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KEYNOTE ADDRESS: CONSTITUTIONAL BAIT AND SWITCH†

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Many scholars and observers have made important contributions to our understanding of the detention policy adopted in response to the post-9/11 threats against America's national security. I add my voice not to intensify the cacophony, but to make some observations about the constitutional conversation among separate branches sharing power. Inter-branch dynamics concern not merely how power is divided, but how the branches deal with one another—sometimes quite acrimoniously—in order to assert their own roles within the constitutional structure. The title of my speech, of course, is borrowed from Chief Justice Roberts's dissent in *Boumediene v. Bush*.[1]

PRECEDENT AND A POLICY PARADOX

In the wake of 9/11—an unprecedented attack by non-state actors against civilian targets, with the goal of destabilizing our government and society—legal thinkers and policymakers have searched in vain for appropriate precedents on which to base detainee policies. Most have come up short, recognizing that post-9/11 policymakers were driving in a fog without many taillights to follow.

One of my first experiences involving the application of extraterritorial jurisprudence to Guantánamo Bay involved *Haitian Refugee Center, Inc. v. Baker*, decided by the United States Court of Appeals for the Eleventh Circuit in 1992.[2] At issue was whether the Clinton Administration was correct in denying Haitian asylum seekers, being held at Guantánamo Bay, interviews or other processes before sending them back to Haiti.[3] As a second-year law student, I worked on a brief by Professor Harold Koh—now Dean of the Yale Law School—which contended that the Haitians were entitled to some process by virtue of the Immigration and Nationality Act, the Constitution, and the non-refoulement principle, which prohibits sending an asylum seeker

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1 128 S. Ct. 2229, 2285 (2008) (Roberts, C.J., dissenting) ("Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.").

2 953 F.2d 1498 (11th Cir. 1992) (per curiam).

3 *Id.* at 1502–03.

back to his country of origin if he has a valid fear of persecution. The argument proved difficult because the aliens had not effected entry into our territorial waters. The first wave that successfully made it to southern Florida received very significant statutory and constitutional processes, just as the Cuban nationals of the Mariel Boatlift had before.[4] But the subsequent policy of deliberately blocking and diverting Haitian émigrés to Guantánamo Bay complicated the argument.

The Eleventh Circuit Court of Appeals decided that neither statute nor Constitution afforded the Haitians a day in court or a right to any process.[5] The Haitians were seeking a simple five-minute interview with a responsible official during which they could express and explain their fear of persecution.[6] If the official deemed the fear well-founded, the individual would be admitted as a refugee.[7] If not, as would likely be the case in the overwhelming majority of the interviews, they would be treated as economic migrants and legally and logically would be sent back to Haiti.[8] But the panel did not consider the Haitians held at Guantánamo Bay worthy of even that limited process.[9]

The present situation involving detainees at the same locale has evolved far differently. I quote Chief Justice Roberts's dissent in *Boumediene*: "Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."[10] Detainees held at Guantánamo Bay currently claim extensive procedural rights and protections. They may have more rights than prisoners of war under Article Five of the Geneva Convention, which requires that detainees "enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[11] Unlike members of the U.S. armed forces who are subject to the Uniform Code of Military Justice ("UCMJ"), detainees can challenge their detention in Article III civilian courts.[12]

How did we arrive at a place where those who defend our freedom and those who come here seeking freedom receive fewer rights and

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[4] *See, e.g.*, Garcia-Mir v. Smith, 766 F.2d 1478, 1480, 1483–84 (11th Cir. 1985) (per curiam).

[5] *Haitian Refugee Ctr., Inc.*, 953 F.2d at 1513 & n.8.

[6] *Id.* at 1503.

[7] *Id.* at 1502.

[8] *Id.*

[9] *Id.* at 1509, 1515.

[10] 128 S. Ct. at 2279.

[11] Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[12] *Compare* Uniform Code of Military Justice art. 3, 10 U.S.C. § 803 (2006), *with Boumediene*, 128 S. Ct. at 2275–76.

protections than those who stand accused of waging war and fomenting terror in order to threaten and defeat that freedom? In the first instance, responsibility rests with the Executive. For three years, the Executive Branch sought to restore security and protect our country in a time of national crisis. Early responses to the severe threat against our national security emphasized safety over process. Policymakers at the Department of Justice, the Department of Defense, and many other agencies did their best to fulfill their obligations to uphold and defend the Constitution during a time characterized by no significant support or input from the Legislative or Judicial Branches. To be clear, plenty of members delivered speeches alternately supporting and criticizing the Administration, but none culminated in concrete congressional action that might have offered greater assurance as to where the nation stood as a democratic polity. Furthermore, notwithstanding the inaction of the other branches, an Executive Branch decision to afford some process to detainees—especially to U.S. citizens—likely would have stayed aggressive judicial intervention.

EXECUTIVE AUTHORITY

Initially, the Supreme Court recognized the Executive's authority to detain. When the Court ruled in *Hamdi v. Rumsfeld* that the United States could not detain one of its own citizens without some process in place for him to challenge his status as an enemy combatant,[13] members of the legal academy, the print media, and the television punditry widely viewed the Court's opinion as a judicial push back against executive authority. A more careful reading of *Hamdi* reveals, however, a powerful affirmation of executive authority. Contrary to arguments strongly advanced by Hamdi and his counsel, the plurality held that the President did have authority to engage in executive detention of Hamdi and other enemy combatants.[14] Rather than extending the entire panoply of procedural rights expressed in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the justices enumerated only two core protections—the right to have the charges presented and the right to have them heard before an impartial observer.[15]

Justice O'Connor wrote: "the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[16] She went so far as to suggest that the military exigencies could reasonably allow

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[13] 542 U.S. 507, 533 (2004) (plurality opinion).

[14] *Id.* at 516–19.

[15] *Id.* at 533.

[16] *Id.*

the admission of hearsay evidence and justify a shift to the presumption of guilt in detainee hearings.[17]

When the Court spoke, the Executive listened. After *Hamdi*, the Department of Defense promulgated the Combatant Status Review Tribunals ("CSRT") in part to bring U.S. policy into compliance with the Court's directive.[18] The Executive provided detainees the basic rights required by the Court while placing the process under the direction of the military to ensure proper deference to the exigencies of the circumstances. Notably, the Executive went well beyond the requirements the Court enunciated in *Hamdi*, applying the procedures not only to U.S. citizens—like Hamdi and Padilla—detained on U.S. soil, but also extending the same processes to all enemy combatants regardless of citizenship, including those housed at Guantánamo Bay.

LEGISLATIVE-JUDICIAL DIALOGUE

A second Supreme Court opinion, *Rasul v. Bush*, released concurrently with *Hamdi*, held that Rasul and other non-U.S. citizen Guantánamo Bay detainees could avail themselves of statutory habeas jurisdiction to challenge their detention in federal court.[19] *Rasul* was the opening salvo in an often-contentious dialogue between the Legislature and the Judiciary that markedly changed the direction of detainee policy. Members of Congress acted on the Court's implicit invitation to play a more active role in the detainee policymaking process.

In December 2005, Congress passed the Detainee Treatment Act ("DTA"). The Act codified the CSRT procedures, placed some limitations on them and the use of interrogation techniques and, most relevantly, stripped the Court of jurisdiction to hear habeas petitions from detainees held at Guantánamo Bay.[20] In short, the Court found statutory jurisdiction and Congress promptly acted to amend the relevant statute and remove the Court's jurisdiction.

Unwilling to acquiesce, the Court heard *Hamdan v. Rumsfeld* despite the jurisdiction-stripping language in the DTA, and held that the Court still had jurisdiction over cases pending at the time the DTA passed.[21] Once it had established jurisdiction to decide the case, the Court raised the ante and struck down as unconstitutional the President's Military Commissions Order, holding that it violated the

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[17] *Id.* at 533–34.

[18] *Boumediene*, 128 S. Ct. at 2241.

[19] 542 U.S. 466, 484 (2004).

[20] Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2739–44 (codified as amended in scattered sections of 28 and 42 U.S.C.).

[21] 548 U.S. 557, 584 & n.15 (2006).

UCMJ and the Geneva Convention.[22] Here again, the Court invited congressional action. Justice Breyer in his concurring opinion wrote:

> Nothing prevents the President from returning to Congress to seek the authority he believes necessary.
>
> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so.[23]

Justice Breyer and the other members of the *Hamdan* majority extended a second invitation for the President to involve Congress—ignoring the fact that Congress had already made clear its intent in the DTA.

After *Hamdan*, the President submitted a package to Congress that became the Military Commissions Act ("MCA"). The idea was simple. The legislation expressly conferred authority for the military commissions the President had empanelled, and that the Court had struck down just earlier that summer.[24] Once again, Congress stripped the courts of jurisdiction, this time more explicitly including pending cases.[25]

Senator Lindsey Graham, one of the sponsors of the MCA—and himself a military attorney—expressed a sentiment held by many members of Congress that underpinned the legislative intent:

> [T]he fundamental question for the Senate to answer when it comes to determining enemy combatant status is, Who should make that determination? Should that be a military decision or should it be a judicial decision?
>
> I am firmly in the camp that when it comes to determining who an enemy of the United States is, one who has taken up arms and who presents a threat to our Nation, that is not something judges are trained to do, nor should they be doing. That is something our military should do.
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> For as long as I have been a military lawyer, Geneva Conventions article 4, where it talks about a competent tribunal to decide whether a person is a civilian—lawful, unlawful, combatant—that competent tribunal has been seen in terms of military people making those decisions.[26]

But in *Boumediene*, the Court disagreed again, claiming constitutional jurisdiction over enemy combatants held outside the United States.[27] Moreover, the Court declared that the congressionally

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[22] *Id.* at 613.

[23] *Id.* at 636 (Breyer, J., concurring).

[24] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

[25] *Id.* sec 7, 120 Stat. at 2635–36 (codified as amended at 28 U.S.C. § 2241 (2006)).

[26] 152 CONG. REC. S10,266 (daily ed. Sept. 27, 2006) (statement of Sen. Graham).

[27] 128 S. Ct. at 2274.

prescribed procedures crafted in response to the Court's earlier dictates were an inadequate substitute for constitutional jurisdiction.[28]

The Court, unhappy that Congress had circumscribed its statutory authority to hear habeas petitions, changed the metric and framed its opinion on constitutional grounds. Members of the *Boumediene* majority understandably were sensitive that observers might criticize their decision to change the rules of the game. Justice Kennedy articulated several important rationalizations—six years had passed, we were fighting a war of indefinite duration, and the President and Congress should not restrict the Court.[29] Such reasoning may have been rational if the DTA and the MCA had stripped jurisdiction without providing any alternative procedure, but both laws prescribed the conduct of the military commissions in accordance with the requirements previously articulated by the Court. In *Hamdan*, the Court acknowledged that the DTA stripped jurisdiction, restricted methods of interrogation, and furnished a procedural protection for U.S. personnel accused of engaging in improper interrogation.[30] In *Boumediene*, the Court acted as though no such processes were in place.[31]

The *Boumediene* opinion so callously disregarded the Court's earlier judgments that Justice Souter saw fit to write a concurring opinion almost exclusively to defend the institutional integrity of the Court.[32]

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On the surface, the *Boumediene* opinion addressed the sufficiency of the established processes, but an issue no less important was the Court's dissatisfaction with the role granted the Judiciary by the MCA. Rather than accept jurisdiction in the D.C. Circuit, the Supreme Court sought to create its own terms.[33] If the Court intended only to exercise its traditional and accepted power of judicial review, it could have heard a detainee case appealed through the D.C. Circuit under the procedures established by the DTA and MCA—where there would be no question regarding jurisdiction—and evaluated the constitutional adequacy of the procedures within that judicial framework.

By claiming constitutional jurisdiction, however, the Court declared a substantial degree of ownership of detainee policy. By displacing the rules upon which the President and Congress had agreed, the Court placed itself in the position not of final arbiter, but of original author. By

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28 *Id.* at 2275.

29 *Id.* at 2275, 2277.

30 548 U.S. 557, 572–73 (2006).

31 *See* 128 S. Ct. at 2274–77.

32 *Id.* at 2277–78 (Souter, J., concurring).

33 *See id.* at 2274–75 (majority opinion).

exercising its habeas jurisdiction, the Court claimed responsibility for writing the script going forward. This assumption of authority may carry costs.

The sense of constitutional fealty embodied in the oath of every government official to uphold and defend the Constitution may begin to atrophy in the Executive and Legislative Branches if we rely upon the Court to act not only as the backstop, but also as the sole protector of the Constitution. But a more immediate and concrete concern involves the limited options available to the Executive and Legislative Branches. They have already passed the DTA and MCA. By claiming constitutional habeas jurisdiction, the Court has left limited room for the political branches to maneuver. What started out as a dialogue between the Judiciary and the other two political branches threatens to become a monologue.

The idea of 9/11 exceptionalism—that the terrorist attacks and the ensuing events were unprecedented and required extraordinary responses—is often invoked by those who criticize executive action and, to a lesser extent, legislative proposals. But similar charges could apply also to the Supreme Court. The series of opinions culminating in *Boumediene* calls into question whether the Court has created its own brand of 9/11 exceptionalism, and in so doing has deprived the political branches of their proper constitutional authority. We can all hope for a future free from terrorist attacks and other threats to public safety, but we must bear in mind the need for a strong and flexible policymaking structure within the political branches, working in tandem—not at odds—with the Judiciary in order to craft a body of laws and opinions that preserve the constitutional authority of all three branches of government.

LUNCHEON ADDRESS: SECURING LIBERTY†

*John D. Ashcroft**

The single most important responsibility of any culture is the transmission of values from one generation to the next. The study and practice of law are disciplines where fundamental values of the American culture are protected and enriched. Nothing is more important to America than an understanding of our core value of liberty and the way in which we protect, enrich, and enhance that core value and its place in our culture.

The current security environment including large-scale threats by terrorists presents a new paradigm of peril that must be addressed. As threat potentials evolve, the defense of liberty must adapt. On March 5, 1946, in Fulton, Missouri, at Westminster College Winston Churchill sounded the alert, "From Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended across the Continent." He described a new paradigm of peril that would transform world politics. Citizens in the United States and around the globe would adjust their lives to accommodate a changed order for over half a century.

Similarly, the events of September 11, 2001, ushered in a new paradigm of peril, or at least made us acutely aware of it. It marked us anew and indelibly. It awakened us to the fact of an unprecedented level of lethality that is available to those who would attack freedom-loving communities such as the United States, assault our institutions, and seek to undermine our freedoms. It would mandate a change in the way we operate and how we respect and protect human dignity in the context of liberty.

The nature and scale of modern lethality is grossly different than it has ever been in history. We can compare today's lethality with what existed in the early days of American culture. At the time of the American Revolution, black powder was among the most robust of explosives. If a container of black powder the size of this podium were detonated in a hall with several hundred people, it would kill a number of people, injure many more, and give everyone else a pretty significant ringing in their ears for a period of time.

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In the 1860s, Alfred Nobel found a way to combine and stabilize nitroglycerine so it could be an exponentially stronger explosive. Known as dynamite, it elevated the level of lethality significantly.

Add almost eighty years to Nobel's achievement and you get to August 6, 1945, when U.S. President Harry Truman announced to the world that America had won "the battle of the laboratories." The victory in the battle of the laboratories meant that America had found a way to use atomic energy in a way that would be decisive in the war. America unleashed that power over Nagasaki and Hiroshima. President Truman understood that technology was the way in which America could protect our freedom and win the peace. Yet, that formula for peace planted seeds, which today have grown into a lethal threat.

The nearly seventy years that followed Truman's announcement take us to the present day and the second component of the new paradigm of peril. The second part of that paradigm is that the new robust lethality is both transportable and deliverable in ways never before available.

During the American Revolution, according to David McCullough's recent book *1776*, Americans stood over the hills of Boston and watched the British fleet advancing across the bay. It is easy to imagine them stroking their chins saying, "If the winds don't change, they should be here in another twenty or thirty minutes or another hour or two. Let us go down to Starbucks and get a cup of Joe." Then, threats advanced against a culture at the speed of sailing vessels or horse drawn vehicles.

In revolutionary times, enough destructive capacity to disrupt a culture could only be transported by another culture. It took the capacity of a nation state to deliver something that was big enough to disrupt a state. But with modern miniaturization of lethality and jet-aged transportation, we face the potential of a nuclear weapon the size of this podium that could vaporize an American city and destabilize the entirety of the American culture. That kind of lethality and deliverability not only defines a new scale of peril, but it means that those who can threaten America are more numerous. Instead of having to prepare against threats posed only by nation states that have the scale and mass to disrupt America, we have to look to the potential disruptive capacity of individuals or small, non-state institutions, such as al Qaeda.

Another aspect of modern peril is its "fragmentability." In earlier days, an assault on a nation would require traceable troop movements. As we look back to 9/11 we find that the terrorists operated in small groups of individuals in scattered settings. The terrorists fragmented both their planning and implementation to avoid detection. The fragmentation of the terrorist threat necessitates integration and cooperation on the part of those threatened. America needs the

cooperation and help of other cultures to detect and prevent acts of terror before they can be coordinated and launched.

This cooperation is part of a necessary new plan of prevention. As a result of the modern paradigm of peril being more lethal, deliverable, fragmentable, numerous, and potentially dispersed, America has to be more agile, integrative, and cooperative in her new preparation and prevention.

On one hand, America has to be more focused; on the other hand, America has to be broader. America must cooperate internationally. One of the major conclusions about 9/11 is that the domestic security of the United States is no longer merely a domestic endeavor. Put differently, to secure America internally, we have to act externally—to secure America nationally, we must work internationally. The fragmentation of terror mandates the international cooperation and integration of law enforcement. If we do not understand that, we will be unable to detect precursor activities in order to disrupt the next attack.

When our forensic experts reconstructed the events of 9/11, they found that Afghanistan was the terrorists' training ground; Germany was a planning ground; and funding flowed from a variety of Middle Eastern communities. America herself became the task-specific flight training arena. Kuala Lumpur was a base where terrorists regrouped and fine tuned the operation. Seeing any one of those activities in isolation might not trigger an awareness of or reveal the real potential of the operation but, seeing those activities in an integrated way reveals that a coordinated response to the fragmented operation would be America's best hope to detect and defeat such an attack. An integrated response is part of the new plan of prevention that America must understand to overcome the paradigm of peril.

America is struggling towards such a program of prevention. As America struggles, we hope that we can remain secure and uninjured. There are cultural trends in America that make it difficult for us to accommodate the new demands of the paradigm of peril with the new demands for the priority of prevention.

An aspect of modern American liberty is a trend towards specificity in rule-making and regulation. On one hand, the idea is that we govern everything with a predetermined legalism that anticipates and forecasts all circumstances. It assumes we can craft ways of directing and refining our activities so that no matter what happens we will act within a predetermined set of rules that have been negotiated, enacted, signed into law, and implemented. On the other hand, there is a need for additional agility and flexibility that is occasioned by the constantly evolving new paradigm of peril characterized by greater lethality, deliverability, fragmentation, and difficulty in tracking. This need for agility and flexibility is in tension with our cultural demand for specific

rules and hard, clear answers determined in advance on all the issues. As a result, it is most important to have robust, clear, and transparent focused discussions about what is necessary for us to accommodate the realities of the world. Winston Churchill talked about the realities in 1945; we need to talk about the realities in these times of vastly accelerated changes in threat capacities.

The culture of legalism, some might say, is at odds with the acknowledged concepts and ideas of national security that require agility, flexibility, and responsiveness. Fighting terrorism is tougher today than defending America has been in previous settings. It is tougher because there are identity issues—who is the enemy? We did not have a whole lot of trouble figuring out who the enemy was after Pearl Harbor—not a difficult task. Terrorism attempts to destroy our liberty and disrupt our culture by targeting civilians. That has not been the case in the past. There is a difference between the kind of threat that we endured in Pearl Harbor and 9/11—what happened in New York, what happened in Washington, what happened in Pennsylvania.

When terrorists target our civilian population, America is forced to defend a much broader set of resources. Virginia happens to be one of these locations in our country where every place you put your foot is a battlefield of some kind. They were, however, conventional sorts of battlefields. When Virginia was a battlefield, at the end of the day, from time to time, a truce would be called and the commanders or generals who had been roommates or classmates at West Point would stroll through the battlefield, supervise the collection of the wounded or the dead, agree that they had been enemies and that they would be enemies, and go back to the lines to resume the battle the next day. Defending the civilian population was not the same concern in the way it is in the war against terror. The defense of the civilian population of the United States of America is a matter of focused concern in the war on terror. Because we are all targeted, terrorism threatens liberty of the civilian population in ways that other attacks against America have not.

There are some individuals who want to minimize the impact of terrorist attacks. For too long we have misstated and misunderstood the full impact and consequences of terrorism. In no way do I downplay the horrific attack on Pearl Harbor, but we must remember that the Pearl Harbor attack, infamous for its casualties, had fewer casualties than 9/11. It was a terrible attack; yet, it was not an attack on an American state. In 1941, Hawaii was not yet a state. Unlike 9/11, the attack on Pearl Harbor attacked a military target, not a civilian target. We have to understand that finding ways to address the new paradigm of peril with a new paradigm of prevention is a struggle.

In this effort, there are those who want to talk continually about balancing freedom and security. I believe the notion of balancing

freedom with anything should be rejected. There are no parallel values to liberty in my pantheon. Freedom is *the* value. When we talk about security, we should ask: secure what? The right answer for filling in that blank is securing freedom. The purpose of security is to enrich freedom. It is not to counterbalance freedom; it is not to somehow offset it.

The right thing to do with liberty is to secure it. When thinking about security, one should ask a simple question: is our liberty going to be worth more if we add this security than if we do not add this security? If our liberty is not worth more with that security, then we should not have it.

Some may want to return to the shop-worn idea that the enactment of laws inevitably result in a net loss of liberty. I reject that notion. If you are in a state of nature and there are no laws, passage of a law prohibiting murder and rape enhances liberty; it does not restrain liberty. Amending the Constitution and enacting laws against slavery enlarged liberty. They did not diminish it. The purpose of law is to enhance freedom, to enlarge and enrich liberty. Laws that fail to do so should not be enacted, or if enacted should be repealed. If the net liberty value of laws relating to security is ever negative, they should be abandoned.

But there is great confusion in American culture about how to respond to the new paradigm of peril and how to construct a new paradigm of prevention. Part of the great confusion results from courts inserting the Judicial Branch into a decisionmaking role that was intended by the Founders to be reserved to the political branches of government. Of late, the judiciary has rushed in where Founders feared to tread. One noted jurist wrote that he wanted to have clear rules but, "in extreme cases" the President simply would have to break the laws in order to defend the security, integrity, and liberty of America. The jurist proposed that America have laws governing most situations but that we should expect the President to break those laws, even to act criminally in order to defend the country. I simply cannot understand how you would want to have the person responsible for enforcing the federal laws in the country pledge in a presidential debate, "Yes, I will break the laws, and this is when I might do it." In the event of such a situation, the President would then have to throw himself on the mercy of the prosecutors, hoping that they would not prosecute. Although this is an unrealistic position, it comes from well-respected members of our judicial and legal communities.

Can you imagine a President having to consider how popular he was on other domestic agenda items because he would have to throw himself on the mercy of potentially politically ambitious prosecutors having defended the United States?

As the courts have invaded the national defense arena, the ability of hard-working legal analysts to provide counsel has become increasingly difficult and has been challenged more and more pervasively. If the rule of law means anything, it means that there is freedom for people to understand what they can and cannot do—which actions are legal and which are illegal. When it cannot be determined what is legal and what is illegal, two things happen. First, uncertainty induces paralysis because one cannot know what is legal or illegal. Second, multiple legal opinions and analyses are sought in search of certainty, thus elevating legal costs.

The syllabus of *Hamdan v. Rumsfeld* lists the position of the United States Supreme Court justices as follows:

> Stevens, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI-D-iii, VI-D-v, and VII, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined, and an opinion with respect to Parts V and VI-D-iv, in which Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a concurring opinion, in which Kennedy, Souter, and Ginsburg, JJ., joined. Kennedy, J., filed an opinion concurring in part, in which Souter, Ginsburg, and Breyer, JJ., joined as to Parts I and II. Scalia, J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined, and in which Alito, J., joined as to all but Parts I, II-C-1, and III-B-2. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined as to Parts I through III. Roberts, C. J., took no part in the consideration or decision of the case.[1]

If the rule of law means anything and if the law should in any way be a guide to behavior, it is challenging, to say the least, to expect the rule of law to be followed by law-abiding public officials and citizens in a context where the Supreme Court itself is fragmented in more ways than a windshield hit by a tombstone.

The Justice Department's responsibility is to advise the administration. There is not a group of individuals more dedicated to giving the correct advice and counsel to the President of the United States than Justice Department lawyers. I am not talking about Republicans or Democrats. I have never met a person in the Justice Department who did not sincerely desire and attempt in every respect to offer the best advice.

The Justice Department's advice in regard to defense policy was given on numerous occasions and was tested in court. The Supreme Court ruled in four notable cases: *Rasul v. Bush*,[2] *Hamdi v. Rumsfeld*,[3]

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1 548 U.S. 557, 564 (2006) (syllabus).

2 542 U.S. 466 (2004).

3 542 U.S. 507 (2004).

Hamdan v. Rumsfeld,[4] and *Boumediene v. Bush*.[5] The Supreme Court overruled the Justice Department and the lower courts in some measure in each of the cases.[6] At the Court of Appeals level, in the four cases mentioned, all but one judge voted with the Justice Department.[7]

What would cause that many judges of the Courts of Appeals to misunderstand what the Supreme Court would later recite as the law? The Courts of Appeals are a little closer in time to the real events, possibly making concepts like "necessity" have a different influence on the decisionmaking. The Courts of Appeals are also bound by precedent in ways that the Supreme Court does not see itself bound. Regardless, it is curious that the American legal system operates in such a way that makes it most difficult for even Courts of Appeals judges to anticipate the correct disposition of vital national security issues.

In such a matrix of uncertainty, when the solution is—according to some members of the federal judiciary—that we need public officials who are willing to violate the law and then throw themselves upon the mercy of the public in order to save the democracy from attack, you begin to grasp the importance of discussing these issues and coming to a resolution that actually confronts the new paradigm of peril with appropriate plans for prevention. It should not, however, involve ways that call upon public officials somehow to be expected to disobey the law.

The defense of freedom is the single most important responsibility we have. The maintenance of a culture in which people grow by virtue of their freedom to be creative and productive is at the top of all of our lists.

There are numerous cultures that might allege they are better than other people, but we cannot be better than other people because we *are* other people. It is the character of freedom in our culture that makes this the best place, hands down, for anybody from anywhere. We are all

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[4] *Hamdan*, 548 U.S. 557.

[5] 128 S. Ct. 2229 (2008).

[6] *Id.* at 2275 (overruling the Government's use of the Detainee Treatment Act as an adequate review procedure for habeas corpus petitions); *Hamdan*, 548 U.S. at 613 (overruling the Government's use of military commissions to punish individuals criminally as violations of the Uniform Code of Military Justice and the Geneva Conventions); *Hamdi*, 542 U.S. at 535 (rejecting the Government's insistence under separation of powers principles on a limited role for the courts during a state of war); *Rasul*, 542 U.S. at 484 (granting the federal courts jurisdiction to hear habeas corpus petitions from executively detained aliens at Guantanamo Bay over the Government's objection).

[7] *See* Boumediene v. Bush, 476 F.3d 981, 984 (D.C. Cir. 2007) (Judges Randolph and Sentelle voting in favor the Justice Department's position); Hamdan v. Rumsfeld, 415 F.3d 33, 35 (D.C. Cir. 2005) (Judges Randolph, Roberts, and Williams voting in favor the Justice Department's position); Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003) (Chief Judge Wilkinson, Judges Wilkins and Traxler voting in favor the Justice Department's position); Al Odah v. United States, 321 F.3d 1134, 1135 (D.C. Cir. 2003) (Judges Randolph, Garland, and Williams voting in favor the Justice Department's position).

from someplace else. It is the nature of our freedom that makes the difference. We need to be clear about the fact that it must be defended. We must provide a capacity for the defense of freedom that is intelligible enough for people to be able to make good decisions and to make those decisions with character and integrity.

THE EFFECT OF U.S. LEGISLATIVE EFFORTS TO ENHANCE NATIONAL SECURITY†

*Admiral Vern Clark**

I was the Chief of Naval Operations on September 11, 2001. In fact, I was in the Pentagon that day. If you have ever been to the Pentagon, you know that it is designed with a hub and spoke arrangement. The airplane that hit the building that day, American Airlines flight 77, slammed into the Pentagon between spokes four and five;[1] my office was right at the end of spoke six. The plane that day went all the way through two of the rings, and penetrated into the third ring.[2] And in the third ring, it went into my command center. And, of course, we all know what happened after that.

I am still taken by our focus on our ability to enhance national security in the reflection of what happened immediately after 9/11. If you recall your history, the President was not in Washington that day and so he spent much of that day and the next circling around in airplanes[3]—all the things that would happen naturally when an event like this occurs, and the nation faced a real crisis.

I remember vividly on the twelfth of September when the President came to the Pentagon to meet personally with the senior national security leaders. Shortly after 9/11, on the twentieth of September, the President addressed the nation and the combined houses of Congress.[4] I will never forget that evening. Typically, for the State of the Union

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† This Essay is adapted for publication from a panel discussion presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies National Security Symposium at Regent University School of Law, September 27, 2008. The panel discussed recent legislation affecting national security. Speakers included: Admiral Vern Clark (ret.), Chief of U.S. Naval Operations; Professor A. John Radsan, William Mitchell College of Law; and Professor Gregory S. McNeal, Penn State Dickinson School of Law. The panel was moderated by Professor Robert W. Ash, Regent University School of Law.

* Admiral Vern Clark completed a distinguished thirty-seven year career with the United States Navy in 2005. His Navy experience spans his early days in command of a Patrol Gunboat as a Lieutenant and concluded in the halls of the Pentagon as the Chief of Naval Operations and a member of the Joint Chiefs of Staff. Admiral Clark now serves as Distinguished Professor in the schools of Government and Leadership at Regent University.

1 Brian J. Roberts, *The September 11th Attack on the Pentagon*, http://pentagon.spacelist.org (last visited Apr. 10, 2009).

2 *Id.*

3 *See* OUR MISSION AND OUR MOMENT: PRESIDENT GEORGE W. BUSH'S ADDRESS TO THE NATION BEFORE A JOINT SESSION OF CONGRESS, SEPTEMBER 20, 2001, at 26–29 (Newmarket Press 2001).

4 147 CONG. REC. 17,320 (2001) (statement of President George W. Bush).

Address the Joint Chiefs of Staff sit on the left side of the front row. On the twentieth of September, however, we were right in the middle of the front row.

The world knew, and certainly the President knew, that the United States military was going to be called to action. That night, about half way through his address to the nation, the President said, "I have a message for our military: Be ready."[5] It was as if he was pointing his finger right at us and the 1.2 or 1.3 million men and women who wear the U.S. military uniform, what I call the "cloth of the nation." He said, "The hour is coming when America will act, and you will make us proud."[6] As you can imagine, we all listened attentively to that message.

He also said that we have an enemy, a new enemy, an enemy that has focused our attention.[7] He said that we are going to pursue that enemy and all who harbor them.[8] My ears perked up: I knew that for this nation and the instruments of government to meet that challenge, some things were going to have to change. The "all who harbor them" message was new policy.

In the post-operational world of 9/11, I am the only Chief of a military service and the only member of the Joint Chiefs of Staff who said in a very public way that I did not think my Navy was effectively postured to deal with the post-9/11, twenty-first century challenges that it faced—the ability to operate and to have the kind of resources that we needed in a post-9/11 world.

The President said we are going to use all the elements of national power to pursue this enemy and all who harbor them.[9] I believe the issue for America today, and certainly for our discussion about the performance of Congress, is whether all of the institutions of government are correctly and effectively postured to deal with the world we have today. By the way, that means the world we really have today; not the world that we had five years ago, or the world we had a decade ago, or even twenty-five years ago—but the one we really have today. I guess it goes without saying: the world that we have, not the world that we wish we had.

As an evolving leader, I learned that I needed a model on how to spend my time and organize my life. I was tasked with finding out how a CEO would spend his or her time as a CEO. And I got to command a lot of things, so I had ample opportunity to apply the lessons of my study.

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5 *Id.* at 17,321.

6 *Id.* at 17,322.

7 *See id.* at 17,321.

8 *Id.* ("[W]e will pursue nations that provide aid or safe haven to terrorism. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.").

9 *Id.*

I took to a particular model that says leaders of organizations might consider spending one-third of their time on the touchstones. When I talked to our folks in the Navy, I would say, "If we were running General Motors, our touchstones might be our customers, our auto dealers, our suppliers, and certainly our labor market, our banker, and the kind of groups that if we did not have a wonderful relationship with them, we would fail." Under this model, the leader would spend one-third of his time on the touchstones, one-third on executive placement and development, and one-third on evaluating the product of the plan. One of my mentors, a CEO of a medium-sized company, taught me in my personal growth and development walk that if he did not have an effective touchstone relationship with his banker, he could be out of business in a week. In other words, if the banker called one morning and said he had a ten million dollar short-term commercial arrangement for you to finance your manufacturing process, then he called back later and said, "Now you have only one million dollars," my friend the manufacturer said he would be out of business in a week. When I got to be the Chief, I started ticking off who my touchstones were, and a major touchstone for me was Congress—because it was my banker.

Congress—this entity inside the government that makes the ultimate investment decisions in the national security arena—must develop the mechanisms and the means to effectively integrate the investment strategy of the United States of America in the national security arena. Obviously, we all understand Congress is responsible for the enactment of laws, policies, and rules.[10] They also act as the banker of the institutions of government for the capabilities the government is going to pursue[11]: in the course of our discussion today, specifically in the arena of national security. In my leadership walk, I have come to the conclusion that when we summarize the work of leaders, who direct and run organizations, we find that leaders get to commit resources—not just fiscal resources, but all of the resources. For the government, Congress is that leader. Congress gets to commit the resources.

I looked at Congress from the standpoint of how it was going to commit resources. Every resource commitment decision it made said a lot about Congress, how it defined itself, what it believed in, and who it was going to be. Of course, over time and since 9/11, we have seen Congress legislate into existence new structures, which include the Director of National Intelligence.[12] The Intelligence Reform and Terrorism Prevention Act of 2004 had a big impact on the Director of the

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[10] U.S. CONST. art. I, § 8.

[11] *Id.*

[12] Intelligence Reform and Terrorism Prevention Act of 2004 § 1011, 50 U.S.C. § 403 (Supp. V 2006) (establishing a Director of National Intelligence position).

Central Intelligence Agency and what his authorities would be, as well as how the Director and the institution were going to pursue their mission in the days to come.[13] There was much debate about the pros and cons of the Act and its impact on the Central Intelligence Agency. Ultimately, Congress made a number of changes to the uniform command structure of the Department of Defense.[14] This means Congress made changes to the particular responsibilities of organizations globally postured around the world. And of course, one of the most famous things Congress did was establish the Department of Homeland Security.[15]

I conclude with this observation: the President said we were going to use all of the elements of national power.[16] When we talk about national security, we tend to think solely about those organizations that have "defense" somehow, either very closely or loosely, associated with the national security thought process.

The task before Congress and the nation today is to engage in the task and mission that the President gave us shortly after 9/11. That mission is to *effectively* engage all of the elements of national power in this process, not just the Department of Defense. It certainly involves the Department of Justice. It is also certainly about diplomacy and the role of the Department of State. I am one of many individuals who believe that there are great resource limitations that constrain the ability of the diplomacy arm of our government.

Other departments, like the Department of Commerce and the Department of Energy, are not properly resourced. I happen to sit as a member of a group that believes energy security is one of the major issues facing us today.[17] Of course, T. Boone Pickens has become famous for his television advertisement stating that seven hundred billion dollars is going to other nations—some which do not like us—every year to pay for oil.[18] So is the Department of Energy doing what it should be doing to protect our national security?

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[13] *See generally* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, tit. I, 118 Stat. 3638 (codified as amended in scattered sections of 5, 6, 18, and 50 U.S.C.).

[14] *Id.*

[15] Homeland Security Act of 2002, 6 U.S.C. § 111 (2006).

[16] 147 CONG. REC. 17,320, at 17,321 (2001) (statement of President George W. Bush).

[17] Securing America's Future Energy, A Change to Our National Security, http://www.secureenergy.org/site/page.php?node=358 (last visited Apr. 10, 2009); Securing America's Future Energy, Energy Security Leadership Council Members, http://www.secureenergy.org/site/page.php?node=376&project=2 (last visited Apr. 10, 2009).

[18] *T. Boone Pickens Videos*, http://www.pickenssupporters.com/ video.cfm (last visited Apr. 10, 2009).

We need to ask ourselves this question and others: what about agriculture, interior, labor, education, and transportation departments? There are major issues in the Department of Transportation—not just protecting particular routes in a subway, but rather our capability to respond to all kinds of global challenges. And what about Treasury? Secretary Paulson is at the forefront of our attention today. Finally, how does his role, and the strength of the dollar, affect the security posture of the United States of America and what we observe with regard to our economic security today?

While I am not an expert on each of the Departments of our government outside the Department of Defense, I do not believe they are correctly postured to do the kinds of things that need to be done in the post-9/11 environment. Those resource limitations largely still exist. So what happens? Over time, the organization with the bulk of the resources ends up with the bulk of the responsibilities and the bulk of the mission. And that is the Department of Defense.

As a naval officer who had the opportunity to observe the pursuit of our national security at a fairly high level in the government, I would say the U.S. military has been overused in the pursuit of a solution to the challenges that we face in dealing with the national security challenges of the United States of America. It has been overused because all of the other elements of national power are not properly resourced and equipped to take on the challenge in front of us.

The nation is now at war. Interestingly, through all of this, Congress is left with the single task of integrating all of this cross-governmental activity from a policy and resourcing point of view; to equip them and enable them to take on the tasks before them; to act as the prime integrator inside the government to take on these tasks. We must look at the changes that have been made and ask ourselves the question: is Congress up to that task?

CHANGE VERSUS CONTINUITY AT OBAMA'S CIA†

*A. John Radsan**

Sweeping change is necessary at the Central Intelligence Agency ("CIA"). During President Barack Obama's transition into office, change should go deeper than usual between administrations. To restore the trust of the American people and to regain the confidence of the international community, the CIA needs to do better.

These comments might make me sound like a reformer, and you may wonder if I am a Democrat or a Republican. It does not matter, because this applies across the parties. Deeper change is necessary within the CIA offices of the Director, General Counsel, and Inspector General. The CIA has failed the American people and created a perception that security has come at the expense of fundamental rights. As a justice of the Supreme Court of Israel said, "Sometimes, a democracy must fight with one hand tied behind its back."[1] That is what makes the United States better than the people it is up against.

I will outline three areas for legislative change relating to my former employer, the CIA. The first proposal is to have a national security court for the trials of terrorists. The second is to permit the CIA to continue to have an exception to pursue aggressive interrogations with a lot of oversight and checks. The third is to continue the process of rendition or the transfer of suspected terrorists with more oversight and checks.

I. PROPOSAL FOR A NATIONAL SECURITY COURT

The first proposal is the creation of a national security court to deal with the trials of suspected terrorists. By a national security court, I mean something different from the criminal justice system—the Article

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1 Aharon Barak, President (Chief Justice), Supreme Court of Isr., Keynote Address to the Brandeis Univ. Class of 2003 (May 18, 2003), http://my.brandeis.edu/news/item?news_item_id=101585 (discussing the importance of law and individual rights even while fighting a war).

III courts that were used in prosecuting Zacarias Moussaoui,[2] Jose Padilla,[3] and the people involved in the first attack on the World Trade Center.[4] We need something different. I will not go into detail, but I would like to claim some ownership here. There is much writing in this area, and I am part of the group that says terrorism cases cannot all be handled through the criminal courts. I am not necessarily in favor of Guantanamo Bay. I am not in favor of court martial under the Uniform Code of Military Justice ("UCMJ") for suspected terrorists.[5] Instead, we need a national security court that blends what works in the criminal justice system with adjustments that take into consideration this new threat.

I differ from the Bush Administration because I think it was a profound mistake to try to create a new type of court by executive order based solely on the President's prerogative.[6] Instead, Congress should sort out the intricacies through congressional hearings and then pass a statute for special trials that protect the intelligence community's sources and methods. I am spreading the blame, but it is fair to say that Congress has let the United States down. Congress has not done enough to think through these difficult issues—in the seven years since September 11, 2001, there is still no consensus on what the legal framework is going to be for dealing with terrorism cases.[7]

During the last presidential campaign, the media let the American people down. I understand the importance of energy security and economic security—these are also important issues—but the media would have served the American people well by simply asking the candidates whether they were for a national security court.

The idea of a national security court is fashionable now. It has some proponents, including one who formerly wrote for *The Washington Post*,[8] and other professors.[9] Commander Glenn Sulmasy was probably one of

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[2] *See* United States v. Moussaoui, 483 F.3d 220, 223 & n.1, 224 (4th Cir. 2007).

[3] Rumsfeld v. Padilla, 542 U.S. 426, 430–31 (2004). Padilla was first held in the criminal justice system, transferred to military custody, and then transferred back to the criminal justice system for trial in Miami, Florida.

[4] *See* United States v. Salameh, 856 F. Supp. 781, 782 (S.D.N.Y. 1994) (listing individuals convicted for World Trade Center bombing).

[5] Uniform Code of Military Justice, 10 U.S.C. § 816 (2006).

[6] *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror § 4, 66 Fed. Reg. 57,833, 57,834–35 (Nov. 13, 2001).

[7] *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240–42, 2277 (2008) (discussing the varied attempts the U.S. government has undertaken to bring detainees to justice and concluding that "the law . . . . is a matter yet to be determined" for detainee cases).

[8] *Workable Terrorism Trials: A Special Federal Court Could Balance Fundamental Rights and National Security Needs*, WASH. POST, July 27, 2008, at B6.

[9] Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

the first to publicly advocate for a national security court.[10] I also wrote on the topic at length in the *National Law Journal*[11] and *Temple Law Review*.[12] I have consistently supported the idea of a national security court.

The national security court should be modeled after something like the FISA Court to review who goes into the program and to ensure compliance with the rules.[13] The Inspector General of the CIA, the General Counsel of the CIA, and the oversight committees should not be blindly trusted to monitor secret proceedings. Instead, another branch of government or its representative should monitor this program.

II. INTERROGATION REFORM FOR THE CIA

The second area I propose for legislative change is a special set of rules for the CIA. Should the CIA use interrogation tactics that differ from what Federal Bureau of Investigation agents can use in the criminal justice system or from the rules that investigators for the Department of Defense can use under the Army Field Manual? The CIA should be able to use different tactics, I say, subject to some checks and controls in the proposed legislation.

To review the current legal markers of what covers interrogation, you may refer to the U.S. Constitution. But you can also look at the Military Commissions Act[14] ("MCA"). Congress passed the MCA in response to the *Hamdan v. Rumsfeld* decision, which held that the President's military commissions in Guantanamo were illegal because they did not comply with Common Article 3 of the Geneva Conventions as incorporated through the UCMJ.[15] The MCA amended the War Crimes Act, permitting the President discretion to decide what tactics would be consistent with Common Article 3.[16] As a result, President Bush issued a secret executive order.[17] The Bush Administration operated in an intermediate zone of tactics beyond what the criminal

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[10] Glenn Sulmasy, Op-Ed., *The National Security Court: A Natural Evolution*, JURIST, May 10, 2006, http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php.

[11] A. John Radsan, Op-Ed., *Unfinished Business*, NAT'L L.J., July 24, 2006, at 30.

[12] A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1233, 1244–46, 1288 (2006).

[13] Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1811 (2000 & Supp. III 2004). The FISA Court, also known as the Foreign Intelligence Surveillance Court, was established to deal with matters of electronic surveillance. *Id.*

[14] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

[15] 548 U.S. 557, 567, 635 (2006).

[16] Military Commissions Act of 2006 sec. 6(a)–(b), 120 Stat. at 2632–35 (codified as amended in 18 U.S.C. § 2441 (2006)).

[17] *See* John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 31.

justice system would permit for a crime suspect, while insisting its actions did not fall within the definition of torture.[18] I agree with Elisa Massimino that an interrogation tactic such as waterboarding is torture;[19] but I think we disagree on what tactics we are willing to permit the CIA to use, as matters of law and policy.

When I think about aggressive interrogation, I have Khalid Sheikh Mohammed in mind.[20] When he was captured in March of 2003, in what was thought to be a joint operation between Pakistani intelligence agencies and the CIA,[21] President Bush had to decide whether to allow Khalid Sheikh Mohammed access to the criminal justice system and all it entails. This would include access to a lawyer, an obligation to appear before the nearest available magistrate, and the beginning of the criminal process. Access to a lawyer would almost inevitably result in advice not to talk to the government unless Khalid Sheikh Mohammed received a plea agreement in exchange. It is unlikely, however, that President Bush would have been able to plea bargain with Khalid Sheikh Mohammed.

In 2003, Americans had a heightened sense of urgency—a sense of fear that there may be more attacks on the United States. President Bush made a decision that we needed to interrogate Khalid Sheikh Mohammed more aggressively than is allowed by the criminal justice system.[22] I am not supporting black sites.[23] I am not supporting

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[18] *See* Condoleezza Rice, Sec'y of State, Remarks Upon Her Departure for Europe at Andrews Air Force Base (Dec. 5, 2005), http://2001-2009.state.gov/secretary/rm/2005/57602.htm.

[19] Mark Benjamin, *The CIA's Favorite Form of Torture*, SALON.COM, June 7, 2007, http://www.salon.com/news/feature/2007/06/07/sensory_deprivation (quoting Elisa Massimino during a discussion of "what worries human rights advocates" as stating, "'People finally came to an understanding of what waterboarding really was, and once that happened, it was no longer sustainable'"). Waterboarding is "the technique of strapping a subject to a board with his feet raised and pouring water on his face to produce a sensation of imminent death." *Id.*

[20] Khalid Sheikh Mohammed is a career terrorist and the mastermind of the 9/11 attacks. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 145–47 (2004), http://govinfo.library.unt.edu/911/report/911Report.pdf.

[21] *See* Erik Eckholm, *Pakistanis Arrest Qaeda Figure Seen as Planner of 9/11*, N.Y. TIMES, Mar. 2, 2003, at 1.

[22] *Bush Admits to CIA Secret Prisons*, BBC NEWS, Sept. 7, 2006, http://news.bbc.co.uk/2/hi/americas/5321606.stm (noting President Bush's view that new questioning has "helped us to take potential mass murderers off the streets before they have a chance to kill").

[23] Black sites were secret, overseas interrogation centers used predominately by the CIA. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ON THE RECORD: U.S. DISCLOSURES ON RENDITION, SECRET DETENTION, AND COERCIVE INTERROGATION 11, 15–16 (2008) (referring to black sites as CIA's "secret facilities," "secret prisons," and "covert prisons"), *available at* http://www.chrgj.org/projects/docs/ontherecord.pdf.

waterboarding. But I am carving out the possibility for more aggressive interrogations on someone like Khalid Sheikh Mohammed. As I have previously stated, "As a society, we haven't figured out what the rough rules are yet . . . . There are hardly any rules for illegal enemy combatants. It's the law of the jungle. And right now we happen to be the strongest animal."[24]

What I propose, in order to find some common ground with my opponents in the human rights community, is to incorporate more checks on the CIA while allowing these enhanced tactics to be used on a limited number of people considered to be high-value detainees. In contrast to the view of the Bush Administration, I do not think the actual tactics need to be classified. I understand that the "bad guys" may train against tactics if we announce which techniques are permitted. But the "bad guys" already have some sense of the interrogation techniques currently used.[25] Plus, any loss in the value of that intelligence is far outweighed by the gain of transparency, which would help the American public and the world buy into these interrogation efforts to defeat terrorism.

It is a principled debate, but if you believe that the government should limit itself to the criminal justice system in trying terrorists, and we have another attack—which sadly, I think we will—then I hope you will not blame your politicians for not doing what they think should be done to people like Khalid Sheikh Mohammed. Their view of what should be done, sadly, is informed by televisions programs like *24* rather than helpful programs like this Symposium and the reading of deep, knowledgeable materials about the very important tactics of how to interrogate high-level terrorists.[26]

Transparency is key. I would publish a list of available tactics. Then there would be no guessing game where it is unclear which tactics are permitted. Is sleep deprivation permitted? Sensory deprivation? Bombarding with music? Imagine listening to Madonna—maybe that would be fine for five or ten minutes. But what if Madonna is played for twenty-four hours, and it is played loudly? These are serious questions that need answers. I understand that these tactics cannot be considered in isolation; it is necessary to talk about the cumulative effect—the long-

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[24] Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 123.

[25] Greg Jaffe & David S. Cloud, *Investigators Cope with Curbs in Iraq on Interrogation*, WALL ST. J., Aug. 25, 2004, at A3.

[26] Dahlia Lithwick, *The Fiction Behind Torture Policy*, NEWSWEEK, Aug. 4, 2008, at 11 ("[T]he star of Fox television's '24,' Jack Bauer. . . . has his fingerprints all over U.S. interrogation policy. . . . [T]he lawyers designing interrogation techniques cited Bauer more frequently than the Constitution."); Evan Thomas, *'24' Versus the Real World*, NEWSWEEK, Sept. 20, 2006, http://www.newsweek.com/id/45788 (discussing the impact that the FOX Network television show *24* has had on the views of Americans toward torture).

term effect on both the person being interrogated and the interrogator. But the law deals with difficult issues. This is one more difficult issue that needs to be sorted out.

Strict limits should be put on the number of people that can be subject to these interrogation tactics. Legislation should build in a low number that binds the President for this special program. This number could be classified, but the President could be required to designate in advance those people who, if captured, the government would like to use enhanced interrogation tactics against. I think most Americans would agree that in February of 2003, Khalid Sheikh Mohammed would have been on that list.

