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INTERNATIONAL LAW AND THE TORTURE MEMOS*

Michael P. Scharf[†]

This article explores the influence of international law in the evolution of the Bush Administration's policies toward detainees in the global war on terror. The detainee case study provides a modern lens for evaluating Jack Goldsmith and Eric Posner's hypothesis set forth in THE LIMITS OF INTERNATIONAL LAW that international law exerts no "compliance pull" on American policymakers in times of crisis.

I. INTRODUCTION

The purpose of this article is to ascertain the influence of international law in the formation of American foreign policy in time of crisis, using the case study of the White House Torture Memos as a backdrop.

This article is a response to two books written by one of the authors of the Department of Justice's Office of Legal Counsel (OLC) "Torture Memos," Professor Jack Goldsmith of Harvard Law School, who had served as head of the OLC during the height of the Bush Administration's "global war on terror." In *The Limits of International Law*,¹ published in 2005, Goldsmith employs rational choice theory to argue that international law is really just "politics" and that it is no more unlawful to contravene a treaty or a rule of customary international law than it would be to disregard a non-binding letter of intent.² In a memoir of his days as one of the Bush

* This article is a slightly revised and shortened version of Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45 (2009). A book-length treatment of this subject is forthcoming. MICHAEL P. SCHARF AND PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* (Cambridge University Press, forthcoming 2010).

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¹ JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

² *Id.* at 90. See also Eric Posner, *Do States Have a Moral Obligation to Obey International Law?* 55 STAN. L. R. 1901 (2003).

Administration's top lawyers, titled *The Terror Presidency*,³ published in 2007, Goldsmith reveals the underlying normative purpose behind *The Limits of International Law*, namely to free the President from the shackles of international law in shaping a response to terrorism in the aftermath of the 9/11 attacks.

This article begins with a history of the scholarly debate about the binding nature of international law—the so-called compliance debate. This sets the stage for a critique of Goldsmith's contribution to the compliance debate. This is followed by an examination of the role that international law actually played in the Bush Administration's policies regarding the treatment of detainees in the war on terror. The article ends with several conclusions about the influence of international law on American foreign policy during times of crisis.

II. THE COMPLIANCE DEBATE

Since the decline of the Roman Empire and the attendant weakening of the Roman Legion at the end of the fourth century A.D., there has existed no sort of constabulary to implement rules of international law. Subsequently, international rules have been subject to sporadic enforcement through protest and condemnation, reciprocal suspension of rights and benefits, unilateral or multilateral economic and political sanctions, and sometimes through individual or collective use of armed force.

Lacking a pervasive and effective enforcement mechanism, scholars and policy makers have pondered whether international law is really binding law. The question has been debated since ancient times and remains one of the most contested questions in international relations. As described below, major historic developments, such as the Peace of Westphalia, the conclusion of the Second World War, the onset of the Cold War, the proliferation of international institutions in the 1970s and 80s, the collapse of the Soviet Union in 1989, and the terrorist attacks of September 11, 2001, have each rekindled and reshaped the debate.

To understand how the historic context affects the debate about whether international law is really law, it is helpful to draw upon the theory of Semiotics (pronounced sem-ee-AH-tiks). Semiotics (from the Greek *semeion*, meaning "sign"), was developed by Charles Peirce in the nineteenth century as the study of how the meaning of signs, symbols, and language is constructed and understood.⁴ Umberto Eco made a wider audience aware of semiotics through several notable books, including his best-selling

³ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

⁴ See generally 5 CHARLES S. PEIRCE, *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE: PRAGMATISM AND PRAGMATICISM* (1935).

novel *The Name of the Rose*, which includes applied semiotic operations.⁵ Semiotics begins with the assumption that phrases, such as “international law,” are not historic artifacts whose meaning remains static over time. Rather, the meaning of such terms changes along with the interpretive community or communities. As applied to law, semiotics theory posits that “different conceptions of the nature and character of the legal community give rise to different interpretations of the meaning of the rules and principles of positive law”⁶

The modern age of international law is said to have been inaugurated with the 1648 Treaties of Westphalia, which ended the Thirty Years War by acknowledging the sovereign authority of various European Princes.⁷ During the next three-hundred years, up until World War II, there were four major schools of thought regarding the binding nature of international law.⁸ The first was “an Austinian positivistic realist strand,” which held that nations never obey international law because it is not really law.⁹ The second was a “Hobbesian utilitarian, rationalistic strand” which held that nations sometimes follow international law, but only when it serves

⁵ UMBERTO ECO, *A THEORY OF SEMIOTICS* (1976); UMBERTO ECO, *SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE* (1986); UMBERTO ECO, *THE NAME OF THE ROSE* (1983).

⁶ Wouter Werner, *The Unnamed Third: Roberta Kevelson's Legal Semiotics and the Development of International Law*, 12 INT'L J. SEMIOTICS L. 309, 309–31 (1999). See generally Susan W. Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89 (1986).

⁷ Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 375 n.20 (2003). Footnote twenty states that:

The Peace of Westphalia was composed of two separate agreements: (1) the Treaty of Osnabruck concluded between the Protestant Queen of Sweden and her allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other; and (2) the Treaty of Munster concluded between the Catholic King of France and his allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other. The Conventional view of the Peace of Westphalia is that by recognizing the German Princes as sovereign, these treaties signaled the beginning of a new era. But in fact, the power to conclude alliances formally recognized at Westphalia was not unqualified, and was in fact a power that the German Princes had already possessed for almost half a century. Furthermore, although the treaties eroded some of the authority of the Habsburg Emperor, the Empire remained a key actor according to the terms of the treaties. For example, the Imperial Diet retained the powers of legislation, warfare, and taxation, and it was through Imperial bodies, such as the Diet and the Courts, that religious safeguards mandated by the Treaty were imposed on the German Princes.

Id. (citing Stephane Beaulac, *The Westphalian Legal Orthodoxy—Myth or Reality?* 2 J. HIST. INT'L L. 148 (2000)).

⁸ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2614 (1997).

⁹ *Id.* at 2611. See also JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 127, 201 (Weidenfeld & Nicolson 1954) (1832).

their self-interest to do so.¹⁰ The third was a “Kantian liberal strand,” which held that nations generally obey international law out of a sense of moral and ethical obligation derived from considerations of natural law and justice.¹¹ The fourth was a Bentham “process-based strand,” which held that nations are induced to obey from the encouragement and prodding of other nations through a discursive legal process.¹² The modern debate has its roots in these four theoretical approaches.

In the aftermath of World War II, the victorious Allies sought to establish a “new world order,” replacing the “loose customary web of state-centric rules” with a rules-based system built on international conventions and international institutions such as the U.N. Charter, which created the Security Council, General Assembly, and International Court of Justice; the Bretton Woods Agreement, which established the World Bank and International Monetary Fund; and the General Agreement of Tariffs and Trade, which ultimately led to the creation of the World Trade Organization.¹³ The new system reflected a view that international rules would promote Western interests, serve as a bulwark against the Soviet Union, and emphasize values to be marshaled against fascist threats.¹⁴

Yet the effectiveness of the new system was immediately undercut by the intense bipolarity of the Cold War. In the 1940s, political science departments at U.S. universities received from the German refugees—such as Hans Morgenthau who is credited with founding the field of international relations in the U.S.—“an image of international law as Weimar law writ large, formalistic, moralistic, and unable to influence the realities of international life.”¹⁵ With fear of communist expansion pervading the debate, the positivistic, realist strand came to dominate Western scholarly discourse on the nature of international obligation. Thus, one of America’s leading post-war international relations theorists, George F. Kennan, attacked the Kantian approach as anathema to American foreign policy interests, saying, “the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some

¹⁰ Koh, *supra* note 8, at 2611; ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 58–59, 112–25 (1947) (discussing the contributions of Hobs and other early positivists).

¹¹ Koh, *supra* note 8, at 2611; Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795), in *PERPETUAL PEACE AND OTHER ESSAYS* 107 (Ted Humphrey trans., 1983).

¹² See 2 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 538, 540, 552–54 (1843).

¹³ Koh, *supra* note 8, at 2615.

¹⁴ See Philippe Sands, *Mischon Lecture 2005, Lawless World: International Law After 9/11 and Iraq* (May 18, 2005), available at https://www.ucl.ac.uk/laws/mishcon/docs/Mishcon_2005_Sands.pdf.

¹⁵ MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 471 (2001).

system of legal rules and restraints" is an approach that "runs like a red skein through our foreign policy of the last fifty years."¹⁶

Even during the height of the Cold War, however, international law had its defenders, and within the American legal academy a new school of thought arose with roots in the Bentham strand, based on notions of legal process. Thus, the writings of Harvard Law professors Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld, and Yale Law professors Myres McDougal and Harold Lasswell, hypothesized that compliance with international law could be explained by reference to the process by which these actors interact in a variety of public and private fora.¹⁷ As Abram Chayes, who had himself once served as State Department Legal Adviser, put it: international law may not be determinative in international affairs, but it is relevant and influences foreign policy "first, as a constraint on action; second, as the basis of justification or legitimization for action; and third, as providing organizational structures, procedures, and forums" within which political decisions may be reached.¹⁸ The process approach was later refined by Harvard Law Professors Henry Steiner and Detlev Vagts and Yale Law Professor Harold Koh to include, in addition to States and international organizations, multinational enterprises, nongovernmental organizations, and private individuals, which all interact in a variety of domestic and international fora to make, interpret, internalize, and enforce rules of international law.¹⁹

During the 1970s and 80s the legal landscape underwent another major transformation with the proliferation, growth, and strengthening of countless international regimes and institutions. Despite the bipolarity of the Cold War, international cooperation had persisted and was facilitated by treaties and organizations providing channels for dispute-settlement, requiring states to furnish information regarding compliance, and authorizing retaliatory actions in cases on non-compliance. During this period, international relations scholars developed "regime theory," the study of principles, norms, rules, and decision-making procedures that govern such areas as international peacekeeping and debt management.²⁰ At heart, the regime

¹⁶ GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 95 (1984).

¹⁷ Professor Koh distinguishes between the Harvard and Yale methods, observing that the Harvard approach focused on process as policy constraint while the New Haven approach was more value oriented, focusing on process as policy justification. See Koh, *supra* note 8, at 2623.

