to basics, in order better to explain to society the enormous values that are lost when the jury is sidelined, fact-finding marginalized, and the Great Writ derailed. I posit that the lower federal courts are today ill-positioned to meet the compelling challenges of the Twenty-First century. No doubt others, equally concerned and well-informed, will disagree; so much the better, for robust debate is good for society. What we can no longer afford is a papering over of these differences with the bland assertion that all is well with the lower federal courts. It is not.

This much, however, I know is true: “You [die] when you [refuse] to stand up for right. You [die] when you [refuse] to stand up for truth. You [die] when you [refuse] to stand up for justice.” What’s more, “liberty and justice for all”—today as much as any time in our history. So when the death knell sounds for anyone’s civil liber-


It has long been the tradition in the federal district courts that the judge imposes a criminal sentence in open court with the offender present; the judge frequently explains the reasons for the sentence. See generally Jeffrey Brandon Morris, Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit 3–31 (2001); Peter G. Fish, Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1789–1835 (2002). My remarks in sentencing Reid presaged certain of the themes amplified here; they are set forth in App. C. See Transcript of Disposition, United States v. Reid, 214 F. Supp.2d 84, 87 (D. Mass. 2002) (Criminal No. 02-10013-WGY) (Jan. 30, 2003).


ties, “never send to know for whom the bell tolls; it tolls for thee.”

To me, Ronald Reagan may have said it best: “[f]reedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people.”

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Appendix A

Average Trial and Nontrial Time Reported on JS-10 by Judges Who Were Active District Judges All Year and Reported Time for at least 11 Months

Appendix B

Average Trial & Non-Trial Hours Reported by Active Judges as of Sept. 2008
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.
02-10013-WGY

UNITED STATES OF AMERICA     

v.                                 

RICHARD C. REID           

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

GERARD T. LEONE, TIMOTYH Q. FEELEY, COLIN
G.K. OWYANG and GARY S. KATZMANN, Assistant United
States Attorneys, 1 Courthouse Way, Boston, Massachusetts 02210

OFFICE OF THE FEDERAL DEFENDER (By Owen S.
Walker, Esq., Tamar R. Birckhead and Elizabeth L. Prevett, Esq.),
408 Atlantic Avenue, Third Floor, Boston, Massachusetts 02210,
on behalf of the Defendant

1 Courthouse Way
Boston, Massachusetts

January 30, 2003
THE COURT: Mr. Richard C. Reid, hearken now to the sentence the Court imposes upon you.

On Counts 1, 5 and 6 the Court sentences you to life in prison in the custody of the United States Attorney General. On Counts 2, 3, 4, and 7, the Court sentences you to 20 years in prison on each count, the sentence on each count to run consecutive one with the other. That’s 80 years.

On Count 8 the Court sentences you to the mandatory 30 years consecutive to the 80 years just imposed.

The Court imposes upon you on each of the eight counts a fine of $250,000 for the aggregate fine of $2 million.

The Court accepts the government’s recommendation with respect to restitution and orders restitution in the amount of $298.17 to Andre Bousquet and $5,784 to American Airlines.

The Court imposes upon you the $800 special assessment.

The Court imposes upon you five years supervised release simply because the law requires it. But the life sentences are real life sentences so I need not go any further.

This is the sentence that is provided for by our statutes. It is a fair and just sentence. It is a righteous sentence. Let me explain this to you.

We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.

Here in this court where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice.

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether is it the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists. We hunt them down one by one and bring them to justice.

So war talk is way out of line in this court. You’re a big fellow. But you’re not that big. You’re no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.

In a very real sense Trooper Santiago had it right when first you were taken off that plane and [placed] into custody, and you won-
dered where the press and . . . TV crews were, and [he] said, “you’re no big deal.” You’re no big deal.

What your counsel, what your able counsel and what the equally able United States Attorneys have grappled with, and what I have as honestly as I know how tried to grapple with, is why you did something so horrific. What was it that led you here to this courtroom today. I have listened respectfully to what you have to say. And I ask you to search your heart and ask yourself what sort of unfathomable hate led you to do what you are guilty and admit you are guilty of doing.

And I have an answer for you. It may not satisfy you. But as I search this entire record it comes as close to understanding as I know.

It seems to me you hate the one thing that to us is most precious. You hate our freedom. Our individual freedom. Our individual freedom to live as we choose, to come and go as we choose, to believe or not to believe as we individually choose.

Here, in this society, the very winds carry freedom. They carry it everywhere from sea to shining sea. It is because we prize individual freedom so much that you are here in this beautiful courtroom. So that everyone can see, truly see that justice is administered fairly, individually, and discreetly.

It is for freedom’s sake that your lawyers are striving so vigorously on your behalf and have filed appeals, [and] will go on in their . . . representation of you before other judges. We care about it. Because we all know that the way we treat you, Mr. Reid, is the measure of our own liberties.

Make no mistake, though. It is yet true that we will bear any burden, pay any price, to preserve our freedoms.

Look around this courtroom. Mark it well. The world is not going to long remember what you or I say here. Day after tomorrow it will be forgotten. But this, however, will long endure. Here, in this courtroom, and courtrooms all across America, the American people will gather to see that justice, individual justice, justice, not war, individual justice is in fact being done.

The very President of the United States through his officers will have to come into courtrooms and lay out evidence on which specific matters can be judged, and juries of citizens will gather to sit and judge that evidence democratically, to mold and shape and refine our sense of justice.
See that flag, Mr. Reid? That’s the flag of the United States of America. That flag will fly there long after this is all forgotten.\textsuperscript{111} That flag still stands for freedom. You know it always will.

Custody, Mr. Officer. Stand him down.

\textsuperscript{111} Well, perhaps not. I have recently been informed that on March 17, 2009, without discussion or debate, the Judicial Conference of the United States voted to advise the President that the next vacancy in this District ought to be left unfilled. See \textit{Judicial Conference of the United States, Preliminary Report: Judicial Conference Actions} 5 (2009) (on file with author) (recommending to the President and the Senate “not to fill the existing judgeship vacancy in the District of Wyoming and the next judgeship vacancy occurring in the District of Massachusetts, based on the consistently low weighted caseloads in these districts.”). Thus, should I be the next judge in this District to falter or fail, it is now the official policy of the Judicial Conference that this position ought sit vacant, the courtroom go dark, and the flag of the United States of America, which has flown so proudly in this courtroom for 24 years, be taken down.
FROZEN OBLIGATIONS: RUSSIA’S SUSPENSION OF THE CFE TREATY AS A POTENTIAL VIOLATION OF INTERNATIONAL LAW

ADAM COLLICELLI*

Abstract: As the world witnesses renewed displays of Russian military aggression, the importance of multilateral arms treaties is illuminated. This Note argues that Russia’s suspension of the Treaty on Conventional Armed Forces in Europe was likely an illegal act, violating both the explicit terms of that treaty and the law governing international treaties, generally. The United Nations, NATO, and other world leaders must act carefully to redress this wrong without pushing Russia into a full withdrawal from this significant treaty. This Note highlights the variety of dispute resolution mechanisms available and concludes that formal public scrutiny and condemnation of Russia’s suspension are crucial to ensure that illegal treaty suspension does not become a reasonable option for Russia or any other international actors in the future.

Introduction

On July 14, 2007, Russian President Vladimir Putin formally decreed that the Russian Federation would suspend its participation in the Treaty on Conventional Armed Forces in Europe (CFE Treaty), effective in 150 days.¹ Sergei Kislyak, a Russian deputy foreign minister, suggested that a negotiated solution might be reached in the five-month interim.² That was not the case.³ Russia’s suspension of the CFE

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² Kramer & Shanker, supra note 1, at A1.

³ See Press Release, Ministry of Foreign Affairs of the Russian Fed’n, Statement by Russia’s Ministry of Foreign Affairs Regarding Suspension by Russian Federation of Treaty on

4 Russia Suspends Arms Control Pact, supra note 1.
5 See JOHN E. PETERS, CFE AND MILITARY STABILITY IN EUROPE, at xi(1997).
6 Kramer & Shanker, supra note 1, at A1.
7 Blair, supra note 3, at 15.
8 See id.
9 See Press Release, supra note 1.
assumes that such a violation did occur and analyzes how this international delict should be remedied, taking into account widespread concern over Russia’s nonparticipation in this crucial treaty.

I. Background

The CFE Treaty is a landmark arms control agreement that attempted to reduce the number of conventional military forces and establish parity between members of the Warsaw Pact and members of the North Atlantic Treaty Organization (NATO). The importance of this treaty was largely a result of the time in which it was enacted. It was conceived as a way to temper the security dilemmas created in a number of European States (divided into the two blocs of the Warsaw Pact and NATO States) by the bipolarity of the Cold War. Soon after negotiations for the treaty began in March, 1989, however, the Berlin Wall came down to reunite Germany and communism fell, dividing up the Soviet Union. A world of bipolarity was ending. Amidst this tumult, the CFE Treaty took shape and was signed by 22 members of both NATO and the Warsaw Pact on November 19, 1990. It entered into force on July 17, 1992.

The CFE Treaty’s aim of arms control was so timely precisely because the political future of Europe appeared so uncertain. Indeed, as Professor Joseph Nye noted, “arms control can become one of the tools for helping manage processes of political change . . . .” through the creation of regimes that deal with international security, helping to “legitimize some activities and discourage others.” The stage was set for this particular treaty to ensure that security and stability were maintained and that the deeply rooted divisions of Europe could be overcome.

A. Structure of the 1990 CFE Treaty

At its core, the CFE Treaty sought to extinguish threats of military force that grew organically from the tension between NATO and War-
saw Pact States. This was approached through a combination of quantitative parity in conventional armaments and complete transparency among the treaty parties on a number of matters concerning their military force.

The CFE Treaty that was signed in 1990 imposed four main obligations on the participating States (Party States). These obligations were: (a) to cap the total amount of treaty limited equipment (TLE) situated between the Atlantic Ocean and the Ural Mountains; (b) to reduce any excess TLE amounts to below the quantitative ceiling imposed by the treaty; (c) to provide information about all TLE to other Party States; and (d) to allow for verification of treaty compliance. Since the treaty entered into force in 1992, 60,000 pieces of TLE have been destroyed and there have been over 4000 inspections.

The first two obligations are established in Articles IV–VIII of the CFE treaty. Article IV sets the quantitative ceilings of TLE for Party States, requiring the Warsaw Pact and NATO blocs respectively to have no more than 20,000 battle tanks, 30,000 armored combat vehicles, 20,000 pieces of artillery, 6800 combat aircraft, and 2000 attack helicopters. Articles IV–VIII require Party States to reduce their levels of TLE within forty months, either through destruction or conversion of the TLE into non-military equipment.

The third obligation of providing information appears in Article XIII of the CFE Treaty, requiring each Party State to provide notifications and exchange information based on the Protocol on Information Exchange. Party States must not only account for any TLE in their possession between the Atlantic Ocean and the Urals, but they also must provide information about their command structure, organizational concepts, and deployment. As stated in Article XVI, the Joint

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19 Falkernath, supra note 12, at xi.
20 See id. at xv.
22 CFE Treaty, supra note 10, art. I (stating that the obligations in the treaty relate to five categories of conventional armed forces: battle tanks, armored combat vehicles, artillery, combat aircraft, and combat helicopters).
25 CFE Treaty, supra note 10, art. IV.
26 See id. arts. IV–VIII.
27 See id. art. XIII.
28 Falkernath, supra note 12, at xv.
Consultative Group was created in order to coordinate this sharing of information, which was to occur on the date of the treaty’s signing (November 19, 1990), upon its entry into force (July 17, 1992), and thereafter each year on December 15.29

Finally, verification of compliance in the reduction of TLE is effected through open inspections, as laid out in Articles XIII–XV.30 Each Party State has the obligation to receive inspections of its military facilities and also the right to conduct inspections of military facilities in any other Party State.31

Most pertinent to this Note, the ways in which the CFE Treaty can be terminated are delineated in Article XIX. This section begins by stating that the treaty would be of “unlimited duration.”32 It goes on, however, to establish that a Party State has two explicit means of withdrawal.33 First, withdrawal is allowed if “extraordinary events related to the subject matter of [the] Treaty have jeopardized its supreme interests.”34 If a State wishes to take this unilateral step, it must give at least 150 days notice of its intended withdrawal to the Depositary and all other parties, with a full statement of the “extraordinary events.”35 Second, withdrawal is allowed if another party increases its holdings in TLE in violation of the CFE Treaty and, in doing so, creates an “obvious threat to the balance of forces within the area.”36

B. 1999 Adaptation Agreement

By the middle of the 1990s, the Warsaw Pact had dissolved and NATO had expanded, making the bloc categories of the CFE Treaty all but obsolete.37 In 1996, France and Russia proposed an amendment to the treaty that would replace the bloc TLE caps with individual State caps to reflect the current geopolitical situation of the region.38 In November 1999, each of the then thirty parties to the original treaty signed

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29 Id.
30 See CFE Treaty, supra note 10, arts. XIII–XV.
31 Id. arts. XIV–XV.
32 Id. art. XIX(1).
33 Id. art. XIX(2),(3).
34 Id. art. XIX(2).
35 CFE Treaty, supra note 10, art. XIX(2).
36 Id. art. XIX(3).

Only four States, however, have fully ratified the Adaptation Agreement: Belarus, Kazakhstan, Ukraine, and Russia.\footnote{Weitz, supra note 3.} NATO member states have refrained from ratifying this agreement, asserting the unsatisfactory fulfillment of three commitments Russia made in the 1999 negotiations.\footnote{Weitz, supra note 3.} First, Russian TLE were situated in excessive amounts in certain restricted “flank” regions and a commitment was made to reduce the troop levels to comply with the CFE Treaty.\footnote{See Press Release, supra note 24, at 2.} Second, Russia agreed to withdraw from the non-consensual military presence it had in Moldova.\footnote{See id.} Third, Russia agreed to pull a certain number of forces out of Georgia.\footnote{See id. Even though NATO concedes that Russia has fulfilled the first of these commitments (compliance with CFE Treaty caps in “flank” regions), satisfactory withdrawal of troops from Moldova and Georgia has yet to occur.\footnote{See id.} As such, the NATO member states refuse to ratify the Adaptation Agreement and, therefore, it has not entered into force.\footnote{Weitz, supra note 3.}

C. Russia’s Suspension of the CFE Treaty

On July 14, 2007, Russian President Vladimir Putin made known his intentions to suspend his country’s participation in the CFE Treaty.\footnote{Press Release, supra note 1.} That intention became official on December 12, 2007.\footnote{Ministry of Foreign Affairs of the Russian Fed’n, supra note 3.} Given the historic relationship between Russia and this treaty, the decision was not too surprising.\footnote{See Falkenrath, supra note 12, at 243. Over a decade ago, Falkenrath noted that Russia had the least to gain from the CFE Treaty, with enough of a nuclear arsenal to deter any aggressors despite a minimized conventional force, and enough intelligence capabilities to render the treaty’s transparency objectives somewhat redundant. See id. Indeed, Falkenrath predicted that pressure for Russian compliance with the CFE Treaty “can only
ceilings and refuse to provide information or allow inspections of its conventional forces.\textsuperscript{50}

Putin claimed that the following six “exceptional circumstances” justified Russia’s suspension of the CFE Treaty: 1) the failure of six former Warsaw Pact States (Bulgaria, Hungary, Poland, Romania, Slovakia, and the Czech Republic) to make adjustments in the treaty framework to account for their accession to NATO; 2) the excess of NATO members that are parties to the treaty; 3) the American deployment of conventional forces in Bulgaria and Romania; 4) the failure of a large number of parties to comply with commitments made at Istanbul in 1999; 5) the failure of Hungary, Poland, Slovakia and the Czech Republic to adjust their territorial caps on TLE according to the Istanbul commitments; and 6) the absence of Estonia, Latvia, and Lithuania from the CFE Treaty.\textsuperscript{51}

II. Discussion

A. Legal Methods of Evading Treaty Obligations

For centuries, treaties have been the standard tool used by the subjects of international law to engage in various binding transactions with one another.\textsuperscript{52} The Vienna Convention on the Law of Treaties (Vienna Convention), currently celebrating its fortieth birthday, codified the preexisting customary law of treaties that existed between State actors (as opposed to those involving non-governmental organizations).\textsuperscript{53} It defines a treaty as an “international agreement concluded between States in written form and governed by international law.”\textsuperscript{54} Further, it makes explicit a fundamental principle guiding international law: \textit{pacta

\textsuperscript{50} See Ministry of Foreign Affairs of the Russian Fed’n, \textit{supra} note 3; Weitz, \textit{supra} note 3.

\textsuperscript{51} See Press Release, \textit{supra} note 1.

\textsuperscript{52} See Mohammed M. Gomaa, \textit{Suspension or Termination of Treaties on Grounds of Breach}, at xix (1996).


sunt servanda—“treaties must be obeyed.” At present, 108 States are party to the Vienna Convention, including the Russian Federation.

Once a treaty has entered into force, an important topic of concern and occasional bone of contention is determining the duration of the binding obligations. When and how a treaty will end is a common issue discussed during the initial negotiation stage. Termination or withdrawal effectively ends a party’s participation in a treaty, an action that can only be undone through renewing consent to be bound (i.e., making a new treaty). Suspension, on the other hand, is presumably temporary and even during the suspension period a treaty relationship continues to exist between the parties. Moreover, the suspending party must “refrain from acts tending to obstruct the resumption of the operation of the treaty.” The Vienna Convention states that a party may terminate, withdraw, or suspend a treaty only through applying either: a) the explicit exit provisions of the treaty; or b) the provisions of the Vienna Convention itself. Thus, if such an act of termination, withdrawal or suspension deviates from these two avenues, it violates the Vienna Convention.

An explicit provision in a treaty may allow for legal termination of or withdrawal from a treaty or for suspension of its operation. In practice, the exit provisions in treaties vary and sometimes are altogether absent. Most modern treaties, however, include some mechanism to allow parties the opportunity to avoid the obligations set forth, making the legality of the act easier to determine.

The Vienna Convention, itself, allows for five alternative exit paths for treaty parties outside of the pertinent treaty text. To invoke one of these paths, the State must notify all other treaty parties of its intent at
least three months prior to acting. Notably, the Vienna Convention distinguishes between justifications for withdrawal and those for suspension of a treaty, though the requirements are largely the same. First, a party may terminate or withdraw from a treaty or suspend its operation with the consent of the parties. For multilateral treaties, consultation is required with other “contracting States,” meaning those States which have consented to be bound, but for which the treaty has not yet come into force.

Second, Article 59 allows for termination or suspension of a treaty if a supervening treaty was concluded on the same subject matter by the exact same parties. This is the case only when there is a clear intention to terminate or suspend the earlier treaty or the earlier treaty is incompatible with the new one.

Third, a treaty may be terminated or suspended as a response to a “material” breach of the treaty. A material breach is either a “repudiation of the treaty not sanctioned by the present Convention” or one which violates a provision “essential to the accomplishment of the object and purpose of the treaty.” If there is a material breach in a multilateral treaty, one of three scenarios may occur: 1) the other parties may suspend or terminate a treaty by unanimous agreement between themselves and the breaching State or between all parties; 2) a party “specially affected” by the breach may suspend its operation of the treaty between itself and the breaching State; or 3) if the breach “radically changes the position of every party with respect to the further performance of its obligations under the treaty,” any non-breaching party may suspend the operation of the treaty. This final situation is especially relevant to disarmament treaties, where one party’s breach may endanger the whole group of treaty participants.

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69 Id. art. 65(1) (stating that notification to all parties of the ground for suspension under the provisions of the VCT “shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.”).
70 See id.
71 Id. art. 54(b).
72 Id. art. 57(b).
73 See Vienna Convention, supra note 54, arts. 54(b) & 57(b); Aust, supra note 53, at 232.
74 Vienna Convention, supra note 54, art. 59.
75 Id.; see also Aust, supra note 53, at 235–36.
76 Vienna Convention, supra note 54, art. 60(1).
77 Id. art. 60(3).
78 Id. art. 60(2).
79 See Aust, supra note 53, at 238.
Fourth, a party may terminate or withdraw from a treaty because of the supervening impossibility of performance of the treaty obligation(s). If it is merely a temporary impossibility, the party may only suspend its treaty operations. The threshold for impossibility is very high.

Finally, a party may terminate or withdraw from a treaty because of a fundamental change of circumstances. The Vienna Convention allows for suspension of a treaty’s operations if the same criteria are met. A state may not cite its own conduct as the fundamental change. As with impossibility, the threshold to using this justification to exit a treaty’s obligations appears to be very high.

Unilateral acts of State treaty parties, which deviate from the treaty, are often presumed to be breaches because of the aforementioned limitations. If a State party is justified in withdrawing from or suspending a treaty’s operation, the Vienna Convention provides the procedure to be employed in Article 65. The State must first notify all of the other parties of the treaty of its claim for withdrawal or suspension. Unless there is a case of “special urgency,” a period of three months must elapse in which any other party to the treaty duly notified of the claim may express an objection. If no objection is raised in that period, then the State may proceed with its withdrawal or suspension by way of an official written instrument. If an objection is raised, however, the parties are directed to resolve the dispute via Article 33 of the Charter of the United Nations (UN Charter).

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80 Vienna Convention, supra note 54, art. 61.
81 Id.
82 See id. (stating that “impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty”).
83 Id. art. 62.
84 Id.
85 See Aust, supra note 53, at 241.
86 See id. at 241–42.
88 Vienna Convention, supra note 54, art. 65.
89 Id. art. 65(1).
90 Id. art. 65(2).
91 Id.
92 Id. art. 65(3). Article 33 of the UN Charter calls on parties to an international dispute that risks global peace and security to engage in some type of dispute resolution such as negotiation, arbitration, mediation, judicial settlement, or other peace means. U.N. Charter, art. 33, para. 1. If necessary, the United Nations Security Council can step in to request that the parties engage in this type of peaceful settlement process. Id. art. 33, para. 2.
B. Russian Suspension of the CFE Treaty Violates the Vienna Convention

1. Russia did not adhere to the exit provisions of the CFE Treaty

Russia’s suspension of the CFE Treaty may constitute a violation of the CFE Treaty and the Vienna Convention, both of which Russia has duly ratified. First, the CFE Treaty itself provides no express authorization for a party to suspend its operation, but only allows for full withdrawal from the treaty under specific limitations. Withdrawal and suspension are two entirely different acts. Although the CFE Treaty arguably may contain an implicit right of suspension, the fact that there exists an explicit provision for withdrawal severely damages this argument. In addition, because it has become commonplace for treaties to include explicit exit provisions, a treaty’s silence on the matter is more likely to imply the absence of the exiting option. Finally, the CFE Treaty’s drafters may have intentionally excluded the right to suspend if they viewed it as an invitation to a “temporally opportunistic exit.” To be sure, any restriction on exiting a multilateral treaty can be viewed as an intelligent way of encouraging continuous cooperation among the parties.

In any event, Putin’s actions portray no effort in advocating any implied right to suspension and, instead, purport to adhere to the explicit terms of the CFE Treaty. By citing “exceptional circumstances” and granting notice of 150 days, both required for a proper “withdrawal” under the CFE Treaty, indicates that Putin equated suspension with withdrawal. Yet, since Russia did not endeavor to withdraw from the treaty, its intent to suspend has no legal basis in the express language of the CFE Treaty itself.

93 See Hollis, supra note 1.
94 See CFE Treaty, supra note 10, art. XIX.
95 See, e.g., Vienna Convention, supra note 54, arts. 56–57 (expressly distinguishing between withdrawal from and suspension of a treaty’s operation).
96 See CFE Treaty, supra note 10, art. XIX.
97 See Aust, supra note 53, at 234.
98 See Helfer, supra note 87, at 1625.
99 See id., at 1633.
100 See Press Release, supra note 1 (stating that the suspension is “in conformity with international law”).
101 The author construes as equivalent the phrase used by Putin (“exceptional circumstances”) and the phrase found in Article XIX of the CFE Treaty (“extraordinary events”). See CFE Treaty, supra note 10, art. XIX; Press Release, supra note 1.
102 See CFE Treaty, supra note 10, art. XIX; Press Release, supra note 1.
2. Russia’s suspension is likely not justified under any provision of the Vienna Convention

The only other way for Russia’s suspension of the CFE treaty to have been legal under current international law would require justification under a provision of the Vienna Convention.\(^{103}\) As discussed above, those possibilities are: party consent, supervening treaty, impossibility, fundamental change, and material breach.\(^{104}\) The only two plausible possibilities, as explained below, which might justify the suspension are the existence of a fundamental change of circumstances or the breach of the CFE Treaty.\(^{105}\)

Party consent\(^{106}\) is the easiest of these other justifications to eliminate because it is strikingly clear that many of the CFE Treaty Party States did not consent to Russia’s suspension.\(^{107}\) Indeed, three days after Putin’s announcement, NATO responded with a press release, which disclosed its deep disappointment in the Russian decision and a desire to maintain the CFE Treaty’s operation.\(^{108}\)

Second, the supervening treaty justification for suspension is also quickly eliminated because there was no such treaty between the exact same parties.\(^{109}\) The 1999 Adaptation Agreement might have qualified as such a supervening treaty as it was an update to the CFE Treaty and Russia was a party to it.\(^{110}\) That agreement, however, never entered into force because of the lack of ratifiers.\(^{111}\) Even if the Adaptation Agreement had come into force, it makes no change to the CFE Treaty’s exit provision (Article XIX), so it would not have made any alteration in

\(^{103}\) Vienna Convention, supra note 54, art. 42(2).
\(^{104}\) Id. arts. 54–62.
\(^{105}\) See id. arts. 60 & 62.
\(^{106}\) See id. art. 54(b).
\(^{107}\) Press Release, supra note 10.
\(^{109}\) See Vienna Convention, supra note 54, art. 59.
\(^{110}\) See Adaptation Agreement, supra note 39.
\(^{111}\) Hollis, supra note 1.
regard to suspension. Thus, no supervening treaty can justify Russia’s suspension of the CFE Treaty.

Third, Russia’s participation in the CFE Treaty has likely not become impossible. For this justification of treaty suspension, there needs to be at least a temporary “disappearance or destruction of an object indispensable for the execution of the treaty.” There are few examples of what could render a treaty’s operation impossible in this way, though the International Law Commission has mentioned as possible examples the submergence of an island or the destruction of a dam. No such indispensable object has been lost, even temporarily, here. The six “exceptional circumstances” that Putin offered on July 14, 2007, involve political objections to what was occurring or not occurring within other CFE Treaty party States along with the “adverse effects” of Estonia, Latvia, and Lithuania’s non-participation on Russia’s northwestern security. As pressing as these concerns may have been, none of them reflect an absent “indispensable object,” which could deprive Russia of its ability to perform the tasks under the treaty (i.e., maintaining a certain amount of TLE west of the Ural Mountains, providing information of those amounts, and allowing inspections to verify compliance).

Fourth, a fundamental change of circumstances has likely not occurred, which could otherwise legitimize Russia’s unilateral suspension of the CFE Treaty. This justification is extremely narrow and there is not one distinct example of a successful assertion of the doctrine in any international case. The International Court of Justice famously rejected Hungary’s attempt to utilize this justification for its own suspension of a treaty, when it cited profound political changes.

\[112\] Compare Adaptation Agreement, supra note 39 (providing no amendment to the exit provision of the CFE Treaty), with CFE Treaty, supra note 10, art. XIX (providing explicitly for unilateral withdrawal, but not suspension). See generally Olivette Rivera-Torres, The Biosafety Protocol and the WTO, 26 B.C. Int’l & Comp. L. Rev. 263, 319–20 (noting that obligations from multiple agreements between the same parties must be harmonized if at all possible).

\[113\] See Vienna Convention, supra note 54, art. 59.

\[114\] See id. art. 61.

\[115\] Id. art. 61(1).

\[116\] Aust, supra note 53, at 239–40.

\[117\] See President of Russ., supra note 1.

\[118\] Id.

\[119\] See CFE Treaty, supra note 10, arts. I–XV; Vienna Convention, supra note 54, art. 61(1).

\[120\] See Vienna Convention, supra note 54, art. 62.

\[121\] Helfer, supra note 87, at 1643.

denied that a fundamental change of circumstances had occurred and emphasized that treaty law stability demands that this exit route for treaty obligations must be applied in only the most exceptional cases.\footnote{See id.}

Here, Putin’s complaint about the widening of the NATO alliance without a concurrent adjustment to the CFE Treaty may be the closest thing to a fundamental change of circumstances.\footnote{See President of Russ., supra note 1.} Since the CFE Treaty was first signed in 1990, the Warsaw Pact fell apart and several former Warsaw Pact nations joined NATO, but the treaty has not changed in kind.\footnote{See Hollis, supra note 1.} Whether this political change was more of a radical transformation than occurred in the \emph{Gabcikovo-Nagymaros Project} is out of the scope of the present Note.\footnote{See Gabcikovo-Nagymaros Project, 1997 I.C.J. at 125–27.} The change of circumstances remains, however remotely, one arguable justification.\footnote{See Vienna Convention, supra note 54, art. 62.}

This leaves the possibility that a material breach to the CFE Treaty occurred, which justified Putin’s suspension.\footnote{See id. art. 60.} Putin has proffered a list of six “exceptional circumstances” that supported Russia’s suspension of the CFE Treaty.\footnote{President of Russ., supra note 1.} Can any of these circumstances qualify as a material breach of the CFE Treaty in order to justify Russia’s unilateral suspension?\footnote{See Vienna Convention, supra note 54, art. 60; see also id.} The only assertion that might be construed as a material breach is the first: The failure of the new NATO states to make the “necessary changes in the composition of group of states party to the Treaty.”\footnote{See President of Russ., supra note 1.} Such a failure to act would not constitute the type of material breach that the Vienna Convention calls an unsanctioned treaty repudiation.\footnote{See id. art. 60(3)(a).} Instead, it would have to fall under a violation of a pro-
vision essential to the objects and purposes of the treaty.\textsuperscript{133} Again, the merit of this argument is outside of this Note’s scope. It remains, as does the fundamental change in circumstances, one plausible justification for Russia’s unilateral suspension under the Vienna Convention.\textsuperscript{134}

Even if there was a material breach or a fundamental change in circumstances, to invoke any of these Vienna Convention exit justifications Putin would have had to specifically notify the other Party States at least three months prior to suspension.\textsuperscript{135} In terms of notification, Putin did give 150 days notice to the CFE Treaty parties prior to its suspension, but his notification aimed to suspend within the bounds of the CFE Treaty.\textsuperscript{136} If any argument for suspension based on Vienna Convention provisions was also to be made, further notification of that was necessary.\textsuperscript{137}

In addition, under Article 65 of the Vienna Convention, any notified party may object to the assertions in the notification.\textsuperscript{138} NATO’s press release a few days after Putin’s decree might qualify as an objection,\textsuperscript{139} which would initiate a dispute requiring a resolution in accordance with the UN Charter’s Article 33.\textsuperscript{140} No such dispute settlement has occurred.

C. Russian Federal Law Cannot Preempt International Law

In his July 14th decree, Putin stated that Russian federal law further justified his suspension of the CFE Treaty.\textsuperscript{141} Putin was referring to the Federal Law on International Treaties of the Russian Federation (Russian Law on Treaties), which Russia adopted on June 16, 1995.\textsuperscript{142} Article 37 of the Russian Law on Treaties authorizes the Russian President to suspend a multilateral treaty “in instances requiring the taking of urgent measures.”\textsuperscript{143} The federal law does not, however, authorize the President to terminate or withdraw from a treaty.\textsuperscript{144} Putin cited Article 37 of the Russian Law on Treaties, declaring that it gave him the ability

\textsuperscript{133} See id. art. 60(3)(b).
\textsuperscript{134} See id. art. 60.
\textsuperscript{135} See id. art. 65(2).
\textsuperscript{136} See President of Russ., supra note 1.
\textsuperscript{137} See Vienna Convention, supra note 54, art. 65(1).
\textsuperscript{138} See id. art. 65.
\textsuperscript{139} See NATO Response, supra note 108.
\textsuperscript{140} See Vienna Convention, supra note 52, art. 65(3).
\textsuperscript{141} President of Russ., supra note 1.
\textsuperscript{142} WILLIAM E. BUTLER, THE RUSSIAN LAW OF TREATIES 6 (1997).
\textsuperscript{143} Id. at 127.
\textsuperscript{144} See Hollis, supra note 1.
to suspend the CFE Treaty since it was a situation of “necessity”, requiring “immediate action.” Of course, Russian domestic law did not empower Putin to withdraw from treaties, so he was forced into relying on suspension.

There is a clear conflict between Putin’s inability to withdraw from an international treaty under Russian domestic law and the lack of a way to suspend the CFE Treaty according to its text. Putin’s reliance on domestic law to increase his number of ways to exit an international treaty will not pass legal muster. Since the CFE Treaty has entered into force in Russia, it prevails over inconsistent domestic law. In fact, the preamble to the Russian Law on Treaties states: “The Russian Federation favours undeviating compliance with treaty and customary norms and affirms its adherence to the basic principle of international law—the principle of the good-faith fulfillment of international obligations.” Article 5 of the Russian Law on Treaties even further provides: “If other rules have been established by an international treaty of the Russian Federation than those provided for by a law, then the rules of the international treaty shall apply.” Thus, although Putin only possessed the authority to single-handedly enforce a suspension under Russian domestic law, if the CFE Treaty effectively prohibits suspensions, then the CFE Treaty’s prohibition must prevail.

III. Analysis

A. Seeking a Solution: Possible Remedies to Russian Suspension If It Violates International Treaty Law

This analysis assumes arguendo that Russia’s suspension was a violation of both the CFE Treaty (unilateral suspension was not an available option under the treaty) and the Vienna Convention (suspension cannot be otherwise justified). The remainder of this Note addresses what realistic remedies are available to correct this type of delict, which allows Russia to enjoy the security benefits of the CFE Treaty without fac-

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145 See President of Russ., supra note 1.
146 See Hollis, supra note 1.
147 See id.
148 See Aust, supra note 53, at 149.
149 See id.
150 Butler, supra note 142, at 6.
151 Id. at 23–24.
152 See CFE Treaty, supra note 10, art. XIX; Butler, supra note 142, at 23–24; Hollis, supra note 1.
ing any of its responsibilities. Any remedy must also aim to discourage Russia from fully withdrawing from the CFE Treaty.\footnote{See Press Release, supra note 10.} The precariousness of the situation is augmented by the true importance of the treaty in achieving global security.\footnote{See CFE Treaty, supra note 10, Preamble; Russia Suspends Arms Control Pact, supra note 1.}

The CFE Treaty’s preamble states that the parties have made a commitment to “[c]ontinue the conventional arms control process including negotiations, taking into account future requirements for European stability and security in the light of political developments in Europe.”\footnote{CFE Treaty, supra note 10, Preamble.} Russia argues that its suspension was triggered by exactly such political developments\footnote{See Ministry of Foreign Affairs of the Russian Fed’n, supra note 3; President of Russ., supra note 1.}, while the NATO parties would argue that the suspension risks restoring the security imbalance in Europe that the CFE Treaty aimed to fix.\footnote{See Press Release, supra note 10.} Either way, the suspension has resulted in Moscow’s current refusal to provide information about its conventional military forces between the Atlantic Ocean and the Ural Mountains.\footnote{See Ministry of Foreign Affairs of the Russian Fed’n, supra note 3; President of Russ., supra note 1.} The new freedom also opens the door to troop escalations in some regions of Russia, though the head of the Russian General Staff has discounted that notion.\footnote{Weitz, supra note 3 (quoting General Yury Baluyevsky as saying that the suspension “doesn’t mean there will be a massive arms buildup…” although he could now “exercise complete freedom in movement of the armed forces on Russian territory.”). But see Time-line: Russia, supra note 45.}

Assuming that Russia’s suspension was contrary to international law, more forceful objections must be made in the international community to condemn the behavior.\footnote{See Falkernath, supra note 12, at 264.} Although NATO and individual States have expressed clear disappointment in Putin’s unilateral act, a more definitive objection to its illegality is in order.\footnote{Kramer & Shanker, supra note 1 (noting that the European Union called Putin’s suspension “regrettable”, while James Appathurai, a NATO spokesman, commented: “This is a disappointing move in the wrong direction”); Press Release, supra note 10.} Such an act would undoubtedly activate Article 33 of the UN Charter, directing actors to initiate some type of dispute resolution.\footnote{See U.N. Charter, supra note 92, art. 33; Vienna Convention, supra note 54, art. 65(3).}
Further negotiations between Russia and the remaining CFE Treaty Party States is an obvious option at the current impasse. This is the most common method of settling treaty disputes. Negotiations have, however, been unsuccessful in the past. Putin arranged the Extraordinary Conference of State Parties to the Treaty on Conventional Forces in Europe in Vienna on June 11–15, 2007 precisely to open a dialogue about his concerns, but no agreement could be reached. After Russia’s unilateral violation of the CFE Treaty, it may be even more difficult to achieve a negotiated resolution now than it was during the June conference. Still, considering how the current CFE Treaty maintains the geography of the Cold War, serious negotiations to get the Adapted Agreement entered into force are long overdue.