Flowing from my idea of a national security court, I say defense counsel should not be present during the beginning of the interrogation process. Interrogators should have a one-on-one relationship with the detainees who may have important information that could make us all safer if disclosed. I understand, however, that putting an interrogator in a room without an outside monitor from another agency creates the possibility for abuse. Therefore, it would be sensible to borrow from other systems and incorporate an ombudsman, who should have a security clearance.[27] The ombudsman would serve as another check to help keep the process honest. Furthermore, videotaping the interrogations and making sure the tapes are not destroyed create accountability. If people destroy the tapes, they should be accountable for their crimes. This proposal creates a limited exception for the CIA—an exception that allows for necessary interrogation tactics. The government should not authorize invasions of countries based on a tidbit of information that comes out of the detainee's mouth without first comparing and corroborating it with other sources of information. We do, however, want to get the detainee talking.

III. EXTRAORDINARY AND IRREGULAR RENDITION

The third proposal centers around rendition. Extraordinary or irregular rendition must continue. What is rendition? Rendition is the transfer of individuals—in this case suspected terrorists—from one jurisdiction outside the United States to another,[28] and may be used to bring someone to trial or gather intelligence.[29]

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[27] Other governmental departments have established ombudsmen. *E.g.*, 6 U.S.C. § 272 (2006) (creating ombudsman for the Department of Homeland Security); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 101, 110 Stat. 1452, 1455–56 (1996) (codified as amended at 26 U.S.C. § 7811 (2006)) (changing title of "ombudsman" to "taxpayer advocate" although responsibilities are quite similar).

[28] BLACK'S LAW DICTIONARY 1322 (8th ed. 2004) (defining rendition).

[29] Ingrid Detter Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C. J. INT'L L. & COM. REG. 657, 662 (2008).

What is the alternative? The alternative is to do extradition, a formal process that involves the courts and foreign ministries of the countries involved.[30] Why is extradition not possible in all cases? The United States does not have the cooperation of all countries. Why does the United States need to use extraordinary or irregular rendition? There are some "bad guys" and "bad gals" that the United States needs to bring to justice or bring into a situation where information can be gathered.

We are taught, because of the good reporting of Jane Mayer and others, to sneer whenever we hear the word "rendition."[31] If the sole purpose of rendition is to transfer someone to another place to torture him, then of course rendition is wrong—no reasonable person can be in favor of that. Rendition for the purpose of torture is off limits. But if you feel yourself being trained to say that rendition is horrible, think of all the people who were held in Guantanamo. The human rights community wants to release many of them, claiming that they are not a threat, that there is no need to hold them, and that Guantanamo is a stain on our reputation.[32] The process by which they would be transferred to their home countries or third countries is irregular rendition, as I define it. It is not extradition.

Cases which involve the risk of torture or improper treatment by the receiving country create a need to negotiate. Assurances of fair treatment and proper monitoring reduce the risk of torture. Rendition can work, and the United States needs the ability to transfer suspected terrorists. The United States does not need to use rendition as frequently as it has. We should not outsource to other countries—having other countries interrogate our prisoners in a way that is more aggressive than we ourselves permit. Instead, allowing for enhanced interrogation techniques reduces the temptation to send detainees to other countries with harsher interrogation tactics than U.S. law allows.

Again, my proposals seek to find a middle ground to tie a reformer's thread with a conservative thread. I would involve the secret court to monitor irregular rendition, and I have moved forward with this idea in

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[30] *See id.* at 659–61.

[31] Mayer, *supra* note 24, at 107, 118 (equating the term "rendition" with various forms of abuse); *see also* Reuel Marc Gerecht, Op-Ed., *Out of Sight*, N.Y. TIMES, Dec. 14, 2008, at 11 (equating "extraordinary rendition" with abuses).

[32] *See, e.g., Military Commissions Act and the Continued Use of Guantanamo Bay as a Detention Facility: Hearing Before the H. Comm. on Armed Servs.*, 110th Cong. 112–13, 116–18 (2007) (statement of Elisa Massimino, Washington Director, Human Rights First).

my writing.[33] We have had too many mistakes and too little accountability in the current program. I respect the work of Elisa Massimino and others who are saying that we need checks.[34] The human rights community says rendition should be banned,[35] but it should consider the case of Adolf Eichmann who was brought to Israel for trial for his war crimes by rendition from Argentina, although Israel did not get Argentina's permission to do so.[36] Renditions, in special cases, make sense.

I propose fewer renditions and much better oversight of them with a secret court and a new regime at the CIA in the offices of the Inspector General and the General Counsel. Rendition will continue and should continue. It is not something that was invented by the Bush Administration; renditions were also done in the Clinton Administration.[37] What has evolved—from what we can tell in the public record—is that rendition occurs more now for interrogation rather than to bring people to justice. And there have been more renditions after 9/11 than under the Clinton Administration.[38]

For the CIA, there will be both change and continuity under President Obama. A national security court is a big change that is necessary. By contrast, aggressive interrogations and irregular renditions are tactics that should continue with small changes through new personnel and new controls.

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[33] *See generally* A. John Radsan, *Irregular Rendition's Variation on a Theme by* Hamdi, 33 N.C. J. INT'L L. & COM. REG. 595 (2008); A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1, 54–56 (2006).

[34] Elisa Massimino & Avidan Cover, *While Congress Slept*, HUM. RTS., Winter 2006, at 5, 5, 8–10; Kenneth Roth, *Why the Current Approach to Fighting Terrorism Is Making Us Less Safe*, 41 CREIGHTON L. REV. 579, 592–93 (2008).

[35] *See* AMNESTY INT'L, BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND 'DISAPPEARANCE' 31 (2006), *available at* http://www.amnesty.org/en/library/info/AMR51/051/2006 (recommending the ban of renditions unless certain procedures are followed).

[36] James Paul Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259, 273 (2006).

[37] Frankopan, *supra* note 29, at 665.

[38] *Id.*

ORGANIZATIONAL THEORY AND COUNTERTERRORISM PROSECUTIONS: A PRELIMINARY INQUIRY†

*Gregory S. McNeal**

INTRODUCTION

This Essay is a preliminary organizational theory inquiry into potential issues resulting from the creation of the National Security Division,[1] the first new division in the Department of Justice ("DOJ") in nearly fifty years.[2] My goal is to outline a preliminary research agenda, setting the stage for scholars who seek to analyze in greater detail the legal and theoretical issues identified in this Essay. I approach these issues in an interdisciplinary fashion, explicitly detailing different organizational theory methods of analysis and applying them to legal problems raised by the creation of this new DOJ entity. Accordingly, Part I describes the creation of the National Security Division and the reorganization associated with its creation. Part II introduces four theoretical approaches drawn from the organizational theory literature. After providing a basic explanation of each approach, I will demonstrate the utility of organizational theory by applying it to select aspects of the National Security Division. The Essay concludes by synthesizing the observations detailed in Part II and suggesting a research agenda that could expand upon those findings.

I. THE REORGANIZATION OF THE DOJ

On March 9, 2006, the President signed legislation that created the National Security Division—the first new division in the DOJ in nearly

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† This Essay is adapted for publication from a panel discussion presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies National Security Symposium at Regent University School of Law, September 27, 2008. The panel discussed recent legislation affecting national security. Speakers included: Admiral Vern Clark (ret.), Chief of U.S. Naval Operations; Professor A. John Radsan, William Mitchell College of Law; and Professor Gregory S. McNeal, Penn State Dickinson School of Law. The panel was moderated by Professor Robert W. Ash, Regent University School of Law.

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1 USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, sec. 506(b)(1), 120 Stat. 192, 248–49 (codified at 28 U.S.C. § 509A (2006)).

2 Kenneth L. Wainstein, *Message from the Assistant Attorney General* to U.S. DEP'T OF JUSTICE, NATIONAL SECURITY DIVISION PROGRESS REPORT (2008) [hereinafter NSD REPORT], *available at* http://www.usdoj.gov/nsd/docs/2008/nsd-progress-rpt-2008.pdf.

fifty years.[3] Some notable aspects of the National Security Division are its ability to: 1) control investigations regarding terrorist threats, 2) determine which terrorism-related cases U.S. attorneys will prosecute, 3) review and authorize national security surveillance techniques, and 4) exercise control over the sharing and disclosure of intelligence information.[4]

The Counterterrorism Section was one of three primary national security components within the DOJ that The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction ("WMD Commission") recommended be consolidated into a single national security division.[5] The WMD Commission noted that the Department's three primary security components "remained separated from one another, reported through different chains of command, and were located in separate parts of the Department."[6] The WMD Commission further concluded that the Department failed to take full organizational advantage of recent governmental reforms aimed at improved coordination.[7] The WMD Commission further argued, "One of the advantages of placing all three national security components under a single Assistant Attorney General is that they will see themselves as acting in concert to serve a common mission."[8] When President George W. Bush signed the legislation that acted upon these recommendations and created the National Security Division, he stated that the creation of the Division

> "allow[s] the Justice Department to bring together its national security, counterterrorism, counterintelligence and foreign intelligence surveillance operations under a single authority [and] . . . fulfills one of the critical recommendations of the WMD Commission: It will help our brave men and women in law enforcement connect the dots before the terrorists strike."[9]

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[3] Patriot Improvement and Reauthorization Act of 2005 sec. 506, § 509A, 120 Stat. 192, 248–49 (codified at 28 U.S.C. § 509A); NSD REPORT, *supra* note 2, at 39.

[4] *See* NSD REPORT, *supra* note 2, at 11–12, 18, 21.

[5] *Id.* at 1–2; THE COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 471 (2005) [hereinafter WMD COMMISSION], *available at* http://www.gpoaccess.gov/wmd/pdf/full_wmd_report.pdf (recommending consolidation of the Office of Intelligence Policy and Review and the Counterterrorism and Counterespionage sections).

[6] NSD REPORT, *supra* note 2, at 1–2; WMD COMMISSION, *supra* note 5, at 472.

[7] NSD REPORT, *supra* note 2, at 2; WMD COMMISSION, *supra* note 5, at 472 ("Major changes were made at the CIA, FBI, and Department of Homeland Security. The core organization of the Justice Department, however, did not change at all.").

[8] WMD COMMISSION, *supra* note 5, at 472.

[9] Press Release, U.S. Dep't of Justice, Fact Sheet: Department of Justice to Create National Security Division (Mar. 13, 2006), http://www.usdoj.gov/opa/pr/2006/March/06_opa_136.html (quoting President George W. Bush).

While his statement may be true, the reorganization also fundamentally altered the organizational structure and culture of the Counterterrorism Section (the prosecutors responsible for counterterrorism prosecutions). Before the reorganization, the prosecutors of the Counterterrorism Section were part of the Criminal Division, supervised by an Assistant Attorney General with criminal law responsibilities.[10] After the creation of the National Security Division, the prosecutors of the Counterterrorism Section were moved out of the Criminal Division and placed under the supervision of an Assistant Attorney General with extensive ties to the intelligence community.[11]

According to the Senate Intelligence Committee report accompanying the legislation that created the National Security Division, the new division is a "full element of the Intelligence Community."[12] The Assistant Attorney General for National Security who leads the Division can only be appointed with the approval of the Director of National Intelligence ("DNI") and reports to the DNI and the Attorney General.[13] The DNI enjoys full supervisory authority over all aspects of the Assistant Attorney General's work functions except he may not "execute" any law enforcement powers.[14] In short, what may outwardly appear as a mere rearranging of boxes on an organizational chart is rather a fundamental change from a law enforcement mindset and culture to an intelligence mindset and associated intelligence culture surrounding the prosecutors of the Counterterrorism Section.

Through this consolidation, the reorganizers sought centralized management that situates a quasi-intelligence agent at the head of the National Security Division, one whose appointment is subjected to the approval of and supervision of the DNI. This is in stark contrast to the Counterterrorism Section's prior leadership structure, situated in the Criminal Division. Thus, there exists the potential for tension between the Counterterrorism Section's national security mission and criminal law mission, a point acknowledged by the DOJ, which has described the intelligence-law enforcement tension as a "careful balancing of important competing interests."[15]

The reorganization that took place in the DOJ was, on its face, premised upon a belief in structure and control. Such a belief presumes that all organizational players will perfectly balance their competing

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[10] NSD REPORT, *supra* note 2, at 3, 5.

[11] *Id.* at 3, 5–6.

[12] SELECT COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2006, S. REP. NO. 109-142, at 32 (2005).

[13] *Id.* at 31.

[14] *Id.* at 31–32.

[15] NSD REPORT, *supra* note 2, at 12.

missions, without regard to external influences. As the following discussion will make clear, however, structure is but one factor in the potential success of an organization.

II. FOUR ORGANIZATIONAL THEORY LENSES AND WHAT THEY REVEAL ABOUT THE DOJ REORGANIZATION

A. Classical Theory

1. Classical Theory Generally

Classical organizational theory is grounded in principles of engineering and economics developed during the industrial revolution of the 1700s;[16] it is rational and normative. While the classical school has evolved since its inception, its core theoretical assumptions have been largely unaltered. Those assumptions are:

1. Organizations exist to accomplish production-related and economic goals.
2. There is one best way to organize for production, and that way can be found through systematic, scientific inquiry.
3. Production is maximized through specialization and division of labor.
4. People and organizations act in accordance with rational economic principles.[17]

As these principles make clear, the primary focus of the classical organizational theory is the structure or "anatomy of formal organization."[18] W. Richard Scott refers to this orientation as the "rational perspective," which assumes highly formalized rational collectivities pursuing specific goals.[19] Frederick W. Taylor's seminal work, *The Principles of Scientific Management*, is representative of this orientation in its articulation of processes to structure, rationalize, and control organizations.[20] Similarly representative are the works of Max Weber, whose focus on bureaucracy centered on the importance of rules and hierarchy, and Henri Fayol, who advocated a series of principles to guide and coordinate specialized work activities.[21]

There are key distinctions amongst the various approaches taken by the classical era theorists I have described. Taylor, with a focus on rationalization, studied the worker or lower levels of organizations, and in so doing, sought to translate knowledge from these studies into

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16 JAY M. SHAFRITZ ET AL., CLASSICS OF ORGANIZATION THEORY 28 (6th ed. 2005).

17 *Id.*

18 William G. Scott, *Organization Theory: An Overview and an Appraisal*, J. ACAD. MANAGEMENT, Apr. 1961, at 7, 9.

19 SHAFRITZ, *supra* note 16, at 6.

20 *Id.* at 31–32.

21 *Id.*

scientifically driven management practices.[22] In contrast, Fayol sought to rationalize the efforts of top management.[23] While their unit of focus differed, they both "proposed *one best way* to manage" and "they attempted to develop *rational* techniques that would help in building the structure and processes necessary to coordinate action in an organization."[24]

Taylor believed that identifying and eliminating wasteful steps in worker performance could enhance the efficiency of organizations.[25] To accomplish this end he "sought to simplify tasks so that workers could be easily trained to master their jobs."[26] Taylor, like Weber, focused on competence and believed workers were motivated by money; accordingly, an objective system that rewarded productivity would best accomplish organizational goals.[27]

Fayol, however, posited two management functions: *coordination* and *specialization*.[28] His principles of management were, in his words, "those to which I have most often had recourse."[29] Fayol's belief was that these were "universally applicable principles . . . that could be used to improve management practices."[30] Five of his six principles—technical, commercial, financial, security, and accounting—were deemed less important than his sixth and final principle: managerial.[31] This management principle concerned itself with "division of work, authority and responsibility, discipline, unity of command, unity of direction, subordination of individual interest to general interest, remuneration of personnel, centralization, scalar chains, order, equity, stability of personnel tenure, initiative, and esprit de corps."[32] Such a lengthy list of principles is beyond the scope of this Essay; however, some general themes can be derived from them. Coordination and control are achieved through four of Fayol's principles:

1. The Scalar Principle. The "scalar principle stated that coordination would be aided by a hierarchical distribution of authority in

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[22] *Id.* at 31; B.J. HODGE ET AL., ORGANIZATION THEORY: A STRATEGIC APPROACH 19 (6th ed. 2003).

[23] HODGE, *supra* note 22, at 19.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 20.

[29] HENRI FAYOL, GENERAL AND INDUSTRIAL MANAGEMENT 41 (Constance Storrs trans., 1949), *as reprinted in* SHAFRITZ, *supra* note 16, at 48, 60.

[30] HODGE, *supra* note 22, at 19.

[31] SHAFRITZ, *supra* note 16, at 31.

[32] *Id.*

organization," best achieved through a "pyramid-like structure" of "[a]uthority and control."[33]

2. Unity of Command. The "unity of command" principle posits "that workers should only have to respond to one superior," otherwise conflict may result.[34]

3. Span of Control. The "span of control" principle refers to "the optimal number of subordinates that a supervisor could efficiently and effectively supervise."[35]

4. The Exceptions Principle. The "exceptions principle" posits that top managers should handle unusual problems, and lower level employees should handle routine events and issues.[36]

Specialization, however, was achieved through organizational formation and grouping. The "departmentalization principle" posited that "similar tasks or functions should be grouped within the same department or unit."[37] Furthermore, line and staff functions should be distinguished and separated, with line functions being defined as "those that contribute directly to . . . organizational goals," while staff functions are "support activities" that "are peripheral to the organization's primary goals," and therefore "should be subordinated within the organization's scalar authority structure."[38]

The insights of Luther Gulick in his *Notes on the Theory of Organization* expanded upon the previously established principles.[39] Gulick developed a set of principles of administration that relied upon many of the assumptions found in Fayol's work.[40] In light of those assumptions, Gulick articulated what an executive must do to successfully organize his functional elements. The acronym developed by Gulick was known as "POSDCORB,"[41] which is comprised of the following activities:

- **Planning**: determining that which "need[s] to be done and the methods for doing them to accomplish" organizational goals;[42]

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33 HODGE, *supra* note 22, at 20.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 Luther Gulick, *Notes on the Theory of Organization*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION (Luther Gulick & L. Urwick ed., 3d ed. 1954), *as reprinted in* SHAFRITZ, *supra* note 16, at 79; *see also* SHAFRITZ, *supra* note 16, at 33.

40 *See* SHAFRITZ, *supra* note 16, at 33.

41 *Id.*; Gulick, *supra* note 39, at 13, *as reprinted in* SHAFRITZ, *supra* note 16, at 86.

42 Gulick, *supra* note 39, at 13, *as reprinted in* SHAFRITZ, *supra* note 16, at 86.

- **Organizing:** establishing "formal structure of authority through which work . . . [is] arranged, defined and co-ordinated for the defined objective";[43]
- **Staffing:** handling the personnel functions of bringing in and training staff, and maintaining work conditions;[44]
- **Directing:** making decisions, crafting orders and instructions, and leading the enterprise;[45]
- **Coordinating:** interrelating various parts of organizational work;[46]
- **Reporting:** keeping executives' superiors informed, and as a consequence, informing self and subordinates using "records, research and inspection";[47] and
- **Budgeting:** providing "fiscal planning, accounting and control."[48]

These classical theories and the principles they espouse, when taken together, suggest a normative model of how organizations *should be.* This is evident from their reliance upon a "best way" to organize philosophy. Moreover, the classical theories assume a rational way to control organizational behavior through reliance upon structure. In such an orientation, the organizational chart and control mechanisms embedded within positions and authority are viewed as sufficient measures for achieving—or at least maximizing—organizational goals.

As a normative theory, the classical approach can be criticized for a failure to recognize the reality of how organizations actually behave. Furthermore, its reliance on control techniques and hierarchy as mechanisms of rational control lacks a humanistic dimension and fails to take account of environmental and sociological phenomenon. Moreover, the principles espoused in the classical approach, with their grounding in manufacturing industries and the factory system, may not be generalizable to organizations that produce knowledge or deliver services. These shortcomings will become evident through application of classical theory principles to the Counterterrorism Section of the National Security Division.

2. Classical Theory Insights Regarding the Counterterrorism Section

The rationale for moving the Counterterrorism Section into a new National Security Division is a clear example of classical theory

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43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*

thinking. The WMD Commission, the DOJ, and the President of the United States all accepted arguments that reflect the theories of Fayol, Taylor, and Gulick. The DOJ exhibited a belief that rationally developed techniques for structure and processes could lead to coordinated action, and that formal structures with deliberately prescribed lines of authority and a unified chain of command could further organizational objectives. Below I provide a more detailed explication of these operative principles.

The DOJ, by creating the National Security Division and moving the Counterterrorism Section under a new hierarchy, demonstrated its reliance upon principles of coordination and specialization. The scalar principle, or scalar chain as articulated by Fayol, posits that many activities require "speedy execution" for success.[49] Consequently, the chain of superiors from "the ultimate authority to the lowest ranks," especially in government, may suffer from too many links in the chain, which may cause needless delay or even subordinate action in the "general interest" without direction or authority from superiors.[50] Such a result runs contrary to the principle of unity of command, and may impact upon the principles of directing and coordinating as articulated by Fayol.[51] It appears the DOJ reorganization saw the solution to this challenge as a rationally derived hierarchy that unifies disparate components under a singular management structure and, where necessary, creates coordination of work effort.[52] To achieve this goal, recognition of the limits of human nature, articulated in Gulick's concept of "span of control,"[53] is necessary and was readily apparent in the reorganization approach followed by the DOJ.

In its reorganization efforts, the DOJ embraced these classical organizational theory concepts. In its National Security Division Progress Report, which explains the origins of the Division, the DOJ reaffirmed that its creation and the movement of the Counterterrorism Section into the new division was justified because the three national security components previously in place had "remained separated from one another, reported through different chains of command, and were located in separate parts of the Department."[54] The solution implemented by the DOJ was a pyramid-shaped hierarchical structure led by an Assistant Attorney General for National Security, thus

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[49] FAYOL, *supra* note 29, at 34, *as reprinted in* SHAFRITZ, *supra* note 16, at 56.

[50] *Id.* at 34–35, *as reprinted in* SHAFRITZ, *supra* note 16, at 56–57.

[51] *See id.* at 25–26, *as reprinted in* SHAFRITZ, *supra* note 16, at 51–52.

[52] *See supra* note 11 and accompanying text.

[53] *See supra* note 35 and accompanying text.

[54] NSD REPORT, *supra* note 2, at 1–2 (citing WMD COMMISSION, *supra* note 5, at 472).

unifying disparate components under one leader.[55] Moreover, to ameliorate concerns regarding span of control, three Deputy Assistant Attorney Generals oversee the daily work of the Division.[56]

Furthermore, in the eyes of reformers, the prior system had only one "point of common authority between the intelligence lawyers . . . and the criminal prosecutors."[57] In a clear acknowledgement of the classical theorists' reliance upon hierarchy and rational techniques of control, the DOJ noted, but ultimately dismissed, the utility of effective leadership and personalities. Its Progress Report states, "While each of these components was supervised by dedicated and effective managers, there was no single, clear line of authority and no direct management accountability beneath the Deputy Attorney General for all matters related to national security."[58]

Acting in accordance with its theoretical orientation, the DOJ implemented a leadership reorganization that minimized the perceived inefficiencies represented by a lengthy scalar chain designed to promote the exception principle by pushing decisions farther down the chain of command for resolution. The Department reinforced the hypothesis that it had adopted a classical theory orientation. In explaining the National Security Division's objective of "centralized management," its Progress Report states, "Prior to the creation of the [National Security Division], the Department's national security operations were conducted by several components that worked through different chains of command and varied reporting structures."[59]

The DOJ reorganization also demonstrates sensitivity to the departmentalization principle. The departmentalization principle posits that "similar tasks or functions should be grouped within the same department or unit."[60] This principle is more specifically detailed in the concept of "division of work," in which the workers always work on the same part, and the manager is always concerned with the same effort.[61] While the activity of the Counterterrorism Section does not involve the production of goods, its work effort can be analyzed in analogous fashion. Prior to reorganization, the Counterterrorism Section was led by a Deputy Assistant Attorney General in the Criminal Division, the official who also supervised the Fraud and Appellate sections,[62] which produced

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55 *Id.* at 2–3.

56 *Id.*

57 *Id.* at 5.

58 *Id.*

59 *Id.*

60 HODGE, *supra* note 22, at 20.

61 FAYOL, *supra* note 29, at 20, *as reprinted in* SHAFRITZ, *supra* note 16, at 48.

62 NSD REPORT, *supra* note 2, at 3.

an "output" in the form of investigations, research, and advocacy. These critical tasks, while similar to the work of the Counterterrorism Section, are governed by different goals, subject matter, expertise, and policy concerns. Through reorganization, the division of work that the supervisor of the Counterterrorism Section had been concerned with was necessarily reduced and became focused upon national security related functions. In a related sense, this departmentalization and division of work (or perhaps more accurately, this consolidation of specialized work) facilitated unity of direction by placing one head or manager over the organizational subdivisions and grouping activities under a manager who will facilitate a singular objective. This approach can be understood as the "one head one plan" method, which is a distinct but essential condition for achieving "unity of action, co-ordination of strength and focus[ed] . . . effort."[63] The DOJ's classical theory orientation is further instantiated by the mission statement of the National Security Division, which declares as its primary objectives: "[t]he centralization of the management of the Department's national security program"; "[t]he coordination of operations and policy across the national security spectrum"; "[t]he implementation of comprehensive national security oversight"; and "[t]he further development of national security training and expertise."[64]

3. Possible Conclusions Regarding Classical Theory and the National Security Division

A careful examination of the DOJ's creation of the National Security Division and its movement of the Counterterrorism Section into the new bureaucratic structure represents a heavy reliance upon classical theory. The reformers responsible for recommending and implementing the reorganization rely in many respects upon the principles articulated by Weber, Fayol, Taylor, and Gulick, among other classical theorists. This orientation is not without criticism, just as the classical school is not without critics. While I have identified some preliminary classical theory issues, there exists a substantial opportunity for further scholarly research and analysis of the reorganization. For example, while the Counterterrorism Section has a national security mission, it also has a criminal law mission. As such, its dual objectives are in tension with each other, a point acknowledged by the DOJ in its Progress Report, which described the tension as a "careful balancing of important competing interests."[65]

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63 FAYOL, *supra* note 29, at 25, *as reprinted in* SHAFRITZ, *supra* note 16, at 51.

64 NSD REPORT, *supra* note 2, at 5.

65 NSD REPORT, *supra* note 2, at 12.

Furthermore, the classical theory principles of line and staff functions, as articulated by Fayol, are largely dependent upon the analytical approach adopted by researchers. For example, if one sees the institutional mission of the National Security Division as the incapacitation of terrorists through prosecutions, this mission mandate will subordinate intelligence and investigation components to staff or support status. If the mission mandate is to prevent attacks through prolonged investigations and surveillance, however, this mission mandate will subordinate prosecutions from a line function to a secondary function. These issues and the potential tension they create may pose legitimacy problems for the DOJ as it makes decisions regarding the importance of intelligence gathering versus prosecutions.[66] Moreover, because support activities such as legal review are necessary but insufficient conditions for organizational success, it is unclear where in this complex hierarchy the role of legal advice fits. These brief conclusions highlight the rich opportunities for further examination of this historic governmental reorganization.

B. Organizational Behavior

1. Organizational Behavior Theory Generally

The organizational behavior perspective is concerned with how personnel act within organizations. This analytical approach focuses "on people, groups, and the relationships among them and the organizational environment."[67] Organizational behavior theory seeks to determine how organizations can maximize growth and development amongst their personnel and assumes that from personnel growth and development, organizational creativity, flexibility, and prosperity will result.[68] Given organizational behavior theory's focus and assumptions, the relationship between the organization and its personnel is necessarily codependent and is premised upon providing individuals with maximum amounts of information openly, accurately, and honestly, enabling them to make decisions about their future.[69]

These assumptions were summarized by Lee G. Bolman and Terrence E. Deal in their work *Reframing Organizations: Artistry, Choice, and Leadership* as follows: 1) "Organizations exist to serve human needs rather than the reverse"; 2) "People and organizations need each other"; 3) "When the fit between individual and [organization]

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[66] For a discussion of the tension between legitimacy and effectiveness see generally Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. (forthcoming 2009).

[67] SHAFRITZ, *supra* note 16, at 145.

[68] *See id.* at 149.

[69] *Id.* at 145.

is poor, one or both suffer"; and 4) "A good fit benefits both."[70] Thus the organization is the context in which behavior occurs— the organization is not merely an independent or dependent variable, but is both shaped by and shapes personnel behavior. This is a logical and necessary consequence of the codependent and interactive nature of organizational behavior theory. Such a context-dependent interactive relationship suggests that "under the right circumstances, people and organizations will grow and prosper together."[71] Those circumstances require an optimal balance of values that impact human behavior— values that may be influenced by different leadership, team building, and motivational factors or changes in the work environment or interpersonal relationships.[72]

The first theorist to discover the importance of attention to personnel within an organization was Elton Mayo in his famous "Hawthorne Experiment."[73] Mayo's approach was initially premised upon classical organizational theory; however, when he began observing changes in a working environment (for example, lighting, temperature, and humidity) he found that nearly any change positively impacted worker performance.[74] The common variable was the attention paid to the worker and the importance of stable social relationships in the work place.[75] Management's ability to succeed depended in large part on its ability to motivate people, listen to their needs, and maintain open lines of communication.[76]

Douglas McGregor, another early theorist, suggests that motivation can in fact be largely impacted by how "managerial assumptions about employees . . . become self-fulfilling prophecies."[77] He termed these management assumptions "Theory X" and "Theory Y."[78] Theory X takes a classical approach. It sees workers as unmotivated, without ambition, needing to be led, resistant to change, and not a part of the organization.[79] As such, workers must be controlled through organization, money, and other motivating factors or persuasive or

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[70] LEE G. BOLMAN & TERRENCE E. DEAL, REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP 115 (3d ed. 2003).

[71] SHAFRITZ, *supra* note 16, at 149.

[72] *See id.* at 145–49.

[73] DEREK S. PUGH & DAVID J. HICKSON, WRITERS ON ORGANIZATIONS 131–32 (6th ed. 2007).

[74] *Id.* at 132.

[75] *Id.* at 132–34.

[76] *Id.*

[77] SHAFRITZ, *supra* note 16, at 148.

[78] *Id.*

[79] Douglas Murray McGregor, *The Human Side of Enterprise*, MANAGEMENT REVIEW (Nov. 1957), *as reprinted in* SHAFRITZ, *supra* note 16, at 179, 179.

punitive tools.[80] Theory Y, however, looks at human nature and human motivations.[81] It assumes that management organizes for success, but must do so with the recognition that people are responsible and can determine their own goals and direct their own efforts to help achieve organizational aims.[82] Under Theory Y, management must provide to employees the tools for success.[83] The implication of these theories is that management must not seek control (for example, reject Theory X), and instead must have confidence in human capacities (Theory Y).[84]

Abraham Maslow also studied motivation, developing a "hierarchy of needs" that was largely criticized for its simplicity and lack of empirical grounding.[85] The hierarchy of needs relates in its assumptions to McGregor's Theory Y. Maslow envisioned a set of goals, beginning with the most essential requirements of food and oxygen, and increasing hierarchically to the need for self-actualization.[86] Maslow's hierarchy is a component of his overall argument that goal achievement is a consequence of man's perpetual wanting, or need for growth, and threats to that growth will impact one's motivation and performance.[87]

Finally, Irving Janis's article *Groupthink* highlights a shadow side of organizational behavior theory—the possibility that interrelationships and "concurrence seeking" can rise to a level where those within a group become blind to alternative (non-group derived) courses of action.[88] Janis identifies eight "groupthink symptoms" and suggests that groupthink can be avoided by implementing management practices that stress the following: critical evaluation, impartiality, open inquiry, outside policy planning and evaluation groups, pre-consensus deliberations, outside expert critiques, a devil's advocate, altering subgroups, relations with rivals, and a residual doubts meeting.[89]

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80 *Id.*

81 *Id.* at 182–83.

82 *Id.* at 183.

83 *Id.*

84 *Id.* at 184.

85 SHAFRITZ, *supra* note 16, at 147–48.

86 A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REV. 370, 372–83 (1943), *as reprinted in* SHAFRITZ, *supra* note 16, at 167, 168–72.

87 *Id.* at 395, *as reprinted in* SHAFRITZ, *supra* note 16, at 176.

88 SHAFRITZ, *supra* note 16, at 148–49; *see also* McNeal, *supra* note 66 (providing an example of groupthink present during the creation of the military commissions where officials within the Bush White House intentionally shielded themselves from the coercive isomorphic pressures of outside influence).

89 Irving L. Janis, *Groupthink: The Desperate Drive for Consensus at Any Cost That Suppresses Dissent Among the Mighty in the Corridors of Power*, PSYCHOLOGY TODAY, Nov. 1971, at 43, 44–46, 74–76, *as reprinted in* SHAFRITZ, *supra* note 16, at 185, 187–92.

2. Relationship of Organizational Behavior Theory to Classical Theory

Organizational behavior theory envisions organizations as systems in which people have a significant impact on organizational goal attainment. The main concern of organizational behavior theorists is not merely the formal system (its structure, organization, mission, methods, and resources), but instead, people. Those people are not viewed as resources who work for the organization; "they *are* the organization."[90] As such, a structurally oriented theoretical approach would not account for the variable impact that people have on the method and manner by which organizational goals are achieved or how personnel can affect organizational structure itself. This perspective challenges the "rational, efficiency-oriented scientific management" approaches and posits that social climate and group interactions affect goal attainment.[91] The classical theory—in rational and efficient machine-like systems subject to one best managerial approach—is undermined by the acceptance of the reality of human nature within organizations; reality recognizes that people have different roles and objectives, varied and complex interrelationships, diverse needs, and sometimes conflicting responsibilities and interests.

3. Lessons Learned from Applying Organizational Behavior Theory to the Counterterrorism Section

The reformers who moved the Counterterrorism Section from the Criminal Division to the National Security Division failed to appreciate many of the insights that organizational behavior theory can provide. By moving the Counterterrorism Section into a work group dominated and led by intelligence agents, they created the serious potential for groupthink. The orientation of the new workgroup creates an environment where dissenting opinions advocating criminal law solutions may not be considered or viewed as legitimate. Moreover, the self-assessments developed by the National Security Division reveal a clear rejection of the organizational behavior theory and reliance upon mandated structures to achieve cooperation.[92] By shifting the orientation of the Counterterrorism Section, the National Security Division may also have impacted the satisfaction that Counterterrorism Section prosecutors derived from their proactive role as criminal prosecutors. As a result, the Counterterrorism Section may witness resignations and additional unfavorable press.[93] The new control-oriented and regimented

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[90] PUGH, *supra* note 73, at 130.

[91] HODGE, *supra* note 22, at 20.

[92] *See* NSD REPORT, *supra* note 2, at 5.

[93] *See, e.g.*, Ari Shapiro, *As Domestic Spying Rises, Some Prosecutions Drop*, NPR, July 11, 2008, http://www.npr.org/templates/story/story.php?storyId=91968094.

structure may fail to recognize the potential for employees, when left to their own abilities, to develop the right outcomes based on the overall organizational mission of preventing terrorist attacks.

Despite these facts, the National Security Division has recognized some features reminiscent of an approach cognizant of organizational behavior theory. It created an external ethics review team to ensure that intelligence officials were not abusing their authority similar to the type of external review proposed by Janis to protect against groupthink.[94] But one could also view this remedy as a classical structure masquerading as an organizational behavior remedy. In other words, rather than being an audit team, it may be more accurately described as a Theory X control process.

C. Power Politics Theory

1. Power Politics Theory Generally

The "power and politics" school, or power in organizational theory perspective, can be contrasted with other rational "modern" structural, organizational economics and organizations or environment schools based on the differences in its assumptions. Other schools rely on certain assumptions—they assume rationality; assume that the institution's primary purpose is to accomplish established goals; assume that people in positions of formal authority set goals; assume that their primary questions involve how best to design and manage organizations to achieve declared purposes effectively and efficiently; and see "personal preferences of organization members [as] restrained by . . . rules, authority, and norms of rational behavior."[95] These assumptions can be firmly distinguished from power politics theory.

Power politics theory rejects the above stated assumptions as *naïve* and *unrealistic*.[96] Power politics theory views organizations as "complex systems of individuals and coalitions, each having its own interests, beliefs, values, preferences, perspectives, and perceptions."[97] Power politics theory predicts the development of coalitions that "continuously compete with each other for scarce organizational resources."[98] Given this assumption, conflict is "inevitable" and "[i]nfluence—as well as the power and political activities through which influence is acquired and maintained—is the primary 'weapon' for use in competition and conflicts."[99] In the power politics school, the competition for control,

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94 NSD REPORT, *supra* note 2, at 9.

95 SHAFRITZ, *supra* note 16, at 283.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

resources, and influence are "essential and permanent facts of organizational life."[100]

In their organization theory text, Shafritz, Ott, and Jang combine the definitions of power proposed by scholars Gerald Salancik, Jeffrey Pfeffer, Robert Allen, and Lyman Porter and define power as "the ability to get things done the way one wants them done; it is the latent ability to influence people."[101] This helpful, albeit non-universal definition emphasizes the relativity of power—power is context-specific and relational. Stated differently by Pfeffer, "A person is not 'powerful' or 'powerless' in general, but only with respect to other social actors in a specific social relationship."[102] The phrase "the way one wants them done" reminds us that "conflict and the use of power often are over the choice of methods, means, approaches, and . . . 'turf.'"[103] Importantly, power in this amalgam definition is made explicitly a structural phenomenon—a consequence of the division of labor and specialization. "[O]rganizational behavior and decisions frequently are not 'rational'" (in the modern structural/organizational economics/systems sense) and are not always "directed toward the accomplishment of established organizational goals."[104]

John R. P. French Jr. and Bertram Raven, in their work *The Bases of Social Power*,[105] theorize that in relations amongst individuals (or agents), "the reaction of the *recipient agent* is the more useful focus for explaining the phenomena of social influence and power."[106] In their work, they identify the following five bases of social power: "reward power, the perception of coercive power, legitimate power (organizational authority), referent power (through association with others who possess power), and expert power (power of knowledge or ability)."[107] The implications of this study are insightful in that they reveal that the efficacy of power is dependent upon the base of power from which it is exercised. The efficacy of power is reflected in "the recipient's sentiment toward the agent who uses power," also known as attraction, "and *resistance* to the use of power."[108]

James March, unsurprisingly (given his links to sociology), finds that the power of organizations is not limited to internal sources. He

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[100] *Id.*

[101] *Id.* at 284.

[102] *Id.* at 285.

[103] *Id.*

[104] *Id.*

[105] John R. P. French, Jr. & Bertram Raven, *The Bases of Social Power*, *in* STUDIES IN SOCIAL POWER 150–67 (Dorwin P. Cartwright ed., 1966).

[106] SHAFRITZ, *supra* note 16, at 285.

[107] *Id.* at 286; French & Raven, *supra* note 105, at 155–56.

[108] SHAFRITZ, *supra* note 16, at 286.

posits six models of social choice as a template for further empirical predictions about power.[109] His ultimate conclusion that influence and power are useful but have not provided much insight for social scientific research is to be expected when considered with his other research.[110] March is a proponent of bounded rationality and believes (much as power politics theorists do) that coalitions form, and those coalitions have their own preferences regarding what an organization should be like.[111] The coalition point is the area where, in March's view, power politics and its ties to rationality begin to conflict with organizational limits.[112] This is because various states of anarchy can exist at once and those anarchic states are not constrained by organizational structure and may be influenced by environmental factors.[113] Decision-making processes ultimately become a complex interplay between "problems, solutions, participants, and choices, all of which arrive relatively independently of one another."[114]

2. Application of Power Politics to the Counterterrorism Section

A power politics perspective would view the move of the Counterterrorism Section from the Criminal Division to the National Security Division as a control mechanism to guard against the possibility that the Criminal Division would subvert the administration's goal of shifting away from criminal enforcement and towards an intelligence and military-based approach to counterterrorism. In fact, the rationale for moving the Counterterrorism Section was that coordinated action could not come about without more clearly defined structures, lines of authority, and a unified chain of command.[115] These are structural responses to a growth in factions or difficult to control substructures (whether real or perceived), and structure is inherently bound up in the power politics theory.

By moving the Counterterrorism Section to the National Security Division, the DOJ sought to eliminate the potential for shifting organizational goals by minimizing the possibility that the balance of power amongst coalitions could take place. Stated differently, by consolidating personnel with counterterrorism responsibilities, the possibility that "many conflicting goals, and different sets of goals take

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109 *Id.*

110 *Id.*

111 PUGH, *supra* note 73, at 119.

112 *Id.*

113 *Id.*

114 *Id.* at 121.

115 *See* NSD REPORT, *supra* note 2, at 5.

priority as the balance of power changes among coalitions" was largely counteracted.[116]

Another power politics way to analyze the reorganization is to recognize that counterterrorism missions within the DOJ involve diverse functional specialties amongst labor components. A counterterrorism case can be successfully prosecuted only with cooperation between prosecutors, criminal investigators, and intelligence operatives, as well as interagency collaboration. Such diverse and technical labor components hold equal degrees of importance for a successful prosecution, in the sense that they are all necessary. These units have different path dependencies, however, and may even have different goals. As such, they will necessarily seek to advance their own interests and create their own sub-goals, which may be in conflict with the criminal justice goal of successful prosecutions. The prosecutors, when situated in the Criminal Division, were, in Pfeffer's terms, "resource dependent" upon intelligence agents because they could not prosecute their cases without the support of the intelligence community, which holds information regarding potential defendants and enjoys a level of expertise that prevents outsiders from questioning its judgment.[117] Such protective coalitions, with their information advantage, have been termed "fiefdoms" by intelligence scholars, an appropriate term to describe their critical and walled-off nature.[118]

Much as Pfeffer predicts, "'[t]hose persons and those units that have the responsibility for performing the more critical tasks in the organization have a natural advantage in developing and exercising power in the organization. . . . Power is first and foremost a structural phenomenon, and should be understood as such.'"[119] The potential for such coalitions to develop was in the eyes of the DOJ's organizational designers—a phenomenon that could only be addressed through structural reform—and the Counterterrorism Section was accordingly moved to the new National Security Division.[120]

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[116] SHAFRITZ, *supra* note 16, at 284.

[117] *Id.*

[118] JOSEPH J. TRENTO, PRELUDE TO TERROR: THE ROGUE CIA AND THE LEGACY OF AMERICA'S PRIVATE INTELLIGENCE NETWORK, at xii (2005); Philip Davies, *Intelligence Culture and Intelligence Failure in Britain and the United States*, 17 CAMBRIDGE REV. OF INT'L AFF. 495, 507 (2004).

[119] SHAFRITZ, *supra* note 16, at 284 (citation omitted).

[120] The corrective structural measures employed may have created an entirely new set of organizational issues including, but not limited to: the creation of a new organizational culture, a shift in organizational goals, dissatisfaction amongst personnel, and, of course, new power relationships.

D. Organizational Culture Theory

1. Organizational Culture Theory Generally

Organizational culture theory places its focus on "the culture that exists in an organization, something akin to a societal culture."[121] It analyzes "intangible phenomena, such as values, beliefs, assumptions, perceptions, behavioral norms, artifacts, and patterns of behavior."[122] Organizational culture is seen as "a social energy that moves people to act."[123] "'Culture is to the organization what personality is to the individual—a hidden, yet unifying theme that provides meaning, direction, and mobilization.'"[124] The organizational culture perspective is an organizational theory with its own central assumptions, and given its unique assumptions, it is a counterculture within organizational theory that differs from the rational schools.[125]

Organizational culture theory challenges the rational perspectives about "how organizations make decisions and . . . why organizations—and people in [them]—act as they do."[126] Organizational culture theorists criticize the rational schools because while the rational schools have clearly stated assumptions, those assumptions are premised upon four organizational conditions that must exist for their theories to be valid, but those conditions in practice rarely exist.[127] Those assumptions are: "1. a self-correcting system of interdependent people; 2. [a] consensus on objectives and methods; 3. coordination achieved through sharing information; and 4. predictable organizational problems and solutions."[128]

Organizational culture theorists contend that in the absence of those four conditions, "organizational behaviors and decisions are [instead] predetermined by the patterns of basic assumptions held by members of an organization. These patterns of assumptions continue to exist and to influence behaviors in an organization because they repeatedly have led people to make decisions that 'worked in the past.'"[129] Accordingly, "[w]ith repeated use, the assumptions slowly drop out of people's consciousness but continue to influence organizational decisions and behaviors even when the environment changes and

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[121] SHAFRITZ, *supra* note 16, at 352.

[122] *Id.*

[123] *Id.* (citing RALPH H. KILMANN ET AL., GAINING CONTROL OF THE CORPORATE CULTURE, at ix (1985)).

[124] *Id.* (quoting KILMANN ET AL., *supra* note 123, at ix).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* (citation omitted).

[129] *Id.* at 352–53.

different decisions are needed."[130] Organizational culture explains the phenomenon of the phrase "that's the way things are done here"—the organizational culture becomes "so basic, so ingrained, and so completely accepted that no one thinks about or remembers [the assumptions driving behavior]."[131]

Organizational culture theorists believe that "[a] strong organizational culture can control organizational behavior."[132] Such a culture "can block an organization from making [needed] changes" to adapt to its environment.[133] Moreover, "rules, authority, and norms of rational behavior do not restrain the personal preferences of organizational members. Instead, [members] are controlled by cultural norms, values, beliefs, and assumptions."[134] Across organizations, basic assumptions may differ and organizational culture may be shaped by many factors, some of which may include: societal culture, technologies, markets, competition, personality of founders, and personality of leaders.[135] Furthermore, the effect of organizational culture may be pervasive and may include subcultures with similar or distinct influence factors.[136]

Given the multitude of influence factors, organizational culture theorists contend that studying structure alone is not enough.[137] "[P]ositivist, quantitative, quasi-experimental research methods favored by . . . [rational] schools cannot identify or measure unconscious, virtually forgotten basic assumptions."[138] Because such methods cannot identify or measure these unconscious assumptions, organizational culture theorists believe that other rational and "modern" schools "are using the wrong tools (or the wrong 'lenses') to look at the wrong organizational elements."[139]

2. Application to the DOJ's National Security Division

When one considers the organizational environment and new culture in which the Counterterrorism Section operates, faith in structure and control becomes harder to accept. Culture in this circumstance may best be described in three ways: (1) "A set of common

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[130] *Id.* at 353.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* (citing J. STEVEN OTT, THE ORGANIZATIONAL CULTURE PERSPECTIVE ch. 4 (1989)).

[137] *Id.*

[138] *Id.*

[139] *Id.*

understandings around which action is organized . . . finding expression in language whose nuances are peculiar to the group."[140] (2) "[A] set of understandings or meanings shared by a group of people . . . [that] are largely tacit among the members [and] are clearly relevant [and distinctive] to [the] particular group" which are also passed on to new members.[141] (3) "[A] system of knowledge, of learned standards for perceiving, believing, evaluating and acting."[142] Each definition seeks to relate human communities to their environmental settings and reveals that when applied to the National Security Division, organizational culture may drive prosecutors to be torn between their law enforcement and intelligence mission mandates because of the nuances, standards, and knowledge of the group of which they are a part.

Unlike the classical theory approach, which may lend itself to rational and efficient resolution, when one considers the organizational environment in which the Counterterrorism Section operates, one can see how the set of common understandings and beliefs embodied in organizational culture theory can reveal potential tension within the new DOJ organization. For example, a systems theory perspective would acknowledge that the Counterterrorism Section relies upon inputs (in the form of intelligence and investigatory leads) from intelligence agencies for successful prosecutions. The Counterterrorism Section must necessarily avoid blowback from those intelligence agencies by acting in a manner that preserves their interests (secrecy and protection of sources). A trial by its very nature, however, is a public and overt process that "effectively terminates covert intelligence investigation" and necessarily risks exposing sources.[143] If the Counterterrorism Section must rely on intelligence agencies for its success, and presumably may be overruled in its law enforcement decisions by intelligence agencies when prosecutorial decisions involve the potential disclosure of intelligence, a shift in the organizational culture may occur. This organizational culture may be further influenced by the propensity of leaders and peer subdivisions who may favor their role as an intelligence agency over their role as a law enforcement agency, especially in light of

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[140] Nat'l Def. Univ., *Organizational Culture* (citing Howard S. Becker & Blanche Geer, *Latent Culture: A Note on the Theory of Latent Social Roles*, 5 ADMIN. SCI. Q. 304, 305 (1960)), *available at* http://ww2.jhu.edu/jhuonpoint/content/organizational-culture.pdf (last visited Apr. 10, 2009).

[141] JOANNE MARTIN, ORGANIZATIONAL CULTURE: MAPPING THE TERRAIN 57 (2002), *as reprinted in* SHAFRITZ, *supra* note 16, at 393, 396 (citing Meryl Reis Louis, *An Investigator's Guide to Workplace Culture*, *in* P. FROST ET AL., ORGANIZATIONAL CULTURE 73–74 (1985)).

[142] Yvan Allaire & Mihaela E. Firsirotu, *Theories of Organizational Culture*, 5 ORG. STUD. 193, 198 (1984).

[143] NSD REPORT, *supra* note 2, at 12.

the negative externalities associated with trials.[144] In fact, recent DOJ statistics may support this conclusion, demonstrating that the amount of covert intelligence surveillance initiated by the DOJ has increased while the number of prosecutions has decreased.[145]

The consequences for Counterterrorism Section prosecutors are that their organizational culture, as assessed by analyzing their vertical relationships (leadership above and intelligence agents below) and horizontal relationships (office of intelligence), are all inclined to disfavor prosecutions. Moreover, Counterterrorism Section prosecutors must rely on these elements for success, and presumably will lose any conflict with their horizontal intelligence counterparts when disagreements are appealed to National Security Division superiors, who have an intelligence orientation. Taken together, these structural components and incentives, combined with the attitudes and knowledge base of intelligence agents and other personnel, form a culture surrounding the Counterterrorism Section that is predisposed toward an intelligence role, not a law enforcement role.

There are significant consequences that flow from this. The prosecutors in their law enforcement role in supervising intelligence investigations may be more likely to presume guilt when it comes time to make charging decisions because by supervising an investigation, they are cognitively aligned with the justifications offered by an investigator for continued surveillance. The Counterterrorism Section prosecutors, because they are less insulated, may be more susceptible to the day-to-day influence of an investigation and its incremental suggestions of a defendant's guilt. In this respect, organizational theory predicts that a close working relationship will generate a unifying influence between prosecutors and intelligence agents—their shared commitment will dominate.