¹⁸ See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 7 (1974). See also ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS* (1968).

¹⁹ See HENRY STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS* (1994).

²⁰ See *generally* INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); ROBERT O. KEOHANE JR., *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY* (1989).

theorists were rationalists, viewing compliance with international law as a function of the benefits such compliance provides.

This same period saw a revival of the Kantian philosophical tradition. NYU Law Professor Thomas Franck sought to answer the question "Why do powerful nations obey powerless rules?" in his path-breaking *The Power of Legitimacy Among Nations*.²¹ Frank's answer: "Because they perceive the rule and its institutional penumbra to have a high degree of legitimacy."²² According to Frank, it is the legitimacy of the process that "exerts a pull to compliance . . ."²³

The end of the Cold War and the collapse of the Soviet Union in 1989 had a significant impact on compliance scholarship. With the dismantling of the Berlin Wall, the end of Apartheid in South Africa, and the United Nation's defeat of Saddam Hussein in Operation Desert Storm, the 1990s were a period of unparalleled optimism about the prospects of international law and international institutions. At the same time, conflicts in failed states like Somalia and Haiti, the violent break-up of the former Yugoslavia, and the tribal carnage in Rwanda presented new challenges that severely tested the efficacy of international rules and institutions. Meanwhile, the status of the U.S. as the "sole remaining superpower" encouraged triumphalism, exceptionalism, and an upsurge of U.S. provincialism and isolationism, as well as a preference to act unilaterally rather than multilaterally.²⁴ During this decade, scholarly writing about compliance with international law featured four prevailing views.

The first view was an "instrumentalist" strand which, like its predecessors, applied rational choice theory to argue that States only obey international law when it serves their self-interest to do so. What differentiated modern rationalists such as Robert Keohane,²⁵ Duncan Snidal,²⁶ Kenneth Abbott,²⁷ and John Setear²⁸ from their realist forerunners was the sophistication of their version of the prisoner's dilemma game, introducing international institutions and transnational actors, disaggregating the State into its

²¹ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3 (1990).

²² *Id.* at 25 (emphasis omitted).

²³ *Id.* at 26.

²⁴ See generally JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 7 (2004).

²⁵ See Robert O. Keohane, Jr., *International Relations and International Law: Two Optics* 9 (Sherrill Lecture, Yale Law School), quoted in Koh, *supra* note 8, at 2632 n.171.

²⁶ See Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985).

²⁷ See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

²⁸ See John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996).

component parts, and incorporating notions of long-term as well as short-term interests.

The second view was a “liberal internationalist” strand, led by the Dean of Princeton’s Woodrow Wilson School, Anne-Marie Slaughter, who posited that compliance depends on whether or not the State can be characterized as “liberal” in identity (e.g., marked by a democratic representative government, guarantees of civil and political rights, and an independent judicial system).²⁹ Slaughter and other liberal theorists argued that liberal democracies are more likely to comply with international law in their relations with one another, while relations between liberal and illiberal states will more likely be conducted without serious deference to international law.

The third view, an outgrowth of Kantian theory, was a “constructivist” strand, which argued that the norms of international law, the values of the international community, and the structure of international society have the power to reshape national interests.³⁰ According to the constructivists, States obey international rules because a repeated habit of obedience transforms their interests so that they come to value rule compliance.

The fourth post-cold war view was a refurbishment of the Harvard/New Haven “institutionalist approach,” as embodied in works by Abram/Antonia Chayes and Harold Koh. In *The New Sovereignty*, the Chayeses dismiss the importance of coercive enforcement, pointing out that “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.”³¹ Instead, they offer a “management model” in which compliance is induced through interactive processes of justification, discourse, and persuasion. According to the Chayeses, the impetus for compliance is not so much a nation’s fear of sanction as it is fear of diminution of status through loss of reputation. To improve compliance, the Chayeses propose a range of “instruments of active management,” such as transparency, reporting and data collection, verification and monitoring, dispute settlement, capacity-building, and strategic review and assessment.

Harold Koh, who was appointed State Department Legal Adviser of the Obama Administration in 2009, has sought to add an additional level of

²⁹ See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995).

³⁰ See generally THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996); INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 4–8 (Robert J. Beck et al. eds., 1996); FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1991).

³¹ ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 32–33 (1995).

sophistication to process theory by explaining how and why States internalize the constraining norms through judicial incorporation, legislative embodiment, and executive acceptance.³² According to Koh, when a State fails to comply with international law, frictions are created that can negatively affect the conduct of a State's foreign relations and frustrate its foreign policy goals.³³ To avoid such frictions in its continuing interactions, the State will shift over time from a policy of violation to one of grudging compliance to eventual habitual internalized obedience.³⁴

III. A CRITIQUE OF THE GOLDSMITH PARADIGM

The terrorist attacks on the World Trade Center and Pentagon of September 11, 2001 and the invasion of Iraq in March 2003 inaugurated the current period of compliance scholarship. In the aftermath of 9/11, the U.S. implemented policies regarding the detention and treatment of suspected terrorists that were harshly criticized at home and abroad as inconsistent with international law requirements. In seeking to minimize the impact of international law on the Bush Administration's foreign policy agenda, then Ambassador to the U.N., John Bolton, said, "[i]t is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so—because, over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States."³⁵ The term "lawfare" was coined,³⁶ and the Bush Administration's official 2005 National Defense Strategy compared the use of international "judicial processes" to terrorism, concluding that

³² Koh, *supra* note 8, at 2602–03, 2641.

³³ *Id.* at 2617, 2635.

³⁴ *Id.* at 2655–56.

³⁵ Samantha Power, *Boltonism*, NEW YORKER, Mar. 21, 2005, at 23, available at http://www.newyorker.com/archive/2005/03/21/050321ta_talk_power (last visited Oct. 24, 2009). Bolton has also written: "International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law." John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000) (Bolton served as Under Secretary of State for Arms Control and U.S. Ambassador to the U.N. during the George W. Bush Administration).

³⁶ The term was apparently coined by Major General Charles J. Dunlap, Jr. at a speech at Harvard's Carr Center in 2001. Major General Dunlap defined "lawfare" as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective." Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, YALE J. INT'L AFF. 146 (2008), available at www.nimj.org/documents/Lawfare%20Today.pdf. As neoconservative lawyers David Rivkin and Lee Casey have put it, lawfare aims to "gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals." Scott Horton, *State of Exception: Bush's War on the Rule of Law*, HARPER'S, July 2007, available at <http://www.harpers.org/archive/2007/07/0081595>.

both are “strategies of the weak” that threaten “our strength as a nation state.”³⁷ The Administration even persuaded Congress to enact legislation that prohibited U.S. courts from considering international law or jurisprudence in determining the validity of detentions of suspected terrorists at Guantánamo Bay.³⁸

It was in this context that Harvard Law Professor Jack Goldsmith, who had served as Assistant Attorney General and head of DOJ’s Office of Legal Counsel from October 2003 to June 2004, along with Chicago University Law Professor Eric Posner, published *The Limits of International Law* at the start of the Bush Administration’s second term in 2005.³⁹ The book, which is an expanded and more sophisticated version of Posner’s 2003 article, *Do States Have a Moral Obligation to Obey International Law?*,⁴⁰ deploys economic-based rational choice theory, using modeling techniques derived from game theory, to advance the thesis that neither customary international law nor treaty-based international law have any “exogenous influence on State behavior.”⁴¹ In other words, according to Goldsmith and Posner, when States act in accordance with international law it is not because of its moral pull or a preference for abiding with law, but rather solely due to self-interest.⁴²

Using a variety of illustrative historical case studies involving international Agreements (e.g., human rights treaties and trade treaties) as well as customary international law (e.g., ambassadorial immunity and free passage of neutral ships), Goldsmith and Posner propound four models that seek to explain away the behavior that legal scholars have termed “compliance” with international law. The first model, “coincidence of interest,” essentially proposes that States may act in accordance with international law simply by acting in their own self-interest, with no regard to international rules or the interests of other States.⁴³ The second model, “coordination,” describes instances in which two or more states create and abide by a rule not out of a sense of obligation, but simply because it is convenient.⁴⁴ The third model, “cooperation,” applies to situations in which States reciprocally refrain from activities that would otherwise be in their short-term self-

³⁷ UNITED STATES DEPARTMENT OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 6 (2005), available at <http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf>.

³⁸ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

³⁹ GOLDSMITH & POSNER, *supra* note 1.

⁴⁰ Posner, *supra* note 2, at 1918.

⁴¹ GOLDSMITH & POSNER, *supra* note 1, at 39, 43, 108.

⁴² *Id.* at 225. See also Edward Swaine, *Restoring and (Risking) Interest in International Law*, 100 AM. J. INT’L L. 259 (2006) (book review of GOLDSMITH & POSNER, *supra* note 1).

⁴³ See GOLDSMITH & POSNER, *supra* note 1, at 111.

⁴⁴ *Id.* at 32.

interest in order to reap larger long-term benefits.⁴⁵ The fourth model, “coercion,” results when a State with greater power forces a weaker State to engage in acts that benefit the more powerful State.⁴⁶

Based on their rational choice analysis, Goldsmith and Posner conclude that States have no preference for compliance with international law; they are unaffected by the “legitimacy” of a rule of law; past consent to a rule does not generate compliance; and decision makers do not internalize a norm of compliance with international law. States therefore employ international law when it is convenient, are free to ignore it when it is not, and have every right to place their sovereign interests first—indeed democratic States have an obligation to do so when international law threatens to undermine federalism, separation of powers, and domestic sovereignty.⁴⁷

The potential impact of Goldsmith and Posner’s work cannot be overstated. George Washington University Law Professor Edward Swaine writes that U.S. elites may seize on Goldsmith and Posner’s book to justify noncompliance with international law and may have done so already.⁴⁸ As Professor Allen Buchanan of Duke University has pointed out, Goldsmith and Posner’s “normative claims, if valid, would lend support to the view that it is wholly permissible for the U.S. government to take a purely instrumental stance toward international law, and that its citizens do not have a moral obligation to try to prevent their government from doing so.”⁴⁹ Finally, Professor Mary Ellen O’Connell of Notre Dame warns, “[a] policymaker reading the book might well conclude that compliance with international law, such as the 1949 Geneva Conventions or the Convention against Torture, is optional”⁵⁰

While many realists and rationalists immediately embraced Goldsmith and Posner’s approach and conclusions, their book was met with criticism by institutionalists and constructivists who sought to disprove their thesis in several ways. To start with, Professor Peter Spiro of Temple University points out that many of Goldsmith and Posner’s reasons for dismissing international law as something less than real law would apply to domestic law as well.⁵¹ Goldsmith and Posner’s assertion that “[d]omestic law is

⁴⁵ *Id.* at 112.