Another possible form of dispute resolution is conciliation, wherein a Conciliation Commission can hear both parties’ claims and objections and then make recommendations that could eventually lead to an amicable result. These commissions usually are made up of three to five members representing each side of the dispute and a third-party chairperson. Since the result of the conciliation is non-binding, it may be easier to persuade Russia to participate. At the same time, without a binding result, the time and expense of a conciliation may be impractical.

Seeking a compulsory binding settlement through either an arbitration or litigation in the International Criminal Court is a less plausible solution. Even if Russia is convinced it did nothing wrong, it would be unlikely to provide the requisite consent to such binding proceedings. This is mainly because instead of facing the time and expense involved in litigation, Russia could simply undertake a full withdrawal from the CFE Treaty, in accordance with the treaty’s provisions.

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163 See Aust, supra note 53, at 288; Blair, supra note 3; NATO Reponse, supra note 108 (requesting a “constructive and creative dialogue”).
164 Aust, supra note 53, at 286.
165 NATO Response, supra note 108.
166 Id.
167 See Weitz, supra note 3.
168 See Boese, supra note 37; Hollis, supra note 1.
169 Vienna Convention, supra note 54, Annex.
170 Aust, supra note 53, at 289.
171 See id.
172 See id. at 290.
173 See id.
174 CFE Treaty, supra note 10, art. XIX.
If the other CFE Treaty parties see the unilateral act as unacceptable, however, and wish to get a legal judgment to that effect, seeking a decision from the International Court of Justice (ICJ) could be an option.\textsuperscript{175} In 1979, for example, the United States brought a case before the ICJ concerning the seizure and holding as hostages of members of the U.S. diplomatic and consular staff in Iran.\textsuperscript{176} Despite the fact that Iran refused to plead or argue before the ICJ, the case proceeded on the merits.\textsuperscript{177} This may have been an effort to “use the Court’s decision as a means for translating a dispute between Iran and the United States specifically into one between Iran and the international community generally.”\textsuperscript{178} By filing a suit in the ICJ, however, other CFE Treaty parties would be widening the divide between themselves and Russia, which is precisely the problem that demands a solution.\textsuperscript{179}

Another course of action that may be possible here was highlighted by the attempted withdrawal of the Democratic People’s Republic of Korea (DPRK) from the Nuclear Non-Proliferation Treaty (NPT) in 1993.\textsuperscript{180} On March 12, 1993, the DPRK announced it would withdraw from the NPT in 90 days, due to “extraordinary events . . . [which have] jeopardized [its] supreme interests . . . .”\textsuperscript{181} The extraordinary events cited were the U.S. military exercises that threatened the DPRK with nuclear war and certain actions of the International Atomic Energy Agency.\textsuperscript{182}

The United States, Russia, and the United Kingdom, three other parties to the NPT, expressed to the United Nations (in a joint statement dated April 1, 1993) their concern that the DPRK’s cited justifications for withdrawal did not constitute “extraordinary circumstances” and, therefore, that the withdrawal violated the NPT.\textsuperscript{183} The United Nations Security Council quickly responded on May 11, 1993 in a resolution that took into account all of the surrounding facts, including the DPRK’s letter asserting justifications for withdrawal, the April 1st letter

\textsuperscript{175} See Aust, supra note 53, at 295.


\textsuperscript{177} Id. at 8 & 20.


\textsuperscript{179} See President of Russ., supra note 1; Press Release, supra note 10.

\textsuperscript{180} See Aust, supra note 53, at 228.


\textsuperscript{182} Aust, supra note 53, at 228.

opposing withdrawal, and the “critical importance” of the NPT. The resolution called upon the DPRK to “reconsider” its decision to withdraw and reaffirm its commitment to the NPT. Furthermore, it encouraged all members of the NPT to work together to establish a solution to the problem, reserving further Security Council action if necessary.

 Though the precise impact of this U.N. Resolution is difficult to ascertain, further negotiations occurred soon after its announcement and they were fruitful. Exactly one month after the resolution, the DPRK halted its plans for withdrawal from the NPT just before they became effective. On October 21, 1994, the United States and the DPRK signed an Agreed Framework, effectively ending the crisis.

 Given the various similarities between the NPT crisis and the current situation with the CFE Treaty, an appeal to the U.N. Security Council seems prudent. The future of both arms treaties was threatened by the potentially illegal exit (be it temporary or permanent) of one of the key parties. With regard to the CFE Treaty, not only is there a strong argument that the “exceptional circumstances” provided by Putin were insufficient, but there is an additional argument that the entire act of suspension was a violation of the treaty’s text on its face. If the Security Council felt compelled to issue a resolution in 1993, it may, therefore, feel more compelled to assert itself now. The other members of the CFE Treaty should write a joint letter to the Security Council addressing their concern on this matter.

184 Id. ¶¶ 3, 6 & 7.
185 Id. ¶ 10.
186 Id. ¶¶ 13 & 14.
188 Id.
189 Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, October 12, 1994, 34 I.L.M. 603.
190 See S.C. Res. 825, supra note 183.
191 See id. at ¶ 7; Hollis, supra note 1.
192 See CFE Treaty, supra note 10, art. XIX.
193 See S.C. Res. 825, supra note 183. Russia’s membership on the Security Council, though less likely to make a resolution politically feasible, is not otherwise an obstacle. See U.N. Charter, supra note 90, art. 27 (noting that in decisions under Chapter VI regarding “Pacific Settlement of Disputes,” a party to a dispute that is a member of the Security Council shall abstain from voting).
194 See S.C. Res. 825, supra note 183, ¶ 7.
B. Global Reaction to Russia’s Suspension: Reputational Harm

If the global public carefully scrutinizes Putin’s unilateral suspension of the CFE Treaty in light of its potential illegality, Russia may be more receptive to further serious negotiations aimed at finding a resolution quickly and amicably.\(^{195}\) Although Putin’s act may have strengthened his popularity domestically and assisted in the 2008 election of Dmitri Medvedev, his choice for the new president, a visibly improper exit from an important arms treaty could have severe long-term consequences for Russia.\(^{196}\) Most importantly, it may make other States more hesitant to enter into agreements with Russia in the future.\(^{197}\)

The lackluster attempts of NATO and other States in expressing their “disappointment” of Putin’s suspension may stem from the regularity of treaty exits.\(^{198}\) In 2002, for example, the United States unilaterally withdrew from another important arms agreement: the Anti-Ballistic Missile Treaty (ABM Treaty).\(^{199}\) President Bush’s withdrawal, however, was at least available to him in the ABM Treaty’s text.\(^{200}\) Putin’s suspension was potentially authorized by neither the governing treaty nor the Vienna Convention.\(^{201}\) If the international community does not unite in its opposition to acts that facially violate an important treaty, a new precedent may develop that encourages State actors to regularly rely on illegal treaty suspension as a bargaining tool.\(^{202}\)

Conclusion

Both international legal scholars and international relations theorists have long focused on what is involved in entering into treaties, but

\(^{195}\) See Helfer, supra note 87, at 1621–22.

\(^{196}\) See Kramer & Shanker, supra note 1.

\(^{197}\) See Helfer, supra note 87, at 1621.

\(^{198}\) See id. at 1602.


\(^{200}\) Treaty on the Limitation of Anti-Ballistic Missile Systems art. XV(2), May 26, 1972, 23 U.S.T. 3435.

\(^{201}\) See CFE Treaty, supra note 10, art. XIX; Vienna Convention, supra note 54, arts. 54–62.

\(^{202}\) See Helfer, supra note 87, at 1631 (stating: “In a multilateral organization with a large number of members having diverse interests, the problem of temptations to free ride will become especially acute. Although ongoing mutual cooperation provides long-term benefits, without the threat of specific retaliations, the temptation to cheat in order to maximize immediate payoffs rises substantially.”).
have generally ignored careful studies of treaty exit.\textsuperscript{203} Russia’s unilateral and potentially unlawful suspension of the CFE Treaty is a reminder of how crucial this portion of treaty law can be. The CFE Treaty does not explicitly authorize suspension. The Vienna Convention does not convincingly provide for any other justification for the suspension and Putin did not attempt to invoke one. Thus, Russia’s suspension likely violated the CFE Treaty.

As a result, the other CFE Treaty Party States are left in an awkward predicament. To be sure, they are pleased that Putin did not yet withdraw from this important treaty altogether. There is a chance, however, that Putin never would have taken this more dramatic step, and that he simply capitalized on suspension to elevate Russia’s negotiating posture. If this is the case, then the tactic must be outwardly condemned. As Richard Falkenrath so astutely noted more than a decade ago, Russia’s participation in the CFE Treaty hinges on the international community’s ability to convince Russia that the costs of an unlawful treaty exit exceed any potential political benefits.\textsuperscript{204} If the international community cannot do this, then the CFE Treaty may not be the only casualty. Indeed, the very benefits attained from engaging in international agreements will be in true jeopardy if parties can invariably deviate from those agreements and halt their responsibilities for political gain.

\textsuperscript{203} See id. at 1592 & 1647 (noting that major international law treatises and even specialized treatises on treaty law practically ignore treaty exit or give the issue only passing attention).

\textsuperscript{204} See Falkenrath, supra note 12, at 264.
A FRAMEWORK FOR CLOSING GUANTÁNAMO BAY

MATTHEW IVEY*

Abstract: The treatment of the detainees Guantánamo Bay has caused an uproar both domestically and internationally. Specifically, scholars, politicians and the international community have expressed disdain with allegations of torture and the lack of process afforded to detainees at Guantánamo. As a result, the call for the closure of the prison facility at Guantánamo Bay has seemed virtually unanimous. This Note evaluates some of the proposed solutions to problems associated with closing Guantánamo. The author offers elements of a comprehensive plan to close Guantánamo Bay that attempts to balances the security needs of the free world with a respect for international law and human rights.

INTRODUCTION

President Barack Obama has described events of the past seven years at Guantánamo Bay as a “sad chapter in American history” and promised to close down the prison. On January 21, 2009, President Obama ordered the suspension of all prosecutions of Guantánamo Bay detainees for 120 days in order for his administration to review all detainee cases. Shortly after his inauguration, President Obama issued an executive order mandating the closure of Guantánamo Bay within a year.

Well prior to the Obama administration, the global outcry for the closing of the military prison at Guantánamo Bay had been enormous.

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4 See generally Amnesty Int’l Memorandum to the U.S. Government on the Rights of People in US Custody in Afghanistan and Guantnamo Bay (Apr. 15, 2002) avail-
In the initial years following the attacks of September 11, 2001, the Bush administration gave inconsistent signals concerning the fate of Guantánamo detainees and the future of the prison.\textsuperscript{5} Nevertheless, in recent years, President Bush and other top officials have signaled a desire to close the facility permanently.\textsuperscript{6} As early as 2006, President Bush stated that he would like to close the facility but did not have the appropriate framework to do so.\textsuperscript{7} On December 21, 2007, Secretary of State Condoleezza Rice supported closing Guantánamo but stated that it would be difficult without the support of other countries.\textsuperscript{8} On January 12, 2008, Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, called for the closing of the prison facility as soon as possible.\textsuperscript{9} Admiral Mullen also stressed, however, that there are “numerous legal questions” to be settled before a closure decision could be finalized.\textsuperscript{10}

In addition to top U.S. government and military officials, the international community’s call for the closure of Guantánamo has been equally resounding.\textsuperscript{11} Former British Prime Minister Tony Blair, former Secretary-General of the United Nations Kofi Annan, German Chancellor Angela Merkel, and other heads of state have also unequivocally called for the closure of the Guantánamo facility.\textsuperscript{12} While the world is unanimously calling for the closure of Guantánamo, there is currently no consensus on how to make this goal a reality.\textsuperscript{13} Indeed, President


\textsuperscript{6} Laura Parker, \textit{Bush Offers No Timeline for Closing Gitmo Prison}, USA Today, June 15, 2006, at 2A.

\textsuperscript{7} Id.


\textsuperscript{12} \textit{See Dodds, supra note 11 at A17; U.N. Chief: “Ban” Gitmo, supra note 11, at 30.}

\textsuperscript{13} \textit{See, e.g., Harold Hongju Koh; Restoring America’s Human Rights Reputation, 40 Cornell Int’l L.J. 635, 654 (2007); Thom Shankar & David Johnston, Legislation Could Be Path to Closing Guantánamo, N.Y. Times, July 3, 2007, at A10; Editorial, Closing Guantánamo,
Obama has already encountered difficulties in executing his plan to close the facility by 2010.\textsuperscript{14} Many of these difficulties hinge on how to effectively balance the security interests of the free world with respect for the prisoners’ rights under international law.\textsuperscript{15}

This Note attempts to decipher a framework for achieving these sometimes countervailing goals by examining proposed frameworks that provide potential solutions to the problems presented by closing Guantánamo Bay.\textsuperscript{16} Part I explores the recent history of Guantánamo and the events that led to the world’s seemingly unanimous call for its closure.\textsuperscript{17} Part II includes an assessment of how U.S. Courts and Congress have handled the problems posed by the detainee treatment and discusses closure options proposed by legal scholars and politicians.\textsuperscript{18} Finally, Part III contains an analysis of each option and proposes a road ahead for the prisoners at Guantánamo.

I. BACKGROUND

A. The Making of a “Legal Black Hole”

On September 11, 2001, four planes were highjacked by the al-Qaeda organization and used in attacks on the Pentagon and World Trade Center.\textsuperscript{19} Approximately one week later, Congress authorized President Bush to use military force against “those nations, organizations, or persons” determined to be responsible for the terrorist acts that occurred.\textsuperscript{20} After unsuccessfully demanding that the Taliban rulers of Afghanistan turn over al Qaeda’s leaders, the United States and its

\textsuperscript{14} See Williams, \textit{supra} note 2, at C13.


\textsuperscript{18} See, e.g., Simard, \textit{supra} note 16, at 382.


allies launched missile and air strikes on October 7, 2001.\textsuperscript{21} In the ensuing fighting on the ground, over 10,000 persons were captured and approximately 700 persons from a variety of national origins were sent to the facilities at Guantánamo Bay, the first arriving on January 11, 2002.\textsuperscript{22}

In the years prior to September 11, 2001, Guantánamo Bay Naval Station existed as a sleepy port for the U.S. Navy, used occasionally to house refugees.\textsuperscript{23} Following the attacks of September 11, after some consideration, the U.S. government decided to use Guantánamo as prison facility for those captured in the course of the ground war.\textsuperscript{24} According to some scholars and jurists, the facilities at Guantánamo Bay were chosen because the detainees would have neither constitutional rights regulating their treatment by the government, nor the ability to use federal courts to enforce any other rights (such as those available under Common Article 3 of the Geneva Conventions).\textsuperscript{25}

On January 4, 2002, General Tommy Franks, the commander of the U.S. forces in Afghanistan at the time, announced that some detainees would be sent to a high-security prison at the U.S. Navy base in Guantánamo Bay, Cuba.\textsuperscript{26} The first prisoners were housed in a very basic facility known as Camp X-Ray.\textsuperscript{27} At the end of April 2002, all the


prisoners in Camp X-Ray were transferred to the more modern Camp Delta.\footnote{Charlie Savage, As Threats to U.S. Changed, So Did Prison Tactics, BOSTON GLOBE, May 16, 2004, at A1.} Currently, the prisoners are separated into smaller camps based on their level of compliance and intelligence value.\footnote{See Kathleen T. Rhem, Detainees Living in Varied Conditions at Guantanamo, ARMED FORCES PRESS SERVICE, Feb. 16, 2005; Carol Rosenberg, War Crimes Sessions Are Shut Down, MIAMI HERALD, Nov. 13, 2004, at 3A.} Camp 4 houses the most compliant prisoners and Camp 6 houses the most dangerous prisoners.\footnote{See, e.g., Tung Yin, supra note 17, at 160-63.} Camp 5 houses prisoners less compliant than those in Camp 4 but also less dangerous than those in Camp 6.\footnote{See id.} Camp Iguana detains prisoners who are awaiting transfer to their nation of origin.\footnote{See id.} In early 2008, the Pentagon announced the existence of a Camp 7, a top-secret facility where “high value” prisoners are kept.\footnote{See id.}

As of early 2009, approximately 300 people were still imprisoned at Guantánamo.\footnote{Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).} Although President Obama has called for review of all detainee files and for the closure of the facility within the year, his plans have seen some setbacks.\footnote{Id.} Many of the detainees have incomplete or nonexistent files.\footnote{Karen DeYoung & Peter Finn, Guantanamo Case Files in Disarray, WASH. POST, Jan. 20, 2009, at A5.} Further, although some detainees have been cleared for release, there has been difficulty in the repatriation process in parent countries.\footnote{Uighurs Ask Supreme Court for Their Freedom, WASH. POST., Apr. 7, 2009, at A5.} 

B. International Public Outcry

Calls for closing the prison facility at Guantánamo Bay have largely centered on two types of human rights abuses.\footnote{See Akbar, supra note 4, at 197–200. See generally ACLU Calls, supra note 4; Lugar Condemns Plan, supra note 4; Amnesty Int’l Memo, supra note 4.} First, much public outcry has centered on various allegations of torture.\footnote{See Akbar, supra note 4, at 197–200. See generally ACLU Calls, supra note 4; Lugar Condemns Plan, supra note 4; Amnesty Int’l Memo, supra note 4.} Second, many commentators assert that the incarceration of prisoners at Guantánamo
and the Military Commission system impinges on the detainees’ basic right to legal process.\textsuperscript{40}

1. Torture at Guantánamo

In 2002, the Justice Department issued a memorandum that implicitly authorized the torture of detainees.\textsuperscript{41} Many former Guantánamo prisoners have recounted testimonials of abuse and torture at the hands of prison personnel.\textsuperscript{42} These accounts allege various forms of torture, including the use of extreme heat or cold; food deprivation; isolation in cold for more than thirty days; and threats with German Shepherds.\textsuperscript{43} In early 2008, the CIA admitted to using waterboarding techniques at least three times.\textsuperscript{44} In April 2009, reports surfaced that waterboarding was employed over two hundred times on two terrorism suspects.\textsuperscript{45}

Regardless of the legal status or alleged guilt of prisoners at Guantánamo, international law expressly prohibits torture.\textsuperscript{46} The three main bodies of international law prohibiting torture that are routinely cited by scholars and politicians include the United Nations Convention Against Torture, the Geneva Conventions, and the customary law of war.\textsuperscript{47} Furthermore, the prohibition of torture is often referenced as a \textit{jus cogens} norm.\textsuperscript{48}

The United Nations Convention Against Torture provides that “no exceptional circumstances whatsoever, whether a state of war or a

\begin{footnotesize}
\textsuperscript{40} See Akbar, supra note 4 at 197–200. See generally ACLU Calls, supra note 4; Lugar Condemns Plan, supra note 4; Amnesty Int’l. Memo, supra note 4.


\textsuperscript{42} See John Barry et al., The Roots of Torture, NEWSWEEK, May 24, 2004, at 26.


\textsuperscript{44} The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Eventually, the gag reflex kicks in causing a fear of drowning. See Dan Eggen, White House Denies Cheney Referred to Torture, TIMES-PICAYUNE (New Orleans), Oct. 28, 2006, at A4.

\textsuperscript{45} Scott Shane, Waterboarding Used 266 Times on 2 Suspects, N.Y TIMES, Apr. 19, 2009, at A1.


\textsuperscript{47} See CAT, supra note 46; Geneva Convention, supra note 46.

\textsuperscript{48} See Prosecutor v. Furundzija, Case No. IT-95–17/1, ¶ 153–57 (Dec. 10, 1998). \textit{Jus cogens} are international norms accepted by the community of states from which no derogation is ever permitted. \textit{Id.}
threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

The document should be construed to prohibit torture absolutely, regardless of how compelling the reasons for derogation may be.

Common Article 3 of the 1949 Geneva Conventions provides minimum standards of protection to prisoners of war in the case of armed conflict. Specifically prohibited are “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”

In addition to positive sources of law, the customary law of war also governs the use of torture. Both U.S. courts and the International Court of Justice have found that torture violates the customary law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has taken this contention even further by indicating that the prohibition of torture belongs to universal norms of jus cogens.

2. Process Concerns

In late 2001, the Justice Department began purporting that federal courts would not have jurisdiction over the detainees at Guantánamo Bay. Accordingly, the Bush administration advanced the idea that Guantánamo Bay was beyond the reach of U.S. laws, essentially a “legal black hole.” Such a situation has led to much international concern regarding the lack of due process granted to the prisoners. The issues

49 See CAT, supra note 46, art. 2, para. 2.
51 Geneva Convention, supra note 46, art. 3.
52 Id.
53 See Furundzija, Case No. IT-95–17/1, ¶ 153–157; Military and Paramilitary Activities (Nicar v US), 1986 I.C.J. 14 (June 27).
55 See Furundzija, Case No. IT-95–17/1, ¶ 153–57.
56 Memorandum from Patrick Philbin and John C. Yoo to White House, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001), available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf (concluding that the great weight of legal authority indicated that a federal district court could not properly exercise habeas jurisdiction over an alien detained at Guantamano Bay).
fall into two main categories.\textsuperscript{59} First, under the legal process employed at Guantánamo, some detainees could remain in Guantánamo indefinitely without trial.\textsuperscript{60} Second, many legal scholars and politicians have argued that the trials afforded to the detainees have lacked fairness.\textsuperscript{61}

In several Guantánamo detainee appeals that have reached federal courts, Bush administration lawyers contended that many of the prisoners could be detained indefinitely.\textsuperscript{62} Bush administration lawyers asserted that Congress’ Authorization for Use of Military Force coupled with the inapplicability of the Geneva Conventions provided the necessary power to detain any unlawful combatant indefinitely.\textsuperscript{63} Legal scholars, politicians, and members of the international community responded that Guantánamo detainees should be afforded the protections of the Geneva Conventions and customary international law.\textsuperscript{64} Legal scholars routinely point to sections of the Geneva Conventions requiring detainees to be presumptively considered prisoners of war until a competent tribunal can determine their status.\textsuperscript{65} Scholars contend that, at a minimum, since the war in Afghanistan was explicitly waged against the Taliban regime, Taliban fighters should qualify for prisoner of war status under Article 4(A)(1) as “members of the armed forces of a Party to the conflict.”\textsuperscript{66}

The second process concern centers on the fairness of the trials that have been afforded to Guantánamo detainees.\textsuperscript{67} President Bush established the Military Commission system in a Military Order of No-

\textsuperscript{59} See Farer, supra note 58, at 377. See generally Boeving, supra note 58.


\textsuperscript{62} See Hamdi, 542 U.S. at 517–18.


\textsuperscript{65} See Gruber, supra note 64, at 1055; Sands, supra note 64, at 300; Jinks & Sloss, supra note 64, at 102.

\textsuperscript{66} See Geneva Convention, supra note 46, art. 4(A)(1); Gruber, supra note 64, at 1055.

\textsuperscript{67} See generally Lewis, supra note 61.
vember 13, 2001. Military Commissions provided unlawful combat-

ants with a trial, but the process was heavily subjected to security re-

quirements. Because of security concerns, the detainee may not have

been allowed to be present throughout the trial and may not have been

able to review all the evidence against him. While statements obtained

through torture are expressly prohibited, statements obtained through

methods in “which the degree of coercion is disputed” may be admitted

subject to certain conditions: (1) if the statement was obtained prior to

the enactment of the Detainee Treatment Act of 2005; (2) if the presid-

ing military judge finds that it is reliable; and (3) if the statement pos-

sesses sufficient probative value and if the interests of justice would best

be served by admission of the statement into evidence.

Though President Bush mandated that the Military Commissions

provide a “full and fair trial,” legal scholars have noted that presiding

officers essentially made up procedures as the trials proceeded and

were unable to articulate the legal regimes governing their courts.

Even supporters of the use of military tribunals have questioned their

fairness. When questioned about the decision to prosecute Zacharias

Moussaoui in federal court, rather than before a military tribunal, Vice

President Cheney explained that the decision was “primarily based on

an assessment of the case against Moussaoui, and that it cannot be

handled through the normal criminal justice system without compro-

mising sources or methods of intelligence” and the fact that “... there’s a good, strong case against him.” Senator Joseph Lieberman,

who once supported the use of the military tribunals, emphasized that

68 Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-


mil/news/Sep2005/d20050902order.pdf (outlining the procedures to which the accused is

entitled).

70 Id. § 5(F).


2600, 2607 (2006).

72 David Glazier, Full and Fair by What Measure?: Identifying the International Law Regulating


73 Michael P. O’Connor & Celia M. Rumann, Into the Fire: How to Avoid Getting Burned by

the Same Mistakes Made Fighting Terrorism in Northern Ireland, 24 Cardozo L. Rev. 1657, 1719

(2003).

74 Jerry Seper & Bill Gertz, Bush Made Decision Not to Try Moussaoui in Military Court,

“their use should be based on the type of crime alleged—whether it is a war crime—and not the quality of the evidence against the accused.”75

II. DISCUSSION

A. Judiciary Interpretation and Congressional Response Regarding Detainees

1. Challenges to Detention Before the U.S. Courts

In 2002, the Bush administration declared that all of the prisoners at Guantánamo Bay are “unlawful combatants,” who may be held indefinitely without trial and designated fifteen detainees eligible for trial by military commission.76 Several detainees have subsequently challenged their status and detention in federal courts.77

In 2004, the Supreme Court held in Rasul v. Bush that U.S. courts have jurisdiction to hear challenges on behalf of detainees at Guantánamo Bay in connection with the war against terrorism.78 The Court left questions involving detainees’ rights and status unanswered.79 Also in 2004, the Court decided Hamdi v. Rumsfeld, holding that a U.S. citizen detained as an “illegal enemy combatant” must be guaranteed recourse to challenge his detention before an impartial judge.80

In compliance with Rasul, the detainees at Guantánamo were afforded Combatant Status Review Tribunals in 2005, where they could challenge their status as “enemy combatants.”81 Congress enacted the Detainee Treatment Act, effectively denying detainees access to federal courts to file habeas corpus petitions but allowing appeals of status determinations and final decisions of military commissions.82

In 2005, in In re Guantánamo Detainee Cases, the District Court for the District of Columbia held that although the government had to take

78 Rasul, 542 U.S. at 485.
79 See id.
80 Hamdi, 542 U.S. at 532.
82 See id.
action to protect the country against enormous terrorist threats, that necessity did not negate the existence of fundamental due process rights for the detainees. The court further held that the Combatant Status Review Tribunal procedures violated the detainees’ due process rights.

In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court determined that the military commissions procedure violated numerous aspects of U.S. and international law, including the Uniform Code of Military Justice and Geneva Conventions Common Article 3. The Court refrained from determining whether Hamdan was entitled to all the protections afforded to a prisoner of war.

In response to the Court’s decision in *Hamdan*, Congress passed the Military Commissions Act (MCA) in 2006, authorizing “trial by military commission for violations of the law of war, and for other purposes.” Furthermore, the MCA attempted to establish what definitively constitutes a “lawful” or “unlawful” enemy combatant.

The MCA still faced challenges in the Supreme Court. In the consolidated cases of *Al Odah v. United States* and *Boumediene v. Bush*, the Court found the MCA to be unconstitutional. In doing so, the Court determined that constitutional habeas rights applied to all Guantánamo detainees. Furthermore, the Court described the military tribunals as “an inadequate substitute for habeas corpus” although “both the Detainee Treatment Act and the Combat Status Review Trials process remain intact.”

2. Congressional Response to Human Rights Violation

The McCain Amendment is perhaps the strongest attempt by the U.S. government to rectify the human rights violations in Guantánamo. The Amendment effectively bans torture and degrading treatment of prisoners held by U.S. authorities. With the intent to prevent detainee abuse, the Amendment requires military interro-
gations to be performed in strict accordance with the U.S. Army Field Manual for Human Intelligence Collector Operations.\textsuperscript{94}

While President Bush signed the Amendment into law, he nevertheless issued a signing statement that reads, in pertinent part, as follows:

The executive branch shall construe [the amendment] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of Congress and the President, evidenced in [the amendment], of protecting the American people from further terrorist attacks.\textsuperscript{95}

While it is unclear what this statement fully meant, commentators have viewed this interpretation as an attempt by the administration to reserve the right to stray from the letter and spirit of the Amendment in the name of national security.\textsuperscript{96}

The McCain Amendment, along with President Bush’s signing statement, has been criticized as insufficient to prevent the inhumane treatment of prisoners at Guantánamo.\textsuperscript{97} Nevertheless, at a minimum, the McCain Amendment helped restore Congressional oversight to the U.S. human intelligence program.\textsuperscript{98}

On July 20, 2007, President Bush issued an executive order prohibiting cruel and inhumane treatment during the interrogation of detained terror suspects, in compliance with Common Article 3 of the Geneva Convention.\textsuperscript{99} Specifically, President Bush banned the desecration of religious articles in the interrogation of suspects.\textsuperscript{100} Some commentators have alleged that the executive order merely places a gloss on the language of Common Article 3 and gives members of al Qaeda

\begin{footnotes}
\item See id.
\item See Allen, supra note 96, at 907–09.
\item See Harold Hongju Koh, Can the President Be Torturer in Chief?, 81 IND. L.J. 1145, 1153–54 (2006).
\item See id. § 3(b)(i) (F).
\end{footnotes}
another legal weapon. Former Commandant of the Marine Corps, P.X. Kelley, went so far as to state that the order allows the CIA “to engage in willful and outrageous acts of personal abuse.” Nevertheless, no major instance of torture or detainee mistreatment has been reported since the executive order.

B. Proposed Elements of a Plan to Close Guantánamo

1. Political Asylum

Many scholars have advocated for the immediate release of specific Guantánamo detainees that have been cleared of any wrongdoing and for accompanying that release with political asylum in the United States. In order to obtain asylum in the United States, an alien-petitioner must meet three requirements. First, an alien must prove that they have a well-founded fear of persecution or have suffered past persecution. Second, the persecution must be on account of race, religion, nationality, or membership in a particular social group or political opinion. Third, an alien must prove presence in the United States. Even if these three requirements are met, the ultimate grant of asylum is still at the discretion of the Attorney General.

Particularly strong arguments exist for granting political asylum for the Uighur Muslims, an Islamic group from China. The United States held twenty-two members of this Chinese Islamic group after their capture in Afghanistan. In 2005, fifteen of the Uighurs were no longer considered enemy combatants. The United States attempted repatriation, but the Uighurs expressed a strong desire not to return to

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102 See Kelley & Turner, supra note 101, at A21.


104 See id.

105 See id.

106 See id.

107 See id.

108 See id.

109 See id.


111 Simard, supra note 16, at 379–87; White, supra note 110, at A17.

112 Simard, supra note 16, at 395–98; White, supra note 110, at A17.
China due to fears of persecution.\textsuperscript{113} The United States has since transferred five of the Uighurs to a prison in Albania and detained the remainder at Camp Six in Guantánamo Bay.\textsuperscript{114} In December 2008, approximately 60 detainees, including the Uighurs, were cleared for release from the facility, but remain incarcerated due to the continued difficulties in repatriation.\textsuperscript{115}

The U.S. Department of State has attempted to persuade almost two-dozen nations to provide refuge for the Uighurs.\textsuperscript{116} Nevertheless, few countries have offered any assistance.\textsuperscript{117} In the meantime, the U.S. government has refused to allow the Uighurs into the United States.\textsuperscript{118}

2. Working with the International Community

In December 2007, Secretary of State Rice stated that closing Guantánamo Bay would be impossible without the help of the international community.\textsuperscript{119} The United States does not repatriate prisoners from Guantánamo unless at least two requirements are met.\textsuperscript{120} First, the parent country must want to repatriate its national.\textsuperscript{121} Second, the parent country must guarantee, in some cases, that the prisoner will remain incarcerated, and, in all cases, that the prisoner will not be tortured or killed.\textsuperscript{122} On some level, these efforts have proved successful.\textsuperscript{123} Afghanistan, Britain, Australia, and other countries have successfully reclaimed their nationals.\textsuperscript{124}

\begin{thebibliography}{99}
\bibitem{113} Simard, \textit{supra} note 16, at 395–98; White, \textit{supra} note 110, at A17.
\bibitem{114} White, \textit{supra} note 110, at A17.
\bibitem{116} Simard, \textit{supra} note 16, at 395–98; White, \textit{supra} note 110, at A17.
\bibitem{117} Simard, \textit{supra} note 16, at 395–98; White, \textit{supra} note 110, at A17.
\bibitem{118} Simard, \textit{supra} note 16, at 395–98; White, \textit{supra} note 110, at A17.
\bibitem{119} \textit{See} Rice Interview, \textit{supra} note 8.
\bibitem{121} \textit{See}, e.g., Report to the Committee Against Torture, \textit{supra} note 120, Annex at 56; \textit{see also} Chesney, \textit{supra} note 120, at 670–80.
\bibitem{122} \textit{See}, e.g., Report to the Committee Against Torture, \textit{supra} note 120, Annex at 56; \textit{see also} Chesney, \textit{supra} note 120, at 670–80.
\bibitem{124} \textit{Id}.
\end{thebibliography}
Many countries have been less supportive than Britain and Australia. Yemen, Saudi Arabia, and Tunisia have all refused to repatriate nationals exported from their countries. Russia and other countries have been reluctant to guarantee that the repatriated prisoner will be kept imprisoned, given a trial, or that the prisoner’s human rights will be respected.

3. Transfer to Fort Leavenworth

Several scholars have proposed the immediately closure of Guantánamo Bay and subsequent transfer of detainees to Fort Leavenworth, Kansas. Central to this proposal is the development of a Homeland Security Court. Because of the complicated legal issues surrounding intelligence gathering and the law of war, a court authorized by Congress under Article I would provide judges equipped with a background helpful to deciding national security issues. The current system of appeals for Guantánamo detainees allows for judges with no background in warfare or national security to decide cases that may be beyond the scope of their expertise.