As a consequence, prosecutors closely tied to investigations may, without much scrutiny, come to trust the conclusion of an investigator that a target is in fact a terrorist. Comparative studies into the practices of prosecutors in Germany and New Zealand reinforce this potential for risk through prosecutor-law enforcement coordination. A German study

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[144] *But see* SERRIN TURNER & STEPHEN J. SCHULHOFER, LIBERTY & NATIONAL SECURITY PROJECT, THE SECRECY PROBLEM IN TERRORISM TRIALS 9–10 (2005), *available at* http://brennan.3cdn.net/2941d4bea7c3c450d2_4sm6iy66c.pdf (describing concerns with disclosure of intelligence information in trials as "a myth" noting that "[p]rosecutors and defense counsel responsible for trying the embassy bombings case agree that the case did not result in disclosure of any sensitive intelligence information. Indeed, before September 11th, the government won a number of significant terrorism convictions in federal court; yet no credible claim has been made that any of these cases resulted in the disclosure of sensitive intelligence secrets" (footnote omitted)).

[145] *See* Shapiro, *supra* note 93.

documented how prosecutors in organized crime cases were drawn into the concerns of police efficiency and away from judicial criteria.[146] A New Zealand study noted that separation of prosecution and investigation ensures checks and balances and impartiality.[147] For example, Daniel Richman notes that "[k]nowledge itself can influence perspective. The prosecutor who, while taking *no* part in the conduct of investigations, regularly learns from agents about their false starts and tactical gambles [and] may find himself more sympathetic to agency travails than would a more removed official accustomed to hearing seamless narratives."[148] Such a prosecutor may be cognitively limited as well—ready to find that any new information confirms her original impressions of a case or target.[149] In terrorism cases, where the commitment is at its highest due to the high stakes, and immersion in the investigation is at its greatest, these cognitive biases that stem from a distinct organizational culture will be at their apex.

CONCLUSION

As stated from the outset, this Essay is intended as a preliminary organizational theory inquiry into institutional issues raised by the creation of the DOJ's National Security Division. The theories explored highlight how structure, power and politics, organizational behavior, and organizational culture can all be impacted by this reorganization and consolidation. What is clear is that there exists at least the potential for unintended consequences that are worthy of future research and attention by scholars and policymakers.

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[146] Heiner Busch & Albrecht Funk, *Undercover Tactics as an Element of Preventive Crime Fighting in the Federal Republic of Germany*, *in* UNDERCOVER: POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE 55, 65–67 (Cyrille Fijnaut & Gary T. Marx eds., 1995).

[147] NEW ZEALAND LAW COMMISSION, REPORT NO. 66: CRIMINAL PROSECUTION 3 (2000), *available at* http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_73_150_R66.pdf.

[148] Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 803 (2003) (emphasis added). When directing an investigation,

> [t]he risks to prosecutorial judgment are even greater . . . . Just as corporate lawyers [may] "cease to objectively evaluate transactions that are often their own creations," prosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter.

Id. (quoting Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 545 (1994)).

[149] *See* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 102 (1993).

LEGISLATION PANEL: DISCUSSION & COMMENTARY†

Professor Ash: The issue that I see with respect to the global War on Terrorism is that it is very confusing to know exactly what we have. Under international law, there is debate on whether you can have a war between a state and a non-state actor, except possibly under Common Article 3 of the 1949 Geneva Convention.[1] It seems to me, from my observations, that much of what has been said during this Symposium about the congressional role and its attempt to deal with this is that we are dealing with a great deal of ad hocery because what would normally happen under the law of armed conflict is relatively set. If we were in a traditional situation, those types of issues would seem to be relatively clear.

We are in a situation, however, where some people are not even sure that this can ever constitute a war under international law, but others have said it has. For instance, I do not need to tell everybody here that NATO, for the first time, triggered the mutual defense provision of the North Atlantic Treaty after the events of September 11, 2001,[2] and we had allied aircraft patrolling our skies for the defense of the United States.[3] There were a lot of international organizations that recognized the severity of what had happened, and thought that even if it was not technically war, at least we should respond in a war-like manner.

One of the key issues is that there is a great deal of confusion over what law should apply in the international realm. What I would like to do is to ask that question and have comments from the panel. For instance, Admiral Clark, I am sure you had to testify numerous times before congressional committees, and to what degree did you find that a lot of what was discussed was based on confusion as to whether this was purely a criminal matter or was a law of armed conflict, and how do we deal with that? I think, Professor Radsan, some of your comments deal

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† This panel discussion was presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies National Security Symposium at Regent University School of Law, September 27, 2008. The panel discussed recent legislation affecting national security. Speakers included: Admiral Vern Clark (ret.), Chief of U.S. Naval Operations; Professor A. John Radsan, William Mitchell College of Law; and Professor Gregory S. McNeal, Penn State Dickinson School of Law. The panel was moderated by Professor Robert W. Ash, Regent University School of Law.

1 *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

2 Suzanne Daley, *A Pause to Ponder Washington's Tough Talk*, N.Y. TIMES, Sept. 16, 2001, at 4.

3 JOYCE P. KAUFMAN, A CONCISE HISTORY OF U.S. FOREIGN POLICY 154 (2006).

with the same type of thing. I would like to open that up to members of the panel to address.

Admiral Clark: Well, that is really a terrific question, and I am reminded that I have spent some time talking about fourth generation warfare. I do that from a historical perspective. While I am not allowed to speak for the Joint Chiefs, I can speak for one person who was in that body. Think about what happened right after 9/11 and we can start wrapping up some of the players—for example, Khalid Sheikh Mohammed. One of the guys who worked for me said that he does not look like a warrior; he looks like someone who slept in a bakery all night. But he is a warrior in a new world order. He is what a new warrior looks like.

Think about what happened right after 9/11. We went to work and started wrapping up some of the players involved in the attacks—for example, Khalid Sheikh Mohammed. One of the guys who worked for me said "He does not look like a warrior; he looks like someone who slept in a bakery all night." But Khalid Sheikh Mohammed is a warrior in a new world order. He is what the new warrior looks like.

And so 9/11 goes down and we have activity that is not represented by a state, but by non-state actors. I want to tell you that it causes tremendous confusion about how you organize. Who do you present your demarche to if you want to employ diplomacy so that you can tell them how disappointed you are by the activity that has just occurred? It is a very real and serious problem.

Of course, fourth generation warfare is part of this. To speak to this effectively would be a one-hour lecture, but let us just summarize it like this: first generation warfare was equated to the Civil War—hand-to-hand combat. Second generation warfare was during World War I and the introduction of mass combat. Third generation warfare started with the introduction of maneuver and goes all the way to Desert Storm and Schwarzkopf's big left hook—coming around the side. Another example is Rommel in North Africa—introducing speed into the equation. All of that activity was conducted since the 1600s. Our body of law about warfare is based upon the supposition that we are talking about state versus state activity. Fourth generation warfare falls out of that model and introduces a brand of warfare conducted by non-state players.

So what is the body of law and record to fall back on and refer to in the non-state actor, fourth generation arena? In fourth generation warfare, it is about ideals and principles and values and people operating independently. The last thing the non-state wants is to be tied to a particular state. Consider, for example, Osama bin Laden. You cannot go file your demarche with any specific country to deal with him, which was what President Bush was trying to deal with in establishing

the principle of "and all who harbor them."[4] He was trying to create a link that would allow him to work, state with state, in a very difficult part of the world that was being presented to us when we were dealing with state versus non-state kinds of players. It then gets you to dysfunctional states, and states that are eroding and do not have the ability to govern themselves. How are we supposed to deal with them? This is definitely a significant challenge for us.

Professor Radsan: I found out after fifteen years of being a practitioner that Sandra Day O'Connor is not popular in the legal academy. She is too pragmatic. She was messy in her decisions. But I think if you go back and look at the *Hamdi v. Rumsfeld* decision in 2004, you will see a key to unlocking this question.[5] The issue there was whether the Government had the authority to designate a United States citizen as an enemy combatant; and if so, what sort of process was owed to that individual?[6]

What I like about that opinion, the plurality opinion, is that Justice O'Connor recognizes and tries to weave these two threads. One is the law of armed conflict and the other is an international human rights or a due process model. It is a messy opinion, but I think to deal with the problem of terrorism we are going to have to find solutions between systems. I agree with Professor Ash, or maybe what he is implying, that neither the law of armed conflict nor international human rights law; nor what we would call in the United States the due process model, take care of this issue of terrorism. Maybe we are broadening the topic because not only do we need legislative changes, we need changes in customary international law practices. And the opinion of some scholars is that we might need changes in treaties. I am looking to the experts as to what changes should be made to the Geneva Conventions to deal with this issue, but I disagree with the Bush Administration—you cannot neatly place this within the law of armed conflict.

Two comments, though, about the references. When people retreat to the law of armed conflict, they tend to think everything is neat and tidy. It is not even tidy, as I think the Admiral is saying here, within conventional war. What do we do with targeted killings within the law of armed conflict? What do we do with insurgents and guerillas? What do we do with the use of nuclear weapons? What do we do with people who will use civilians as shields and who will hide in mosques to fight us?

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[4] 147 CONG. REC. 17,321 (2001) (statement of President George W. Bush) ("[W]e will pursue nations that provide aid or safe haven to terrorism. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.").

[5] 542 U.S. 507 (2004).

[6] *Id.* at 509.

These are very difficult questions even within a conventional battle, even in the battle that goes on in Iraq.

One other comment about the criminal justice system is that we talk about it as an alternative or as the baseline for some of these issues that I discussed, such as rendition and aggressive interrogation.[7] When we talk about the criminal justice system, we forget that coercion is allowed in interrogations. The due process model allows coercion of suspects. What Federal Bureau of Investigation ("FBI") agents do within the law is not going to seem tidy and polite. It is not all about telling the suspect what is in his best interest. When the FBI agent says, "Do you want a turkey sandwich with swiss or mozzarella?" he does not mean that with respect; he is trying to establish rapport. That can be coercive.

The other point about the criminal justice system is that it is not infallible. We make mistakes all the time in the criminal justice system. You will hear about the mistakes that are made in the intelligence world when we do not have as many checks. The criminal justice system is not an answer to all this. You can go to various law schools with their innocence projects; we have innocent people on death row. I think there is a blend needed between the systems, but I do not think either system fully answers the questions.

Professor Ash: Professor McNeal?

Professor McNeal: There are two points that are important for the audience to recognize, and I think all the panelists recognize these. When discussing the issue of what body of law should apply, it is critical for us to separate the detention issues—particularly, the detention of individuals found on the battlefield versus trial issues. One of the reasons that we are in the circumstance that we are in is because a memo came out during the Afghanistan conflict—most likely from the Office of Legal Counsel—suggesting that there was no requirement to do in-the-field determinations of an individual's status under the Geneva Conventions. Specifically, administration lawyers agreed that "al Qaeda or Taliban soldiers [were] presumptively not POWs" the practical result of that determination was that in the field status adjudications were foregone.[8] Had we done those determinations in the field, we may not have brought the number of detainees that we did to Guantanamo. Considering the population of detainees in Guantanamo, it is hard to argue with the fact that there may have been some mistakes made since

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[7] A. John Radsan, *Change Versus Continuity at Obama's CIA*, 21 REGENT U. L. REV. 299 (2009).

[8] *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 113 (2007) (quotation marks omitted).

I think the population has dropped from around 670 to 264 detainees.[9] Of those who are left, the Government has affirmatively stated that it only seeks to try eighty.[10] There is another indeterminate group of about one hundred who are dangerous, but we do not have evidence to try them on,[11] which sounds like a fraud, but there are actually some circumstances where that would occur.[12] There is another group we would like to release but we cannot find anyone who will take them.[13] The Chinese Uighurs, for example, would get off of the plane in China, and their trip would likely end on the tarmac because the Chinese government would likely execute them.[14] There are a series of issues there.

But with regard to the eighty who may be tried, this is where an interesting secondary issue comes up. If one of the eighty was in a standard criminal justice context, knowing that the Government was going to try him, the fact that the Government had not yet charged him would be an exercise of prosecutorial mercy. It is the equivalent of saying "I am not being charged; I will go free. Thank you very much."

Here, though, the Government says there is a group of eighty people we seek to try, and they are going to stay in detention while we conduct our extensive seven-year investigation through our Criminal Investigation Task Force,[15] build a case file filled with evidence to use against them, preserve our witnesses, preserve our testimony, and someday seven to ten years down the road we will bring charges against them—and somehow expect that it will be a fair trial. The model of speedy trial that would apply in the standard criminal justice system somehow does not translate back into this system, yet we still think that it is a fair trial. While *Hamdan v. Rumsfeld* looked to the requirements of Common Article 3 for a fair trial,[16] I think as these military

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[9] *See* Sherwood Ross, *U.S. May Not Release Any Acquitted Gitmo Prisoners*, OPEDNEWS.COM, Apr. 12, 2008, http://www.opednews.com/articles/genera_sherwood_080412_u_s__may_not_release.htm.

[10] *Id.*

[11] *See id.*

[12] *See* Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/28/LRColl2008n28McNeal.pdf.

[13] *See id.*

[14] Peter Spiegel & Barbara Demick, *Uighur Detainees at Guantanamo Pose a Problem for Obama*, L.A. TIMES, Feb. 18, 2009, at A5, *available at* http://articles.latimes.com/2009/feb/18/world/fg-uighurs-gitmo18.

[15] *See* L.J. "Jim" Powlen, *Criminal Investigation Task Force*, MIL. POLICE (U.S. Army Military Police, Fort Leonard Wood, Mo.) Spring 2007, at 1, 1–2, *available at* http://www.wood.army.mil/mpbulletin/pdfs/Spring%2007%20pdfs/Powlen.pdf (describing the role and functions of the Criminal Investigation Task Force).

[16] 548 U.S. 557 *passim* (2006).

commissions continue, we are going to see that there are other fundamental fair trial guarantees—in a normative sense of what a trial should be—separated from constitutional values that will likely undermine this process.[17] This again speaks to Professor Radsan's point that we need some sort of resolution of how we will try, not only those currently detained (which is a sui generis mess in and of itself), but also future detainees.

Professor Ash: Okay, thank you.

Professor Radsan: Professor Ash, could I make a comment?

Professor Ash: Certainly.

Professor Radsan: I thank Professor McNeal for agreeing with me; but now, once he hears my comments, maybe he will disagree with me.

Professor McNeal: That is good. It keeps it exciting.

Professor Radsan: We will stir it up. About the National Security Division, I do not know that I would make too much of it. I agree it is a worthy area of scholarship, but if we are looking at terrorism prosecutions that exist, I would recommend going to the Southern District of New York, the Eastern District of Virginia, the U.S. Attorney's Office in Miami, and even the U.S. Attorney's Office in Detroit to ask them the question with a camera: what do you think about main Justice? The eyes will roll; and then if you ask them about the National Security Division, it will be like a slot machine in Las Vegas. The eyes will just spin. I still think the center of the action in terrorism prosecution will be in those U.S. Attorney's Offices where there is experience. But I do understand that your focus is on the National Security Division.

That is the first point, and the second is that I do not know that I would make so much of this tension about surveillance or arrest as a problem that exists between the criminal justice system and the intelligence world. This is an issue that also exists strictly within the criminal justice system for organized crime prosecutors, for narcotics prosecutors, and for white collar prosecutors. If you leave some suspects

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[17] *See* Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. (forthcoming 2009) (discussing how the legitimate form for a criminal trial is one which complies with the practice of Article III courts, although in the case of counterterrorism this may not be the most effective tribunal).

out they will take you to the information and they will take you to other people. There is a risk that they might get away and that may complicate your case, but there is an intelligence value in building your case. What investigators and prosecutors are always faced with is the question: when do we take down the organization? Because, if we start arresting people, we may have suspects leave and we may have evidence disappear. I think you recognize this would be a box within the box that you are talking about.

Professor McNeal: The only point of clarification that I wanted to offer—I agree with you on the U.S. Attorney's Offices point—is that this is the precise issue that was created by the reorganization.[18] The U.S. Attorney's Offices have now been organized in such a manner that every U.S. Attorney has an Anti-Terrorism Coordinator for the area, which I gather you are familiar with.[19] The reorganization created a series of local Anti-Terrorism Coordinators, all of whom report to main Justice.[20] A U.S. Attorney in the Southern District of New York or in the Eastern District of Virginia can no longer bring a case as the line attorney in the U.S. Attorney's Office without main Justice approving how the charges will be brought, or supervising the investigation. In the words of the Department of Justice, according to their most recent White Paper, the Counterterrorism Section, which is located at Main Justice "has the lead for managing the ATAC Program, a National ATAC Coordinator and six Regional Coordinators . . . [who] provide, receive and exchange terrorism-related information in regard to threats, litigation, criminal enforcement, intelligence and training."[21] So the control mechanisms are in place, and the tentacles have gone out to control the U.S. Attorney's Offices from Main Justice, the action may be in the U.S. Attorney's offices, but the control is centralized.

On the second point, I agree with you that there is a problem of supervision that extends to the criminal justice system. It is not unique to counterterrorism cases. The distinction being, of course, the potential

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[18] *See generally* Gregory S. McNeal, *Organizational Theory and Counterterrorism Prosecutions: A Preliminary Inquiry*, 21 REGENT U. L. REV. 307 (2009) (explaining that the DOJ sought to implement an organizational structure which centralized all national security functions at main Justice).

[19] Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All United States Attorneys (Sept. 17, 2001) ("[I]nstruct[ing] each United States Attorney's Office to implement . . . measures to enhance our capacity to combat terrorism."), *available at* http://www.usdoj.gov/ag/readingroom/ag-091701.pdf.

[20] *See id.* at 1–3.

[21] U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 7 (2006), *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf.

harm that comes about if a plot slips through. But I think we are in agreement.

Admiral Clark: I would like to piggyback on these thoughts a bit. First of all, I want you to know that as a practitioner, I do not know what we would have done without rendition well before 9/11 ever happened. Generally, people do not know all the circumstances where rendition did things for our nation, and they do not ever hear about it because those things are all done in classified channels and, if they are disclosed, they are no longer going to be channels that we can exploit—necessarily exploit—in a globalized world. Way before 9/11, when I was the Director for Operations and worked for the Chairman of the Joint Chiefs as a three-star officer, rendition was a tool that, if we did not have it, we would be trying to figure out how to get it as a tool.

I want to talk about the Guantanamo Bay U.S. Naval Base ("Gitmo"). I guess I should talk about the National Security Division. If you are a practitioner, this confusing line between criminal activity and terrorist activity really gets to be a problem for somebody like me who was in the military. The challenge is figuring out where that line is, and so let us translate. I was certainly not inside the Justice Department, but I was in a number of places in government, where you can see the move to create a security operation and separate it from a criminal operation to try to do something about where that line is drawn. It is classic when you get to Gitmo. I want to state publicly that Gitmo was on the naval base, but it was not operated by the Navy. I do not know if I should take comfort in that or not, but I do.

Here is a reality: there were numbers of prisoners at Gitmo that we wanted to let go, but either their country would not take them back or, from a human rights point of view, releasing them could become a problem for us. We knew that the moment we sent them back they were going to be stood against a wall and be executed because they came from a bad neighborhood. So there were a lot of things going on at Guantanamo that people do not necessarily know how to put in context.

I am back to whether I call this activity criminal or if it is under the rule of war, and whether we declare somebody a combatant. To begin with, we did not know, from a practitioner's point of view, where to go and how to define this. But we were pretty sure that if no one could figure out a magical way to define when the end of the war was going to occur, and whether a person should be classified as a prisoner of war ("POW"), the POWs would someday be released and just go home. If Khalid Sheikh Mohammed was classified as a POW and we had not gotten through the process, then we were going to have to release him. To me, and people like me, that's a real problem.

For the record, of the persons we have returned and those who went back to home base, we have encountered numbers of them in the field again and captured them—again—a second time. This is where the body of law and nations decide to deal with the fuzzy line question Professor Ash has asked, and it has certainly not reached a resolution.

Professor Ash: Thank you. What I would like to do now is open to questions from the public. We have at least two people with microphones. Please direct your questions to an individual or to the whole panel, whichever you prefer.

Question 1: This is Jordan Paust. I will be on the second panel.[22] This question is really directed to all of the panelists. It is a counter-thought or counter-consideration. It starts off with Admiral Clark's recognized need to use all of our national power resources. One of those resources I would emphasize that has not been emphasized enough is our respect abroad. Professor Radsan started to mention that at the beginning of his talk. I think that our respect abroad should definitely be part of the conditioning of choices with respect to the types of interrogation tactics that are used and whether we should have a national security court. I think our respect abroad has been based in part on our national values, our commitment to human dignity, and human rights. Whether you agree with human rights or human dignity, I think from a practical point of view you can see that our own self-interests are connected with retaining our commitment, especially in a war of values, or conflict of values, which terrorism often raises. That we need to at least think, Professor Radsan, about the consequences of a national security court when we have JAG officers resigning in protest over the Gitmo military commissions that are already approved by Congress. We have clearly had problems with gaining extradition of certain persons from other countries because of problems of rendition and the interrogation tactics that became public at Abu Ghraib and obviously at Gitmo. Then came the two memos from our former Secretary of Defense and the list continues. So it is a caution in terms of our own self-interest and retainment of our fundamental American values. I would actually say that some of your suggestions are dangerously nonconservative—you are not conserving enough of traditional American values. What do you think about my comment?

Professor Radsan: Could I take the first crack?

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[22] *Supreme Court Panel: Discussion & Commentary*, 21 REGENT U. L. REV. 385 (2009).

Professor Ash: Sure, please.

Professor Radsan: I agree with you. At the William Mitchell College of Law, we have on our National Security Forum advisory council Doug Johnson,[23] who is the executive director for the Center for Victims of Torture, based in Minneapolis.[24] He is in touch with the victims of torture. He has been a big proponent of the rule of law working there, and he said that what has happened in the last two presidential terms has set us back decades. It is, I agree, one of our great advantages that we stand for hope, freedom, decency, and the rule of law. I also agree with your point that perhaps my proposals are politically unpalatable because of what has occurred in the last two terms. But professor to professor, let us consider it as a thought experiment. Would Radsan's proposals today seem so outrageous if we had put them in effect in the year 2002? We did go through a period when it was just executive supremacy—the Commander-in-Chief Clause was used to answer all of our questions. So I am looking back at it and asking what could have been done? What sort of compromise could have been reached? Recognizing these values, but also recognizing the need to gather intelligence because of the nature of the threat—we need to try to come up with some construct that satisfies our concerns about civil liberties, but also satisfies the concerns of the American people and practitioners to make ourselves safe. So I will put my ideas out there, but you can hear in my tone that I am pragmatic in a negotiated way. But where I hold firm is that I do not think that the pure model of the criminal justice system by itself is going to handle all of these questions. I think we are going to have to go back and forth in this middle ground, and I respect your comments and your work on that to push me back to something that you would consider more conservative—more truly conservative.

Admiral Clark: I really could not agree more that the international standing of the United States of America has paid a price. Sometimes you pay a price for taking the right stand, and sometimes you pay a price for taking the wrong stand. Or maybe it is not a stand—maybe it is activity. I will tell you that one of the lowest days of my entire life was the day that the information about Abu Ghraib became public, and I found out about it on television. I am not a person given to

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[23] About the National Security Forum, http://www.wmitchell.edu/national-security-forum/?page=88 (last visited Apr. 10, 2009).

[24] The Center for Victims of Torture, CVT Staff, http://www.cvt.org/main.php/InsideCVT/WhoWeAre/Staff (last visited Apr. 10, 2009); The Center for Victims of Torture, The History of CVT, http://www.cvt.org/main.php/InsideCVT/WhoWeAre/History (last visited Apr. 10, 2009).

anger, but I was first angry and then it made me sick. I just could not believe that that could be us. I am thankful, however, that we live in a country where those kinds of disclosures not only could be made, but were made, and that the individuals responsible for getting that into the public domain had a sense of protection that was positive.

Here is what I believe one of the major challenges is for us, though. I agree with you completely about our standing and our loss of good will. Somewhere, we have to figure out how to bridge the divide that has us hamstrung in areas such as what I call "ISR"—intelligence, surveillance, and reconnaissance. We cannot succeed without successful ISR. It crosses lines all the time. For example, for most Americans, the global War on Terrorism started on 9/11; it did not for me. It started on October 12, 2000, when the USS *Cole* was hit and bombed in Yemen.[25] The confusing lines between intelligence, surveillance, and reconnaissance immediately were in question. And did I go to Congress? Was I in a bunch of hearings about that? You better believe I was. The question of the day was, did anybody have intelligence that would have led us to understand that this was headed our direction? That very day I sat down at my computer and wrote a message to the entire Navy telling them that the world had changed and that we were not going to wait for a two-year investigation to tell us what we were going to do about it.[26] I set into motion a series of things that we had to do differently the very next moment.

I do not know if the national security court is the right answer. If Professor Radsan has this right, then hooray. But if he does not, we will keep working on it. In any case, we have to have some methodologies that allow us to have a check-and-balance system in this new fourth generation warfare world that allows us to function in an era where success in the ISR challenge is necessary for us to survive. That will enable us to maintain our good will globally and rebuild it globally. Whatever kind of mechanism that is, it is not a singular—it is certainly a plural. We have to figure out how to put it in place, and to me, that is one of the greatest challenges facing Congress.

Professor Radsan: Could I add a note of optimism? I am thinking of who the heroes are during this time. More and more of the reporting

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[25] "On October 12, 2000, a small boat piloted by two suicide bombers and carrying between 400 and 700 pounds of explosives rammed the hull of the U.S. Navy's guided missile destroyer, the USS *Cole*." MARTIN C. LIBICKI ET AL., EXPLORING TERRORIST TARGETING PREFERENCES 37 (2007). Seventeen servicemen were killed and twenty-nine were injured in the attack, which Bin Laden denied responsibility for, while indicating support for the attackers. *Id.*

[26] *See* Joseph Gunder, *After* Cole*—New Initiatives Taken*, NAVY NEWS SERVICE, Dec. 20, 2000, http://www.navy.mil/navydata/cno/news/clark001220.txt.

has shown us what happened at the Justice Department. I worked there. When people talk about "the Department," they speak with a sense of respect and honor for that word. If you look at what Attorney General Ashcroft did, what Deputy Attorney General James Comey did, and what the head of the Office of Legal Counsel Jack Goldsmith did, I think whether you are a Democrat or a Republican, you can be proud of those people because at very difficult times—standing up to the Vice President or the President—they stood for the rule of law rather than laws of men. That goes back to our founding decision, *Marbury v. Madison*.[27] It is not a partisan note that shows that lawyers—and you mentioned the lawyers in the JAG Corps—can play a very important role. They defend our liberties at the same time that they defend our security. I think we all owe our gratitude to John Ashcroft, Jim Comey, and Jack Goldsmith.

Professor McNeal: I am similarly optimistic despite the ground that we may have lost in the esteem of our allies. In my prior position before coming to Penn State, I supervised an eighteen-month-long counterterrorism program with the U.S. Department of Justice ("DOJ"), where we brought together counterterrorism prosecutors from the DOJ and their counterparts in Germany, the Netherlands, and the United Kingdom. This issue actually came up in one of our discussions and our European attendees were confident that there are enough review mechanisms in place on their end, such as through the European Court of Human Rights, there is judicial review that they can feel comfortable with.

America's most controversial policies seem to have largely come from circumstances where there are no checks, as the Admiral has pointed out. That does not necessarily mean that it needs to be a judicial check. As I suggested, you could have institutionally designed checks.[28] There could be a mechanism by which Congress can exercise greater oversight over some of our activities.

But some check is necessary to bring us in line with what our allies expect. That is not a fundamentally liberal principle—I am actually a pretty conservative guy. You would not know it from my comments today, but I worked as an academic consultant to Colonel Morris Davis, the chief prosecutor in Guantanamo, until he resigned from his position for reasons similar to those Professor Radsan has stated. I believe that when people stand up and say this is not working, those resignations, taken together start to suggest that we have institutional design problems. Such problems can be remedied I think, if the next President decides to take the reins and do something about them.

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[27] 5 U.S. (1 Cranch) 137 (1803).

[28] *See generally* McNeal, *supra* note 17; McNeal, *supra* note 18.

Professor Ash: Professor Wagner.

Question 2: I am David Wagner. I teach constitutional law here,[29] and I have a question about a constitutional debate. There is a debate among constitutional law professors, but I am interested in getting a practitioner's view point on it, especially Admiral Clark's view. But I would like to hear the other panelists' views on it, too.

This question occurred to me when Admiral Clark was talking about Congress as one of his key touchstones. The bookends for this debate in the academy, as far as I can tell, are Professors John Yoo[30] and Neal Katyal[31]—good, solid bookends. The issue is the extent of presidential war power, and according to Professor Yoo, it is essentially totally in the Executive.[32] The only congressional check is the appropriation process. Congress can cut off the funds. Professor Katyal says that is unrealistic because if the President commits troops to battle, there is no way politically that Congress can do anything other than—as the bumper sticker says—support the troops.[33]

It strikes me that we may have a different situation between the way it was, the way things looked in 1787, and the way things are now. In other words, we may have a difference between original meaning and present application. It could be that complete authority was vested in the Executive because Congress did not meet full time. It might have been an emergency. There was more suspicion about armed forces generally in the founding generation, however, so I especially want to get the Admiral's perspective on how that cashes out today.

Is Professor Katyal's suspicion correct, or is his view incorrect, that the appropriation process is completely unrealistic as a check on the Executive's power? Also, what would Professors Radsan and McNeal say about that?

Admiral Clark: I thought we might get into what kind of things need to happen in Congress. I am a great believer that we have got to

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[29] Regent Law, Faculty Profiles, David M. Wagner, http://www.regent.edu/acad/schlaw/faculty_staff/wagner.cfm (last visited Apr. 10, 2009).

[30] Berkeley Law, Faculty Profiles, John Choon Yoo, http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235 (last visited Apr. 10, 2009).

[31] Georgetown Law, Full Time Faculty, Neal K. Katyal, Paul and Patricia Saunders Professor of National Security Law http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=272 (last visited Apr. 10, 2009).

[32] *See* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. (Mar. 14, 2003), *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

[33] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006).

have a breadth of reform. Let me give you an example. With all of the elements of national power, and the expansion that has occurred in every one of the departments where a cabinet member sits in the cabinet room, look at what has happened. As a result, has the methodology and the approach on the Hill changed one bit? No. We have more committees to go to, and more subcommittees, but is the oversight better? If the oversight is better, it has escaped me. I do not think that it is. The oversight process was built around the banker role (the appropriators), but on the defense side, half of the activity is in the authorizing side. Some years the authorizers do not even pass a bill before the appropriators do, and do you think it slows anybody down who wore uniforms? They do not wait for it, or hold the check and say to themselves that maybe they will not cash it because the authorizers have not passed their bill yet. That is not the way it works.

I could not agree more that we have a dilemma. The model that we have was not designed for a time when jet airplane provided rapid transportation to the home district every weekend—nobody had ever heard of rapid transportation. At those times, the Pony Express was rapid. I was in meetings this week where the discussion was about the role of the jet aircraft and its type of speed being too slow for the game. Think of it. And if that is the case, what does that mean to us as decisionmakers and the policymakers who are behind it? To be sure, the model is difficult, and so I think it ends up having a debilitating effect upon the ability of the branches of the government to effectively partner, because now the Executive is always seen as stretching beyond and reaching for more and more.

It is similar to a discussion I was recently participated in which asked, are we going to wait for the State Department to engage and solve the problems though diplomacy? You cannot win in fourth generation warfare if you do not play. Eighty percent of winning the fourth generation war is not kinetic. It is all the other stuff—and the other stuff should include big-time diplomacy. In this new world where speed of response is paramount, is the Commander-in-Chief going to wait? Probably not. And one of the reasons diplomacy is slow to respond is that Congress has not given them the new tools to respond more effectively.

As I said earlier, it too often falls back to the fact that the defense arm of our government has been overused. It is overused not because anybody who founded and created it intended it to be this way, but it has become this way in the world that we have, which is moving too fast. The scheme for response that we have is moving too fast for it to be limited to Congress getting together and deciding it is going to pass an authorization bill.

Professor Radsan: From a practical perspective, and a constitutional law professor's perspective, I think that Neal Katyal has it more right than John Yoo. I do not disagree with John Yoo on everything, however, and I do not agree with Katyal on everything.

On our topic about legislative proposals, I laid out my proposal.[34] If you want a more restrictive proposal on irregular rendition, you can look at a bill that was put forward by Senator Biden in the year 2007.[35] He is more restrictive; rendition would be a last resort in his proposal. As I read his proposal, even if there is a chance of cruel, inhuman, or degrading treatment—which is an intermediate category under the Convention Against Torture[36]—he would prevent those transfers. Article 3 of the Convention Against Torture prohibits transfers if there are substantial grounds for believing that torture would occur.[37] There is some reading out there for you on Article 3 in the Convention Against Torture. If you are very kind, you can go to my Social Science Research Network website and you will see a couple of articles on rendition.[38]

Professor Ash: Yes sir.

Question 3: As you know, Admiral, for many, many months—if not for years—the former Chairman of the Joint Chiefs, General Pace, was saying we needed a Goldwater-Nichols for the civilian side of the house.[39] That was the military's cry. The first big question is, where do you all stand on Goldwater-Nichols reform vis-à-vis what is required for the civilian side of the house? The question is whether it is possible? Constitutional?

The second issue is the tension that the Admiral raised—and also is raised by Professor Radsan's question of the Article III court—about a real confusion over covert operations and overt operations. If you are the General Counsel for the Central Intelligence Agency, the biggest issue you have dealt with for the last number of years is, what is Title 10 authority?[40] What is Title 50 authority?[41] The answer is basically the

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[34] *See* Radsan, *supra* note 7.

[35] National Security with Justice Act, S. 1876, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-1876.

[36] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

[37] *Id.* art. 3.

[38] Social Science Research Network, John Radsan, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=453088 (last visited Apr. 10, 2009).

[39] *See, e.g.*, Jim Garamone, *Pace Urges Interagency Cooperation in Government*, AM. FORCES PRESS SERVICE, Aug. 8, 2007, http://www.defenselink.mil/news/newsarticle.aspx?id=46991.

[40] 10 U.S.C. (2006).

difference between whether it is an agency matter or a military matter. What must you report to Congress? What do you not have to report to Congress? Those are major issues that the new world is forcing us to think about. I leave you those two little questions for you to think about vis-à-vis.

Admiral Clark: Number one, if we do not have a Goldwater-Nichols Act for the civilian side of government, we will never get to where we need to go. We are simply unable to execute the way we are required to deal with the fourth generation warfare world.

Here are a couple of statistics. I said the military is overused. (By the way, this is not just my view. The Chairman of the Joint Chiefs of Staff two back said it,[42] then one back said it[43]—this is widely held. I think it is unusual for you to hear military persons talking like that. Usually that is not the way they come at it.) If you are going to apply diplomacy to the game, you have got to have resources. I said we have 1.2 to 1.3 million in our military structure. Do you know how many foreign State Department officers we have? Unrestricted, a little over 6,000. We needed at least a couple thousand to go into Iraq the day after the war so that they could begin the process of establishing a new government. When we went to Baghdad to help them establish a new government, from a civilian side of the house instead of a military side of the house, Ambassador Bremer was tremendously under resourced. We were never able to fill the human resource roster. But if you have 1,200,000 or 1,300,000 people do it, then by default you go there because the resources are there.

This was a proposal: establish a civilian reserve. Just like we have a military reserve. The reason that is important is if I need somebody to establish a judicial system or to be a city manager in Baghdad, am I going to get that out of the military? Why not sign up a professor here and say, congratulations here are your orders? Therein lies the problem—they are orders and not invitations. But the Department of State put forward a proposal to create such a civilian reserve. Did you know the bill was approximately fifteen or twenty million dollars to start the program? And Congress would not enact it. I do not understand. We have to have new thinking.[44]

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[41] 50 U.S.C. (2000 & Supp. V 2006).

[42] *See* Thom Shanker, *Iraq Role Limits Military Ability, Congress is Told*, N.Y. TIMES, May 3, 2005, at A1.

[43] *See* Lolita C. Baldor, *Gen. Pace: Military Capability Eroding*, ASSOCIATED PRESS, Feb. 27, 2007, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/02/26/national/w163538S85.DTL.

[44] Reconstruction and Stabilization Civilian Management Act of 2007, S. 613, 110th Cong. (2007) (as reported by S. Comm. on Foreign Relations, Feb. 15, 2007); Reconstruction

Let me talk briefly about the line between covert and overt. I do not want any American citizen to ever look at a military person in uniform and say, "I wonder how many of them are here who are not in uniform or operating covertly." This line that exists is part of our good standing in the world—we have carefully tried to keep the military out of the covert world. That does not mean that special operations people do not sneak around; we are not talking about that. We are talking about operating under cover and different kinds of things. The covert side has appropriately resided within the CIA. We want the citizens, when they look at men and women wearing the cloth of the nation, to know that that is who they are.

Professor Radsan: I have not thought enough about Goldwater-Nichols to give you an answer. But I do believe we have to sort out—even in the important area of human source networks—intelligence gathering and what the roles are going to be between the intelligence side and the military side. That has not been sorted out. It is a very important area, and I agree with your questions and the need for reform or thinking in this area.

I think where we differ is that my proposals were very specific and discrete. Implicit in that, I do not know that this is the time for structural changes. I do not think the structure is so bad, looking at it from somebody who worked in the intelligence community, and looking at our authorities and the legal structure. We have the Director of National Intelligence—that was a big reform that was rushed through in 2004.[45] Many people, including Judge Posner, believe all that did was add another layer of bureaucracy.[46] I do not know as much about the military area, but I am suggesting let us not add layers of bureaucracy and regulation to the CIA.

Embedded in your question is a question about oversight. I do not think you can blame the CIA for the breakdown of the oversight system. Let me defend the line officers, or the people who understand the lessons of the Church Committee, the reaction to abuses, and the reaction to the notion that the CIA was a rogue elephant.[47] What did the CIA learn from

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and Stabilization Civilian Management Act of 2008, H.R. 1084, 110th Cong. (2007) (as introduced in the House of Representatives, Feb. 15, 2007).

[45] Intelligence Reform and Terrorism Prevention Act of 2004 § 1011, 50 U.S.C. § 403 (Supp. V 2006) (establishing a Director of National Intelligence position).

[46] *See* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005).

[47] The Church Committee, a common reference for the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, published a number of reports that "contain a wealth of information on the formation, operation, and abuses of U.S. intelligence agencies. They were published in 1975 and 1976, after which recommendations for reform were debated in the Congress and in some cases

Church, from Iran-Contra? Two basic lessons—maybe three. One is that you need presidential authorization to do covert actions and to do sensitive programs. I am not revealing anything classified, nor has the Admiral, but it has been reported that President Bush signed a comprehensive covert action plan within a week of 9/11 that gave the CIA written authorities.[48] So the people who are doing these operations said President Bush has authorized this.

The second thing the CIA was taught, and rightly so, is the need to go to the oversight committees. We are not going to go into the public session of Congress, but the public record shows that the CIA went to both intelligence committees. People may be skeptical; they say maybe they limited it, but this is more a problem aimed at Congress. What did you do? There are ways to be squeaky without necessarily revealing classified information.

The third thing the CIA was taught to do is get legal advice to understand that the President, as a matter of constitutional law, may not necessarily be able to override statutes. Everything in the public record shows that the CIA received legal advice within the General Counsel's Office and went to the Justice Department. The Office of Legal Counsel was considered to be the gold standard, and I think it is fair to criticize the lawyers in the CIA for relying on perhaps what was flawed advice from John Yoo and others in the Office of Legal Counsel. But I think it is especially unfair to criticize a line officer, who is not a lawyer, for pursuing policies that were authorized, briefed on the Hill, and were supported by written memos from the Office of Legal Counsel. So when I talked about sweeping change, I am not thinking about those people who do the day-to-day work in the CIA—whether they are in the Directorate of Intelligence, or the National Clandestine Service.

Professor Ash: Okay. Do you have any comments?

Professor McNeal: I will try to be brief, but first regarding Goldwater-Nicholas reform. I think maybe the question is targeted at recommendations made by the Project on National Security Reform,[49] which is another possible interesting issue to discuss. Some of the points that the Admiral made were about the number of State Department

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carried out." Assassination Archives and Research Center, Church Committee Reports, http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm (last visited Apr. 10, 2009).

[48] *See, e.g.*, David Johnston & Todd S. Purdum, *Threats and Responses: Pursuing Intelligence*, N.Y. TIMES, Mar. 25, 2004, at A1.

[49] *See* Project on National Security Reform, Project Overview, http://www.pnsr.org/web/page/578/sectionid/578/pagelevel/1/interior.asp (last visited Apr. 10, 2009).

employees we have. Largely, the State Department gets relegated to second status because it does not have as great a seat at the table. The argument is that if you can integrate our national security structure—recognizing that there are soft power and hard power components of it—that integration could lead to some better policy outcomes. But that will require a major reorganization.

The Title 10 and Title 50 question is an interesting one because it is somewhat in the ether here academically. When the military goes out, there are JAGs who sit with intelligence agents or officials and advise on whether it is lawful strike a specific target or engage in a specific operation. If a JAG is seated in a targeting cell in a special operations unit, the first question will still be whether a certain target can be attacked. However, the second question that the officer in that cell will oftentimes ask is whether he is operating under Title 10 or Title 50 authority. If it is a CIA drone, the answer may be that it is fine to hit the target.[50] Under Title 10—the answer may be, no you cannot.[51] Different authorities at the tip of the spear can create different outcomes. That can be a good thing, or it could potentially lead to abuse. It is a decision that involves resolving the difficult question of whether one wants that flexibility at the tip of the spear. I would argue you probably do want that operational flexibility.

Admiral Clark: Of course you have to have the flexibility to be able to operate in the environment you have. In the Navy, we cannot arrest drug smugglers because that is criminal kind of conduct. The Coast Guard, however, does have that authority because they operate under a law enforcement jurisdiction. And so, if we find ourselves in a position where we think we are assigned to that kind of surveillance role, we are going to be hooked up with and have a Coast Guard detachment aboard so we can execute our mission. We are then willing to have any kind of oversight that is required of us. The point goes back to Professor Radsan's point that I wanted to piggyback on. The challenge for the future in so many areas is figuring out the mechanisms to provide the kind of oversight that keeps us in good standing in the world—the mechanisms that would allow us to rebuild goodwill. The point to be made is we must have mechanisms that keep us in good standing—first of all with ourselves. We get to define who we are and who we are going to be as a people. We believe that we are going to be people who live under the rule of the law. It happens to make us a special people, and is why I am so proud to be a citizen of the United States of America.

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[50] *See* 50 U.S.C. § 413b (2000 & Supp V. 2006).

[51] *See* 10 U.S.C. § 167(g) (2006).

Professor Ash: I do not think I could have ended it any better than that, Admiral. I appreciate your sharing with us. Thank you very much.

BOUMEDIENE AND FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL POWER†

*Jordan J. Paust**

The Supreme Court's decision in *Boumediene v. Bush* in June 2008 reaffirmed the extraterritoriality of the United States Constitution.[1] More particularly it recognized the extraterritoriality of constitutionally-based habeas corpus to aliens detained at Guantanamo Bay, Cuba, as well as the restraining reach of the Suspension Clause, Article I, Section 9, Clause 2 of the Constitution with respect to congressional attempts to strip aliens of the privilege of habeas corpus.[2] More generally, and more importantly, *Boumediene* is the latest among four Supreme Court cases that have clearly rejected an ahistorical and radical commander-above-the-law theory claimed by the Bush Administration during its so-called "war" on terror.[3] The cases reaffirm a fundamental understanding that our security and our liberty require that all persons within the Executive Branch remain bound by the law even in time of war or when there are other serious outside threats to our national security. If we are to preserve our democracy, each generation must ensure that law forms a barrier that will hold against any attempted break or circumvention.

I. THE EXECUTIVE DOES NOT HAVE UNCONTROLLED POWER

A major theme embraced by Justice Kennedy in the majority opinion was that uncontrolled governmental power is an autocratic and

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1 128 S. Ct. 2229, 2240 (2008).

2 *Id.*

3 In my opinion, the other three cases in which the Supreme Court held the line against claims to abandon the rule of law were *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *Rasul v. Bush*, 542 U.S. 466 (2004). Concerning the radical commander-above-the-law theory, see, for example, JORDAN J. PAUST, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, *in* JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 86, 89–91 (2007) [hereinafter PAUST, BEYOND THE LAW].

unconstitutional outcome that must be opposed.[4] As he noted when referring to the venerated Magna Carta, "from an early date it was understood that the King, too, was subject to the law."[5] Addressing the views of the Framers of our Constitution, Justice Kennedy emphasized their abhorrence of "undivided, uncontrolled power" and noted that their "inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches" in order to serve "not only to make Government accountable but also to secure individual liberty."[6] Related to this general theme was his recognition "that the Framers deemed the writ [of habeas corpus] to be an essential mechanism in the separation-of-powers scheme,"[7] a scheme that was "'known to be a defense against tyranny'"[8] and one that required, as understood by those participating during the New York Ratifying Convention in 1788, "'[t]hat every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint.'"[9] "Security," Justice Kennedy recognized, "subsists . . . in fidelity to freedom's first principles," and "[c]hief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[10] While stressing the need to assure the rule of law, he added:

> The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled . . . within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.[11]

The related themes of governmental power restrained by law and the need for judicial review of the propriety of executive detention are evident also in Justice Souter's concurring opinion. "[A] basic fact of . . . constitutional history," he wrote, is "that the power . . . of the

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[4] *Boumediene*, 128 S. Ct. at 2244–46.

[5] *Id.* at 2245.

[6] *Id.* at 2246 (citing Loving v. United States, 517 U.S. 748, 756 (1996)).

[7] *Id.*

[8] *Id.* (quoting *Loving*, 517 U.S. at 756).

[9] *Id.* (alteration in the original) (quoting Resolution of the New York Constitutional Convention, Ratification Message (July 25, 1788), *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327, 328 (Jonathan Elliot ed., 2d ed. 1836)); *see also Boumediene*, 128 S. Ct. at 2244 ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.").

[10] *Boumediene*, 128 S. Ct. at 2277; *see also* Stephen Abraham & William S. Sessions, *Habeas Affirmed: Judicial Review of Detentions after Boumediene*, JURIST, June 19, 2008, http://jurist.law.pitt.edu/forumy/2008/06/habeas-affirmed-judicial-review-of.php.

[11] *Boumediene*, 128 S. Ct. at 2277.

Executive Branch . . . is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention."[12]

II. THE EXTRATERRITORIAL CONSTITUTION

Another major thematic recognition in *Boumediene* is the reaffirmation of the extraterritorial Constitution.[13] As Justice Kennedy remarked: "[t]he Court has discussed the issue of the Constitution's extraterritorial application on many occasions."[14] While quoting an 1885 Supreme Court opinion, Justice Kennedy noted that "[e]ven when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[15] More particularly, Justice Kennedy wrote, the Court's holding in *Boumediene* is "that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay."[16]

The extraterritorial reach of the Constitution's unavoidable limitations on executive power should have been recognized by Justice Scalia in dissent when he quoted *Balzac v. Porto Rico*,[17] but he apparently did not appreciate the full meaning of the quoted language. Justice Scalia quoted *Balzac's* declaration that "'[t]he Constitution of the United States is in force in Porto Rico as it is wherever and whenever the *sovereign power* of that government is exerted.'"[18] Justice Scalia seemed to recognize that the Constitution applies where the United States exercises power in its "sovereign territory,"[19] an undoubted truth, but *Balzac* addressed something far different than territoriality. *Balzac* affirmed that the Constitution applies wherever the government exerts its "sovereign power."[20] What Justice Scalia did not address is the fact

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[12] *Id.* at 2279 (Souter, J., concurring).

[13] *Id.* at 2253–58 (majority opinion).

[14] *Id.* at 2253.

[15] *Id.* at 2259 (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)). *Murphy* addressed conduct that occurred outside the United States in what was then the Utah territory. *Murphy*, 114 U.S. at 15.

[16] *Boumediene*, 128 S. Ct. at 2262. The Court did not rule that Congress had engaged in an unconstitutional "formal suspension" of habeas. *Id.* Instead, the majority opinion ruled that the congressional legislation (that is, Section 7 of the Military Commissions Act) "operates as" and "effects an unconstitutional suspension." *Id.* at 2240, 2274; *see also id.* at 2265 ("intended to circumscribe habeas review" by "jurisdiction-stripping language" in Section 7 of the Military Commissions Act, 28 U.S.C. § 2241(e)(1) (2006)).

[17] 258 U.S. 298 (1922).

[18] *Boumediene*, 128 S. Ct. at 2300 (Scalia, J., dissenting) (quoting *Balzac*, 258 U.S. at 312 (emphasis added)).

[19] *Id.*

[20] 258 U.S. at 312.

that sovereignty is a form of lawful governmental power[21] and that wherever the U.S. Government detains individuals it is exercising a form of sovereign power.

While stressing a fundamental principle of our constitutional system of government and the nature of the federal government's power, Justice Black affirmed in *Reid v. Covert* that the government of the United States "is entirely a creature of the Constitution" and "[i]ts power and authority have no other source. It can only act [at home or abroad] in accordance with all the limitations imposed by the Constitution."[22] As I have written elsewhere, at the time of the framing of the Constitution "it was well understood that our federal and state governments possess limited authority and merely the powers that have been delegated by the people of the United States, whether or not such powers are exercised within the United States or abroad."[23] Furthermore, "[t]his fundamental recognition and related expectations have often been reaffirmed by the

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[21] *See Boumediene*, 128 S. Ct. at 2252 (noting that the proper focus is on "sovereignty in the general . . . sense, meaning the exercise of dominion or power . . . [not] sovereignty in the narrow, legal sense of the term, meaning a claim of right").

[22] 354 U.S. 1, 5–6 (1957); *see also id.* at 12, 35 n.62 (noting that the Constitution applies beyond the boundaries of the United States, and that it "must be observed" during war (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866))). In *Boumediene*, Justice Kennedy stated that Justice Harlan suggested in *Reid* "that whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.'" *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring)). This is generally correct, although Congress has no power to obviate constitutional strictures and, importantly, Harlan did not suggest that the Constitution is not extraterritorial. As Harlan stated, in his view "[t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances." *Reid*, 354 U.S. at 74 (Harlan, J., concurring). A more fundamental point expressed by Justice Black is, of course, that the government simply has no lawful power or authority to act here or abroad inconsistently with the Constitution. *Id.* at 5–6 (majority opinion). With respect to treatment of aliens, the point is not so much whether aliens have rights, but whether the government has a lawful power. *See* JORDAN J. PAUST, *Antiterrorism Military Commissions: Courting Illegality*, *in* PAUST, BEYOND THE LAW, *supra* note 3, at 106–07, 279–81 nn.44–52.