⁴⁶ *Id.* at 115.

⁴⁷ Goldsmith and Posner are particularly concerned about international law’s propensity to shift decisional authority from local government and the federal executive to international institutions and activist federal judges.

⁴⁸ See Swaine, *supra* note 42, at 265.

⁴⁹ Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT’L COMP. L. 305, 307–08 (2006).

⁵⁰ MARY ELLEN O’CONNELL, *THE POWER & PURPOSE OF INTERNATIONAL LAW* 104 (2009).

⁵¹ See Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT’L COMP. L. 445 (2006).

enforced in well-ordered societies,” whereas “international law is not reliably enforced,”⁵² flies in the face of the actual data, including the fact that murder cases have only a sixty-five percent clearance rate in the U.S.⁵³

Although international law has traditionally employed horizontal rather than vertical mechanisms of enforcement (such as protests, reciprocal suspension of compliance, and breaking of diplomatic relations) and such enforcement has rarely been bolstered by the use of force, this “does not necessarily detract from its salience as a regulator of behavior.”⁵⁴ It just means international law is more like domestic contract law than domestic tort or criminal law. And while some States violate the Torture Convention’s prohibitions on inhumane treatment, the Geneva Convention’s prohibition on war crimes, and the U.N. Charter’s prohibition on the use of force, this does not mean that these international rules have no consequence. As with the sixty-five miles-per-hour speed limit, international law may not exert a moral pull nor enjoy perfect compliance, but it does deter and constrain unlawful behavior at the margins. Finally, while nearly all international law scholars will acknowledge that if State interests are powerful enough they may trump contrary international law norms, the same is true with respect to contracts in domestic law. That a business or individual may chose to break a legally binding contract (and suffer the consequences thereof) does not mean that contract law is not real law.

Another criticism of the Goldsmith and Posner paradigm, made by Professor Kenneth Anderson of American University, concerns their underlying assumption that the only possible basis of legal obligation is morality. Anderson points out that a sense of legal obligation can be based on instrumentalist concerns about reputation as a law-abiding State, long-term self-interest in the maintenance of order, or long-term self-interest in a functioning legal system.⁵⁵ In seeking to circumvent this objection, Goldsmith and Posner never explain what they believe constitutes the self-interests of States. Rather, they provide a circular approach that is so open-ended that it renders their theory “an empty vessel.”⁵⁶ In particular, critics argue that by defining reputation as one of a State’s instrumentalist interests rather than considering it part of the pull of international law, Goldsmith and Posner have rendered their theory non-falsifiable and lacking in predictive value. As Professor Daniel Bodanski of University of Georgia notes, under

⁵² GOLDSMITH & POSNER, *supra* note 1, at 195.

⁵³ Spiro, *supra* note 51, at 452 n.16 (citing BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/homicide/cleared.htm> (last visited Oct. 24, 2009)).

⁵⁴ Spiro, *supra* note 51, at 451.

⁵⁵ See Kenneth Anderson, *Remarks by an Idealist on the Realism of the Limits of International Law*, 34 GA. J. INT’L & COMP. L. 253 (2006).

⁵⁶ *Id.* at 280–81.

Goldsmith and Posner's approach, "international law cannot be an exogenous influence on state behavior for the simple reason that it has already been made endogenous."⁵⁷

Goldsmith and Posner attempt to answer this criticism by observing that in any event reputational considerations have little impact on State behavior.⁵⁸ But Professor David M. Golove of New York University takes issue with this supposition, which arises out of Goldsmith and Posner's single-issue game approach using the prisoner's dilemma model. According to Professor Golove, the metaphorical games that States actually play are vastly more complex. "States repeatedly and intensively interact across a wide range of subject areas, and they do so indefinitely into the future."⁵⁹ Viewing international interaction instead as a "super game" requires that significantly more value be placed on reputation than Goldsmith and Posner are willing to acknowledge. States obtain a benefit if they are perceived as reliable partners not just with the particular State on the particular issue in question in a given interaction, but also with third States on a range of issues long into the future. Moreover, once a norm is named a customary international law rule or is codified in a treaty to which a State is a party, violation of that norm will have far more serious reputational costs.⁶⁰

Goldsmith and Posner's response is to argue that State reputations are compartmentalized. For example, they assert that a State might have a good record complying with trade treaties and a bad record complying with environmental treaties, and that the State's trading partners will not hold its environmental shortcomings against it.⁶¹ If this were true, answers Golove, it would only mean that preserving the State's reputation as a law abiding State would be more significant with respect to that State's trade relations than in the environmental area; it would not mean that reputation is irrelevant. Nor does Goldsmith and Posner's self-evident assertion that "a reputation for compliance will not always be of paramount concern"⁶² mean that reputation should automatically be dismissed as inconsequential. If compliance reputation makes a difference in the margins, putting a thumb on the scale in favor of compliance, then it is neither irrelevant nor inconsequential.

⁵⁷ Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285, 295 (2006).

⁵⁸ See GOLDSMITH & POSNER, *supra* note 1, at 100-04.

⁵⁹ David M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 333, 345 (2006).

⁶⁰ Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1294 (2006) (book review of GOLDSMITH & POSNER, *supra* note 1).

⁶¹ See GOLDSMITH & POSNER, *supra* note 1, at 102.

⁶² *Id.* at 103.

A further criticism of the Goldsmith and Posner approach is that in order to fit within their simplified prisoner dilemma game theory, Goldsmith and Posner begin with the assumption that the relevant actor is the "State" as a unitary player, represented by what Goldsmith and Posner call its leaders.⁶³ The State as they conceive it does not reflect multiple power bases and multiple agendas. To better mirror reality, Professor Spiro suggests that the State should be disaggregated and understood as a nexus of competing and contradictory actors which influence its behavior, including bureaucratic subsets within the Executive Branch, political subsets within the Congress, Supreme Court and lower court judges, as well as nongovernmental organizations outside the government.⁶⁴

A final critique concerns Goldsmith and Posner's methodology. According to Professor Andrew T. Guzman of California Berkely's Boalt Hall School of Law, Goldsmith and Posner's aim is to debunk the constructivist theory of compliance, but they do so through selective use of a handful of case studies which are no more than anecdotal in nature, and their identification of the controlling state interests in each is almost entirely conjectural.⁶⁵ In addition, Goldsmith and Posner offer no explanation for how they chose the particular historical events that they employ, nor do they cite to other scholars of history or political science who concur with their appraisals of those events. In contrast, several scholars that have carefully examined the case studies set forth in *The Limits of International Law* have concluded that "at least some of those case studies are consistent with competing claims."⁶⁶

Moreover, where a case study reveals a State's compliance with an accepted rule (as most of Goldsmith and Posner's do), it is difficult to determine without qualitative empirical data (which Goldsmith and Posner do not provide) whether the State complied out of self-interest, out of a sense of duty to uphold the law, or a mix of both. As Professor Oona Hathaway points out, with respect to international law, which is primarily consent-based, "utility seeking and law-abiding behavior is often identical."⁶⁷ Professor Golove observes that "Goldsmith and Posner make little effort to

⁶³ See generally *id.*

⁶⁴ See Spiro, *supra* note 51, at 454–62.

⁶⁵ See Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 540 (2006) (book review of GOLDSMITH & POSNER, *supra* note 1).

⁶⁶ Guzman, *supra* note 65, at 540 (arguing that Goldsmith and Posner misrepresent the facts in their international trade case study); Golove, *supra* note 59, at 353 (arguing that Goldsmith and Posner's account is cherry-picked and fails to present a fair picture of the "Free Ships, Free Goods" example).

⁶⁷ Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1442 (2006) (book review of GOLDSMITH & POSNER, *supra* note 1).

investigate direct historical evidence . . . of the actual motivations of the individuals who made the decisions on which they focus Instead they focus on the events themselves and draw speculative inferences about why States acted as they did."⁶⁸

IV. JUST A MATTER OF SEMANTICS?

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is" said Alice, "whether you can make words mean so many different things."

—Lewis Carroll *"Through the Looking Glass"* (1871)

In *The Limits of International Law*, Goldsmith and Posner acknowledge that international legal rules exert influence on State behavior through concern about negative publicity, diminution of reputation, reduced international cooperation, and retaliation⁶⁹ and that as a consequence States usually act in accordance with customary international law and treaty law.⁷⁰ What difference does it make, then, if international law is labeled "binding" law or not? Why the focus on whether or not government officials should perceive a "moral" obligation to comply with international law? In light of Goldsmith and Posner's self-identified "instrumentalist" mind set, another way to put this question is: what are they trying to accomplish by seeking to prove that international law is not real law? And, in semiotic terms, who are they seeking to influence and why?

A recent essay in *The American Interest* by Nicholas Rostow, who served as Chief Counsel of the National Security Council (NSC) during the administration of George H. W. Bush and subsequently as Legal Adviser of the U.S. Mission to the U.N. during the administration of George W. Bush, points to the answer to this question. According to Rostow:

[C]riticism of the United States on international law grounds is especially notable because of the very nature of the United States as a country: the United States is defined by law. Its oaths of citizenship and office holding are pledges to the Constitution, not to a flag, not to a territory, not to the mother or fatherland, and, of course, not to a sovereign. The law defines who an American is, and it binds each of us to every other.

⁶⁸ Golove, *supra* note 59, at 348 (citing as an example GOLDSMITH & POSNER, *supra* note 1, at 49–50).

⁶⁹ GOLDSMITH & POSNER, *supra* note 1, at 90.

⁷⁰ *Id.* at 165.