Under a Homeland Security Court, prosecutors would be assigned to the Criminal Division of the Justice Department. Detainees would be provided uniform defense counsel in the form of judge advocates from the U.S. military and Coast Guard. Additionally, similar to the Military Commissions, a detainee could employ civilian counsel at his or her own expense, as long as the civilian counsel meets security clearance requirements. While the media would not be allowed full cov-
verage of these trials, the trials would be open to U.N. observers to ensure fairness and procedural protections of the accused.\textsuperscript{135} These observers would also be subject to security clearance requirements.\textsuperscript{136} If found guilty, a Guantánamo prisoner would be detained alongside alleged and convicted criminal members of the U.S. military in Fort Leavenworth.\textsuperscript{137} Appeals could be heard through the same process afforded to criminal defendants in the armed services.\textsuperscript{138}

Despite the many appealing elements of this plan, moving the Guantánamo detainees from Cuba to Fort Leavenworth appears to be an uphill battle.\textsuperscript{139} In July 2007, the Senate voted ninety-four to three for a non-binding resolution that opposed the movement of Guantánamo prisoners to the United States.\textsuperscript{140} Furthermore, many U.S. citizens have strongly expressed opposition to the plan, arguing that it would be undesirable and dangerous to bring a collection of terrorists to their backyards.\textsuperscript{141} Finally, detainee lawyers have questioned what a move to Leavenworth would ultimately mean for the detainees, concluding that the move would not do much to improve their situation.\textsuperscript{142}

III. Analysis

The current situation at Guantánamo Bay presents complex and unique problems with no clear legal framework available to rectify the situation.\textsuperscript{143} The difficulty of the issues cannot trump basic principles of justice and human rights.\textsuperscript{144} Accordingly, if the international community and the U.S. government truly condemn the current status of Guantánamo Bay, action must accompany the rhetoric.\textsuperscript{145} In order to permanently close the facility, the United States needs to first clearly define the status of each prisoner, the international community needs to increase repatriation efforts, and guarantees of legal process and

\textsuperscript{135} See Sulmasy, \textit{ supra} note 128, at 10–14.
\textsuperscript{136} See id.
\textsuperscript{137} See id.
\textsuperscript{138} See id.
\textsuperscript{141} Scharnberg, \textit{ supra} note 139, at 1.
\textsuperscript{143} See Parker, \textit{ supra} note 6, at 2A.
\textsuperscript{145} See id.
human dignity need to be in place for the remaining prisoners. The preservation of global and national security must also be considered in each step of the process.

A. Categorizing the Detainees

As a threshold matter, the detainees need to be categorized in a logical and comprehensive manner, and the categorization of a detainee should ultimately determine detainees’ legal rights. Currently, the categorization of detainees focuses largely on their status as an enemy combatant. While this categorization plays some role as to what rights and privileges are afforded to each prisoner, it does not represent the full spectrum of law available to categorize prisoners.

1. Geneva Conventions Application

The Geneva Conventions provides one definition for those considered prisoners of war. Prisoners of war status, under the Geneva Conventions, encompasses members of militias and organized resistance movements, whether or not they are operating within their own territory, as long as they fulfill four requirements including: (1) command by a person responsible for subordinates; (2) fixed distinctive insignia recognizable from a distance; (3) openly carrying arms; and (4) conducting operations in accordance with the laws and customs of war.

While many scholars and commentators advocate for the categorization of the Guantánamo detainees under the Geneva Conventions, this framework falls short in light of the nature of the war on terrorism. The Geneva Conventions provide that “all prisoners of war are to be released and repatriated immediately upon cessation of active hostilities . . . .” Because the war on terrorism could continue indefinitely, the Conventions could be construed to legitimize the indefinite detention of

146 See id.
147 See generally Clover, supra note 63.
148 See, e.g., Geneva Convention supra note 46; Franck, supra note 144, at 688.
150 See generally Geneva Convention supra note 46.
151 Id. art. 4.
152 Id.
154 Geneva Convention, supra note 46, arts. 118 & 119.
the prisoners currently held at Guantánamo.\textsuperscript{155} Also, as previously discussed, many prisoners currently held at Guantánamo Bay have no country willing to accept them.\textsuperscript{156}

2. The Military Commissions Act and the Courts

The Military Commission Act distinguishes prisoners in terms of their status as “enemy combatants,” a status many scholars have criticized as an overbroad categorization.\textsuperscript{157} In \textit{In re Guantánamo Detainees}, the court concluded that the definition of “enemy combatant” utilized in military proceedings is unworkable and vague.\textsuperscript{158} In order to balance the interests of fairness and security properly, one scholar called for the definition of enemy combatant to be narrowed to include only those persons who directly and voluntarily engaged in hostilities against the United States.\textsuperscript{159}

The Courts have done little to clarify the current definition and, if anything, have complicated the issue further.\textsuperscript{160} In \textit{Hamdan}, the Supreme Court recognized that prisoners who are U.S. citizens should be granted additional rights under the Constitution and Geneva Conventions.\textsuperscript{161} In \textit{Khalid v. Bush}, the District Court for the District of Columbia found that distance from the battlefield does not mean that a detainee cannot be categorized as an “enemy combatant.”\textsuperscript{162} Nevertheless, the court in \textit{Khalid} found that an off-the-battlefield capture still meant that the detainees were not extended the protections of the Geneva Conventions regardless of their status as “enemy combatants.”\textsuperscript{163}

A clearer definition of what constitutes an “enemy combatant” needs to be applied to the Guantánamo detainees.\textsuperscript{164} As the court concluded in \textit{In re Guantánamo Detainees}, the status of a detainee should turn on the fundamental nature of the constitutional rights being asserted rather than the citizenship of the person asserting them.\textsuperscript{165} Fi-

\begin{flushleft}
\textsuperscript{155} See id.
\textsuperscript{156} See Report to Committee Against Torture, \textit{supra} note 120.
\textsuperscript{157} \textit{In re Guantánamo Detainee Cases}, 355 F. Supp. 2d at 453–54.
\textsuperscript{158} Id.
\textsuperscript{160} See, e.g., \textit{Hamdan}, 548 U.S. at 775–78.
\textsuperscript{161} Id.
\textsuperscript{163} See id.
\textsuperscript{164} \textit{In re Guantánamo Detainee Cases}, 355 F. Supp. 2d at 453–54.
\textsuperscript{165} See id.
\end{flushleft}
nally, under general principles of international law, a detainee should be treated as a prisoner of war until a “competent tribunal” decides otherwise.\textsuperscript{166}

3. “Men Without Countries”

There remain prisoners in Guantánamo, such as the Uigher Muslims, who simply do not have a country where repatriation is possible.\textsuperscript{167} These detainees warrant special categorization and require the assistance of the international community to ensure the protection of their basic human rights as well as their continued imprisonment if they present a security risk.\textsuperscript{168} As of late 2008, Albania is the only third party nation to assist in this difficult problem, granting asylum to several Uighers in 2006.\textsuperscript{169} Perhaps indicating a reversal of this trend, more European nations have recently offered willingness to help.\textsuperscript{170}

B. The International Community Needs to Become a Part of the Solution

The U.S. government has repeatedly claimed that shutting down Guantánamo will be decidedly more difficult without increased assistance from the international community.\textsuperscript{171} Professor Chemerinsky stated that closing Guantánamo cannot mean detainees get fewer procedural protections than already afforded and “that might happen if the U.S. sends detainees to a foreign country which argues that they’re entitled to no procedural protection at all.”\textsuperscript{172} Parent countries need to reclaim their nationals and guarantee treatment in accordance with established international law and international sentiment.\textsuperscript{173} This means that countries must observe the international rights of suspected terrorists, respect human rights obligations and afford suspected terrorists some form of accepted legal process.\textsuperscript{174} If states and international organizations are going to be so vocal in their condemnation of the U.S. actions

\textsuperscript{166} See, e.g., Geneva Convention \textit{supra} note 46, art. 5.

\textsuperscript{167} Simard, \textit{supra} note 12, at 395–98.

\textsuperscript{168} Carol Rosenberg, \textit{Albania Grants Asylum to Five from China}, \textit{Miami Herald}, May 6, 2006, at A3.

\textsuperscript{169} See id.

\textsuperscript{170} See, e.g., Rotella, \textit{supra} note 115, at A10.


\textsuperscript{172} Red Cross Objects to Camp Photos; A Federal Judge Will Hear Challenges to the Treatment of \textit{Al-Qaeda} and Taliban Detainees, \textit{Orlando Sentinel Trib.}, Jan. 22, 2002, at A6.

\textsuperscript{173} See id.

\textsuperscript{174} See id.
concerning Guantánamo detainees, then they should become part of the solution.\textsuperscript{175}

There will undoubtedly still be states that are unwilling to either repatriate or guarantee to respect the rights of their nationals.\textsuperscript{176} Even more problematic, there are Guantánamo detainees that are difficult or impossible to classify as citizens of any particular state.\textsuperscript{177} In these cases, the U.N. High Commissioner for Refugees could intervene to find third-party nations willing to accept these individuals.\textsuperscript{178} In extremely rare circumstances, the United States could perhaps offer political asylum to those prisoners who are both completely cleared of all charges and meet the requirements for political asylum.\textsuperscript{179}

The United States and the international community could also apply elements of the model employed by the ICTY.\textsuperscript{180} There, lower level offenders are granted immunity and, in some cases, a new identity and citizenship in a third-party nation for testifying or providing evidence leading to the conviction of more serious offenders.\textsuperscript{181} The U.S. government has been stymied in their pursuit and conviction of high level terrorists due to lack of evidence or intelligence.\textsuperscript{182} Providing a chance of a new life in a third party nation would probably be more compelling to at least some Guantánamo detainees than the current methods employed.\textsuperscript{183}

C. Transfer to Fort Leavenworth Alone Is an Insufficient Solution

By itself, transferring the Guantánamo detainees to Fort Leavenworth does not seem sufficient to cure the problems that have plagued the facility in Cuba.\textsuperscript{184} Assuming that the security concerns of moving some of the world’s most dangerous terrorists to U.S. soil are alleviated, a move to Fort Leavenworth still presents many significant legal challenges that exist at Guantánamo Bay.\textsuperscript{185} Regardless, the security

\textsuperscript{175} See Rice Interview, supra note 8.

\textsuperscript{176} See id.

\textsuperscript{177} Report to Committee Against Torture, supra note 120.

\textsuperscript{178} See id.


\textsuperscript{181} See id.


\textsuperscript{183} See id.

\textsuperscript{184} See Northam, supra note 10.

\textsuperscript{185} Scharnberg, supra note 139, at A1.
concerns of the international community need to be reconciled with international law and human rights.\textsuperscript{186}

The attorneys of Guantánamo detainees have been particularly critical of a move to Fort Leavenworth.\textsuperscript{187} Professor Falkoff, who represents seventeen detainees, stated that the actual closure of Guantánamo and subsequent transfer to Leavenworth is of far less importance than affording the detainees a trial and treating detainees in accordance with the Geneva Conventions.\textsuperscript{188} Similarly, Professor Katyal, who served as counsel to Hamdan, believes that closing Guantánamo will not do much to impact the status of Guantánamo prisoners.\textsuperscript{189}

Professor Posner has argued that even though wrongful acquittal is a risk we accept in the interest of fair justice in terms of traditional criminal law, this reasoning should not apply in the case of terrorist organizations.\textsuperscript{190} Others argue that terrorist suspects simply do not deserve the protection of the U.S. Constitution enjoyed by U.S. citizens.\textsuperscript{191} Moving some of the dangerous terrorists imprisoned in Guantánamo to U.S. soil may automatically mean that these prisoners are afforded the full protection of the Constitution because of their presence within the United States.\textsuperscript{192}

D. Closing Guantánamo: A Comprehensive Solution

The closure of the facility at Guantánamo Bay and subsequent transfer to Fort Leavenworth coupled with the creation of an Article I Homeland Security Court or similar body is, perhaps, the best compromise between the demands of national security and international law.\textsuperscript{193} Establishing such a court would protect security interests by appointing judges and prosecutors with security clearances required to evaluate the evidence to be used against terrorism suspects without compromising national security.\textsuperscript{194} A Homeland Security Court would be subject to greater public scrutiny than the Military Commission sys-


\textsuperscript{187} See Bennett, supra note 142, at D1; Mazzetti & Hendren, supra note 142, at A16.

\textsuperscript{188} Bennett, supra note 142, at D1.

\textsuperscript{189} Mazzetti & Hendren, supra note 142, at A16.

\textsuperscript{190} See id.

\textsuperscript{191} See id.

\textsuperscript{192} See id.; see also Johnson v. Eisentrager, 339 U.S. 763, 769–771 (1950).

\textsuperscript{193} Sulmasy, supra note 128, at 10–13.

\textsuperscript{194} See id.
tem of trials.\textsuperscript{195} Furthermore, Congressional establishment of such a court would allow the detention of those who have yet to commit a terrorist act but have the substantial propensity to do so, similar to how U.S. Courts allow detention of the insane, child molesters, and people with infectious diseases, because of their great potential danger.\textsuperscript{196} Even Professor Katyal, one of the staunchest advocates for detainee legal protections, supports such an idea.\textsuperscript{197} Finally, an Article I court would not necessarily be subject to all the restrictions of domestic criminal law, but would operate in accordance with the Constitution and international standards.\textsuperscript{198}

The good that closing the Guantánamo Bay facility will do for the United States on the global stage cannot be understated.\textsuperscript{199} The continued operation of Guantánamo makes for easy rhetorical attacks by those who oppose the United States’ commitment to democracy and freedom.\textsuperscript{200} Heads of states who are suspected of human rights violations, including Robert Mugabe of Zimbabwe, Vladimir Putin of Russia, Bashar Assad of Syria, and Mahmoud Ahmadinejad of Iran, have all pointed to Guantánamo to deflect attention from their own misdeeds.\textsuperscript{201} Concurrently, the State Department has reported increased difficulty promoting human rights policies abroad.\textsuperscript{202} The continued operation of Guantánamo Bay only encourages the enemies of the United States, making martyrs, in a sense, of the people detained there.\textsuperscript{203}

Closing Guantánamo Bay will be a positive step toward restoring the United States’ reputation as a global leader in human rights.\textsuperscript{204} During trying times, the balance between human rights and security is often tipped in favor of security interests.\textsuperscript{205} Nevertheless, it has become abundantly clear that human rights are intrinsically connected with the

\textsuperscript{195} See id.


\textsuperscript{197} Jack L. Goldsmith & Neal Katyal, A Case for a National Security Court, 153 CHI. DAILY L. BULL. 6 (2007).

\textsuperscript{198} See Sulmasy, supra note 128, at 10–13.

\textsuperscript{199} See Koh, supra note 13, at 658–60.

\textsuperscript{200} See Daskal, supra note 126, at 30–31.

\textsuperscript{201} See id.


\textsuperscript{204} See Efron, supra note 202, at A4.

\textsuperscript{205} See id.
values we wish to protect through national security. Many military leaders have noted that the breaches of international law at Guantánamo will lead to the mistreatment of U.S. prisoners of war. Undoubtedly, national security and human rights are both important to preserve, but the United States cannot sacrifice one in the name of the other without consequences.

**Conclusion**

If the United States wishes to reclaim its status as a leader of human rights in the international community, the prison at Guantánamo Bay needs to be closed as soon as possible. Despite the legal and foreign policy challenges that may exist, the executive and legislative branches of government need to reach out to the international community and find a workable alternative to the system currently in place. Otherwise, the United States will continue to be rhetorical fodder for those who oppose democracy and fuel U.S. enemies in the war on terrorism.

As a threshold matter, the United States needs to develop internal policy to categorize prisoners in a clear and logical manner. This policy should clarify ambiguities in international standards such as the Geneva Conventions. To the greatest extent possible, prisoners should be transferred to their country of origin. The remainder could be transferred to Fort Leavenworth, Kansas, or a similar facility. This will provide the government, media, and human rights organizations greater oversight of detainee treatment and prison operations.

A transfer to Fort Leavenworth alone will not remedy all the problems that exist in Guantánamo. The executive branch and Congress should consider establishing an Article I Homeland Security Court to provide a full and fair trial for prisoners that also respects the security needs of the free world. As the war on terrorism may continue indefinitely, the problems presented by fighters from terrorist organizations will not go away. Accordingly, a court equipped with judges and rules suited for the challenges presented by the war on terrorism will help prevent the legal quagmire caused by the tactics employed at Guantánamo.

Finally, the United States needs to reach out and work with the international community to bring full closure to the issues surrounding the operation of Guantánamo Bay. The United Nations and third-party

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206 See id.
207 See, e.g., Pincus, supra note 13, at A3.
208 See id.
nations need to help with the repatriation of certain detainees. Further, the international community needs to respect the human rights and security risks presented by detainees transferred to their custody. These measures will restore the United States as a beacon for human rights and respect for international law.
STATE OF UNCERTAINTY: CITIZENSHIP, STATELESSNESS, AND DISCRIMINATION IN THE DOMINICAN REPUBLIC

STACIE KOSINSKI*

Abstract: The phenomenon of statelessness is a grave and growing problem. Millions of stateless individuals are among the least visible but most vulnerable populations in the world. They are not recognized as citizens by any government and thus are forced to function at the edges of society. Without citizenship, people often have no effective legal protection, no ability to vote, and limited access to education, employment, health care, marriage and birth registration. This Note examines the root causes and overall impact of statelessness on a global scale. It also takes a closer look at the history and impact of the systematic, discriminatory denial of citizenship for Dominicans of Haitian descent in the Dominican Republic in light of the 2005 Inter-American Court of Human Rights landmark decision against the Dominican Republic affirming nationality as a human right.

INTRODUCTION

Approximately fifteen million people throughout the world are stateless—living “in the shadows at the edge of society.”¹ The 1948 Universal Declaration of Human Rights (UDHR) asserts that all people have a right to citizenship,² yet millions have never acquired citizenship or have lost their citizenship and have no claim to citizenship of another state.³ Staggering numbers of stateless people live and die “unprotected and unrecognized.”⁴ Furthermore, Statelessness has a cri-

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³ See generally Leclerc & Colville, supra note 1.

pling impact on an individual’s ability to function within a particular country or as a citizen of the world.\(^5\) In a speech before the U.S. Congress in February 2007, Thomas Albrecht, a Deputy Representative for the United Nations High Commissioner for Refugees (UNHCR), succinctly articulated the overwhelming burden of a stateless existence on the individual:

No nationality means identity documents conferring legal personality and the rights that go with this—access to health care, education, property rights, freedom to leave and return to your country—are simply not available. In some instances, individuals who are stateless and are outside their country of origin or country of former residence can be detained for long periods if those countries refuse to grant them re-entry to their territories. Births and deaths may not be registered. In many ways these people simply do not exist.\(^6\)

Part I of this Note will examine the root causes and overall impact of statelessness, as well as the history and impact of the systematic, discriminatory denial of citizenship for Dominicans of Haitian descent in the Dominican Republic. Part II will focus on the 2005 Inter-American Court of Human Rights (IACHR) landmark decision against the Dominican Republic affirming nationality as a human right. Part III will then analyze the reaction to the IACHR decision on the part of the Dominican Republic and the international community as a whole.

I. Background

A. Statelessness and Nationality

The problem of statelessness is not a geographically specific phenomenon; rather, stateless people can be found across the planet as well as across socio-economic boundaries.\(^7\) In international terms, a stateless individual is “any person who is not considered as a national by any state through its nationality legislation or constitution.”\(^8\) The root causes of statelessness are complex and multifaceted—including state

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\(^5\) See id.

\(^6\) Id.

\(^7\) See generally Leclerc & Colville, supra note 1; Interview with Phillippe Leclerc, supra note 1.

\(^8\) Interview with Phillippe Leclerc, supra note 1.
succession, decolonization, conflicting laws between states, domestic changes to nationality laws, and discrimination.\textsuperscript{9}

Statelessness impairs the ability of an individual to function as a member of society—domestically and internationally—and its impact is felt psychologically, socio-economically, and socio-culturally.\textsuperscript{10} While specific circumstances vary between countries, all stateless people are ultimately faced with the overwhelming challenge of existing without an acknowledged identity.\textsuperscript{11} As one would expect, “[v]alid identity documents are crucial to accessing a wide variety of rights.”\textsuperscript{12} For adults, statelessness creates significant barriers to basic freedoms such as marriage, land ownership, employment, signing of contracts, and voting.\textsuperscript{13}

The overall impact of statelessness on children is particularly devastating.\textsuperscript{14} For children, a lack of identity often results in the denial of access to education, health care, and the protections and constitutional rights granted by the State.\textsuperscript{15} “Through no fault of their own, stateless children inherit a trying reality and an uncertain future.”\textsuperscript{16} The U.N. Convention on the Rights of the Child (CRC) sets forth the international standard for the birth registration of children.\textsuperscript{17} Article 7 of the Convention provides that “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”\textsuperscript{18} Contrary to standard principles of international law, stateless children and adults alike are denied internationally recognized human rights and protections due to their lack of citizenship.\textsuperscript{19} They often “cannot travel freely or access justice when necessary.”\textsuperscript{20} Additionally, lack of documentation and proof of identity

\textsuperscript{9} Id.
\textsuperscript{10} See generally Leclerc & Colville, supra note 1.
\textsuperscript{11} See Interview with Phillippe Leclerc, supra note 1.
\textsuperscript{13} Interview with Phillippe Leclerc, supra note 1.
\textsuperscript{14} See Lynch, supra note 4.
\textsuperscript{15} Id.
\textsuperscript{16} Id. (quoting U.S. Rep. Sheila Jackson Lee, Chair of the Congressional Children’s Caucus, Brief to Congress on the Problem of Statelessness).
\textsuperscript{18} Id.
\textsuperscript{19} Lynch, supra note 4.
\textsuperscript{20} Id.
leaves individuals in immigration limbo—vulnerable to expulsion from their home country.\textsuperscript{21}

United Nations agencies—such as the U.N. High Commission on Refugees (UNHCR), the U.N. Children’s Fund (UNICEF), and the U.N. Population Fund (UNFPA)—together with international human rights agencies and other non-governmental agencies work to identify stateless populations, provide guidance and support for timely birth registrations, and combat the “arbitrary deprivation of nationality.”\textsuperscript{22} Additionally, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) sets forth a standard for the elimination of all racially discriminatory government policies.\textsuperscript{23} This Convention requires states to condemn all forms of racial discrimination, whether based on race, color, descent, or national or ethnic origin, and to pursue a policy of eliminating racial discrimination.\textsuperscript{24} Countries must guarantee all people’s right to equality before the law, and to various political, civil, economic, social and cultural rights.\textsuperscript{25}

While complex issues of parentage, race, ethnicity, place of birth, and politics all play a role in determining an individual’s citizenship and nationality, one of the main causes of statelessness is conflict between the two principles upon which nationality is based at birth: \textit{jus soli} and \textit{jus sanguinis}.\textsuperscript{26} \textit{Jus soli}, literally translated as “right of soil,” was historically a tenant of the common law in England.\textsuperscript{27} The focus of \textit{jus soli} is on birthplace, the fact of being born in a territory over which a state maintains, has maintained, or wishes to extend its sovereignty.\textsuperscript{28} \textit{Jus sanguinis}, literally translated as “right of blood,” historically was a rule of civil law in continental European nations.\textsuperscript{29} In \textit{jus sanguinis} countries, citizenship is based on bloodline and is usually determined by the nationality of one or both parents or other more distant ances-


\textsuperscript{22} Interview with Philippe Leclerc, supra note 1.


\textsuperscript{24} See id. arts. 1 & 2.

\textsuperscript{25} Id.


\textsuperscript{27} Mohsen Aghahosseini, Claims of Dual Nationals and the Development of Customary International Law 16 n.6 (2007).

\textsuperscript{28} Weil, supra note 26, at 17.

\textsuperscript{29} Aghahosseini, supra note 27, at 16.
Acquisition of nationality is generally based on the operation of one of these rules. Conflict and confusion arise because there is no single principle that nations appear willing to accept as a test of their own nationality laws, with some ascribing to the tenants of *jus sanguinis*, some looking to *jus soli* principles, and others choosing a combination of both.

The UDHR provides that all people have a right to a nationality, however, it does not provide specific guidance with respect to which state should grant its nationality nor to what circumstances should affect this determination. In an effort to fill this void, international treaties such as the CRC have created a framework of obligations and procedures for states to follow to prevent statelessness and arbitrary denial or deprivation of nationality. Specifically, the CRC mandates that states should systematically register children at birth and provide them with a nationality.

Countries within the Americas have also taken special steps toward the recognition, monitoring, and adjudication of regional human rights violations. The American Convention on Human Rights (also known as the Pact of San José) was adopted by the twenty-four nations of the Americas in a meeting in San José, Costa Rica, in 1969 and came into force on July 18, 1978. One of the main purposes of the Convention is “to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.” The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are responsible for overseeing compliance with the Convention. The stated purpose of the Inter-American Court of Hu-

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30 Weil, supra note 26, at 17.
31 See id.
32 See id.
33 See generally UDHR, supra note 3 (notably lacking any reference to standards for determining an individual state’s responsibility for the granting of citizenship).
34 Leclerc & Colville, supra note 1; see also CRC, supra note 16, arts. 3–40.
35 CRC, supra note 16, art. 7.
38 American Convention on Human Rights, supra note 36, pmbl.
man Rights is to act as an autonomous judicial institution whose primary function is the application and interpretation of the American Convention on Human Rights. Questions and cases involving nationality, citizenship, and statelessness in the Americas are brought before these organs.

B. Haitians and Dominicans of Haitian Descent in the Dominican Republic

Unlike in Asia and the Middle East, where there are large concentrations of stateless people, there generally is not a statelessness problem in the Americas due to widespread adherence to the rule of *jus soli*. The one major exception to this trend in the Americas is the problematic situation of ethnic Haitians in the Dominican Republic, where historical animus, discriminatory government policies and legislation and anti-Haitian public sentiment act as barriers to systematic birth registration for people who have in many cases resided in the country for generations. These problems persist despite the fact that the Dominican Republic is a signatory to the 1961 Convention on the Reduction of Statelessness, which also sets forth universal requirements for access to citizenship and nationality.

A large number of the hundreds of thousands of stateless people in the Dominican Republic are children. While the exact number of stateless children of Haitian descent living in the Dominican Republic is unknown, an estimated two to three million individuals—between twenty to twenty-five percent of people residing in the Dominican Republic—are not documented. Some estimates suggest that at least one-fifth of these individuals are children. Today, the Dominican Republic is far more prosperous than Haiti. As a result, many Haitians

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40 Id.
42 Interview with Phillippe Leclerc, supra note 1.
43 Id.
45 See id.
46 Id.
are driven to work in the Dominican, traditionally in the sugar cane plantations cutting cane, but more recently in construction and the service industry.\textsuperscript{49} Many factors, including political turmoil, violence, repression and extreme poverty drive Haitians to cross the border into the Dominican Republic.\textsuperscript{50} The Dominicans rely on them for cheap labor, though widespread discrimination and prejudice against Haitians permeates society and limits access to nationality.\textsuperscript{51}

As Phillipe Leclerc, Chair of the UNHCR Statelessness Unit, notes, “[t]he importance of registering births is graphically illustrated by the situation of people of Haitian descent in the Dominican Republic, where there are believed to be hundreds of thousands of stateless people.”\textsuperscript{52} The Constitution of the Dominican Republic grants citizenship to all those born on Dominican soil, except the children of diplomats or those “in transit” through the country.\textsuperscript{53} The state continues, however, to neglect registering births among certain groups of people, and particularly those of Haitian descent.\textsuperscript{54} Historically, birth registration has been systematically withheld from children born to Haitian parents, who are often migrant workers.\textsuperscript{55} Unregistered children are not issued birth certificates and thus rendered stateless, as they cannot prove their nationality, where they were born, or to whom.\textsuperscript{56} This “in transit” exception was codified into law via the 2004 General Law on Migration 285–04, providing that only children of those individuals deemed to be “residents” born on Dominican soil are entitled to Dominican citizenship.\textsuperscript{57} In 2005, the Inter-American Court of Human Rights (IACHR) found this law to be a discriminatory violation of human rights and
subsequently ordered the Dominican government to register all births in the country. To date, the Dominican Republic has refused to comply with the majority of the Court’s decision.

II. Discussion

A. Moving Forward: Yean and Bosico v. Dominican Republic

On September 8, 2005 the IACHR issued a landmark decision reaffirming nationality as a human right. Yean and Bosico “marks the first time that an international human rights tribunal has unequivocally upheld the international prohibition on racial discrimination in access to nationality.” The IACHR would ultimately find that the Dominican Republic’s denial of nationality, through their refusal to issue birth certificates, was in direct contravention of the country’s constitution.

The initial petition was brought before the Inter-American Commission on Human Rights by El Movimiento de Mujeres Domincano-Haitiana (MUDHA) [The Movement of Dominican-Haitian Women], the Center for Justice and International Law (CEJIL) and the International Human Rights Clinic at the University of California, Berkeley, on behalf of two children of Haitian descent who were born in the Dominican Republic and had resided there for their entire lives. In

59 OHCHR REPORT, supra note 20, ¶ 8.
61 Justice Initiative, supra note 60.
63 See Yean & Bosico, 2005 Inter-Am. Ct. H.R., ¶¶ 5–6; Baluarte, supra note 62, at 26–27. The founder of MUDHA, Sonia Pierre, overcame the myriad of problems associated statelessness to lead a human rights movement on behalf of stateless children. Marc Lacey, A Rights Advocates Work Divides Dominicans, N.Y. TIMES, Sept. 29, 2007, at A4. For this work, she was the recipient of the 2006 Robert F. Kennedy Human Rights award. Id. These achievements have not been without significant impact on her own citizenship. See id. Within months of receiving this international human rights award, the Dominican Government began questioning Ms. Pierre’s citizenship and eventually suggested that she “belonged” to Haiti, not the Dominican Republic. Id. In March 2007, Dominican officials at the registrar’s office attempted to revoke her Dominican birth certificate based on questions about the legal status of her parents and the validity of their identification documents. Diógenes Pina, Dominican Republic: Children of Haitians Fight for Birth Certificates, INTER PRESS SERVICE, Aug. 28, 2007. According to press reports, after her case made in-
1997, Dilicia Yean and Violeta Bosico (then ten months and twelve years old, respectively) visited the civil registry with their mothers and representatives from MUDHA to request birth certificates.\textsuperscript{64} Documentation proved that the mothers of the two girls were Dominican and that they themselves were born on Dominican soil.\textsuperscript{65} Despite all of the evidence presented, the girls were denied Dominican nationality, an apparent breach of the rights set forth in the Dominican Constitution.\textsuperscript{66} They were subsequently unable to obtain birth certificates or enroll in school.\textsuperscript{67} The girls appealed this decision through the Dominican judicial system, the refusal was upheld, and Bosico was subsequently expelled from school.\textsuperscript{68} Their lack of status “also left them vulnerable to expulsion from their home country.”\textsuperscript{69} The IACHR would ultimately find that the Dominican Republic’s denial of nationality, through their refusal to issue birth certificates, was in direct contravention of the country’s constitution and international law.\textsuperscript{70}

In its official application against the Dominican Republic submitted to the IACHR on July 11, 2003, the Inter-American Commission on Human Rights alleged that the Dominican Republic, through the State’s Registry Office authorities, had illegally refused to issue birth certificates for the children Yean and Bosico.\textsuperscript{71} The children were born within the State’s territory, and the Constitution of the Dominican Republic establishes the principle of \textit{jus soli} to determine those who have a right to Dominican citizenship.\textsuperscript{72} The Commission asked that the Court declare the international responsibility of the Dominican Republic for alleged violations of several Articles of the American Convention on Human Rights, including Articles 19 (Rights of the Child), 20 (Right to Nationality), 24 (Right to Equal Protection), 3 (Right to Juridical Personality), and 18 (Right to a Name), to the detriment of the Yean and Bosico children.\textsuperscript{73}
B. Official Findings of the IACHR

After a thorough examination of the facts, the Court found that the Dominican Republic discriminatorily applied its nationality and birth registration laws to children of Haitian descent.\(^\text{74}\) The Court further ruled that these discriminatory policies and regulations rendered such children interminably stateless and thus unable to access fundamental human rights and freedoms.\(^\text{75}\) The Court’s ruling acknowledged that these circumstances left the Yeán and Bosico children without an identity.\(^\text{76}\) The Court also acknowledged the dramatic consequences on their rights as children and with respect to their ability to function as individuals within Dominican society.\(^\text{77}\) Lack of proof of identity in the form of a birth certificate rendered the children unable to access fundamental human rights such as the right to education, the right to health services, the right to equal protection before the law, or even a right so fundamental as the right to a name.\(^\text{78}\)

In its written decision, the Court made several important observations with respect to the role of states in preventing statelessness and protecting human rights.\(^\text{79}\) The Open Society Justice Initiative summarized the Court findings as follows:

- Nationality is the legal bond that guarantees individuals the full enjoyment of all human rights as members of the political community.
- Although states maintain the sovereign right to regulate nationality, the Court noted that state discretion must be limited by international human rights standards that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.
- States must abstain from enacting or enforcing regulations that are facially discriminatory or have discriminatory effects on different groups.
- States have an obligation to avoid adopting legislation or engaging in practices with respect to the granting of nationality that would

\(^{74}\) Id. at ¶260(2)–(3).
\(^{75}\) Id. at ¶ 260(3).
\(^{76}\) Id. at ¶ 240.
\(^{77}\) See id.
\(^{78}\) Baluarte, supra note 62, at 27(citing specific rights as guaranteed by the American Convention on Human Rights).
\(^{79}\) Justice Initiative, supra note 60. See generally Yeán & Bosico, 2005 Inter-Am. Ct. H.R.
lead to an increase in the number of stateless persons. Statelessness makes impossible the recognition of a jurisdictional personality and the enjoyment of civil and political rights, and produces a condition of extreme vulnerability.

- States cannot base the denial of nationality to children on the immigration status of their parents.
- Proof required by governments to establish that an individual was born on a state’s territory must be reasonable and cannot present an obstacle to the right of nationality.  

In sum, the Court ordered that the Dominican Republic publicly acknowledge its responsibility for the human rights violations detailed in the decision within six months of the judgment date; reform its system of birth registration; create and implement procedures to issue birth certificates to all children born on its territory irrespective of their parents’ immigration status; make available education for all children, including those of Haitian descent; and finally, pay monetary damages to the children and their families.

As asserted by David Belaurte, attorney at the Center for Justice and International Law (CEJIL), Yean and Bosico is of monumental significance for several reasons. “It was the first judgment to be entered against the Dominican Republic since the State ratified the jurisdiction of the IACHR in 1999.” Further, the case and the judgment address the incredibly contentious issue of Haitian migration in Dominican society and has “thrust Dominican society into a furious debate.” All branches of Dominican government—executive, legislative, and judicial—have been involved in responding to the decision. Finally, and most importantly, the decision identified institutional and cultural discrimination against Haitians and “outlined the state’s affirmative obligations to remedy this situation.”

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80 Justice Initiative, supra note 60. See generally Yean & Bosico, 2005 Inter-Am. Ct. H.R.
82 Baluarte, supra note 62, at 25.
83 Id.
84 Id.
85 Id.
86 Id.
III. Analysis

A. Dominican Response to the Decision of the IACHR

The Dominican government has displayed hostility and resentment with respect to the IACHR decision, an overall unwillingness to fulfill the country’s international obligations and a lack of respect for international human rights law.87 The limited steps which the Dominican government has taken since the judgment in 2005 have fallen short of, and in some cases subverted, the directives of the Court.88

In the days and weeks following the release of the IACHR decision, human rights observers noted the re-emergence of a “furious debate” in Dominican society.89 These issues are not unfamiliar to Dominican culture.90 International organizations have been long concerned with the hostility suffered by Haitian migrants in the Dominican Republic.91 “Institutionalized anti-Haitian discrimination” in the Dominican is considered by experts to be extensive and far-reaching.92 Together with the international community, human rights groups decried the official reaction of the Dominican government and expressed frustration with the Dominicans’ “apparent unwillingness to fulfill the country’s legal obligations.”93

The Dominican government’s reaction is best understood by acknowledging that the decision ordering it to amend its legislation and address discrimination took place in the context of pervasive pre-existing anti-Haitian sentiment.94 In 2005, prior to the IACHR decision and amid mounting pressure to regulate the migration of Haitians, the Secretary of Labor announced a plan to “dehaitianize” the country.95 This official announcement led to increased anti-Haitian rhetoric and violence, culminating in a campaign of brutal mass expulsions in the

87 Lynch, supra note 44; see also Caroline Bettinger-Lopez & Indira Goris, Grant Full Citizenship to All Born in Country, MIAMI HERALD, Jun. 9, 2007, at A6.
89 Baluarte, supra note 62, at 25.
90 See Lynch, supra note 44.
91 See id.
92 Baluarte, supra note 62, at 25; see Press Release, supra note 12.
93 Baluarte, supra note 62, at 25.
94 See id.
fall of 2005. To date, expulsions and attacks on Haitians have become more common and those who perpetrate such acts have enjoyed complete immunity.