[23] Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 208 (2008) [hereinafter Paust, *In Their Own Words*]; *see, e.g.*, U.S. CONST. pmbl. ("We the People . . . do ordain and establish this Constitution for the United States of America."); *id.* amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 68, 83 n.34, 169, 171, 247 n.90, 326, 328–31, 333–35, 487–95 (2d ed. 2003) [hereinafter PAUST, INTERNATIONAL LAW]. As James Wilson remarked, the government "is founded upon the power of the people. . . . in their name and their authority." James Wilson, Delegate for Bedford County, Remarks at The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 11, 1787), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 9, at 497–98.

judiciary."[24] A few of the other judicial affirmations that the federal government and all persons within the Executive Branch can only act in accordance with the Constitution are worth highlighting.

While dissenting in *Downes v. Bidwell* in 1901, Justice Harlan affirmed: "[b]y whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its Government, the validity or invalidity of that which is done must be

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[24] Paust, *In Their Own Words*, *supra* note 23, at 208; *see, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5 (1974) ("'[T]here cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States.'" (quoting Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953))); *Reid*, 354 U.S. at 5–6, 12, 35 n.62; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power . . . must stem either from an act of Congress or from the Constitution itself."); *id.* at 646, 649–50 (Jackson, J., concurring) (noting that the President's power to execute law "must be matched against words of the Fifth Amendment" and the Founders omitted "powers *ex necessitate* to meet an emergency"); *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution."); *Balzac*, 258 U.S. at 312–13 (recognizing that "[t]he Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted," but the "real issue" is "which of its provisions were applicable," and holding that the requirements of due process apply); Downes v. Bidwell, 182 U.S. 244, 381–82, 385 (1901) (Harlan, J., dissenting) ("[The] written constitution. . . . protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it created, or by any branch of it . . . . [In fact,] Congress . . . has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. . . . By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its Government, the validity or invalidity of that which is done must be determined by the Constitution."); United States v. Lee, 106 U.S. 196, 220 (1882) (see quote *infra* note 27 and accompanying text); *Milligan*, 71 U.S. (4 Wall.) at 120–21 ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection *all classes of men*, at all times, and *under all circumstances*." (emphasis added)); New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736 (1836) ("The government of the United States . . . is one of limited powers."); United States v. Worrall, 2 U.S. (2 Dall.) 384, 393–94 (Chase, Circuit Justice 1798) (see quote *infra* note 26 and accompanying text); United States v. Tiede, 86 F.R.D. 227, 242, 244 (U.S. Ct. for Berlin 1979) (see quote *infra* notes 28–29 and accompanying text); United States v. Robins, 27 F. Cas. 825, 828–29 (D.C.D. S.C. 1799) (No. 16,175) ("Col. Moultrie . . . for the prisoner . . . [argued] [t]hat the constitution . . . is the compact by which our government was formed, and under which alone it exists; and that from this compact, all civil power and authority, and every constituted branch of our society, as a nation, was derived, and is exercised . . . . [T]hose [rights] not given up, formed a sacred residuum in the hands of the people, and which are unalienable by any act of legislation . . . ."); S. REP. NO. 56-249, at 11 (1900), *noted in* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 479 n.87 (2007); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006) ("[T]he Executive is bound to comply with the rule of law . . . ."); *id.* at 637–38 (Kennedy, J., concurring) (addressing the need for congressional statutes operative abroad to be "in conformance with the Constitution and other laws" and recognizing that trial of aliens by a military commission abroad "raises separation-of-powers concerns of the highest order" and results in "an incursion [into] the Constitution's three-part system").

determined by the Constitution."[25] More than one hundred years earlier, Justice Chase recognized in 1798 with respect to the unavoidable reach of constitutional limitations on power that the U.S. "government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed."[26] In 1882, with respect to the limits imposed by law and the only power or authority that any person within the Executive Branch can lawfully exercise, Justice Miller affirmed a fundamental principle of our constitutional government that was applicable to executive conduct during war:

> No man in this country is so high that he is above the law. . . . All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office . . . is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[27]

"It is a first principle of American life," Judge Herbert Stern affirmed while sitting in a U.S. court in Berlin, "—not only life at home but life abroad—that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution."[28] While ruling against executive claims to unchecked power, Judge Stern aptly noted that by the time of his decision in 1979,

> there ha[d] never been a time when United States authorities exercised governmental powers in any geographical area—whether at war or in times of peace—without regard for their own Constitution. . . . Nor ha[d] there ever been a case in which constitutional officers, such as the Secretary of State, have exercised powers of their office without constitutional limitations.[29]

III. HABEAS ABROAD AND LAW TO BE APPLIED

Boumediene held that the privilege of habeas corpus applies at Guantanamo Bay, Cuba,[30] a place where the United States exercises its power and, in fact, exercises complete control.[31] What the Justices may not have been aware of, however, is the fact that in other cases before the Court habeas corpus had been available to aliens being held on

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[25] *Downes*, 182 U.S. at 385 (Harlan, J., dissenting).

[26] *Worrall*, 2 U.S. (2 Dall.) at 393–94.

[27] *Lee*, 106 U.S. at 220.

[28] *Tiede*, 86 F.R.D. at 244.

[29] *Id.* at 242 (citation omitted).

[30] 128 S. Ct. at 2262.

[31] *See, e.g., id.* at 2252–53; *see also* JORDAN J. PAUST, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure, in* PAUST, BEYOND THE LAW, *supra* note 3, at 82–84.

foreign flag vessels,[32] which under international law are the equivalent of foreign territory.[33] Moreover, habeas review had been granted to excluded aliens who, by fiction, are without "entry" into the United States.[34] For whatever reason, *Boumediene* made no mention of the point made in *Rasul v. Bush* that, in any event, the ultimate custodians of habeas petitioners held at Guantanamo are in fact in Washington, D.C.[35]

With respect to the consequences of granting habeas, I have written elsewhere that "[b]y granting habeas review, one does not guarantee a particular decision on the merits of a claim."[36] Such "review merely assures judicial consideration of the lawfulness of an [e]xecutive decision to detain the petitioner."[37] With respect to the law to be applied during habeas review, the Court correctly noted that "relevant law" must be addressed.[38] Such law clearly includes constitutionally sound extraterritorial laws of the United States, which in turn necessarily include treaties of the United States[39] and customary international law.[40] Importantly, unswerving recognitions by the Founders and Framers and all relevant federal and state judicial opinions throughout our history have affirmed that during an actual war the President and all persons within the Executive Branch are bound by the laws of war.[41] With

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[32] *E.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 660–64 (1892) (allowing a foreigner forbidden entry into the United States, after detaining her on a foreign steamer, to challenge her detention under a writ of habeas corpus even though she was never officially admitted into the United States); United States v. Jung Ah Lung, 124 U.S. 621, 622–23, 626 (1888) (detaining foreigner on a foreign steamer otherwise located within the city and county of San Francisco before the Court determined that issuing a writ of habeas corpus was proper); PAUST, *The Ad Hoc*, *supra* note 31, at 83, 231 n.148.

[33] *E.g.*, Lauritzen v. Larsen, 345 U.S. 571, 584–86 (1953); United States v. Flores, 289 U.S. 137, 155–59 (1933); PAUST, INTERNATIONAL LAW, *supra* note 23, at 417, 427 n.17.

[34] *E.g.*, Brownell v. Tom We Shung, 352 U.S. 180, 183 (1956); Chen v. Carroll, 858 F. Supp. 569, 573 (E.D. Va. 1994); PAUST, *The Ad Hoc*, *supra* note 31, at 83, 231 n.148.

[35] *See* Rasul v. Bush, 542 U.S. 466, 483 (2004).

[36] PAUST, *The Ad Hoc*, *supra* note 31, at 83.

[37] *Id.*

[38] *Boumediene*, 128 S. Ct. at 2266.

[39] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 23, at 67–70, 169–74; JORDAN J. PAUST, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, *in* PAUST, BEYOND THE LAW, *supra* note 3, at 67–69, 71–76; David Kaye, Op-Ed., *Boumediene's Uncertain Aftermath*, JURIST, June 23, 2008, http://jurist.law.pitt.edu/forumy/2008/06/boumedienes-uncertain-aftermath.php (noting the "obvious" need to apply Geneva law when determining whether a combatant is subject to detention).

[40] With respect to the binding nature of customary international law as law of the United States, see, for example, PAUST, INTERNATIONAL LAW, *supra* note 23, at 7–11, 170–73; Paust, *In Their Own Words*, *supra* note 23.

[41] *E.g.*, JORDAN J. PAUST, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, *in* PAUST, BEYOND THE LAW, *supra* note 3, at 20–22, 169–72 nn.182–194; Paust, *In Their Own Words*, *supra* note 23, at 240 n.135.

respect to international law concerning the propriety of detention, human rights law allows detention that is not arbitrary;[42] and during an actual war, such as those in Afghanistan and Iraq, the laws of war allow detention of prisoners of war[43] and any person who poses a security threat when and as long as such detention is necessary.[44] In each case, international law requires review of the propriety of detention.[45] Additionally, numerous U.S. cases affirm that judicial power clearly exists to review the legality of executive decisions and actions taken in time of war, including decisions regarding the status of prisoners of war and other persons who are detained, as well as the propriety of their detention.[46]

A law that may not apply to certain detainees is the Authorization for Use of Military Force[47] ("AUMF"). As noted by the Court, some of the detainees claim that they are not members of al Qaeda and had no connection to al Qaeda.[48] These claims are relevant, since the AUMF expressly reaches only certain persons and entities. As noted in a prior writing, a claim that the AUMF provides an authorization for executive use of lawful war measures during a so-called "war" on terrorism is in significant error:

> The AUMF is not a declaration of "war," but merely a very limited authorization to use necessary and "appropriate" "force" against certain persons, nations, or organizations directly involved in or that aided the 9/11 attacks or that had "harbored" such organizations or persons before or during the 9/11 attacks. Congressional use of the past tense regarding nations, organizations, or persons that "aided" or "harbored" those who planned, authorized, or committed the 9/11 attacks means that the intentional aiding or harboring must have

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42 PAUST, *Judicial Power*, *supra* note 39, at 67.

43 *See, e.g.*, *id.* at 70, *cited in* Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004).

44 *Id.*

45 *See id.* at 68–69, 71. The attempt in the Military Commissions Act ("MCA") to deny use of the Geneva Conventions in habeas proceedings should not prevail in view of relevant constitutional strictures and Supreme Court tests concerning the primacy of treaty law. *See* PAUST, *Above the Law*, *supra* note 3, at 92–94, 97–98, 252 n.60, 254 n.68, 257 nn.104–105; *see also* Kaye, *supra* note 39 (questioning whether "Congress unconstitutionally attempt[ed] to constrain the federal courts from applying existing treaty law"). Further, the MCA's provision is the same one that was struck down by the Court because of its unconstitutional "jurisdiction-stripping language" that "effects an unconstitutional suspension" and circumscription of habeas review. *Boumediene*, 128 S. Ct. at 2265, 2274.

46 For a discussion of cases, see PAUST, *Judicial Power*, *supra* note 39, at 71, 73–75; Paust, *In Their Own Words*, *supra* note 23, at 242 n.136. The cases are so numerous and easily discoverable that it is clear error to state that judicial review of the propriety of detention "is entirely *ultra vires*." *But see Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting).

47 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

48 *Boumediene*, 128 S. Ct. at 2241.

> occurred prior to or during the 9/11 attacks and with reference to such attacks. The AUMF does not authorize use of force against those persons or organizations who were or are merely general supporters of those responsible for the 9/11 attacks; who were or are merely "affiliated," "associated," or have had "links" with al Qaeda; or who pose any threat of future terrorist attacks.
>
> It most certainly did not authorize a "war" against al Qaeda (a non[-S]tate actor), as opposed to force, or a "war" against a mere tactic of "terrorism." Congress actually refused to authorize use of force against "acts of terrorism" as such and the Supreme Court has recognized that only Congress has the constitutional power to determine whether a war exists. Moreover, the United States cannot be at "war" with al Qaeda as such, since it is not a state, nation, belligerent, or insurgent.[49]

The fact that the United States cannot be at war with al Qaeda has consequences with respect to the reach of the laws of war and the status of certain members of al Qaeda. For example, those persons who are not U.S. nationals, who are found and remain outside of actual theaters of war in Afghanistan and Iraq, and who have had no direct connection with the violence occurring in actual war are not covered by the laws of war.[50] As a consequence, the propriety of their detention, their status, and their rights and duties are not governed by the laws of war.[51] Nevertheless, human rights law (which applies in all social contexts) and other relevant international and domestic law will apply.[52]

Strangely, another ruling of the Court in 2008 attempted to take away relevant executive power. In *Medellín v. Texas*, Chief Justice Roberts decided that the President had no power to execute a certain treaty of the United States.[53] As noted in another writing, however, at least seven other Supreme Court cases have recognized that the President does have an executing power.[54] Indeed, Article II, Section 3 of

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[49] PAUST, *Above the Law*, *supra* note 3, at 91–92 (footnotes omitted); *see* Authorization for Use of Military Force, Pub. L. No. 107-40, pmbl., 115 Stat. 224 (2001) ("To authorize . . . against those responsible for the recent attacks launched against the United States."); *id.* § 2(a) ("[T]hose . . . [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . ."); *see also* JORDAN J. PAUST, *War and Enemy Status After 9/11: Attacks on the Laws of War*, *in* PAUST, BEYOND THE LAW, *supra* note 3, at 48–50. *But see Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting) (opining without attention to relevant international law and U.S. cases that we are "at war with radical Islamists," an "enemy" in "battle").

[50] *See generally* Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATHOLIC U. L. REV. 759, 760–61, 765–66, 771–74 (2007).

[51] *Id.*; *see also* PAUST, *War and Enemy Status*, *supra* note 49, at 49; PAUST, *Above the Law*, *supra* note 3, at 257 n.103.

[52] PAUST, *War and Enemy Status*, *supra* note 49, at 49.

[53] 128 S. Ct. 1346, 1368–70, 1372 (2008).

[54] *See* Jordan J. Paust, Medellín, Avena, *The Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 313 & nn.45–46, 332 (2008)

the United States Constitution expressly mandates that the President "shall take Care that the Laws be faithfully executed."[55] Such laws include treaties. As I have written elsewhere:

> The Founders, Framers, and the judiciary have consistently recognized that "the Laws" that the President must faithfully execute include treaties of the United States. This constitutionally-based mandate leaves no discretion with the President whether to faithfully execute the laws, but it can leave some discretion with respect to the means available to faithfully execute the laws, assuming that the relevant laws do not dictate use of a particular method of enforcement. This constitutional duty to faithfully execute the laws also enhances presidential authority to do so. In other words, the very duty to execute laws provides a constitutionally-based competence to execute the laws.[56]

With respect to detention of individuals, treaty law of the United States establishes a competence to detain in certain circumstances.[57] Whether or not a relevant provision of such treaty law is self-executing,[58] the President should not have to wait for Congress to enact relevant law when the President is bound to faithfully execute treaty law on behalf of the United States. This point is clearly evident with respect to judicial acceptance of presidential execution of the customary and treaty-based laws of war that permit detention of prisoners of war and other persons during an actual armed conflict.[59]

CONCLUSION

Boumediene has reaffirmed that executive power is restrained by law and that judicial review of the propriety of executive detention of persons in time of war or some other national security crisis is an essential part of our constitutional process. Furthermore, the extraterritorial reach of the Constitution places unavoidable limits on executive power. In fact, in view of the constitutional design, it is a fundamental principle of our constitutional form of government that the Executive "is entirely a creature of the Constitution" and that "[i]t can only act [here or abroad] in accordance with all the limitations imposed

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[hereinafter Paust, Medellín, Avena]. Incredibly, the Chief Justice did not understand that the President ratifies treaties of the United States, not the Senate or the full Congress. *See, e.g., id.* at 310 n.31. Furthermore, the majority opinion used improper tests regarding self-execution. *See, e.g., id.* at 328–29 & nn. 127–31.

[55] U.S. CONST. art. II, § 3.

[56] Paust, Medellín, Avena, *supra* note 54, at 311–12 (footnotes omitted).

[57] *See supra* notes 42–44.

[58] Concerning the nature of various provisions of the Geneva Conventions as self executing, see, for example, PAUST, *Judicial Power*, *supra* note 39, at 71–72, 218 n.39, 219 n.43, 221 n.47.

[59] *Id.* at 74, 222 n.71, 224 n.72.

by the Constitution."[60] Understandably, therefore, the Court has often reaffirmed the related principle that "[n]o man in this country is so high that he is above the law"[61] and every known judicial opinion since the creation of the United States has affirmed that the President and all others within the Executive Branch are bound by the laws of war.[62] This is not surprising since the President has the express constitutional duty to faithfully execute the law.

The security of our democracy and constitutional order demands continued adherence to these fundamental constitutional principles. Their reclamation is also essential for the reemergence of trust and respect for the United States abroad. More particularly with respect to terroristic threats to our democracy, a recommitment to the rule of law and to human rights that have been prominent among our traditional values[63] will enhance the efficacy of a rational policy-serving antiterrorist strategy. Terrorism, of course, is contrary to human dignity and is essentially antithetical to human rights.

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60 Reid v. Covert, 354 U.S. 1, 5–6 (1957).

61 United States v. Lee, 106 U.S. 196, 220 (1882).

62 *See supra* note 41 and accompanying text.

63 *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 23, at 193–207.

BOUMEDIENE V. BUSH: A CATALYST FOR CHANGE†

*Commander Glenn Sulmasy**

As one might expect, I disagree with some of my colleagues on myriad issues relating to national security, but what I would like to focus on this afternoon is the impact of the United States Supreme Court decision in *Boumediene v. Bush*.[1] Although I believe strongly in what Chief Justice Roberts has written in his dissent in the *Boumediene* case,[2] there may still be a silver lining in this decision that really highlights the need for change in the detention and adjudication policy for detainees in the war on al Qaeda.

First and foremost, we have to recognize that whether you define the current conflict as a war or as a law enforcement action completely decides how you are going to review, analyze, and discuss Supreme Court cases in the war on al Qaeda. How you look at it will decide how you are going to write about it, how you are going to think about it, and what policies will stem from it.

To a large degree, prior to *Boumediene*, the Court held that this was a war. In each of the three preceding cases relating to those detainees captured outside the U. S., there was some recognition, either tacit or overt, that the current conflict is a war.[3] Unfortunately, in many regards, the worst part of the decision in *Boumediene* is that it really

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1 128 S. Ct. 2229 (2008).

2 *Id.* at 2279–93 (Roberts, C.J., dissenting).

3 Hamdan v. Rumsfeld, 548 U.S. 557, 599 n.31 (2006) ("[W]e do not question the Government's position that the war commenced with the events of September 11, 2001."); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) ("We conclude that detention of individuals . . . for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."); Rasul v. Bush, 542 U.S. 466, 499 (2004) (Scalia, J., dissenting) (entertaining detainee habeas petitions "force[s] courts to oversee one aspect of the Executive's conduct of a foreign war").

returns us back to the 9/10 mentality.[4] It is the first time that we can ascertain a willingness (or an inference) from the Court in its 5-4 decision that it views this as a law enforcement action and no longer as a war.[5] The Court does not specifically state it, but it is alluded to.[6]

If you accept this notion from *Boumediene* that the current conflict is a law enforcement action, it reaches a level of concern beyond simply what is being stated at Regent Law School today or even within the parameters of the specific holding in *Boumediene*. Politically, people will refer to the "9/10 mentality," but the 9/11 Commission cautioned about this mentality after the attacks of September 11, 2001. Once the Commission had the opportunity to look back, in hindsight, they were able to warn against reverting back to that 9/10 mentality.[7]

This is a war being waged against radical Islam, international terrorism, and al Qaeda and its associates.[8] It is critical to look at it from this perspective, and one of the major concerns I maintain is that we—the U. S. government and polity—are slipping back; the sleeping giant is going back to sleep not recognizing this is truly a war that we are engaged in.

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[4] A 9/10 mentality refers to the national mindset prior to the attacks of September 11, 2001. It is what left the government and its people totally unprepared for those attacks. A 9/10 mentality ignores the gravity of the threat posed by our enemies and ignores the institutional ineptitudes that allow such acts of terror to be successfully carried out against the United States. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *Preface* to THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, at xv–xvi (2004), http://govinfo.library.unt.edu/911/report/911Report.pdf [hereinafter 9/11 COMMISSION REPORT].

[5] *Boumediene*, 128 S. Ct. at 2239 (syllabus of the Court). The majority opinion was written by Justice Kennedy and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 2240. The dissenting justices were Chief Justice Roberts, Justices Scalia, Thomas, and Alito. *Id.* at 2279, 2293; *see also infra* note 6 and accompanying text.

[6] *Boumediene*, 128 S. Ct. at 2248–49. The Court noted:

> To the extent these authorities suggest the common-law courts abstained altogether from matters involving prisoners of war, there was greater justification for doing so in the context of declared wars with other nation states. Judicial intervention might have complicated the military's ability to negotiate exchange of prisoners with the enemy, a wartime practice well known to the Framers.

Id. Based on the Court's assertion, the judicial intervention on behalf of the prisoner in *Boumediene* exposes the Court's view of this case as being one of a law enforcement action because the Court acknowledged the validity of abstaining from matters involving prisoners of war during wartime conflicts. *See also id.* at 2260–61. The Court draws more than a mere trivial distinction "between Landsberg Prison, circa 1950, [in Germany] and the United States Naval Station at Guantanamo Bay." *Id.* at 2260.

[7] *See* 9/11 COMMISSION REPORT, *supra* note 4, at xv–xvi.

[8] *Id.* at 363 (stating that our enemies are al Qaeda and a radical ideological Islamic movement).

The Supreme Court's 5-4 decision in *Boumediene* in late June of 2008 justifiably sent shock waves through the legal community. The majority opinion, authored by the ever-wandering Justice Kennedy, disregarded centuries of precedent, disregarded the military deference doctrine altogether, and intruded on what is clearly the province of the political branches. As a result of this holding, the detainees at Guantanamo Bay now formally have more rights than prisoners of war under the Geneva Conventions.[9]

To say the least, citizens, regardless of political affiliation, partisanship, or views on Guantanamo, should be concerned about the ramifications of this decision. I address this from three perspectives: historical precedent, military deference, and prisoners of war.

I. HISTORICAL PRECEDENT

From a precedential perspective, the *Boumediene* holding permits aliens held outside the United States to exercise constitutional rights within U.S. courts of law during a time of armed conflict.[10] This has never been the policy of the United States regardless of what has been said, and the Court has never granted such rights to those detained outside of U.S. jurisdiction. Additionally, this is the first Supreme Court case since the attacks of September 11, 2001, that actually declares a constitutional violation contained within the military commissions process.[11] In previous cases, there were tweaks or setbacks, but no constitutional violations.

Although many people on both sides of the aisle believe that Guantanamo Bay and the military commissions might be flawed as a matter of policy—and some may say as a matter of law—I am one of those who believes the military commissions at Guantanamo Bay do not work efficiently. For full disclosure, I did initially, from 2001–2003, support the use of these unique tools of military justice in adjudicating the alleged crimes committed by the detainees captured in the war on al Qaeda. I also thought the military commissions would work because I thought they were going to be adjudicated. This was all happening in the summer of 2003 when they were supposed to begin the commissions.[12] But now we have to recognize that as a matter of policy, they are ineffective. We have to look at new and fresh ways to use the military commissions.

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9 *Boumediene*, 128 S. Ct. at 2288–89 (Roberts, C.J., dissenting).

10 *Boumediene*, 128 S. Ct. at 2275.

11 *Id.* at 2274 (holding Section 7 of the Military Commissions Act "effects an unconstitutional suspension of the writ" of habeas corpus).

12 *See* 32 C.F.R § 17 (2007). This statute took effect as of July 1, 2003, and it was promulgated for the purpose of establishing procedure and responsibilities for the conducting of trials by the military commissions. *Id.* § 17.1.

Boumediene will have a greater impact on the military commissions than simply finding them to be illegal. Justice Kennedy went to lengths to try to limit the decision to only those detained at Guantanamo Bay.[13] It is clear, however, that some will analogize this decision to other military bases overseas—for example, the military base in Bagram, Afghanistan. There are 270 prisoners at Guantanamo Bay,[14] and there are arguably 20,000 more detainees overseas.[15] In fact, on September 17, 2008, I debated Steven Wax, author of *Kafka Comes to America*, who conceded what is already understood by most: any good defense counsel worth her weight will advocate strongly to increase these constitutional protections and the rights of the detainees.[16] Many others will advocate to expand—or even drive a truck through—the holding in *Boumediene*.

The practical effect of flooding an already overburdened federal court system is no longer more than likely—it is happening right now. As is well known, the Department of Justice is busy trying to figure out ways to handle this flood of cases.[17] In fact, they are detailing government attorneys from all over the Department of Justice to work on these habeas petitions.[18] These alleged international terrorists, as of now, have access to federal district courthouses. There is strong potential that in the near future other constitutional rights of American citizens will begin to attach to the detainees as well.

Furthermore, there will be unprecedented legal challenges involving other constitutional provisions being provided to the detainees, who will argue that the Fourth and Fifth Amendments should apply to those searched or captured on the battlefield.[19] This is not a stretch but a frightening, arguably unintended consequence of the *Boumediene* decision. For example, Salim Ahmed Hamdan's attorneys filed a motion

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[13] *See Boumediene*, 128 S. Ct. 2229.

[14] Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES, June 13, 2008, at A1 (noting the prison "now holds 270 detainees").

[15] Solomon Moore, *In Decrepit Court System, Prisoners Jam Iraq's Jails*, N.Y. TIMES, Feb. 14, 2008, at A16 (recognizing there are nearly 24,000 detainees being held in the American military prisons in Iraq).

[16] Video: Rules of Engagement: A Debate in Celebration of Constitution Day, (Colgate University 2008), http://offices.colgate.edu/video_console/preview_player.asp?videoID=290.

[17] James Vicini, *Judges Assigned to Decide Guantanamo Cases*, REUTERS, July 2, 2008, http://www.reuters.com/article/topNews/idUSN0235993420080702 (reporting federal district judges in Washington, D.C., are being assigned to hear the nearly 250 cases that have already been filed involving 643 individuals who were held or are being held at Guantanamo Bay and that the court is expecting several dozen more cases to follow).

[18] *See, e.g.*, Respondents' Reply Memorandum in Support of Motion for Partial and Temporary Relief from the Court's July 11, 2008 Scheduling Order at 2, 5–6, *In re* Guantanamo Bay Detainee Litigation, No. 08-0422, 577 F. Supp. 2d 309 (D.D.C. Sept. 15, 2008).

[19] U.S. CONST. amends. IV–V.

before the court for preliminary injunctive relief in hopes of delaying the military commission's process from going forward based on the holding in *Boumediene*.[20] They laid out a laundry list of constitutional rights that they believe should attach to Hamdan, even before the military commission's process, as a result of the decision in *Boumediene*.[21] Although the motion for preliminary injunctive relief was not granted,[22] it still is the beginning of a slippery slope that we might be going down.

II. MILITARY DEFERENCE

Boumediene has altogether removed the military from the habeas process of the detainees that they have captured. Few will doubt we are a nation at war, and the military is detaining and adjudicating those unlawful combatants accused of war crimes within the military commissions process. Under *Boumediene*, however, civilian federal judges are left to their own devices without proper opportunity for the military to formally review or determine the status of those they detain.[23] The civilian courts within the federal district court will make the decision of whether to issue a writ of habeas corpus.[24]

Ordinarily, the United States Supreme Court has refrained from interfering with ongoing military operations and policy decisions. It has repeatedly refrained from intruding in this area where possible—for example, on issues such as homosexuals in the military[25] and women in combat.[26] In the past, the Court has been aware of its limitations. The justices have frequently questioned whether they are qualified to be making decisions such as the one made in *Boumediene*, as nine unelected folks in robes with life tenure who have no background or experience in military combat operations. The Court has acknowledged a lack of

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[20] Hamdan v. Gates, 565 F. Supp. 2d 130, 133–34 (D.D.C. 2008).

[21] *Id.* at 134 ("Hamdan argues that the Commission lacks power to proceed because the charges filed against him violate the Constitution's *ex post facto*, define and punish, and bill of attainder clauses. He also asserts that the MCA violates the equal protection component of Fifth Amendment due process by subjecting only aliens to trial by military commission, and that the Commission's potential allowance of certain kinds of hearsay evidence and evidence obtained through coercion will violate his Geneva Convention and due process rights.").

[22] *Id.* at 137.

[23] *See* Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008).

[24] *Id.*

[25] *See* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (upholding the military's policy of "don't ask, don't tell" towards homosexuals), *cert. denied*, 525 U.S. 1067 (1999).

[26] Rostker v. Goldberg, 453 U.S. 57, 78–79 (1981) ("Congress'[s] decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. . . . The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.").

knowledge in these areas of military policymaking and has noted the need for deference to other more capable authorities.[27]

In *Boumediene*, however, the Court inserted itself and removed the military altogether from the habeas process. In *Hamdan v. Rumsfeld*, Justice Stevens asserted the need for the commission process to be a mirror of the Uniform Code of Military Justice ("UCMJ")—the laws that govern the armed forces—and that it should be applied to the detainees.[28] Strangely, as noted in the dissents, *Boumediene* completely disregards *Hamdan* and the UCMJ process for determining the lawfulness of detention.[29]

Additionally, the Court has intruded into what the Founders clearly intended to be decisions left to the political branches.[30] With so much angst, as Professor Paust has discussed,[31] over executive power in the past few years, one hopes reasonable minds will recognize this overreach by the Court. Clearly Congress and the President are better able to make these national policy decisions. In many ways, the Court is inserting itself not necessarily because of its concerns over executive power, but because of the ineffectiveness and inability of Congress to carry out its

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[27] *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . . .

Id.; *see also Boumediene*, 128 S. Ct. at 2276–77. "Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Id.*

[28] 548 U.S. 557, 620 (2006) (noting "the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable").

[29] *Boumediene*, 128 S. Ct. at 2293 (Roberts, C.J., dissenting) (noting the Court has "unceremoniously brushed aside" *Hamdan* and has granted lawyers "a greater role than military and intelligence officials in shaping policy for alien enemy combatants"); *id.* at 2295–96 (Scalia, J., dissenting) (stating that the Court "elbows aside" the military and that it "[t]urns out they were just kidding" about what was stated in *Hamdan*).

[30] THE FEDERALIST NO. 41, at 253 (James Madison) (Clinton Rossiter ed., 2003).

[31] *See generally* Jordan J. Paust, Boumediene *and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351 (2009). *See also* JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007).

constitutional function to check the Executive. Now the Court is finding itself required to intervene in these areas, which was never intended by our Founding Fathers.[32]

III. PRISONERS OF WAR

Ironically, the holding in *Boumediene* now affords greater protection to the alleged unlawful combatants than prisoners of war would have under the Geneva Conventions.[33] This absurdity should be shocking to American citizens. Prisoners of war are given the gold standard of treatment, but drafters and signatories to the Geneva Conventions never envisioned providing access to the domestic courts of the detaining country. The Guantanamo detainees, of course, are not even signatories to the tradition of the Geneva Conventions.[34]

Now, however, nine unelected and life-tenured justices have determined that someone such as Khalid Sheikh Mohammed should be given access to our great courts of justice. If such a policy decision is to be made—and it could be made—it needs to be made by our elected representatives who have the voice of the people. The inaction of the political branches should not be a catalyst for the United States Supreme Court to intervene, particularly when such decisions impact a nation at war. Rather than argue back and forth on the merits or relative demerits of any given case, policymakers must quickly review the implications of the decision and find mutual ground on how best to proceed.

The political branches must seek a third way—not necessarily the federal courts or the military commissions, as I think most would agree they are not functioning efficiently—to balance the interests of both national security as well as the promotion of human rights. Perhaps we should seriously consider creating a specialized, hybrid court with civilian oversight. Such a court has most often been referred to as a national security court.[35]

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[32] JEAN REITH SCHROEDEL, CONGRESS, THE PRESIDENT, AND POLICYMAKING: A HISTORICAL ANALYSIS 7 (1994) (defining the Founding Fathers' intent to have the Legislative Branch of government be superior based on a formalized constitutional ability to control executive power through enumerated positive and negative legislative powers); *see also* THE FEDERALIST NO. 41, *supra* note 30.

[33] *Boumediene*, 128 S. Ct. at 2288–89 (Roberts, C.J., dissenting).

[34] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3425–31, 75 U.N.T.S. 135, 244–51; *see also* Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007) (determining that "members of al Qaeda, the Taliban, and associated forces" are not entitled to the protections afforded to prisoners of war by the Third Geneva Convention).

[35] *See generally* Glenn Sulmasy, *The National Security Court: A Natural Evolution*, JURIST, May 10, 2006, *available at* http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php. *See also* GLENN SULMASY, THE NATIONAL SECURITY COURT

We have witnessed the relative failures of the military commissions in Guantanamo Bay, but I predict the holding in *Boumediene* will demonstrate the weaknesses of having the detainees simply tried or having some resort to our traditional federal courts. I would also predict that our traditional Article III courts will go the same way as the commissions have gone.[36] The reality is that we are fighting a war but it is a hybrid war. This hybrid war mixes law enforcement and warfare, and it mixes law enforcement with warfare at higher levels than ever before. This new war is being fought against hybrid warriors who are truly international criminals. As has been noted by General Ashcroft, they are not our traditional warriors in our generally accepted understanding of the term.[37] They come in civilian clothes and flout the Geneva Conventions.

We need to be pragmatic in our idealism to uphold the rule of law. If we are faced with a hybrid war against hybrid warriors, it logically follows that we should consider a hybrid court system. Perhaps the most compelling component of such a system would be to shift the oversight from the Department of Defense to the Department of Justice. Such a system would have civilian judges who are learned in the law of armed conflict, intelligence law, and international humanitarian law. These civilian judges, not military officers, would oversee cases regarding alleged international terrorists.

Such a federal terrorist court would be structured to better meet the policy concerns of many legal commentators both domestically and internationally. The court's purpose would be to facilitate the process by which we detain and adjudicate cases against unlawful belligerents in this war, not necessarily against terrorism, but against al Qaeda. *Boumediene*, for all its faults, might just be the catalyst necessary for such action to occur.

SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (forthcoming June 2009); Benjamin Wittes, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); Amos N. Guiora, *Military Commissions and National Security Courts after Guantánamo*, 103 Nw. U. L. Rev. 199 (2008); Amos N. Guiora & John T. Parry, Debate, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008), http://www.pennumbra.com/debates/pdfs/terrorcourts.pdf; Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court*, *in* OUTSOURCING AMERICAN LAW (forthcoming) (on file with authors), *available at* http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf; Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19 (proposing the creation of a bipartisan national security court), *available at* http://www.nytimes.com/2007/07/11/opinion/11katyal.html; Stuart Taylor Jr., *Opening Argument: The Case for a National Security Court*, NAT'L J., Feb. 24, 2007, at 15.

[36] U.S. CONST. art. III.

[37] John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285, 287–88 (2009) (indicating that fighting terrorism creates new challenges because it is difficult to define the enemy).

A HUMAN RIGHTS PERSPECTIVE†

*Elisa Massimino**

As a human rights advocate based in the United States I have often used the example of U.S. adherence to human rights principles when pressing other governments to live up to their human rights obligations and respect the rights of their own citizens. I believe strongly in the potential of the United States as a force for good in the world. This country played an important leadership role in creating the international system of norms and standards that recognize the inherent dignity of all people. And so I felt privileged to be able to do human rights work from a base inside the United States. But as an organization based in the United States, I take very seriously the obligation to ensure that my own government respects those ideals. It has been increasingly difficult over the last eight years to hold the United States up as that shining city on the hill when I speak to other governments who are violating the rights of their own citizens.[1]

It is important to understand what is at stake here, and how urgent it is that we get this right. The erosion of human rights protections in the United States in the aftermath of September 11, 2001 has had a profound impact on human rights standards around the world. Over the last seven years, the United States has become identified with its selective observation of international human rights treaties to which it is bound, a pattern that has weakened the fabric of human rights norms and emboldened other governments to do the same. A growing number of countries have adopted sweeping counterterrorism measures into their domestic legal systems, at times significantly expanding on the substance of U.S. measures while explicitly invoking U.S. precedent. Opportunistic governments have co-opted the U.S. "war on terror," citing

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† This Essay is adapted for publication from a panel discussion presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies National Security Symposium at Regent University School of Law, September 27, 2008. The panel discussed recent Supreme Court decisions affecting national security, focusing on the 2008 decisions *Boumediene v. Bush* and *Munaf v. Geren*. Speakers included: Professor Jordan Paust, University of Houston Law Center; Commander Glenn M. Sulmasy, Associate Professor of Law, U.S. Coast Guard Academy; Elisa Massimino, CEO and Executive Director, Human Rights First; and Professor Harvey Rishikof, National War College. The panel was moderated by Dr. Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice.

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1 *See* John Winthrop, *A Modell of Christian Charity* (1630), *in* POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY 7, 12 (Michael B. Levy ed., Waveland Press, Inc. 2d ed. 1988) (providing the origin of the phrase designating the United States as a "city on a hill").

support for U.S. counterterrorism policies as a basis for internal repression of domestic opponents.

In the course of my work I often meet with human rights colleagues from around the world, many of them operating in extremely dangerous situations. When I ask how we can support them as they struggle to advance human rights and democratic values in their own societies, invariably their answer is: "get your own house in order. We need the United States to be in a position to provide strong leadership on human rights."

Failure of U.S. global leadership on human rights affects more than our own reputation and identity as a nation; it erodes worldwide commitment to the standards of universal rights and freedoms for which the United States claims to stand. That is why, during the last five or six years, my own work has been transformed from spending most of my time in the embassies of Egypt, Indonesia, China, and other countries around the world criticizing them for their human rights policies, to talking mostly to my own government.

I testified at a Senate Judiciary Committee hearing on September 16, 2008, which was entitled "Restoring the Rule of Law."[2] There was some debate among the panelists and with the senators about the rule of law and whether it needs to be restored.[3] But no matter where you come down on that issue, it is becoming increasingly clear, in the course of sorting our way through the challenges of responding to the terrorist threat, that we have suffered a number of self-inflicted wounds to our moral standing and to our reputation in the world as a nation that respects the rule of law.

The threat of terrorism is real and serious, and we must take steps to address it. I am very grateful for the approach this Symposium has taken to discussing these issues, because I can tell you that I have been involved in these debates in a lot of other fora where challenges to the way we are grappling with these issues are often dismissed as the inexperience of people who do not take the threat seriously. It is refreshing to be involved in a discussion where we can start from a place

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[2] *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 33–35 (2008) (statement of Elisa Massimino, Chief Executive Officer and Executive Director, Human Rights First) [hereinafter *Hearing*].

[3] *Compare id.* at 6 (statement of Frederick A. O. Schwarz, Jr., Senior Counsel, Brennan Center for Justice, New York University School of Law) ("Renewing our commitment to the rule of law by confronting and acknowledging our recent failures gives substance to our national moral commitment, and thus can help begin to restore our reputation in the rest of the world."), *with id.* at 8 (statement of Charles J. Cooper, Partner, Cooper & Kirk, PLLC) ("In perilous times such as these, with regard to momentous and difficult issues such as those that have confronted our [g]overnment, can the imperative to grant the Executive the benefit of genuine legal doubt be any greater?").

of common ground and common purpose. I have a deep personal respect for all government servants—civilians and those who serve in uniform—who have to face these very difficult challenges every day.

Former Attorney General John Ashcroft made a powerful and very profound point that resonated with me. He indicated that liberty and security are not competing interests to be balanced in kind of a zero sum game.[4] When we view the challenge simply as getting the right balance we tend to lose our balance completely. But this is the prevailing wisdom in Washington. The attitude seems to be that if we just tinker with our liberties, trim a bit here and there, we will find the golden mean of perfect security. Respect for human rights is a core strength of this country in the asymmetric battle with terrorist enemies. So many of the missteps we have made since 9/11, as we have been trying to sort out these challenges, stem from a failure to understand this fundamental point. We cannot secure liberty if we turn away from our first principles as a nation. And yet, we seem to have to learn that lesson over and over again. As the United States Supreme Court said in *Boumediene v. Bush*, "Security subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[5] That is an important point as we think about whether we are talking about a balance of competing interests or about core values on which the country was founded.

Many people argue that the threat of al Qaeda is unique and requires broad changes to the framework of laws dealing with terrorism and armed conflict. Glenn Sulmasy cautioned against getting stuck in the "9/10 mentality,"[6] by which he means not taking the threat sufficiently seriously. You often hear that the whole world changed on 9/11, and in fact, many things did changed, not the least of which was our sense of invulnerability. Of course we must adapt, just as the enemy has adapted. But there are some things that did not—or should not—change: our ideals, our values, and our commitment to human rights. And we must keep those in mind too. One of my fellow panelists at the Senate hearing pointed to a corollary risk, saying that not only do we have to be careful about "a September 10th mindset," but we also have to be careful about getting "stuck in a September 12th mindset."[7] This goes back to what we have learned over the last seven years. The enemy is

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[4] *See* John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285, 289 (2009).

[5] 128 S. Ct. 2229, 2277 (2008).

[6] Glenn M. Sulmasy, Boumediene v. Bush*: A Catalyst for Change*, 21 REGENT U. L. REV. 363, 364 (2009).

[7] *Hearing*, *supra* note 2, at 37 (statement of Suzanne E. Spaulding, Principal, Bingham Consulting Group).

adapting, and we need to adapt too. For example, one of the things that we have learned—which is becoming more accepted throughout the government and particularly at the Pentagon—is that this conflict is, in many respects, a war of ideas. We will not win or lose it on the traditional battlefield.

When we fail to adhere to our values, even in the sincere belief that it is necessary to meet the threat, we unwittingly give the enemy an advantage. We cannot afford that. I would be curious to know how many people have read the open letter from General Petraeus to the troops that he issued in May of 2007.[8] The letter is only one page, but it is incredibly powerful, and I think it should be required reading for every American. It was prompted in part by the results of a mental health survey of troops serving in Iraq.[9] In the letter, General Patraeus addressed the acceptability of torture practices and abuse of prisoners.[10] To General Petraeus, there was a disturbing level of acceptance of that kind of behavior.[11] He said:

> Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone "talk;" however, what the individual says may be of questionable value. In fact, our experience in applying the interrogation standards laid out in the Army Field Manual . . . that was published last year shows that the techniques in the manual work effectively and humanely in eliciting information from detainees.[12]

He cautioned that we must adhere to our values and maintain the moral high ground.[13] That principle extends to the issues that the Supreme Court dealt with in *Boumediene v. Bush*[14] and *Hamdan v.*

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[8] Letter from David H. Petraeus, General, U.S. Army, to Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force-Iraq (May 10, 2007) [hereinafter Petraeus Letter], *available at* http://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm.

[9] *See id.*; Sara Wood, *Petraeus Urges Troops to Adhere to Ethical Standards*, AM. FORCES PRESS SERVICE, May 11, 2007, http://www.defenselink.mil/news/news article.aspx?id=45983.

[10] Petraeus Letter, *supra* note 8.

[11] *Id.* ("I was concerned by the results of a recently released survey . . . that revealed an apparent unwillingness on the part of some [U.S.] personnel to report illegal actions taken by fellow members of their units. The study also indicated that a small percentage of those surveyed may have mistreated noncombatants. This survey should spur reflection on our conduct in combat.").

[12] *Id.*

[13] *Id.*

[14] 128 S. Ct. 2229 (2008).

Rumsfeld.[15] In some respects, the cases do not answer the most important question—how do we deal with this problem going forward? During the presidential debate on September 26, 2008, I was heartened to hear an agreement between the two candidates—they did not agree on very much, but one of the issues they did agree on was the importance of adhering to those values.[16] Both appeared ready to turn the page on this chapter where we have sanctioned torture and other abuse of prisoners.[17]

In my business, working on Capitol Hill and lobbying on human rights issues, the way you talk about an issue is almost as important as what you say about it. This Symposium is framed as *The Battle Between Congress & the Courts*. I would like to challenge that framework and urge another way of thinking about the challenge we now face. Our government is based on a system of checks and balances between the three branches, and one of the mistakes the government made shortly after 9/11 was consciously moving detainees into a place where it believed they would be beyond the reach of the law.[18] That was understandable at the time, but we need to move beyond this "September 12th mindset."[19]

One of the questions posited during this Symposium was whether the current conflict can be categorized in a law enforcement framework or in a law of war framework.[20] Critics of the Bush administration's framing of this struggle as a "war on terror" are often caricatured as wanting to "serve subpoenas on Osama bin Laden." But today, seven years after the attacks, we must recognize that the challenge of countering terrorism is a complex one, and we must use all the tools of national power to deal with it. We have to be creative. We have to get beyond a September 12th mindset. We have to think outside the box. But there are boxes outside of which we should not be thinking, and those

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15 548 U.S. 557 (2006).

16 Transcript of The First McCain-Obama Presidential Debate, Sept. 26, 2008, http://www.debates.org/pages/trans2008a.html [hereinafter McCain-Obama Presidential Debate].

17 *See id.*

18 *See* Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165, 167 (2006) (explaining that because Guantanamo is outside the United States, "[t]he [g]overnment's position has been a simple one: the Constitution does not reach aliens detained outside of the United States. . . . [T]hey are, as aliens without significant voluntary connections with the United States, without constitutional rights").

19 *See supra* note 7 and accompanying text.

20 *Legislation Panel: Discussion & Commentary*, 21 REGENT U. L. REV. 331, 331 (2009) (the moderator asked, "[T]o what degree for instance did you find that a lot of what was discussed was based on a confusion as to whether this was purely a criminal matter or was a law of armed conflict matter . . . [?]").

include our Constitution, our laws, and our values. We must make sure that we have a firm grounding in those three things as we try to sort through these issues.

I would like to conclude with two thoughts. As I was listening to the September 26, 2008, presidential debate,[21] I thought, "What is it that the next President really has to do to move us beyond where we are now in our counterterrorism strategy?" I can identify two big challenges.

The first challenge is that our own people and the rest of the world—our allies and our enemies—need to understand what the United States means when it says it will treat prisoners humanely. Right now, our biggest problem is not that our enemies know what we are capable of; it is that the rest of the world—including our allies—does not. We need a single standard of humane treatment of prisoners that is consistent with our laws and values. That need not be the Army Field Manual, but it must encompass the golden rule standard that the military follows: we should not be doing anything to prisoners in our custody that we would find unacceptable if perpetrated by the enemy against captured Americans.

The second challenge is whether we are using all of the tools at our disposal. One of the tools that has not been sufficiently exploited—or at least we have not recognized the extent to which it has been exploited—is the criminal justice system. Some have argued that our existing criminal justice system is not equipped to handle complex terrorism cases and that we need special terrorism courts.[22] My organization undertook the task of researching international terrorism prosecutions over the last fifteen years, and we found that most of the reasons given by critics for eschewing the regular criminal justice system in terrorism cases do not hold up under scrutiny.[23] In fact, our criminal justice system has been doing a very good job,[24] particularly when compared to the military commissions at Guantanamo,[25] in convicting dangerous terrorism suspects.

Al Qaeda terrorists who have been subjected to our criminal justice system, are no longer a problem for the United States—they are serving prison sentences, many for the rest of their lives. Obviously the criminal justice system is not the sole answer to terrorism. But it is an important and underutilized tool.

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[21] McCain-Obama Presidential Debate, *supra* note 16.

[22] *See, e.g.*, A. John Radsan, *Change Versus Continuity at Obama's CIA*, 21 REGENT U. L. REV. 299, 299–301 (2009); Sulmasy, *supra* note 6, at 369.

[23] RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 5, 129 (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

[24] *Id.* at 129.

[25] *Id.* at 3.

POWERS, DISTINCTIONS, AND THE STATE IN THE TWENTY-FIRST CENTURY: THE NEW PARADIGM OF FORCE IN DUE PROCESS†

*Harvey Rishikof**

The *Boumediene v. Bush* case raises issues of constitutional powers, distinctions, and the state in the twenty-first century.[1] The case is a reflection of the new paradigm of how force is projected in this new era and how we understand the concept of due process. The case, when placed in a strategic framework, argues for the creation of a national security court. Over the last eight years, we have been involved in a constitutional dialogue among the three branches of government. *Boumediene* is the latest volley in this dialogue and highlights the role the Supreme Court plays and why the concept of due process is critical to winning the battle of ideas in the struggle against violent extremism.

In an ABA publication that I was involved in, we grouped individuals who have been captured or seized in the war on terror into six categories: "(1) U.S. citizens captured and held on the battlefield"; "(2) U.S. citizens captured on the battlefield and held elsewhere"; "(3) U.S. citizens seized and held elsewhere"; "(4) Non-U.S. citizens captured and held on the battlefield"; "(5) Non-U.S. citizens captured on the battlefield and held elsewhere"; and "(6) Non-U.S. citizens seized and held elsewhere."[2] *Boumediene* falls into the final category.[3]

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1 128 S. Ct. 2229 (2008).

2 AM. BAR ASS'N STANDING COMM. ON LAW & NAT'L SEC. ET AL., DUE PROCESS AND TERRORISM: A POST-WORKSHOP REPORT 7 (2007), *available at* http://www.mccormicktribune.org/publications/dueprocess.pdf.

3 *Boumediene*, 128 S. Ct. at 2241, 2244.

Lakhdar Boumediene was an Algerian living in Bosnia at the time he was captured.[4] He was arrested on suspicion that he was involved in a plot to bomb the United States embassy in Sarajevo.[5] The Supreme Court of the Federation of Bosnia and Herzegovina—a court that the United States helped establish—released him because they could not find any evidence to justify his arrest.[6] Despite the fact that the Bosnian court released him, the United States seized him and brought him to Guantanamo.[7] This is the genesis of the case.