That is part of the reason why the United States cannot long sustain foreign policies at odds with international law: In the end, Americans will not support them. The American people ask “Is it legal?” before they ask any other question about foreign policy actions short of self-defense against direct aggression.⁷¹

Rostow’s observation suggests that as long as policymakers, bureaucrats, and the general public believe that compliance with international law is important, this belief will have a significant impact on State decision-making.

In his 2007 memoir *The Terror Presidency*, Goldsmith identifies himself as “part of a group of conservative intellectuals—dubbed ‘new sovereigntists’ in *Foreign Affairs* magazine—who were skeptical about the creeping influence of international law on American law.”⁷² In his 2007 book, Goldsmith reveals the underlying normative purpose behind *The Limits of International Law*. Goldsmith writes:

Many people think the Bush administration has been indifferent to wartime legal constraints. But the opposite is true: the administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because it [believed that it] had no choice.⁷³

While Special Counsel to Secretary of Defense Donald Rumsfeld, and later as Assistant Attorney General in charge of the Office of Legal Counsel, Goldsmith saw it as his mission to convince those inside the government that international rules that constrain U.S. power and thus compromise national security are not really binding.

A 2003 inter-agency memo prepared by Goldsmith, titled *The Judicialization of International Politics*, warns: “In the past quarter century, various nations, NGOs, academics, international organizations, and others in the ‘international community’ have been busily weaving a web of international laws and judicial institutions that today threatens [U.S. Govern-

⁷¹ Nicholas Rostow, *Law Abiding: Restoring America’s Global Reputation*, AM. INTEREST 81 (Jan.–Feb. 2008).

⁷² GOLDSMITH, *supra* note 3, at 21. Goldsmith states:

My academic objections to this trend were based on the need for democratic control over the norms that governed American conduct. My scholarship argued against the judicial activism that gave birth to international human rights lawsuits in U.S. courts. It decried developments in “customary international law” that purported to bind the United States to international rules to which the nation’s political leaders had not consented.

Id.

⁷³ GOLDSMITH, *supra* note 3, at 69.

ment] interests”⁷⁴ The memo continues: “The [U.S. Government] has seriously underestimated this threat, and has mistakenly assumed that confronting the threat will worsen it. . . . Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism.”⁷⁵ *The Limits of International Law* can therefore be understood as Goldsmith’s effort to bring this “anti-lawfare” argument to a wider audience.

Goldsmith recounts how when he advised White House Chief Counsel Alberto Gonzales that “[t]he President can also ignore the law, and act extralegally,” citing “honorable precedents, going back to the founding of the nation, of defying legal restrictions in time of crisis,” Gonzales “looked at me as if I were crazy.”⁷⁶ Goldsmith offers the following explanation for the Attorney General’s reaction:

The post-Watergate hyper-legalization of warfare, and the attendant proliferation of criminal investigators, had become so ingrained and threatening that the very idea of acting extralegally was simply *off the table*, even in times of crisis. The President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal.⁷⁷

Disdaining the hypocrisy enshrined in the Bush Administration’s approach, in *The Limits of International Law* Goldsmith has sought to put the idea of openly defying international law back on the table by convincing policymakers, bureaucrats, and the American public that international law is not real law but merely “a special kind of politics”⁷⁸ that can be ignored whenever government officials believe it is in the national interest to do so. Understood in this light, *The Limits of International Law* is not really a descriptive account of how international law actually works, but an effort to alter public perceptions about the importance of international law in order to expand presidential power in foreign relations.⁷⁹ According to Professor Oona Hathaway of Yale Law School, there is a necessary connection between Goldsmith and Posner’s underlying “revisionist” political agenda and their book’s methodological approach and conclusions.⁸⁰ As Professor Margaret McGuinness of University of Missouri-Columbia observes, “[t]he book cannot be viewed as separate from the authors’ broader normative

⁷⁴ GOLDSMITH, *supra* note 3, at 60.

⁷⁵ *Id.*

⁷⁶ *Id.* at 80.

⁷⁷ *Id.* at 80–81 (emphasis added).

⁷⁸ GOLDSMITH & POSNER, *supra* note 1, at 202; Posner, *supra* note 2, at 1918.

⁷⁹ Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT’L & COMP. L. 393, 421 (2006).

⁸⁰ Hathaway & Lavinbuk, *supra* note 67, at 1404.

project—a project that seeks to minimize U.S. participation in international institutions and to limit the application of international law in the United States by expanding presidential power and limiting the role of the judiciary.”⁸¹

Goldsmith and Posner are not, however, merely tilting at windmills, and their work is unlikely to be the “Alamo” of the realist school, as one commentator colorfully suggested.⁸² Rather, their venture must be viewed in the context of recognition of the power of tactical words and phrases to fundamentally alter popular attitudes and perceptions. The leading expert in this area today is Frank Luntz, a Republican political consultant, Fox News pundit, and author of *The Luntz Republican Playbook*, a strategy memo that has been widely employed by Republican political candidates.⁸³ In 1994, Luntz found through focus group research that “death tax” kindled voter resentment in a way that the phrases “inheritance tax” and “estate tax” did not.⁸⁴ He shared his findings with Republican leaders, who included the new formulation in the GOP’s “Contract with America.”⁸⁵ Soon the term “death tax” began to appear in news shows and newspaper articles and was even included in the title of the legislation that ultimately repealed the estate tax, the “Death Tax Elimination Act of 2000.” In the years since then, Luntz has spear-headed the Republican effort to frame the debate on dozens of other salient political issues through creative use of language. Examples of this include changing the phrases “oil drilling” to “energy exploration,” “tax cuts” to “tax relief,” “undocumented workers” to “illegal aliens,” “private school vouchers” to “parental choice,” “global warming” to “climate change,” “late-term abortion” to “partial-birth abortion,” and perhaps most relevant to our discussion, renaming the effort to suppress terrorism the “Global War on Terror,” dubbing “kidnapping” “extraordinary rendition,” referring to “detainees” as “unlawful enemy combatants” and calling “torture” “enhanced interrogation.”⁸⁶

⁸¹ See McGuinness, *supra* note 79, at 421 (citing Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 95 (2003); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORD. L. REV. 319 (1997)).

⁸² Spiro, *supra* note 51, at 446.

⁸³ An excerpt of the *Frank Luntz Republican Playbook*, Part X “Appendix: The 14 Words Never to Use,” was leaked and posted on the internet. See Tom Ball, *Frank Luntz Republican Playbook—Searchable Text-Version: Part X Appendix: The 14 Words Never To Use*, POL. STRATEGY.ORG, Mar. 6, 2005, <http://www.politicalstrategy.org/archives/001208.php> (providing links to downloadable PDFs) (last visited Oct. 24, 2009). See also Matt Bai, *The Framing Wars*, N. Y. TIMES MAG., July 17, 2005, at 43, available at <http://www.nytimes.com/2005/07/17/magazine/17DEMOCRATS.html>.

⁸⁴ See Ball, *supra* note 83.

⁸⁵ See *id.*

⁸⁶ *Id.*

Over the years, Democratic politicians and liberal commentators have practiced these word games as well. They have, for example, altered the moniker “pro-abortion” to “pro-choice” in the 1970s and re-branded Ronald Reagan’s missile defense initiative “Star Wars” in the 1980s. Luntz’s counterpart on the Democratic side is Professor George Lakoff of Berkeley University, best-selling author of *Don’t Think of an Elephant*, and founder of a political consulting firm known as the Rockridge Institute.⁸⁷ Lakoff has convinced the Democratic leadership that Republican success has been in part due to skilled use of loaded language, along with constant repetition, enabling the phrases to enter the everyday lexicon and thereby bias the debate in favor of conservatives. Following Lakoff’s advice, in the 2008 national elections, Democrats began referring to themselves as “progressives” instead of “liberals,” labeled the Bush Administration’s Iraq strategy “escalation” instead of “surge,” and called “deficit spending” “economic stimulus.”

In the context of international law and foreign policy, the importance of labeling can be clearly demonstrated with respect to the development and use of the euphemistic term “ethnic cleansing” as an alternative for “genocide.” Although the Genocide Convention does not generally require countries to take action to halt genocide outside their borders,⁸⁸ governments have found that the term “genocide,” with its roots in the Holocaust, has a unique power to create often irresistible public pressure on a government to act. Consequently, in order to preserve their options or excuse inaction, governments prefer to instead employ the term “ethnic cleansing” to describe mass atrocities.

While the term “ethnic cleansing” is frequently attributed as a linguistic creation of Serb leaders in 1992 to describe their policy of ridding parts of Bosnia of Muslims, in fact the term was an invention of journalists and it was propagated first by the U.S. and then by the U.N., not the Serbs. In March 1993, the State Department Office of the Legal Adviser prepared a memorandum for the Secretary of State, opining that the information in the government’s possession was sufficient to legally conclude that a one-sided, well-organized campaign of genocide was taking place in Bosnia, but Secretary of State Warren Christopher nevertheless refused to use the “the G-word.”⁸⁹ When asked while testifying before Congress, “[d]oesn’t ethnic cleansing qualify as genocide,” Secretary Christopher answered in the negative, insisting “there are atrocities on all sides” and that Bosnia was

⁸⁷ See Bai, *supra* note 83, at 43.

⁸⁸ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

⁸⁹ Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistleblowing*, 38 CASE W. RES. J. INT’L L. 567, 569 (2007).

essentially an “ethnic feud” and therefore “somewhat different from the Holocaust.”⁹⁰

In response, several mid-level State Department officials took the extraordinary step of resigning to protest the Secretary of State’s intentional obfuscation of the truth about the Bosnian atrocities, whose purpose was to allow the Administration to maintain that there was no moral or legal imperative for U.S. military intervention in Bosnia.⁹¹ Conrad Harper, the Legal Adviser at the time, recalls:

In my view it was genocide. But there were a lot of policy concerns about being that blunt, including what obligation we had under the Genocide Convention to act—so it was a tap dance. But I never had any doubt in my own mind, and I made it clear that was my view. But the Legal Adviser doesn’t make the ultimate decisions, even about characterizing something as an international crime.⁹²

A year later, while 800,000 Tutsis were being massacred by Hutus in Rwanda, the U.S. State Department similarly engaged in what genocide chronicler Samantha Power later characterized as “a two-month dance to avoid the g-word.”⁹³ A subsequently leaked Pentagon discussion paper on the unfolding crisis in Rwanda revealed the purpose behind this strategy, warning that a “[g]enocide finding could commit [the U.S. government] to actually ‘do something.’”⁹⁴ Consistent with this, in a comprehensive study covering 1990–2005, which was published in the *European Journal of Public Health*, researchers found that the term “ethnic cleansing” was frequently used by government officials and U.N. bodies instead of “genocide” to downplay urgency “leading to inaction in preventing current and future ge-

⁹⁰ Elaine Sciolino, *U.S. Goal on Bosnia: Keeping the War Within Borders*, N.Y. TIMES, May 19, 1993, at A10.