In an effort to further demonstrate their displeasure with the IACHR ruling, on October 18, 2005, the Dominican Senate issued a resolution rejecting the ruling of the Court. The international community was quick to respond to this action by stating that the “extreme hostility of the legislature, the body responsible for executing institutional reforms ordered by the Court, is a clear cause for alarm.”

In yet another attempt to subvert the IACHR ruling, the Dominican Republic has recently begun to implement nationality legislation enacted in 2004 that adversely affects the ability of Dominicans of Haitian descent to gain access to nationality. The General Law on Migration (No. 285–04), adopted in 2004 and implemented in 2007, narrows the Dominican Constitution’s jus soli principles by denying children born in the Dominican Republic birth certificates if their parents cannot prove that they are legal residents of the Dominican Republic. This law is being applied in a sweeping manner—“non-residents” is being defined “broadly to include temporary workers, visa overstays, undocumented migrants, and persons who cannot otherwise prove their legal residence in the Dominican Republic.” Without proof of legal residence, thousands of children and adults continue to be denied the right to nationality in direct conflict with norms of international law and human rights.

The Dominican Supreme Court has also interpreted the state’s constitution in such a way as to facilitate the practice of denying citizenship to Haitian Dominicans. The Courts decision to uphold the provision in the 2004 Immigration Law that “fits undocumented immigrants squarely into the ‘in-transit’ exception to the jus soli rule of nationality” as put forth in Article 11 of the Dominican Constitution, is

96 Id., at 26.
99 Id. at 28.
100 Open Society Statement, supra note 88, ¶ 5.
101 Id.
102 OHCHR REPORT, supra note 21, ¶ 6.
103 See generally Open Society Statement, supra note 88.
104 OHCHR REPORT, supra note 21, ¶ 7.
in direct defiance with a portion of the IACHR’s ruling.\textsuperscript{105} As mentioned above, the Dominican Constitution extends citizenship to all persons born in Dominican territory “except for the legitimate children of foreigners resident in the country as diplomats or those in transit.”\textsuperscript{106} When the Supreme Court ruled to uphold the constitutionality of Migration Law No. 285–04, it held that Haitian workers are to be considered “in transit” and that their offspring are therefore not entitled to citizenship.\textsuperscript{107} Regardless of the fact that many of these individuals, their parents and grandparents have lived in the country for decades, this exception is being used extensively to deny documents to Dominican-born Haitians.\textsuperscript{108}

Further, Dominican legislators have spearheaded a movement to amend the Dominican Constitution and change the rule of nationality from \textit{jus soli} to \textit{jus sanguinis} in an effort to fashion a system where Dominican citizenship would only pass to children born to Dominican nationals.\textsuperscript{109} The rule of \textit{jus sanguinis} is used in many countries throughout the world and such a proposed change is not a \textit{per se} violation of international law or custom.\textsuperscript{110} Nevertheless, an effort to change the rule for the purpose of avoiding compliance with the decision of the IACHR would serve to “reaffirm the existence of institutionalized discrimination” against Dominicans of Haitian descent.\textsuperscript{111}

In April 2007, the Dominican Republic’s civil registry approved a controversial new plan to create a “Pink Book of Foreigners” and assign pink certificates (in lieu of standard birth registration) to certain groups of children born on Dominican soil.\textsuperscript{112} These certificates document date of birth and the names of the parents only.\textsuperscript{113} They are not official birth certificates, nor can they be used to obtain official birth certifi-
They confer no specific rights on the holder and place no obligations on the state. They do not “grant nationality, legal status, or record the birth officially.” A government official openly identified the purpose of the “Pink Book of Foreigners” to be that of providing a means for the registration of all “children of foreigners born in the Dominican Republic, so that the embassies of their countries of origin can issue them an identity card.” “Without presenting an official ‘white’ birth certificate, children cannot obtain a ‘cedula’ or national identification card.” A “cedula” is required to obtain access to rights, services, and protections granted by the government. The “pink” system of differentiation does not solve or address any of the complex issues associated with statelessness, migration, and identity, and therefore leaves hundreds of thousands stateless and in no better situation than before. In fact, many international observers believe that the “Pink Book” only serves to brand children born to women (primarily those of Haitian descent) who are non-legal residents or who are unable to prove their nationality “with a modern-day scarlet letter of statelessness.”

Even those Dominicans of Haitian descent in possession of birth certificates and cedulas are not outside of the reach of the discriminatory Dominican policy directives. In March of 2007, the Junta Central Electoral (JCE), the government agency responsible for birth registrations and the issuance of identity documents, put forth a policy directive which effectively denationalizes those who have received Dominican birth certificates under “irregular” conditions. Circular No. 17, an internal instructional memorandum dated March 29, 2007, orders all civil registry officials to suspend processing identity documents for children found to be born of “foreign parents” who were issued Dominican birth certificates under what they deem to be “irregular circumstances.” Individuals are then subject to investigation by the JCE, de-
spite the JCE’s lack of legal authority to conduct such inquiries. Furt
125 her, the application of Circular No. 17 is subjective and unjust in that it
126 provides no criteria by which civil registry officials are to determine “ir
127 regularity” and there is no prescribed time limit for the investigatory
128 period. Circular No. 17 appears specifically aimed at targeting Do
129 minicans of Haitian descent. Aside from those of Haitian national
130 origin, the Dominican Republic has no other significant foreign popu
131 lation and some JCE officials have gone so far as to replace the phrase
132 “foreign parents” with “Haitian parents” on official documents.

B. Underlying Reasons for Lack of Compliance

It is impossible to understand the modern day issues in Haiti and
the Dominican Republic without an examination of their colonial past. Many of the current social, cultural, and political conflicts in
the region are firmly rooted in the events which shaped and reshaped
its geographic borders. The present day division of the island of His
paniola is the end result of decades of struggle for control of the peo
ple and resources of the island. Struggle for dominance between the
French and Spanish came to a head in 1801 as the Haitian Revolution
spilled over the border of Haiti into the Dominican Republic. The
division of the island into two separate colonies resulted in the forma
tion of two distinct peoples—with different languages, cultures, and
customs. The two countries also followed very different economic
paths.

Waves of mass expulsions and violence have plagued the history of
these two nations and contributed to “fueling the flames of xenopho-

\[\text{References}\]

125 See id.
126 See id. ¶¶ 12–13.
127 See Open Society Statement, supra note 93, ¶ 14.
128 Id.
129 See Baluarte, supra note 62, at 25.
130 See Press Release, supra note 12.
132 See Baluarte, supra note 62.
As one author has noted, “[e]xploitative migrant labor agreements and years of unregulated migration have created a permanent underclass of people of Haitian descent in the Caribbean, including in the Dominican Republic.” The most infamous incident of mass expulsion took place in 1937 on the orders of then Dictator Rafael Trujillo. Trujillo’s anti-Haitian campaign ended with the massacre of approximately 20,000–30,000 Haitians on the northwest border. As recently as May 2005, thousands of Haitians, undocumented Dominico-Haitians and even children with Dominican birth certificates, were forcibly removed from the Dominican Republic in a period of less than a week, and such practices have continued in smaller magnitudes in the years following.

C. Racism and Discrimination in Dominican Society

The colonial history of the region has resulted in pervasive racism in Dominican society. After a week-long visit to the Dominican Republic in October 2007, the U.N. Special Rapporteur on Racism, Racial discrimination, and Related intolerance, together with the U.N. Independent Expert on minority issues, announced their preliminary view that “while there is no official government policy of discrimination, there is nevertheless a profound and entrenched problem of racism and discrimination against such groups as Haitians, Dominicans of Haitian descent, and more generally against blacks within Dominican society.” The report further states that while there is no Dominican legislation that is facially discriminatory, laws relating to migration, civil status, and the granting of Dominican citizenship to persons of Haitian descent impact society in a manner that can be categorized as discriminatory. After conducting extensive interviews in an effort to understand the problems faced by blacks, both Dominican and of Haitian descent, the experts witnessed first hand:

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136 Lynch, supra note 44.
138 See id.
139 Baluarte, supra note 62, at 26.
140 See generally Press Release, supra note 12.
141 Id.
142 Id.
Blacks typically live in worse conditions, are employed in manual and low-paid work and suffer a high degree of prejudice. Disturbing references are made to blacks as being “pig feed”, ignorant or unhygienic, and many spoke of their daily experiences of racism, including by administrative officials in registration offices, on public transportation and elsewhere. Many reported that, because of their colour or their Haitian looks or name, it is impossible to obtain documents and they are left vulnerable to deportation or expulsion to Haiti, even as Dominican citizens with no connection whatsoever with that country.143

As a result of their findings, the U.N. experts strongly suggest that the situation be given “urgent attention” by the international community “to ensure that the Dominican Republic conforms with its obligations under international human rights law, including the International Convention on the Elimination of all Forms of Racial Discrimination.”144

Steven Gregory, an Associate Professor of Anthropology and African American Studies at Columbia University, notes the following observations in his book on globalization and politics in the Dominican Republic: “It was not uncommon for persons’ identities to be publicly in dispute, ambiguous, and shot through with contradictions. In a sociopolitical milieu where full citizenship rights were difficult to achieve, subject to recurrent verification, and the risk of being diminished and even negated, much was at stake in whom people were believed to be.”145 In his analysis of the close nexus between prejudice, discrimination and appearance in Dominican society, he further observes, “Rumor and gossip concerning one’s identity, as well as one’s appearance, could be significant in influencing the actions of the police or other authorities as the papers in one’s possession. It was not uncommon for those perceived to be Haitian. . . . to be detained by the police or army and deported to Haiti, irrespective of the papers in their possession.”146

Haitians are also summarily discriminated against in Dominican culture through expressions and terminology.147 “Haitianization” is a pejorative term that many Dominicans, including government and political figures, use to describe the negative influences that they believe

143 Id.
144 Id.
145 Gregory, supra note 111, at 171.
146 Id.
147 See Lacey, supra note 63.
poor Haitians bring to their country. Part of this animus may be rooted in the fact that Dominican Republic is itself a poor nation, with thirty percent of the population living below the poverty line. Resources are scarce, and negative sentiments about Haitians are fueled not only by historic struggles for island dominance but also by a survival mentality.

This issue of the impact of “Haitianization” is highly volatile in the Dominican Republic, as evidenced in a letter Dominican foreign minister, Carlos Morales Troncoso, sent to Ethel Kennedy immediately following the bestowing of the Robert F. Kennedy Prize on Sonia Pierre, previously identified as the founder of the MUDHA. In his letter, an infuriated Minister Troncoso questioned the validity of awarding Ms. Pierre the international human rights award and labeled it “ill-advised” and “myopic.” Minister Troncoso used the term “Haitianization” in his letter and asserted that his country could not handle the large numbers of illegal immigrants flooding the Dominican Republic from Haiti. He suggested that the blame for the conditions should fall to the United States and other countries for failing to improve conditions for Haitians in Haiti. The letter and subsequent press release from the Ministry of Foreign Affairs, reflected the negative sentiments expressed throughout Dominican society. Around the same time, Dominican Vice-President Rafael Alburquerque de Castro publicly denounced the Court’s holdings and “declared that the country was under siege by international organizations intent upon discrediting the Dominican Republic before the world community.”

148 See id.
150 See id. ¶ 2.
151 Lacey, supra note 63.
152 Id.
153 See id. Mr. Morales’ remarks have come under scrutiny in light of his long-standing relationship as an executive and major shareholder of Central Romana Corporation, the largest sugar producer in the Dominican Republic. See generally Cent. Romana Corp., http://www.centralromana.com (last visited Apr. 1, 2008).
154 Lacey, supra note 63.
155 See Baluarte, supra note 62, at 26.
D. Prospects for Change

Because the issue is rooted in the complicated history of the two island-sharing nations, solving the problem of statelessness in the Dominican Republic will require much more than simple legislative or constitutional changes. Scholars and human rights advocates have identified “racial discrimination in access to nationality” as a global problem. The IACHR ruling is considered to be a significant decision for its contribution to “international jurisprudence on non-discrimination” and the universal human right to nationality. Absent implementation however, its true significance has yet to be established.

Since 1950, the United Nations has been advocating that states take measures to recognize stateless people and avoid the creation of statelessness in general. The U.N. Economic and Social Council, “[i]nvites states to examine sympathetically applications for naturalization submitted by stateless persons habitually resident in their territory and, if necessary, to re-examine their nationality laws with a view to reducing as far as possible the number of cases of statelessness created by the operation of such laws . . . .” In light of this long-standing view, the Dominican government must take necessary steps to comply fully with the IACHR ruling without further delay.

Haiti and the Dominican Republic should develop and implement non-discriminatory citizenship policies. More specifically, policies on documentation, recognition of citizenship, and migration that prevent future statelessness and work toward ameliorating the plight of those currently affected. The Dominican Republic should fully comply with the 2005 Inter-American Court decision to demonstrate to the international community that they truly embrace the international principles to which they have “subscribed on paper.” In practical terms, they must create and implement a birth registration system that will guarantee “birth certificates to all children born on Dominican soil,” irrespective of the immigration status, race, or ethnicity of their par-

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157 Justice Initiative, supra note 60.
158 Id.
160 Id. (emphasis added).
163 Bettinger-Lopez & Goris, supra note 87.
Perhaps even more importantly, the government must take steps to ensure that the due process of the law is respected in cases where an individual’s nationality is called into question.\textsuperscript{165}

Numerous suggestions and strategies for an appropriate Dominican response have been put forth by the international community. Some have called for the Dominican Republic to sign the 1954 U.N. Convention Relating to the Status of Stateless People.\textsuperscript{166} Many have also suggested that the UNHCR, as the U.N. agency with a mandate on behalf of stateless persons, establish an active, permanent presence in the Dominican Republic.\textsuperscript{167} Additionally, investment and participation in the creation of a rights-based regional response to the complex issue of statelessness and migration from other countries has also been proposed as a means of addressing the current situation.\textsuperscript{168}

International institutions such as the World Bank have submitted projects for consideration aimed at assisting the Dominican government with the issuance of birth certificates and identity documents.\textsuperscript{169} Such projects have met with resistance, however, from non-governmental organizations who feel that these programs would continue the systematic discrimination against Dominicans of Haitian descent.\textsuperscript{170}

From the other side of the island, scholars and legal experts on Haitian affairs have taken preliminary steps toward addressing the problem of Haitians born in “legal limbo.”\textsuperscript{171} In a report stemming from a symposium on the Haitian Constitution, the parties concluded that there was a need to “[a] mend the Constitution, to grant citizenship rights to Diaspora Haitians, regardless of their citizenship status in their adopted country.”\textsuperscript{172} They further state that “such rights should also be bestowed the children of Haitian refugees born at Guantanamo and on the bateys of the Dominican Republic.”\textsuperscript{173} This will only be of assistance to those who both \textit{want} and \textit{are able} to return to Haiti. Most stateless people born in the Dominican have no remaining ties to Haiti and desire to stay in the Dominican Republic.

\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} See Lynch, supra note 44.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} See id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
Despite the expectation of universal respect and compliance with international norms and requirements for nationality, today the number of stateless people continues to grow with limited action being taken to ameliorate the circumstances. There is mounting international concern, with respect to the circumstances in the Dominican Republic, that Dominican laws, official government policies and practices discriminate against Dominicans of Haitian descent in relation to their right to nationality, in violation of the Dominican Republic’s obligations to its citizens and norms of international law.

In the long run, the Dominican Republic and Haiti, with the help of the international community, will need to develop policies which will meet with the expectations of the international law, ensure the rights of stateless people and work towards a reduction in statelessness in years to come. The leadership must face the difficult task of cutting through the historical illusion that the people of Haiti and the Dominican Republic inhabit separate worlds. Combating the impact of statelessness on individuals and populations will require an integrated collaboration between governments, international non-governmental organizations and the agencies of the United Nations, with a large role to be played by the UNHCR. The Dominican Republic has the opportunity to set a precedent for dealing with the complex issues posed by the problem of statelessness—whether or not it will do so without additional pressure from the international community has yet to be determined.
WILL THE “BUSH DOCTRINE” SURVIVE ITS PROGENITOR? AN ASSESSMENT OF JUS AD BELLUM NORMS FOR THE POST-WESTPHALIAN AGE

CHRISTIAN J. WESTRA*

Abstract: The election of President Barack Obama has generated enormous goodwill abroad. Many have come to anticipate a sharp departure from the foreign policy of President George W. Bush. There is no question that President Obama has broken with his predecessor in important ways, especially in terms of his emphasis on multilateralism and strategic dialogue. Nevertheless, he is unlikely to jettison two core principles associated with what has become known as the Bush Doctrine: state responsibility and anticipatory self-defense. This Note asks whether there is support for these principles under customary international law. It concludes that there is, and that the use of force provisions in the United Nations Charter—at least as originally interpreted in 1945—no longer accurately reflect international legal norms on the use of military force.

Introduction

“No president should ever hesitate to use force—unilaterally if necessary—to protect ourselves and our vital interests when we are attacked or imminently threatened.”1 Thus declared a leading candidate for the presidency of the United States in his first major foreign policy address.2 To “constrain rogue nations” and “penetrate terrorist networks,” he suggested, requires a “new conception of our national security,” one better suited to address the “threats we face at the dawn of the twenty-first century.”3 The candidate? Senator Barack Obama.4

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2 Id.

3 Id.

4 Id.
History has yet to judge the legacy of President George W. Bush’s foreign policy, but it is unlikely to be kind. In the years following President Bush’s first inauguration, the image of the United States became tarnished across much of the globe. Whatever goodwill the United States enjoyed following the attacks of September 11, 2001 was largely squandered by the invasion of Iraq. Domestically, the Bush administration’s once stratospheric approval numbers plummeted to historic lows. In the modern polling era, no other president has gone without majority approval for a longer period of time.

Of course, history is not written by pundits and pollsters. As Bush himself has noted, President Harry S. Truman is recognized today for the sagacity of his foreign policy, even though he polled abysmally throughout the late 1940s. Yet, despite a number of unheralded successes, the foreign policy of the Bush administration is unlikely to undergo a comparable rehabilitation. The specters of Guantánamo and Abu Ghraib will not be vanquished so easily. It is therefore all the more remarkable that since winning the White House, President Obama has refrained from rejecting two central tenets of what has become known as the “Bush Doctrine”: the principles of state responsibility and anticipatory self-defense.

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5 See Pew Global Attitudes Project (2006), http://pewglobal.org/reports/pdf/252.pdf (illustrating, for example, that favorable opinions of the United States fell between 2002 and 2006 from 61% to 30% in Indonesia, from 30% to 12% in Turkey and from 61% to 37% in Germany).

6 See id.


8 See Gary Langer, Poll: A New Low in Approval Starts Bush’s Final Year, ABC News, Jan. 15, 2008, http://i.abcnnews.com/PollingUnit/Vote2008/story?id=4133095&page=1 (noting only three post-World War II presidents have ever had lower approval ratings—Jimmy Carter (28 percent), Richard Nixon (24 percent) and Harry Truman (22 percent)).

9 Kate Zernike, Bush’s Legacy vs. the 2008 Election, N.Y. Times, Jan. 14, 2008, at 44.

10 Perhaps most notable among them is the President’s Emergency Plan for AIDS Relief (PEPFAR), which has distributed life-saving medication to around 1.4 million AIDS patients in the developing world. See Joseph Loconte, Bush’s Other War, Wkly. Standard, Jan. 30, 2008, available at http://www.weeklystandard.com/Content/Public/Articles/000/000/014/668cbrke.asp.


12 See id.

13 During the 2008 election, Hilary Clinton and John McCain also embraced the principles of state responsibility and anticipatory self-defense. As Matthew Yglesias noted in a December 2007 editorial, Lee Feinstein, Clinton’s top campaign national security staffer, wrote that “the biggest problem with the Bush preemption strategy may be that it does not go far enough.” Matthew Yglesias, Beyond Preemption, L.A. Times, Dec. 8, 2007, at A3. Sena-
Why is this? The answer has much to do with pragmatism, given the novel threat posed by non-state actors, such as terrorists\textsuperscript{14} and transnational criminal groups.\textsuperscript{15} Nevertheless, \textit{jus ad bellum}, the law governing when it is permissible to make war, also holds explanatory value.\textsuperscript{16} Even though there is little support for the sort of “preventative warfare” epitomized by the 2003 invasion of Iraq, other elements of the Bush Doctrine are compatible with modern customary international law.\textsuperscript{17} Indeed, certain aspects of the Bush Doctrine better approximate the modern \textit{jus ad bellum} than do the use of force provisions in the United Nations Charter (the Charter).\textsuperscript{18}

This Note begins in Part I by defining the Bush Doctrine. Part II continues by discussing how the Bush Doctrine conflicts with the use of force provisions in the Charter, specifically articles 2(4), 39 and 51. It goes on to argue that this is not dispositive on the question of whether the Bush Doctrine is legal under international law because the original meaning of the Charter no longer necessarily represents the law of war. Part III departs from the U.N. framework to analyze the principles of state responsibility and anticipatory self-defense under the lens of customary international law. Ultimately, the Note concludes that these principles do have some basis in customary international law, even if preventative warfare—an extreme form of anticipatory self-defense—does not.

\textsuperscript{14} This note defines terrorism as “the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.” Bruce Hoffman, \textit{Defining Terrorism}, TERRORISM AND COUNTERTERRORISM 23 (Russell D. Howard & Reid L. Sawyer, eds., 2006).

\textsuperscript{15} See Press Release, White House, President Bush Delivers Graduation Speech at West Point (June 1, 2002), http://www.whitehouse.gov/news/releases/2002/06/20020601–3.html [hereinafter Graduation Speech at West Point].

\textsuperscript{16} \textit{jus ad bellum} is to be contrasted with \textit{jus in bello}, the law of how war ought to be conducted once it has actually commenced. Michael Walzer, \textit{Just and Unjust Wars} 21–22 (1977).

\textsuperscript{17} See \textit{id}.

I. BACKGROUND

Defining ideological movements in their infancy presents obvious challenges.\textsuperscript{19} History has a way of congealing slowly into recognizable norms.\textsuperscript{20} It took thirty years for the Monroe Doctrine to enter parlance and assume its present meaning.\textsuperscript{21} If the past is any guide, what is described today as the Bush Doctrine may mean something quite different years from now.\textsuperscript{22} Nevertheless, endeavoring to define the term is not an altogether feckless enterprise.\textsuperscript{23} Commentators began referring to a “Bush Doctrine” shortly after the attacks of September 11th, 2001.\textsuperscript{24} Over time, the term has been used in reference to three principles: state responsibility, anticipatory self-defense and the so-called “freedom agenda.”\textsuperscript{25}

The first of these principles to be articulated by President Bush was the principle of state responsibility, the notion that a state should be held liable for whatever happens within its borders.\textsuperscript{26} Addressing a joint session of Congress just a little over a week after September 11th, President Bush issued an ultimatum to the world:

\begin{quote}
Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or
\end{quote}

\textsuperscript{19} See \textit{Monroe Doctrine},\textsuperscript{19} \textit{Columbia Encyclopedia}, 2007, \url{http://www.encyclopedia.com/doc/1E1-MonroeDo.html}.
\textsuperscript{20} See id.
\textsuperscript{21} \textit{Id. (noting that although President James Monroe called for an end to European interventionism in the Americas during a speech to Congress in 1823, the term, “Monroe Doctrine” did not come into use until the 1850s).}
\textsuperscript{22} See id.
\textsuperscript{23} See id.
\textsuperscript{24} As early as September 13, 2001, reference was made to a “Bush Doctrine on combating global terrorism.” See \textit{Proper Response—War on Terrorism Will Be Long and Involved, Houston Chron.}, Sept. 13, 2001, at A24.
support terrorism will be regarded by the United States as a hostile regime.\textsuperscript{27}

With its implicit sanction of self-help, the Bush administration’s state responsibility principle represented a sharp departure from the law enforcement paradigm that had previously characterized U.S. foreign policy.\textsuperscript{28} Notably, the president made no distinction between states that actively choose to support terrorists and states that lack control over their territory and are therefore incapable of barring terrorists from using their land as sanctuary.\textsuperscript{29}

Next came anticipatory self-defense, the principle that a nation is permitted to use force as a means of preempting attack.\textsuperscript{30} Speaking to a graduating class of West Point cadets in June 2002, President Bush declared, “our security will require all Americans . . . to be ready for preemptive action when necessary to defend our liberty and to defend our lives.”\textsuperscript{31} As he explained:

The gravest danger to freedom lies at the perilous crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology . . . occurs, even weak states and small groups could attain a catastrophic power to strike great nations.\textsuperscript{32}

Although it outlined a clear rationale for anticipatory self-defense, President Bush’s West Point address did not specify when preemptive action is permissible, let alone what form it should take when exercised.\textsuperscript{33} These questions remained unanswered in the 2002 National Security Statement, which formally incorporated the principles of state responsibility and anticipatory self-defense as a matter of U.S. policy.\textsuperscript{34}

\textsuperscript{27} See \textit{id}.

\textsuperscript{28} See generally Michael J. Glennon, \textit{Forging a Third Way to Fight: Bush Doctrine for Combating Terrorism Straddles Divide Between Crime and War}, 24 \textit{LEGAL TIMES} 38 (2001) (noting that when states were historically held “liable for injurious activities carried out by individuals within their territory,” the appropriate remedy was indemnification or sanctions, not self-help).

\textsuperscript{29} See Address to Joint Session of Congress, supra note 26.

\textsuperscript{30} See Graduation Speech at West Point, supra note 15.

\textsuperscript{31} \textit{Id}.

\textsuperscript{32} \textit{Id}.

\textsuperscript{33} \textit{Id}.

The final principle that some commentators have associated with the Bush Doctrine is the so-called “freedom agenda,” the concept that U.S. security is enhanced by promoting democratic reform abroad.\(^\text{35}\) Drawing from Kant and Wilson, the freedom agenda is essentially a variation on the democratic peace theory, which posits that liberal democracies do not go to war with one another.\(^\text{36}\) While it found voice in the 2002 National Security Statement,\(^\text{37}\) the freedom agenda was most clearly expressed three years later when President Bush said in his second inaugural address:

> The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world.\(^\text{38}\)

Putting aside the empirical matter of whether promoting democracy abroad actually does enhance U.S. security, such statements leave unanswered important questions, not least of all whether the freedom agenda should be applied to erstwhile allies.\(^\text{39}\)

So how ought we to define the Bush Doctrine? Insofar as it represents a *jus ad bellum* norm, the Bush Doctrine stands for the proposition that the United States treats harboring terrorists, whether deliberately or not, as a just cause of war, and reserves the right to use preemptive force in self-defense.\(^\text{40}\) As noted above, such vague dictates leave fundamental questions unresolved.\(^\text{41}\) The freedom agenda has played an important rhetorical role in the Bush administration’s foreign policy, but it is less directly tied to the law of war.\(^\text{42}\) Although the freedom agenda was mustered as an *ex post* justification for the Iraq invasion, it


\(^{40}\) See Address to Joint Session of Congress, *supra* note 26; Graduation Speech at West Point, *supra* note 15.

\(^{41}\) See Address to Joint Session of Congress, *supra* note 26; Graduation Speech at West Point, *supra* note 15.

\(^{42}\) See Second Inaugural, *supra* note 38.
was never the primary rationale for invading Afghanistan or Iraq. Therefore, it is best tabled in an inquiry as to whether the Bush Doctrine is consistent with international law on the use of force.

II. Discussion

Assuming the Bush Doctrine stands for the principles of state responsibility and anticipatory self-defense, does it violate international law? There can be little question that the Bush Doctrine violates the text of the U.N. Charter. Underpinning the Charter are the twin buttresses of state sovereignty and sovereign equality. Article 2(7) precludes the U.N. from intervening in “matters which are essentially within the domestic jurisdiction of any state.” This sentiment is echoed in the Charter’s use of force provisions. Article 2(4) stipulates that member states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” There are only two exceptions. First, when the U.N. Security Council ascertains the “existence of any threat to the peace, breach of the peace, or act of aggression,” it may sanction the use of force under article 39. Second, under article 51, U.N. member states are permitted to use force in “individual or collective self-defense” if an “armed attack” has been launched against them.

Neither of these exceptions appears to accommodate the Bush Doctrine. Article 39 is inapplicable because state responsibility and anticipatory self-defense are implicitly principles of self-help. As President Bush put it succinctly in his 2004 State of the Union address, “America will never seek a permission slip to defend the security of our

44 See id.
46 See id. art. 2(7).
47 Id.
48 See id. arts. 39 & 51.
49 Id. art. 2(4).
50 See id. arts. 39 & 51.
51 Id. art. 39.
52 Id. art. 51 (stipulating that states are permitted to use force in self-defense but only “until the Security Council has taken measures necessary to maintain international peace and security”).
53 See id. arts. 39 & 51.
country.” At first blush, article 51 seems more promising. One might argue, for example, that the term “armed attack” could be construed broadly to include imminent attacks or the provision of sanctuary to non-state armed groups operating within a given country. Nevertheless, this line of reasoning is almost certainly inconsistent with the intent of the Charter’s drafters. Moreover, it has been effectively sealed off by the International Court of Justice (ICJ). In *Nicaragua v. United States* the ICJ held that for purposes of article 51, an “armed attack” refers only to an actual large-scale invasion or bombardment directed by a state. More recently, in its *Israeli Wall Advisory Opinion* the ICJ emphasized that article 51 may be invoked only by states that are attacked by other states.

As a number of observers have noted, the real question is whether the use of force provisions in the Charter still represent international law. The answer to this question, in turn, hinges on how one interprets the Charter. Borrowing from U.S. constitutional jurisprudence it is possible to identify two broad approaches: originalism and adaptivism. Under the originalist school of thought, the Charter is a static

55 Id.
56 See U.N. Charter, art. 51.
58 See Michael J. Glennon, *Idealism at the U.N.*, Pol’y Rev., Feb. & March 2005, 8–12 (noting scholars such as Thomas Franck, Louis Henkin and Ian Brownlie have argued that the drafters of article 51 meant to bar anticipatory self-defense, including self-help measures pursuant to the state responsibility principle).
60 See *Nicaragua v. United States*, 1986 I.C.J. at ¶ 231 (noting that neither “incursions, nor the alleged supply of arms” is enough to justify the exercise of collective self-defense under article 51).
61 See id.; see also Murphy, *supra* note 57, at 65 (noting that under the jurisprudence of the *Nicaragua* court, “if a state simply provides weapons or logistical support to a non-state actor, which in turn uses force against a second state, such action does not constitute an ‘armed attack’ by the first state within the meaning of Article 51”).
63 See Murphy, *supra* note 57, at 65.
66 See id.
treaty. By ratifying the Charter, each member state consents to be bound by its use of force provisions, as these provisions were interpreted by the original drafters in 1945. Changes in historical circumstance have no effect on this obligation. To suggest otherwise by maintaining that the Charter is some sort of "living document" imposes an entirely new set of obligations upon signatory states. Doing so, originalists underscore, is fundamentally inconsistent with a voluntarist legal regime in which states are bound only insofar as they consent to be bound.

Originalists can be divided further into two camps: formal textualists and legal realists. Formal textualists limit any jus ad bellum inquiry to the text of the Charter and maintain that military action taken outside of the Charter is ultra vires and per se illegal. By contrast, legal realists argue that the use of force provisions of the Charter have fallen into desuetude, meaning that they no longer have binding legal force. Legal realists agree with formal textualists that the Charter must be read according to the intent of its drafters. Nevertheless, they posit that contrary state practice has rendered the Charter’s use of force provisions effectively meaningless. Legal realists point to the fact that despite article 2(4)’s categorical proscription on the use of force, states have used force against one another on hundreds of occasions since the Charter’s inception. Moreover, when force has been used, it has rarely been used under the auspices of article 39 or 51. What matters most to legal realists is not what states have formally con-

67 See id.
68 See id. at 63.
69 See id.
70 See Glennon, supra note 65, at 63.
71 In 1927 the Permanent Court of International Justice (PCIJ) set forth what has subsequently become known as the “freedom principle.” As explained by the Court: “[t]he rules of law binding upon states . . . emanate from their own free will as expressed in conventions . . . . [R]estrictions upon the independence of states therefore cannot be presumed.” Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7), quoted in Glennon, supra note 65, at 63.
72 See Glennon, supra note 65, at 101–02 (Professor Glennon does not draw this distinction explicitly, although it is suggested by his analysis).
73 See id. at 101.
74 See id. at 60–64 (noting that “[t]he idea traces to Roman law, which recognized that a statute could be rendered void by lack of enforcement over a given period”).
75 See id.
76 See id.
77 Glennon, supra note 58, at 8 (noting that between 1945 and 1989 states used armed force between 200–680 times).
78 See id.
sented to but how they actually behave.\textsuperscript{79} At its essence, the legal realist \textit{jus ad bellum} conception is predicated on the notion that there can be no law without compliance.\textsuperscript{80} In other words, law is coercive, not aspirational.\textsuperscript{81}

Unlike originalists, adaptivists begin with the premise that the Charter is no ordinary treaty.\textsuperscript{82} Although treaties typically bind states only to the extent they consent to be bound, the Charter gave birth to the world’s preeminent international organization.\textsuperscript{83} As such, adaptivists argue, it is a constitutive document which should be interpreted to meet the challenges of each new age.\textsuperscript{84} Adaptivists emphasize that the drafters of the Charter lived in a world very different from our own.\textsuperscript{85} Emerging from the rubble of the Second World War, their overriding concern was to avoid the mistakes of Versailles and restrain the nations of the world from ever going to war with each other again.\textsuperscript{86} Today, the security landscape is dramatically different.\textsuperscript{87} Enabled by advances in weapons and communications technology, non-state armed groups—from heroin traffickers to Islamic jihadists—exert power across state borders in a way hitherto unimaginable.\textsuperscript{88} Adaptavists believe that the Charter’s use of force provisions should be read to address these new threats, even if doing so departs sharply from the original intentions of the drafters.\textsuperscript{89}

Which is the correct interpretative method? As in the U.S. domestic sphere, the answer is not easily settled.\textsuperscript{90} Originalism resonates strongly as a form of treaty interpretation, but adaptivists reject the notion that the Charter is a conventional treaty.\textsuperscript{91} Thus, even if originalism is correct as a matter of conventional treaty interpretation, that would hardly be dispositive.\textsuperscript{92} Instead of asking which interpretive

\textsuperscript{79} See id.
\textsuperscript{80} See id.
\textsuperscript{81} See id.
\textsuperscript{82} See GLENNON, supra note 65, at 101–02.
\textsuperscript{83} See id.
\textsuperscript{84} See id.
\textsuperscript{86} See Franck, supra note 85, at 45–52.
\textsuperscript{87} See Graduation Speech at West Point, supra note 15.
\textsuperscript{88} See id.
\textsuperscript{89} See GLENNON, supra note 65, at 101–02.
\textsuperscript{90} See id.
\textsuperscript{91} See id.
\textsuperscript{92} See id.
method is correct, one might instead consider the implications of following each approach. In so doing, it is instructive to examine one earlier challenge to the Charter’s legitimacy: the 1999 North Atlantic Treaty Organization (NATO) operation in Kosovo.