This case is interesting because of the status of Lakhdar Boumediene. Boumediene is a non-U.S. citizen, seized in a non-battlefield environment placed under U.S. authority.[8] As noted by the Court in *Boumediene*, this fact pattern raises significant due process questions that must involve the court.[9] I have no problem defending the role of the Supreme Court in *Boumediene*. I believe the controversy surrounding the legitimacy of the Court's involvement in this case stems from the principles of *Marbury v. Madison*.[10] Some people believe that this is an Article II arena in which the courts should not be involved. Others, including the majority of the Court, believe that cases that involve detainees who have a tenuous relation to the classic "battlefield" require judicial review for due process.[11]

The Court's assertion of jurisdiction is a response to previous administrations' aggressive interpretation of power under Article II. *Boumediene* follows the logic of the Court in *Rasul v. Bush*.[12] In *Rasul*, the Bush Administration claimed that the district court did not have jurisdiction because the territory was not U.S. property.[13] The Court rejected this assertion and said that its power did reach to Guantanamo.[14] In this context, the United States passed the Authorization for the Use of Military Force, declaring war on "nations, organizations, [and] persons."[15] This declaration of war on "people" has generated concerns.

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[4] Andy Worthington, *Profiles: Odah and Boumediene*, BBC NEWS, Dec. 4, 2007, http://news.bbc.co.uk/1/hi/world/americas/7120713.stm.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Boumediene*, 128 S. Ct. at 2241, 2244.

[9] *See id.* at 2244.

[10] 5 U.S. (1 Cranch) 137 (1803).

[11] *Boumediene*, 128 S. Ct. at 2275.

[12] 542 U.S. 466 (2004).

[13] *See id.* at 475.

[14] *Id.* at 485.

[15] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001).

If you check the FBI top ten list, you will see that Osama bin Laden is still on it.[16] I have taught, and been involved with, many of the JAG officers on both defending the individuals in Guantanamo and prosecuting them. I always ask, "Who is the person who is supposed to 'Mirandize' Osama bin Laden as we would in the classic criminal paradigm when the FBI would be involved in an arrest?" Are you supposed to arrest Osama bin Laden? Or do you have the right to kill him under the law of armed conflict? Under the law of armed conflict, you have the right to kill him because he is involved in an armed conflict and has violated the rules of armed conflict by targeting civilians along with other violations.[17] But as a civilian or unlawful combatant, what due process is he owed? If we do capture him, and decide to try him, is he a criminal or a prisoner of war? How did we get to this level of confusion? The first reason for the confusion is caused by the fact that we have changed the notion of what we understand as sovereignty. Sovereignty is under attack in the new world order in a way that has completely challenged the principles of the Treaty of Westphalia in 1648.[18] The first issue is: how do we understand force and projection of force? We went into Iraq without the cover of a U.N. resolution—we went in articulating an international law defense under Article 51 of the U.N. Charter on self-defense or anticipatory self-defense.[19] We never expected to be an occupying power. But we did become one, and as a result, we created categories of detainees; first from Afghanistan and then from Iraq. The problem becomes, what do you do with them? The reason the military can kill without resulting in an indictment is because it, like law enforcement, is working for the sovereign as an agent of the state. When we fight people in other nation states, they too are working on behalf of their sovereign, which is why they can kill us lawfully as they follow the law of armed conflict. And that is why we can kill them lawfully up to the moment we capture them.

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[16] Fed. Bureau of Investigation, Most Wanted Terrorists: Usama Bin Laden, http://www.fbi.gov/wanted/terrorists/terbinladen.htm (last visited Apr. 10, 2009).

[17] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001). Osama bin Laden issued repeated declarations of war; praising the Riyadh and Dhahram attacks on U.S. forces in Saudi Arabia, he said the attacks marked "the beginning of *war* between Muslims and the United States." Anti-Defamation League, *Osama bin Laden*, http://www.adl.org/terrorism_america/bin_l.asp (last visited Apr. 10, 2009).

[18] Yale Law School, The Avalon Project, Treaty of Westphalia (Oct. 24, 1648), http://avalon.law.yale.edu/17th_century/westphal.asp. "The Treaty of Westphalia of 1648 brought to a not quite conclusive end the previous thirty years of warfare which had torn central Europe apart, largely destroying in the process its prosperity, infrastructure[,] and vast swathes of its population." 2 MARK LEVENE, GENOCIDE IN THE AGE OF THE NATION-STATE: THE RISE OF THE WEST AND THE COMING OF GENOCIDE 143 (2005).

[19] U.N. Charter art. 51.

As soon as we capture them, however, the Geneva Conventions concerning capture kick in and we can no longer kill them.[20] If we do kill them, it then becomes a violation of the law of armed conflict. And what do we have to do? You can ask their name, rank, serial number, and age.[21] Prisoners of War ("POW") do not "get lawyered up," as we would say in criminal law. Why? Because they are representatives of a state—they are doing the same thing our soldiers do. What makes this complicated is that in this new form of "hybrid warfare," when you exert force into another geographical area, you are also generating new types of detainees. In addition to the six categories of detainees above, there is also a theoretical category of individuals in Iraq who do not like the idea of Americans being there. During the initial invasion, individuals had a legitimate right to take up arms against Americans under the law of armed conflict theory of "levee en masse." These individuals would be categorically different than al Qaeda.

So the question becomes, what is the due process owed to an individual not on the battlefield who is "captured" under a theory of threat? That is the debate in *Boumediene*. A majority of the Court is saying that we are not going to let a detainee's status or location dictate the obligations and duties that some people believe are critical for understanding the great writ of habeas corpus.[22] That is revolutionary. Why? A quick way of understanding the cases is to read the dissents first. If you read the dissents first, you immediately get to the problem of what the case is. Look at the opening lines of Justice Roberts's dissent:

> Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. . . . The Court rejects them today out of hand, [Congress's actions], without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation.[23]

Then look at Justice Scalia's opening line.

> Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of ongoing war. . . . The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.[24]

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[20] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[21] *Id.* art. 17.

[22] *Boumediene*, 128 S. Ct. at 2262.

[23] *Id.* at 2279 (Roberts, C.J., dissenting).

[24] *Id.* at 2293–94 (Scalia, J., dissenting).

What does the majority say? This gets back to former Attorney General Ashcroft's argument that we have a new paradigm of peril, a new paradigm of prevention, and a new paradigm of protection.[25] Regardless of how you break on these cases, do you agree or disagree on the nature of the conflict? Justice Kennedy says in his argument,

> It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the largest wars in American history. . . . The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.[26]

That is the real core. What is the nature of the conflict? Why do we have these people? If you believe that this is a clear POW issue, we all know what we are supposed to do. If it is a pure criminal issue, we all also know what we are supposed to do. When one thinks of due process, eighteen characteristics should come to mind: presumption of innocence,[27] the right to remain silent,[28] freedom from unreasonable searches and seizures,[29] assistance of effective counsel,[30] the right to indictment and presentment,[31] the right to a written statement of charges,[32] the right to be present at trial,[33] prohibition against ex post facto laws,[34] protection against double jeopardy,[35] the right to a speedy and public trial,[36] burdens and standards of proof that are clear,[37] privileges against self-incrimination,[38] the right to examine or have

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25 *See generally* John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285 (2009).

26 *Boumediene*, 128 S. Ct. at 2262.

27 *E.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) (explaining that the presumption of innocence "lies at the foundation of the administration of our criminal law").

28 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (establishing the right to remain silent as a procedural safeguard to protect citizens during custodial interrogations).

29 U.S. CONST. amend. IV.

30 *Id.* amend. VI; *see also Miranda*, 384 U.S. at 472.

31 U.S. CONST. amend. V.

32 *See id.* amend. VI.

33 *See id.*

34 *Id.* art. 9, § 3.

35 *Id.* amend. V.

36 *Id.* amend. VI.

37 *Id.* amend. XIV, § 1.

38 *Id.* amend. V.

examined adverse witnesses,[39] the right to compulsory process to obtain witnesses,[40] the right to trial by impartial judge,[41] the right to trial by impartial jury,[42] the right to appeal to an independent reviewing authority,[43] and protection against excessive penalties.[44]

When we say due process, under the Constitution, that is more or less what we are talking about in the criminal context. What did the Court say should be the sort of due process given to this new category of detainees? *Hamdi v. Rumsfeld* suggests that it be a very light, in-between due process.[45] It is not the due process given a prisoner of war, and it is not the due process in the criminal context. As stipulated by Justice O'Connor, it is "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[46] For the dissenters in *Boumediene*, the Detainee Treatment Act meets these standards.[47] Then why does the majority disagree? I think the disagreement harkens back to the fact that we are in a battle of ideas. In the sense of sovereignty, we have made it clear that inside the international community, some believe that there is a duty to protect. This duty to protect, a Canadian concept, has become the new rule for how you should be able to violate sovereignty.

Who is in favor of genocide? If I said to you, genocide is going on right now in a number of countries, do you think we should have a duty to intervene? That is the modern debate for the modern world. When do you have the right to intervene, and once you intervene, under what authority, and what do you do with the individuals that you capture?

As former Attorney General Ashcroft said, the other problem we have is this notion of miniaturization of the threat of terrorism.[48] He pointed out that the real issue about terrorism is threefold: it is

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[39] *Id.* amend. VI.

[40] *Id.*

[41] *See id.* amend. XIV, § 1; Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.").

[42] U.S. CONST. amend. VI.

[43] *See* Geneva Convention Relative to the Treatment of Prisoners of War arts. 105–06, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[44] U.S. CONST. amend. VIII.

[45] 542 U.S. 507, 533, 538 (2004) (plurality opinion); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[46] *Id.* at 533.

[47] 128 S. Ct. 2229, 2287 (2008) (Roberts, C.J., Scalia, Thomas, & Alito, J.J., dissenting).

[48] Ashcroft, *supra* note 25, at 286.

transcendent; it is transnational; and it uses soft targets.[49] If you are terrified of this threat, you then say we need information to stop it. If we need information to stop it, we get into the issue of rendition and what a coerced interrogation is.

There are always three responses to this notion of due process and coerced interrogations. First, it does not work because people will always tell you what you want to hear. But I could probably bring in some Israelis who would have a different perspective on that issue. Second, there is a political reason why I oppose coerced interrogations. I do not want to do them because the political traditions of the United States do not tolerate such actions and we will be lowering the political bar of international behavior. The response to that is our enemies are committing torture. All of the enemies we have fought historically post-World War II have not followed the Geneva Conventions—the Koreans did not; the Vietnamese did not. So that is not the relevant issue. Therefore, the third issue becomes a moral issue. Regardless of the effectiveness of coerced interrogations or torture, and regardless of their political effect, we should not use them because they are morally wrong. Who should make that decision to break the law? Should it be the Executive Branch? The Executive Branch says it will make that decision, maybe in violation of the law, and if you disagree with its decision, impeach the President. Or if you disagree with a covert action, and if it ever is known, then again, the remedy is impeaching the President. This is the dilemma for the Executive Branch.

The other approach is that we should let Congress make the decision. Congress made it very clear in the Detainee Treatment Act ("DTA"), if you wear the cloth of the state you cannot use coerced interrogations or torture.[50] But if you notice under the DTA, nonmilitary forces are left out. The CIA for example, is not mentioned—the statute is silent on the issue, and that has been the problem.

So what has happened? The Supreme Court has intervened—and it has said no. Under our notions of due process, the Court is asserting itself because that is what freedom is all about. Is the Court asserting the belief that the Executive and Legislative Branches have not performed their duty? There may be times when the Executive and Legislative Branches agree on a course of action, and the Court contends it is unconstitutional. The Executive Branch wanted to restrict the writ of habeas corpus, for example, Congress agreed to restrict the writ of

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[49] *See generally id.*

[50] Detainee Treatment Act of 2005, Pub L. No. 109-148, div. A, tit. X, §§ 1002–1003, 119 Stat. 2739, 2739–44 (codified as amended at 10 U.S.C. § 801 note (2006) and 42 U.S.C. § 2000dd (Supp. V 2006)).

habeas corpus, and the Court in *Boumediene* disagreed.[51] In a *Steel Seizure* moment, the Executive was working at its highest level of authority with the assent of Congress,[52] and the Court slapped its action down as being unconstitutional. That was the Court's right, and that has been the role of the Court since *Marbury v. Madison*.[53]

In a rare occurrence, Justice Scalia admitted he was wrong because he could not remember the legal history, stating, "My dissent in *Rasul v. Bush* mistakenly included Scotland among the places to which the writ could run."[54] The issue of using a legal history from the eighteenth century to determine our twenty-first century problems is in itself a problem that the courts should no longer be involved in. We need a more strategic approach to resolve these problems. The battle of ideas about the best institutional solution should be a debate for Congress and the Executive. *Boumediene* argues for a new approach—a new understanding of the way to have due process. That is why I agree that there should be an Article III national security court to create a new understanding of the paradigm of projecting force because due process is a strategic and constitutional choice.

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[51] 128 S. Ct. at 2240.

[52] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

[53] 5 U.S. (1 Cranch) 137 (1803).

[54] *Boumediene*, 128 S. Ct. at 2304 n.5 (Scalia, J., dissenting) (citation omitted).

SUPREME COURT PANEL: DISCUSSION & COMMENTARY*

Dr. Sekulow: I am going to lead you through a few questions. To keep it moving, I am going to set ground rules. On the first round of questions, I am going to ask that each panelist respond quickly. Then, we will expand out as the questions get more complex. Professor Rishikof, we will start with you. Was *Boumediene v. Bush* correctly decided?[1]

Professor Rishikof: Yes.

Ms. Massimino: Yes.

Commander Sulmasy: Definitely no.

Professor Paust: Yes.

Dr. Sekulow: So three say that *Boumediene* was correctly decided, and one says it was not. In Justice Scalia's dissent in *Boumediene*, there is a line that reads, "Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."[2] Justice Scalia then says in Part I of his opinion, "America is at war with radical Islamists."[3] Is America at war with radical Islamists?

Professor Rishikof: The answer is yes, but the problem with Justice Scalia's formulation is that when you look at *Johnson v. Eisentrager*, which is the case that turns the issue, twenty-one Germans captured in China were brought over to and held in Germany.[4] This is the case that Scalia's dissent in *Boumediene* says should govern.[5] The difference is those German prisoners were part of a state we were at war

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* This panel discussion was presented as part of the Regent University Law Review 2008 National Security Symposium, September 27, 2008. The panelists included: Professor Harvey Rishikof, National War College; Professor Jordan Paust, University of Houston Law Center; Ms. Elisa Massimino, CEO & Executive Director, Human Rights First; Commander Glenn M. Sulmasy, U.S. Coast Guard Academy Fellow, Carr Center for Human Rights Policy, Harvard University; moderated by Dr. Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice.

1 128 S. Ct. 2229 (2008).

2 *Id.* at 2293–94 (Scalia, J., dissenting).

3 *Id.* at 2294.

4 339 U.S. 763, 765–66 (1950).

5 *Boumediene*, 128 S. Ct. at 2298–99 (Scalia, J., dissenting).

with.[6] The prisoners fell under the classic prisoner of war doctrine. Regarding the people we are holding now—and I may be wrong about this—I am not aware that we are at war with either Algeria or Bosnia, which is where our friend Boumediene comes from.[7] That is the distinction Justice Scalia does not get, but the majority does.

Dr. Sekulow: But the proposition that America is at war with radical Islamists, is that a correct proposition? Or do you think it is misapplied in context?

Professor Rishikof: The answer is yes and no.

Dr. Sekulow: Well, let us say you have to pick one. You would say yes and no?

Professor Rishikof: Yes, I would say yes and no.

Dr. Sekulow: Okay. Is America at war with radical Islamists?

Ms. Massimino: Well, clearly America is at war. That is the easy part. And there is no question that many, if not most, of the people we are fighting are radical Islamists. But I do not think that is really what you are asking. I think what you are asking is if we are in a state of armed conflict with an entity called al Qaeda.

Dr. Sekulow: I did not ask that actually. And that is the good thing about once in a while getting to ask the questions.

Ms. Massimino: Then I gave an easy answer, and that is my answer. We are at war and the laws of war apply in our actions at war. We have not really talked too much about the reason for this panel, *Boumediene* and *Munaf v. Geren*.[8] From my perspective, these cases would never even have been brought had we applied the laws of war in this armed conflict that you are talking about.

Dr. Sekulow: We will get into the laws of war in a moment. Commander, is America at war with radical Islamists?

Commander Sulmasy: Yes. Obviously, I think we are. But I think there is a better way to focus the discussion. One of the problems is that

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6 *Eisentrager*, 339 U.S. at 765–66.

7 *See Boumediene*, 128 S. Ct. at 2241.

8 128 S. Ct. 2207 (2008).

words matter and calling it the "war on terror"—as Professor Paust alluded to as the "so-called 'war' on terror"[9]—has created a lot of the problems in the legal ambiguities associated with calling it that. Things like the cessation of hostilities, which would be a trigger under traditional armed conflict for release of prisoners, and what has been done on a variety of levels, has clouded whether we are actually at war or engaged in law enforcement.

Dr. Sekulow: Professor?

Professor Paust: I am in the minority on this panel, but perhaps some members of the audience would appreciate my situation. I am correct in stating we are not at war with al Qaeda. We simply cannot be, as a matter of international law, at war with a non-state actor who does not even have the status of an insurgent. There are several criteria for insurgent status.[10] It is a no-brainer in terms of international law. Importantly, the Authorization for Use of Military Force ("AUMF") was not a declaration of war.[11] Under international law, we know the difference between war and armed struggles and war and force. We know, for example, under Article 51 of the UN Charter that if you have a right, which you do, to target non-state actors who are attacking you, you are not simplistically at war with the non-state actors you target—even though you have a right to use lethal military force against them.[12] And certain things follow. Note in my Essay, I said that the laws of war do not apply to certain members of al Qaeda; for example, those picked up in Canada who have had no direct experience with the actual theaters of war.[13] We are at war in Afghanistan with the Taliban, and we have been at war with Iraq since we first entered in 2003, even though it is dying down. I wanted to make this point because Commander Sulmasy referred to being at war. There are dangerous consequences, and Professor Rishikof mentioned three or so concerns.[14] This would be a fourth concern: your self-interest, your foreign policy interest. What are the detrimental consequences of being at war with al Qaeda? Al Qaeda's status could possibly enhance because it is now at war with a powerful

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[9] Jordan J. Paust, Boumediene *and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351, 351 (2009).

[10] JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007).

[11] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[12] U.N. Charter art. 51.

[13] Paust, *supra* note 9, at 358–60.

[14] *See generally* Harvey Rishikof, *Powers, Distinctions, and the State in the Twenty-First Century: The New Paradigm of Force in Due Process*, 21 REGENT U. L. REV. 377 (2009).

state. I think that is quite interesting. It can have certain victories against a powerful state like the United States. There has been a blurring of the permissibility of certain targets and methods of conflict—like the attack on the USS *Cole*,[15] which in a real war would be a lawful military target. The September 11, 2001, attack on the Pentagon in a real war would be an attack on a lawful military target.

There has also been a blurring of the status of individuals. For example, most members of al Qaeda, if they were not formal members of the armed forces of the Taliban when we went into Afghanistan in October 2001, would be called unprivileged fighters under international law, not enemy combatants.[16] The President has turned this all on its head. A real prisoner of war is a combatant with combatant immunity for lawful targetings during a war. Al Qaeda is not a combatant, has no combatant status, and no combatant immunity unless its members are prisoners of war when captured. So a lot of things follow; importantly, you cannot be at war with a tactic. Terrorism is merely a tactic—state actors and non-state actors have used such a tactic.

Dr. Sekulow: Okay. Commander.

Commander Sulmasy: I agree that you cannot be at war against an entity like the war on poverty or the war on drugs. But that kind of reasoning diminishes if we really are at war. Regarding a war on al Qaeda, although there are other like-minded jihadists, if you refer to it as the war on al Qaeda, you can declare victory.[17] You can actually disrupt the organization so, at least at the minimum, al Qaeda becomes is de minimis in fact or not influential on the world stage. But one item—a red herring that is thrown out consistently—is that we cannot be at war because there was no declaration of war. That is a red herring, with all due respect to my learned colleague.

Professor Paust: I agree that you can be at war without a declaration. I just said the AUMF is not a declaration.

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[15] "On October 12, 2000, a small boat piloted by two suicide bombers and carrying between 400 and 700 pounds of explosives rammed the hull of the U.S. Navy's guided missile destroyer, the USS *Cole*." MARTIN C. LIBICKI ET AL., EXPLORING TERRORIST TARGETING PREFERENCES 37 (2007). Seventeen servicemen were killed and twenty-nine were injured in the attack, which Bin Laden denied responsibility for, while indicating support for the attackers. *Id.*

[16] *See* PAUST, *supra* note 10, at 51–56.

[17] *See* Glenn Sulmasy, Op-Ed., *Obama Administration Needs New Approach to Battling al Qaeda*, U.S. NEWS & WORLD REP., Nov. 12, 2008, *available at* http://www.usnews.com/articles/opinion/2008/11/12/obama-administration-needs-new-approach-to-battling-al-qaeda/photos (suggesting a change in the terminology from the "War on Terror" to the "War Against al Qaeda").

Commander Sulmasy: The authorization is not, but it certainly is to use military force.

Dr. Sekulow: The next issue has been touched on by the panelists: applying the laws of war and the Geneva Conventions to this conflict. Which of our enemies, or potential enemies we may face in the future, do you think will be impressed by or will govern themselves according to the *Boumediene* decision to grant habeas, play by the Geneva Conventions, or abide by the rules of war? I will give for example al Qaeda, Hezbollah, Hamas, or for that matter, China or Russia.

Ms. Massimino: I want to jump in on this because I have spent a lot of time with retired generals and admirals who are thinking a great deal about this issue. I remember listening to Secretary Rumsfeld muse out loud as he wondered if we are creating more terrorists than we are killing.[18] One of the things General Petraeus has done in Iraq, and I think it has helped diminish the violence, is that right before he went to Iraq he supervised the production of a new Counterinsurgency Field Manual that implemented the lessons from Afghanistan and Iraq.[19] They are very important lessons. He is implementing them in Iraq, and hopefully will do so in Afghanistan now that he is in charge. Quoting the Manual, "Efforts to build a legitimate government though [sic] illegitimate actions"—including unjustified or excessive use of force, unlawful detention, torture, and punishment without trial—"are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law."[20] What he basically says is that we are not going to win this war through kinetic means.

Those entities you just listed, Dr. Sekulow, are not our audience for these actions—for our adherence to the Geneva Conventions. There are a vast number of people, many of them in the Arab and Muslim world, who have not signed up to the ideals of al Qaeda. They are our audience. If we lose that battle, then we lose the whole thing.

Dr. Sekulow: So it is a question of world opinion and moral good.

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[18] *See, e.g.*, Memorandum from Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def., to Gen. Dick Myers et al. (Oct. 16, 2003), *available at* http://www.foxnews.com/story/0,2933,100917,00.html ("Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?").

[19] U.S. DEP'T OF THE ARMY, COUNTERINSURGENCY, FM NO. 3-24 (2006).

[20] *Id.* ¶ 1-132.

Professor Rishikof: But to reinforce Ms. Massimino's position, one of the original codes for trying to figure out when an appropriate use of force was proportional and with appropriate discrimination is the Lieber Code from the Civil War.[21] Lincoln began to realize that brothers were killing brothers and Americans were killing Americans. If the killings went too far, the Union would remain forever divided. Thus the Americans, in a Civil War context, started the generation of the Lieber Code. It eventually became the set of codes that we know as the international doctrine.

I think Dr. Sekulow's question is the wrong question. The relevant groups are not the groups composed of people who do not believe in human rights and the law of armed conflict. The relevant group is the rest of the world. We won the Cold War because of our values and our ideals in the face of what appeared to be a very different worldview. And we said as Americans we are willing to do that. The question is, is it a suicide pact, which is what you . . .

Dr. Sekulow: No, I asked the question for a reason. I wanted the members of our audience, who may not have studied these cases, to understand the general principles. I want them to understand what people are asking.

I, and probably most of the people here, understand the concept of moral good and of establishing our world standing. But some people ask a legitimate question, which I remember from a discussion group that I was in right after Danny Pearl was beheaded.[22] I remember a government witness at one of the congressional hearings on the torture issue who said that we are sitting here debating waterboarding while they are cutting off the heads of American citizens. Now, I also understand the counterpoint—that we should not sink to their level. But let me ask another question. Go ahead, Professor Paust.

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[21] U.S. WAR DEP'T, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100 (1863), *in* THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS app. 410 (N.Y., Moore, Wilstach & Baldwin 1865).

[22] Daniel Pearl, a *Wall Street Journal* reporter, was kidnapped by terrorists in January 2002, while he was on an assignment in Pakistan. *Daniel Pearl Is Dead, Abducted in Pakistan and Killed by Captors—Investigators Have Videotape Confirming the Murder of Journal Correspondent—A Career of Sparkling Stories*, WALL ST. J., Feb. 22, 2002, at A1. He was murdered and beheaded at some point over the next thirty days. Douglas Jehl, *A Nation Challenged: Journalists; U.S. in Talks on Handing over of Suspect in Reporter's Killing*, N.Y. TIMES, Feb. 26, 2002, at A1. It remains unclear exactly what caused his death. *Id.* But the video of his death has been the source of much controversy as it, and still-frames of it, have been released in various media formats. *See* Felicity Barringer, *Traces of Terror: The News Media; Paper Publishes Photo of Head of Reporter Who Was Killed*, N.Y. TIMES, June 7, 2002, at A24.

Professor Paust: This is not merely a question of our morality, although I think that is terribly important. Ms. Massimino mentioned value orientations that are at stake. This morning Admiral Clark talked about our national power.[23] If you are going to focus not on the law, but on our self-interest, power-interest, or foreign policy interest it is evident that we should be regaining a respect that we have lost because of illegal interrogation tactics, and the world knows about secret detentions, forced disappearance, and violations of international law.

We need to regain that strength we have lost even if one focuses merely on a self-interested point of view. More generally, I agree with Commander Sulmasy when he stressed that human rights values have been our values right from the beginning of this country. In 1788, in this Commonwealth of Virginia, Patrick Henry decried the attempt to create a Constitution of the United States because it did not adequately reflect "human rights."[24] He was the first person I know to use that phrase, although we had had used the phrase "rights of man," among others.

It is important that we realize that terrorism is just a tactic. But if we are talking about Osama bin Laden and al Qaeda, we are talking about an armed struggle in which values are important. Those values are important in winning that struggle and—as Ms. Massimino mentioned—maybe not in convincing Hamas or a similar organization, but in convincing neutral or generally pro-U.S. Arab groups to avoid contact with al Qaeda and its illegal tactics.

Ms. Massimino: This is another reason why it is important to consider trying these people in the criminal system. The Counterinsurgency Field Manual points to depriving the enemy of its "recuperative power."[25] You want to cut them off from the societies from which they draw their recruits. Their recruits are fungible. An endless stream of people remain willing to sign up, so you want to marginalize them in their societies. If you read the transcripts of Khalid Sheikh Mohammed's combatant status review tribunal hearing down at Guantanamo—they are redacted, but you get the picture—you see the problem with treating detainees like combatants instead of criminals.[26]

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[23] Admiral Vern Clark, *The Effect of U.S. Legislative Efforts to Enhance National Security*, 21 REGENT U. L. REV. 293 (2009).

[24] Patrick Henry, Against the Federal Constitution (June 5, 1788), *in* SELECT ORATIONS: ILLUSTRATING AMERICAN POLITICAL HISTORY 66, 68 (Samuel Bannister Harding ed., 1909).

[25] U.S. DEP'T OF THE ARMY, *supra* note 19, ¶ 1-129.

[26] Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024 (CSRT Mar. 10, 2007), *available at* http://www.defenselink.mil/news/transcript_ISN10024.pdf.

This guy sits across from our uniformed Navy officers and says that, military-to-military, we all know war is hell and I hate that civilians get killed, but that is the way it goes in wartime.[27] That is not what we want. That plays totally into their narrative.

Commander Sulmasy: I think we all would agree that everyone wants to regain the initiative and have the United States once again be viewed as a shining city on a hill.[28] I do not think anyone would disagree with that—here or anywhere. However, to answer Dr. Sekulow's question, what is the real issue? What would al Qaeda, Hezbollah, China, or Russia do? What is the benefit to us adhering to these provisions in the Geneva Conventions, or providing habeas relief? One of the goals of recognizing the Geneva Conventions was reciprocity—reciprocity so our soldiers are treated the same way we would expect our soldiers to be treated here.

We have to remove ourselves from emotion, hyperbole, and politics. Factually, to answer the question, al Qaeda will not abide by the Geneva Conventions. We know that because they do things like cut off our soldiers' heads when they are captured and indiscriminately target civilians. Hezbollah will not abide by it: they indiscriminately attack civilians. I would suggest, unfortunately, China and Russia will not abide by it either, in a conventional armed conflict. That is just a fact; we have to get that out there. Some people are mentioning reasons—I think nobly and correctly—why we have to find a way to become that shining city on the hill once again, but . . .

Professor Rishikof: Think of Algeria and the French. The French became an occupying power and fought the Algerians.[29] They used very, very dirty tactics and those tactics lost.[30] Now the issue is: when we are in Iraq, is Iraq an independent country? Or can America exercise power over it by extension? That is the problem.

One of my students helped set up the Iraqi criminal court. The Iraqis should be doing this in Iraq. The Afghanis should be doing this in Afghanistan. But the criminal court justice system would not be appropriate for the third category of individuals, individuals who are not on a traditionally defined battlefield, and from a country not a war with the United States. If we pick them up what are the resulting legal

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[27] *See id.* at 23–24.

[28] *See* John Winthrop, *A Modell of Christian Charity* (1630), *in* POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY 7, 12 (Michael B. Levy ed., Waveland Press, Inc. 2d ed. 1988) (providing the origin of the phrase designating the United States as a "city on a hill").

[29] WILLIAM R. POLK, VIOLENT POLITICS 124 (2007).

[30] *See id.* at 129, 137–38, 141–42.

consequences? Thus, you have to think of the individuals analytically. What is their status? Where are they being picked up? Why are they being picked up? Who has the right to control them?

The last point is the United States did not ratify Protocol I or II of the Geneva Conventions.[31] And why? Speculate upon this. If an American citizen jihadist commits an act of terrorism inside the United States, what is the due process? One of the only circumstances that Justice Stevens and Justice Scalia agree on is that this person would be a traitor, and if that person is a traitor, we should be using the criminal court system.[32] That reasoning, however, was rejected by several of the members of the Supreme Court.[33] That is the problem.

Ms. Massimino: I want to return to the core of your question, which really gets to the issue that Commander Sulmasy raised about reciprocity and the reasons behind the Geneva Conventions. Of course al Qaeda will not conform its behavior to the law simply because we do. But we often lose sight of the sad fact that this is not the last war we will fight. In the future, undoubtedly we will be engaged in a war with another state actor. If we destroy the integrity of these standards now, or put them aside, then we are not going to be in a position to rely on them to protect our own people in future armed conflicts.

Commander Sulmasy: I think that as American men and women in the armed forces, we do abide by the Geneva Conventions. We try to do so completely. Al Qaeda does not. The jihadists do not. The jihadists did not sign the Geneva Conventions—they did not even exist when the conventions were drafted. We need to keep that as a guidepost for everyone in the audience.

Dr. Sekulow: Ms. Massimino, you mentioned in your presentation that one of the concerns you have is that the United States needs to get

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[31] International Committee of the Red Cross, Protocol I Signatories, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S (last visited Apr. 10, 2009) (showing that the United States signed but did not ratify Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391); International Committee of the Red Cross, Protocol II Signatories, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=S (last visited Apr. 10, 2009) (showing that the United States signed but did not ratify Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442).

[32] Hamdi v. Rumsfeld, 542 U.S. 507, 558–59 (2004) (Scalia & Stevens, J.J., dissenting).

[33] *Id.* at 522–23 (2004) (plurality opinion).

its house in order on human rights issues because we are generally the best example.[34] Can you think of another country that on the human rights issues, especially in a war context or when that country has been attacked, has a better human rights record than the United States? Under the Bush Administration and even right now today? In light of everything that has happened, including Abu Ghraib, can you think of another country that has a better record than the United States?

Ms. Massimino: One of the reasons Human Rights First does not publish reports ranking countries is because this is a pretty complex question with many different parts. It is hard to say who has the best record overall. The most important point is that in my view—and this may be parochial because I am an American—the United States is the indispensable nation in leading the world in human rights.

Dr. Sekulow: Do you think we still carry that role?

Ms. Massimino: I think people look to us.

Dr. Sekulow: But do you think we possess that role right now?

Ms. Massimino: It has been damaged. Our ability to lead has been damaged.

Dr. Sekulow: Okay, so some say it is tarnished. Here is my follow-up question: if you were a terrorist caught on the battlefield, would you rather be taken to Guantanamo Bay or to a facility in Germany or Jordan? Panel, answer with regard to the human rights issue.

Commander Sulmasy: No question, Guantanamo Bay.

Dr. Sekulow: Versus Jordan even?

Commander Sulmasy: Yes, no question.

Dr. Sekulow: Another Arab country?

Commander Sulmasy: Nope, no question. If you read Kyndra Rotunda's new book about Guantanamo Bay, you may get a different

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[34] Elisa Massimino, *A Human Rights Perspective*, 21 REGENT U. L. REV. 371, 371 (2009).

perspective than what the media reports.[35] I think some in this room who have been to Guantanamo would agree that it is not the horrendous place that it is portrayed to be. It is certainly not the gulag of our times—certainly not a place where we flush the Qurans down the toilet.

Ms. Massimino: Why are we asking ourselves whether we are better than Jordan? Is that our touchstone now? We are Americans; we hold ourselves to a higher standard.

Professor Rishikof: Why is the person not being held in Iraq? If he is on the battlefield in Iraq, he should be held in Iraq. If he fought in the battlefield in Afghanistan, he should be held in Afghanistan.

Dr. Sekulow: But is that not a decision the military has to make—where is it best to hold him? It may not be a secure facility.

Professor Rishikof: No, because if it is a sovereign state, Iraq should make the decision. If it is a sovereign state, Afghanistan should make the decision. Unless you are saying that they are not sovereign states.

Dr. Sekulow: No. They are sovereign states who may not have a functioning system, like how Iraq did not have one after the toppling of Saddam Hussein.

Professor Rishikof: But at this point in time, there is a sovereign Iraq and a sovereign Afghanistan.

Dr. Sekulow: The question I am asking, though, is on the human rights front. I think everybody would probably agree that world opinion of the United States being held to this high standard, which we traditionally have hoped to exalt ourselves to, has been tarnished. Having said that, look at other countries' systems of interrogation. I still think that at our lowest point, we are probably better than anybody else at their current point. That does not solve the problem. I am just trying to put a balance as to where we are.

Professor Paust: This is really sort of a silly question. I would rather be held in Canada . . .

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[35] KYNDRA MILLER ROTUNDA, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (2008).

Dr. Sekulow: Why do you say that? Why would you rather be held in Canada?

Professor Paust: Because our former Secretary of Defense issued two authorizations to use clear violations of the laws of war—to use snarling dogs at the feet of naked, hooded detainees for interrogation.[36] I believe history will judge us harshly for that. I do not want to be subjected to that harsh fear that threatens people with death and threatens their family members with death. I do not want to be subjected to a United States Government that is doing that to me—no matter where they are doing it. The Lieber Code was very important to identify customary laws of war that we, the United States, would apply regardless of the situation.[37] The fact is the Canadians might apply the law of war more adequately. And that is my main point.

The United States must live up to a higher standard. In any event, the law requires that human rights laws are a minimum set of laws in any social circumstances. It does not matter if you are at war, a war paradigm, or a fear paradigm. Human rights laws are a minimum set of standards, and you simply cannot engage in inhumane treatment of another human being. I am a Christian and my God requires that I treat all human beings equally and with dignity. You probably remember in *Matthew*, for example, one of the rules that He talked about. I am paraphrasing, but He said as you have mistreated your fellow human beings in this way, you have done this "unto me."[38] That is a powerful statement if we think about it. That is what drives not only my moral being, but my legal being as well, as a matter of law.

Dr. Sekulow: It actually says as you treat "the least of these,"[39] which is a completely different context, but go ahead.

Commander Sulmasy: I think Professor Paust is right in many ways, but we should recognize that some concerns are not occurring now.

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[36] *E.g.*, Action Memorandum from William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., to Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def. (Nov. 27, 2002) (approving, on December 2, 2002, an interrogation plan for detainees located at Guantanamo Bay, Cuba that included removal of clothing and fear of dogs). *But see* Memorandum from Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def., to Commander, U.S. S. Command (Jan. 15, 2003) (rescinding approval for the December 2, 2002 interrogation plan); Memorandum from Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def., to Commander, U.S. S. Command (Apr. 16, 2003) (approving a new interrogation plan that did not include the use of dogs or removal of clothing).

[37] U.S. WAR DEP'T, *supra* note 21.

[38] *See Matthew* 25:40 (King James) ("Verily I say unto you, Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me.").

[39] *Id.*

To clarify, mistakes have been made, and they have been rectified. Dogs are not being used with people in Guantanamo right now.

The question asks where you would rather be held. I would always want to be held, being a proud member of the armed forces, under military control by the U.S. armed forces because we act with dignity. We act with respect. We did when problems occurred in Abu Ghraib—we court-martialed the people involved. I think we should be proud of our men and women in the armed forces. I would be very comfortable being held under their jurisdiction and control.

Ms. Massimino: I agree with that. I think that is a good example of how we learned from our experiences. Because frankly, that was not the case immediately afterwards. We know that the military lacked clarity about what standards applied. To its great credit, the military has—in part due to the McCain Amendment, which restored the Army Field Manual as the interrogation standard for the military and said that all agencies must refrain from cruel and inhuman treatment of prisoners—largely corrected itself.[40] That is a great virtue of our military. But this morning we heard from Professor Radsan that the CIA needs to operate in the shadows, do things differently, and have a different standard.[41] We tend to beat up on Congress and say it has failed us. Congress is an easy target. But in fact, Congress has spoken twice very clearly on this issue. The McCain Amendment in 2005 forbids "cruel, inhuman, or degrading treatment" of any detainee in U.S. custody—period.[42] That is not who we are. We do not do that stuff. The President signed that law. Then, the President issued an executive order reauthorizing the CIA program to hold people in secret and use the techniques that our military thinks violate the laws of war.[43] So Congress passed another law because it was not convinced that the first one had accomplished its objective.[44] The President vetoed it—the law that told the CIA that Congress really meant to abide by the Army Field Manual rules and the golden rule standard within it.[45]

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[40] Detainee Treatment Act of 2005, Pub L. No. 109-148, div. A, tit. X, §§ 1002–1003, 119 Stat. 2739, 2739–44 (codified as amended at 10 U.S.C. § 801 note (2006) and 42 U.S.C. § 2000dd (Supp. V 2006)) (introduced by Sen. John McCain).

[41] A. John Radsan, *Change Versus Continuity at Obama's CIA*, 21 REGENT U. L. REV. 299, 301–04 (2009).

[42] Detainee Treatment Act of 2005 § 1003(a), 119 Stat. at 2739 (codified at 42 U.S.C. § 2000dd(a)).

[43] Exec. Order No. 13,440, 3 C.F.R. 229–31 (2007).

[44] Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. (2008).

[45] 154 CONG. REC. H1419 (daily ed. Mar. 10, 2008) (veto of H.R. 2082 by the President of the United States).

We need clarity about this. The lack of clarity is one of the reasons we got off track early on. No matter whether we are in uniform or out of uniform, a civilian agency or the military, we need to have a standard for what it means as Americans to treat people humanely.

Professor Rishikof: The distinction remains important because if you are out of uniform, you are a spy. If you are a spy, you do not get the traditional law of armed conflict protections.

Ms. Massimino: You get Common Article 3.[46]

Professor Rishikof: You get Common Article 3, which is humane.

Ms. Massimino: That is all I am talking about.

Professor Rishikof: But then you can be hung, which can never be done to a prisoner of war. Without question that is what we do to spies.

Ms. Massimino: I do not dispute that at all.

Professor Rishikof: But see, to me, that issue is the darker side. The easy case is one with people in uniform in which the laws of armed conflict apply.[47] A harder case is how far we are willing to go vis-à-vis using out-of-uniform covert actions and special forces.

Dr. Sekulow: Let me open it up to the students and guests to ask questions. As you have questions, please raise your hand to participate. Yes sir.

Question 1: My question involves international law and national security, specifically regarding post-*Boumediene* and the prisoners in Guantanamo who are due for acquittal or release. What should we do with those prisoners? According to international law, many of them cannot go back to their home countries because they will be subject to torture or death. But at the same time, are we to release them into the United States? I am asking all four panelists what they would do.

Dr. Sekulow: That is a good question.

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[46] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[47] *Id.* art. 4.A(2).

Professor Paust: In my Essay, I said the United States has the power to detain certain persons as security detainees when reasonably necessary under human rights law if the detention is not arbitrary in any context—law of war context or not.[48] Such detainees do not receive much protection against detention, but they have a right to judicial review of the propriety of their detention. If the laws of war apply, the Geneva Conventions provide a relevant status for every person. There are no gaps. At a minimum, you have Common Article 3—the Supreme Court recognized that in *Hamdan v. Rumsfeld*.[49] In particular, you cannot mistreat them, but you can try them for any domestic or international crimes they committed within your jurisdiction. You can continue to detain them as prisoners of war and non-prisoners of war as long as the laws of war remain applicable and it is reasonably needed to detain the security detainee. I do not think *Boumediene* addressed any of those issues directly.

Commander Sulmasy: The national security court proposal might be the best way to move forward on this issue because you will have adjudication, rather than simply preventative detention.[50] Try them in a statutorily created court that satisfies issues of due process as well as the laws of war—that might be the best answer.

Ms. Massimino: We produced a short blueprint on how to close down Guantanamo.[51] It breaks down the categories of prisoners and makes specific recommendations for the next administration, which will have to deal with this. Everyone says they want to close Guantanamo, but doing so involves very difficult choices. I think, in contrast to some of my colleagues here, that we have a greater substantive legal basis for trying people who have committed crimes against the United States in the regular federal criminal system that we do under military commissions. I believe these cases ought to be moved there. Khalid Sheikh Mohammed is already under indictment in federal court.[52] We probably knew enough about him before we even picked him up—before

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[48] Paust, *supra* note 9, at 358.

[49] 548 U.S. 557, 629–30 (2006).

[50] *See* GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (forthcoming June 2009).

[51] HUMAN RIGHTS FIRST, HOW TO CLOSE GUANTANAMO: BLUEPRINT FOR THE NEXT ADMINISTRATION (2008), *available at* http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf.

[52] Press Release, U.S. Dep't of Justice, Virginia Man Returned to the United States to Face Charges of Providing Material Support to Al Qaeda (Feb. 22, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/February/05_crm_072.htm.

he was ever waterboarded—to convict him and put him away for the rest of his life. I think that is what should happen.

Professor Rishikof: I think your case is the Uighurs.[53] What do we do with them? We were detaining them and then a civilian court of appeals finally said there was not enough evidence to detain them.[54] We have them. China does not want them back, and we have created yet another facility for that group.

Ms. Massimino: China wants them back,[55] but they are at risk of torture there.

Professor Rishikof: Yes, but China wants them back for the wrong reasons, so we will not do that.[56] I believe that when you do the capture, you have to think long and hard about what to do with the detainee—keep them in place or not in place? Where Ms. Massimino and I disagree is that I think there may be many reasons why we actually should not use the criminal courts. My recent law review article details why the Human Rights First report on prosecuting terrorism cases fails to address a set of caveats.[57] Its report makes it clear it has already thought through this international issue and a set category of cases that they do not think are going to be appropriate. That is why people like Commander Sulmasy and I say we need a national security court. But the real issues with detainees involve where you seize them, where you are going to place them, what is the appropriate due process, and how quickly you determine the evidence is insufficient to keep them.

The other issue is our parole system in the United States. Mistakes will be made. We have had many years with parole systems. We let people go and they turn around and commit illegal acts. There will be some mistakes, but you are creating a structure that the world will have confidence in because there will be accountability and transparency.

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53 "The Uighurs are from the far-western Chinese province of Xinjiang, which the Uighurs call East Turkistan." Parhat v. Gates, 532 F.3d 834, 837 (D.C. Cir. 2008).

54 *Id.* at 836, 854.

55 Peter Spiegel & Barbara Demick, *Uighur Detainees at Guantanamo Pose a Problem for Obama*, L.A. TIMES, Feb. 18, 2009, at A5, *available at* http://articles.latimes.com/2009/feb/18/world/fg-uighurs-gitmo18.

56 *Id.*

57 Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 125–27 (2008) (discussing RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf).

Dr. Sekulow: Next question. Yes sir.

Question 2: We have talked about the dichotomy between criminal courts and enemy combatants in military courts. It seems our enemy is more and more a non-state actor—with Hezbollah, Hamas, and al Qaeda—yet we are using our military force to fight them instead of law enforcement. My impression is that this series of recent cases has given more rights to enemy combatants in Guantanamo than our military members sitting here today, who waived some rights when they joined the military and fell under the Uniform Code of Military Justice.[58] How do we reconcile, and please correct me if I am wrong, this issue of criminal courts using a military force to enforce law? Anybody on the panel can please answer.

Commander Sulmasy: Two quick things. I think that is a great question, first of all. But I think we are not at war with Hamas or Hezbollah. We may be in a state of disagreement. We may condemn their actions, but we are actually only at war with al Qaeda. This distinction is important. In terms of your specific question, obviously I am concerned about giving nontraditional warriors rights greater than if they were prisoners of war right now. Again, I think that is something that would go to the national security court system to strike the constitutional balance between national security and human rights.

Professor Rishikof: Dr. Sekulow elegantly has created the confusion by grouping together these types of groups—Hezbollah is actually more of a problem for Israel than the United States. Let me ask you this question: how do terrorist organizations end? How does a terrorist group end using a tactic? The large number of historical cases involving occupation ended in one of two ways: either the occupiers withdrew or successfully took over the country.

Right now we have a problem in Colombia with the Revolutionary Armed Forces of Colombia[59] ("FARC"). How is the FARC as a terrorist group going to end? Either Colombia will be able to crush them with a variety of mechanisms, or the FARC will be able to take over power in Bogota. Right now the smart money is on President Uribe and Colombia. How it ends often turns on whether you are an occupying or non-occupying force. What do they want? That becomes the issue. By collapsing the different groups all together the way Dr. Sekulow did helps create the confusion. When you start to disaggregate each

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[58] Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2006).

[59] U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2007, at 154–57 (2008), *available at* http://www.state.gov/documents/organization/105904.pdf.

organization, you get leverage on how to resolve the problem. That is the issue.

Commander Sulmasy: Can I go a step further on that, Dr. Sekulow? Look at organizations like the FARC, Hezbollah, or Hamas. I would suggest most of us detest and condemn their tactics, but we are not at war with them. I think we also have to recognize that al Qaeda has declared war on us. Those folks have not. In fact, they have rejected the support of al Qaeda on numerous occasions.

Dr. Sekulow: Next question.

Question 3: Some of us who have grown up in the 9/11 world are not used to thinking about war as against a country. I want to ask about the situation here. We have Russia selling weapons and technology to Iran, who then gives them to Hezbollah in Iran, who transfers them across the border to Iraq, who then kills our troops. Which laws apply and to whom? Can we bomb Russia and Iran under a military law, and kill the guys while they are driving in Iran? What happens when they cross the border, and what happens when the bomb goes off? I think it applies to everyone now as we look at the world. We see Venezuela who then gives technology to Tehran, who uses it against us, but through other actors. So do we use the Geneva Conventions or . . .

Professor Paust: You are bringing up a basic international law issue concerning state responsibility. A state should not intervene and try to overthrow certain types of governments in certain circumstances through proxies. It should not finance or foment armed groups for armed violence. It should not support terrorism. From the United Nations, a number of General Assembly and Security Council resolutions touch on this. There is a state duty not to support these type of groups, and violations can lead to economic, political, diplomatic, and juridic sanctions—but a mere violation of this duty does not authorize the use of military force against a state that is financing, training, or equipping such groups. The International Court of Justice has recognized this.[60] You cannot use military force against a state that merely supports terrorism, unless that state is in control of these proxy-type groups, but

[60] *See, e.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 115, 195, 228, 230 (June 27); Jordan J. Paust, *Use of Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 540-43 (2002).

you or your troops are subject to an armed attack in Iraq, in which case you could act under Article 51 self-defense.[61]

We must note an important distinction. Some people are talking about Iran, for example, financing Hezbollah. That is an important current question. I would find Iranian responsibility under international law if the facts fit and if it is financing or fomenting terrorist groups to attack Israel, for example. But that does not justify either an Israeli or a United States raid on Iran until there is an armed attack on our troops by Iran or Iran takes direct control of Hezbollah.

Ms. Massimino: I think this question is so important because it underscores the complexity of the problem that we are facing. We will continue to face these problems if we look at this as a one-dimensional or binary choice between criminal law, war, or something else. I think the answer to your question was given this morning by Admiral Clark.[62] The question "Can we under the law bomb Russia?" or "Can we do this?" only gets you so far. It does not tell you how we achieve the United States' interests in this complex world. We must use a whole range of tools of our national power to deal with the complex problem that you set out there. I know this is a law school and we are all lawyers. We are talking about the importance of international law and the laws of war, but at our peril, we focus only on that slice of the problem. We have to look across the whole spectrum.

Professor Rishikof: The issue partly concerns the notion of preemption and prevention in the international regime system. I submit that the Bush Administration completely confused and absolutely abused the notion of preemption and prevention. The idea that you can use it as a tool has caused extraordinary disturbance inside the system. So the idea "when I see an act 'X' now I have the right to respond" is actually outside of our international law understanding. The prevention doctrine is disagreed upon in a dramatic way. Notice that we recently had Israel bombing Syria. We have never had a system in which everyone denied such an event. We have never had an international system in which everyone says, like a Monty Python script, "We bombed. No you did not. Yes we—no you did not." And why? Because it strikes at the heart of sovereignty. The Syrian leadership must look at its people and say we have no capacity to protect each other, to protect you.

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[61] U.N. Charter art. 51 ("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 Security Council has taken measures necessary to maintain international peace and security.").

[62] *See generally* Clark, *supra* note 23.

Dr. Sekulow: Which was the real problem.

Professor Rishikof: Which is the sovereignty issue. What is the collective responsibility and response of Russia, as opposed to our unilateral decision as to what America is going to do?

Commander Sulmasy: I just want to go back, if I could, to the question, which was great because the answer is so difficult. I think we have to be careful about completely discrediting preventative attacks or anticipatory self-defense. General Ashcroft and Admiral Clark talked about fourth generation warfare and how things proceed.[63] At what point do we say it is not preventative war or anticipatory self-defense when someone is actually attacking a nuclear plant? If someone is putting the missiles on a silo to be launched or on a launching pad to be launched? At what point do we wait for ourselves to be attacked before we respond in kind? I would be careful or hesitant, with all due respect to Professor Rishikof, about disregarding anticipatory self-defense altogether. In this new world order, I think it is important to have it as a tool.