⁹¹ The resigning officials included George Kenney, Deputy head of the Bosnia Desk; Marshall Harris, head of the Bosnia Desk; Jon Western of the Intelligence and Research Bureau; and Steven Walker, the head of the Croatian Desk. See Norman Kempster, *4th U.S. Aide Quits Over Balkan Policy*, CHI. SUN-TIMES, Aug. 24, 1993, at 10 of News Section. One of the officials who resigned, Marshall Harris, told the press, “It’s genocide and the Secretary of State won’t identify it as such. That’s where we get beyond the political to the moral.” Daniel Williams, *A Third State Department Official Resigns over Balkan Policy*, WASH. POST, Aug. 24, 1993, at A1.

⁹² Conrad Harper, Remarks at the Day-Long Conference of Former Legal Advisers at the Carnegie Endowment for International Peace (Apr. 28, 2004), transcript reproduced in MICHAEL P. SCHARF AND PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIME OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* (forthcoming 2010).

⁹³ SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 359 (2007).

⁹⁴ Joanne Mariner, *Is Genocide Just a Word?*, COUNTERPUNCH.ORG, Sept. 15, 2004, <http://www.counterpunch.org/mariner09152004.html>.

nocides.”⁹⁵ Concluding that “the term ‘ethnic cleansing’ corrupts observation, interpretation, ethical judgment and decision-making,” the authors of the study argue that the Public Health community “should lead the way in expunging the term ‘ethnic cleansing’ from official use.”⁹⁶

It turned out that the Pentagon was right to be concerned about the power of the “G-word,” as the George W. Bush Administration learned the hard way ten years after the crisis in Rwanda. In June 2004, the U.S. Congress and the State Department announced their determination that the atrocities in Darfur, Sudan amounted to genocide.⁹⁷ A year later, when France and the U.K. submitted a Security Council resolution to authorize the International Criminal Court (ICC) to exercise jurisdiction over the Darfur situation, the Bush Administration realized that by having labeled the atrocities genocide it could not get away with voting against the resolution despite its opposition to the ICC.⁹⁸ As a result, subsequent to abstaining on the resolution, the Bush Administration found that it could no longer assert that the ICC was an illegitimate and inherently unfair institution, and because the power of the Security Council was now on the line, the Administration had to support efforts to compel the surrender of indicted Sudanese officials to the ICC.

Echoing the underlying premise of semiotic theory, both Luntz and Lakoff argue that the most important resource a politician or policy-maker has is the way in which people understand the world and therefore interpret the message. As Luntz puts it, “[i]t’s not what you say, it’s what people hear.”⁹⁹ Thus, Luntz and Lakoff advocate “framing,” that is, choosing the language to define a debate, which is exactly what Posner and Goldsmith have sought to accomplish through *The Limits of International Law*. At the same time that Goldsmith and Posner decline to acknowledge the ways international law may influence legal consciousness, by seeking to convince the public that it is no more “illegal” to contravene international law than it would be to disregard a non-binding letter of intent,¹⁰⁰ “they themselves are

⁹⁵ Rony Blum et al., *Ethnic Cleansing Bleaches the Atrocities of Genocide*, 18 EUR. J. PUB. HEALTH 204, 204 (2008).

⁹⁶ *Id.*

⁹⁷ Mahmood Mamdani, *The Politics of Naming: Genocide, Civil War, Insurgency*, LONDON REV. BOOKS, Mar. 8, 2007, available at <http://www.lrb.co.uk/v29/n05/mamd01.html>.

⁹⁸ Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005).

⁹⁹ See FRANK LUNTZ, WORDS THAT WORK, IT’S NOT WHAT YOU SAY, IT’S WHAT PEOPLE HEAR (2007).

¹⁰⁰ GOLDSMITH & POSNER, *supra* note 1, at 90; Posner, *supra* note 2, at 1901.

nevertheless attempting to affect legal consciousness in the United States.”¹⁰¹

George Orwell discussed the power of language to alter societal conceptions in his famous 1946 essay *Politics and the English Language*¹⁰² and then brought the theory to life in his fictional masterpiece *1984*.¹⁰³ Particularly prophetic was *1984*'s portrayal of propaganda by labeling and through re-definition of words. Thus, the “Ministry of Peace” in the novel actually deals with war, the “Ministry of Love” is in charge of torturing people, and the mandate of the “Ministry of Truth” is to revise historical records to match the government’s version of the past and to develop “Newspeak,” the government’s minimalist artificial language meant to ideologically align thought and action with the aims of the government. What Goldsmith and Posner seek to accomplish through their book is not that different from what Orwell’s fictional government sought through the use of the Newspeak concept of “Blackwhite.” Orwell described “Blackwhite” as the “loyal willingness to say black is white when Party discipline demands this. But it means also the ability to *believe* black is white, and more, to *know* black is white, and to forget that one has ever believed the contrary.”¹⁰⁴

Most neo-realists and rationalists who seek to discount the influence of international law tend to avoid even using the term “international law” or “international obligation”—preferring to speak of international “principles,” “norms,” “standards,” “precepts,” “rules,” and “procedures.”¹⁰⁵ Goldsmith and Posner’s objective is much more ambitious: they seek to reverse the meaning of the term altogether. Thus, under the Goldsmith and Posner paradigm, whenever one thinks of “binding” international legal obligations, they are expected to understand the term to actually mean “non-binding”; whenever one thinks of international “law” they are expected to understand the term to really mean international “politics.”

V. A MODERN CASE STUDY: THE OLC TORTURE MEMOS

In light of subsequent revelations, it is surprising that Goldsmith and Posner did not include the case study of the treatment of detainees in the war on terror in their book, especially since Goldsmith gives a first-hand account of the decision-making that led to the promulgation of the “White

¹⁰¹ Berman, *supra* note 60, at 1306.

¹⁰² George Orwell, *Politics and the English Language* (1946), reprinted in *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 127 (1968).

¹⁰³ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1981).

¹⁰⁴ *Id.* at 212 (emphasis in original).

¹⁰⁵ Koh, *supra* note 8, at 2625.

House Torture Memos” in his later book, *The Terror Presidency*.¹⁰⁶ Because it reflects the contemporary state of the international community and the current U.S. perceptions about the role of international law, and because there is a concrete paper trail of the legal positions of the relevant actors, the story of the Torture Memos is in many ways a better vehicle for examining the binding nature of international law than the older historic anecdotes that Goldsmith and Posner rely on in their book. The facts set forth below reflect the unanimous findings of a bi-partisan panel of twenty-five Senators following extensive hearings into the matter in the summer and fall of 2008.¹⁰⁷ In some cases, these findings are supplemented by interviews of the principal players conducted by Professor Philippe Sands,¹⁰⁸ the personal recollections of Jack Goldsmith¹⁰⁹ and John Yoo,¹¹⁰ and the commentary of two of the Legal Advisers that I interviewed for a related book project—William Taft and John Bellinger.

The story begins soon after the terrorist attacks of September 11, 2001 and the U.S. invasion of Afghanistan. Rather than vet questions related to the interpretation of international law to the legal departments of all the relevant agencies, much of the legal work related to the war on terrorism was done by a self-styled “war council,” composed of White House Counsel Alberto Gonzales, the Vice President’s Counsel David Addington, the Pentagon’s Chief Counsel Jim Haynes, and the Deputy head of the Department of Justice’s Office of Legal Counsel (OLC), and John Yoo, who Goldsmith identifies as a fellow “new sovereigntist.”¹¹¹ David Addington was reportedly the dominant force among the group,¹¹² and one high-level Bush Administration insider told Philippe Sands that “if you favored international law, you were in danger of being called ‘soft on terrorism’ by Addington.”¹¹³ Notably absent from the group were the State Department Legal Adviser, William Taft, and NSC Chief Counsel, John Bellinger, who would three years later replace Taft as State Department Legal Adviser. Since OLC had

¹⁰⁶ GOLDSMITH, *supra* note 3, at 142, 172.

¹⁰⁷ See U.S. Senate Armed Servs. Comm., *Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody*, 110th Cong. (Dec. 11, 2008), available at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf> [hereinafter *Committee Inquiry*]. The full two hundred and sixty-three page report, which was subsequently de-classified and released in May 2009, is available at: <http://levin.senate.gov/newsroom/supporting/2009/SASC.DetaineeReport.042209.pdf>.

¹⁰⁸ See PHILIPPE SANDS, *TORTURE TEAM* (2008).

¹⁰⁹ GOLDSMITH, *supra* note 3.

¹¹⁰ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 168 (2006).

¹¹¹ GOLDSMITH, *supra* note 3, at 21–22.

¹¹² SANDS, *supra* note 108, at 213.

¹¹³ *Id.*

the power to issue opinions that were binding throughout the executive branch, in coordination with the war council, John Yoo wrote opinion after opinion approving every aspect of the Bush Administration's aggressive antiterrorism efforts, giving counter-terrorism officials and personnel "the comfort of knowing that they could not easily be prosecuted later for the approved actions."¹¹⁴

John Yoo believed "the candid approach would be to admit that our old laws and policies did not address this new enemy [al-Qaeda]."¹¹⁵ On January 9, 2002, Yoo authored a key memorandum, providing legal arguments to support administration officials' assertions that the Geneva Conventions did not apply to detainees from the war in Afghanistan. On January 25, 2002, Gonzales sent a memo (ghost-written by Addington)¹¹⁶ to President Bush, which opined that the advice in the January 9th OLC memorandum was sound and that the President should declare the Taliban and al-Qaeda outside the coverage of the Geneva Conventions.¹¹⁷ This, Gonzales pointed out, would keep American interrogators from being exposed to the War Crimes Act, a 1996 law that makes it a federal crime to cause a grave breach of the Geneva Conventions or a violation of Common Article 3.¹¹⁸ Gonzales's memo described the war against terrorism as "a new kind of war" and a "new paradigm" that showed Geneva's strict limitations on questioning of enemy prisoners" to be "obsolete" and even "quaint."¹¹⁹

When he learned of the Gonzales memorandum, Secretary of State Colin Powell quickly prepared a memorandum for the White House, stating that the advantages of applying the Geneva Conventions to the Afghan detainees far outweighed those of their rejection.¹²⁰ Powell said that declaring the conventions inapplicable would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops"¹²¹ He added that it would

¹¹⁴ GOLDSMITH, *supra* note 3, at 23.