Following the 1991 Gulf War, the United States took part in a number of peacekeeping missions abroad. Although the Security Council backed several of these humanitarian interventions, it refrained from doing so in Kosovo, even as reports spread of mounting human rights atrocities across the region. On March 24, 1999, the United States and its NATO allies commenced operations against Yugoslavia without U.N. authorization. Over the course of its eleven-week campaign, NATO flew 38,000 sorties against Serb positions throughout Yugoslavia. Russia and China, which had previously resisted any Security Council authorization for the use of force, adopted a strict textualist position and condemned the operation as a gross violation of international law. Many Western observers demurred. As one report for the Independent International Commission on Kosovo concluded, the operation may have been “illegal” under the Charter but it was still “le-
The Charter, in other words, had either fallen into desuetude or evolved to permit the sort of military action its drafters had sought to proscribe.102

The response to the Kosovo crisis from legal realists and adaptivists is open to criticism.103 Legal realists argue that NATO was free to intervene in Kosovo because the Charter’s use of force provisions had fallen into desuetude and no longer represented international law.104 In making this argument, however, they undermine the legitimacy of the Security Council and offer no remedy for U.N. reform short of amending the Charter or replacing it altogether—an entirely unrealistic proposition.105 Institutionalists who believe that the U.N. has an important role in international security cannot but find this unpalatable.106 Adaptivists, in turn, argue that a new “responsibility to protect” has emerged to justify humanitarian interventionism, consistent with the Charter.107 Adaptivists maintain that even without Security Council approval, NATO’s intervention in Kosovo was justified under a broader responsibility to protect because sovereignty is no longer absolute but “contingent” upon humane governance.108 Of course, the problem with this sort of consequentialist reasoning is that it conflicts sharply with the intent of the drafters, not to mention the views of many current U.N. member states.109

Despite the drawbacks of legal realism and adaptivism, formal textualism is much less suited to address the security challenges of the modern age, an age in which the greatest threat to peace is intrastate conflict rather than warfare between states.110 As the Kosovo crisis reveals, formal textualism may offer consistency and predictability as an interpretive approach, yet it also holds the possibility of yielding normatively repugnant results.111 This is particularly evident in regard to the paradigm of state sovereignty.112 Although originally devised as a...

101 Kosovo Report, supra note 100.
102 See id.
103 See id.
104 See Glennon, supra note 65, at 60–64.
105 See id. at 207–09. But see Glennon, supra note 58, at 3 (acknowledging that “[f]or a Burkean realist with any sense of institutional conservation, making the most of the United Nations is a useful project”).
106 See id.
107 See Evans & Sahnoun, supra note 85, at 99–110.
108 See id.
109 See Glennon, supra note 58, at 11–14.
111 See Glennon, supra note 65, at 28–30.
112 See U.N. Charter, art. 2(7).
bulwark against interstate aggression, article 2(7) was invoked during the Kosovo crisis to shield the Milosevic regime as it committed atrocities against its own people. Even if there is “no question that Russia and China were correct in arguing that NATO’s bombing violated the Charter,” it is difficult to accept that NATO should have stood by in the face of a mounting humanitarian catastrophe. Likewise, it is hard to argue that the world community should not have taken action to stop genocide in Rwanda or Darfur, even if doing so would have violated the Charter’s use of force provisions.

There are clear parallels between humanitarian interventionism and the Bush Doctrine, at least in terms of their permissibility under the Charter. Like humanitarian interventionism, the principles of state responsibility and anticipatory self-defense are precluded by a formal textualist’s reading of the Charter, but not by the reading of a legal realist or an adaptavist. Put somewhat differently, if the Charter’s use of force provisions—as originally interpreted by the drafters—represent international law, the Bush Doctrine is clearly illegal. Nevertheless, if they no longer represent international law or if their meaning has somehow evolved to accommodate other jus ad bellum norms, elements of the Bush Doctrine may well be legal. Assuming this is true, any inquiry into the legality of the Bush Doctrine under international law would proceed outside the text of the Charter.

III. Analysis

If the original meaning of the Charter no longer governs the doctrine of just war, what takes its place? One possibility is that nothing does. Outside of enforceable treaty obligations, generalized legal norms may simply have no place in the international security arena.

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113 See Kosovo Report, supra note 100.
114 See Glennon, supra note 65, at 29.
115 See Kosovo Report, supra note 100.
116 See Responsibility to Protect, supra note 85 (noting that although “conceptually and practically distinct,” the issues do share common questions, “especially concerning the precautionary principles which should apply to any military action anywhere”).
117 See id.
118 See id.
119 See id.
120 See Glennon, supra note 65, at 37–48.
121 See id. at 60–65.
122 See id. at 63.
123 See id.
Judge Rosalyn Higgins alluded to this prospect before assailing it in her dissent to the ICJ’s 1996 Nuclear Weapons Advisory Opinion.\textsuperscript{124} Like Ronald Dworkin’s “Judge Hercules,” Higgins suggested that there are no \textit{non-liquets},\textsuperscript{125} or gaps, in international law regarding the use of force.\textsuperscript{126} Rather than defer judgment on the legality of using or threatening to use nuclear weapons, Higgins argued that the ICJ should have expounded a legal norm, thereby confirming its existence and viability.\textsuperscript{127} If Higgins is mistaken and the international security arena is characterized largely by a \textit{non-liquet}, the freedom principle would permit states to apply the principles of state responsibility and anticipatory self-defense at will, barring any enforceable treaty obligations to the contrary.\textsuperscript{128} If, on the other hand, international law still has some function in determining whether a particular conflict is justified, custom would play an important interstitial role.\textsuperscript{129}

In the international context, custom is defined as “a general and considered practice of states followed by them from a sense of legal obligation,” or what is commonly referred to as \textit{opinio juris}.\textsuperscript{130} Traditionally, practice and \textit{opinio juris} have been accorded equal weight in ascertaining custom.\textsuperscript{131} The theory is that law cannot simply mirror state practice; to be law it must have some independent coercive force because it is law.\textsuperscript{132} Discerning \textit{opinio juris}, however, raises a significant causation problem.\textsuperscript{133} How can one possibly know that a state is acting in a certain way from a sense of legal obligation?\textsuperscript{134} How does one iso-

\begin{itemize}
\item \textsuperscript{124} See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 66, ¶ 29 (July 8) (Higgins, J., dissenting) [hereinafter Nuclear Weapons Opinion] (arguing “[w]hat the Court has done is reach a conclusion of ‘incompatibility in general’ with humanitarian law; and then effectively pronounce a \textit{non-liquet} on whether a use of nuclear weapons in self-defence when the survival of a State is at issue might still be lawful”).
\item \textsuperscript{125} Meaning “it is not clear,” \textit{non-liquet} is a concept from Roman law indicating “an insufficiency in the law, to the conclusion that the law does not permit deciding the case one way or the other.” Glennon, supra note 65, at 63.
\item \textsuperscript{126} See Nuclear Weapons Opinion, 1996 I.C.J. at ¶ 29.
\item \textsuperscript{127} See id.
\item \textsuperscript{128} See Glennon, supra note 65, at 63.
\item \textsuperscript{129} See id.
\item \textsuperscript{130} Restatement (Third) Foreign Relations Law § 102; see also Statute of the International Court of Justice, art. 38(b) [hereinafter ICJ Statute] (referring to “international custom, as evidence of a general practice accepted as law” as one basis for ICJ decisions).
\item \textsuperscript{131} See ICJ Statute art. 38(b).
\item \textsuperscript{132} See Glennon, supra note 65, at 56–60.
\item \textsuperscript{133} See Glennon, supra note 58, at 6. (noting “[t]he truth is that in most cases no one can know the principal reason that states behave as they do. Governments, like individuals, act for many reasons, some of which can barely be discerned let alone identified as ‘primary’”).
\item \textsuperscript{134} See id.
\end{itemize}
late other possible motivations, most importantly, self-interest? Revi-

sionists maintain that practice should be weighted more heavily than opinio juris because it is far easier to measure and much less open to subjective interpretation. Given that there is little clear evidence of opinio juris regarding the principles of state responsibility or anticipa-
tory self-defense, this seems a prudent approach in analyzing the legal-
ity of the Bush Doctrine under customary international law.

Before delving into the intricacies of custom, it is worth noting a few general principles that have traditionally colored popular just war conceptions. While there is no formal lexicon of customary jus ad bellum principles, Augustine’s City of God is a logical starting point. The notion of “righteous war” discussed in City of God finds its source in natural law, namely the law of Christian morality. Fundamentally, Augustine believed that war must be “undertaken in obedience to God.” A “man,” he wrote, “[is] blameless who carries on war on the authority of God.” As a product of early medieval thought, City of God is hardly a workable guide for confronting modern-day security challenges. Even so, it has, over the ages, inspired criteria for judging the legitimacy of military action that continue to have resonance today. Just wars, for example, are widely understood to be proportionate in their ends and undertaken only as a last resort, after all other possible recourses have been exhausted. A strict positivist would dismiss any precepts predicated on natural law—whether ordained by God or otherwise manifested—as “nonsense upon stilts.” At the same time, this does not preclude what is perceived to be just from having expressive power.

135 See id.
136 See Glennon, supra note 65, at 56–60.
137 See id.
138 See Glennon, supra note 58, at 5.
139 See id.
140 Id.
141 Id.
142 Id.
143 See Glennon, supra note 58, at 5.
144 See Walzer, supra note 16, at 58–63; see also Evans & Sahnoun, supra note 85, at 104–08 (commenting on four “precautionary principles” purportedly needed to justify humanitarian intervention: “right intention,” “last resort,” “proportional means” and “rea-
sonable prospects” of success).
145 See Evans & Sahnoun, supra note 85, at 104–08.
147 See id.
A. State Responsibility

As a general principle of customary international law, a state is not permitted to use its territory in a way that causes harm beyond its borders. International environmental law has long encapsulated this principle, as exemplified by the landmark Trail Smelter Arbitration between the United States and Canada (1928–1931, 1935–1941). For years, the Consolidated Mining and Smelting Company of Trail, British Columbia emitted great clouds of sulfur dioxide southward into Washington’s Columbia River Valley, causing agricultural damage and diminishing air quality for local inhabitants. The U.S. government objected and eventually an arbitral tribunal was assembled to consider the matter. Over a series of deliberations, the tribunal determined that the Canadian government should pay damages to the United States and limit future sulfur emissions from the Trail smelter. In so doing, it reasoned that a state bears responsibility for pollution that spreads beyond its borders.

There are clear parallels to the Trail Smelter Arbitration in the security context. One of the earliest cases brought before the ICJ was the Corfu Channel Case. On October 22, 1946, four British warships entered Albanian waters. As one of the warships made its way up the Corfu Straight, a violent explosion ripped across its hull. A second warship steamed towards the fiery hulk, only to hit another mine. In all, forty-four British sailors died. Although the mines had actually been laid by Germany during World War II, the ICJ concluded that “Albania [was] responsible under international law for the explosions.” In arriving at its decision, the Court pointed to the fact that “nothing was attempted by the Albanian authorities to prevent the disaster.” Moreover, even if the mines had been German, “the laying of

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149 Kuhn, supra note 148, at 785–88.
150 Id.
151 Id.
152 Id.
153 Id.
156 Id. at 10.
157 Id.
158 Id.
159 Id.
160 Corfu Channel Case, 1949 I.C.J. at 23.
161 Id.
the minefield . . . could not have been accomplished without the knowledge of the Albanian Government.”  

Taken together, the *Trail Smelter Arbitration* and the *Corfu Channel Case* affirm the general proposition that a state has responsibility for preventing what transpires on its territory from adversely impacting other states.  

Of course, many questions are unresolved at this rarefied level of abstraction.  

In both the *Trail Smelter Arbitration* and the *Corfu Channel Case*, the principal remedy was monetary damages. Are there instances in which monetary damages would not offer adequate restitution? Canada was also required to limit its sulfur dioxide emissions, but what if it had been incapable of doing so? Should poorer countries be compelled to allocate resources for the protection of foreigners when such resources could otherwise be used to provide their own people with basic necessities? Finally, what if there is not enough time to refer a breach of state responsibility to an arbitral tribunal or the ICJ? Is a state ever entitled to act unilaterally?

The Bush Doctrine offers some answers to these questions. Although it starts from the same general proposition that states are responsible for what transpires within their borders, the Bush Doctrine departs significantly from the approach taken in the *Trail Smelter Arbitration* and the *Corfu Channel Case*. Monetary damages are not contemplated under the Bush Doctrine. Nor are institutional arbiters like the ICJ called upon to adjudicate. If a state “harbor[s] or support[s] terrorism” it is automatically “regarded by the United States as a hostile regime.” Consequently, any self-help measures deemed to be

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162 Id. at 22.  
163 Id.  
169 See id.  
171 See id.  
173 See Address to Joint Session of Congress, supra note 26.  
174 See id.  
175 See id.  
176 Id.
necessary may be taken.\textsuperscript{177} The principle of state responsibility envisioned by the Bush Doctrine is essentially a form of strict liability.\textsuperscript{178} Regardless of whether they have the resources to police their borders, states are held liable for the conduct of those whom they “harbor,” even if such individuals are not being harbored by design.\textsuperscript{179}

Customary international law may support elements of this reformulation.\textsuperscript{180} Operation Enduring Freedom, the U.S.-coordinated offensive against the Taliban in Afghanistan following September 11th, is perhaps the most notable recent example of self-help undertaken pursuant to the state responsibility doctrine.\textsuperscript{181} Nevertheless, there are other examples of supporting state practice.\textsuperscript{182} The United States used force in Libya (1986)\textsuperscript{183} following an attack on a West German discotheque by Libyan militants, and in Afghanistan and the Sudan (1998)\textsuperscript{184} following the bombing of the U.S. embassies in Nairobi and Dar es Salaam. Over the past twenty years, Israel has intervened on countless occasions in Lebanon and the Palestinian Territories in response to terrorist attacks on its civilians.\textsuperscript{185} And as recently as March 2008, Colombia launched a cross-border commando raid against a Revolutionary Armed Forces of Colombia (FARC) camp in the jungles of northeastern Ecuador.\textsuperscript{186}
Admittedly, many states flatly reject the legality of self-help measures.\(^{187}\) Even so, the sheer number of times self-help has been exercised pursuant to the principle of state responsibility may render this position untenable.\(^{188}\) Assuming certain forms of self-help are legitimate under international law, what would custom permit?\(^{189}\) One predicate to any intervention would presumably be harm suffered by the intervener caused by forces operating within or supported by the target country.\(^{190}\) As a general rule, the more proportionate and less overtly unilateral an intervention is, the more legitimacy it would likely be accorded by the international community.\(^{191}\) Operation Enduring Freedom, for example, was widely accepted, given the gravity of the September 11th attacks and the fact that international institutions like the U.N. and NATO had signaled their support prior to the commencement of hostilities.\(^{192}\) By contrast, the U.S. strike on Libya was roundly criticized in light of its scale and unilateral character.\(^{193}\)

Another way of contemplating the state responsibility principle is to expand the notion of contingent sovereignty.\(^{194}\) Proponents of humanitarian interventionism suggest that traditional concepts of sovereignty and sovereign equality originating from the Peace of Westphalia (1648) and later encapsulated in the U.N. Charter no longer characterize the international system.\(^{195}\) Sovereignty, they maintain, is not absolute but rather contingent upon humane governance.\(^{196}\) In much the same way, sovereignty might also be said to be contingent upon a country’s ability to control its own territory.\(^{197}\) States that lack this ability

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\(^{188}\) *See* id.

\(^{189}\) *See* Restatement (Third) Foreign Relations Law § 102; ICJ Statute, art. 38(b).


\(^{191}\) *See* Jinks, *supra* note 181, at 85–86.

\(^{192}\) *See* id.


\(^{194}\) *See* Evans & Sahnoun, *supra* note 85, at 101–02.

\(^{195}\) *See* id.

\(^{196}\) *See* id.

\(^{197}\) *See* id.
could be described as having forfeited sovereignty over the ungoverned spaces within their borders. If other states are threatened or attacked by non-state actors operating in such areas, they may well be justified in taking military action.

B. Anticipatory Self-Defense

The classic case of early anticipatory self-defense involving the United States took place long before the inception of the Bush Doctrine. In 1837 an insurrection raged across parts of British Canada. Suspicions grew that the Caroline, a U.S. steamship, was providing support to the rebels. One late December night, a band of Canadian loyalists crossed into New York and boarded the Caroline. After killing several U.S. nationals, they set fire to the ship and sent it crashing over Niagara Falls. Condemnation came swiftly from Washington, where U.S. Secretary of State Daniel Webster demanded an apology. Although the British were hardly contrite, Webster’s efforts did yield one nascent standard for determining the permissibility of anticipatory selfdefense.

There are two aspects to Webster’s standard: necessity and proportionality. First, Webster argued, for anticipatory self-defense to be justified, the “necessity of that self-defense [must be] instant, overwhelming, and leaving no choice of means, and no moment of deliberation.” Simply suspecting that an attack might soon occur is not enough to demonstrate necessity. An attack must be imminent and there must be no other possible recourse. Second, Webster noted, an action taken in anticipatory self-defense must be proportionate to the threat at hand. In other words, to justify the destruction of the Caroline:

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198 See id.
199 See Evans & Sahnoun, supra note 85, at 101–02.
201 Id.
202 Id.
203 Id.
204 Id.
205 Id.
206 Id.
207 Id.
208 Id.
209 See id.
210 See Arend, supra note 200, at 91.
211 Id.
The local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, [must not have taken action that was] unreasonable or excessive; since [an] act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.\textsuperscript{212}

In essence, regardless of whether the attack on the \textit{Caroline} met the requirement of necessity, its impact still had to have been reasonably correlated to the nature of the initial threat.\textsuperscript{213}

The Bush Doctrine departs significantly from the \textit{Caroline} standard.\textsuperscript{214} In one sense, the Bush Doctrine can be understood to expand Webster’s definition of necessity broadly.\textsuperscript{215} Whereas the \textit{Caroline} test of necessity requires an attack to be imminent before it can be preempted, the Bush Doctrine is significantly more permissive.\textsuperscript{216} However feasible waiting until the “necessity of self-defense is instant [and] overwhelming” may have been in the nineteenth century, doing so in the twenty-first century, the Bush Doctrine posits, would be naively anachronistic.\textsuperscript{217} After all, non-state armed groups operating at the “perilous crossroads of radicalism and technology” have the potential to exert tremendous destruction with little or no warning.\textsuperscript{218} Yet, what becomes of the \textit{Caroline} standard’s proportionality requirement?\textsuperscript{219} Do notions of proportionality fall out of the Bush Doctrine altogether?\textsuperscript{220}

Another way of understanding the Bush Doctrine is to say that it effectively collapses the \textit{Caroline} standard into a modified form of cost-benefit analysis.\textsuperscript{221} Viewed in this light, the necessity of anticipatory self-defense is determined not by some measure of imminence but rather by the risk of taking action measured against the risk of not acting.\textsuperscript{222} Proportionality is relevant to this calculus insofar as security threats are evaluated as a function of two variables: potential impact and probability of occurrence.\textsuperscript{223} What has made the Bush Doctrine so permissive is the

\begin{footnotesize}
\begin{enumerate}
\item[212] Id.
\item[213] Id.
\item[214] See Graduation Speech at West Point, supra note 15.
\item[215] See id.
\item[216] See id.
\item[217] See id.
\item[218] See id.
\item[219] See Graduation Speech at West Point, supra note 15.
\item[220] See id.
\item[221] See id.
\item[222] See id.
\item[223] See id.
\end{enumerate}
\end{footnotesize}
heavy weight accorded to the former.\textsuperscript{224} Indeed, to a large extent, the decision to invade Iraq in 2003 was driven by an emphasis on the potential impact of Iraq acquiring weapons of mass destruction (WMD) and using them, as opposed to the probability of this actually occurring.\textsuperscript{225}

Customary international law may support some relaxation of the \textit{Caroline} standard.\textsuperscript{226} Since the end of the Second World War, there have been several incidents involving anticipatory self-defense.\textsuperscript{227} With the possible exception of Israel’s preemptive attack on its Arab neighbors in 1967, when “[a]n orchestrated Arab assault on Israel seemed inevitable,” none of these incidents satisfies the \textit{Caroline} necessity requirement.\textsuperscript{228} Moreover, to the extent that \textit{opinio juris} can be gleaned, there is evidence to suggest that states have come to accept a somewhat broader interpretation of when anticipatory self-defense is permissible.\textsuperscript{229} At the very least, state practice and \textit{opinio juris} seem to indicate that waiting until an attack is actually in progress is no longer required under customary international law.\textsuperscript{230} Imminence in the modern age almost certainly encompasses a somewhat broader time-frame.\textsuperscript{231}

This is not to say that custom supports the Bush Doctrine vintage of anticipatory self-defense.\textsuperscript{232} Whether the Bush Doctrine is interpreted to expand the \textit{Caroline} test of necessity or to replace the \textit{Caroline} standard with a modified form of cost-benefit analysis, there is little support in international legal custom for the sort of “preventative” warfare exemplified by the U.S. invasion of Iraq in 2003.\textsuperscript{233} Ultimately, Iraq was invaded to prevent it from developing WMD that it might have used or transferred elsewhere.\textsuperscript{234} In this sense, one analogue to the U.S. invasion of Iraq is the 1981 missile strike by Israel on Iraq’s Osirak nuclear reactor, which was also roundly condemned by the international community.\textsuperscript{235} Although the impact of the Israeli operation was far smaller than the impact of the Iraq War, the overall objective was

\textsuperscript{224} See \textit{Powell U.N. Presentation}, supra note 43.
\textsuperscript{225} See \textit{id}.
\textsuperscript{226} See \textit{FRANCK}, supra note 85, at 99–107.
\textsuperscript{227} See \textit{id}. (identifying Cuba Missile Crisis (1962–1963), Israeli-Arab War (1967) and Israeli missile strike on Iraq’s Osirak nuclear reactor (1981)).
\textsuperscript{228} See \textit{id}.
\textsuperscript{229} See \textit{id}.
\textsuperscript{230} See \textit{id}.
\textsuperscript{231} See \textit{Powell U.N. Presentation}, supra note 43.
\textsuperscript{232} See \textit{id}.
\textsuperscript{233} See \textit{id}.
\textsuperscript{234} See \textit{id}.
\textsuperscript{235} See \textit{FRANCK}, supra note 85, at 105–06.
the same: to prevent a dangerous potentiality from occurring at some point later in time.\textsuperscript{236} Regardless of whether such an objective is strategically prudent, it is clearly inconsistent with the longstanding just war notion that war should be undertaken only as a last resort.\textsuperscript{237}

**Conclusion**

The Bush Doctrine is not illegal under international law simply because it violates the text of the U.N. Charter. Assessed from the lens of adaptivism or legal realism, the Charter’s use of force provisions—at least as understood by the original drafters—no longer represent the law of war. This is not to say that anything necessarily replaces them. The Athenians of Thucydides’ Melian Dialogue may well have put it best in musing that “the strong do what they will while the weak suffer what they must.” Law, in other words, may have no determinative role in assessing whether a state should go to war. Perhaps at a fundamental level, the decision to make war is no different from any other policy decision.

Yet, for all of its explanatory power, this approach seems overly simplistic. While state interest plays a major role—almost certainly the major role—in any decision to make war, it does not automatically follow that law has no meaning or coercive force in the international security arena. At the very least, what is perceived as being just or legal has an expressive power that cannot easily be ignored, and which may well aid in predicting state behavior. Visions of natural law contemplated by Augustine onwards provide one source of just war principles. So too, does custom, as revealed through state practice and, wherever discernable, opinio juris.

In considering these indicia, it is clear that the principles of state responsibility and anticipatory self-defense have some basis in international law. The Bush Doctrine, while at once incorporating the two principles, also expands upon them dramatically by permitting expansive self-help in the case of the former and by effectively jettisoning the concept of necessity in the case of the latter. Modern state practice supports elements of this reformulation, particularly as regards the state responsibility principle. Nevertheless, there is little support for

\textsuperscript{236} See id.

\textsuperscript{237} References to the Iraq War as a “war of choice” are revealing. Even assuming, \textit{ex ante}, that WMD were actually being developed in Iraq, the United States clearly had other options beyond armed intervention, no matter how imperfect those options may have been. See David Ignatius, \textit{A War of Choice, and One Who Chose It}, Wash. Post, Nov. 2, 2003, at B01.
expanding the principle of anticipatory self-defense to incorporate preventative warfare.

President Obama is unlikely to invoke the Bush Doctrine by name. At the same time, he is almost certain to take a broad reading of what is permitted under the principles of state responsibility and anticipatory self-defense, even if he flatly rejects the notion of preventative warfare. The U.S. may not always abide by the advice of its allies, but the tenor of American diplomacy will undoubtedly change. At its most effective, American diplomacy will move away from Manichean totems towards a more traditional understanding of when military action is just and appropriate.
ARTS AND ARMS: AN EXAMINATION OF THE LOOTING OF THE NATIONAL MUSEUM OF IRAQ

COURTNEY CAMPBELL*

Abstract: In April 2003, the National Museum of Iraq was extensively looted. At the time, the United States was an occupying power of Iraq and subsequently bore the brunt of considerable international press speculation that the United States was, at best, ill-prepared to protect the museum and, at worst, indifferent to the devastation wrought upon the considerable number of priceless artifacts. Beyond international dismay, however, lay the possibility that the United States was bound by both custom and treaty to protect Iraq’s cultural property. Though the damage to the artifacts may be irreparable, there are solutions available to the United States that serve to both remedy past and protect against future destruction and loss of cultural property.

INTRODUCTION

The arts and the army are unlikely bedfellows. During World War II, however, the U.S. military formed the Monuments, Fine Arts and Archives (MFAA) division to protect European cultural property during and after hostilities.\(^1\) As a result of the 2003 invasion of Iraq and the subsequent destruction of the National Museum of Iraq, scholars have called for the reformation of this division, terminated in 1946.\(^2\) Surprisingly, despite the hostilities of 2003, the destruction was rendered not by bombs, but by looting.\(^3\)

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Although the true extent of the looting can only be estimated, it is clear that the United States did not deploy adequate troops to protect Iraqi cultural property despite appeals from cultural policy groups, academics and civilians. An estimated 15,000 artifacts remain missing from the museum. Iraq is considered the Cradle of Civilization and harbors priceless artifacts from Babylonian, Assyrian and Sumerian kingdoms. Some missing artifacts date from before 9000 B.C. while others represent the earliest human-made tools.

This Comment investigates the United States’ obligation as an occupying power to reasonably protect cultural property of the occupied nation’s war zones. The Comment focuses on the events of the Iraq War, specifically the preventable looting of the National Museum of Iraq. In the pages that follow, the Comment will explore whether and to what extent the obligation exists under international treaties and custom.

Part I focuses on the events surrounding the looting of the National Museum of Iraq and discusses their import to the international community generally and to the United States’ past and future policy specifically. Part II provides the legal background on the U.S. obligation as an occupying power to reasonably protect cultural property. Finally, Part III proposes the existence of the United States’ obligation as an occupying power and suggests the possible remedies for the breach of its obligation, which largely focus on defining the obligation’s future applicability.

I. Background

The United States has occupied Iraq since 2003 and is considered Iraq’s occupying power under the Geneva Convention Relative to the Protection of Civil Persons in Time of War (1949 Geneva Convention).

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4 See generally Editorial, Iraq’s Stolen Heritage, ASAHII SHIMBUN (Japan), Apr. 22, 2003, available at 2003 WLNR 8997677 (describing U.S. failure to make museum protection a priority or enforce control of the museum).
5 Iraq Museum Database, supra note 3.
7 Iraq Museum Database, supra note 3.
During its time as an occupying power, the United States has not adequately protected Iraqi zones of cultural property. The United States’ failure to protect Iraqi zones of cultural property was internationally recognized through press coverage of several days of looting at the National Museum of Iraq. Though the international press initially exaggerated the severity of the looting, the incident nonetheless exacerbated the perception of U.S. indifference.

The National Museum of Iraq’s looting from April 9 to April 11, 2003 resulted in the loss of 15,000 artifacts. Since 2003, about 5000 pieces have been returned, such as the famous Warka Vase which dates to 3000 B.C., though many have been lost or damaged. The United States and the United Kingdom have led efforts to return the stolen artifacts. Despite these efforts, the international public has expressed dismay at the lack of foresight of the U.S. Army. Indeed, the lead U.S. investigator into the looting shares the sense of international dismay.

The international reaction to the looting warrants an investigation into the existence of an obligation of the United States to reasonably protect cultural property. Negative international reaction to the looting of the museum was extended to the war itself. If the United States offends international sentiment by neglecting to respect national cultural property, it can expect an adverse impact on its diplomacy and global perception generally.

Investigating the existence of a U.S. obligation to reasonably protect cultural property is furthermore important in terms of the United States’ responsibility to maintain public order as an occupying power.

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9 See Dan Vergano, On the Trail of Stolen Iraqi Art, USA TODAY, Nov. 3, 2005, at D1.

10 See id.


13 Id.


15 Vergano, supra note 9.

16 See id.

17 See id.

18 See id.


20 See Hague Convention Respecting the Laws and Customs of Land art. 43, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention 1907]; see, e.g., Lowen-
The Hague Convention Respecting the Laws and Customs of Land, to which the United States is a party, requires an occupying power like the United States in Iraq to maintain public order. 21 It does not, however, specify whether preventing this type of looting is a tenet of maintaining public order. 22 As weapons become more precise, the United States will grow increasingly accountable for destruction wrought because of the increased measure of control it possesses; it is possible that the United States will be held increasingly accountable for destruction of cultural property not only by weapons but also by human looting. 23

Though this investigation is relevant in light of future concerns over the American presence in Iraq and potentially in other nations, it is rooted in the past. 24 Even if the United States is not bound by the 1949 Geneva Convention to reasonably protect cultural property, it may have obligations under international customary law formed decades ago. 25

In World War II, the U.S. Army formed the MFAA section to combat the destruction of European heritage. 26 Although the federal Roberts Commission that advised the MFAA did not explicitly state its formation was out of consideration for international law or obligation, its scope was international. 27 The Roberts Commission consulted extensively with the British government to determine which pieces of art were unaccounted for and to devise plans for regaining them. 28 The Roberts Commission also established liaisons with French, Dutch, and Belgian governments favoring restitution and reparations. 29 The U.S. government continued presidential efforts through the auspices of the Roberts Commission until the commission's termination in 1946. 30

thal & Urice, supra note 2, at A25 (stating looting occurred as product of the “chaos that engulfed Baghdad”).

22 See id.
24 See Nat’l Archives, supra note 1, at 1.
25 See id. at 1, 4 & 6 (describing U.S. large-scale and international protection of cultural property effort during World War II); North Sea Continental Shelf (F.R.G. v. Neth., Den.) 1969 I.C.J. 3, 42 (Feb. 20) (indicating practice establishing international customary law must have sufficient degree of participation, especially by affected states); Geneva Convention 1949, supra note 8, art. 53; see also Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277 (Nov. 20) (indicating consistency in State practice is a consideration in determining whether international customary law established).
26 See Nat’l Archives, supra note 1, at 1.
27 See id. at 1 & 4.
28 See id. at 4 & 6.
29 See id. at 4.
30 See id. at 1 & 5.
In 1956, eight years after the Roberts Commission’s termination, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) entered into force. Though the United States is not a party to this Convention, the goals the Convention espouses are consistent with the actions the United States took in forming the MFAA. Though there is an extremely high threshold for establishing international customary law, it is evident that at the very least there exists a discernible international movement toward the protection of cultural property—and that the United States has recognized the move.

II. Discussion

As a result of the extensive looting of the National Museum of Iraq, the United States may have violated both treaty and customary international law. The United States is a ratifying party to the 1949 Geneva Convention, which may contain restrictive terms limiting an occupying power’s right to destroy property of the occupied state. International customary law may also bind the United States, which potentially recognized international customary law through its action during World War II.

A. Geneva Conventions and Protection of Cultural Property

The disastrous effects of World War II on civilians inspired the 1949 Geneva Convention. The 1949 Geneva Convention provisions were meant to supplement rather than invalidate the earlier conven-

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32 Compare Hague Convention 1954, supra note 23, pmbl. (agreeing to “take all possible steps to protect cultural property” from “damage”), with Nat’l Archives, supra note 1, at 3 (explaining MFAA responsible for “protecting” cultural property from “damage”).
33 See, e.g., Asylum Case, 1950 I.C.J. at 277.
34 See Nat’l Archives, supra note 1, at 4.
35 See Geneva Convention 1949, supra note 8, art. 53; Hague Convention 1907, supra note 20, arts. 43 & 56.
38 See Geneva Convention 1949, supra note 8, art. 53.
39 See Nat’l Archives, supra note 1, at 4; North Sea Continental Shelf, 1969 I.C.J. at 277.
tion provisions.\textsuperscript{41} The United States was a party to both the earlier conventions as well as the 1949 Geneva Convention.\textsuperscript{42}

The 1949 Geneva Convention binds the United States as a ratifying party to comply with the Convention’s provisions as an occupying power in Iraq at least so long as the period of occupation.\textsuperscript{43} The looting of the National Museum of Iraq occurred during the period of occupation and thus subjects the United States to review for compliance with Geneva Convention provisions.\textsuperscript{44}

Article 53 of the 1949 Geneva Convention prohibits the “destruction by the Occupying Power of real or personal property belonging . . . to the State or to other public authorities . . . unless such destruction is rendered absolutely necessary.”\textsuperscript{45} Although the 1949 Geneva Convention generally deals with individual civilian protection, the negotiating parties agreed to refer in Article 53 to State property despite the provision’s reach somewhat beyond the scope of the Convention.\textsuperscript{46} The negotiation parties’ departure from the subject matter of the Convention in this provision reveals its importance; the fact that the parties make note of this departure in the Commentaries further demonstrates that the provision is central rather than aberrational.\textsuperscript{47}

The negotiating parties’ Commentaries also note that Article 53 must be understood in a “very wide sense.”\textsuperscript{48} The parties’ decision to extend the Article’s protection to State property is in accordance with a broad understanding of the 1949 Geneva Convention’s intent to afford protection to civilians.\textsuperscript{49} The intent of the 1949 Geneva Convention with regard to Article 53 is further clarified because Article 53 serves to reinforce rules previously laid out in the 1907 Hague Convention.\textsuperscript{50}

Article 56 of the 1907 Hague Convention protects property of “institutions dedicated to . . . the arts and sciences, even when State property,” from “seizure . . . destruction or willful damage” by an occupying power at the risk of “legal proceedings.”\textsuperscript{51} The Article declares destruc-

\textsuperscript{41} See id.
\textsuperscript{42} See Geneva Convention 1949, supra note 8; Int’l Comm. of the Red Cross, supra note 40.
\textsuperscript{43} See Geneva Convention 1949, supra note 8, arts. 2 & 6.
\textsuperscript{44} See id.; Security Council Press Release, supra note 8, annex II.
\textsuperscript{45} Geneva Convention 1949, supra note 8, art. 53.
\textsuperscript{46} See id. art. 53 cmt. 1.
\textsuperscript{47} See id.
\textsuperscript{48} Id.
\textsuperscript{49} See id.
\textsuperscript{50} See id.
\textsuperscript{51} Hague Convention 1907, supra note 20, art. 56.
utive occupying power activity “forbidden,” a term also used in reference to pillaging activity by the occupying power.\(^{52}\) As in the 1949 Geneva Convention, the breadth of the Article is strengthened by its clarity and unconditional terms.\(^{53}\)

If the United States is subject to “legal proceedings” due to the destruction and loss of the National Museum of Iraq’s artifacts, the United States’ accountability will be dependent on whether or not its failure to prevent the organized and sustained looting of the museum can be considered destruction or “willful damage.”\(^{54}\) It is clear that treaty law binds an occupying power to refrain from destruction of property at the same time that it extends protection to arts institutions, although State owned, like the National Museum of Iraq.\(^{55}\) It is less clear, however, what level of protection the United States is bound to offer those institutions and whether the knowledge of museum looting and subsequent lack of a response can be equated with willful destruction.\(^{56}\)

B. Possible Sources of International Customary Law

If the United States is not held accountable under treaty law for the looting of the National Museum of Iraq, it may nonetheless be accountable under international customary law.\(^{57}\) The potential sources of international customary law that could be applied to the looting of the National Museum of Iraq are treaties and instances of the United States and other States protecting occupied States’ arts or cultural institutions.\(^{58}\)

The 1907 Hague Convention’s substantive provisions are considered embodiments of international customary law.\(^{59}\) As such, they bind the entire international community rather than strictly the ratifying

\(^{52}\) Id. arts. 47 & 56.