Dr. Sekulow: The red stop is up, but I want to give each panelist one minute to sum it up and reiterate a point.

Professor Paust: In my discussion I jumped into my Essay, so I did not have a chance to thank everyone for inviting me here. That is the way I would like to end my presentation. Thank you very much.

Commander Sulmasy: I think *Boumediene* was wrongly decided. Even though we did not really have a chance to get into it much, I think we should ask when people raise issues of executive power, "Who is really at fault?" Is the institution of Congress or is the Executive really at fault in creating the catalyst for the Supreme Court to intervene in these affairs?

Ms. Massimino: The last thing I would like to say is that we need to keep our heads in this and not overreact. I think many of our problems resulted from our panicking and losing our way. I believe we have a serious challenge, but I do not believe that we are facing an existential threat as a nation. Terrorists hit us hard and we need to fight back. We need to be smart. But we have to use the tools that we know

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[63] *See generally* John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285 (2009); Clark, *supra* note 23.

work. We have to have confidence as a nation in our own values and our own system. Because that is—in the end—what this battle is all about.

Professor Rishikof: First, I would like to thank Dr. Sekulow for being such an agent provocateur in the questions. Second, on Commander Sulmasy's notion of preemption and prevention, I think one will only use the doctrine when general consensus believes the state is clearly acting in pariah-like way—then you would feel very comfortable making the case to world opinion vis-à-vis the issue. For example if the Security Council agreed, then the action would have international law approval. And third, I think Ms. Massimino has said we have reacted to empire baiting. When you bait the empire and the empire overreacts, it diminishes the true values that America has understood and why we won the Cold War—for a variety of reasons that also involved covert actions, which is why I protect covert actions.

But really, the test for your generation is how you see these issues and how you participate in the debate to make sure that the best, most rational, and most appropriate answers take place. That is why I thank Regent Law School for having the foresight to bring us all together. I thank all of you for participating and supporting us to come and be here.

Dr. Sekulow: I want to thank first the Law School and the Law Review, as well as the Federalist Society for sponsoring this tremendous debate. One of the things we pride ourselves on at Regent is this diversity of views and dialogue. As the agent provocateur, you want to bring out the most difficult aspects—some might even say silly—but issues on the minds of every American in the country.

I view the threat a little more on the existential side of things. But I think what we have seen today is that if we continue to discuss these issues, write about them, publish articles about them, and debate them in public fora like this, we do something that most other countries do not do at this level—certainly not the enemies who we are fighting or who are fighting us. The United States allows this free thought, free speech, and free exchange of ideas.

I will leave with one comment, which is one question to ponder. What would you do if you were the Commander-in-Chief of a country—it does not matter what country—and you were faced with a decision to authorize an act that would clearly be illegal torture under the Articles of War, the rules of war, and the Geneva Conventions, if you knew that that person had information about an act of terror that would surely happen, and there was a way to get that information that would prevent mass casualties? With that, and no answer, ponder it. I want to thank the panel for an engaging discussion. Thank you very much.

SEX, PSYCHOLOGY, AND THE RELIGIOUS "GERRYMANDER": WHY THE APA'S FORTHCOMING POLICY COULD HURT RELIGIOUS FREEDOM*

INTRODUCTION

Even as early as elementary school, David always felt more comfortable around the girls in his class than the boys.[1] He was a momma's boy and though he had various "girlfriends," he really just wanted a male best friend.[2] In high school this struggle escalated.[3] David continued dating girls, but he longed for male acceptance.[4] When a popular guy sought out friendship with David in college and they discovered that they both felt attracted towards males, their friendship transitioned into a sexual relationship.[5] Post-college, David's sexual encounters with males continued through online chat rooms, pornography, and a one night stand.[6]

This example of a youth's exploration of homosexuality is not distinctively rare, but for one remaining factor: David grew up in a church-attending southern family and became a Christian when he was eleven years old.[7] His sexual encounters conflicted with his religious convictions. He felt distant from God and wanted help.[8]

What happens when the worlds of sexuality and religion collide? What is the response when individuals encounter sexual desires inconsistent with their religious beliefs? How do they sort through the incompatible thoughts and actions? Until recently, an individual dealing with these difficult issues could consult a psychologist who might recommend that the individual maintain an orientation or lifestyle consistent with his or her religious faith. But under the American Psychological Association's ("APA") potential forthcoming policy on therapies involving homosexuality ("Policy"),[9] psychologists may no longer be able to make certain recommendations based on a patient's

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* Winner of the first annual Leroy Rountree Hassell, Sr. Writing Competition, hosted by the Regent University Law Review.

1 David Fountain, *Why Was It Worth It?*, EXODUS INTERNATIONAL 1 (2006), http://exodus.to/files/DFountainTestimony.pdf.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at 2.

7 *Id.* at 1.

8 *Id.* at 2.

9 *See infra* Part I.B.

religious faith, and religious patients may no longer be able to receive the breadth of counsel they need.[10]

The APA's Policy will likely cite to and reinterpret the APA's *Ethical Principles of Psychologists and Code of Conduct* ("*Ethics Code*") to articulate its position on counseling homosexuals.[11] Because many states incorporate the *Ethics Code* into their psychologists' licensing codes—which state psychology boards oversee and apply—a change in the APA's interpretation of the *Ethics Code* could promulgate a change in the way the state boards adjudicate ethics complaints.[12]

This Comment explores the constitutional issues, namely the First Amendment problems, with the Policy and whether state psychology boards should follow the APA's lead when applying their licensing codes. Part I discusses the historical background relevant to the Policy and predicts what problems the Policy will cause. Part II analyzes the First Amendment concerns, specifically regarding the Free Exercise Clause, created by the Policy as well as the resulting harmful effect the Policy could have on patients. In addition to examining problems arising under the U.S. Constitution, Part II also argues that state constitutions and religious liberty statutes conflict with the application of the Policy. Part III proposes as a solution a conscience clause addendum to the Policy, the *Ethics Code*, and state licensing codes.

I. HISTORICAL BACKGROUND TO THERAPIES INVOLVING HOMOSEXUALITY AND THE APA'S FORTHCOMING POLICY CHANGE

A. History of the APA's Position on Homosexuality

The APA is "a scientific and professional organization that represents psychology in the United States" and "is the largest association of psychologists worldwide."[13] As such, the APA's influence on therapy involving homosexuality is unmatched. After the American Psychiatric Association declared in 1973 that homosexuality is not a

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[10] David Crary, *Psychologists to Review Stance on Gays*, HUFFINGTON POST, July 10, 2007, http://www.huffingtonpost.com/huff-wires/20070710/gays-psychologists.

[11] The APA cited to and defined its 1997 position on homosexuality based on its *Ethics Code*. APA Council of Representatives, Resolution on Appropriate Therapeutic Responses to Sexual Orientation (Aug. 14, 1997), http://www.apa.org/pi/sexual.html [hereinafter 1997 Resolution].

[12] *See infra* note 32 and accompanying text. *See generally* Angela M. Liszcz & Mark A. Yarhouse, *A Survey on Views of How to Assist With Coming Out as Gay, Changing Same-Sex Behavior or Orientation, and Navigating Sexual Identity Confusion*, 15 ETHICS & BEHAV. 159, 160 (2005); Crary, *supra* note 10.

[13] About the American Psychological Association, http://www.apa.org/about (last visited Apr. 10, 2009).

mental disorder, altering its century-long position, the APA followed suit in 1975.[14]

Years later, in 1997, the APA advanced its position on homosexuality a step further by establishing a resolution ("1997 Resolution") about therapy involving sexual orientation.[15] One behavior health journal summarized the APA's 1997 Resolution as follows: "Homosexuality is not a mental illness and therefore does not need any so-called conversion therapy . . . ."[16] In light of the coercive pressures gay, lesbian, and bisexual adults and youths experience to conform their actions to social norms, the 1997 Resolution aimed to discourage harmful therapy practices.[17] The APA resolved, among other things, that psychologists must obtain the client's informed consent to therapy and must not discriminate based on sexual orientation or allow sexual orientation biases to impact their work.[18] The 1997 Resolution further stated:

> [T]he American Psychological Association opposes portrayals of lesbian, gay, and bisexual youth and adults as mentally ill due to their sexual orientation and supports the dissemination of accurate information about sexual orientation, and mental health, and appropriate interventions in order to counteract bias that is based in ignorance or unfounded beliefs about sexual orientation.[19]

The APA's 1997 Resolution, though reaffirming its position against treating homosexuality as a mental disorder, remained merely cautionary toward therapies that change homosexual orientation or behavior. The 1997 Resolution addressed general concerns that certain therapies may implicate, but the absence of specific prohibitions gave psychologists the discretion needed to best confront issues religious patients face.[20] Now, more than a decade later, the APA revisits its 1997 Resolution in a more directed sanction on certain therapies.

B. The APA's Potential Policy Against Certain Therapies Involving Homosexuality

Though the APA's 1997 Resolution sets forth authoritatively the APA's concerns about certain sexual orientation therapies, it wisely left

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[14] John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620, 633 (1975).

[15] 1997 Resolution, *supra* note 11.

[16] *APA Passes Resolution on Homosexuality Conversion Therapy*, BEHAV. HEALTH TREATMENT, Sept. 1997, at 5, 5.

[17] 1997 Resolution, *supra* note 11.

[18] *Id.*

[19] *Id.*

[20] *See id.*

room for psychologists who disagreed. Allowing for dissenters was essential because there are multiple ways that psychologists approach counseling homosexual patients.[21]

Change therapy, for example, is one approach used by some psychologists, often in response to requests from clients who are highly religious.[22] It is the umbrella term for reorientation counseling techniques, including reparative therapy.[23] In contrast, the gay-integrative approach views "homosexuality and heterosexuality equally as natural or normal" and "facilitates the integration of same-sex attraction into an LGB [(lesbian, gay, and bisexual)] identity synthesis."[24] The tension between these approaches makes the Policy remarkably polarizing. Even more alarming, the Policy could conceivably undermine a third approach, sexual identity therapy,[25] which views behavioral change as a legitimate option for patients seeking to harmonize their faith and lifestyle. After decades of maintaining a policy broad enough to include legitimate forms of change therapies, gay-integrative approaches, and sexual identity therapy, a potential ban on certain therapies is significant.[26]

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[21] *See, e.g.*, Liszcz & Yarhouse, *supra* note 12.

[22] *See* STANTON L. JONES & MARK A. YARHOUSE, EX-GAYS?: A LONGITUDINAL STUDY OF RELIGIOUSLY MEDIATED CHANGE IN SEXUAL ORIENTATION ch. 1 (2007).

[23] Reparative therapy is a very specific approach that aims for change based on the assumption that "some childhood developmental tasks were not completed" and that the parents' failings created inevitable wounds. JOSEPH NICOLOSI, HEALING HOMOSEXUALITY: CASE STORIES OF REPARATIVE THERAPY 211–13 (1993).

[24] Liszcz & Yarhouse, *supra* note 12, at 161; *see also id.* at 176 (discussing results of a study that found "not all clinicians accept a gay-integrative treatment approach as acceptable ethical practice for every client who experiences same-sex attraction").

[25] In sexual identity therapy, "the focus is not on changing orientation or integrating attractions into an LGB identity per se but on helping each client identify him- or herself publicly and privately in ways that are consistent with their beliefs and values about human sexuality and sexual behavior." Liszcz & Yarhouse, *supra* note 12, at 162; *see also* Warren Throckmorton & Mark A. Yarhouse, *Sexual Identity Therapy: Practice Framework for Managing Sexual Identity Conflicts* (2006), http://wthrockmorton.com/wp-content/uploads/2007/04/sexualidentitytherapyframeworkfinal.pdf.

[26] The Department of Health and Human Services provides a question and answer document on sexuality, which states that therapy *cannot* change sexual orientation:

> Even though most homosexuals live successful, happy lives, some homosexual or bisexual people may seek to change their sexual orientation through therapy, sometimes pressured by the influence of family members or religious groups to try and do so. The reality is that homosexuality is not an illness. It does not require treatment and is not changeable.

U.S. Dep't of Health & Human Servs., *Answers to Your Questions About Sexual Orientation and Homosexuality*, http://www.ct.gov/dcf/LIB/dcf/safe_harbor/pdf/Answers_About_Orientation.pdf (last visited Apr. 10, 2009). In general, psychologists who oppose change therapy do so based on three prevailing arguments: "(a) homosexuality is no longer considered a mental illness, (b) those who request change do so because of internalized homophobia, and (c) sexual orientation is immutable." Mark A. Yarhouse & Warren

In furtherance of this revision, an APA taskforce is currently considering which approaches to sexual orientation therapy the APA will endorse and oppose.[27] The taskforce will submit, subject to the full APA governance's review, recommendations for the APA's Policy on several topics, including "[t]he appropriate application of affirmative therapeutic interventions for adults who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both."[28] Though called a taskforce on "sexual orientation," the APA's reference to "*behavioral* expression" of sexual orientation could threaten therapies that simply focus on changing homosexual behavior.[29]

The APA taskforce was expected to develop a preliminary report by December 2007 with the final report submitted in early 2008.[30] As of this publication, however, the APA continues to compose the Policy, which will likely be released in 2009.

C. State Psychology Boards and the Problematic Implications of the Policy

Even if the Policy remains merely aspirational and not mandatory for APA members, the contemplated Policy could create a ruckus for state boards of psychology. State psychology boards serve as arbitrators for ethical infractions committed in violation of state codes that govern the licensing of psychologists.[31] Many state codes incorporate by reference the *Ethics Code* into their licensing provisions.[32] Consequently,

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Throckmorton, *Ethical Issues in Attempts to Ban Reorientation Therapies*, 39 PSYCHOTHERAPY: THEORY/RES./PRAC./TRAINING 66, 66 (2002) [hereinafter *Ethical Issues*].

[27] *See* Press Release, Am. Psychological Ass'n, APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation (Mar. 13, 2007), http://www.apa.org/releases/lgbctaskforce.html [hereinafter APA Task Force]. To the chagrin of many conservatives, the APA taskforce failed to consider the input of many conservatives. *See* Jennifer Mesko, *APA Shuns Academic and Religious Coalition on Homosexuality*, CITIZENLINK (Dec. 3, 2007), *available at* http://www.citizenlink.org/content/A000006042.cfm.

[28] APA Task Force, *supra* note 27. In addition, the APA taskforce is reconsidering its sexual orientation policies for minors; specifically for those minors whose guardians desire change or who demonstrate early indicators of homosexuality. *Id.*

[29] *Id.* (emphasis added).

[30] Crary, *supra* note 10.

[31] *See, e.g.*, Department of Consumer Affairs, Board of Psychology, What is the California Board of Psychology?, http://www.psychboard.ca.gov/about-us/whatis.shtml (last visited Apr. 10, 2009); Ohio State Board of Psychology: Mission, Vision, Core Values, http://www.psychology.ohio.gov/minutes/MISSION%20VISION%20VALUES.pdf (last visited Apr. 10, 2009).

[32] *See, e.g.*, ALA. ADMIN. CODE r. 750-x-5.03(c) (Supp. Dec. 31, 2008) (basing its disciplinary actions against psychologists on the "APA's *Ethics Code* and *General Guidelines for Providers of Psychological Services* ("*General Guidelines*")); ALASKA ADMIN. CODE tit. 12, § 60.185(a)–(b) (2008) (requiring that licensed psychologists abide by the *Ethics Code* and *General Guidelines*); GA. COMP. R. & REGS. 510-4-.01 to -4-.02 (2008) (requiring compliance with the "APA Ethical Standards"); IOWA ADMIN. CODE r. 645-242.2

when confronted with an ethics situation involving a religious psychologist's use of change therapy, or conceivably sexual identity therapy, state boards could defer to the Policy to interpret the *Ethics Code* and adjudicate the complaint.

The APA is a self-governing professional organization and thus possesses considerable leeway in making policy statements.[33] As a private actor, its freedom to establish and enforce a therapy policy is unquestioned. What is being challenged is the constitutional religious freedom problem the Policy might create in those states whose psychology boards abide by the *Ethics Code* and defer to the APA's policies. State psychology boards operate as agents of the state. Because a psychology board is a state actor, if it adopts an APA policy that burdens the free exercise of religion, it will be subject to constitutional scrutiny.[34]

II. FIRST AMENDMENT IMPLICATIONS OF THE POLICY

The First Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ."[35] Historically, the Supreme Court has interpreted and applied the Free Exercise Clause in a manner safeguarding free religious expression.[36] The First Amendment, applied to the states through the Fourteenth Amendment,[37] stands as a protective buffer between a state's need to regulate aspects of society and a citizen's right to freely exercise religious beliefs.

(2009) (mandating failure to comply with the *Ethics Code* as grounds for discipline); 251 MASS. CODE REGS. 1.10(1) (2009) (adopting the *Ethics Code*); 49 PA. CODE § 41.61 (1998) (requiring a psychologist's "competency" to be consistent with the *General Guidelines*).

[33] *See* APA Online, Governance, http://www.apa.org/governance (last visited Apr. 10, 2009).

[34] *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191–92 (1988). "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *Id.* at 191 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

[35] U.S. CONST. amend. I (emphasis added).

[36] *See infra* Part II.A. Then-Judge Alito, before coming to the Supreme Court, wrote in a court of appeals decision that "[f]or many years, the Supreme Court appeared to interpret the free exercise clause as requiring the government to make religious exemptions from neutral, generally applicable laws that have the incidental effect of substantially burdening religious conduct." Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 361 (3d Cir. 1999) (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

[37] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

The power of states to enact laws that directly or indirectly infringe upon free exercise of religion has evolved in the last few decades.[38] The current controlling case, *Employment Division, Department of Human Resources v. Smith*,[39] faces criticism both from academics[40] and Supreme Court Justices[41] for the way it alters Free Exercise Clause precedent by minimizing religious protections. But even under *Smith*, the Policy will not satisfy Free Exercise requirements. Because the Policy could prohibit psychologists from adopting certain therapy methods consistent with their faith and prevent religious patients from accessing the treatment most suitable for addressing faith and sexuality conflicts, the Policy will likely undermine the free exercise of religion.

The following hypothetical illustrates a type of case potentially implicated by the Policy: Psychologist A is a Christian. He believes that homosexuality is a sin, but as a professional psychologist is adamantly opposed to coercing patients into altering their sexual practices. When Patient B, also a Christian, comes to Psychologist A for counseling, Psychologist A discovers that Patient B is trying to sort out homosexual feelings that conflict with his religious beliefs. Patient B is confused and seeks advice from Psychologist A because he knows that he is both a licensed professional and a Christian. Psychologist A wants to help Patient B sort through his issues so that Patient B can live in a manner consistent with his faith. In Patient B's case, a lifestyle consistent with his religious beliefs might mean abstaining from homosexual conduct. Or, to go a step further, it might mean reorienting Patient B to heterosexuality. On one hand, if the APA's Policy is to include behavioral proscriptions, or a ban on reorientation, Psychologist A's recommendations might violate the Policy. In violating the Policy, Psychologist A also opens the door to state action through his state's psychologist licensing code, which likely incorporates the *Ethics Code*,

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[38] *See* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851–52 (2001).

[39] 494 U.S. 872 (1990).

[40] *E.g.*, Edward McGlynn Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. REV. 189, 210–11 (1993) (calling *Smith* "a sweeping disaster for religious liberty"); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591 (1991) (discussing the tangled outcome of *Smith*).

[41] *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) ("I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle." (citing *Smith*, 494 U.S. at 908–09 (Blackmun, J., dissenting)); *Smith*, 494 U.S. at 891 (O'Connor, J., concurring) ("[T]oday's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.").

and which may accordingly deem his methods discriminatory, biased, or incompetent. But on the other hand, if Psychologist A does not recommend to Patient B to change his sexual behavior or orientation, he prevents Patient B from receiving the counseling that he, as a Christian, seeks.

In the end, both Psychologist A and Patient B are impaired because of the Policy and the state board's implementation of it.[42] Psychologist A cannot counsel in a way consistent with his Christian faith because he is unable to recommend reorientation from homosexuality—or, in the most extreme hypothetical, behavior changes—as a valid option. Patient B likewise suffers because he cannot receive therapy that takes into account both his sexual tendencies and his religious beliefs.

Though it may sound farfetched, recent cases indicate that public officials already struggle to balance psychology and the First Amendment. Thus, the Policy possesses the potential to increase the uncertainty of constitutional religious freedom. The City of Springfield and the City of Minneapolis, for instance, failed to renew a licensed psychologist's contract and terminated the psychologist's services after a critical newspaper column revealed that the psychologist served on the board of the conservative Illinois Family Institute.[43] Though serving Springfield's police and fire departments for more than a decade, the conservative affiliation tainted his proven expertise.[44] In Georgia, a counselor lost her contract with the Center for Disease Control ("CDC")

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[42] *See generally* Liszcz & Yarhouse, *supra* note 12. The article explains how those opposing all reorientation (or change) therapies themselves violate the *Ethics Code*:

> Yarhouse and Burkett (2002) asserted that it is imperative for psychologists to recognize religion and sexual orientation as legitimate expressions of diversity, in keeping with APA (2002) ethical principles. Davision (2001) and others have asserted that clinicians who promote orientation-change therapy, even for religious beliefs, demonstrate bias and discrimination against sexual diversity. This argument is certainly true if clinicians do so in a way that shows disregard for scientifically derived information (Ethical Standard 2.04, Bases for Scientific and Professional Judgments) or reflects discrimination on the basis of sexual orientation (Ethical Standard 3.01, Unfair Discrimination). At the same time, those who would limit client options to gay-integrative therapy only do an injustice to some clients' values and may demonstrate a kind of bias and discrimination against religious expressions of diversity (Ethical Standard 3.01).

Id. at 176–77.

[43] Campion, Barrow & Assocs., Inc. v. City of Springfield, No. 06-3215, 2008 U.S. Dist. LEXIS 21249, at *1–2, *7, *9–10 (C.D. Ill. Mar. 18, 2008); Verified Complaint For Declaratory Relief & Damages at 3–5, 8, Campion, Barrow & Assocs., Inc. v. City of Minneapolis (D. Minn. 2007) (No. 07–3935), *available at* http://telladf.org/UserDocs/CampionComplaint.pdf.

[44] *See Campion, Barrow & Assocs.*, 2008 U.S. Dist. LEXIS 21249, at *1.

after referring a CDC employee's case to a colleague.[45] Because of her Christian faith, the counselor believed she could not adequately provide counsel regarding a lesbian employee's sexual relationship.[46] Believing the client's interests were best served by a referral, the counselor discussed the conflict with the client and arranged an appointment for the client minutes later with a colleague.[47] Nonetheless, the counselor faced homophobia accusations and lost her job.[48]

*A. The Pre-*Smith *World of Free Exercise*

The restrictions on religious freedom established under *Smith* complicate the constitutional analysis regarding a state's implementation of the potential APA Policy. There was a time when medical practitioners were expected to utilize freedom of conscience when facing moral dilemmas in their jobs. The Supreme Court's early decisions recognized the government's interest in placing some constraints on freedoms, including religious conduct, because it did not want "every citizen to become a law unto himself."[49] In contrast to the *Smith* legacy, the Court's pre-*Smith* jurisprudence understood that the government's ability to restrict religious freedom was itself bound by certain limitations.[50]

Similar to recent Free Exercise decisions, early decisions recognized the important distinction between freedom of religious *beliefs* and freedom of religious *conduct*.[51] Religious beliefs—the internal deliberations of the heart and mind—are outside the reach of state control,[52] while religious conduct is not.[53] That being said, pre-*Smith*

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[45] Verified Complaint For Declaratory Relief & Damages at 2, 9–10, Walden v. Ctr. for Disease Control & Prevention, No. 108-CV-2278 (N.D. Ga. 2008) [hereinafter Walden Complaint], *available at* http://www.telladf.org/UserDocs/WaldenComplaint.pdf; Pete Vere, *Gay Rights vs. Faithful*, WASH. TIMES, July 31, 2008, *available at* http://www.washingtontimes.com/news/2008/jul/31/gay-rights-vs-faithful.

[46] Walden Complaint, *supra* note 45, at 1–2; Vere, *supra* note 45.

[47] Walden Complaint, *supra* note 45, at 6.

[48] *Id.* at 6, 9–10.

[49] Reynolds v. United States, 98 U.S. 145, 167 (1879); *see* Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

[50] *Cantwell*, 310 U.S. at 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").

[51] Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute.").

[52] Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute." (citing *Cantwell*, 310 U.S. at 303)).

[53] *Id.* ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." (citing *Cantwell*, 310 U.S. at 303–04, 306)); *see, e.g.*, *Reynolds*, 98 U.S. at 164–65. In regard to the government's ability

cases afforded more protection of religious *conduct* than is granted today.[54] For instance, even in *Braunfeld v. Brown*, which upheld a Pennsylvania statute requiring Sunday business closings despite contentions that Jews observe the Sabbath on a different day, the Court acknowledged that the State could justify only limited infiltration into religious practices.[55] Recognizing that the "[a]bhorence of religious persecution and intolerance is a basic part of our heritage," the Court reasoned, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[56]

The Supreme Court's definition of religious belief and practice, which even encompasses beliefs incomprehensible or illogical to others,[57] is broad enough to encompass the faith-based conduct of religious psychologists burdened by the Policy. Before *Smith*, the Court favored Free Exercise over government burdens on religion and used a strict scrutiny standard for deciding such claims. All laws that substantially burdened religious freedom were void unless the state justified them based on two things: (a) a "compelling state interest,"[58] and (b) use of the "least restrictive means" to achieve that interest.[59] The *Sherbert v. Verner*[60] and *Wisconsin v. Yoder*[61] cases provide prime examples of how the pre-*Smith* Court applied the First Amendment to Free Exercise

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to ban polygamy in Utah, despite Mormon religious beliefs, the Court explained that "it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." *Reynolds*, 98 U.S. at 165.

[54] *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 717–18 (1981). When a "state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* Even if the "compulsion" on religious conduct was "indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718.

[55] *Braunfeld*, 366 U.S. at 605, 608–09.

[56] *Id.* at 606–07; *see also* United States v. Lee, 455 U.S. 252, 256–58, 260 (1982) (requiring the state to have an "overriding governmental interest" for refusing to grant an Amish employer religious exemption from Social Security taxes); Gillette v. United States, 401 U.S. 437, 439, 454 (1971) (requiring that "valid neutral reasons exist for limiting the exemption to objectors to all war" to justify the state's refusal to grant religious exemptions for one particular war).

[57] *Thomas*, 450 U.S. at 714 ("[T]he resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

[58] *Sherbert*, 374 U.S. at 406.

[59] *Thomas*, 450 U.S. at 718.

[60] 374 U.S. 398 (1963).

[61] 406 U.S. 205 (1972).

cases. In both cases, religious freedom prevailed because the states could not meet the compelling interest and least restrictive means requirements.

In *Sherbert*, a Seventh-day Adventist sued for unemployment benefits under South Carolina's Unemployment Compensation Act after she was fired for not working on Saturday, which she recognized as the "Sabbath."[62] Her disqualification for unemployment benefits was "solely from the practice of her religion,"[63] and because South Carolina could not demonstrate a compelling interest that justified this burden on Free Exercise,[64] the Court held that the State could not "constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."[65]

The Supreme Court in *Yoder* used a similar analysis in a decision that gave an Amish family religious exemption from a compulsory education law.[66] The Court held that the state of Wisconsin could not compel the Amish children to attend formal high school.[67] Even though Wisconsin's law on education appeared facially neutral and applied uniformly to all citizens, the Court recognized that it "nonetheless offend[ed] the constitutional requirement for governmental neutrality if it unduly burden[ed] the free exercise of religion."[68] Because the compelled school "attendance interfere[d] with the practice of a legitimate religious belief,"[69] the state could only uphold the law if it showed that "there [was] a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[70]

Both *Sherbert* and *Yoder*, though not formally overruled, were drastically undermined by *Smith*. *Smith* increased limitations on Free Exercise by shifting the balance away from religious freedom protections and towards enforcement of all state laws.

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62 *Sherbert*, 374 U.S. at 399–400.

63 *Id.* at 404.

64 *Id.* at 408–09. Burdens on free exercise must be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

65 *Id.* at 410. South Carolina's law forced the employee to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

66 *Yoder*, 406 U.S. at 234.

67 *Id.*

68 *Id.* at 220 (citing *Sherbert*, 374 U.S. at 403).

69 *Id.* at 214.

70 *Id.*

B. The Policy and the Smith *Test*

Under *Sherbert* and *Yoder*, the present issue regarding a state's use of the APA Policy on therapies involving homosexuals would favor Free Exercise. Assuming a state's enforcement of the Policy burdens the Free Exercise rights of psychologists whose religious beliefs on homosexuality conflict with the APA's stance, the psychologist's religious views would likely prevent that state's enforcement of the Policy against him or her.[71]

The religious protections offered by *Sherbert* and *Yoder*, however, are obscured by *Smith*. The *Smith* decision dispels the strict scrutiny, compelling interest test and creates a new religious exercise rule: "the right of [F]ree [E]xercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[72] Thus, after *Smith*, valid state laws can trump Free Exercise rights.

This new rule came in the context of religious peyote use. When employees in *Smith* were fired from their jobs and denied unemployment benefits because of ceremonial peyote use in the Native American Church,[73] they argued that it violated their Free Exercise rights.[74] The Court disagreed: "[b]ecause respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug."[75] Because Oregon's controlled substance law did *not* target religion, but rather neutrally applied to all drug users, the Court upheld the law.[76]

The *Smith* decision pulls the reins in on religious expression that conflicts with valid laws, but it nonetheless prevents laws from targeting religious conduct. In contrast to the peyote proponents, faith-informed psychologists possess a strong argument that even under *Smith*'s new test the Policy violates the Free Exercise Clause. States implementing the Policy against faith-informed psychologists would violate the *Smith* test for two reasons: the forthcoming Policy is neither a (1) religiously neutral, nor (2) generally applicable rule.

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[71] For a state to overcome the Free Exercise claim, it must possess a compelling interest for enforcing the APA's Policy despite its burden on some religious psychologists and patients, and it must be able to enforce that interest using the least restrictive means. *See supra* text accompanying notes 58–59.

[72] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

[73] *Id.* at 874.

[74] *Id.* at 878.

[75] *Id.* at 890.

[76] *Id.* at 882, 890.

States possess a vested interest in upholding and enforcing their laws; thus, a citizen's duty to obey valid laws does not disappear the instant a law conflicts with one's religious belief or practice.[77] It is entirely a different case, however, when a law is *not* religiously neutral or generally applicable. When it fails the *Smith* test, the pre-*Smith* compelling interest test of *Sherbert* and *Yoder* applies.[78]

C. The Policy Is Not Religiously Neutral

In his Third Circuit decision *Blackhawk v. Pennsylvania*, then-Judge Alito explained that "[a] law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice."[79] Writing decades earlier, then-Chief Justice Burger underscored the historical importance of legal neutrality in *Walz v. Tax Commission of New York*:

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.[80]

The *Smith* decision resolutely commits to religiously neutral laws. While the *Smith* analysis did not thoroughly define "neutrality," a Free Exercise case a few years after *Smith* helps clarify the requirement.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court defined a "neutral" law by explaining what it is not: "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[81] At a bare minimum, a neutral law cannot "discriminate on its face."[82] If a law "refers to a religious practice without a secular meaning discernible from the language or context," then it "lacks facial neutrality."[83]

The Policy on therapies involving homosexuality would likely meet the "bare minimum" neutrality requirement. It would not, on its face, openly suppress the actions of religious psychologists or patients. Moreover, a state board's application of the Policy is through the facially neutral *Ethics Code*, which does not single out religious conduct.

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[77] *Id.* at 879. "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940)).

[78] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[79] 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 533).

[80] 397 U.S. 664, 676–77 (1970).

[81] *Lukumi*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878–79).

[82] *Id.*

[83] *Id.*

Because the Policy does not directly target religious practice in its text, psychologists cannot successfully challenge its facial neutrality under the *Lukumi* standard.

Beyond the minimum requirement of a facially neutral law, however, is a defense that supports religious psychologists.[84] The Court's rationale in *Bowen v. Roy*, which concluded that Social Security numbers as a prerequisite for welfare did not violate the First Amendment rights of those with religious views against them, provides insight: "[t]he statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable."[85] While in *Bowen* the welfare law did exhibit neutrality, the Court nonetheless made it clear that facial neutrality is not determinative in many cases.[86] It reasoned, "There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs."[87] Because the statute in *Bowen* was neutrally applied to all welfare recipients and "in no sense [did] it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons,"[88] it was constitutional. In contrast, the Policy, though potentially facially neutral, could affirmatively compel religious psychologists to stop using certain therapies or else face sanctions.[89]

The Court in *Lukumi* reinforced that the protection of Free Exercise is not limited to laws that overtly target religious expression; protection also extends to laws that represent "'subtle departures from neutrality'"[90] and "'covert suppression of particular religious beliefs.'"[91] Thus, a law cannot immunize itself from inquiry by pretending to be neutral on its face. The Free Exercise Clause, in addition to prohibiting open and direct attacks on religious expression, also prevents "religious gerrymanders."[92] To eliminate such religious gerrymanders, courts

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84 *See id.* at 534 ("Facial neutrality is not determinative.").

85 476 U.S. 693, 695, 703, 706 (1986) (plurality opinion).

86 *See id.* at 703–04.

87 *Id.* at 703.

88 *Id.* (footnote omitted) (citing United States v. Lee, 455 U.S. 252, 259 (1982)).

89 *See id.* at 706 ("We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.").

90 508 U.S. at 534 (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).

91 *Id.* (quoting *Bowen*, 476 U.S. at 703 (plurality opinion)); *see also Gillette*, 401 U.S. at 452 ("[G]overnmental neutrality is not concluded by the observation that [the statute] on its face makes no discrimination between religions . . . .").

92 *Lukumi*, 508 U.S. at 534 (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

should determine "whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."[93]

The Policy is just that—a religious gerrymander, similar to the one identified in *Lukumi*. The Free Exercise claim in *Lukumi* involved devotees of the Santeria religion who, as part of their religious practices, engaged in animal sacrifice.[94] When the city council adopted an ordinance opposing animal sacrifice, the Santeria church brought suit.[95] Though the ordinance's language did not directly target the Santeria devotees on its face, the "central element of the Santeria worship service was the object of the ordinances."[96] It was the Santeria's use of animal sacrifice that initiated the community's concern, which in turn, motivated the city council to pass the prohibitions.[97] The ordinance in *Lukumi* was not a religiously neutral law; the Court recognized that its object was ending the Santeria's animal sacrifice.[98]

Just as the ordinances in *Lukumi* "had as their object the suppression of religion,"[99] the APA Policy, though potentially facially neutral, will likely target a methodology used by religious psychologists. Motivated by a religious understanding of sexual orientation, some psychologists believe that conversion from a homosexual lifestyle or orientation is possible—indeed, even recommended at times.[100] Because the APA rejects the moral underpinnings of this methodology, their new Policy purports to prohibit it. But the truth is that "[e]xperts in human sexuality do not agree on whether orientation is immutable; in fact, they do not agree as to what sexual orientation *is*."[101]

By adopting the Policy and applying it to resolve ethics complaints against religious psychologists, state boards will be implementing laws that, by design, constitute a "religious gerrymander." Notably, state psychology boards cannot escape the repercussions of implementing the Policy by claiming that they merely mechanically applied the law. Because neither the Policy nor its motivating impetus against religious

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93 *Walz*, 397 U.S. at 696 (Harlan, J., concurring).

94 *Lukumi*, 508 U.S. at 524.

95 *Id.* at 528.

96 *Id.* at 534.

97 *Id.* at 534–35. "No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria." *Id.* at 535.

98 *Id.*

99 *Id.* at 542.

100 *See, e.g.*, Exodus International, Policy Statements, http://exodus.to/content/view/34/117 (last visited Apr. 10, 2009); National Association for Research & Therapy of Homosexuality, NARTH Position Statements, http://www.narth.com/menus/positionstatements.html (last visited Apr. 10, 2009).

101 *Ethical Issues*, *supra* note 26, at 69–70.

psychologists is present on the face of state licensing codes, each state's psychology board will have to choose consciously whether to incorporate the Policy when interpreting its state code. In adopting the Policy, the state board willingly accepts a policy that targets a religious group and uses it to guide its understanding of the *Ethics Code*.[102]

Thus, as applied by state boards in their interpretation of the *Ethics Code*, the Policy is not neutral. It creates an unequal playing field among psychologists, specifically favoring one form of therapy, while banning approaches more compatible with a religious worldview.

D. The Policy Is Not Generally Applicable

In some circumstances it is permissible for laws to be "selective," but when a law "has the incidental effect of burdening religious practice" it must be generally applicable.[103] For a law to meet the general applicability requirement, a law cannot "burden[] a category of religiously motivated conduct" while exempting or not applying to "a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated."[104] At a minimum, the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief."[105] One of the central functions of the Free Exercise Clause is preventing unequal legal treatment between the religious and the secular,[106] such as the unequal treatment furthered by laws like the Policy. The Free Exercise Clause safeguards religious observers especially against the "inequality [that] results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[107]

The lack of general applicability in *Lukumi* sheds light on a comparable shortcoming in the Policy. *Lukumi*'s analysis of general applicability hinged on the fact that the ordinances prohibiting animal sacrifice were "underinclusive": "[t]hey fail to prohibit nonreligious

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[102] *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 360, 362 (1977) (establishing that although the American Bar Association ("ABA") formulated its disciplinary rules as a private actor, the Supreme Court of Arizona's use and enforcement of the ABA's rules constituted state action).

[103] *Lukumi*, 508 U.S. at 542.

[104] Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 543–46).

[105] *Lukumi*, 508 U.S. at 543.

[106] *Id.* at 542 (stating that the Free Exercise Clause "'protect[s] religious observers against unequal treatment'" (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring))).

[107] *Id.* at 542–43.

conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."[108] A state cannot make laws in pursuit of an alleged state interest that substantially leaves out some groups while targeting others.[109]

In *Lukumi*, the state claimed that the animal sacrifice ordinance was intended to "protect[] the public health and prevent[] cruelty to animals."[110] In reality, however, the state's regulation only applied to a narrow set of circumstances:

> [The ordinances] fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. . . . Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision.[111]

The animal sacrifice ordinances, only effective against certain religious actions, were not generally applicable. While the ordinances applied to religious conduct, they did not similarly apply to equivalent secular conduct.

The APA's forthcoming Policy is likewise not generally applicable. The Policy will presumably address a type of therapy used by religious psychologists without reaching comparable concerns raised by secular methodologies. The APA argues that change therapy is an ineffective and scientifically inaccurate way to approach homosexuality issues.[112] Such criticisms could likewise implicate sexual identity therapy if the APA sanctions against changing not only homosexual orientation, but also homosexual behavior.[113] The APA will potentially ban such therapies in the name of medical competency, ending harmful or coercive practices, and preventing biases or sexual discrimination.[114] The problem with this justification, however, remains that the Policy most likely will not approach these ends in a generally applicable manner. Instead of creating a policy in which the APA and state boards target *all* harmful psychology practices, the Policy will likely target allegedly harmful practices used by many religious psychologists. Just as the city council in *Lukumi* had little reason to "explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within

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[108] *Id.* at 543.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] APA Help Center, Sexual Orientation and Homosexuality, http://www.apahelpcenter.org/articles/pdf.php?id=31 (last visited Apr. 10, 2009).

[113] APA Task Force, *supra* note 27.

[114] *See* 1997 Resolution, *supra* note 11.

the city's interest in preventing the cruel treatment of animals,"[115] the APA has little reason to justify singling out the practice of religious psychologists for unequal treatment. As recognized by Justice Scalia in *Florida Starr v. B. J. F.*, "a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[116]

E. The Policy Does Not Pursue a Compelling State Interest Using the Least Restrictive Means

Because the Policy, as applied by state psychology boards, will likely fail the religiously neutral or generally applicable requirements, the pre-*Smith* standard of strict scrutiny for Free Exercise applies.[117] A law restricting a religious practice that is not neutral or generally applicable is only constitutional if it advances "interests of the highest order"[118] and is "narrowly tailored in pursuit of those interests."[119] Moreover, the *Lukumi* analysis makes it clear that courts applying the pre-*Smith* standard to "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[120]

To survive strict scrutiny, a law that is not neutral or generally applicable must further a "compelling" interest of the state.[121] Infringement on a citizen's First Amendment rights requires a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[122] When the government's actions are not "justifiable in terms of the [g]overnment's valid aims,"

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[115] *Lukumi*, 508 U.S. at 544. "[I]n sum . . . each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief." *Id.* at 545.

[116] 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment) (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

[117] *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

[118] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[119] *Lukumi*, 508 U.S. at 546; *see also* Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) ("Accordingly, it must serve a compelling government interest and must be narrowly tailored to serve that interest." (citing *Lukumi*, 508 U.S. at 546)).

[120] *Lukumi*, 508 U.S. at 546.

[121] *Id.*

[122] *Yoder*, 406 U.S. at 214.

then the "Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience."[123]

For example, in *Thomas v. Review Board*, the Court concluded that the state could not withhold unemployment benefits when a Jehovah's Witness ended his job because of religious conflicts.[124] The justifications offered for denying benefits—to prevent "widespread unemployment" and funding problems due to employees quitting based on religious beliefs, and to "avoid a detailed probing by employers into job applicants' religious beliefs"—were not compelling enough to justify the restraint on religious freedom.[125] There was no indication that granting unemployment benefits to employees who quit for religious reasons would increase unemployment or an employer's detailed probing into the religious views of employees.[126]

In contrast, the Court in *Lukumi* did find a compelling interest: the city council's regulation furthered public health and minimized cruelty to animals.[127] Further, the state in *Yoder* claimed an interest in "universal compulsory education."[128] According to *United States v. Lee*, individuals with religious qualms concerning taxes cannot receive exemption from taxes because of "the broad public interest in maintaining a sound tax system."[129] This interest is "of such a high order" that any "religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[130]

Regarding a state psychology board's use of the Policy, it remains unclear whether the state possesses a compelling interest to restrict the use of certain therapies despite the restriction's burden on the free exercise of religion. A state could argue that its compelling interest is to prevent coercive and discriminatory psychology practices because some psychologists argue that change therapy is harmful to patients.[131] One

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[123] Gillette v. United States, 401 U.S. 437, 462 (1971) (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

[124] 450 U.S. 707, 720 (1981).

[125] *Id.* at 718–19.

[126] *Id.* at 719.

[127] *Lukumi*, 508 U.S. at 543.

[128] *Yoder*, 406 U.S. at 215. In analyzing the role a compelling state interest has in justifying a restraint on a fundamental right, the Court notes that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. . . . [H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.*

[129] 455 U.S. 252, 260 (1982).

[130] *Id.*

[131] *See generally* Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. OF CONSULTING & CLINICAL PSYCHOL. 221 (1994) (referring to the "potentially harmful effects" of conversion therapy treatments).

could also argue, however, that the state does *not* have a compelling interest because the "harm" created by such therapies is too attenuated and unverifiable as to necessitate state intervention.[132]

In addition to demonstrating a compelling interest, a state that infringes upon religious practice must also show that its means were narrowly tailored.[133] Thus, for the sake of argument, even if state psychology boards adopt the Policy in pursuit of legitimate state interests, the states also must use the least restrictive means of pursuing such interests.[134]

In *Lukumi*, although the city council had a legitimate interest in regulating animal slaughters, for purposes of public health and animal cruelty, the city council used improper means to accomplish its interests.[135] The ordinances enacted by the city council were "underinclusive" and did not pursue the council's concerns "with respect to analogous nonreligious conduct."[136] Moreover, the ordinances were "overbroad" because the council's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree."[137] Because the ordinances singled out the Santeria's use of animal sacrifice without including other health and animal cruelty concerns and burdened Santeria more than necessary to achieve its interests, the ordinances were unconstitutional.[138]

The tax exemption scheme in *Arkansas Writers' Project, Inc. v. Ragland* similarly lacked narrow tailoring because of its "overinclusive and underinclusive" nature.[139] The Court concluded that even if the tax exemption encouraged "fledgling publishers," it applied unnecessarily to successful publishers who did not financially need the exemption and did not apply to many struggling publishers.[140] Consequently, the Court reasoned that "[e]ven assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption . . .

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[132] *See Ethical Issues*, *supra* note 26, at 70–71.

[133] Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part) ("Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens."); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (explaining that an infringement can be justified by showing it is "the least restrictive means of achieving some compelling state interest").

[134] *Lukumi*, 508 U.S. at 546 ("[E]ven were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests.").

[135] *Id.* at 543, 546.

[136] *Id.* at 546.

[137] *Id.*

[138] *Id.* "The absence of narrow tailoring suffices to establish the invalidity of the ordinances." *Id.* (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987)).

[139] 481 U.S. at 232.

[140] *Id.* (quotation marks omitted).

of religious, professional, trade, and sports journals narrowly tailored to achieve that end."[141]

The state psychology boards' use of the Policy to adjudicate ethics complaints will most likely not be narrowly tailored to serve the state's interests, such as preventing medical incompetency, bias, or sexual orientation discrimination. State boards that single out faith-influenced therapies for regulation would adopt a largely underinclusive policy. Even if there are valid concerns that a psychologist's use of change therapy fosters harm, for example bias or discrimination, targeting change therapy exclusively ignores the similarly harmful effects of other therapy methods. Instead of banning the harmful effects of all practices, the forthcoming Policy will likely target the methods used by some religious psychologists. The Policy might also suffer from an unconstitutionally overbroad reach if it restricts all change therapy, or all sexual identity therapy, instead of limiting its allegedly negative effects. If, as expected, the Policy is underinclusive and overbroad, it cannot meet the narrowly tailored requirement.

The Policy will fail the *Smith* analysis because it will be neither religiously neutral nor generally applicable. Moreover, as a nonneutral, nongeneral law, it will likewise fail *Lukumi*'s compelling interest and least restrictive means standard. The Policy, as a result, remains unconstitutional as incorporated and applied by state psychology boards against licensed psychologists.

F. State Religious Freedoms Implicated by the Policy

On a federal constitutional level, because the Policy as implemented by state psychology boards will likely lack neutrality and general applicability, it violates the Free Exercise Clause under *Smith*. Even if one disagreed, however, and successfully argued that the Policy failed the *Smith* test—convincing a court, for instance, that the Policy *was* religiously neutral and generally applicable—it remains suspect under many state laws.

Many state constitutions and statutes, such as those modeled after the Religious Freedom Restoration Act[142] ("RFRA"), require *more* religious freedom than *Smith*. They implement the pre-*Smith* strict scrutiny, compelling interest standard, even against neutral or generally applicable laws. For instance, the Ohio Constitution affords greater religious freedom than *Smith*. It states that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience"; consequently, "no preference shall be given, by

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[141] *Id.*

[142] 42 U.S.C. § 2000bb to 2000bb-4 (2000), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

law, to any religious society; *nor shall any interference with the rights of conscience be permitted.*"[143] The Ohio Constitution goes on to affirm "[r]eligion, morality, and knowledge . . . [as] being essential to good government" and making it "the duty of the general assembly to pass suitable laws *to protect every religious denomination in the peaceable enjoyment of its own mode of public worship.*"[144] The Ohio Supreme Court interpreted this free exercise clause as broader than that found in the U.S. Constitution: "[t]he Ohio Constitution allows no law that even *interferes* with the rights of conscience," while the U.S. Constitution only applies to "laws that *prohibit* the free exercise of religion."[145] Thus, Ohio's free exercise clause "applies to direct and indirect encroachments upon religious freedom" and requires "that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest."[146] Other courts have likewise held that state constitutions can guarantee *more* religious freedom than required by the federal Constitution as interpreted by *Smith*.[147]

In addition to state constitutions, states that have enacted statutes such as RFRA have enhanced their citizens' religious freedom protections. When the *Smith* decision dramatically shifted the Free Exercise climate in the courts, Congress responded by enacting the RFRA.[148] The intent of RFRA was clear:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[149]

In short, RFRA directly aimed to undo the *Smith* test. Congress's attempt to undermine *Smith*, however, did not stand. In 1997, the Supreme Court in *City of Boerne v. Flores* invalidated RFRA as it applies

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[143] OHIO CONST. art. I, § 7 (emphasis added).

[144] *Id.* (emphasis added).

[145] Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000).

[146] *Id.* at 1045.

[147] *E.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska 1994) ("[A] state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution." (citing Roberts v. State, 458 P.2d 340, 342 (Alaska 1969))); Catholic Charities, Inc. v. Superior Court, 85 P.3d 67, 90 (Cal. 2004) ("Certainly the high court's decision in *Smith* does not control our interpretation of the state [c]onstitution's free exercise clause." (citing *Smith*, 494 U.S. 872)).

[148] 42 U.S.C. § 2000bb to 2000bb-4 (2000), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[149] *Id.* § 2000bb(b).

to the states and, in doing so, reaffirmed *Smith*'s Free Exercise analysis.[150]

The *Flores* decision caused state legislatures to fight back by passing state versions of RFRA.[151] In more than one dozen states that maintain RFRA statutes, use of the APA's Policy would most likely not be upheld because the state potentially lacks a "compelling interest" and its means are not "narrowly tailored."[152]

G. Psychologists, Pharmacists, and the Ironic Effect of the Policy

Because litigation of the religious freedom of psychologists has been so infrequent, it is helpful to draw comparisons with an analogous profession. The right of conscience for pharmacists and other medical professions, especially regarding the right to refuse dispensing emergency contraception (commonly known as "Plan B" or the morning-after pill), provides insight into how courts might analyze the right of psychologists to use change therapies.

Many religious pharmacists believe that Plan B acts as an abortifacient; thus, they argue that being forced to distribute it compromises their faith.[153] In lawsuits arising from this issue, the pharmacists use the Free Exercise Clause to justify their right to refuse distribution of Plan B.[154] Courts seem to recognize that the religious freedom of pharmacists necessitates some recourse towards pharmacists who cannot issue emergency contraception for religious reasons.[155]

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[150] 521 U.S. 507 (invalidating RFRA as it applies to the states on separation of powers grounds).