¹¹⁵ YOO, *supra* note 110, at 47. *See also id.* at 22.

¹¹⁶ Barton Gellman and Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, available at http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/ (last visited Oct. 24, 2009).

¹¹⁷ *Id.*

¹¹⁸ *See* 18 U.S.C. § 2441 (2006).

¹¹⁹ Memorandum from Alberto R. Gonzales, Counsel to George W. Bush, President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), reprinted in 37 CASE. W. RES. J. INT'L. L. 615 (2006).

¹²⁰ Memorandum from Colin Powell, Secretary of State, to Alberto R. Gonzales, Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), reprinted in 37 CASE. W. RES. J. INT'L. L. 615 (2006) [hereinafter Powell Memorandum].

¹²¹ *Id.* at 2.

“undermine public support among critical allies”¹²² An accompanying memorandum prepared by State Department Legal Adviser William Taft opined that it is important for the U.S. to confirm “that even in a new sort of conflict the United States bases its conduct on its international treaty obligations and the rule of law, not just its policy preferences.”¹²³ Despite Powell and Taft’s contrary advice, on February 7, the President signed a memorandum stating that the Geneva Conventions did not apply to the conflict and that al-Qaeda and Taliban detainees were not entitled to prisoner of war status or the protections afforded by the Third Geneva Convention.¹²⁴ Although the President’s order stated that “as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely,” the decision to replace compliance with the Geneva Conventions with a policy subject to discretionary interpretation set the stage for the serious abuses that were to follow.¹²⁵

A few months later, on August 1, 2002, John Yoo issued two OLC memos signed by his boss, Assistant Attorney General Jay Bybee.¹²⁶ The first, addressed to White House Chief Counsel Gonzales, opined that interrogators could inflict pain and suffering on detainees, up to the level caused by “organ failure” without violating the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention) and the U.S. federal statutes that implanted the Torture Convention.¹²⁷ Yoo derived his definition of torture from a completely unrelated statute that authorized benefits for emergency health conditions, using the phrase “severe pain” as a possible indicator of an emergency condition that might cause serious harm if not immediately treated.¹²⁸ Yoo’s memo also advised that under the doctrine of “necessity” the President could supersede national and international laws prohibiting torture.¹²⁹ The second August 1, 2002 OLC memo, which responded to a request from the CIA, specifically

¹²² *Id.*

¹²³ Memorandum from William H. Taft, IV, The Legal Adviser, Department of State, to Alberto R. Gonzales, Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *reprinted in* 37 CASE. W. RES. J. INT’L. L. 615 (2006).

¹²⁴ *Committee Inquiry*, *supra* note 107, at xiii.

¹²⁵ *Id.*

¹²⁶ Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§2340–2340A (Aug. 1, 2002), *reprinted in* 37 CASE. W. RES. J. INT’L. L. 615 (2006) [hereinafter Bybee Memorandum]; Letter from John Yoo, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Honorable Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* 37 CASE. W. RES. J. INT’L. L. 615 (2006) [hereinafter Yoo Letter].

¹²⁷ *See* Bybee Memorandum, *supra* note 126.

¹²⁸ *See* GOLDSMITH, *supra* note 3, at 145.

¹²⁹ *See* Bybee Memorandum, *supra* note 126.

opined that “waterboarding” did not rise to the level of torture in violation of international or domestic law.¹³⁰

Two months later, on October 11, 2002, after meeting with Gonzales, Addington, and Haynes in Cuba,¹³¹ the Commander of Guantánamo Bay, Major General Michael Dunlavey, sent a memo to the Pentagon requesting authority to use aggressive interrogation techniques that were originally designed to simulate abusive tactics used by our enemies against our own soldiers, including tactics used by the Communist Chinese to elicit false confessions from U.S. military personnel.¹³² These included “stress positions,” “exploitation of detainee fears,” “removal of clothing,” “hooding,” “deprivation of light and sound,” “deprivation of sleep,” and “waterboarding.”¹³³ Dunlavey’s memo stated that the existing techniques permitted by the Army Field Manual 34-52 had been exhausted, and that some detainees—in particular Mohammed al-Qahtani, a Saudi Arabian believed to be the twentieth 9/11 hijacker—had more information that was vital to U.S. national security.¹³⁴

Given a four-day deadline, and without access to international law books or databases, Guantánamo’s Staff Judge Advocate Lt. Col. Diane Beaver wrote an analysis justifying the legality of the techniques.¹³⁵ Lt. Col. Beaver expected that a broader legal review conducted at more senior levels would follow her own.¹³⁶ The Chairman of the Joint Chiefs of Staff General Richard Myers solicited the views of the several branches of the military.¹³⁷ All stated their opposition. The Air Force cited “serious concerns regarding the legality of many of the proposed techniques.”¹³⁸ The Chief of the Army’s International and Operational Law Division wrote that the techniques “cross the line of ‘humane’ treatment” and would “likely be considered maltreatment” under the Uniform Code of Military Justice and “may violate the torture statute.”¹³⁹ The Marine Corps stated that the requested techniques “arguably violate federal law, and would expose our service members to possible prosecution.”¹⁴⁰

¹³⁰ See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to John Rizzo, Acting General Counsel, Central Intelligence Agency, Aug. 1, 2002, *available at*: http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf.

¹³¹ See SANDS, *supra* note 108, at 63–64, 129.

¹³² *Committee Inquiry*, *supra* note 107, at xvii.

¹³³ *Id.*

¹³⁴ SANDS, *supra* note 108, at 37.

¹³⁵ See *id.* at 65.

¹³⁶ *Id.*

¹³⁷ *Committee Inquiry*, *supra* note 107, at xviii.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

State Department Legal Advisers William Taft provided the author the following account of the role his Office played during this period:

In the months following the President's decision, the Legal Adviser's Office drafted a lengthy memorandum which concluded that because our policy was to treat the al Qaeda and Taliban detainees consistent with the requirements of the Geneva Conventions, the question of whether they were entitled to this as a matter of law was moot. (This draft memo was made public by the Administration in January of 2005.) The draft also expressed the view that customary international law required that the detainees in any event be treated humanely and had certain of the rights set out in the Conventions. We thought that because it was our policy to treat the detainees consistent with the Conventions, that this was being done. It developed, however, that at the same time we were working on our memo and subsequently the Department of Justice lawyers were working separately with the lawyers at the Department of Defense to authorize certain departures from the Conventions' terms in the treatment of the detainees, particularly with regard to methods of interrogation. I and my staff were not invited to review this work and we were, indeed, unaware that it was being done

It was highly regrettable that the Legal Adviser's Office was not involved in the legal work following the decisions in February 2002. I think that we were excluded because it was suspected, in light of some of the positions we had taken, that we would not agree with some of the conclusions other lawyers in the Administration expected to reach and that we might leak information about the work to the press. It was somewhat ironic that when the fact of the work subsequently did become known, it was clear that we at least were not responsible for this because we had been excluded. I am convinced, however, that if we had been involved and our views considered, several conclusions that were not consistent with our treaty obligations under the Convention Against Torture and our obligations under customary international law would not have been reached. Later, in 2004, when we worked with the Department of Justice on the revision of the memorandum on the Torture Convention that had been withdrawn earlier in the year, we were able to reach agreement on a very respectable opinion.¹⁴¹

Having cut out the State Department Office of Legal Adviser, and ignoring the serious concerns raised by the senior lawyers of the military services, on November 27, 2002, Jim Haynes, the Pentagon's chief lawyer, and a member of the so-called "war cabinet" who had been Best Man at David Addington's wedding,¹⁴² sent a one-page memo to Secretary of De-

¹⁴¹ William Taft, E-mail Supplement to Day-Long Conference of Former Legal Advisers, Remarks at the Carnegie Endowment for International Peace, 2006, reproduced in SCHARF & WILLIAMS, *supra* note 92.

¹⁴² See SANDS, *supra* note 108, at 95.

fense Rumsfeld recommending that he approve the techniques requested by Guantánamo Bay.¹⁴³ A few days later, on December 2, 2002, Secretary Rumsfeld signed Haynes' recommendation, adding a handwritten note that referred to limits proposed in the memo on the use of stress positions: "I stand for 8–10 hours a day. Why is standing limited to 4 hours?"¹⁴⁴ By December 30, 2002, the interrogators at Guantánamo Bay were employing the extraordinary interrogation techniques—including hooding, removal of clothing, stress positions, twenty-hour interrogations, and use of dogs—on Mohammed al-Qahtani and several other detainees.¹⁴⁵

A month later, these same techniques were being used at the U.S. detention center at Bagram Airfield in Afghanistan, and after the March 2003 invasion of Iraq they migrated to the Abu Ghraib detention facility.¹⁴⁶ In his "insider's account of the war on terror," *War by Other Means*, John Yoo dismisses the migration theory as "an exercise in hyperbole and partisan smear."¹⁴⁷ According to the Senate Bi-Partisan Committee Report, however,

[t]he abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at [Guantánamo Bay].¹⁴⁸

Between mid-December 2002 and mid-January 2003, Navy General Counsel Alberto Mora spoke with Haynes three times to express his concerns about the interrogation techniques at Guantánamo Bay, opining that they constituted at a minimum, cruel and inhumane treatment and "could rise to the level of torture," and "probably will cause significant harm to our national legal, political, military, and diplomatic interests."¹⁴⁹ He prepared a memo to that effect, which he threatened to sign unless he heard definitively that the use of the techniques had been suspended.¹⁵⁰ Secretary of Defense Rumsfeld signed a memo rescinding authority for the techniques on January 15, 2003,¹⁵¹ though word of the suspension apparently never got to Afgha-

¹⁴³ *Committee Inquiry*, *supra* note 107, at xix.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at xx–xxiv.