\(^{53}\) Compare Hague Convention 1907, supra note 20, art. 56 (declaring destruction of cultural property “forbidden”), with Geneva Convention 1949, supra note 8, art. 53 (declaring destruction of cultural property “prohibited”).

\(^{54}\) See Geneva Convention 1949, supra note 8, art. 53; Hague Convention 1907, supra note 20, art. 56.

\(^{55}\) See Geneva Convention 1949, supra note 8, arts. 2, 4 & 53; Hague Convention 1907, supra note 20, art. 56.

\(^{56}\) See Geneva Convention 1949, supra note 8, art. 53; Hague Convention 1907, supra note 20, art. 56.


\(^{58}\) See id. art. 38.

parties. If Article 56 is considered substantive, it would be doubly binding on the United States as customary and treaty law. Furthermore, if Article 56 is considered customary law, the definition of destruction and willful damage is determined by the international community’s common practices.

Even before European art and arts institutions were devastated during World War II, the United States recognized the universal value of arts institutions and the terrible social cost of their destruction in wartime. In 1935, the United States entered the Roerich Pact with 21 other North and South American States. The object of the Roerich Pact was the preservation of arts institutions and immovable monuments in face of hostilities. Though the protection afforded by the Roerich Pact is focused against bombing and targeted destruction, the Pact nonetheless broadly requires that arts institutions be “respected and protected by belligerents.”

The Roerich Pact of North and South America inspired the rest of the world to establish the 1954 Hague Convention. More than 100 states from Asia, Europe and Africa ratified this treaty. The treaty centers on the protection of cultural property—which encompasses arts institutions like the National Museum of Iraq—from destruction during wartime and times of peace. The treaty manifests a two-sided effort, whereby possessor States act in peacetime to devise means of protection for their cultural property while hostile States act in wartime to refrain from the destruction of cultural property. Article 4 of the 1954 Hague Convention explicitly requires states to “prohibit, prevent, and,

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61 See id.
62 See id.
64 Id.
66 Id. art. 1.
68 Int’l Comm. of the Red Cross, supra note 67.
70 See id. arts. 3 & 4.
if necessary, put a stop to any form of theft, pillage, or misappropriation” of cultural property.\textsuperscript{71}

The Roerich Pact read together with the Hague Convention seem to present a united front of States, encompassing the entire globe.\textsuperscript{72} The States share a common burden of protecting their own and other States’ cultural property to ensure the common benefit of posterity’s enjoyment and understanding of great works and history.\textsuperscript{73} Though the United States is not a party to the Hague Convention for Protection of Cultural Property, it is a signatory and is thus at least nominally tied to both treaties.\textsuperscript{74}

If the United States’ concern for cultural property is exclusively reserved for that of the Americas, its concern runs counter to the purpose of the Roerich Pact—and the majority of the parties and signatories to the Roerich Pact, recognizing this, also are parties to the 1954 Hague Convention.\textsuperscript{75} The United States’ interest in the preservation of international cultural property should be strengthened in recognition of American diversity and the possibility, therefore, that many Americans may be tied to cultural property located outside the Americas.\textsuperscript{76} Furthermore, as war becomes increasingly global in nature, an emphasis is placed on the need for more extensive international protection in wartime.\textsuperscript{77} The large number of State parties that have committed

\begin{itemize}
  \item \textsuperscript{71} Id. art. 4.
  \item \textsuperscript{73} See generally Hague Convention 1954, \textit{supra} note 23, art. 2 (declaring “protection of cultural property shall comprise the safeguarding of and respect for such property”); Roerich Pact, \textit{supra} note 65, art. 1 (declaring cultural property must be “respected and protected” by both “belligerents” and “personnel of institutions”).
  \item \textsuperscript{75} See Roerich Pact, \textit{supra} note 65, preamble (stating purpose of treaty is to preserve “all nationally and privately owned . . . monuments which form the cultural treasure of peoples”). Compare Int’l Council on Monuments and Sites, \textit{supra} note 72, \textit{with} Roerich Pact, \textit{supra} note 67 (illuminating fact only two parties to Roerich Pact not also parties to 1954 Hague Convention).
\end{itemize}
themselves by treaty to the preservation of cultural property in wartime is an indication of international customary law.78

The joint reading of the Roerich Pact with the 1954 Hague Convention to demonstrate an international custom of protecting the possessor state’s cultural property like museums is encouraged by several concrete and consistent examples of States’ behavior in wartime.79 The National Museum of Beirut acted to protect its cultural heritage during hostilities in the 1970s and 1980s.80 Iraq acted to protect museums in Kuwait, though ultimately about twenty percent of the museum artifacts were lost.81 Russia requisitioned a huge number of artifacts from Germany after World War II that had been taken from German Jews during Nazi rule but failed to consistently return the artifacts to the owners.82 Though State behavior is indicative of an international custom, assessment of whether the United States failed to adhere to international custom in its failure to protect the National Museum of Iraq is complicated by the fact that the United States did not affirmatively destroy, but instead failed to protect, cultural property.83

III. Analysis

If the United States’ failure to protect the National Museum of Iraq from looting is to be considered destruction of cultural property in violation of international customary or treaty law, there are several courses of action the United States and the international community may take to remedy the situation.84

78 See North Sea Continental Shelf, 1969 I.C.J. at 42; Roerich Pact, supra note 65; Int’l Council on Monuments and Sites, supra note 72.
81 Id.
83 See Hague Convention 1954, supra note 23, art. 4.3 (requiring merely that States “undertake” to prevent looting); Roerich Pact, supra note 65, art. 2 (failing to detail requirements of “protection and respect due to” cultural property).
A. Trial: The United States Before the International Community

The International Criminal Tribunal of the former Yugoslavia (ICTY) was established to punish those responsible for the war atrocities committed in the territory of the former Yugoslavia since 1991.\(^{85}\) The approbation of the ICTY demonstrates not only the seriousness of the war crimes committed, but also the international community’s condemnation of the acts.\(^{86}\)

A crime specifically addressed by the ICTY was the destruction of cultural property during wartime; the ICTY was especially concerned by the destruction of the Mostar Bridge and Old Town of Dubrovnik by Serb-controlled federal troops.\(^{87}\) The bridge and historic village were considered cultural property because the former was a symbol of the connection between the area’s Muslim and Croat communities and the latter was a town dating to the year 667 A.D.\(^{88}\) Commentators have characterized the destruction of these pieces of cultural property as an “instrument to erase the manifestation of the adversary’s identity”\(^{89}\) and an insult to the “memory of humanity.”\(^{90}\)

In the midst of the destruction of human life and dignity in the war in the former Yugoslavia, it is significant that the ICTY addressed the destruction of cultural property.\(^{91}\) Although the war in the former Yugoslavia was not international in character, but rather civil, and thus not subject to any sanctions under the 1954 Hague Convention, the ICTY nonetheless investigated and renounced the destruction of cultural property.\(^{92}\) Furthermore, the ICTY cited the 1949 Geneva Convention as relevant authority, a convention also applicable to the United States but with added force because its hypothetical dispute with Iraq would be international in character and thus clearly subject to international treaty law.\(^{93}\)

The ICTY’s considerations illustrate the international community’s conception of the severity of destruction of cultural property during

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\(^{86}\) See id. at 3–4.


\(^{88}\) Id. secs. III(a), II(a).

\(^{89}\) Abtahi, *supra* note 85, at 1.

\(^{90}\) Id. at 32.

\(^{91}\) See U.N. Security Council, *supra* note 87, sec. II(c); Abtahi, *supra* note 85, at 1.


\(^{93}\) See id.
wartime and occupation. In the unlikely event, due to political reasons, that the United States is subject to such considerations, sanctions would be imposed because the dispute with Iraq is international in character and thus within the jurisdiction of the relevant binding Geneva Conventions. As such, the United States should follow either or both of two courses of action in anticipation or recognition of those sanctions.

1. Funding to Alleviate National Museum of Iraq Losses

Perhaps the most obvious course of action the United States can take to alleviate the National Museum of Iraq’s losses is some sort of monetary contribution. Whether the monetary contribution takes the form of a sum representing the worth of the cultural property losses or supplies meant to facilitate the repair and restore process, the course of action will serve the dual purpose of sanctioning the United States and aiding the National Museum of Iraq. Though this course of action may be the easiest, it is far from the best.

Ironically, monetary contribution may be counter-productive. The U.S. State Department has already sent the National Museum of Iraq new office furniture, computers, air conditioners and other supplies. One commentator, who served the United States in the protection of arts, monuments and other cultural property as an Army Reserve major and arts curator, felt that the empty shipment of supplies was not only unnecessary, but also burdensome and duplicative. Indeed, the commentator noted that it would be far more valuable for the United States to commit its experts or at least a designated, long-term volunteer team. Without coordination between National Museum of Iraq restoration personnel and the United States, the use of monetary contribution will continue to be ineffective—and thus ultimately meaningless.

94 See id. sec. I(c).
95 See Geneva Convention 1949, supra note 8, art. 2.
96 See Brodie, supra note 80.
97 See id.
98 See id.
99 See id.
100 See Wegener, supra note 84, at 257.
101 See id.
102 See id. at 256–57.
103 Id. at 257.
104 See generally id. (reinforcing importance of collaboration of U.S. and National Museum resources in training and planning).
The United States should also be wary of offering monetary contributions in the form of rewards for the return of cultural property.\textsuperscript{105} If rewards are too sizable, the United States may unintentionally add an incentive to continue looting or illicitly trading stolen cultural property.\textsuperscript{106} Furthermore, if the United States awards the return of cultural property from outside Iraq, the United States succeeds in merely sustaining the market of looted cultural property from the National Museum of Iraq.\textsuperscript{107} Perhaps the only workable form of monetary contribution in the form of rewards would be for cultural property that is readily identified as belonging to the National Museum of Iraq, thereby limiting market sustenance and avoiding incentive to loot cultural property from other sites for reward.\textsuperscript{108}

2. Contribution Beyond Funding

Aside from the practical difficulties resulting from monetary contributions, the global significance of cultural property may render U.S. monetary contributions a shallow attempt, at best, to match the value of the cultural property lost.\textsuperscript{109} The United States may serve the dual purposes of appeasing the dismayed international community and meeting the losses of the National Museum of Iraq by organizing its educated experts and pledging them to the museum.\textsuperscript{110}

The United States currently has military personnel committed to the preservation of cultural property, a liaison with the Ministry of Culture at the former Coalition Provisional Authority (CPA).\textsuperscript{111} Because it was difficult for additional support to get clearance with the CPA, however, and because military personnel are in a constant state of flux, the personnel committed are ill-suited to the task of a large-scale and detail-oriented museum restoration effort.\textsuperscript{112} Without a treaty specifically requesting a more focused effort, it appears the United States will resign itself to the provision of inadequate personnel.\textsuperscript{113}

\textsuperscript{105} See Brodie, supra note 80.
\textsuperscript{106} Id.
\textsuperscript{107} See id.
\textsuperscript{108} See id.
\textsuperscript{109} See Abtahi, supra note 85, at 2; Brodie, supra note 80.
\textsuperscript{110} See Abtahi, supra note 85, at 3.
\textsuperscript{111} Wegener, supra note 84, at 254.
\textsuperscript{112} See id. at 255.
\textsuperscript{113} See generally id. (discussing reticence of U.S. government to make contributions well-suited to unique task of museum restoration).
The United States could take steps to replace the current personnel with an educated, trained and expert group. The group would lend the needed infrastructure for a large-scale restoration effort. With a consolidated effort, the United States could invite and grant clearance to curators and restoration professionals from around the world. The group could serve not only to provide updated training to the Iraqi professionals currently at work, but could prove invaluable in the restoration of the National Museum of Iraq’s building, damaged artifacts, and storage collection.

B. Ratification of 1954 Hague Convention: Clarity for the Future

The United States can avoid the international community’s condemnation and the uncertainty of the repercussions for its actions against cultural property by ratifying the 1954 Hague Convention. By so doing, the United States would clarify its responsibilities during wartime by subjecting the effects of its actions to international treaty law.

The United Kingdom has also been reticent in ratifying the 1954 Hague Convention. There is an ongoing movement to encourage its ratification, largely inspired by the events at the National Museum of Iraq. Though the United Kingdom previously stated concerns about retaining the right to use methods of warfare that may unavoidably destroy cultural property, its Ministry of Defense speculated that future conflicts will likely be geographically restricted and fought using standard methods of warfare. The United States may likewise be concerned that the 1954 Hague Convention is not practicable in light of the possibility of global or nuclear warfare, but if the resolution of the United Kingdom is valid, the United States’ concern may no longer be as dominant.

114 See id. at 257.
115 See id.
116 Wegener, supra note 84, at 254, 255.
117 See id. at 254.
119 See Brodie, supra note 80.
120 See Gaimster, supra note 118, at 35.
121 See id. at 36.
122 See id.
123 See id.
The United States’ ratification of the 1954 Hague Convention will be consistent with ideals already espoused by the MFAA and the Roerich Pact. While the United States may have abstained from ratifying the 1954 Hague Convention to avoid accountability in the event of extreme circumstances and to retain the freedom to choose the most effective means of warfare, its decision has had the opposite effect in practice. In not ratifying the 1954 Hague Convention, the United States remains accountable to the international community and further loses the ability to exercise control over how and when it will be held accountable. The United States may have to affirmatively act to protect cultural property, and in that sense loses some freedom in means of warfare. What it gains, however, is the freedom as an occupying power to control the resources and personnel devoted to protecting cultural property where it otherwise would have been forced to do so.

Ultimately, accepting responsibility for the protection of cultural property through ratification of 1954 Hague Convention would ensure that future responsibility for the destruction of cultural property on an unpredictable international scale is avoided in that the United States would be able to exercise more discretion in acting on its obligation. When the trade of responsibilities is accomplished, the safety of cultural property is achieved.

**Conclusion**

The organized looting of the National Museum of Iraq in April 2003 was a preventable disaster. If the United States had accepted its obligation under either international treaty or customary law, it could have exercised more care in protecting Iraq’s cultural property. Indeed, the National Museum of Iraq’s injury is felt by the entire international community because the ancient artifacts lost and damaged represent a shared history irreparably damaged.

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124 See Hague Convention 1954, supra note 23, pmbl., arts. 3 & 4 (stating main purpose of Hague Convention 1954 to safeguard and “respect cultural property”); Roerich Pact, supra note 65, art. 1 (stating main purpose of Roerich Pact to ensure respect and protection for cultural property); Nat’l Archives, supra note 1, at 3 (stating main purpose of MFAA to protect cultural property from “damage and looting”).

125 See Gaimster, supra note 118, at 36.

126 See Abtahi, supra note 85, at 9.

127 See id. at 30–31.

128 See id.

129 See Brodie, supra note 80.

130 See id.
The United States may act to ameliorate the situation by both looking to the future and remedying the past. To clarify its responsibility to reasonably protect cultural property in times of war in the future, the United States should ratify the 1954 Hague Convention. A limited reward system for returned artifacts could be practicable, but the United States should strongly consider the possibility of assembling a group of experts to aid in the restoration of the museum and its priceless artifacts as a more effective and well-tailored remedy to the unique form of destruction wrought upon the National Museum of Iraq.

The United States has known the benefit of cooperating internationally to preserve cultural property through its experiences with the MFAA and the Roerich Pact. It should act again to protect cultural property after the looting of the National Museum of Iraq, and in so doing, act for the benefit of the thousands of years of civilization that the artifacts embody.
Abstract: Cyberwarfare represents a novel weapon that has the potential to alter the way state and non-state actors conduct modern war. The unique nature of the threat and the ability for cyberwar practitioners to inflict injury, death, and physical destruction via cyberspace strains traditional definitions of the use of force. In order to clearly delineate the rights of the parties involved, including the right to self-defense, the international community must come to some consensus on the meaning of cyberwarfare within the existing *jus ad bellum* paradigm. After examining the shortcomings inherent in classifying cyberattacks according to classical notions of kinetic warfare, this Comment argues that international law should afford protection for states who initiate a good-faith response to a cyberattack, especially when the attack targets critical national infrastructure.

Introduction

Cyberwarfare is a new type of weapon that has the potential to alter modern warfare significantly. Computer technology has advanced to the point where military forces now have the capability to...
inflict injury, death, and destruction via cyberspace.\(^3\) Cyberwarfare can range from relatively innocuous web vandalism to severe attacks on critical national infrastructure.\(^4\) While the temporary deactivation of government web pages may represent little more than a nuisance, the threat of misinformation spread to military commanders in the field, or a concerted attack on a state’s electric, water, communications, transportation, or fuel networks represents a serious risk to both soldiers and civilians.\(^5\) The infiltration of state information networks and the procurement of classified data—commonly called computer espionage—also fall within the spectrum of cyberwarfare, and are made easier by the increased dependence of state agencies on electronic communications.\(^6\)

Despite the potential lethality of cyberwarfare, the practice currently exists in a legal netherworld.\(^7\) The highly destructive scenarios, as well as the potential use of cyberwar techniques in asymmetrical warfare, underscore the need for an unambiguous standard of conduct for cyberwarfare that will be universally recognized and respected.\(^8\) Whether cyberwarfare constitutes a use of force giving rise to the right of self-defense therefore represents an important question in international law.\(^9\)

Modern law on the use of force is based on article 2(4) of the United Nations (U.N.) Charter (Charter); however, the precise definition of what constitutes the use of force is unclear.\(^10\) Neither the Char-


\(^4\) See Center for the Study of Technology and Society, *Special Focus: Cyberwarfare*, http://web.archive.org/web/20061205020720/tecsoc.org/natsec/focuscyberwar.htm (2001). The authors split cyberwar into five general varieties. Ranging from the mildest to the most severe these five are: 1) web vandalism, 2) disinformation campaigns, 3) gathering secret data, 4) disruption in the field, and 5) attacks on critical national infrastructure. See id. Other commentators have defined cyberwarfare more generally as any operation that disrupts, denies, degrades, or destroys information resident in computers or computer networks. See Walter Gary Sharp, *Cyberspace and the Use of Force* 132 (1999).

\(^5\) See Special Focus, supra note 4.

\(^6\) See id.


\(^8\) See Brown, supra note 3, at 180–81.


\(^10\) See Barkham, supra note 2, at 69–70.
ter nor any international body has defined the term clearly. Attempts to define cyberwarfare within the meaning of article 2(4) have strained traditional interpretations further. Analysis of the acceptability under the *jus ad bellum*, the body of international law governing the use of force as an instrument of national policy, of cyberwarfare centers on the Charter’s prohibition of the use of force in article 2(4), its Chapter VII security scheme, the inherent right to self-defense codified in article 51, and customary international law as established by the behavior of states.

While a considerable body of international law applies to the use of force by states, its application to cyberspace is not always obvious and many questions remain surrounding precisely how international law relates to cyberwarfare. After a brief look at the history of cyberwarfare, this Comment initially seeks to answer a threshold question: what constitutes a use of force in cyberspace? Discussion addresses the related questions of what qualifies as an armed attack in cyberspace, and whether certain acts of cyberwarfare could constitute a per se use of force. Once the key prescriptions on the use of force are identified, the discussion moves to the right to use force in self-defense, and the circumstances when a state may legally invoke the right. Conclusions in the analysis include the assertion that the prevalence of cyberwarfare will require either an expansion of the application of the article 2(4) definition of the use of force or the development of new means of addressing the threat.

11 See id. at 70.
12 See id. at 57; see also Raymond C. Parks & David P. Duggan, Principles of Cyberwarfare, Proceedings of the 2001 IEEE Workshop on Information Assurance and Security (June 5–6, 2001) (examining the differences between cyberwarfare and traditional kinetic warfare).
14 See Sharp, supra note 4, at 7.
15 See Office of Gen. Counsel, Dep’t of Def., An Assessment of International Legal Issues in Information Operations 15 (1999) available at http://www.au.af.mil/au/awc/awcgate/dod-legal/dod-legal.pdf [hereinafter DoD OGC]. Read together, the applicable provisions of the Charter and related General Assembly resolutions provide a myriad of terms and concepts concerning prohibited uses of force among nations, including the threat or use of force, acts of aggression, wars of aggression, the use of armed force, invasion, attack, bombardment and blockade. These acts may be directed at the victim nation’s territorial integrity or political independence, or against its military forces or marine or air fleets. They all have in common the presence of troops and the use of traditional military weapons. Id. The question before this Note is how they are likely to apply to cyberwarfare.
I. BACKGROUND

Cyberattacks present an attractive option to foes of the United States as a form of guerilla or asymmetrical warfare.\(^{16}\) The specter of an unanticipated and massive attack on critical infrastructures that disables core functions such as telecommunications, electrical power systems, gas and oil, banking and finance, transportation, water supply systems, government services, and emergency services has been raised in a number of reports on national security and by the U.S. National Infrastructure Protection Center (NIPC), as well as other sources within the government.\(^{17}\)

In 1997, Operation Eligible Receiver was the first information warfare exercise in the United States to address the issue of cyberwarfare.\(^{18}\) In the ninety-day exercise, thirty-five people participated on behalf of the rogue state using off-the-shelf technology and software.\(^{19}\) The scenario assumed a rogue state rejecting direct military confrontation with the United States, seeking instead to attack vulnerable information systems.\(^{20}\) Some of the goals of the rogue state were to conceal the identity of the hackers and to delay or deny any ability by the United States to respond militarily.\(^{21}\) A number of simulated attacks were made against power and communications networks in nine major metropolitan areas.\(^{22}\) According to unclassified reports, the government and commercial sites proved susceptible to attack and take-down.\(^{23}\)

In a 2001 Congressional Research Service (CRS) report to Congress, Stephen Hildreth, a national defense specialist from the Foreign Affairs, Defense, and Trade Division urged Congress to critically examine the policies, organization, and legal framework guiding executive branch decision-making on issues of cyberwarfare.\(^{24}\) Hildreth’s report examined broad cyberwarfare issues and their underlying questions.\(^{25}\)


\(^{18}\) See Hildreth, supra note 1, at 4.

\(^{19}\) See id.; Vatis, supra note 17.

\(^{20}\) See Hildreth, supra note 1, at 4.

\(^{21}\) See id.

\(^{22}\) See id.

\(^{23}\) See id.; Vatis, supra note 17.

\(^{24}\) See generally Hildreth (urging Congress to consider the threat seriously and articulating some possible approaches).

\(^{25}\) See id. at 1–2.
The report highlighted the pervasiveness and seriousness of the threat, and indicated that the risk of cyberwarfare represented an emerging area of national interest.26

The real-life impact of cyberattacks became obvious in 2007 when Russian hackers unleashed an international cyber-assault on Estonia temporarily shutting down Estonian government computers, after the Baltic country caused offense by re-burying a Russian soldier from the Second World War.27 Some analysts characterized the attack as the first direct Russian assault on a North Atlantic Treaty Organization (NATO) member.28 Again, in 2008, the Russian military sought to employ the weapon of cyberwarfare as a complement to its kinetic invasion of the Abkhazia and South Ossetia regions of neighboring Georgia, this time disabling numerous government websites, including the site for the Georgian Ministry of Foreign Affairs.29

Russia is not alone in utilizing cyberwar techniques as recent reports also indicate that hackers connected to the Chinese army successfully broke into Pentagon computers.30 Pentagon officials speculated that the online intruders were probably engaged in espionage, downloading information.31 Some claim that the attacks can be directly attributed to the People’s Liberation Army (PLA).32 Germany’s government has protested to China’s rulers, saying it too was once hacked by the PLA.33 Given U.S. vulnerabilities, it may only be a matter of time before the country is faced with either a terrorist-sponsored cyberspace equivalent of the September 11th attacks or with a preparatory cyber onslaught in a situation similar to that proposed by Unrestricted Warfare, the Chinese Military manual.34 A Pentagon report in 2007 on

26 See id. at 15.
27 See The Mouse That Roared, supra note 7. The assault was characterized as a “denial of service” attack, whereby huge numbers of simulated visitors overwhelm the website. See id.  
28 See id.
31 See id.; The Mouse That Roared, supra note 7.
33 See The Mouse That Roared, supra note 7.
China’s military force indicates that the country is developing tactics to achieve electromagnetic dominance early in a conflict.\(^{35}\) It adds that China, while not yet having a formal doctrine of electronic warfare, has begun to consider offensive cyberattacks within its operational exercises,\(^{36}\) and is moving aggressively toward incorporating cyberwarfare into its military lexicon, organization, training, and doctrine.\(^{37}\)

To the extent that national leaders are unlikely to allow such a catastrophic intrusion upon their sovereignty without a response involving more than diplomatic protests, determining what legal responses are available represents a key inquiry into the nature and international legal implications of cyberwarfare.\(^{38}\)

II. Discussion

A. Cyberwarfare, Treaty Law, and International Norms

In 1999, the U.S. Department of Defense produced a document that examined the range of treaties and international law that might pertain to the conduct of cyberwarfare, supplementing the various U.S. laws guiding the conduct of warfare in general and U.S. government conduct in cyberspace.\(^{39}\) The assessment concluded first that the international community is unlikely to promptly produce a coherent body of law on the subject.\(^{40}\) Second, no clear legal remedies exist to address the type of cyberwarfare operations being considered by the United States.\(^{41}\) Third, the document recommended analyzing the various elements and circumstances of any particular planned operation or activity to determine the applicability of existing international legal principles.\(^{42}\)
A number of existing international treaties suggest norms which could ultimately be used to regulate cyberwarfare. The International Telecommunications Convention (ITC), for instance, prohibits harmful interference with telecommunications. While the effectiveness of the treaty is limited by its state security exception, the creation of a norm analogizing network space to airspace could prove vital to the development of international law in cyberspace. Of course, a violation of the ITC does not constitute a per se use of force within the meaning of article 2(4) of the Charter and therefore does not necessarily generate the same opposition within the international community as other clear-cut acts of aggression.

Another potentially relevant international legal document is the Agreement on the Prevention of Dangerous Military Activities, signed by the United States and the Soviet Union in 1989. This treaty prohibits harmful interference with enemy command and control systems, therefore suggesting a possible emergent norm that could designate cyberwarfare attacks as a use of force.

In the 1990s as the concept of cyberwarfare first began to receive widespread attention from the media, there were some efforts within the international community to negotiate an agreement. Russia tabled a resolution in the U.N.’s First Committee in October 1998 in an apparent effort to get the U.N. to focus on the subject. The resolution included a call for states to support their views regarding the advisability of elaborating international legal regimes to ban the development, production, and use of particularly dangerous information weapons. The initiative, however, found little support among the international community, and was never submitted to the General Assembly for a plenary vote.

As a result of the failure of the international community to produce a directly applicable international agreement key legal issues regarding cyberwarfare remain unresolved. These include, for example, the need for standards informing the expeditious pursuit of those violating

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43 See Barkham, supra note 2, at 95.
44 See id.
45 See id. at 95–96.
46 See id. at 96.
47 See id.
48 See DoD OGC, supra note 15, at 49.
49 See id.
50 See id.
51 See id.
52 See Barkham, supra note 2, at 96–97.
the law, law enforcement needs in the conduct of electronic surveillance of those launching cyberattacks, and the establishment of clear and appropriate rules of engagement for cyber defense activities.53

B. Cyberwarfare and International Law on the Use of Force

Any number of purposes might motivate a state to conduct cyberwarfare and regardless of the aim the normative evaluation by the international community will center on whether the cyberattacks, both offensive and retaliatory, constituted a wrongful use of force, or threat thereof, in violation of international law.54 In order to define cyberwarfare effectively, the international community must come to some consensus on the meaning of such activities within the penumbra of the Charter, specifically article 2(4) regulating the use of force, and article 51, which outlines the right of self-defense.55

Article 2(4) of the Charter expresses the key prescription in international law regarding the use of force.56 The provision states that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”57 Given this analytical framework, the dispositive question is whether an act constitutes a use of force.58 The Charter clearly outlaws the aggressive use of force, while recognizing a state’s inherent right of individual and collective self-defense in article 51.59 Accordingly, if a state activity constitutes a use of force within the meaning of article 2(4), it is unlawful unless it is an exercise of that state’s inherent right of self-defense.60

53 See id.
54 See Schmitt, supra note 13, at 900.
55 See Creekman, supra note 34, at 679. See generally Sharp, supra note 4 (articulating an approach that defines acts of cyberwarfare within the existing jus ad bellum).
56 See id.
57 U.N. Charter, art. 2, para. 4.
58 See Schmitt, supra note 13, at 904.
59 See Sharp, supra note 4, at 33.
60 See id. at 33–34. In addition to the inherent right of self-defense codified under article 51, under article 39 the Security Council has the obligation to maintain or restore international peace. Therefore, articles 2(4), 39, and 51 must be read together to determine the scope and content of the Charter’s prohibition on the aggressive use of force, the responsibility of the Security Council to enforce this prohibition, and the right of all states to use force in self-defense. For the purposes of this paper, discussion of article 39 has been omitted; however, Sharp articulates the relevance of article 39 eloquently in his book. See id. at 27–54.
While the precise definition of what constitutes the use of force is unclear, some of the parameters are well-defined. For instance, conventional weapons attacks are included within the article 2(4) definition. Furthermore, cyberattacks intended to directly cause physical damage to tangible property or injury or death to human beings are reasonably characterized as a use of armed force and, therefore, encompassed in the prohibition. Conversely, despite attempts by developing states to include economic coercion within article 2(4) during the drafting of the Charter, such practices have been expressly excluded. Thus, analysis based on either the text of article 2(4) or the history underlying its adoption requires an interpretation excluding economic, and for that matter political, coercion from the article’s prescriptive sphere.

The potential application of article 2(4) to cyberwarfare creates serious interpretive difficulties for the existing distinction between force and coercion. Including all cyberwarfare actions within the definition of use of force would require a major expansion of article 2(4). Such an expanded definition of the use of force would make it very difficult to continue to exclude acts of coercion from article 2(4) because international law would have to distinguish cyberattacks that do not cause physical damage, such as electronic incursions and blockades, from acts of economic and political coercion, such as economic sanctions, which traditionally and specifically have been excluded from article 2(4), but which may often have the same effect. The dilemma lies in classifying cyberattacks that do not cause physical damage, or do so indirectly, vis-à-vis the prohibition on the use of force.