[151] *E.g.*, ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (2004); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01–.05 (West 2008); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/10 (West 2001); MO. ANN. STAT. §§ 1.302, 1.307 (West Supp. 2008); N.M. Stat. Ann. §§ 28-22-1 to -5 (LexisNexis 2000); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2005); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West Supp. 2008); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (Vernon 2005).

[152] *See supra* Part II.E.

[153] Lora Cicconi, Comment, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709, 713–16 (2007); Daniel C. Vock, *FDA Ruling Puts Pharmacists in Crossfire*, STATELINE.ORG, Sept. 6, 2006, http://www.stateline.org/live/details/story?contentId=139338. *See generally* Amanda Freeman, Note, *Does "Emergency" Trump Conscience, Thus Drawing Another Line in the Sand for Pharmacists?*, 21 REGENT U. L. REV. 181 (2008) (discussing the religious freedom impact of the "Final Rule" in Illinois).

[154] *E.g.*, Menges v. Blagojevich, 451 F. Supp. 2d 992 (C.D. Ill. 2006); Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245 (W.D. Wash. 2007).

[155] *Menges*, 451 F. Supp. 2d at 1001–02 ("[W]hen viewed in the light most favorable to the Plaintiffs [pharmacists], the Plaintiffs sufficiently allege that the Rule fails to be narrowly tailored to advance a compelling state interest. The Plaintiffs state a claim that the Rule violates the First Amendment Free Exercise clause."); *Stormans*, 524 F. Supp. 2d at 1266 ("On the issue of Free Exercise of Religion alone, the evidence before the Court

Opponents of pharmacists' religious freedom regarding Plan B, however, argue that allowing religious pharmacists to opt out of their duties to fulfill prescriptions, specifically for emergency contraception, injures patients who require a timely receipt of the drug.[156]

Whereas the pharmacists' First Amendment rights allegedly conflict with the patients' rights to access emergency contraception, the present issue regarding the Policy has the *opposite* impact on patients. In the name of ending discrimination and coercive psychology, state psychology boards may adopt the Policy against change therapy. The Policy's influence could conceivably extend to sexual identity therapy, if it includes prohibitions on behavioral changes. Ironically, the Policy undermines the very state interests it purports to protect. One of its core justifications is that such therapies allegedly discriminate against patients and, in doing so, might coerce them into changing their orientation or behavior.[157] The Policy, however, will actually harm patients. By dictating the type of therapies patients can seek, the Policy negatively limits patients' options. According to a recent sexual identity study, "harm must also be considered for those whose religious beliefs and formed judgments lead them away from gay-integrative approaches and toward other interventions to address sexual behavior and identity in light of greater weight given to their religious identity."[158]

Both psychologists, who desire to engage their profession from a religious perspective, as well as patients, who seek counsel due to conflicts between their faith and sexuality, profit from limited application of the Policy to its *Ethics Code*. Freedom to pursue the full range of counseling approaches, including change therapy or sexual identity therapy, fosters a better atmosphere for Free Exercise.

III. PROPOSED RECOMMENDATIONS TO THE APA AND THE STATES

Any attempts to limit certain psychology approaches should leave open freedom for faith-based practices, seeking to minimize the ill effects of all psychology methods instead of banning carte blanche those used by some religious psychologists. Additionally, the incorporation of conscience clauses into the APA's Policy, its *Ethics Code*, and state licensing codes would help safeguard religious freedom.

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convinces it that plaintiffs, individual pharmacists, have demonstrated both a likelihood of success on the merits and the possibility of irreparable injury.").

156 *See e.g.*, Charu A. Chandrasekhar, *RX for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55 (2006) (contending that "refusals to dispense prescription contraceptives in pharmacies constitute sex-based discrimination").

157 *See generally* APA Help Center, *supra* note 112.

158 Liszcz & Yarhouse, *supra* note 12, at 177.

A. The APA's Policy and Ethics Code *Should Include Conscience Clauses*

In the event that the APA adopts a policy banning change therapy, or sexual identity therapy, it should do so in a way that minimizes the ill effects that it will have on individuals' freedom of conscience by including a conscience clause, which would exempt psychologists' religiously based therapy from certain provisions. A conscience clause could safeguard religious freedom on two fronts: (1) through a specific conscience clause exemption within the Policy and (2) through a general APA conscience clause governing its *Ethics Code* and policies. By including a conscience clause in its Policy and *Ethics Code*, the APA could address therapy methods without trampling on the religious beliefs of psychologists and patients.

Similar conscience clause provisions have been used by other professional organizations, such as the American Pharmacist Association ("APhA"). For example, the differences in religious convictions among pharmacists compelled the APhA to create the Pharmacist Conscience Clause in 1998:

> 1. APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.
> 2. APhA shall appoint a council to serve as a resource for the profession in addressing and understanding ethical issues.[159]

Recognizing that pharmacists should not be required to participate in practices that they find morally reprehensible, the APhA again averred to its conscience clause policy in 2004.[160]

The American Medical Association ("AMA") likewise affirmed a conscience clause, which protects medical professionals from performing abortions against their moral beliefs. The AMA policy states that "[n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles."[161] Similarly, medical schools are required to protect the consciences of their students: "Medical schools should have mechanisms in place that permit

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[159] Am. Pharmacists Ass'n, Current APhA Policies Related to the Practice Environment & Quality of Worklife Issues (2002), http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=Control_Your_Practice1&template=/CM/ContentDisplay.cfm&ContentFileID=267.

[160] Ed Lamb, *Dispensing with the Dilemma: Pharmacists Can Meet Duties to Patients and Conscience*, PHARMACY TODAY, Aug. 2005, *available at* http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=PT_Archive_PDfs_&template=/CM/ContentDisplay.cfm&ContentFileID=2275.

[161] Am. Med. Ass'n, Health and Ethics Policies of the AMA House of Delegates 2, http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf (last visited Apr. 10, 2009).

students to be excused from activities that violate the students' religious or ethical beliefs."[162]

A conscience provision in the *Ethics Code* would preserve the Free Exercise rights of psychologists in many situations, including those psychologists whose religious beliefs inform their decision to employ certain approaches to homosexual clients. A conscience clause for psychologists is likewise consistent with upholding the rights of religious patients to participate in therapies compatible with their beliefs. Though the APA does not include a conscience clause in its *Ethics Code*, it recently promulgated the Resolution on Religious, Religion-Based and/or Religion-Derived Prejudice.[163] The resolution condemns religious prejudice and discrimination, but also distinguishes the field of religion from that of psychology.[164] Adopted in 2007, the resolution's stance against religious discrimination must inform the APA's forthcoming Policy.

B. States Relying on the APA's Ethics Code Should Pass a Conscience Clause Exception for Psychologists

Many state psychology boards abide by the *Ethics Code* in regulating the licensing of psychologists.[165] Even if the Policy alters the way the APA interprets and applies its *Ethics Code*, the state boards should not use the Policy to redefine the states' application of the *Ethics Code*.

As a preventative measure, and to ensure that the Free Exercise rights of psychologists are not undermined by the state's use of the Policy, states that incorporate the *Ethics Code* into their administrative codes should amend the code to include a conscience clause exemption. For example, in response to legalized abortion after *Roe v. Wade*,[166] approximately forty-seven states currently have a type of conscience clause statute.[167] These statutes protect medical professionals from being

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[162] *Id.* at 296.

[163] APA Council of Representatives, Resolution on Religious, Religion-Based and/or Religion-Derived Prejudice (Aug. 16, 2007), http://www.apa.org/pi/religious_discrimination_resolution.pdf.

[164] *Id.*

[165] *See supra* note 32.

[166] 410 U.S. 113 (1973).

[167] Brittany L. Grimes, Note, *The Plan B for Plan B: The New Dual Over-the-Counter and Prescription Status of Plan B and Its Impact Upon Pharmacists, Consumers, and Conscience Clauses*, 41 GA. L. REV. 1395, 1401–02 (2007).

> [F]orty-three states have some form of legislation allowing a health care institution to refuse to perform abortion services, but of those states, fifteen limit the statutory application to private health care institutions only, and one state further limits the protection to religious facilities only. A total of thirteen states allow individuals to not provide contraception in its various forms. Only

forced to perform procedures, namely abortions, that violate their moral conscience.

To likewise prevent psychologists from having to compromise their faith when approaching sexual orientation issues, states should create an addendum to their code stating that incorporating the APA's *Ethics Code* will not be interpreted or applied to abridge a psychologist's right to practice psychology according to the dictates of his or her conscience.

CONCLUSION

James Madison, in his *Memorial and Remonstrance*, wrote that it is the "duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."[168] Though expressed centuries ago, Madison's belief that "[c]onscience is the most sacred of all property"[169] resonates even with a modern audience. Freedom of conscience necessitates affording psychologists the ability to practice and patients the ability to receive psychological therapy consistent with their faith. Because the Policy will likely undermine this sacred freedom, state psychology boards must beware in adopting it as their own.

Erin K. DeBoer

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four of these states, however, explicitly include pharmacists in the protective custody of the statutes. Four additional states possess broadly worded statutes that likely enable their application to pharmacists.

Id. (footnotes omitted).

[168] 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901)).

[169] James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *available at* http://www.vem.duke.edu/POI/madison.pdf.

ON THE ROAD TO VICTORY IN AMERICA'S WAR ON HUMAN TRAFFICKING: LANDMARKS, LANDMINES, AND THE NEED FOR CENTRALIZED STRATEGY

America is at war. Declared by the Clinton Administration in the late 1990s, then prioritized by the Bush Administration, the "war" on human trafficking represents America's struggle to eradicate the phenomenon of modern-day slavery within its borders.[1] An army of legislators, law enforcement agents, and everyday abolitionists fight on legal, social, and political battlefields to liberate the hidden victims who suffer in bondage. The recent enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008[2] ("2008 TVPRA"), heralds significant victories in the battles to achieve better victim protection and increase prosecution of traffickers. But even as legislative battles are conquered, others continue to develop. The war suffers from incohesiveness, a lack of direction, and political discord. These problems point to a missing tactical element that is critical to the war's ultimate success—a strategic framework that is both centralized and comprehensive. This Note proposes that publication of an annual United States Trafficking in Persons Strategy ("U.S. TIPS"), aptly directed by the nation's Commander-in-Chief, could help solve these problems by establishing a well-defined mission, uniting all "soldiers" under a common purpose, and providing a means by which to measure progress toward a specified timeline of goals. In 2009, the task falls on the Obama Administration to pick up the war on trafficking where his predecessors left off: our newest President must provide the leadership necessary to rally the troops, cast a vision, and finish the fight.

This Note tracks the development of the war on human trafficking in America through the 2008 TVPRA and identifies emerging red flags that signal the need for a strategic framework. Part I explains the nature of human trafficking as a criminal enterprise and the context of

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[1] Human trafficking is a crisis that rages in countries throughout the world. In its broadest sense, the "war" on human trafficking, exists at a global level, but it can be dissected and evaluated on regional, national, or even state levels. Though much scholarship is dedicated to assessment of the war on human trafficking at the global level, the scope of this Note encompasses only the legal efforts to address human trafficking within American borders.

[2] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I–III, 122 Stat. 5044, 5044–87 (to be codified in scattered sections of 6, 8, 18, 22, 28, and 42 U.S.C.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ457.110.pdf. The bill passed in the House and Senate on December 10, 2008, and President George W. Bush signed it into law on December 23, 2008. *See* LIBRARY OF CONGRESS, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR07311:@@@L&summ2=m& (last visited May 10, 2009) (providing legislative history) [hereinafter TVPRA of 2008 Legislative History].

America's first anti-trafficking legislation, the Victims of Trafficking and Violence Protection Act of 2000[3] ("TVPA"). Part II addresses some of the critiques, obstacles, and pitfalls experienced in the early years of the TVPA's implementation. Part III acknowledges the impressive legislative strides that mended gaps identified in earlier legislation, focusing largely on the 2008 TVPRA amendments. Part IV illuminates the need for a strategic framework by addressing several potential landmines in the political battleground, where ongoing debate over the scope of trafficking, the effect of prostitution, and the role of competing agencies threatens to impede anti-trafficking efforts. Part V proposes an annually published U.S. TIPS as a means for the President to implement a centralized and comprehensive strategic framework that would define the parameters of human trafficking; establish the roles of concerned departments, agencies, and nongovernmental organizations ("NGOs"); position future goals in an aspirational timeline; measure progress on a state-by-state and national basis; and provide a centrally recognized document to report synthesized updates of ongoing research results.

I. HOW IT ALL BEGAN: THE HUMAN TRAFFICKING BATTLEGROUND IN AMERICAN BACKYARDS AND THE ENACTMENT OF THE TVPA

Despite increasing awareness about human trafficking, many—if not most—Americans would be shocked to know that slavery still exists, even in their own backyard. Known today as human trafficking, this phenomenon has become a "criminal enterprise involving both local scoundrels and sophisticated international syndicates" that generates billions of dollars each year.[4] Notably, "human trafficking is tied with the illegal arms industry as the second largest criminal industry in the world today [after drug dealing], and it is the fastest growing."[5] Under

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[3] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1464–91 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

[4] DAVID BATSTONE, NOT FOR SALE: THE RETURN OF THE GLOBAL SLAVE TRADE—AND HOW WE CAN FIGHT IT 5 (2007). Some debate exists over the economic magnitude of the enterprise: "The Federal Bureau of Investigation (FBI) projects that the slave trade generates $9.5 billion in revenue each year." *Id.* at 3–4 (citing U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 14 (2004) [hereinafter TIP REPORT 2004], *available at* http://www.state.gov/documents/organization/34158.pdf). "The International Labour Office (ILO) estimates that figure to be closer to a whopping $32 billion annually." *Id.* at 4 (citing INT'L LABOUR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 2005, at 55 (2005), *available at* http://www.diversite.be/diversiteit/files/File/MH_TEH/documentatie/DECLARATIONWEB.pdf).

[5] ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., FACT SHEET: HUMAN TRAFFICKING, http://www.acf.hhs.gov/trafficking/about/fact_human.html (last visited May 10, 2009); *see also* TVPA, 22 U.S.C. § 7101(b)(8) (2006) ("Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. . . .

this modern day form of slavery, humans (predominantly women and children[6]) are lured by false promises of valid employment, traded and sold like commodities, and then forced into labor or sexually exploited.[7]

Recognizing the danger of this growing criminal enterprise, President Clinton issued a directive in March 1998 that formally condemned trafficking in women and girls as a "fundamental human rights violation."[8] The directive established the familiar "3-P" prerogative—"a U.S. government-wide anti-trafficking strategy of (1) prevention, (2) protection and support for victims, and (3) prosecution of traffickers."[9] In effect, the directive also served as the initial battle cry that declared America's war on human trafficking.

The Clinton Administration's call for prosecution of traffickers led to the swift enactment of the TVPA,[10] a landmark federal act that enjoyed overwhelming bipartisan support[11] as the first set of laws to criminalize sex and labor trafficking in America.[12] The TVPA not only

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Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.").

6 The 2008 Trafficking in Persons Report, an annual authority published by the U.S. Department of State that monitors human trafficking worldwide, estimates that "80 percent of transnational victims are women and girls and up to 50 percent are minors." U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2008) [hereinafter TIP REPORT 2008], *available at* http://www.state.gov/documents/organization/105501.pdf. These figures "do not include [the] millions . . . trafficked within their own national borders." *Id.*

7 TVPA, 22 U.S.C. § 7101(b)(2)–(3).

> Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.

Id. § 7101(b)(4).

8 Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 34 WEEKLY COMP. PRES. DOC. 412, 412 (Mar. 11, 1998) [hereinafter Clinton Memorandum].

9 CLARE RIBANDO SEELKE & ALISON SISKIN, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 38 (Cong. Research Serv., CRS Report for Congress Order Code RL 34317, Aug. 14 2008) [hereinafter CRS Report], *available at* http://www.fas.org/sgp/crs/misc/RL34317.pdf; Clinton Memorandum, *supra* note 8, at 412–13.

10 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1464–91 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

11 "On October 6, 2000, the report resoundingly passed in the House by a vote of 371 to 1, despite the fact that it had been packaged with some unrelated measures that members found annoying. On October 11, the Senate voted 95 to 0 to . . . approv[e] the trafficking bill." ANTHONY M. DESTEFANO, THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 44 (2007).

12 The TVPA enacted four new crimes specifically related to human trafficking: forced labor; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; sex trafficking of children or by force, fraud or coercion; and unlawful conduct with

provided the ammunition the United States Department of Justice ("DOJ") needed to prosecute human trafficking cases,[13] it answered the President's call for victim protection by providing much needed assistance and immigration benefits such as the T visa.[14] Groundbreaking in its comprehensive tri-fold purpose of prosecution, protection, and prevention,[15] the TVPA set a firm national tone of intolerance for the crime of human trafficking and quickly became a model for other nations and states to follow.

The bad news? Countless instances of slavery still occur each day in America, often hidden in plain sight.[16] Though numbers are difficult to

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respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor. Victims of Trafficking and Violence Protection Act of 2000 sec. 112, §§ 1589–1592, 114 Stat. at 1486–88 (codified as amended at 18 U.S.C. §§ 1589–1592 (2006)). The Act also established a mandatory restitution provision. *Id.* sec. 112, § 1593, 114 Stat. at 1488 (codified at 18 U.S.C. § 1593 (2006)).

[13] Until this bill was signed into effect by President Clinton on October 28, 2000, federal convictions of this unique and heinous crime were difficult to prosecute to an appropriate level of punishment because "trafficking as a particular immigration crime was not defined or penalized as a separate offense," and U.S. peonage laws from the 1880s were the closest analogous laws on the books. *See* DESTEFANO, *supra* note 11, at xvi, xix.

[14] *See generally* Victims of Trafficking and Violence Protection Act of 2000 sec. 107, 114 Stat. at 1474–80 (codified as amended at 22 U.S.C. § 7105 (2006)) (titled "Protection and Assistance for Victims of Trafficking"). Notably, the TVPA granted victims of severe forms of trafficking federal and state benefits "to the same extent as . . . a refugee" under immigration law. *Id.* sec.107(b)(1)(A) (codified as amended at 22 U.S.C. § 7105(b)(1)(A)). These benefits were to be extended "without regard to the immigration status of such victims." *Id.* sec. 107(b)(1)(B) (codified as amended at 22 U.S.C. § 7105(b)(1)(B)). The TVPA also bestowed certain protections for victims in government custody concerning adequate facilities, safety, access to medical care, and information regarding their legal rights. *Id.* sec. 107(c)(1) (codified as amended at 22 U.S.C. § 7105(c)(1)). As discussed further in Parts II and III, the TVPA created the T visa category, which granted important immigration benefits to certain victims by granting temporary legal status to remain in the United States, thus protecting them from removal proceedings. *Id.* sec.107(e)(1) (codified as amended at 8 U.S.C. § 1101(a)(15) (2006)); *see infra* Parts II, III. Most of these benefits are predicated upon certification that the victim suffers or suffered from "a severe form of trafficking in persons, as defined in section 103[(8)]." *Id.* sec. 107(e)(1)(C) (codified as amended at 8 U.S.C. § 1101(a)(15)(T)).

[15] 22 U.S.C. § 7101(a) ("The purposes of this chapter are to combat trafficking in persons, . . . to ensure just and effective punishment of traffickers, and to protect their victims.").

[16] "That's the paradox: slavery is in reality not invisible. Except in rare circumstances, slaves toil in the public eye. The truth is we do not expect to find it in 'respectable' settings." BATSTONE, *supra* note 4, at 7. At any given time, "20, or 50, or 100 victims could be locked behind the walls of an otherwise nondescript building, working for pennies and hoping for freedom—any kind of relief from their hard, forced labor." Alberto R. Gonzales, U.S. Att'y Gen., Prepared Remarks at the 2006 National Conference on Human Trafficking (Oct. 3, 2006), *available at* http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_061003.html.

calculate,[17] the U.S. government initially projected that of the estimated millions of persons trafficked worldwide for labor or sexual services,[18] about 50,000 crossed into the United States each year.[19] The circumstances surrounding these victims are varied—some are psychologically bound to pimps, some are physically forced into cheap manual labor, and some are threatened into domestic servitude.[20] But all victims share this in common: their profiting traffickers are desperate to keep their real stories hidden and employ coercive means to do so.[21] To further complicate the problem, many local law enforcement and immigration officials do not yet possess the training to recognize a victim of human trafficking when they encounter one.[22] All too frequently, victims are convicted of crimes associated with trafficking rather than the actual culprits—the traffickers themselves.[23]

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[17] The DOJ has acknowledged that "[t]he difficulty of developing accurate estimates reflects the challenges of quantifying the extent of victimization in a crime whose perpetrators go to great lengths to keep it hidden and whose victims are reluctant to self-identify for fear of being treated as criminals or illegal aliens . . . ." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2007, at 29 (2008) [hereinafter AG ANN. REP.], *available at* http://www.usdoj.gov/ag/annualreports/tr2007/agreporthumantrafficing2007.pdf.

[18] "A wide range of estimates exists on the scope and magnitude of modern-day slavery"—ranging "from 4 million to 27 million" at any given time. TIP REPORT 2008, *supra* note 6, at 7.

[19] As of 2004, the government reduced this estimate to 14,500 to 17,500 per year, while admitting that an accurate estimate is nearly impossible to obtain due to the hidden nature of the crime. TIP REPORT 2004, *supra* note 4, at 23. For a fuller discussion of statistics on the scope of trafficking in the United States and their potential for inaccuracy, see *infra* note 36 and accompanying text.

[20] A concurrent House Resolution on March 27, 2007, "[s]upporting the goals and ideals of observing the National Day of Human Trafficking Awareness each year" acknowledged that

> human traffickers use many physical and psychological techniques to control their victims, including the use of violence or threats of violence against the victim or the victim's family, isolation from the public, isolation from the victim's family and religious or ethnic communities, language and cultural barriers, shame, control of the victim's possessions, confiscation of passports and other identification documents, and threats of arrest, deportation, or imprisonment if the victim attempts to reach out for assistance or leave.

H.R. Con. Res. 102, 110th Cong. (2007).

[21] *See* TIP REPORT 2008, *supra* note 6, at 7. "The common denominator of trafficking scenarios is the use of force, fraud, or coercion to exploit a person for profit. . . . The use of force or coercion can be direct and violent or psychological." *Id.*

[22] *See infra* Part II.A.1.

[23] *See* 22 U.S.C. § 7101(b)(17) (2006). "Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves." *Id*; *see also* DONNA M. HUGHES, FACT SHEET: DOMESTIC SEX TRAFFICKING AND PROSTITUTION IN THE UNITED STATES 3–4 (2005), *available at* http://www.uri.edu/artsci/wms/hughes/

Though human trafficking continues to grow and remains hard to detect, Americans are organizing to fight against it. Under the leadership of President George W. Bush, human trafficking initiatives were labeled a serious legal issue meriting high priority.[24] Since 2000, Congress has amended and reauthorized the TVPA three times,[25] and most states have followed suit by initiating or enacting their own anti-trafficking legislation.[26] With unequivocal support from the President, Congress, a plethora of federal agencies, a growing number of states, and many impassioned NGOs that mobilized to support victims and raise awareness, the heart of America is indeed ready and willing to wage a twenty-first-century war against slavery. With the passing of the TVPA, the first legislative line was drawn and the combat began.

II. THE SLOW START: BATTLING BUREAUCRACY AND "UNINTENDED OBSTACLES"

During the early years of TVPA's implementation, a number of analysts essentially concluded that though the heart was willing, the body was weak.[27] America's first anti-trafficking initiative was bold and inspiring; implementation, however, was slow and struggled at first.[28] Critics expressed specific disappointment at the unsatisfactorily low levels of convictions compared to the projected magnitude of the crime, the inexcusable delays of certain agencies in acting upon certain

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pubtrfrep.htm (last visited May 10, 2009) (demonstrating the gross disproportionality of statistics projecting the arrest ratio of pimps and johns versus prostitutes).

[24] While signing the second reauthorization of the TVPA into law, President Bush declared, "America is a compassionate and decent nation, and we will not tolerate an industry that preys on the young and the vulnerable. The trade in human beings continues in our time and we are called by conscience and compassion to bring this cruel practice to an end." Press Release, The White House, President Signs H.R. 972, Trafficking Victims Protection Reauthorization Act (Jan. 10, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/01/text/20060110-3.html.

[25] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I–III, 122 Stat. 5044, 5044–87; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

[26] *Infra* note 48 and accompanying text.

[27] Consider, for example, the 2004 statement of one policy expert before the House Subcommittee on Human Rights and Wellness: "The standard I use to evaluate how well the [United States] is doing against trafficking is 'Have the traffickers noticed yet?' and particularly, 'Have the victims noticed yet?' The answer, overwhelmingly, even almost half a decade after the passage of the TVPA, is no." *Trafficking in Persons: The Federal Government's Approach to Eradicate This Worldwide Problem: Hearing Before the Subcomm. on Human Rights and Wellness of the H. Comm. on Gov't Reform*, 108th Cong. 108 (2004) [hereinafter Ellerman Testimony] (statement of Derek P. Ellerman, Co-Executive Dir., Polaris Project).

[28] BATSTONE, *supra* note 4, at 239 ("Despite this strong legal framework, antitrafficking enforcement since the TVPA's passage in 2000 has been tepid.").

provisions, and the perceived imbalance of greater emphasis on prosecution rather than victim protection.[29]

A. Low Levels of Prosecution

In 2001, the first full year during which the TVPA's criminal trafficking provisions were enforced, only twenty-three of the thirty-eight defendants charged with human trafficking related federal crimes were convicted.[30] Over the next several years, the number of cases investigated increased,[31] but the rate of successful prosecutions did not quickly improve. In the five-year span from 2001 to 2005, the DOJ reported that "U.S. attorneys declined to prosecute suspects in 222 matters"—a figure that represents more than half of the trafficking matters that were closed during that period.[32]

Though critics expressed disappointment over what some called these "shockingly low"[33] numbers of prosecution under the TVPA that "pale in comparison" compared to the estimated number of victims,[34]

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[29] A number of articles that circulated in legal scholarship (predating the 2008 TVPRA amendments) identified these concerns—and more—while critiquing the TVPA's shortcomings. *See, e.g.*, Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL'Y 309 (2008); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337 (2007); Natalia Walter, *Human Trafficking in the United States: Immigrant Victims Falling Through the Cracks*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 539 (Richard J. Link et al. eds., 2007); April Rieger, Note, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 Harv. J.L. & Gender 231 (2007).

[30] DESTEFANO, *supra* note 11, at 49. These low numbers reflect "a conviction rate of 60 percent, which is below average for federal prosecutors, who usually convict 80 to 90 percent of indicted defendants"—an indicator that U.S. attorneys encountered "special problems" prosecuting these cases. *Id.*

[31] "Between 2001 and 2005, U.S. attorneys investigated 555 suspects in matters involving violations of Federal human trafficking statutes." MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005, at 1 (2006) [hereinafter PROSECUTION STATISTICS 2001–2005], *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fpht05.pdf.

[32] *Id.*; *see also infra* note 55 (providing reasons for failure to prosecute).

[33] Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 391 (2005).

[34] BATSTONE, *supra* note 4, at 239. Policy analyst Derek Ellerman also brought this fact to Congress' attention in 2004, stating that

> less than one percent of the estimated 17,000–20,000 international victims trafficked into the [United States] have been identified and assisted by the government, and almost half of those numbers came from a single case. If there is one statistic to remind us of how far we have to go, it is this one. . . . We must understand why we are failing . . . .

Ellerman Testimony, *supra* note 27, at 108.

several external factors influence the analysis of these early statistics. First, the elusive nature of the crime makes human trafficking inherently difficult to discover and prosecute.[35] Second, since the initial outcries over human trafficking in the United States, studies have identified what some label the "Woozle Effect" of research statistics, calling the accuracy of initial estimates into question.[36] Third, the terrorist attacks of September 11, 2001, dramatically shifted government priorities and reallocated funding in a way that likely affected anti-trafficking initiatives until 2006.[37] The reality of these independent factors tempers the shock of the seemingly low number of prosecutions in the first few years of the TVPA's enactment. Still, certain weaknesses in

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[35] A sure part of the continuing struggle to effectively implement the TVPA lies in the inherent dynamics of human trafficking itself—a carefully concealed and largely underground criminal infrastructure. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec.102(20), 114 Stat. 1464, 1468 (codified as amended in 22 U.S.C. § 7101(b)(20) (2006)) (expressly recognizing the inherent difficulties of detecting and prosecuting human trafficking); AG ANN. REP., *supra* note 17.

[36] *See, e.g.*, NEIL A. WEINER & NICOLE HALA, VERA INST. OF JUSTICE, MEASURING HUMAN TRAFFICKING: LESSONS FROM NEW YORK CITY 8–10 (2008) [hereinafter MEASURING HUMAN TRAFFICKING], *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/224391.pdf. Based on an allusion to a Winnie the Pooh story in which the character follows his own footprints,

> [t]he Woozle Effect begins when one investigator reports a finding, often with qualifications (e.g., that the sample was small and not generalizable). A second investigator then cites the first study's data, but without the qualifications. Others then cite both reports, and "the qualified data gain[s] the status of an unqualified, generalizable truth."

Id. at 8 (alteration to the original in quoted text) (citing Richard J. Gelles, *Violence in the Family: A Review of Research in the Seventies*, 42 J. MARRIAGE & FAM. 873, 880 (1980)). The net result leads to "distorted and obscured measurements of human trafficking." *Id.* at 10. At least one author has noted how the initial estimates, based on Amy O'Neill Richard's April 2000 report, later proved "too high." DESTEFANO, *supra* note 11, at 32 (citing AMY O'NEILL RICHARD, CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME iii (2000) [hereinafter A. RICHARD], *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs monographs/trafficking.pdf); *see also* U.S. GOV'T, ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 7–9 (2004), *available at* http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf (discussing how the government has "continued to improve [its] data analysis" and methodologies as it refines its statistics measuring how many victims are trafficked into the United States each year and clarifying that the differences "reflect improvements in data collection and methodology rather than trends in trafficking").

[37] DESTEFANO, *supra* note 11, at xx. After the terrorist attacks, which "caused a massive shift in U.S. law enforcement priorities, redirecting attention and resources in the war against terrorism," *id.*, "it took until 2004 for the trafficking center to become operational at even half-strength" *id.* at 51 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, COMBATING ALIEN SMUGGLING: OPPORTUNITIES EXIST TO IMPROVE THE FEDERAL RESPONSE 44 (2005), *available at* http://www.gao.gov/new.items/d05305.pdf).

the TVPA's original framework likely affected the DOJ's ability to prosecute a greater number of traffickers during the early years.

1. The Need for Victim Identification Training

Traffickers cannot be successfully prosecuted if the victims cannot be readily discovered. An important area of weakness often criticized during the initial years of the TVPA was a lack of victim identification training among law enforcement officials at all levels.[38] "[A]s first responders and the 'eyes and ears' of the local community, local law enforcement is in the best position to initially recognize, uncover, and respond to circumstances that may appear to be a routine street crime, but may ultimately turn out to be a human trafficking case[]."[39] Of approximately one million first responders in the form of local and state police officers,[40] very few are equipped with the training necessary to

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[38] *See, e.g.*, Ellerman Testimony, *supra* note 27, at 109 (identifying lack of victim identification as "one of the largest obstacles to progress so far" in government prosecution efforts). To illustrate the problem, a random nationwide survey of about 3,000 local (state, county, and municipal) law enforcement agencies discovered that "[t]he majority, between 73 and 77 percent, of local, county and state law enforcement in the random sample . . . perceive human trafficking as rare or non-existent in their local communities." AMY FARRELL ET AL., NE. UNIV. INST. ON RACE & JUSTICE, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 3 (2008) [hereinafter UNDERSTANDING AND IMPROVING], *available at* http://www.humantrafficking.neu.edu/news_reports/reports/documents/Understanding%20and%20Responding_Full%20Report.pdf. "There is little difference in perceptions of sex trafficking versus labor trafficking among local law enforcement—both types are perceived as rare or non-existent." *Id.*

Another recent government funded study that surveyed a random sample of sixty counties revealed that lack of victim identification often goes hand-in-hand with lack of awareness about trafficking legislation in general:

> In states with anti-trafficking statutes, 44 percent of law enforcement respondents and 50 percent of prosecutors report that their states do not have or they are not aware of having anti-trafficking legislation. In general, law enforcement, prosecutors, and service providers respondents could not: (1) differentiate between severe and non severe forms of human trafficking; (2) distinguish trafficking from smuggling; (3) differentiate domestic and international trafficking; (4) identify types of trafficking (sexual and labor), or (5) state the elements of trafficking.

PHYLLIS J. NEWTON ET AL., NAT'L OPINION RESEARCH CTR. (NORC), FINDING VICTIMS OF HUMAN TRAFFICKING, at v (2008), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/224393.pdf.

[39] *Department's Anti-Trafficking Efforts Featured at International Association of Chiefs of Police Annual Conference*, ANTI-TRAFFICKING NEWS BULL. (U.S. Dep't of Justice Civil Rights Div.), Nov./Dec. 2004, at 5, *available at* http://www.usdoj.gov/crt/crim/trafficking_newsletter/antitraffnews_novdec04.pdf. The 2006 Trafficking in Persons Report also recognized that "[a] child's first contact with authorities in destination countries could be the best opportunity to stop the trafficking chain." U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 18 (2006) [hereinafter TIP REPORT 2006], *available at* http://www.state.gov/g/tip/rls/tiprpt/2006.

[40] AG ANN. REP., *supra* note 17, at 35.

recognize a victim when encountered.[41] Early training efforts existed primarily at the federal level, whereas critics argued that the urgent, immediate need for training existed at the state and local levels.[42]

Not only did the original TVPA fail to sufficiently address the issue of victim identification regarding procedures, research, or training, but potential victims also suffered from existing anti-immigration prejudices among law enforcement, where officers untrained in human trafficking occasionally demonstrated a misguided[43] and negative[44] attitude toward enforcement of certain TVPA provisions.

2. The Need for State Anti-Trafficking Legislation

Early prosecution efforts under the TVPA also suffered for lack of adequate resources. After the bill passed and awareness of human trafficking swept across America, limits on federal resources—notably the deficiencies of manpower and funding[45]—quickly illuminated the

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[41] "[G]overnment personnel . . . particularly outside of task forces headquartered in Washington, D.C., have little or no understanding of the obligations the nation undertook in passing the TVPA and, as a consequence, U.S. personnel are working contrary to the purposes of the Act." Haynes, *supra* note 29, at 339. "[O]nly a few highly ranked agency officials seem to understand how to recognize a victim of trafficking or what should be done with her when she is found." *Id.* at 365.

[42] In the early years, TVPA funding for training programs was "underutilized" and although the DOJ launched federal training programs for its investigators, there existed "few, if any, comparable training programs for officials at the state and local levels." Rieger, *supra* note 29, at 246 (citing Kevin Bales et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 75 (2005)). As local police and immigration officers are essentially the foot soldiers in America's war against trafficking, training for the use of a simple yes-or-no questionnaire could elicit the telling piece of information that transforms an everyday street criminal into a victim of a serious federal crime deserving of government protection. *Id.*

[43] *See* Bales, *supra* note 42, at 79 ("[F]ederal officials often refuse to issue endorsements of T visa applications. One service provider attributed this reluctance to the mistaken belief among law enforcement that the benefits are too generous and that 'they are giving away a green card' by providing certification.").

[44] *See* Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 157 (2002) (reporting claims by immigration agents that "sex trafficked victims are in the United States illegally and must be treated in the same manner as other undocumented workers" and "it is unfair to 'play favorites' because there are other illegal aliens who are also exploited by unscrupulous employers" (quoting A. RICHARD, *supra* note 36, at 36)).

[45] Federal resources are often "unavailable, limited, or inadequate." Ellen L. Buckwalter et al., *Modern Day Slavery in our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 425 (2006) (reporting, for example, that only 0.0022% of the federal budget was focused on anti-trafficking efforts in fiscal year 2004). Federal prosecution efforts, moreover, generally focus on large-scale trafficking cases that involve numerous victims, large rings of traffickers, multiple federal agencies, and even international investigations. Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J.L. REFORM 447, 469 (2005) [hereinafter S. Richard]. The U.S. government

need for state anti-trafficking measures and local enforcement.[46] Strong advocacy for state legislation led the DOJ to release a Model State Anti-Trafficking Criminal Statute in 2004,[47] and almost every state has since enacted or initiated criminal provisions outlawing human trafficking.[48] This positive trend, however, opened the door for potential pitfalls that could inadvertently deny certain benefits to victims. Legal scholars have noted that incongruities between state legislation and the TVPA may negatively impact a victim's opportunity to receive federal benefits and protections.[49] Misalignment with the TVPA's definitions, criminal elements, or certification requirements might cause victims who pursue state remedies to fall through the cracks and miss out on certain federal protections. This particularly poses a problem in light of the TVPA's immigration-related benefits.[50] Ironically, if state legislation does not work together with the TVPA and its progeny, it could actually work *against* victims—the very persons the legislation aims to protect.

3. Difficult Standard of Proof

Prosecutorial difficulties revealed "special problems" with the TVPA's criminal statutes.[51] The DOJ recognized that two of the primary reasons U.S. attorneys declined to prosecute suspects in open investigations of trafficking matters from 2001 to 2005 were due to "lack of evidence of criminal intent" and "weak or insufficient admissible

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reports that "human trafficking cases are among the most labor- and time-intensive criminal investigations that the United States government undertakes," putting an additional strain on already limited federal resources. *Id.* (citing U.S. GOV'T, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 10–11 (2003), *available at* http://www.state.gov/documents/organization/23598.pdf).

[46] *See* Ellerman Testimony, *supra* note 27, at 110 ("The bottleneck that is constraining increased prosecution of traffickers is the resource constraints on federal law enforcement, the lack of state laws against trafficking, and the lack of enforcement of existing state laws related to trafficking."). State legislation complements the TVPA by enabling the prosecution of smaller-scale trafficking offenses and adapting to the unique needs of certain localities.

[47] MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE (U.S. Dep't of Justice 2004), *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf.

[48] *See* POLARIS PROJECT, HUMAN TRAFFICKING REPORT-ALL PENDING LEGISLATION, http://www.trendtrack.com/texis/cq/viewrpt?event=49f99ef0e9&run=y (last visited May 10, 2009) (providing an up-to-date synopsis of all state and federal anti-trafficking legislation).

[49] *See, e.g.*, S. Richard, *supra* note 45, at 472–73.

[50] For instance, if an undocumented woman smuggled into America from another country was certified as a victim of human trafficking by state officials under state law, but failed the certification process under the TVPA, she would not be eligible to apply for a T visa or federal aid. Moreover, her dilemma is enhanced by concern over the lack of victim services and protection provisions in state legislation that fails to adopt the TVPA's comprehensive, victim-oriented approach. *See id.* at 462–75.

[51] DESTEFANO, *supra* note 11, at 49.

evidence."[52] Since authorization of the TVPA in 2000, and through its amendments in 2003 and 2005, the criminal intent standard for the four trafficking-related crimes created by legislation had been "knowingly."[53] By inference, federal prosecution efforts were likely hampered by the TVPA's heightened culpability standard.[54] For example, the "knowingly" requirement could easily frustrate conviction of a culprit in the trafficking chain whose role was limited to a particular aspect—such as physical transportation or financial backing—in such a way that subjective awareness would be difficult, if not impossible, to prove.[55]

In addition, the "knowingly" standard became a potential obstacle in the prosecution of sex traffickers in cases involving minors because the statute, as written, could be construed to require proof that the trafficker had knowledge of the victim's age.[56] At the time, the TVPA did not allow

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[52] PROSECUTION STATISTICS 2001–2005, *supra* note 31, at 1. "U.S. attorneys declined to prosecute suspects in 222 matters or 59% of the matters closed during this period . . . ." *Id.* The "lack of evidence of criminal intent" problem surfaced in 29% of those cases. *Id.* Other evidentiary problems represented 28% of the reasons given for failure to prosecute. *Id.*

[53] *See* 18 U.S.C. §§ 1589–1592 (2006).

[54] The Model Penal Code, for example, designates a subjective awareness component into "knowingly" standard, which must be proved beyond reasonable doubt:

> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is *aware* that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is *aware* that it is practically certain that his conduct will cause such a result.

MODEL PENAL CODE § 2.02(2)(b), 10A U.L.A. 94–95 (2001) (emphasis added).

[55] In this hypothetical, a smuggler of a trafficking victim may concede awareness of the fact he illegally facilitated movement of an undocumented person across the border but deny knowledge that the movement was for the purpose of, or resulted in, slavery. The trafficking chain usually involves an initial recruiter, who hands the victim over to a transporter, who hands the victim over to a handler, who hands the victim over to a customer who purchases a form of labor or service. Task Force on Human Trafficking, *Chain of Trafficking*, http://www.tfht.org/index.php?section=article&album_id=9&id=28 (last visited May 10, 2009). There may be even more culpable parties along the chain who simply harbor victims or receive profits. *Id.* With so many culprits involved for short stints of time, often with limited roles, it is easy to imagine how a participant could feign ignorance of the end goal, which is slavery.

[56] *See* 18 U.S.C. § 1591(a) (2006). According to a coalition comprised of prominent anti-trafficking NGOs, this knowingly standard proved to be a problematic provision and an "obstacle" to the prosecution of sex traffickers. THE ACTION GROUP, ACTION GROUP RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE TRAFFICKING VICTIMS PROTECTION ACT, http://www.theactiongroup.org/legislation/reauthorization.htm (last visited May 10, 2009) [hereinafter ACTION GROUP RECOMMENDATIONS] (concerning the 2008 TVPRA). "Because minors in sex trafficking often have false identification or no identity documents, it is difficult for prosecutors to prove knowledge of their age." *Id.*

for prosecution under a lesser standard of "recklessly."[57] Moreover, while the TVPA included an attempt provision,[58] it did not yet provide a statutory avenue to prosecute for conspiracy to commit a trafficking-related offense.

B. Unreasonable Delays: Battling the Slow-Turning Wheels of Bureaucracy

Bemoaned by critics, unreasonable bureaucratic delays in implementing certain TVPA provisions contributed to disappointment over the slow-starting legislation that seemed so promising on paper. A national news story that published on October 19, 2007, illustrates the problem particularly well: it announced the good news that since the creation of the "U" visa in 2000,[59] the government was finally getting around to processing the very first one.[60] It only took seven years and a class-action lawsuit to get the ball rolling.[61] Although the news called for

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[57] In contrast to the difficult-to-prove subjective analysis of the "knowingly" standard, see *supra* note 54, the Model Penal Code definition for "recklessly" would allow prosecutors to consider an objective element as well:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard *involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.*

MODEL PENAL CODE § 2.02(2)(c), 10A U.L.A. 95 (2001) (emphasis added).

[58] 18 U.S.C. § 1594(a).

[59] Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B, § 1513(a)–(b), 114 Stat. 1491, 1533–35 (codified as amended at 8 U.S.C. § 1101(a)(15)(U) (2006)). The U visa was designed to offer immigration benefits and temporary legal status to noncitizen victims of crimes—including trafficking victims—who assist prosecutorial efforts. *See id.* §1513(a)(2)(A) (codified as amended 8 U.S.C. § 1101 note).

[60] Roxana Hegeman, *New US Visas Offered to Crime Victims*, USA TODAY, Oct. 19, 2007, *available at* http://www.usatoday.com/news/nation/2007-10-19-1565903989_x.htm.

[61] On March 6, 2007, plaintiffs (individuals and organizations on behalf of U visa applicants) filed a lawsuit against U.S. Citizenship and Immigration Services ("USCIS") and Michael Chertoff, Secretary of the Department of Homeland Security ("DHS"), alleging that, "despite having six years to do so, defendants have unlawfully . . . failed to promulgate regulations, establish procedures, or publish application forms through which victims may apply for such visas." Catholic Charities CYO v. Chertoff, No. C07-1307PJH, 2007 WL 2344995, at *1 (N.D. Cal. Aug. 16, 2007). Plaintiffs sued under various statutory and constitutional provisions, *id.* at *2–3, and the court ultimately delayed evaluation of the case because the agency was "in the process of enacting regulations," *id.* at *8. The court concluded, however, that it would "revisit this issue if regulations are not issued by January," and ordered the government to "file a monthly status report on the 15th of every month outlining the status of the regulations at issue." *Id.* Following this lawsuit, on October 17, 2007, the long-awaited regulations governing the U visa were promulgated by USCIS, which allowed the agency to begin processing the applications. *See* Applications for the Exercise of Discretion Relating to U Nonimmigrant Status, 72 Fed. Reg. 53,035 (Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 212).

celebration on behalf of at least 8,919 petitioners who had waited years for their U visa applications to be processed,[62] the story itself implicates the frustrations of a larger national nightmare—the ever-constant battle against the inherently slow-turning wheels of bureaucracy.[63] A similar concern that worried T visa holders until late 2008 involved the lack of regulations necessary to enforce the TVPA's adjustment of status provision that should have been available to victims after three years.[64]

As anti-trafficking initiatives compete with hundreds of other agency actions for attention, these types of unreasonable bureaucratic delays represent just one of the struggles that federal agencies face as they rely and depend on each other to implement the goals of the TVPA.

C. Imbalanced Emphasis on Prosecution and Victims' Struggle for Relief

Before the 2008 TVPRA amendments, critics argued that the TVPA's design to protect victims was failing largely because of a skewed emphasis on prosecution and prevention rather than victim protection.[65] Especially in context of the T visa, victims suffered from a "you help us

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[62] "At least 8,919 aliens have requested U visa status, and approximately 7,494 have been granted interim relief, and approximately 630 cases are pending." *Catholic Charities*, 2007 WL 2344995, at *7. The interim relief equates to "quasi-legal temporary status . . . which is no more than an exercise of prosecutorial discretion not to seek a crime victim's immediate deportation or removal and confers no legal status." *Id.* at *1.

[63] One likely reason for such an unreasonable delay is that the provisions creating the U visa did not include a mandatory timeframe in which the DHS must issue regulations. *See* Violence Against Women Act, div. B, § 1513(b)(3), 114 Stat. at 1534–35. Absent statutory pressure, it was too easy for the U visa regulations to slip through the crack—for seven years. Trafficking victims also lack the necessary resources and political presence to demand legal enforcement of their rights. Hegeman, *supra* note 60 ("'Because it was a largely poor, vulnerable population with no political clout, it took seven years,' said Peter A. Schey, lead counsel in the [*Catholic Charities*] lawsuit.").

[64] In its recommendations for the 2008 TVPRA, the Action Group advocated a statutory deadline for issuance of regulations concerning the T visa, emphasizing that

> [m]any victims have had their T-visas for three to four years. The delay in the issuance of adjustment regulations has deprived these individuals of many rights a T visa holder would have already had as a legal permanent resident, including freedom of travel in and out of the [United States]. Additionally, the delay . . . may add unnecessary waiting time for the T visa holder's path to citizenship.

ACTION GROUP RECOMMENDATIONS, *supra* note 56. This recommendation, however, became moot just two days before Congress passed the 2008 TVPRA. On December 8, 2008, USCIS finally announced an interim final rule that would allow T visa holders to adjust their status. U.S. CITIZENSHIP & IMMIGRATION SERVS., FACT SHEET: USCIS PUBLISHES NEW RULE FOR NONIMMIGRANT VICTIMS OF HUMAN TRAFFICKING AND SPECIFIED CRIMINAL ACTIVITY (Dec. 8, 2008), http://www.uscis.gov/files/article/t_u_fs_8dec2008.pdf [hereinafter USCIS FACT SHEET]. The rule implemented TVPA provisions that had been authorized eight years earlier. *Id.*

[65] *See, e.g.*, Green, *supra* note 29, at 313 ("While the legislators may intend to address avenues for immediate protection for child sex victims in the TVPA, the protection prong is practically treated as the least significant of the three.").

before we will help you" attitude[66] built into the TVPA's overly restrictive procedures for receiving assistance.[67]

Victims were often thrust into the decision-making dilemma of whether to pursue the T visa, along with its accompanying federal benefits. Though designed to provide help and protection, the T visa initially contained some serious shortfalls, and the process of obtaining one involved such overly complex and contradictory mandates[68] that the daunting application process could take upwards of nine months to complete.[69] Victim advocates quickly realized that the T visa is not a golden ticket or cure-all solution for victims of severe trafficking who are caught in the web of a dangerous ring of criminals.[70] For some victims, the ramifications of applying for a T visa may have put them in a *more* dangerous position, "increasing their vulnerability" in several ways[71] and creating "'a chilling effect' on survivors who wish to apply for T visas but are reluctant to place themselves at greater risk."[72]

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[66] The "you help us before we will help you" attitude was best reflected by the statutory strings attached to the certification process, which imposed a so-called "cooperation condition" requiring certain victims to be "willing to assist in every reasonable way in the investigation and prosecution" of their trafficker. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, sec.107(b)(1)(E)(i)(I), 114 Stat. 1464, 1476 (codified as amended at 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2006)); *see also* Green, *supra* note 29, at 330–31. The TVPA elaborated: "For the purpose of a certification under this subparagraph, the term 'investigation and prosecution' includes—(I) identification of a person or persons who have committed severe forms of trafficking in persons; (II) location and apprehension of such persons; and (III) testimony at proceedings against such persons." Victims of Trafficking and Violence Protection Act of 2000 sec. 107(b)(1)(E)(iii), 114 Stat. at 1476 (codified as amended at 22 U.S.C. § 7105(b)(1)(E)(iii)). These restrictions have since been tempered by the 2008 TVPRA amendments. *See infra* Part III.

[67] At the time, the T visa required "that a person not only be a victim of a severe form of trafficking but also collaborate with law enforcement, be present in the United States as a result of being trafficked, and show that he or she would suffer severe harm upon removal." ACTION GROUP RECOMMENDATIONS, *supra* note 56 (labeling these requirements "too onerous").

[68] *See* Walter, *supra* note 29, at 555. Even Congress later recognized that the original TVPA incorporated "unintended obstacles" that blocked victims from obtaining relief and "needed assistance," particularly concerning the T visa. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 2(3), 117 Stat. 2875.

[69] ACTION GROUP RECOMMENDATIONS, *supra* note 56.

[70] *See* Haynes, *supra* note 29, at 378–79 (titling one section: "Acknowledge the TVPA's Dirty Little Secret: The Grant of a T-Visa or Asylum Does Not Necessarily Obviate the Exploitation or End the Extortion").

[71] Bales, *supra* note 42, at 99.