¹⁴⁶ *Id.* at xxii–xxiii.

¹⁴⁷ YOO, *supra* note 110, at 168.

¹⁴⁸ *Committee Inquiry*, *supra* note 107, at xxiv.

¹⁴⁹ SANDS, *supra* note 108, at 140.

¹⁵⁰ *Id.* at 139–40; *Committee Inquiry*, *supra* note 107, at xxi.

¹⁵¹ *Committee Inquiry*, *supra* note 107, at xxi.

nistan or Iraq. That same day, Rumsfeld directed the establishment of a "Working Group" to review the interrogation techniques and requested another legal opinion from OLC in light of the objections that had been raised.¹⁵²

On March 14, 2003, John Yoo provided an OLC memorandum which repeated much of what the first Bybee memo had said six months earlier about the definition of torture.¹⁵³ In addition, it stated that interrogators could not be prosecuted by the Justice Department for using interrogation methods that would otherwise violate the law.¹⁵⁴ This part of the opinion can be reduced to the core proposition that, as Richard Nixon said in relation to Watergate, "if the president does it, then, that means it's legal."¹⁵⁵ The Secretary of Defense rejected the legal advice of the military services in favor of that provided by Yoo, and on April 16, 2003, authorized the use of twenty-four specific interrogation techniques for use at Guantánamo Bay.¹⁵⁶ In addition, the Secretary's memo stated that "if, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee."¹⁵⁷ Rumsfeld subsequently approved specific requests for hooding, sensory deprivation, and "sleep adjustment."¹⁵⁸

In his memoir, Goldsmith describes the role he played as head of the Department of Justice's OLC from October 2003 to June 2004 in withdrawing the controversial August 1, 2002 and March 14, 2003 OLC opinions on what constitutes prohibited acts of torture, and whether the federal torture statute would apply to military interrogations of "unlawful enemy combatants," authored by Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General John Yoo.¹⁵⁹ When his memoir was published

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at xxi-xxii.

¹⁵⁵ See Scott Horton, *A Kinder, Gentler Lawfare*, HARPER'S, Nov. 30, 2007, available at <http://www.harpers.org/archive/2007/11/hbc-90001803> (last visited Oct. 24, 2009).

¹⁵⁶ *Committee Inquiry*, *supra* note 107, at xxii.

¹⁵⁷ *Id.* at xxii.

¹⁵⁸ *Id.* at xxii-xxiii.

¹⁵⁹ GOLDSMITH, *supra* note 3, at 141-76. The Bybee-Yoo memos opined that the Geneva Conventions did not apply to "unlawful combatants" that obligations under human rights treaties do not apply to conduct outside of the territory of the U.S., and that the Torture Convention prohibited only the most extreme forms of intentionally inflicted harm, namely those causing the most severe kind of physical pain tantamount to death or organ failure or psychological forms of pressure that cause permanent or prolonged mental harm, and that this narrow ban applies only when interrogators specifically intend such harms but not when they are

in 2007, Goldsmith was anointed as a hero by the media for rescinding these Torture Memos and resigning from OLC rather than compromise his principles—actions which *Newsweek* called “a quietly dramatic profile in courage.”¹⁶⁰

Paradoxically, Goldsmith acknowledges that he did not rescind Yoo’s Torture Memos because he thought they had reached the wrong conclusions, but rather because he thought the memos “rested on cursory and one-sided legal arguments” and were “legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary.”¹⁶¹ Indeed, Goldsmith confirms that he believed extraordinary interrogation techniques can be legally justified in situations “in which the President believed that exceeding the law was necessary in an emergency, leaving the torture law intact in the vast majority of instances.”¹⁶² Notably, the 2004 OLC memo that replaced Yoo’s 2002 work contained a footnote saying that “all the interrogation methods that earlier opinions had found legal were still legal.”¹⁶³ Yoo has asserted that Goldsmith’s withdrawal of Yoo’s 2002 opinion was merely “for appearances’ sake” to divert public criticism in the immediate aftermath of the Abu Ghraib controversy. “In the real world of interrogation policy nothing had changed.”¹⁶⁴

More significantly, Goldsmith glosses over the tale of his own “Torture Memo,” a March 19, 2004 OLC memorandum that he authored, which has been described as a “roadmap to the outsourcing of torture and other forms of abuse” to Egypt, Jordan, Morocco, Saudi Arabia, Yemen, and Syria.¹⁶⁵ He also tries to downplay the fact that when Yoo wrote the OLC opinion of August 1, 2002—the memorandum that Goldsmith rescinded—Yoo also issued a second eighteen-page memorandum to the CIA

seeking information to defend the nation from harm. The memos likely led to the use of water-boarding and other notorious abuses at Abu Ghraib prison and Guantánamo Bay.

¹⁶⁰ Daniel Klaidman, Stuart Taylor Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, available at <http://www.newsweek.com/id/57101>.

¹⁶¹ GOLDSMITH, *supra* note 3, at 149, 151.

¹⁶² *Id.* at 148.

¹⁶³ YOO, *supra* note 110, at 183.

¹⁶⁴ *Id.*

¹⁶⁵ See Memorandum from Jack Goldsmith, Assistant Attorney Gen., U.S. Dep’t of Justice, to William H. Taft, IV et al., Regarding Draft Memorandum to Alberto R. Gonzales, Counsel to the President, Re: Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq (Mar. 19, 2004), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 213 (2006). The Goldsmith memo opined that it was legal for the U.S. to seize individuals from Iraq or other territory over which it exercises de facto control and transfer them for purposes of interrogation in other countries. A week after it was circulated, news broke of the use of “black sites” and a covert CIA-chartered airline which moved CIA detainees from one secret facility to another. *Id.* at 210–11.

on the same day which concluded that specific proposed techniques, including waterboarding, were compatible with international law.¹⁶⁶ Goldsmith left the memo to the CIA in place, with the effect of providing CIA personnel what Goldsmith describes as a “golden shield”¹⁶⁷ that would protect them against prosecutions under the Federal War Crimes Act¹⁶⁸ and the Federal Anti-Torture Act.¹⁶⁹

In December 2008 a bipartisan panel of twenty-five Senators unanimously concluded that former Secretary of Defense Donald Rumsfeld and several former high-level Whitehouse, Pentagon, and Justice Department lawyers bear direct responsibility for serious human rights abuses at Guantánamo Bay, Abu Ghraib, and elsewhere.¹⁷⁰ The report concludes that “senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”¹⁷¹ Specifically with respect to the responsibility of the government lawyers, the Report states: “Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation tech-

¹⁶⁶ GOLDSMITH, *supra* note 3, at 155–56. In explaining why he did not rescind the August 1, 2002 Yoo/Bybee memo to the CIA, Goldsmith writes:

And in contrast to my sense of the Defense Department techniques [which Goldsmith believed would be legally justified under proper legal analysis], I wasn't as confident that the CIA techniques [including waterboarding] could be approved under a proper legal analysis. I didn't affirmatively believe they were illegal either, or else I would have stopped them. I just didn't know yet. And I wouldn't know until we had figured out the proper interpretation of the torture statute, and whether the CIA techniques were consistent with that proper legal analysis.

Id. The August 1, 2002 Yoo/Bybee memo to the CIA was publicly released by the Obama Administration on April 19, 2009, and is available at: http://www.tpmuuckraker.talkingpointsmemo.com/2009/04/torture_memos_released.php/. A 2005 OLC Memo, which was released on the same day, documents that certain Guantánamo detainees were subjected to waterboarding as many as one hundred and eighty-three times. *See, e.g.,* Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1.

¹⁶⁷ GOLDSMITH, *supra* note 3, at 144.

¹⁶⁸ War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (2006)) (implementing U.S. obligations under the Geneva Conventions).

¹⁶⁹ Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506(a), 108 Stat. 382, 463–64 (1994) (codified as amended at 18 U.S.C. §§2340–2340B (2006)) (implementing U.S. obligations under the Torture Convention).

¹⁷⁰ Joby Warrick and Karen DeYoung, *Report on Detainee Abuse Blames Top Bush Officials*, WASH. POST, Dec. 12, 2008, at A1.

¹⁷¹ *Committee Inquiry*, *supra* note 107, at xii.

niques were legal for use during interrogations conducted by U.S. military personnel.”¹⁷²

Citing the Nuremberg-era *Alstoetter* case, Jose Alvarez, a Columbia Law School professor who had served in the Office of the Legal Adviser at the U.S. Department of State and later as President of the American Society of International Law, concluded: “when government lawyers torture the rule of law as gravely as they [Yoo, Addington, Haynes, and Goldsmith] have done here, international as well as national crimes may have been committed, including by the lawyers themselves.”¹⁷³ Jurists, the Prosecutor of the *Alstoetter* case told the Nuremberg judges in 1946, “can no more escape . . . responsibility by virtue of their judicial robes than the general by his uniform.”¹⁷⁴ The analogy here is not to the scale of the atrocities, but rather to the theory of liability. Consistent with this, human rights and civil rights organizations have called for domestic prosecution of these individuals in the U.S. under federal statutes that criminalize torture and war crimes,¹⁷⁵ and some of the victims have lodged civil suits against them in federal court.¹⁷⁶ At the same time, criminal complaints against these individuals have been filed in Spain, Germany, France, Argentina, and Sweden under “universal jurisdiction” statutes enabling them to prosecute anyone responsible for torture that is present in their territory.¹⁷⁷

¹⁷² *Id.* at xxvi–xxvii.

¹⁷³ Alvarez, *supra* note 165, at 223. According to Professor Alvarez’s critique, the authors of the OLC Memos misconstrued various U.S. treaty obligations prohibiting torture or ignored them altogether, they ignored the plain meaning of Common Article 3 of the Geneva Conventions, they turned the Convention Against Torture into the convention for certain kinds of torture when it came to actions outside the U.S., and they selectively chose non-U.S. judicial authorities to reflect conclusions concerning the severity of pain needed to constitute torture and dismissed customary law in a way that was cavalier and reckless. *See generally id.*

¹⁷⁴ 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 32 (1951).