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61 See Barkham, supra note 2, at 70.
62 See id.; Schmitt, supra note 13, at 904.
63 See Schmitt, supra note 13, at 913.
64 See Vida M. Antolin-Jenkins, Defining the Parameters of Cyberwar Operations: Looking for Law in all the Wrong Places?, 51 NAVAL L. REV. 132, 134–35 (2005); Barkham, supra note 2, at 70–71. Defining cyberattacks on economic centers of gravity as use of force under the current international regimes has grave potential for unintended and undesirable legal consequences. Incorporating cyberattacks on critical economic infrastructures into the definition of use of force cannot be done with sufficient precision to exclude other state economic policies which have long been defended as necessary tools of foreign policy, and deliberately excluded from the international definition of the use of force, particularly by market based democracies. See Antolin-Jenkins, supra.
65 See Schmitt, supra note 13, at 905.
66 See Barkham, supra note 2, at 84.
67 See id.
68 See id. at 84–85.
69 See Schmitt, supra note 13, at 913.
In an attempt to solve this classification impasse, Michael Schmitt delimits economic and political coercion from the use of armed force by reference to six criteria: 1) severity, 2) immediacy, 3) directness, 4) invasiveness, 5) measurability, and 6) presumptive legitimacy.70 Through this scheme, the consequences of the act of cyberwarfare are measured against commonalities to ascertain whether they more closely approximate consequences of the sort characterizing armed force or whether they are better placed outside the use of force boundary.71 According to Schmitt, this technique allows the force “box” to expand to fill gaps resulting from the emergence of coercive possibilities enabled by technological advances without altering the balance of the current framework.72 Instead, the expansion of the use of force definition is cast in terms of the underlying factors driving the existing classifications.73

Applying Schmitt’s technique, in determining whether an a cyberattack falls within the more flexible consequence-based understanding of force, the nature of the act’s reasonably foreseeable consequences are assessed to determine whether they resemble those of an armed attack.74 If the consequences resemble those of an armed attack, extension of the use of force prohibition to the act is justified.75 If not, wrongfulness under international law would have to be determined by resort to prescriptions other than those prohibiting force.76

An even less onerous, purely result-oriented test represents another potential framework for determining whether specific acts of cyberwarfare constitute a use of force.77 Under the strict results-oriented approach no difference exists between an attacker firing a missile at a target or using a computer to remotely cause physical damage.78 If a cyberattack achieves the same result that could have been achieved with bombs or bullets, it will be treated the same under international law governing the use of force.79 The problem with the result-oriented ap-

\[\text{References}\]

70 See id. at 915.
71 See id.; Antolin-Jenkins, supra note 64, at 170.
72 See Schmitt, supra note 13, at 915.
73 See id.
74 See id. at 915–16.
75 See id. at 916.
76 See id.; see also Antolin-Jenkins, supra note 64, at 170 (recognizing the gray areas that result from the consequence based approach, as opposed to the bright line rules provided by an instrument-based analysis).
77 See Barkham, supra note 2, at 86.
78 See Brown, supra note 3, at 187.
79 See id.
proach to cyberattacks is that it blurs the distinction excluding eco-
nomic coercion from the traditional use of force classification charac-
terized by armed attacks, since economic coercion could also serve as
the proximate cause of disruptive or destructive effects.80

C. Cyberwarfare and the Self-Defense Exception

Under the Charter, there are two exceptions to the prohibition on
the use of force: Security Council action pursuant to article 42, and in-
dividual or collective self-defense under article 51.81 Legal scholars dis-
agree on the current state of customary international law as it relates to
the use of force in self-defense and the proper interpretation of article
51.82 Article 51 of the Charter states:

Nothing in the present Charter shall impair the inherent
right of individual or collective self-defence if an armed attack
occurs against a member of the United Nations, until the Se-
curity Council has taken the measures necessary to maintain
international peace and security. Measures taken by Members
in the exercise of this right of self-defence shall be immedi-
ately reported to the Security Council and shall not in any way
affect the authority and responsibility of the Security Council
under the present Charter to take at any time such action as it
deems necessary in order to maintain or restore international
peace and security.83

The scope of article 51 represents the subject of considerable contro-
versy among international legal scholars.84 Some scholars interpret ar-
ticle 51 strictly, arguing that a state may not act in self-defense until that
state has suffered an armed attack.85 According to this reading, a state

80 See Barkham, supra note 2, at 86.
81 See Sean M. Condron, Getting it Right: Protecting American Critical Infrastructure in Cy-
erspace, 20 HARV. J. L. TECH. 403, 413 (2007). Article 42 of the U.N. Charter states,
“Should the Council consider that measures provided for in article 41 would be inade-
quate or have proved to be inadequate, it may take such action by air, sea, or land forces as
may be necessary to maintain or restore international peace and security. See U.N. Charter
arts. 41–42. Such action may include demonstrations, blockade, and other operations by
air, sea, or land forces of the Members of the United Nations.” Id.
82 See Condron, supra note 81.
83 U.N. Charter art. 51.
84 See Barkham, supra note 2, at 74; Condron, supra note 81, at 412–13.
85 See Condron, supra note 81, at 412; see also Barkham, supra note 2, at 74–75 (de-
scribing the Security Council view of article 51 as restrictive, declining to approve of ac-
tions taken that were not in specific response to an armed attack).
could not act in anticipation of an armed attack. 86 Nevertheless, a great many states take the counter-restrictionist view and support the proposition that in certain circumstances it may be lawful to use force in advance of an actual armed attack. 87 Legal scholars supporting the latter stance argue that article 51 incorporates customary international law as articulated by the Caroline standard, allowing anticipatory self-defense. 88 As defined by then Secretary of State, Daniel Webster in the Caroline case, this point in time occurs when the “necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation.” 89

Under the jus ad bellum paradigm, a state response to an armed attack must meet three conditions to qualify as self-defense: necessity, proportionality, and immediacy. 90 To fulfill the principle of necessity the state must attribute the attack to a specific source, characterize the intent behind the attack, and conclude that the state must use force in response. 91 The principle of proportionality requires that the force used in the response be proportional to the original attack. 92 The requirement of immediacy prohibits a response from occurring after too much time has passed. 93 With regard to immediacy as a general criterion, however, no requirement exists for defensive action to be exercised (or risk forfeiture), immediately following an armed attack. 94

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86 See Condron, supra note 81, at 412.
87 See Anthony C. Arend & Robert J. Beck, International Law and the Use of Force: Beyond the UN Charter Paradigm 79 (1993); see also DoD OGC, supra note 15, at 15–16 (examining the well-established view that article 51 did not create the right of self-defense, but that it only recognized a preexisting inherent right that is in some respects broader than the language of article 51); William H. Taft IV, International Law and the Use of Force, 36 Geo. J. Int’l L. 659 (2005) (articulating the U.S. approach to preemption and asserting that states have a well established right to use force before an actual attack has taken place so long as the attack is imminent).
88 See Condron, supra note 81, at 412–13; see also DoD OGC, supra note 15, at 16 (discussing the Caroline doctrine and its venerable roots in United States’ foreign policy).
89 Letter from U.S. Secretary of State, Daniel Webster, to Lord Ashburton (Aug. 6, 1842) available at http://www.yale.edu/lawweb/a Avalon/diplomacy/britain/br-1842d.htm.
90 See Condron, supra note 81.
91 See id.
92 See id.; see also Sharp, supra note 4, at 39 (defining proportionality within the law of armed conflict as that level of force required to destroy a military objective but which does not cause unnecessary collateral destruction of civilian property or unnecessary human suffering of civilians).
93 See Condron, supra note 81, at 414.
Attribution and characterization are especially important in context of cyberwarfare.\textsuperscript{95} Generally, the international law of self-defense does not justify acts of active defense across international borders unless the provocation can be attributed to an agent of the nation concerned.\textsuperscript{96} Given the opportunities cyberspace creates for the remote commission of attacks and attacker anonymity, perpetrators of cyberattacks are likely to go unidentified.\textsuperscript{97} Attribution helps to ensure that a state does not target an innocent person or place.\textsuperscript{98} Furthermore, a state must attribute an attack because the laws governing a permissible response vary depending on whether the attacker is a state actor or a non-state actor.\textsuperscript{99} The article 2(4) prohibition on the use of force generally applies only to states and not to individuals.\textsuperscript{100} States, therefore, are prevented under international law from threatening or using force against each other, while similar acts by individuals fall under the province of domestic criminal laws.\textsuperscript{101}

While it is difficult to discover the identity of the attacker, identifying his or her intent in time to take preventive action represents an equally problematic and potentially more important task.\textsuperscript{102} In order to respond with force, a victim state must first identify the attacker’s intentions as hostile.\textsuperscript{103} Unlike conventional kinetic warfare, the instantaneous nature of a cyberattack deprives the victim state of the opportunity to preemptively contemplate a response.\textsuperscript{104} As a solution, Walter Gary Sharp has proposed that all states should adopt a rule of engagement that allows them to use force in anticipatory self-defense against any identified state that demonstrates hostile intent by penetrating a computer system which is critical to their respective vital national interests.\textsuperscript{105}

\textsuperscript{95} See Condron, \textit{supra} note 81, at 414. See generally Susan Brenner, “At Light Speed”: Attribution and Response to Cybercrime/Terrorism/Warfare, 97 J. Crim. Law & Criminology 379 (2007) (discussing the difficulty of attributing cyberattacks due to the unique quickness of the attack).
\textsuperscript{96} See DoD OGC, \textit{supra} note 15, at 22.
\textsuperscript{97} See Brenner, \textit{supra} note 95, at 380.
\textsuperscript{98} See Condron, \textit{supra} note 81, at 414.
\textsuperscript{99} See \textit{id.}; Jensen, \textit{supra} note 9, at 232–33.
\textsuperscript{100} See Jensen, \textit{supra} note 9, at 232.
\textsuperscript{101} See \textit{id.} at 232–33.
\textsuperscript{102} See \textit{id.} at 235. Jensen discusses identifying the intent of the attacker under the subheading “Characterization of the Attack.” Id.
\textsuperscript{103} See \textit{id.}
\textsuperscript{104} See \textit{id.}
\textsuperscript{105} See Sharp, \textit{supra} note 4, at 130.
III. Analysis

Existing attempts at defining cyberwarfare within the current \textit{jus ad bellum} paradigm fail to offer adequate safeguards from cyberattacks.\footnote{See Condron, \textit{supra} note 81, at 414. See generally Antolin-Jenkins, \textit{supra} note 64 (proposing an approach using the non-intervention doctrine); Barkham, \textit{supra} note 2 (advocating an expansion of article 2(4) interpretations to address the threat of information warfare); Jensen, \textit{supra} note 9 (emphasizing the importance of providing some recourse for states subject to cyberattacks on critical national infrastructure).} The technology inherent in cyberwarfare makes it nearly impossible to attribute the attack to a specific source or to characterize the intent behind it.\footnote{See Condron, \textit{supra} note 81, at 415; Jensen, \textit{supra} note 9, at 232.} Furthermore, acts of cyberwarfare occur almost simultaneously.\footnote{See Condron, \textit{supra} note 81, at 415; Jensen, \textit{supra} note 9, at 239–40.} A legal system that requires a determination of the attacker’s identity and intent does not account for these features of the digital age.\footnote{See_condron, \textit{supra} note 81, at 415; Creekman, \textit{supra} note 34, at 680.} The current international paradigm therefore limits the options available to states, making it difficult to effectively respond without risking a violation of international law.\footnote{See DoD OGC, \textit{supra} note 15, at 17; Condron, \textit{supra} note 81, at 415; Creekman, \textit{supra} note 34, at 668–69.} Restraining a state’s ability to respond will encourage rogue nations, terrorist organizations, and individuals to commit increasingly severe cyberattacks.\footnote{See Jensen, \textit{supra} note 9, at 228.}

Serious flaws exist in Michael Schmitt’s consequence-based framework for analyzing cyberwarfare under article 2(4).\footnote{See Antolin-Jenkins, \textit{supra} note 64, at 172; Barkham, \textit{supra} note 2, at 85–86.} By using presumptive legitimacy as a factor, Schmitt’s approach requires determining the legitimacy of an attack under international law by asking whether the attack is legitimate.\footnote{See Condron, \textit{supra} note 81, at 415; Jensen, \textit{supra} note 9, at 239–40.} In effect, the approach is backwards.\footnote{See id.} Furthermore, unlike other types of warfare, instances of cyberwarfare cannot be assessed readily at the time of the attack to determine their magnitude and the permitted responses.\footnote{See Barkham, \textit{supra} note 2, at 86.} This problem will arise with any framework that requires an \textit{ex post} analysis, including the aforementioned results-oriented approach.\footnote{See id.}
To address the unique nature of cyberwarfare, international law should afford protection for states who initiate a good-faith response to an attack, thus acting in cyber self-defense, without first attributing and characterizing the attack.\textsuperscript{117} State survival may depend on an immediate, robust, and aggressive response; therefore international law should not impose an inflexible requirement on states to fully satisfy the traditional necessity requirements when acting in self-defense of vital state interests.\textsuperscript{118} The law should evolve to recognize a state’s inherent right to self-defense, including anticipatory self-defense, in response to a cyberattack, especially when the attack targets critical national infrastructure.\textsuperscript{119}

Allowing a state to exercise active defense measures in response to an attack on critical national infrastructure, without incurring liability, represents a preferable governing principle to the treatment of cyberwarfare under the existing \textit{jus ad bellum} paradigm.\textsuperscript{120} In order to delineate this exception to the usual rule governing the use of force, the international community should promulgate a list of critical national infrastructure that a state may protect with active defense measures.\textsuperscript{121} If the critical infrastructure identified on the list were subjected to a cyberattack, a state could respond in presumptively good-faith self-defense without first attributing or characterizing the attack to the level of specificity required under the traditional formulation.\textsuperscript{122}

\textsuperscript{117} See Condron, \textit{supra} note 81, at 415.

\textsuperscript{118} See \textit{id.}; Jensen, \textit{supra} note 9, at 239–40.

\textsuperscript{119} See Creekman, \textit{supra} note 34, at 677–78; Jensen, \textit{supra} note 9, at 229. Creekman mentions in his article that while the clarification of article 2(4) may deter states from conducting cyberwarfare, the certainty of the response serves as the ultimate deterrent. Somewhat similar to the mutually assured destruction theory of preventing nuclear war, a clear policy that cyberattacks are met with the severest responses, both conventionally and electronically, serves to outweigh potential benefits that arise from instigating the initial cyberattack. See Creekman, \textit{supra} note 34, at 677–78.

\textsuperscript{120} See Condron, \textit{supra} note 81, at 416.

\textsuperscript{121} See \textit{id.}; Creekman, \textit{supra} note 34, at 654–55. The United States has enumerated, to a certain extent, those targets which may be included on a list of critical national infrastructure. Vital targets are those computer systems related to five critical infrastructures identified by the President’s Commission on Critical Infrastructure Protection, charged with assessing the nation’s vulnerability to computer attacks. The Commission determined that the United States has five critical infrastructures—Information and Communications, Physical Distribution, Energy, Banking and Finance, and Vital Human Services—whose incapacity or destruction would cripple the nation’s defensive or economic security. Such a list could serve as a model for any international cooperative effort addressing self-defense to cyberattacks on critical national infrastructure. See Creekman, \textit{supra} note 34, at 654–55.

\textsuperscript{122} See Condron, \textit{supra} note 81, at 416.
but would instead allow the state to exercise its inherent right of self-defense in response to a novel threat. 123

Conclusion

The U.N. Charter was written before the internet existed and, therefore, cyberwarfare presents a unique challenge to traditional definitions of what constitutes a use of force. Despite this difficulty, the serious and pervasiveness of the threat demand that the international community come to a consensus on both the meaning of cyberwarfare within the *jus ad bellum* paradigm, and the options available to states subjected to cyberattack. Serious threats to international peace will result unless states have the ability to respond in self-defense to cyberattacks without being restrained by outdated interpretations of international law governing the use of force.

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123 See *id.* But see Antolin-Jenkins, *supra* note 64, at 173–74 (advocating an approach which places cyberattacks into a framework of non-intervention as opposed to modifying the existing use of force formulation).
A TALE OF TWO CITIES: REGULATING EQUITY DERIVATIVES IN NEW YORK AND LONDON

ARTHUR KIMBALL-STANLEY*

Abstract: This Comment seeks to understand the relative legal risk facing over-the-counter derivative contracts in London and New York by analyzing the approach each city’s legal system took in deciding to regulate total return swaps. It argues that regulators on both sides of the Atlantic should devote equal attention to the implementation of financial regulation as the specific regulations themselves when it comes to limiting legal risk in the financial marketplace and maintaining a jurisdiction’s competitiveness.

INTRODUCTION

Financial capital of the world: London and New York have competed for this title for the last century. Despite the economic reversals of the last year in both cities, London and New York are still the premier centers of global finance. Given the intertwined language, history, politics, and legal and business traditions of both cities, the competition between them creates interesting parallels.

Among these parallels is the legal and regulatory approach used to police the over-the-counter (OTC) derivatives market, the newest, most controversial and most innovative sector of the financial markets.

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3 OTC Derivative financial contracts have been written about extensively over the last two decades. See generally John T. Lynch, Credit Derivatives: Industry Initiative Supplants Need
Given the infancy of these products, the rules—or lack thereof—by which they are traded are still uncertain. This uncertainty creates legal risk for those entering into OTC derivative contracts, risks that must be evaluated and understood in order to assess the promise of any OTC derivative transaction. Policy makers and market commentators believe that those jurisdictions more willing to provide a stable regulatory environment for OTC derivative products are likely to see the amount of OTC transactions in their jurisdiction increase, along with the lucrative externalities such transactions create. In the war to achieve dominance in the financial services industry, some see the OTC derivatives market as the crucial theater. The industry’s perception of legal risk surrounding OTC derivatives is an important element in deciding the relative merits of the London and New York markets.

This Comment seeks to understand the relative legal risk facing OTC derivative contracts in London and New York by analyzing the approach each city’s legal system took in deciding to regulate total return swaps (TRS), a specific kind of OTC derivative. More specifically, this Comment will compare the narrative and consequences of CSX v. Children’s Investment Fund Management, a New York case examining the uses of TRS, with the United Kingdom’s Financial Services Authority’s (FSA) administrative decision to require the disclosure of some TRS positions. Both decisions, one judicial and one administrative, examined the same question regarding TRS during the first half of 2008.

Part I of this Comment will outline the history of the OTC derivatives market in the context of legal risk. It will also describe the uses of

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5 Id.
7 Id.
8 Id. at 49.
11 See CSX, 562 F. Supp. 2d at 511; FSA Consultation Paper, supra note 10.
total return swaps and briefly discuss the regulatory structure under which these instruments are traded in both London and New York. Part II will discuss the history of the *CSX v. Children’s* decision and compare it with the FSA’s administrative decision to require disclosure of TRS positions. Part III will discuss and analyze the consequences of the different approach used by the regulatory system in each market. Understanding the similarity and differences of the reasoning and process used to reach the conclusions of the respective decisions will provide better understanding of the legal risk OTC derivatives face in these respective markets.

I. Background

The word derivative describes a type of contract that “derives” its value from another referenced security or asset. Some derivatives are standardized and traded on public exchanges. Nevertheless, the vast majority of derivative contracts are traded on the OTC market, where parties to a trade negotiate terms of the contract to suit their individual needs.

A TRS is a particular kind of OTC contract, whereby parties to a trade agree to exchange cash flows based on the fluctuation in value of a share of corporate stock. As U.S. District Judge Larry A. Kaplan explained in the *CSX v. Children’s* opinion, in a TRS:

[W]ith reference to 100,000 shares of stock of General Motors, the short party agrees to pay the long party an amount equal to the sum of (1) any dividends and cash flow, and (2) any increase in the market value that the long party would have realized had it owned 100,000 shares of General Motors. The long party in turn agrees to pay the short party the sum of (1) the amount equal to interest that would have been payable had it borrowed the notational amount from the short party, and (2) any depreciation in the market value that it

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13 Id.


15 Flanagan, *supra* note 12, at 220.
would have suffered had it owned 100,000 shares of General Motors.\textsuperscript{16}

In the United Kingdom, a contract outlining the same set of transactions is called a contract for differences.\textsuperscript{17}

Use of these products by the financial services industry is only about thirty years old.\textsuperscript{18} In fact, many types of derivative contracts or uses for them have been developed in the last decade.\textsuperscript{19} Consequently, the legal rules governing OTC derivatives are new and uncertain.\textsuperscript{20} For much of the last fifteen years, the OTC derivatives market has been characterized by its lack of regulation in both the United States and England.\textsuperscript{21} To the extent that regulation or potential regulation existed in either country, the novelty of the OTC derivatives market, coupled with its continuous innovation, made the development of market rules a risky proposition for market participants.\textsuperscript{22}

As one commentator explained, the OTC derivatives market is plagued by statutes that are “all over the financial map,” providing “little clarity or certainty to market participants.”\textsuperscript{23} What’s worse, judicial application of common law principles or statutory interpretations to OTC derivative disputes often fail to describe the underlying transactions accurately or consistently.\textsuperscript{24} Moreover, some market observers believe that the history of derivatives is little more than a history of financial services participants creating tools to circumvent existing regulation.\textsuperscript{25} The possibility that regulators will begin assessing OTC derivatives based on what they do—their function—as opposed to what they are called—their form—is one of the main sources of legal risk for the market.\textsuperscript{26}

\begin{thebibliography}{10}
\bibitem{16} CSX, 562 F. Supp. 2d at 520–21.
\bibitem{18} Flanagan, \textit{supra} note 12, at 234–35.
\bibitem{19} \textit{Id.}
\bibitem{20} \textit{See} Partnoy, \textit{supra} note 4, at 421–23.
\bibitem{21} Schinasi, \textit{supra} note 14, at 31; \textit{see also} FSA Consultation Paper, \textit{supra} note 10; PHILIP M. JOHNSON & THOMAS L. HAZEN, DERIVATIVES REGULATION § 1.02[2][E] (2004).
\bibitem{22} \textit{See} Partnoy, \textit{supra} note 4, at 421–23.
\bibitem{23} \textit{Id.} at 446.
\bibitem{24} \textit{Id.} at 449–50.
\bibitem{25} \textit{See} Helene Rainelli & Isabelle Hualt, Old Risk, New Market: Constructing the Over-the-Counter Financial Market for Credit Derivatives 16 (2007), (Centre for the Study of Globalization & Regionalization Multilevel Governance Workshop Paper), \textit{available at} http://www2.warwick.ac.uk/fac/soc/csgv/activities/news/conferences/gmorgan/papers/.
\bibitem{26} \textit{See generally} Thomas Lee Hazen, Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling and Insurance, 24 ANN. REV. BANKING & FIN. L. 375 (2005).
\end{thebibliography}
Consequently, legal risk is one of the chief considerations parties must weigh before entering into an OTC derivative transaction.\textsuperscript{27} The relative legal risk posed by a given jurisdiction is a pivotal factor in determining where industry decides to grow the OTC derivatives market.\textsuperscript{28} Analyzing the differences between how jurisdictions—in this case, London and New York—approach OTC derivative regulatory issues is one way to evaluate legal risk.\textsuperscript{29} Assuming that change in regulation is at least as likely to occur as market innovation for a given financial product, it is arguable that the approach used by regulators to implement new rules is as important as the regulations themselves.\textsuperscript{30} To this extent, abrupt changes in the law that allow market participants little time to adjust their practices is indicative of a market with significant legal risk.\textsuperscript{31} Legal changes that are clear and that give market participants ample time to adjust their practice to new rules are indicative of relatively low legal risk.\textsuperscript{32}

\section*{II. Discussion}

In the Spring of 2008, the legal and regulatory authorities in London and New York were considering whether TRS could be used to evade securities disclosure laws and whether such a possibility merited requiring disclosure of TRS contract positions.\textsuperscript{33} The context in which these evaluations were made, however, differed significantly.\textsuperscript{34}

In London, the FSA was in the midst of consulting with derivatives traders and other members of the securities industry to determine how to deal with TRS.\textsuperscript{35} This initiative was the product of an overall move by


\textsuperscript{29} See Partnoy, supra note 4, at 421–23.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id.


\textsuperscript{34} See CSX, 562 F. Supp. 2d at 511; FSA Consultation Paper, supra note 10.

the FSA to harmonize existing English financial regulation with recent reforms in the European Union. The decision to look at the uses of TRS was made after “investors raised concerns relating to lack of disclosure.” The FSA cited the following three concerns by market participants: (1) that lack of transparency regarding the economic interests of market participants allowed those participants to gain control over voting rights attached to underlying shares referenced by TRS; (2) that corporations are not able to know who has economic exposure to their shares; (3) that investors using TRS may outflank other investors using traditional financial products in influencing companies by voting shares. To determine the extent to which these possibilities were real, the FSA surveyed market participants, conducted a review of the relevant academic literature and ran a cost benefit analysis of various methods of providing disclosure of TRS positions.

Meanwhile, in New York, a very different process took place. In March, U.S. railroad CSX sued two hedge funds, The Children’s Investment Fund Management and 3G Capital Partners, alleging the defendants violated disclosure rules by using TRS to secretly gain an upper hand in a proxy fight. The allegations made by CSX mirrored the precise concerns of English investors surveyed by the FSA. CSX asserted that the funds took large TRS positions referencing CSX stock. The funds knew that given the methods used by TRS dealers to hedge risk, these TRS positions could be easily converted into controlling share positions. In essence, CSX asserted that the funds were using the TRS to take control of the company without triggering detection, since TRS did not have to be disclosed according to securities disclosure rules in the United States. Over the next two months, the dispute saw the U.S. Securities and Exchange Commission and industry participants weigh in on the issue.
The financial industry watched closely to see how both the administrative process in England and the litigation process in the United States would affect the market for OTC derivatives. During the spring of 2008, in both countries, the law decided whether a derivative product would be judged by its name or by its use.

A. FSA Analysis and Conclusions

In deciding to analyze TRS, the FSA concerned itself with “possible market failure” or lack of transparency. The FSA intended to analyze whether the non-disclosure of TRS positions allowed buyers of the contracts to take large equity positions in order to influence corporate governance without notifying corporate managers or other shareholders. Such a possibility could, according to the FSA, potentially lead to inefficient price information, a distorted market for corporate control, diminished market confidence and information asymmetry for equity investors.

The FSA worried that under the current rules TRS traders could wind up knowing more about a company’s ownership than the rest of the market's participants. The FSA believed this could happen either through banks, typical sellers of TRS contracts, voting on behalf of TRS holders or through the quick acquisition of a bank’s equity hedge (“it would be difficult to find a seller who would for example sell 5% of a company”). In either case, the TRS seller’s hedge transfers knowledge to the buyer regarding the location and potential voting positions of shares to which the market as a whole is not privy. Nevertheless, the FSA realized that “lack of full information itself is not a market failure.”

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48 See CSX, 562 F. Supp. 2d at 549; FSA Consultation Paper, supra note 10.
49 FSA Consultation Paper, supra note 10, at 3.12.
50 Id. at 3.20.
51 Id. at 3.14–.22.
52 Id. at 3.14.
53 Id. To understand the FSA’s worries requires an understanding of how a TRS seller hedges its risk. When a buyer purchases a TRS contract it pays an upfront fee to place a bet on what will happen to a give company’s equity shares. The buyer will be paid any amount by which those equity shares increase. To hedge its bet the seller, which is usually a bank, will buy the shares on which the two parties to the trade have bet. CSX, 562 F. Supp. 2d at 519–24. TRS sellers are said to exercise voting rights of the shares they acquire in ways that mirror the interests of the counterparty to the TRS trade. Id.
55 Id. at 3.18.
tions [are] large enough to suggest that regulatory intervention has a realistic prospect of improving market outcomes.”

The FSA reasoned that the potential for market imperfection was deemed to be especially great when it came to the market corporate control. Lack of disclosure rules, the FSA said, allowed those organizing a takeover to use TRS to gain an ownership toehold in terms of controlled shares to which the market would be blind. The FSA worried that toeholds could discourage other potential bidders from contesting the takeover, as they would be at a “competitive disadvantage” relative to a bidder with a toehold. The FSA regarded such a disadvantage as enough to keep other bidders from participating in the market, which could lead to the inefficient pricing of corporate shares.

Moreover, the FSA worried that the influence TRS buyers potentially have over sellers could be a deterrent for smaller players from participating in the market. “Without disclosure,” the FSA wrote, “investors may be deterred from participating in the market if they feel uncertain about who the players are.” This issue might also be problematic for the corporations themselves, according to the FSA, as it might lead to issuers expending resources to align their shareholder roles with the market’s actual make-up. The FSA viewed such expenditures as inefficient because it essentially forced corporations to internalize transparency costs that the majority of FSA regulations assign to shareholders.

Once the FSA had identified possible market failures, it then set out to discover the extent to which the possibility of such failures were believed by market participants to occur. A review of academic and professional literature revealed that the potential market failures the FSA had identified were of great concern to most market observers. Furthermore, regulators in other jurisdictions—Hong Kong, Australia, New Zealand, and Switzerland—were introducing disclosure rules for

56 Id.
57 Id. at 3.19.
58 Id.
59 FSA Consultation Paper, supra note 10, at 3.19.
60 Id. at 3.20.
61 Id.
62 Id.
63 Id. at 3.21.
64 FSA Consultation Paper, supra note 10, at 3.21.
65 Id. at 4.1–.35.
66 Id.
TRS based on similar fears about market failures. The FSA also commissioned an independent study, which found some evidence of the type of market failures the FSA described, as well as a cost benefit analysis of adopting different regulatory responses to TRS. Finally, the FSA consulted market participants as to what kind of TRS regulation would most benefit the market for equities. This consultation took place over several months, after the FSA’s research had been made public.

Among the most vocal groups with whom the FSA consulted was the International Swaps and Derivatives Association (ISDA), a trade group that represents participants in the OTC derivatives market, which are chiefly large banks that make markets for OTC derivatives. The group lobbies on behalf of derivatives market participants and attempts to create industry protocols with which derivative contracts can be standardized. The ISDA argued that there was no valid policy need to change FSA rules concerning TRS. At the same time the ISDA stated that it appreciated the manner in which the FSA approached changing the rules, stressing that industry consultation was an important part of the process.

Despite the ISDA’s advice, the FSA concluded that TRS were sometimes, but not always, used to “influence votes and other corporate governance matters.” As a result, some sort of regulation of the TRS market was necessary. The new rules proposed by the FSA would treat TRS positions like equity positions. They would require disclosure as soon as market participants acquired a three percent equity stake in a company, measured by aggregating TRS with company shares. The FSA decided to begin enforcing the new rules in 2009, giving market participants time to adjust their trading practices.

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67 Id.
68 See FSA Consultation Paper, supra note 10.
69 See FSA Policy Update, supra note 10, at 3.21.
70 Id.
72 See Flanagan, supra note 11, at 229.
74 “We are grateful,” the ISDA wrote, “for the careful and considered tone of the Consultation Paper, the thorough preparation that was undertaken before it was issued and the clear desire it expresses to frame a sensible and proportionate regime for disclosure of cash-settled equity derivative transactions.” Id.
75 FSA Policy Update, supra note 10, at 2.
76 Id. at 2.
77 Id.
78 Id.
79 Id.
B. CSX v. Children’s Analysis and Conclusions

In the early spring of 2008, United States District Judge Lewis A. Kaplan, tasked with hearing the CSX v. Children’s case, found himself faced with the same market forces that led the FSA to reconsider its disclosure rules.80 The Children’s Fund and its fellow defendants had entered into TRS contracts with banks.81 The banks had hedged their positions by buying CSX equity shares.82 Children’s Fund had, according to CSX, represented that it controlled or had the ability to control a large portion of CSX shares.83 CSX claimed that Children’s Fund intended to exercise those shares to appoint directors to the CSX’s board if the railroad did not adhere to the hedge Fund’s proposed management changes.84 As the proxy fight between management and the hedge fund commenced, CSX filed suit claiming that Children’s had been able to amass its large position in CSX unbeknownst to the market by violating federal securities disclosure law.85

“The heart of the dispute presently before the Court,” Judge Kaplan wrote, “concerns whether [Children’s Fund]’s investment in cash-settled TRS referencing CSX shares conferred beneficial ownership of those shares upon [Children’s Fund].”86 Unlike the FSA, however, Judge Kaplan was not charged with designing the rules, but with interpreting them.87

Initially, Judge Kaplan invited the SEC to offer its analysis of how SEC Rule 13d-3, the rule defining beneficial ownership of securities for disclosure purposes, should be interpreted regarding the use of TRS.88 Judge Kaplan asked the SEC (1) whether Children’s fund had beneficial ownership of CSX’s shares held by the counterparty banks; (2) what mental state is required to establish the existence of a plan or scheme within the meaning of 13-d3.89

80 See CSX, 562 F. Supp 2d, 548.
81 See id. at 518.
82 See id.
83 See id.
84 See id.
85 See id.
86 CSX, 562 F. Supp. 2d at 539.
87 See id.
89 Id.
In response to the first query, the SEC opined that entering into a TRS is not sufficient to create beneficial ownership. The fact that the TRS seller has economic incentives to act in the interest of the buyer does not change the analysis, the SEC said. Actual authority to vote or to direct the vote of the shares is not created by the mere presence of economic incentives, according to the SEC.

In response to the second query, the SEC wrote that a “plan or scheme to evade” is only manifested when the person entering the transaction knows that it will create a false appearance. The SEC reasoned that entering into a TRS is legitimate and even if it was done to avoid disclosure requirements it does not mean it was done to create a false appearance.

The SEC closed its response to Judge Kaplan by stating it believed any other interpretation would create “significant uncertainties for investors.” No further policy analysis was provided. The crux of the SEC’s argument was that if the legal rights that were being transferred did not fit precisely into the definitions of ownership, ownership did not exist.

Judge Kaplan disagreed with the SEC’s conclusions. He determined:

[The rule] does not confine itself to “mere interpretation of the legal right to vote or direct the acquisition or disposition of securities,” but looks instead to all of the facts and circumstances to identify situations in which one has even the ability to influence voting, purchase or sale decisions of its counterparties by “legal, economic or other” means.

He went on to write that focusing on Children’s Fund’s legal rights under its swap contracts “exalts form over substance.” “The securities markets,” Judge Kaplan wrote, “operate in the real world and not in a

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90 Id.
91 Id.
92 Id.
93 See Letter, supra note 88.
94 See id. (“The significant consideration is not the person’s motive but rather that the person knew or was reckless in not knowing that the transaction would create a false appearance. In this regard, taking steps with the motive of avoiding reporting and disclosure generally is not a violation of 13(d) unless the steps create a false appearance.”).
95 Id.
96 Id.
97 See Letter, supra note 88.
98 CSX, 562 F. supp. 2d at 548–49.
99 Id.
law school classroom. Any determination of beneficial ownership that failed to take account of the practical realities of that world would be open to the gravest abuse.”

For Judge Kaplan, the facts were clear. “The evidence,” he wrote, “that [Children’s Fund] created and used the TRSs, at least in major part, for the purpose of preventing the vesting of beneficial ownership of CSX shares in [Children’s Fund] and as part of a plan or scheme to evade the reporting requirements of section 13(d) is overwhelming.” Children’s Fund, Judge Kaplan concluded, should not be allowed to use TRS to get around 13(d) reporting requirements.

Judge Kaplan enjoined the defendant hedge funds from using TRS to further circumvent securities disclosure rules. He did not, however, enjoin the funds from using the shares they had acquired from the banks that sold them TRS to place new directors on CSX’s board. The Second Circuit Court of Appeals upheld this decision.

Judge Kaplan’s ultimate decision was to do nothing but encourage the Department of Justice and the SEC to take notice of his judicial findings and to act accordingly.

The ISDA’s reaction to Kaplan’s decision was significantly less conciliatory than their reaction to the FSA’s administrative decision. The ISDA claimed, in its amicus brief to The Second Circuit Court of Appeals, that the decision created significant legal uncertainty by creating “a novel ‘influence’ standard for beneficial ownership that cannot be supported by the applicable legal precedent.” The result is that Judge Kaplan created “a potentially unmitigable risk [for market participants] of violating (or subsequently being found to have violated) reporting requirements and thus incurring substantial liabilities.”

The ISDA made specific mention of how Judge Kaplan’s decision differed from the process used by the FSA in England. It argued that Judge Kaplan’s decision differed from the approach taken by the FSA

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100 Id.
101 Id. at 548–649.
102 Id. at 572.
103 See CSX, 562 F. supp. 2d at 572.
104 See CSX, 562 F. Supp 2d 511 at 573–74.
106 Id. at 3.
107 Id. at 27.
in its creation of legal risk and uncertainty because it did not provide “full opportunity for notice and comments.”

III. Analysis

In terms of assessing the legal risk presented by the decisions to regulate TRS in both jurisdictions, the FSA’s approach is preferable. Not only did the FSA provide a forum through which a legal issue could be evaluated by all interested parties, it also gave the market a clear timeline along which the decision would be carried out and clear guidance as to when the enforcement of the new rules would begin. From the perspective of a continuously operating market, these aspects of the FSA rule making process make all the difference.

At first glance, the approaches used by the American court and the English regulator look similar. Both Judge Kaplan and the FSA realized that TRS positions would have to be disclosed if the securities disclosure rules were to be consistent and effective. The difference between the consequences of their respective decisions, however, is severe. Judge Kaplan, a district judge whose decisions could easily be overturned, introduced a novel line of reasoning into American case law examining the uses of derivatives. The Second Circuit Court of Appeal’s decision to affirm Judge Kaplan’s holding left the state of American law regarding TRS in flux, since Judge Kaplan’s decision did not go so far as to change the law, but merely suggest that the SEC and Justice Department do so. At the time of this writing, due to inaction on the part of the SEC, the regulation of TRS in the United States remains uncertain.

In contrast, the FSA decision has left the OTC derivatives market in England with changes to make, but no questions as to what type of behavior is allowed and what isn’t. The rules are clearly laid out in

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110 Id. at 29.
111 See CSX, 562 F. Supp. 2d at 570; FSA Consultation Paper, supra note 10.
112 See FSA Policy Update, supra note 10.
113 See id.; Partnoy, supra note 4, at 421–23.
118 See FSA Policy Update, supra note 10.
the FSA’s regulatory announcements. The market reaction was generally welcoming, according to observers. Though changes will be made, the London OTC derivatives market knows what those changes will be and can adjust accordingly. The same cannot be said about New York.

This distinction is important for market participants attempting to decide where to base OTC trading operations. In New York, on the one hand, OTC derivative traders are faced with a set of legal rules that are unknown. While, at the time of this writing, it might seem as if New York offers a less stringent regulatory environment because TRS positions do not necessarily have to be disclosed, it is unclear how long this state of affairs will continue. It entirely depends on the SEC’s willingness to follow Judge Kaplan’s lead. In London, on the other hand, the law does require more, but it is defined and certain. TRS traders in London know what will be required of them and when. Therefore, from the standpoint of market participants hoping to plan transactions and trading strategies, London offers a far superior regulatory regime in terms of legal risk.

Much of the difference between the outcome regarding the different regulatory approach to TRS in England and the United States can be attributed to the fact that the FSA decided to evaluate their use, while the SEC didn’t. There has yet to be any significant discussion as to why this regulatory problem ended up in a court in one country and before a financial regulatory administration in another. Future comparisons of these two jurisdictions would do well to consider that question.

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119 See id.
121 Id.
123 See Duffie, supra note 28, at 5–6.
124 See Hurwitz, supra note 121.
125 Id.
126 Id.
127 See FSA POLICY UPDATE, supra note 10.
128 Id.
129 See id.; Partnoy, supra note 4, at 421–23.
130 See FSA CONSULTATION PAPER, supra note 10; SEC Letter, supra note 83.
131 See FSA CONSULTATION PAPER, supra note 10; CSX 562 F. Supp. 2d 511.
The beginnings of an answer might be found in the culture of the SEC compared to the FSA. The FSA has stated that it attempts to use a “light touch,” when approaching regulatory issues. The emphasis is on making the markets work, as opposed to enforcing rules and consequently the regulator attempts to cooperate with industry participants to achieve compromise that work for all involved. The emphasis, according to this description of the FSA, is on a substance over form approach and understanding how to help the market function best.