> First, by alerting law enforcement to their presence, survivors without legal immigration status risk deportation if their account is found to lack credibility. Second, alleged perpetrators who are defendants in criminal proceedings have a right to review information provided by survivors to federal investigation. As a result, survivors and their families may be at a greater risk for retaliation.

Id. at 99–100.

[72] Bales, *supra* note 42, at 100.

To some victims, after evaluation of the complexities of the process, it was not worth the time or hassle to apply for the temporary immigration relief. To others, the application would not be possible without the fortuitous happenstance of pro bono legal counsel. And still, for the vast majority of trafficking victims in the United States, application was not an option due to lack of awareness concerning their rights and available benefits under federal law.

III. GAINING MOMENTUM: THE 2003, 2005, AND 2008 TVPRA AMENDMENTS

The reauthorization acts in 2003, 2005, and most recently in 2008, have done much to put teeth in the TVPRA. Though initial statistics measuring the TVPRA's success in implementation seemed unsatisfactory, subsequent amendments have addressed various statutory weaknesses and paved the way for increased effectiveness. In particular, the amendments have helped fulfill the TVPA's aims of prosecution and protection by continually enhancing prosecutorial tools and increasing victim benefits.

The Trafficking Victims Protection Reauthorization Act of 2003 ("2003 TVPRA"), among other things, extended T visa benefits to siblings of victims,[73] raised the age requirement for victim certification from fifteen to eighteen,[74] granted victims a private right of action to sue traffickers civilly for damages and attorneys' fees,[75] and required an annual report from the Attorney General to track trafficking case statistics and enforcement progress.[76] In an effort to increase coordination between the various federal agencies, the 2003 TVPRA created the Senior Policy Operating Group ("SPOG").[77] Another provision revising the certification process responded to concerns that victims may

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[73] Trafficking Victims Protection Reauthorization Act of 2003 sec. 4(b)(1)(B), 117 Stat. at 2878 (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(ii)(I) (2006)). This provision allowed "unmarried siblings under [eighteen] years of age" to accompany or follow to join a T visa holder who is under twenty-one. *Id.* Previously this benefit extended only to the trafficking victim's "spouse, children, and parents." 8 U.S.C. § 1101(a)(15)(T)(ii)(I) (2000).

[74] Trafficking Victims Protection Reauthorization Act of 2003 sec. 4(b)(1)(A), 117 Stat. at 2878 (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb) (2006)).

[75] *Id.* sec. 4(a)(4) (codified as amended at 18 U.S.C. § 1595 (2006)).

[76] *Id.* sec. 6(a), 117 Stat. at 2880 (codified as amended at 22 U.S.C. § 7103(d)(7) (2006)) (requiring the Attorney General to submit an annual report including information measuring the TVPA's progress, such as the number of victims receiving benefits, the number of traffickers charged, and the type of law enforcement training conducted).

[77] *Id.* sec. 6(c), 117 Stat. at 2881 (codified as amended at 22 U.S.C. § 7103(f) (2006)). SPOG "consist[s] of the senior officials designated as representatives of the appointed members of the Task Force" and is "chaired by the Director of the Office to Monitor and Combat Trafficking of the Department of State." 22 U.S.C. § 7103(f)(2)(A)–(B). Its main purpose is to "coordinate activities of [f]ederal departments and agencies regarding [trafficking] policies." *Id.* § 7103(f)(3).

unintentionally "fall through the cracks" of the TVPA due to the increasing prevalence of state anti-trafficking laws and local enforcement efforts.[78]

Two years later, the Trafficking Victims Protection Reauthorization Act of 2005[79] ("2005 TVPRA") again purposed to "close loopholes" in the TVPA.[80] Toward the aim of victim protection, it contained "provisions to increase U.S. assistance to foreign trafficking victims . . . including access to legal counsel and better information on programs to aid victims."[81] To enhance prosecution, the 2005 TVPRA added a forfeiture provision to the toolbox for federal attorneys,[82] which should also serve to increase deterrence because the nature of the crime involves great financial benefit to the traffickers involved. Along the lines of deterrence, and as a somewhat controversial matter of public policy,[83] the 2005 TVPRA also made significant efforts to decrease the demand for human trafficking.[84] And again, legislative efforts encouraged increased state and local involvement.[85]

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[78] Previously, the certification process considered statements only from *federal* officials that the victim cooperated with *federal* investigations; the 2003 TVPRA expanded the TVPA so that the

> Secretary of Health and Human Services shall consider statements *from State and local law enforcement officials* that the person . . . has been willing to assist in every reasonable way with respect to the investigation and prosecution of *State and local crimes* . . . where severe forms of trafficking appear to have been involved.

Trafficking Victims Protection Reauthorization Act of 2003 sec. 4(a)(3), 117 Stat. at 2877–78 (codified as amended at 22 U.S.C. § 7105(b)(1)(E)(iv) (2006)) (emphasis added); *see also id.* sec.4(b)(2), 117 Stat. at 2878 (codified as amended at 8 U.S.C. 1184(o)(6)) (adjusting the corresponding provision of the Immigration and Nationality Act).

[79] Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (codified as amended in scattered sections of 18, 22, and 42 U.S.C).

[80] CRS Report, *supra* note 9, at 43.

[81] *Id.*; *see, e.g.*, Trafficking Victims Protection Reauthorization Act of 2005 sec. 102(a), 119 Stat. at 3560–61 (codified at 22 U.S.C. § 7105(c)(2)) ("To the extent practicable, victims of severe forms of [human] trafficking shall have access to information about federally funded or administered anti-trafficking programs that provide services to victims of severe forms of trafficking.").

[82] *Id.* sec. 103(d), 119 Stat. at 3563 (codified at 18 U.S.C. § 2428(a)(1)–(2) (2006)) (requiring trafficking offenders to surrender to the government "any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation" as well as "any property, real or personal, constituting or derived from any proceeds that such person obtained, directly or indirectly, as a result of such violation"); *id.* sec. 104(b)(1)(A), 119 Stat. 3558, 3564 (codified as amended at 22 U.S.C. § 7106(b) (2006)) (mandating demand-reducing measures "for commercial sex acts and for participation in international sex tourism").

[83] *See infra* Part IV.B.

[84] *See id.* sec. 201(a), (a)(2)(A), 119 Stat. at 3567–68 (codified at 42 U.S.C.S. § 14044(a), (a)(2)(A) (Supp. V 2006)) (implementing a "Program to reduce trafficking in persons and demand for commercial sex acts in the United States" that mandated comprehensive research reports and instituted an annual conference "addressing severe

The 2008 TVPRA, however, implements sweeping reforms to the TVPA and thus packs the most powerful punch in America's legislative battle over human trafficking.[86] The 2008 TVPRA continues to solve problems, mend gaps, and build bridges between government bodies. With its passing on December 10, 2008,[87] abolitionist advocates celebrated a promising victory in the fight for national anti-trafficking legislation that is not only comprehensive but *effective*.[88] Some notable revisions to the problems addressed *supra* include:

Elimination of the "cooperation condition." Section 201 softens the former "you help us before we will help you" stance of the bill that essentially required victim cooperation in prosecution efforts to become eligible for important immigration benefits,[89] providing an important exception for victims who are deemed "unable to cooperate . . . due to physical or psychological trauma."[90]

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forms of trafficking in persons and commercial sex acts that occur, in whole or in part, within the territorial jurisdiction of the United States").

[85] *See id.* sec. 204, 119 Stat. at 3571 (codified at 42 U.S.C. § 14044c(a) (Supp. V 2006)) (authorizing grants "to establish, develop, expand, or strengthen" state anti-trafficking programs).

[86] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I–III, 122 Stat. 5044, 5044–87 (to be codified in scattered sections of 6, 8, 18, 22, 28, and 42 U.S.C.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ457.110.pdf.

[87] TVPRA of 2008 Legislative History, *supra* note 2.

[88] A U.S.-based legislative coalition comprised of ten prominent organizations "dedicated to abolishing modern-day slavery and human trafficking" published a news release "enthusiastically congratulat[ing] Congress for passing the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008." Press Release, Action Group, Congress Passes the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Dec. 11, 2008), *available at* http://www.theactiongroup.org/legislation/TSG_News_Release.pdf. The Action Group celebrated the fact that the 2008 TVPRA amendments incorporated twenty and a half of the coalition's twenty-two legislative recommendations. *Id*; *see also* ACTION GROUP RECOMMENDATIONS, *supra* note 56. Others from across the political spectrum also applauded the bill's passing. *Compare* Press Release, Am. Civil Liberties Union, ACLU Applauds Passage of Human Trafficking Legislation (Dec. 11, 2008), *available at* http://www.aclu.org/womensrights/employ/38058prs20081211.html, *with* Adele Banks, *Bush Signs Anti-Trafficking Bill*, SALT LAKE TRIB., Dec. 26, 2008 ("Religious leaders hailed President Bush's signing of a bill that continues [United States] efforts to combat human trafficking across the globe.").

[89] See *supra* note 66 and accompanying text.

[90] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 201(a)(1)(D)(iii)(bb), 122 Stat. at 5052 (to be codified at 8 U.S.C. § 1101(a)(15)(T)). The Action Group explains that "[w]hile most victims of trafficking will readily comply with law enforcement requests, occasionally victims are unable to cooperate due to physical or emotional limitations or due to fear for their own safety or the safety of their family members." ACTION GROUP RECOMMENDATIONS, *supra* note 56.

Less stringent T visa requirements. Section 201 eases another of the previously "onerous" T visa requirements[91] by adjusting the physical presence condition.[92]

Expanded T visa benefits. Section 201 expanded immigration benefits by authorizing derivative T visas for parents and siblings of adult trafficking victims who may be at risk of retaliation due to the victim's escape from trafficking or cooperation with law enforcement.[93]

Facilitation of victim benefits and rights education. Section 202 mandates the development and distribution of an information pamphlet that educates potential victims about their legal rights and available resources,[94] including telephone hotlines,[95] thus ameliorating the difficulty for victims to obtain necessary services under the TVPA due to lack of awareness. Notably, the mandate includes a translation provision[96] and sets a deadline of 180 days to distribute the pamphlet.[97]

Facilitation of free legal services for child victims. Section 235 guarantees that the Secretary of Health and Human Services will ensure "to the greatest extent practicable" that all unaccompanied child victims under their care "have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and

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91 See *supra* note 67 and accompanying text.

92 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 201(a)(1)(C), 122 Stat. at 5052 (to be codified at 8 U.S.C. § 1101(a)(15)(T)) (modifying the physical presence on account of trafficking requirement by "including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking").

93 *Id.* sec. 201(a)(2)(C), 122 Stat. at 5053 (to be codified at 8 U.S.C. § 1101(a)(15)(T)) (extending the derivative T visa to "any parent or unmarried sibling under [eighteen] years of age" who risk retaliation). Previously, only minor victims could bring parents and siblings into the United States on derivative T visas, whereas adult victims were limited to their spouse or children. ACTION GROUP RECOMMENDATIONS, *supra* note 56. The Action Group advocated that

> [t]he requirement for adult victims should be changed to enable them to bring parents and siblings in addition to their spouse and children for three reasons: 1) these family members often feel threatened in their home country though such threats are often hard to prove; 2) it will assist the victim's recovery to know that close family members are safe; and 3) it will assist the victim to have the moral support of close family in the [United States] if the victim is a witness in a criminal or civil case against a trafficker.

Id.

94 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 202(a)(1), 122 Stat. at 5055 (to be codified at 8 U.S.C. § 1375(b)).

95 *Id.* tit. II, sec. 202(b)(5)(A)–(B), 122 Stat. at 5055 (to be codified at 8 U.S.C. § 1375(b)).

96 *Id.* tit. II, sec. 202(c), 122 Stat. at 5055–56 (to be codified at 8 U.S.C. § 1375(b)).

97 *Id.* tit. II, sec. 202(d)(3), 122 Stat. at 5056 (to be codified at 8 U.S.C. § 1375(b)).

trafficking."[98] The provision also requires the Secretary to "make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge."[99]

Statutorily mandated deadlines. The inclusion of statutorily mandated deadlines attached to many of the new provisions help combat the inherently slow-turning wheels of bureaucracy and provide an administrative remedy for enforcement if deadlines are missed and delays become unreasonable.[100]

Gap-filling provisions for delayed issuance of regulations. In several places, the 2008 TVPRA amendments mitigate the risk that unreasonable agency delay in issuing the regulations necessary to implement certain provisions would deny victims benefits.[101]

Enhanced criminal provisions. Prosecution efforts will be enhanced by helpful revisions to existing criminal statutes and the addition of new tools.[102] Several provisions ease the difficult-to-prove "knowingly" culpability standard by adding a "reckless disregard" alternative.[103] Section 222(b) adds a mechanism to punish obstruction of various trafficking crimes.[104] Section 222(c) supplies a new prosecutorial

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[98] *Id.* tit. II, sec.235(c)(5), 122 Stat. at 5079 (to be codified at 8 U.S.C. § 1232).

[99] *Id.*

[100] *E.g.*, *id.* tit. II, sec. 202(d)(3), 122 Stat. at 5056 (to be codified at 8 U.S.C. § 1375(b)) (imposing a 180-day pamphlet distribution deadline).

[101] *See, e.g.*, *id.* tit. II, sec. 201(b)(1)(C), 122 Stat. at 5053 (to be codified at 8 U.S.C. § 1101(o)(7)) (addressing the situation where a T visa holder is eligible for adjustment of status but "is unable to obtain such relief because regulations have not been issued to implement such section"); *id.* tit. II, sec. 201(c), 122 Stat. at 5053 (to be codified at 8 U.S.C. § 1184(p)(6)) (extending nonimmigration status in certain cases where the applicant for admission meets eligibility requirements and "is unable to obtain . . . relief because regulations have not been issued to implement such section"); *id.* tit. II, sec. 211(b), 122 Stat. at 5063 (to be codified at 8 U.S.C. § 1641 note) (ensuring that amendments to certain work authorization benefits will be effective "without regard to whether regulations have been implemented to carry out such amendments"). Though USCIS published an interim final rule allowing T and U visa holders to adjust their status just days before the bill's passing, *see* USCIS FACT SHEET, *supra* note 64, these provisions illustrate the TVPRA's responsiveness to problems identified by the public and its adaptability in addressing unintended loopholes.

[102] *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 222, 122 Stat. at 5067–71 (to be codified in scattered sections of 8, and 18 U.S.C.).

[103] *See, e.g.*, *id.* tit. II, sec. 222(b)(3), § 1589, 122 Stat. at 5068 (to be codified at 18 U.S.C. § 1589) (amending forced labor statute); *id.* tit. II, sec. 222(b)(5), § 1589, 122 Stat. at 5069 (to be codified at 18 U.S.C. § 1591) (amending sex trafficking of children statute).

[104] *Id.* tit. II, sec. 222(b), 122 Stat. at 5067–70 (to be codified in scattered sections of 18 U.S.C.) (amending five trafficking-related crimes); *e.g.*, *id.* tit. II, sec. 222(b)(1), § 1583(a)(3), 122 Stat. at 5067–68 ("Whoever . . . obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned not more than [twenty] years, or both.").

tool by adding a conspiracy provision specific to trafficking offenses.[105] Section 222(d) creates a new crime designed to punish those who financially benefit from "[p]eonage, [s]lavery, and [t]rafficking in [p]ersons," even if the profiteer did not facilitate the underlying crime.[106]

Clarified sex trafficking provisions. Section 222(b)(5) added several definitional clarifications to the sex trafficking statute,[107] as well as a legal clarification that in cases of child sex trafficking, "the Government need not prove that the defendant knew that the person had not attained the age of [eighteen] years."[108]

Mandatory training provisions. Several sections take important steps toward solving earlier criticisms of the bill that law enforcement agents are inadequately trained to identify victims and have demonstrated a misguided and negative attitude toward the enforcement of certain TVPA provisions.[109]

Increased federal-state coordination. Various provisions of the 2008 TVPRA seek to increase coordination of state anti-trafficking

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[105] *Id.* tit. II, sec. 222(c), 122 Stat. at 5070 (to be codified at 18 U.S.C. § 1594). This provision will be helpful to prosecutors who previously relied on a general conspiracy statute that imposed a maximum of five years imprisonment. *See* 18 U.S.C. § 371 (2006).

[106] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 222(d), 122 Stat. at 5070 (to be codified at 18 U.S.C. § 1593(A)). Notably, the culpability standard is knowingly *or* recklessly:

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a), *knowing or in reckless disregard of the fact that the venture has engaged in such violation*, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.

Id. tit. II, sec. 222(d), § 1593A, 122 Stat. at 5070 (emphasis added).

[107] For instance, the Section clarified two previously ambiguous terms in the definition of "coercion" for purposes of the crime. *Id.* tit. II, sec. 222(b)(5)(E)(iii), 122 Stat. at 5069–70 (to be codified at 18 U.S.C. § 1591(e)(1)) (defining "abuse or threatened abuse of law or legal process"); *id.* tit. II, sec. 222(b)(5)(E)(iv), 122 Stat. at 5070 (to be codified at 18 U.S.C. § 1591(e)(4)) (defining "serious harm" as encompassing "physical or nonphysical, including psychological, financial, or reputational harm").

[108] *Id.* tit. II, sec. 222(b)(5)(D), 122 Stat. at 5069 (to be codified at 18 U.S.C. § 1591(c)); *cf. supra* note 56 and accompanying text.

[109] *E.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 203(b)(3), 122 Stat. at 5058 (to be codified at 8 U.S.C. § 1375(c)) (mandating training of consular officers who conduct interviews with certain at-risk visa applicants); *id.* tit. II, sec. 212(b)(2), 122 Stat. at 5064 (to be codified at 22 U.S.C. § 7105(c)(4)) ("The Attorney General and the Secretary of Health and Human Services shall provide training to State and local officials to improve the identification and protection of such victims . . . ."); *id.* tit. II, sec. 235(e), 122 Stat. at 5081 (to be codified at 8 U.S.C. § 1232) ("The Secretary of State, the Secretary of Homeland Security, the Secretary of Health and Human Services, and the Attorney General shall provide specialized training to all Federal personnel, and upon request, state and local personnel, who have substantive contact with unaccompanied alien children."); *cf. supra* Part II.A.1.

efforts with federal efforts.[110] In particular, Section 225 seeks to ensure that that conflicting federal and state criminal laws will not "preempt, supplant, or limit" each other.[111]

Though the 2008 TVPRA heralds a number of significant victories—addressing legislative and policy concerns alike—there is yet room for improvement, particularly in the areas of the T visa requirements[112] and certain criminal statutes.[113] Moreover, the 2008 TVPRA raises subtle warning flags that reinforce the need for a strategic framework as a key tactical element to help in the fight against trafficking.

IV. TOO MUCH MOMENTUM?: POTENTIAL LANDMINES

Since the issue of human trafficking emerged on the national radar and started to gain political momentum in the late 1990s, legislators, lobbyists, researchers, scholars, and journalists mobilized on the issue relatively quickly.[114] Passion for combating this issue transcends party lines, race, and religious beliefs. The explosion of passion, however, has

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[110] *E.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 205(a)(1), 122 Stat. at 5060–61 (to be codified at 22 U.S.C. § 7105(c)(3)(C)) ("The Secretary of Homeland Security, in consultation with the Attorney General, shall—(i) develop materials to assist State and local law enforcement officials in working with Federal law enforcement to obtain continued presence for victims of a severe form of trafficking in cases investigated or prosecuted at the State or local level; and (ii) distribute the materials developed under clause (i) to State and local law enforcement officials.").

[111] *Id.* tit. II, sec. 225(a)(2), 122 Stat. at 5072 (to be codified at 22 U.S.C. § 7101 note). In relevant part, the provision reads:

> Nothing in this Act, the Trafficking Victims Protection Act of 2000, the Trafficking Victims Protection Reauthorization Act of 2003, the Trafficking Victims Protection Reauthorization Act of 2005, chapters 77 and 117 of title 18, United States Code, or any model law issued by the Department of Justice to carry out the purposes of any of the aforementioned statutes . . . shall preempt, supplant, or limit the effect of any State or Federal criminal law.

Id.

[112] Significantly, the two requirements that are likely the most time consuming and "onerous" in the process—the showings of a severe form of trafficking and severe harm upon removal—remain intact despite the 2008 TVPRA amendments. *See supra* note 67.

[113] Notably, though the 2008 TVPRA amendments revised the criminal intent standard for sex trafficking crimes by adding a "reckless" provision, the parallel labor trafficking provision still relies solely on a "knowingly" standard. *See* 18 U.S.C. § 1590 (2006); *supra* note 103 and accompanying text.

[114] Placed in context: during the past decade, national legislation has been drafted, passed, signed, enforced, and thrice amended. *See supra* notes 3 and 25 and accompanying text. Almost every state, as of this writing, has initiated or enacted local anti-trafficking provisions. *See supra* note 48. Journalists, researchers, and scholars have published thousands of pages of reports, articles, statistics, and books on the topic. *See, e.g.*, *supra* note 29. Evidence of the explosion: a simple Google search on "human trafficking" and "America" yields more than one million results. Google Home Page, http://www.google.com (search "'human trafficking' and America") (last visited May 10, 2009).

led to a snowball effect of sorts, as ideas evolve and ideals collide.[115] Amid the explosion, several landmines have cropped up that threaten to frustrate the progress of certain battles in America's war on human trafficking.

A. The Definition Debate

"What is human trafficking?" The answer to this foundational question is informed by one's personal, or even legal, framework.[116] Varying viewpoints invariably lead to varying definitions. In legislating the scope and boundaries of human trafficking as a crime, much hinges on the arrangement of particular wording in definitional provisions.[117] Anti-trafficking laws impacting the United States exist at three levels—state, federal, international.[118] Although these pieces of legislation cast "a kind of definitional anchor," none "define human trafficking or trafficking victimization in exactly the same way."[119] The definitional provisions at each level have triggered ongoing lengthy political debate[120]

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[115] The collision of politics with advocacy efforts to eradicate human trafficking necessarily leads to "various arguments and emotions of those who are intimately involved," which in turn leads to "problems in defining the dimensions of the trafficking problem and developing policies to deal with it." DESTEFANO, *supra* note 11, at xvii.

[116] If viewed narrowly as an immigration crime, for instance, human trafficking requires the illegal physical movement of persons across borders. If viewed more broadly as a human rights violation, however, emphasis on illegal travel decreases and emphasis on the end result of exploitation increases.

[117] For an illustration of how these criminal provisions can be categorized according to the process, means, and resulting goal, see TIP REPORT 2008, *supra* note 6, at 290 (providing a chart designed to help analyze a universal definition of human trafficking).

[118] In addition to the TVPA and the multiple versions of state laws that have developed over the past decade, see *supra* notes 3, 25, and 48 and accompanying text, the United States signed and ratified the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 40 I.L.M. 335, 377–84, *available at* http://untreaty.un.org/English/TreatyEvent2003/Texts/treaty2E.pdf; U.N. OFFICE ON DRUGS AND CRIME, SIGNATORIES TO THE CTOC TRAFFICKING PROTOCOL (Sept. 26, 2008), http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-trafficking protocol.html.

[119] MEASURING HUMAN TRAFFICKING, *supra* note 36, at 18.

[120] For instance, "battle lines" in the definition debate were drawn in Congress during the late 1990s in a way that "mirrored those in the concurrent U.N. deliberations." *Id.* The two main camps involved religious/feminist groups and human rights/labor rights/immigration advocates:

> Religious and feminist groups insisted that trafficking for prostitution was a "special evil" that should be addressed separately from labor trafficking. Prostitution "abolitionists" objected particularly to the inclusion of the force, fraud, and coercion criteria in the definition of sex trafficking, considering prostitution criminally exploitative under any conditions and thus essentially different from work in other domains. On the other side, human rights, labor, and immigration advocates insisted that human trafficking be defined by internationally recognized and legally translatable elements—forced labor,

and vigorous disagreement,[121] which tends to delay the enactment process.[122]

Beyond slowing the legislative process, the implications of these definitional debates—and the differences between statutory provisions—are far reaching, impacting not only a victim's ability to receive appropriate relief and government benefits,[123] but also methodologies for victim screening protocols[124] and gathering statistical research data.[125]

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slavery, and servitude—rather than by reference to the kind of work migrants might perform.

Id. (internal footnotes and quotation marks omitted).

[121] Disagreement over an early proposal for what eventually became enacted as the 2008 TVPRA, for instance, sparked intense debate about whether the proposed amendments would broaden the scope of human trafficking so much by definition that the TVPA would effectively encompass prostitution-related crimes traditionally reserved for state and local law enforcement. *Compare* BRIAN W. Walsh & Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, HERITAGE FOUNDATION LEGAL MEMORANDUM, Feb. 14, 2008, at 1, 1, *available at* http://www.heritage.org/Research/LegalIssues/upload/lm_21.pdf ("The TVPRA trivializes the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes—such as pimping, pandering, and prostitution—that are neither international nor interstate in nature. The net effect of this unconstitutional federalization of local crime would be to blur the respective lines of federal and state authority, assert federal supremacy without providing sufficient federal resources, and thus undermine the efforts of state law enforcement against both ordinary sex crimes and the local effects of human trafficking."), *with* Press Release, Equality Now, Statement of Jessica Neuwirth, President of Equality Now, to the New York City Council (June 11, 2008), http://www.equalitynow.org/english/pressroom/press_releases/presidentstatement_20080613_en.html ("Critics of the House bill claim that the bill 'federalizes prostitution.' It does no such thing. The crime of prostitution is nowhere in the bill. The House bill recognizes that many pimps are sex traffickers and integrates the crime of pimping into the sex trafficking legislative framework, that is a reflection of reality—not only the reality of sex trafficking but even the reality of the Justice Department's sex trafficking cases to date. It is not the enormous expansion of the TVPA that [critics] claim[].").

[122] *See* MEASURING HUMAN TRAFFICKING, *supra* note 36, at 18, 23. The "[o]ngoing debate continues to delay the passage of legislation in a number of U.S. states," and likely delayed the latest reauthorization to the TVPA, which, although first proposed in January 2007, did not pass until almost two years later in December 2008. *See id.* at 18; Edward Babayan, *Legislative Watch*, HUM. RTS. BRIEF, Spring 2007, at 53, 54, *available at* http://www.wcl.american.edu/hrbrief/14/3legislative.pdf?rd=1; TVPRA of 2008 Legislative History, *supra* note 2.

[123] *See supra* Part II.A.2.

[124] MEASURING HUMAN TRAFFICKING, *supra* note 36, at 18–23. One national survey identified "[a]mbiguous and sometimes contradictory definitions of human trafficking and new, untested laws" as obstacles encountered by anti-trafficking task forces. UNDERSTANDING AND IMPROVING, *supra* note 38, at 10. "These ambiguities result in disagreements among members about whether a person is a victim of human trafficking." *Id.*

[125] MEASURING HUMAN TRAFFICKING, *supra* note 36, at 6 ("International data collection is hampered by differences in the way nations define human trafficking."); *id.* at 11–12 (identifying seven different categories of victims); *id.* at 18 ("'[D]efining key terms and understanding and applying them uniformly are at the heart of establishing

Overall, differences in definitions make it difficult to standardize certain tools that are vital to fighting the war on human trafficking. Just as it is difficult to fight a war against an enemy who is not clearly defined, lack of uniformity among statutory definitions can lead to confusion that impedes effectiveness in the war on human trafficking.

B. The Demand Debate and the Infamous "Anti-Prostitution Pledge"

As one's personal or legal framework colors the debate over how human trafficking should be defined, so it colors one's viewpoint on how it should be fought. The debate surrounding which battle strategy best fits the war on human trafficking derives from one simple equation:

SUPPLY + DEMAND = HUMAN TRAFFICKING

Though some prefer to tackle supply and demand equally and simultaneously,[126] others prefer to focus more heavily on the supply side.[127] The Bush Administration, however, made a policy decision to tackle the demand side of the equation and focused its attention specifically on eradicating the demand for sex trafficking.[128] This

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standardized data and of ensuring reliability of statistics.'" (quoting INT'L ORG. FOR MIGRATION (IOM), ASEAN AND TRAFFICKING IN PERSONS: USING DATA AS A TOOL TO COMBAT TRAFFICKING IN PERSONS 27 (2007), *available at* http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/lowres%20asean%20report-complete.pdf)).

[126] These advocates call for a merger of the interdependent battles against poverty and human trafficking. *See, e.g.*, KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES 219 (2007) ("[N]ot only does combating poverty help to end slavery, but combating slavery helps to end poverty."); *id.* at 226 ("A great deal of thought, theory, and practice focuses on ending poverty, rather less on ending slavery. What is becoming clear is that these two goals should be harnessed together; their combined strength is greater than the sum of the parts.").

[127] *See, e.g.*, DESTEFANO, *supra* note 11, at xxvii ("Powerful economic needs impel people to put themselves at risk by turning to traffickers. Only when governments address those needs will such risky behavior be reduced."). DeStefano advocates that "[i]t is better . . . to give victims places to turn to for help—refuges such as law enforcement protection, social services, and coveted green cards—rather than take on the hopeless task of mandating an end to sex work." *Id.* at xxvi.

[128] *See id.* at 107–17. In 2003, the Bush Administration, which had adopted a strong anti-prostitution stance, responded to pressure to "link" this policy with its anti-trafficking policies. *Id.* at 108–09. Various publications soon began to surface "linking" prostitution with sex trafficking. *See, e.g.*, O'CONNOR & HEALY, *supra*. In turn, the 2005 TVPRA made significant amendments to the TVPA that addressed the problem of demand. *See supra* note 82. While signing the 2005 TVPRA, the President declared:

> [W]e cannot put the criminals out of business until we also confront the problem of demand. Those who pay for the chance to sexually abuse children and teenage girls must be held to account. . . . So we'll investigate and prosecute the customers, the unscrupulous adults who prey on the young and the innocent.

demand-centered policy enjoyed the support of other U.S. government agencies[129] and many anti-trafficking advocates who view sex trafficking as inextricably linked to prostitution.[130] As it played out in legislation, however—most conspicuously in regard to the TVPA's so-called "Anti-Prostitution Pledge"[131]—it garnered controversy and debate,[132] polarizing

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Press Release, The White House, Remarks by the President at Signing of H.R. 972, Trafficking Victims Protection Reauthorization Act of 2005 (Jan. 10, 2005), *available at* http://www.sharedhope.org/images/Presidential_Letter.pdf.

[129] *See* BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004), *available at* http://www.state.gov/documents/organization/38901.pdf ("Prostitution and related activities—including pimping and patronizing or maintaining brothels—fuel the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate."); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 27 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf ("Where prostitution is tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.").

[130] *See, e.g.*, Beverly LaHaye Inst., Concerned Women for Am., *Dr. Janice Crouse Testifies Before Maryland Legislature*, Feb. 8, 2008, http://www.cwfa.org/articles/14671/BLI/commentary/index.htm ("Prostitution and sex trafficking are inextricably linked and the bond that cements them is demand."); MONICA O'CONNOR & GRAINNE HEALY, THE LINKS BETWEEN PROSTITUTION AND SEX TRAFFICKING: A BRIEFING HANDBOOK 3 (2006), *available at* http://action.web.ca/home/catw/attach/handbook.pdf; DONNA M. HUGHES, THE DEMAND FOR VICTIMS OF SEX TRAFFICKING 5 (2005), *available at* http://www.uri.edu/artsci/wms/hughes/demand_for_victims.pdf ("Where prostitution is flourishing, pimps cannot recruit enough local women to fill up the brothels, so they have to bring in victims from other places.").

[131] A controversial provision of the 2003 TVPRA declared that "[n]o funds made available to carry out this division . . . may be used to promote, support, or advocate the legalization or practice of prostitution." Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 7(7), 117 Stat. 2875, 2885–86 (codified as amended at 22 U.S.C. § 7110(g) (2006)). It also attached a condition on funding, essentially requiring recipient organizations to adopt a legal policy opposing prostitution. *Id.* Though still in effect despite the 2008 amendments, the condition has been vigorously opposed by certain groups that advocate human rights for sex workers. *See, e.g.*, Press Release, Urban Justice Ctr., The Sex Workers Project Welcomes Increased Protections for Trafficked Persons (Dec. 12, 2008), *available at* http://www.sexworkersproject.org/downloads/20081212-tvpra-passage-pr.pdf (labeling the condition the "infamous 'Anti-Prostitution Pledge'"); Film: Taking the Pledge (Network of Sex Work Projects 2006), *available at* http://www.sexworkerspresent.blip.tv/file/181155 (labeling the funding restrictions a "prostitution gag rule," that, in effect, "prevent[s] sex workers from helping to create responses to trafficking and prostitution"). For sex worker advocates, "[t]he anti-prostitution pledge requirement . . . claims moral high ground while eclipsing the plight of many trafficked people and sex workers." *Id.*

[132] *See, e.g.*, Laura Blumenfeld, *In a Shift, Anti-Prostitution Effort Targets Pimps and Johns*, WASH. POST, Dec. 15, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/14/AR2005121402539.html; *Talk of the Nation, Authorities Target Customers to Curb Prostitution* (NPR Radio Broadcast Dec. 21, 2005), *available at* http://www.npr.org/templates/story/story.php?storyId=5064700 (radio show debating the effectiveness of law enforcement's focus on the demand side of prostitution).

certain groups of activists[133] and even leading to litigation.[134] "The fight over prostitution as it related to sex trafficking . . . had become a moral battle."[135]

The heated debate surrounding demand and concerning the "infamous" Anti-Prostitution Pledge only underscores the need for the current presidential administration to quell the bickering over the best tactic for fighting human trafficking. As our nation's central authority figure, the President must clearly delineate a battle strategy that all government agencies and private organizations can rally around, despite individual disagreement.[136] Ideally, this long-term strategy should address *both* the supply and demand sides of the equation, though the President's policy may elect to emphasize or prioritize one over the other in the short term.

C. Whose Role Is It Anyway?: Friction Between Government Agencies and Differing Department Priorities

The anti-trafficking movement calls for "an unprecedented degree of coordination between state and federal justice departments."[137] The daunting task of governmental coordination poses both horizontal and vertical challenges. Horizontally, competing federal agencies tasked with enforcement of the TVPA and its amendments must coordinate their efforts to work together in an expedient fashion. Vertically, states must coordinate their efforts with the federal government in order to streamline effective enforcement of anti-trafficking laws and guarantee adequate protection of victims.[138]

The TVPA's Interagency Task Force, uniting no less than nine different federal agencies or departments tasked with spearheading the implementation of the TVPA and its amendments,[139] is a prime example

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[133] DESTEFANO, *supra* note 11, at xxi (presenting his view that "by focusing so much attention on sex work . . . the U.S. debate about trafficking has become a way for anti-prostitution zealots to single out sex work as a particular evil. They have found ready allies in the Bush Administration, which has advanced legislation and policies to conform to the anti-prostitution agenda while further polarizing human rights advocates working on the trafficking issue").

[134] *See* DKT Int'l v. U.S. Agency for Int'l Dev., 435 F. Supp. 2d 5 (D.D.C. 2006), *rev'd*, 477 F.3d 758 (D.C. Cir. 2007).

[135] DESTEFANO, *supra* note 11, at 111.

[136] *See infra* Part V (suggesting that a timetable governing specifically delineated goals will help implement a long-term strategy).

[137] Bales, *supra* note 42, at 80.

[138] For discussion of this issue, see *supra* Part II.A.2.

[139] *See* 22 U.S.C. § 7103(b) (2006). This is no small task, as the Task Force members constitute representatives of a of a wide array of agencies, including "the Secretary of State, the Administrator of the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the Director of National Intelligence, the Secretary of Defense, [and] the Secretary of

of how coordination represents one of the main struggles in the implementation of anti-trafficking initiatives. Though on the surface, the collaborative approach of the Task Force appears to make significant headway toward the goal of streamlining implementation of the TVPA, government officials point to lingering challenges such as interagency rivalries,[140] inconsistent case approaches due to differing agency priorities,[141] and the logistical difficulties of coordinating large numbers of agency employees and participants. For example, DHS and the Department of Health and Human Services ("HHS")—two government agencies heavily involved in the critical processes of apprehension and victim identification—have markedly different missions.[142] Even within the TVPA, friction between competing agencies—especially in light of certain provisions added by the 2008 TVPRA[143]—underscores the need to

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Homeland Security." *Id.*; *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. I, sec. 101, 122 Stat. 5044, 5045 (to be codified at 22 U.S.C. 7103(b)) (amending Section 7103(b) to include the "Secretary of Education").

[140] *See* Bales, *supra* note 42, at 78; Haynes, *supra* note 29, at 376.

[141] UNDERSTANDING AND IMPROVING, *supra* note 38, at 10 (identifying "[t]enuous relationships among task force members who operated with different and at times conflicting goals (i.e. immigration rights advocates and Immigrations and Customs Enforcement officials often must come to agreement about how to best intervene in situations involving potentially out of status immigrant groups)" as obstacles to overcome).

[142] *Compare* U.S. Dep't of Health and Human Servs., HHS: What We Do, http://www.hhs.gov/about/whatwedo.html (last visited May 10, 2009) ("(HHS) is the United States government's principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves."), *and* Admin. for Children & Families, U.S. Dep't of Health and Human Servs., About Rescue & Restore: Campaign Overview, http://www.acf.hhs.gov/trafficking/rescue_restore/index.html (last visited May 10, 2009) ("The intent of the Rescue & Restore campaign is to increase the number of identified trafficking victims and to help those victims receive the benefits and services needed to live safely in the [United States]."), *with* U.S. Dep't of Homeland Sec., Strategic Plan—One Team, One Mission, Securing Our Homeland, http://www.dhs.gov/xabout/strategicplan (last visited May 10, 2009) ("[The] Department of Homeland Security's overriding and urgent mission is to lead the unified national effort to secure the country and preserve our freedoms.").

[143] Notably, the 2008 TVPRA amendments to the TVPA vest increasing authority in the Secretary of HHS to screen illegal aliens to determine victim status and eligibility for benefits. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 212, 122 Stat. at 5063 (to be codified at 22 U.S.C. § 7105(b)(1)) (vesting "exclusive authority" in the Secretary of HHS "to make interim eligibility determinations"); *id.* tit. II, sec. 235, 122 Stat. at 5074–75 (to be codified at 8 U.S.C. § 1232) (vesting authority for the Secretary of HHS to make determinations regarding unaccompanied alien children). Because these provisions "essentially distanc[e] law enforcement" from these unaccompanied minors, some conservative experts fear that an unlimited vesting of authority to HHS "could turn every minor's case into victim advocacy, when law enforcement may have a legitimate role to play in some circumstances." *Aid Approved*, WORLD, Dec. 27, 2008/Jan. 3, 2009, at 12.

Removing law enforcement authorities—such as the DHS, FBI, or DOJ—from the victim identification process has serious national security implications. Publishing its

clearly define the roles of specific agencies. These challenges illuminate a significant void—a lack of leadership and direction from a central authority figure.[144]

V. TIME TO RALLY THE TROOPS: THE NEED FOR A STRATEGIC FRAMEWORK TO FINISH THE FIGHT

"Whatever politics surround the trafficking issue, it is clear that the phenomenon will attract nations' attention and energy for years to come."[145] Though efforts to fight modern-day slavery are growing in scope, sophistication, and momentum, many traffickers remain elusive, shielded by a larger ring of underground criminals.[146] The generational nature of the war on trafficking means that abolitionists must dig into the trenches and settle in for the long battles ahead. A well-fought war requires a well-mapped strategy of attack—including specifically delineated battle plans and a timeline to achieve certain goals.[147] Looking ahead, others have recognized that a strategic framework is

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stance in opposition to similar provisions proposed in an earlier version of the bill, the DOJ made it clear that "[t]he Attorney General should be involved in any program that focuses on combating child trafficking at the border." Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to the Honorable John Conyers, Jr., Chairman of Comm. on the Judiciary, U.S. House of Representatives 11 (Nov. 9, 2007), *available at* http://www.usdoj.gov/olp/pdf/dept-view-letter-hjc-on-hr3887.pdf. In critiquing the bill, the DOJ expressed its strong opposition to any "language . . . that inappropriately remove[d] law enforcement from any initial determination of victim status or benefits eligibility." *Id.* at 6.

Further, in light of "national security interests," the DOJ argued that "DHS need[ed] more flexibility to handle gang members, terrorists, repeat offenders, and state offenders." *Id.* at 11. National security concerns are only amplified by suggested relationships between human trafficking and terrorism. *See, e.g.*, Renee Sauerland, Human Trafficking: Application of Alternative Methodologies For Elimination as a Critical Component in the United States War on Terror 2 (2006) (unpublished M.A. thesis, Regent University) (on file with Regent University Library) ("It has been shown that organized crime organizations are directly associated with terrorist organizations, which use trafficking of humans as a source of income and increased 'manpower' support."); TIP REPORT 2006, *supra* note 39, at 17 ("In some parts of the world, traffickers are distorting traditional Islamic customs to facilitate human trafficking."). Just as victims' rights advocates may argue that DHS is ill equipped to identify and facilitate prompt protection of trafficking victims encountered at the border, others may argue that HHS is not trained to identify criminal or terrorist threats in unaccompanied minors discovered within the borders. *See supra* note 142.

144 *See infra* note 149.

145 DESTEFANO, *supra* note 11, at xxvii.

146 *See supra* notes 17, 35, and 55.

147 Though comprehensive, the TVPA and its amendments alone do not accomplish these objectives. Lingering questions beg answers from a central authority, such as: Should child sex trafficking be prioritized over other forms of trafficking, for example labor trafficking, and if so, to what extent? Which federal department or agency has the final say over which issues? Is there a hierarchy defining how departments and agencies should work together? How are the issues of prostitution and sex trafficking related? How broad should the definition of trafficking be, and what types of activities should it encompass?

essential to finish the fight.[148] This Note proposes that our nation's Commander-in-Chief,[149] along with his administration, should develop and implement this strategic framework, which can be accomplished by publication of an annual United States Trafficking in Persons Strategy called U.S. TIPS. Similar to the Department of State's annual TIP report, U.S. TIPS would provide a published, centralized, authoritative document that all departments and agencies can regard as a source of universal guidance and strategy.[150]

U.S. TIPS could serve at least five specific functions to help implement an effective strategic framework: 1) define the parameters of human trafficking;[151] 2) delineate the roles of concerned departments, agencies, and NGOs;[152] 3) position future goals in an aspirational

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[148] *See, e.g.*, THE ACTION GROUP, RECOMMENDATIONS FOR FIGHTING HUMAN TRAFFICKING IN THE UNITED STATES AND ABROAD: TRANSITION REPORT FOR THE NEXT PRESIDENTIAL ADMINISTRATION 7 (2008) [hereinafter ACTION GROUP TRANSITION REPORT], *available at* http://theactiongroup.org/issues/Action_Group_Transition_Memo_2008.pdf ("[T]he [United States] must ensure that its policies, laws, and implementing government agencies are properly coordinated in an integrated framework to combat human trafficking worldwide."); U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), REPORT TO CONGRESSIONAL REQUESTERS, HUMAN TRAFFICKING: A STRATEGIC FRAMEWORK COULD HELP ENHANCE THE INTERAGENCY COLLABORATION NEEDED TO EFFECTIVELY COMBAT TRAFFICKING CRIMES 38 (2007) [hereinafter GAO FRAMEWORK], *available at* http://www.gao.gov/new.items/d07915.pdf (recommending "a strategic framework to coordinate [United States] efforts to investigate and prosecute trafficking in persons"); Derek Ellerman, *A Framework for Strategic Planning Against Trafficking in Persons* (Mar. 1, 2005), http://www.ellerman.info/joomla/index.php?option=com_content&task=view&id=12&Itemid=29 (showing a strategic framework developed by Polaris Project).

[149] "No single department or agency is capable of wielding the interagency authority necessary to bring together the full range of anti-trafficking actors and activities across the Executive Branch adequately." ACTION GROUP TRANSITION REPORT, *supra* note 148, at 17. Accordingly, this Note agrees with the Action Group's recommendation that "[t]he Office of the President needs to take an active and informed leadership role to improve interagency collaboration, provide oversight, and ensure accountability because of the broad and complex interagency jurisdictional nature of this issue." *Id.* at 18; *cf.* GAO FRAMEWORK, *supra* note 148, at 38 (recommending that "the Attorney General and the Secretary of Homeland Security, in conjunction with the Secretaries of Labor, State, and other agency heads deemed appropriate, develop and implement a strategic framework").

> Despite legislative initiatives establishing the President's Interagency Task Force (PITF) and Senior Policy Operating Ground (SPOG), past performance has shown that relevant agencies all too often do not work well together absent direction and leadership from the White House. Instead they have frequently functioned as independent actors, failing to maximize the [United States] investment of resources in this issue and too often working at cross-purposes.

ACTION GROUP TRANSITION REPORT, *supra* note 148, at 18.

[150] Unlike the broad-based TIP report, however, which assesses international anti-trafficking measures on a nation-by-nation basis, the more localized U.S. TIPS would address internal anti-trafficking policies and directives within the United States, assessing both national and state-specific initiatives.

[151] *See supra* Part IV.A.

[152] *See supra* Part IV.C.

timeline;[153] 4) measure progress on a state-by-state and national basis and identify statutory weaknesses at both levels;[154] and 5) provide a centrally recognized document to report synthesized updates of ongoing research results.[155] U.S. TIPS would also be an ideal forum in which to publish, as appendices, a model protocol for victim identification[156] as well as the DOJ's model state law.[157]

Publication of U.S. TIPS would help address many of the problems identified in this Note by clarifying ambiguities, providing direction, mapping out both long-term and short-term objectives (effectively implementing a "war strategy"), and, ultimately, by rallying the troops under a common purpose by presenting a unified mission. In addition, it would serve as a point of reference from which to disseminate updated information and research, as a means from which to measure progress and identify weaknesses, and as a tool to help sharpen anti-trafficking legislation, victim identification protocols, and assistance methods.

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[153] This function would help quell some of the debate surrounding which "tactic" or strategy the United States should adopt as it tackles the equation of human trafficking, presented *supra* Part IV.B ("SUPPLY + DEMAND = HUMAN TRAFFICKING").

[154] This comparative function would help evaluate states on an individual basis in a manner similar to the TIP report's method of reporting on progress of individual nation-states. Importantly, it would serve as a motivational force to encourage states, by way of peer pressure, to implement and improve local anti-trafficking measures.

[155] Given the overwhelming amount of research being conducted and published on human trafficking—varying in both quantity and quality—the need for a centralized place of dissemination is paramount. *See, e.g.*, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, U.S. GOVERNMENT FUNDED RESEARCH PROJECTS ON TRAFFICKING IN PERSONS FY02-07 (BY AGENCY) (2008), http://www.state.gov/g/tip/rls/other/2008/109866.htm (providing a chart of government funded trafficking research projects in multiple countries, including the United States); Nat'l Inst. of Justice, U.S. Dep't of Justice, Publications Related to Human Trafficking, http://nij.ncjrs.gov/publications/Pub_Search.asp?category=99&searchtype=basic&location=top&PSID=25 (last visited May 10, 2009) (providing links to twenty-seven extensive research publications either published or sponsored by the National Institute of Justice ("NIJ")); *see also* ACTION GROUP TRANSITION REPORT, *supra* note 148, at 28 (suggesting that "[m]eta-analysis could combine data sets from all agencies and make possible a deeper understanding of the incidence and trends of human trafficking, thus helping to improve intervention methods").

[156] HHS, the agency charged with issuing certification letters to victims of human trafficking who are eligible for the federal benefits outlined in the TVPA, provides useful resources in its Rescue & Restore Campaign Tool Kit. Admin. For Children & Families, U.S. Dep't of Health and Human Servs., Rescue & Restore Campaign Tool Kits, http://www.acf.hhs.gov/trafficking/campaign_kits/index.html (last visited May 10, 2009). At the same time, however, independent organizations are also developing similar resources. Notably, one group, funded by a federal grant from the DOJ, has extensively researched best practices for effective questions during screening processes in New York City and created a screening tool and accompanying toolkit for identifying potential victims. MEASURING HUMAN TRAFFICKING, *supra* note 36. As research continues to enhance the screening process and increase its effectiveness in identifying victims, the need for a centralized location to approve and publish a uniform model protocol increases.

[157] *See supra* note 47 and accompanying text.

U.S. TIPS is a tangible solution that would help our current President pick up the fight where the previous administration left off[158] and would help ensure that the 3-P prerogative is not only progressing but achieving an appropriate measure of balance between its independent goals of prevention, protection, and prosecution.[159]

CONCLUSION

The war on human trafficking involves battles on many fronts,[160] fought on many different fields.[161] The 2003, 2005, and 2008 TVPRAs reflect a commendable succession of increasing victories on the legislative battlefield, significantly enhancing the federal government's ability to prosecute traffickers and protect victims. While tracking those victories, this Note endeavored to illustrate how America's war on trafficking still suffers from a critical gap in "war strategy," and suggests that the new presidential administration can organize the future fight by practical implementation of a strategic framework in the form of an annually published U.S. TIPS.

Since the Clinton Administration's 1998 "declaration of war" against human trafficking, progress over the past decade should not be downplayed or diminished, but acknowledged and celebrated. President Bush's successive administration did much to fund and prioritize the fight against human trafficking. Congress, as emphasized, has contributed to significant legislative victories. In the private sector, passionate abolitionists have organized to spread awareness of the cause, provide vital victim services, improve victim identification procedures, develop better research methods, organize lobbying efforts, and contribute to scholarship. The efforts of these private individuals, often in the form of NGOs, have tremendously advanced the fight against trafficking in America.

Despite these advancements, the war rages on. Many battles are yet to be won, many traffickers yet to be discovered and prosecuted, and many victims yet to be rescued and released from bondage. Even with an army of organizations, agencies, and individuals ready to pick up the fight, the war will suffer absent clear direction and a united purpose.

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[158] *See* ACTION GROUP TRANSITION REPORT, *supra* note 148, at 5 (explaining how "the Clinton Administration's policies established a foundation for combating human trafficking" and the George W. Bush Administration "supported and significantly expanded America's commitment to end human trafficking," particularly by way of funding); *supra* Part I.

[159] *See supra* note 9 and accompanying text.

[160] For example, legal, social, political, and individual.

[161] The war on trafficking is fought from local street corners to state legislatures, from national halls of Congress to international conventions.

The President's leadership in developing a cohesive, comprehensive, and authoritative strategy is necessary to finish the fight for freedom.

Valerie S. Payne