The SEC, on the other hand, prosecutes fraud in the securities markets. As an institution, it enforces the Securities Exchange Acts, and in doing so it is hoped that market efficiency will be achieved. The extent to which its stance as a rule enforcer interferes with its ability to understand the purpose of the rules has been questioned by some observers.

**Conclusion**

Though beyond the scope of this Comment, further research regarding why the FSA decided to examine the use of TRS, and why the SEC did not, should prove valuable. Regardless, what is clear is that the regulatory regime in London seems to be doing a superior job of limiting the legal risk associated with OTC derivatives than its counterpart in New York. Such an advantage, if held for long, should help London outpace New York in the competition to be the financial capital of the world.

To a large extent, the events of Fall 2008 make the differing regulatory approaches to TRS outlined in this Comment seem minor. The collapse of major financial institutions and the massive government bailout of others are likely to bring significant regulatory changes in their aftermath. In a severe bear market, legal risk is a relatively minor investment factor to consider. Given the scope of the upheaval in the global markets, new rules and the legal risk they inherently create

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133 See id.
134 See id.
136 Id. at 257.
137 Id. at 15–20.
139 Id.
are certain. Nevertheless, regulators would do well to consider why the manner in which the decision to regulate TRS in London and New York differed to such a great extent. Going forward, regulators on both sides of the Atlantic should regard the implementation of regulation as of as much importance as the specific regulations themselves.

140 Id.
TAKING “BLIND SHOTS AT A HIDDEN TARGET”: WITNESS ANONYMITY IN THE UNITED KINGDOM

JASON M. SWERGOLD*

Abstract: Witness intimidation has become an increasing problem in the United Kingdom, and as a result, British courts have allowed witnesses to testify anonymously in cases where they are fearful of testifying. Recently, the House of Lords overturned a murder conviction based on anonymous witness testimony on the grounds that it rendered that trial unfair. Parliament responded by codifying the power to grant witness anonymity as it existed before the Law Lords’ decision. The use of anonymous witnesses raises questions about the right of a defendant to confront the witnesses before him or her, a right that has its history in English common law and is guaranteed by the European Convention on Human Rights. This Comment argues that the use of anonymous witness testimony violates a defendant’s right to confrontation, and proposes possible alternatives.

Introduction

On June 18, 2008, the House of Lords ruled that a series of protective measures used to conceal the identity of prosecution witnesses “hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair.”1 The decision had instant effects in the United Kingdom, jeopardizing dozens of criminal proceedings and bringing to a halt a murder trial at London’s Central Criminal Court which had already cost the government £6 million.2 Parliament responded almost immediately by creating a statutory framework for witness anonymity;3 it passed The Criminal Evidence

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(Witness Anonymity) Act 2008 (Witness Anonymity Act) on July 21, 2008, a mere month and three days after the decision from the Lords of Appeal. The temporal relationship between the decision and the Act speaks to an inherent contradiction in British courts: that “the principle of open justice is England’s most enduring contribution to the law of other nations,” yet British judges have precluded defendants from knowing the identity of a testifying adverse witness.

Part I of this Comment provides a background on *Davis* and the protective measures used during the trial. This section also discusses the House of Lords’ ruling and the reaction in the United Kingdom, including a brief outline of the Witness Anonymity Act. Part II focuses on whether the right to confrontation truly exists in British courts and the competing public policy concerns that have driven courts in the United Kingdom to allow anonymous witness testimony. Part III analyzes in more detail the Witness Anonymity Act and its attempt to provide judges with the power to order the same protective measures the House of Lords held were unfair in *Davis*. This section focuses on whether the Witness Anonymity Act has struck the proper balance between witness protection and defendants’ rights. In doing so, it looks at the Witness Anonymity Act from the perspective of U.S. jurisprudence on the issue of confrontation. Lastly, this Comment discusses whether the Witness Anonymity Act can be amended to properly protect both the rights of defendants and the witnesses who testify against them.

I. Background

A. The Case of Iain Davis: Trial and First Appeal

Iain Davis was convicted of two counts of murder in the Central Criminal Court on May 25, 2004. The New Year’s Day murders, and the subsequent trial, received substantial media coverage. Despite

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4 Id. at 6. The Lords of Appeal (also referred to as Law Lords) is the United Kingdom’s equivalent to the United States Supreme Court. Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, 26 St. Louis U. Pub. L. Rev. 187, 193 (2007).
6 Id. at 197.
9 See, e.g., Jason Bennetto, One Bullet Kills Two Men at New Year Party, Independent (London), Jan. 3, 2002, at 8; Nick Hopkins, Woman, 19, Shot in Head in Mobile Phone Theft,
Davis’ claim that he had left before the shooting,\textsuperscript{10} three witnesses, who were friends of one of the victims, identified Davis as the shooter.\textsuperscript{11} These witnesses claimed that they feared for their lives if it became known that they had identified the defendant.\textsuperscript{12} The trial judge and Court of Appeal, after an investigation, accepted the claims and ordered that the following special measures be taken: the witnesses each give evidence under a pseudonym; their addresses, personal details, and any identifying information be withheld from the defendant and his counsel; defendant’s counsel be prohibited from asking the witnesses any questions which might lead to their identification; the witnesses give evidence from behind screens so that only the judge and jury can see them; and the defendant only be able to hear a mechanical distortion of their voices.\textsuperscript{13}

Prior to trial, the defense was provided with information on each witness, disclosing any previous convictions as well as “any links the police were able to discover between each of them and any other prosecution witness.”\textsuperscript{14} In addition, the prosecution and the police investigation team informed the court that they had no information indicating that the victim’s family was orchestrating the testimony of the witnesses, nor that the witnesses had any motive to falsely implicate Davis.\textsuperscript{15}

On appeal to the Court of Appeal, Davis’ counsel argued that the trial was unfair, and that the measures ordered by the trial court were contrary to English common law and Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).\textsuperscript{16} In an opinion dismissing the appeal, Sir Igor

\textsuperscript{10} Davis, 1 A.C. at 1136.

\textsuperscript{11} Davis, 2 Cr. App. R. at 471.

\textsuperscript{12} Davis, 1 A.C. at 1137.

\textsuperscript{13} Id.

\textsuperscript{14} Davis, 2 Cr. App. R. at 474. The court went on to state:

In reality there was vast disclosure of relevant material including, for example, a list of all the party goers who were known to the police, the previous convictions of each prosecution witness, and the identity of all the information available to the police of each and every individual said to be “implicated” in this shooting.

\textsuperscript{15} Id. at 473.

\textsuperscript{16} Davis, 1 A.C. at 1137.
Judge, the Head of Criminal Justice and President of the Queen’s Bench Division at the time,\textsuperscript{17} stated that:

Without for one moment suggesting that counsel was not faced with unwanted difficulties, and accepting that there were one or two matters which might have been investigated more closely, our conclusion is that the anonymity ruling did not prevent proper investigation with the witnesses, and before the jury, of the essential elements of the defence case.\textsuperscript{18}

\textbf{B. The House of Lords Judgment and the Fallout}

The House of Lords sent lawmakers into a frenzied panic with its decision in \textit{Davis}.\textsuperscript{19} Basing their judgment on the right to confrontation in English common law, recent United Kingdom authorities on protective measures, and the ECHR, the Law Lords clearly determined that the protective measures used in \textit{Davis} deprived the defendant of a fair trial.\textsuperscript{20} There was less clarity, however, about the future use of protective measures in British courts.\textsuperscript{21} Lord Mance indicated that “further relaxation of the basic common-law rule” of confrontation was for Parliament to determine,\textsuperscript{22} and he was joined in this view by Lord Rodger of Earlsferry, though Lord Rodger did not pass judgment on whether such Parliamentary action was in fact needed.\textsuperscript{23}

There has been much confusion regarding the long-term implications of the Law Lords’ decision,\textsuperscript{24} due in part to the absence of a de-

\textsuperscript{17} Her Majesty’s Court Service, http://www.hmcourts-service.gov.uk/cms/1287.htm (last visited Apr. 1, 2009).

\textsuperscript{18} \textit{Davis}, 2 Cr. App. R. at 479.

\textsuperscript{19} See \textit{A Matter of Justice}, supra note 2, at 63.

\textsuperscript{20} See \textit{Davis}, 1 A.C. at 1137–49.

\textsuperscript{21} See \textit{id}. Lord Bingham of Cornhill did not expressly comment on the validity of protective measures, only stating that, “a trial so conducted cannot be regarded as meeting ordinary standards of fairness.” \textit{id}. at 1149. Lord Brown of Eaton-Under-Heywood issued perhaps the most declaratory statement, noting that, “the creeping emasculation of the common law principle must be not only halted but reversed.” \textit{id}. at 1160.

\textsuperscript{22} \textit{id}. at 1173–74.

\textsuperscript{23} \textit{id}. at 1153 ("But Parliament is the proper body both to decide \textit{whether} such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial.") (emphasis added).

\textsuperscript{24} Compare Jack Straw, Lord Chancellor and Sec’y of State for Justice, Statement on the Anonymity of Witnesses (June 26, 2008), http://www.justice.gov.uk/news/announcement 260608a.htm [hereinafter Jack Straw Statement] ("[T]he Law Lords decided that there was not sufficient authority in common law to provide for the current arrangements for the admission of anonymous evidence . . . .") (last visited Apr. 1, 2009), with Howarth, su-
What is clear is the immediate effect the judgment has had in the British courts and the government. On June 24, six days after the judgment in *Davis*, a £6 million trial of two men accused of killing London businessman Charles Butler, in which four witnesses had testified anonymously, was halted halfway through the trial. The judge, in discharging the jury, stated, “[l]ast Wednesday, the House of Lords decided in a very far-reaching judgment that evidence from anonymous witnesses cannot be admitted.” The judgment in *Davis* led the Crown Prosecution Service to suspend all cases where anonymous witnesses were used, and caused many in the legal and criminal justice communities to believe that some of Britain’s most dangerous convicted criminals would seek appellate review of their trials.

In response, lawmakers, led by Secretary of State for Justice Jack Straw, pushed through emergency legislation to “make sure that, where necessary, anonymous evidence can continue to be given so that we can bring the most violent and dangerous criminals to justice.” The Witness Anonymity Act was not heavily debated in Parliament, largely due to the recognition that witness intimidation posed a real threat and a measured response was necessary.

The Act, in section 1, provides “for the making of witness anonymity orders in relation to witnesses in criminal proceedings” and abolishes the common law power of a court to make an order for withhold-

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28 *Id.*
29 *Id.* It was estimated that up to 600 applications for witness anonymity had been, or were being made in pending trials, and that up to 40 cases were being prepared for appeal. Edwards, *Emergency Law*, *supra* note 26.
32 Criminal Evidence (Witness Anonymity) Act, 2008, c.15, § 1(1) [hereinafter Witness Anonymity Act].
ing the identity of a witness from the defendant in a criminal proceed-
ing. As described in the Act, a witness anonymity order allows the court to use any or all of five enumerated protective measures. The Act goes on to list three conditions that must be satisfied, taking into account the interests of the witness, the defendant, and justice as a whole. In addition, the Act provides that it shall apply to proceedings which are currently in progress at the time the Act is passed. Finally, the Act includes a provision to block any appeal brought on the grounds that the court had granted a witness anonymity order.

II. Discussion

A. The Right to Confront Witnesses in British Courts

1. Confrontation in the Common Law

The foundation of the right to confrontation can be traced back to Roman law. On the continent of Europe, with its rich history of civil law and private examination of witnesses, there rarely existed such a concept prior to the twentieth century. In England, the common law tradi-

33 Id. § 1(2). The Act extends to England, Wales, and Northern Ireland. Id. § 15(2).
34 See id. § 2(2)(a)–(e). Despite the ease with which one can draw the inference that the Witness Anonymity Act was specifically intended to overturn Davis, this notion disappeared from Parliament’s pen. Compare Explanatory Notes to the Criminal Evidence (Witness Anonymity) Bill as Introduced in the House of Commons, July 3, 2008, para. 50 (“It aims to restore the law to, broadly, the position it was believed to be prior to Davis.”), with Explanatory Notes to the Criminal Evidence (Witness Anonymity) Bill, July 8, 2008, para. 54 (“This Bill puts on a statutory footing a power for the courts to grant witness anonymity orders in criminal proceedings where this is consistent with the right of a defendant to a fair trial.”).
35 See Witness Anonymity Act, § 4(2)–(5).
36 See id. § 9(1)(b).
37 See id. § 11(2)(a); Explanatory Notes to the Criminal Evidence (Witness Anonymity) Act, July 21, 2008, para. 50.
38 Coy v. Iowa, 487 U.S. 1012, 1015 (1988); see Daniel H. Pollitt, The Right of Confrontation: It’s History and Modern Dress, 8 J. Pub. L. 381, 384 (1959). Both Justice Scalia, in his majority opinion in Coy, and Pollitt point to the New Testament for evidence of confrontation in Roman law: the Roman Governor Festus stated, “I told them that it was not the custom of the Romans to hand over anyone before the accused had met the accusers face to face and had been given an opportunity to make a defense against the charge.” Acts 25:16 (NRSV); see Coy, 487 U.S. at 1015. Some argue that the idea of confrontation extends as far back as the writings of the Hebrews. See Maffei, supra note 5, at 13; Natalie Kijurna, Note, Lilly v. Virginia: The Confrontation Clause and Hearsay— “Oh What a Tangled Web We Weave . . . ,” 50 DePaul L. Rev. 1133, 1138 (2001).
40 See Maffei, supra note 5, at 16.
tion favored open proceedings and a “face-to-face” “altercation” between the witness and the accused.\textsuperscript{41} Such a concept could be found in early forms of English dispute resolution predating what we now refer to as trial by jury.\textsuperscript{42} As the concept of a trial evolved in England, so too did the role of witnesses, who were now seen as an integral part of judicial proceedings, and whose presence could be compelled by the court.\textsuperscript{43}

By the late sixteenth century, the right to confrontation was becoming a customary part of English trials.\textsuperscript{44} Still, criminal proceedings in England were not immune from continental civil code influence.\textsuperscript{45} Defendants accused of treason were not given the right to confront their accusers, despite statutes to the contrary.\textsuperscript{46} The most notorious case was that of Sir Walter Raleigh, whose request to “call my accuser before my face” was not well-received by the court.\textsuperscript{47} By the mid-seventeenth century, however, the right to confrontation was enjoyed in nearly all criminal cases, regardless of the charges, as the common law began to predominate.\textsuperscript{48} Sir James Fitzjames Stephen noted that “[i]n every case, so far as I am aware, the accused person had the witnesses against him produced face to face, unless there was some special reason (such as sickness) to justify the reading of their depositions.”\textsuperscript{49}

\textsuperscript{41} See Richard D. Friedman, \textit{Confrontation: The Search for Basic Principles}, 86 Geo. L.J. 1011, 1022–23 (1998). The description of this process as an “altercation,” as Friedman notes, comes from Thomas Smith’s \textit{De Republica Anglorum}. Id. at 1023.

\textsuperscript{42} See Pollitt, \textit{supra} note 38, at 385–86 (analogizing certain components of trial by order, oath, and battle with the current conceptions of confrontation). In the early forms of the trial by jury, the jurors were themselves witnesses. \textit{Id.} at 386. It was not until the sixteenth and seventeenth centuries that juries became the triers of facts presented through evidence. See 9 W.S. Holdsworth, \textit{A History of English Law} 127 (1926). Today, juries are no longer used in civil cases in the United Kingdom (except for defamation cases). Andrea K. Bjorklund, \textit{Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims}, 45 Va. J. Int’l L. 809, 880 (2005).

\textsuperscript{43} See Holdsworth, \textit{supra} note 42, at 178.

\textsuperscript{44} See Pollitt, \textit{supra} note 38, at 387–89.

\textsuperscript{45} See Maffei, \textit{supra} note 5, at 14 (“At that time, the continental inquisitorial style was also making its way to England and Wales. Some equity courts and the Star Chamber adhered to the secret procedures of the Inquisition.”).

\textsuperscript{46} See Pollitt, \textit{supra} note 38, at 388. It is noteworthy that Article III, section 3 of the United States Constitution states that “No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. Const. art. III, § 3, cl. 1.

\textsuperscript{47} See Crawford, 541 U.S. at 44. Interestingly, the right to cross-examine adverse witnesses at trial was codified by Parliament over fifty years before Sir Raleigh’s trial. See Maffei, \textit{supra} note 5, at 13–14.

\textsuperscript{48} See Holdsworth, \textit{supra} note 42, at 250.

The notion that, by the eighteenth century, a right to confrontation was an established element of English common law has wide support among English commentators.\(^{50}\) In fact, the right was established at the this time in many American colonies.\(^{51}\) The presence of a right to confrontation in the common law, coupled with the absence of a clear authority establishing such a right, reflected recognition in England that a certain level of morality should be included in the search for justice.\(^{52}\)

2. Confrontation in the ECHR

A right to confrontation also exists under Article 6 of the ECHR.\(^{53}\) Article 6 broadly secures a right to a fair trial\(^{54}\) and enumerates five minimum rights, including a person’s right “to examine or have examined witnesses against him . . . .”\(^{55}\) The right to confrontation is generally satisfied under the ECHR so long as the accused has the opportunity to cross-examine an adverse witness.\(^{56}\) In *Kostovski v. Netherlands*, the European Court of Human Rights (European Court) held that the right to confrontation does not necessarily require the opportunity to examine a witness at trial, so long as the opportunity was available at some other point in the proceedings.\(^{57}\) Nevertheless, the right to confrontation under the ECHR must be understood in light of Article 6’s main objective.\(^{58}\) Thus, while the European Court has found violations of Article 6(3)(d) in cases involving anonymous witness testimony,\(^{59}\) it has declined to find a violation where it has concluded that the trial was essentially fair.\(^{60}\)

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\(^{51}\) See *Alvarado v. Superior Court*, 5 P.3d 203, 213 n. 7 (Cal. 2000). The Virginia Bill of Rights, adopted in 1776, was the earliest colonial declaration of the right to confrontation. See Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 23 (1951).


\(^{55}\) See European Convention, *supra* note 53, art. 6(3)(d).

\(^{56}\) Human Rights and Criminal Justice 639–40 (Ben Emmerson et al. eds., 2d ed. 2007).


In 1998, Parliament passed the Human Rights Act (H.R.A.) “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights . . . .”61 Under the H.R.A, British courts are bound by the ECHR and thus a defendant may assert a right to confrontation under Article 6(3)(d).62 Prior to the incorporation of the ECHR into domestic law, aggrieved defendants could petition the European Commission of Human Rights directly under Article 25 of the ECHR.63 With the passing of the H.R.A., Parliament intended for British courts to consider the rights of the ECHR in their decision making process.64 Clause 6 of the H.R.A. makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right”65 and later lists as a public authority “a court or tribunal.”66 In addition, courts must take into account judgments of the European Court when “determining a question which has arisen in connection with a Convention right.”67 Finally, under the H.R.A., a person can rely on Convention rights in legal proceedings if that person claims that a public authority has acted contrary to clause 6,68 thus providing them with a forum to air their grievances in the United Kingdom.69

B. Witness Anonymity

Although the United Kingdom holds a prominent place in the history of the right to confrontation, it is understood that the right is not

61 Human Rights Act, 1998, c. 42, References & Annotations; see Sec’y of State for the Home Dep’t, Rights Brought Home: The Human Rights Bill, 1997, Cm. 3782, ch. 2.1 [hereinafter Rights Brought Home] (“The essential feature of the Human Rights Bill is that the United Kingdom will not be bound to give effect to the Convention rights merely as a matter of international law, but will also give them further effect directly in our domestic law.”).
62 See Maffei, supra note 5, at 99, 143. But cf. R(D) v. Camberwell Green Youth Ct., (2005) 1 W.L.R. 393, 397 (H.L.) (U.K.) (“It is, however, sufficiently accurate to make one anticipate that the introduction of article 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused.”).
65 Human Rights Act, § 6(1).
66 Id. § 6(3)(a).
67 Id. § 2(1)(a).
68 See id. § 7(1)(b).
69 See Rights Brought Home, supra note 61, ch. 2.3.
absolute. In response to the violence in Northern Ireland in the 1970s, Parliament passed legislation limiting an accused’s right to confront witnesses, though it refrained from codifying measures to prevent disclosure of a witness’s identity. Since then, witness intimidation has become a major problem in the United Kingdom, and the establishment of special measures to deal with this problem has been a joint project of the courts and Parliament. Any question as to the power of the courts to shield a witness’s identity seemed to be answered in 2006, when Sir Igor Judge stated that “the discretion to permit evidence to be given by the witnesses whose identity may not be known to the defendant is now beyond question.”

Prior to the enactment of the Witness Anonymity Act, a judge’s discretion to allow a witness to testify anonymously was governed by *R v. Taylor*, and later clarified by the Court of Appeal in *Davis*. Under *Taylor*, a judge would consider a number of factors: the grounds for the witness’s fear, the importance of the evidence to the prosecution and whether it would be unfair to exclude it, the creditworthiness of the witness, and whether there would be any undue prejudice to the accused. Upon a request for witness anonymity, a judge balanced the necessity of protecting a witness’s identity with “potential or actual disadvantages faced by the defendant in consequence of any anonymity ruling.” There was, however, no bright-line test for the judge to apply.

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71 See *Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 5* (allowing the admission of written statements made and signed in the presence of a constable when the maker of the statement was unavailable for reasons such as death).

72 See Sec. of State for Northern Ireland, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, 1973, Cmnd. 5185, para. 20* (suggesting to Parliament that measures such as screening and withholding the name and address of the witness would “gravely handicap” the accused’s counsel).

73 See Jack Straw Statement, supra note 24.

74 See id.


77 See *Human Rights and Criminal Justice, supra note 56, at 567.*


79 *Human Rights and Criminal Justice, supra note 56, at 567.*

80 See *Davis*, 2 Cr. App. R at 466.
and while certain factors were to be considered, ultimately, the decision came down to the specifics of the case. In addition, British courts have drawn some guidance from decisions of the European Court, which noted in Doorson v. Netherlands that although Article 6 did not require the consideration of the interests of witnesses, “[c]ontracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled.”

There is, however, a major difference between the European Court and British courts when considering the importance of the anonymous witness evidence to the case. The European Court has held that there cannot be a reliance on anonymous witness testimony when it is “decisive” to the outcome of the case. British judges, on the other hand, consider the importance of the anonymous witness testimony to the prosecution. With the passing of the Witness Anonymity Act, the divergent practices of the European Court and British courts now seem to work in tandem. Under section 4 of the Act, a witness anonymity order may not be granted unless, *inter alia*, “it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that it is important that the witness should testify . . . .” But, in making such a determination, the court must consider whether the evidence will be the “sole or decisive” evidence that implicates the defendant.

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81 See id. at 467. As one example, the court noted that “[i]f satisfied that this witness is indeed independent, but unfit to give live evidence, the judge may admit his or her evidence, anonymously, and in statement form.” Id. Nevertheless, “if the decisive evidence comes from an unidentified witness who cannot be cross-examined . . . the judge may decide that the evidence should not be admitted.” Id.


83 See Human Rights and Criminal Justice, supra note 56, at 567.

84 See id.; see also Eur. Consult. Ass., Concerning Intimidation of Witnesses and the Rights of the Defence, Recommendation No. R(97) 13, para. 13 (1997) (“When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons.”).

85 See Human Rights and Criminal Justice, supra note 56, at 567 (“The evidence must be sufficiently important to make it unfair for the Crown to proceed without it.”).

86 See Witness Anonymity Act, 2008, c.15, §§ 4(5) (a) & 5(2) (c).

87 Id. § 4(5) (a).

88 Id. § 5(2) (c).
III. Analysis

The European Court has held that the use of anonymous witness testimony is not always incompatible with Article 6(3)(d). In its report on the Witness Anonymity Bill, and consistent with the European Court’s jurisprudence, Parliament’s Joint Committee on Human Rights concluded that “the Bill contains adequate protections for the right to a fair trial and does not therefore risk incompatibility with Article . . . 6(3)(d) ECHR.”

Contrary to the European Court and Parliament’s opinion on the matter, the granting of a witness anonymity order under the Witness Anonymity Act is in conflict with the right of confrontation and denies a defendant the fundamental right to a fair trial. The relevant considerations to be regarded by the judge under section 5 do little to improve upon the common law guidelines that existed prior to Davis and the Witness Anonymity Act. In addition, the use of anonymous witnesses creates secondary effects which increase the prejudice to the defendant. Thus, while British judges have generally resisted the approach to confrontation used in U.S. courts, the interests of justice would be better served by adopting Sixth Amendment jurisprudence and the importance placed on effective cross-examination as a guide to credibility and the truth.

92 Compare Human Rights and Criminal Justice, supra note 56, at 567 (listing the factors relevant to the judge’s discretion under Taylor), with Witness Anonymity Act, § 5(2)(a)–(e).
93 See, e.g., Holbrook v. Flynn, 475 U.S. 560, 569 (1986) (possible inferences drawn by the jury from measures taken to isolate the defendant); Robert E. Goldman, The Modern Art of Cross-Examination 3 (1993) (inability of defense counsel on cross-examination to adapt his questioning based on the witness’s demeanor).
94 See R(D) v. Camberwell Green Youth Ct., [2005] UKHL 4, (2005) 1 W.L.R. 393, 399 (H.L.) (U.K.) (“It is for the people of the United States, and not for your Lordships, to debate the virtues of the Sixth Amendment in today’s world.”).
95 See Maryland v. Craig, 497 U.S. 836, 846 (1990) (“The combined effect of . . . elements of confrontation—physical presence . . . cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence . . . is reliable and subject to . . . rigorous adversarial testing . . . .”).
A. Witness Credibility Becomes a Non-issue

When an accusing witness testifies anonymously, the right to confrontation is violated and the accused loses the opportunity to effectively cross-examine the witness. A witness anonymity order creates two problems: first, the credibility of the witness is predetermined before that witness goes before the jury, and second, once the witness takes the stand, the defense is limited in discrediting the witness’s testimony.

Absent knowledge of the witness’s identity, the defense is severely limited in challenging the credibility of the witness, and thus cannot properly cross-examine them. Because an anonymity order handicaps the defendant, the Witness Anonymity Act provides that a judge must consider the credibility of a witness before issuing the order. In support of an application for an order, it is the duty of the prosecutor to provide the court with all relevant material “including material that may tend to cast doubt on the credibility, reliability or accuracy of the witness’s evidence.” If there is an issue of a witness’s credibility, however, it has historically been and should continue to be the role of the jury to resolve such issues. It can hardly be said that the credibility of a witness is better determined by a review of “relevant material” than by

96 See 2 Jeremy Bentham, Rationale of Judicial Evidence: Specially Applied to English Practice 413–14 (1827) (“The operation has two professed objectives . . . the other is, that an opportunity may be afforded to the defendant, in addition to whatever testimony may have been delivered to his disadvantage, to obtain the extraction of such other part . . . of the facts within the knowledge of the deponent, as may operate in his favour.”).
97 See generally Witness Anonymity Act, § 5 (requiring the judge to determine the witness’s credibility before issuing a witness anonymity order).
98 See Kostovski v. Netherlands, App. No. 11454/85, 12 Eur. H.R. Rep. 434, 448 (1990) (“If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable.”).
99 See id.; see also Smith v. Illinois, 390 U.S. 129, 131 (1968) (“Yet when the credibility of a witness is in issue, the very starting point in ‘exposing falsehood and bringing out the truth’ cross-examination must necessarily be to ask the witness who he is and where he lives.”) (citations and internal quotations omitted).
100 See Smith, 390 U.S. at 131 (“To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.”).
102 See Witness Anonymity Act, § 5(2)(b) & (d).
103 Attorney General Guidelines, supra note 101, at B3.
a face-to-face confrontation with the defendant, and his attorney, in the courtroom.\textsuperscript{105} Indeed, cross-examination is a “critical tool” that allows a defendant to undermine the credibility of a witness.\textsuperscript{106}

Under the Witness Anonymity Act, the judge essentially “vouches” for the witness and deems credibility a non-issue.\textsuperscript{107} A normally credible witness, however, can be mistaken, and their testimony can suffer from a number of infirmities.\textsuperscript{108} The manner in which a cross-examiner chooses to conduct himself when questioning the witness can affect the witness’s demeanor on the stand\textsuperscript{109} and the jury’s perception of that witness’s testimony.\textsuperscript{110} When an anonymous witness testifies from behind a screen, the defense cannot observe the witness’s demeanor and tailor its questioning accordingly.\textsuperscript{111} More troubling is the notion that the demeanor of an anonymous witness, shielded from the defense, may not be indicative of his truthfulness.\textsuperscript{112} While the Witness Anonymity Act conditions witness anonymity orders on a defendant’s receiving of a fair trial,\textsuperscript{113} it compromises a defendant’s ability to challenge the credibility of an anonymous witness and thus impermissibly provides a structure in which the truth may be buried.\textsuperscript{114}

B. The Inference of Guilt

Section 7 of the Witness Anonymity Act gives the judge very broad discretion to give an appropriate warning to the jury “to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant.”\textsuperscript{115} Such a warning is inadequate to prevent the

\textsuperscript{105} See Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (discussing how confrontation allows the jury to draw its own conclusion about the truth of the witness’s testimony).


\textsuperscript{107} Cf. U.S. v. Young, 470 U.S. 1, 18 (1985) (impropriety of a prosecutor vouching for the credibility of a witness).


\textsuperscript{110} See Goldman, supra note 93, at 2.

\textsuperscript{111} See id. at 3.

\textsuperscript{112} See Coy, 487 U.S. at 1019.

\textsuperscript{113} Witness Anonymity Act, § 4(4).

\textsuperscript{114} See Howarth, supra note 3, at 7 (“[B]ut there are more practical reasons for distrusting the evidence of witnesses whose credibility cannot easily be challenged. Anonymised witnesses make it possible for old scores to be settled . . . .”).

\textsuperscript{115} Witness Anonymity Act, § 7(2).
jury from drawing the inference that, if a witness needs to be “protected,” the defendant must be dangerous and a criminal.116

The U.S. standard for determining whether courtroom procedures are prejudicial offers an alternative. The courts will look at whether “an unacceptable risk is presented of impermissible factors coming into play.”117 In Coy v. Iowa, for example, a sexual abuse case involving the screening of child witnesses, the defendant contended that the use of screens would make him appear guilty.118 Although the majority did not deal with this issue (finding it unnecessary to do so because the screens violated the confrontation clause), the dissent was satisfied with the judge’s instruction and noted that “[a] screen is not the sort of trapping that generally is associated with those who have been convicted.”119 While a judge’s instruction may have been enough to overcome any prejudice when a defendant is merely screened off from a child witness, it arguably is less effective when the entire range of protective measures under the Witness Anonymity Act is used.120 A screen used in a case like Coy may signal to the jury that a witness would be upset or traumatized by seeing the defendant,121 but the additional measures of voice modulation and withholding the witness’s identity from the defendant (under the Witness Anonymity Act) makes it more likely that the jury will draw the reasonable, yet impermissible, inference that the defendant remains a danger to the witness.122 Such prejudice cannot be cured by a judge’s instruction.123

116 See Howarth, supra note 3, at 7.
118 487 U.S. at 1015; see Brief for Appellant at 3, Coy v. Iowa, 487 U.S. 1012 (1988) (No. 86-6757) (“While placing a criminal defendant in shackles or prison garb during trial necessarily suggests to the jury that he is generally dangerous, use of a screening barrier in this case communicated to the jury that appellant was a specific danger to the child witnesses . . . .”) (citation omitted).
119 Coy, 487 U.S. at 1035 (Blackmun, J., dissenting). Justice Blackmun also found support for his opinion in the trial judge’s “helpful” instruction that the jury “draw no inferences of any kind from the presence of that screen.” Id.
120 See Holbrook, 475 U.S. at 569 (discussing the inherent prejudice that may result when a jury draws a “wider range of inferences” from the courtroom practices).
121 See 487 U.S. at 1020.
122 See Howarth, supra note 3, at 7. It can further be argued that if witness intimidation is as prevalent as supporters of the Witness Anonymity Act contend, then it is even more likely that a juror will draw an inference that is prejudicial to the defendant. See, e.g., Jack Straw Statement, supra note 24 (noting the increase in witness intimidation in serious crimes).
123 See, e.g., Fed. R. Evid. 105 advisory committee’s note (explaining the ineffectiveness of a limiting instruction when the prejudicial effect to the defendant is too great).
C. Can Parliament Make the Unfair Fair?: Corroboration and Forfeiture

The interests of justice may be better protected if Parliament considers two approaches that have been accepted abroad and may improve upon the fairness of trials involving anonymous witnesses: corroboration of the anonymous witness’s evidence,124 and “forfeiture by wrongdoing.”125 The New Zealand Evidence Act 2006, which served as a primary example of anonymous witness legislation for Parliament,126 requires that a judge consider, *inter alia*, “whether there is other evidence that corroborates the witness’s evidence.”127 If anonymous testimony, which suffers from the same infirmities as hearsay evidence, was corroborated by additional evidence from a non-anonymous source, the reliability and credibility of the anonymous witness’s testimony would be less problematic.128

The interests of justice could also be better served if Parliament were to consider other methods of protecting witnesses,129 and allow anonymous witness testimony only where the defendant has forfeited the right to confrontation by attempting to prevent the witness from testifying.130 Only briefly touched upon in *Davis*,131 the consideration of “forfeiture by wrongdoing” would be a return to a doctrine rooted in English common law.132 The implementation of this rule would no doubt raise its own issues,133 but as Lord Carswell noted, that “may require further argument on some future occasion.”134

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125 Fed. R. Evid. 804(b)(6).
126 Explanatory Notes to the Criminal Evidence (Witness Anonymity) Bill as Introduced in the House of Commons, July 3, 2008, para. 61.
128 See, e.g., *Idaho v. Wright*, 497 U.S. 805, 831 (1990) (Kennedy, J., dissenting) ("[W]hatever doubt the Court has with the weight to be given the corroborating evidence . . . is no justification for rejecting the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness."); *see also* Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 Va. L. Rev. 149, 170 (1995) (discussing why the majority’s holding in *Idaho v. Wright* was consistent with Justice Kennedy’s position on corroboration in the dissent).
131 *Davis*, 1 A.C. at 1158–59 (Lord Carswell).
132 See *Giles*, 128 S.Ct. at 2683.
133 See *Davis*, 1 A.C. at 1159 (Lord Carswell) (discussing what standard of proof would be necessary to establish that the defendant was responsible for intimidating the witness (citing *R v. Sellick*, [2005] EWCA Crim. 651, (2005) 2 Cr. App. R. 15, 231 (U.K.))); How-
Conclusion

The decision in *Davis* has brought the issue of confrontation to the forefront of legal debate in the United Kingdom. Parliament has expressed its clear intent to preserve the use of witness anonymity with the passing of the Witness Anonymity Act, which will not expire until the end of 2009 (at the earliest). With little or no difference between the Witness Anonymity Act and the protective measures held to be unfair in *Davis*, Parliament has simply codified the pre-existing common law system for anonymous witnesses. The right to confrontation, born in England and preserved in the ECHR, has seemingly lost its protection. By adopting the U.S. approach to confrontation, the United Kingdom can return to basic principles that are essential to a fair trial. Until then, defendants will be severely handicapped by a system that allows the truth to remain as hidden as the witnesses who bury it.

arth, supra note 3, at 9 (discussing the difficulty of reconciling “safety” and “fear” with regards to witness intimidation).

134 *Davis*, 1 A.C. at 1159.