¹⁷⁵ *See* REPORT OF THE STEERING COMMITTEE OF THE JUSTICE ROBERT H. JACKSON CONFERENCE ON PLANNING FOR THE PROSECUTION OF HIGH LEVEL AMERICAN WAR CRIMINALS (Jan. 12, 2009) (chaired by Lawrence Velvel, Dean of Massachusetts School of Law), available at <http://www.scoop.co.nz/stories/HL0901/S00123.htm> (last visited Oct. 24, 2009); Press Release, ACLU, ACLU Asks Justice Department to Appoint Independent Prosecutor to Investigate Torture (Mar. 18, 2009), http://www.aclu.org/safefree/torture/39060prs20090318.html?s_src=RSS (last visited Oct. 24, 2009) (includes text of letter to Attorney General Eric Holder from ACLU Executive Director Anthony Romero).

¹⁷⁶ Jose Padilla, the first American citizen to be designated an “unlawful enemy combatant,” represented by the Lowenstein International Human Rights Clinic at Yale Law School, has filed a suit against John Yoo for authoring the “torture memos.” *See* John Schwartz, *Judge Allows Civil Lawsuit Over Claims of Torture*, N.Y. TIMES, June 13, 2009, at A16, available at <http://www.nytimes.com/2009/06/14/us/politics/14yoo.html>.

¹⁷⁷ The Center for Constitutional Rights named Rumsfeld, Bybee, Yoo, Goldsmith and other former government lawyers in a complaint it filed in Karlsruhe, Germany. *See* Sher-

Meanwhile, in 2004, 2006, and 2008, the U.S. Supreme Court issued a trio of opinions on the detainee issue that began to swing the pendulum back in favor of international law and away from unfettered Presidential power in the war on terror. In 2004, the Court decided the case of *Rasul v. Bush*, rejecting by a six to three majority the President's contention that Guantánamo Bay was outside of the jurisdiction of U.S. courts, and ruling that detainees there must be provided access to legal assistance and given judicial review of the legality of their detention.¹⁷⁸ The Bush Administration purported to implement the *Rasul* decision by establishing a Combatant Status Review Tribunal at Guantánamo Bay to determine on a case-by-case basis the status of the Guantánamo Bay detainees.¹⁷⁹ The Combat Status Review Tribunal process did not, however, provide the detainee's assistance of counsel or any means to find or present evidence to challenge the Government's case. A few months later, when Congress passed the Detainee Treatment Act of 2005 (popularly known as the McCain amendment),¹⁸⁰ which prohibited inhumane treatment of detainees including at Guantánamo Bay, President Bush issued a signing statement in which he asserted his Constitutional authority to depart from the law when warranted by interests of national security.¹⁸¹

Next, in the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court held by a five to three majority that the military tribunals established by Executive Order to prosecute accused al-Qaeda terrorists were unlawful because their procedures "violate both the [Uniform Code of Military Justice] and the four Geneva Conventions signed in 1949."¹⁸² The Supreme

wood Ross, *Many High Bush Officials Violated Anti-Torture Laws*, AM. CHRON., Jan. 13, 2009, available at <http://www.americanchronicle.com/articles/printfriendly/87739> (last visited Oct. 24, 2009). Similar criminal complaints have also been filed against Rumsfeld and others in Argentina, France, Sweden, and most recently in Spain. Jane Mayer, *The Bush Six*, NEW YORKER, Apr. 13, 2009, at 23, available at http://www.newyorker.com/talk/2009/04/13/090413ta_talk_mayer (last visited Oct. 24, 2009).

¹⁷⁸ See 542 U.S. 466 (2004).

¹⁷⁹ Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (last visited Oct. 24, 2009).

¹⁸⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-42. To avoid the President's threatened veto, the Detainee Treatment legislation was revised before enactment to exempt the CIA from its requirements and to stipulate that detainees do not have a right to challenge their detention in U.S. court.

¹⁸¹ Press Release, George W. Bush, President's Statement on Signing of H.R. 2863 (Dec. 30, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-8.html>. John Yoo has explained the significance of the signing statement in the following terms: "McCain's amendment did not explicitly prohibit necessity or self-defense as common law defenses. Thus, under the law, these defenses will continue to exist, as they did in the earlier 1994 anti-torture law." YOO, *supra* note 110, at 200.

¹⁸² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Court confirmed that Common Article 3 of the Geneva Conventions applied to all Guantánamo detainees, whether they were Taliban or al-Qaeda.¹⁸³ “Common Article 3,” wrote the Court, “affords some minimal protection, falling short of full protection under the Conventions, to individuals . . . who are involved in a conflict ‘in the territory’ of a signatory.”¹⁸⁴ The Court reached this conclusion by looking at the official commentaries to the Geneva Convention, which confirmed its wide scope.¹⁸⁵ The Court invoked the U.S. Army’s Law of War Handbook, which described Common Article 3 as “a minimum yardstick of protection in all conflicts, not just internal armed conflicts.”¹⁸⁶ The Court also relied on decisions of the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia.¹⁸⁷

Shortly thereafter, at the urging of President Bush, the Republican-controlled Congress responded by enacting the Military Commissions Act of 2006, which provided a legislative basis for Military Commissions to try unlawful enemy combatants at Guantánamo Bay and stripped the federal courts of jurisdiction to hear suits by enemy combatants relating to any aspect of their transfer, detention, treatment, trial, or conditions of confinement.¹⁸⁸ Two years later, in the case of *Boumediene v. Bush*,¹⁸⁹ the Supreme Court declared parts of the Military Commissions Act unconstitutional, determined that the Combatant Status Review Tribunals were “inadequate,” and ruled that the two-hundred and seventy foreign detainees held for years at Guantánamo Bay have the right to appeal to U.S. civilian courts to challenge their indefinite imprisonment without charges.¹⁹⁰ Guantánamo was designed as a law-free zone, a place where the government could subject detainees to indefinite incarceration and harsh interrogation techniques without having to worry about the legality of such action. The *Boumediene* decision undercut a core rationale for keeping the detention facility off American soil. Justice Anthony Kennedy, writing for the five to four majority, acknowledged the terrorism threat the U.S. faces, but he declared, “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times.”¹⁹¹

¹⁸³ *Id.* at 631–32.

¹⁸⁴ *Id.* at 631.

¹⁸⁵ *Id.* at n.63.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See generally* Pub. L. No. 109–366, 120 Stat. 2600.

¹⁸⁹ 128 S. Ct. 2229 (2008).

¹⁹⁰ *Id.* at 2240.

¹⁹¹ *Id.* at 2277.

Over and over again, the Bush Administration had asserted “we don’t do torture.” That pretense was definitively put to rest on January 14, 2009, when Susan Crawford, the Bush Administration-appointed Convening Authority of the U.S. Military Commissions and a former Chief Judge of the U.S. Court of Appeals for the Armed Forces, announced the dropping of charges against Mohamed al-Qahtani, the detainee for whom the enhanced interrogation policy was originally designed.¹⁹² Without equivocation, Crawford declared, “[w]e tortured al-Qahtani . . . His treatment met the legal definition of torture. And that’s why I did not refer the case for prosecution.”¹⁹³

A week later, on January 20, 2009, Barack Obama was sworn in as the forty-fourth President of the U.S. Just two days into his presidency, on January 22, 2009, President Obama signed Executive Orders requiring the closure of the Guantánamo Bay facility within twelve months,¹⁹⁴ the dismantling of the CIA’s network of secret prisons around the globe,¹⁹⁵ and prohibiting the CIA from using coercive interrogation methods that deviate from the requirements of the Army Field Manual.¹⁹⁶ The Executive Order on Interrogations specifically prohibits U.S. government personnel or agents from relying on the OLC Memos in interpreting Federal criminal laws, the Convention against Torture, or the requirements of Common Article 3 of the Geneva Conventions. This changing of the guard is not the end of the story, for closing down Guantánamo will present significant challenges to the new Administration, but it is the beginning of the end.

VI. CONCLUSION

What does the case study of the torture memos tell us about the nature of international law? First, if one were to have taken what could be called a “semiotic snapshot” of the detainee story when the Torture Memos first leaked out in 2004, the perception of the U.S.’ commitment to comply with international law would be very different than the perception reflected by the legislative, judicial, and executive branch actions in 2008–2009.

Second, the case study demonstrates that to understand State interests and behavior, the State must be disaggregated into its components, and sometimes those components must be further disaggregated. Normally, the President would receive legal advice from top agency lawyers throughout the government, often with conflicting interpretations of international law.

¹⁹² Bob Woodward, *Detainee Tortured, Says U.S. Official; Trial Overseer Cites “Abusive” Methods Against 9/11 Suspect*, WASH. POST, Jan. 14, 2009, at A1.

¹⁹³ *Id.*

¹⁹⁴ Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

¹⁹⁵ Woodward, *supra* note 192.

¹⁹⁶ Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

The State Department Legal Adviser would ordinarily be among the entities advocating most forcefully for compliance with international law. In this case, however, the normal process of inclusive clearance was for a short time circumvented by a like-minded cabal of aggressive lawyers calling themselves the “war council” whose influence initially masked the considerable inter and intra-departmental disagreement and dominated detainee policy.¹⁹⁷

Eventually, both Congress and the Supreme Court inserted themselves into the question, and thereby forced the President to alter his policies in order to bring them into accord with their view of the requirements of the Torture Convention, the Geneva Conventions, and customary international law. As former State Department Legal Adviser John Bellinger recounts, the government legal offices that had been frozen out of the initial legal/policy decisions (including the State Department Office of Legal Adviser) then ended up playing an influential role in formulating the new interpretations and policies:

When I moved to the State Department with Secretary Rice in 2005, first as Senior Adviser and ultimately as Legal Adviser, I was deeply concerned by international (and domestic) perceptions that the Bush Administration not only did not believe in international law but was actively hostile towards it In the Bush Administration’s second term, [the State Department Legal Adviser] lawyers led the efforts inside the Administration to clarify and adopt a more robust legal framework for the detention, treatment, and prosecution of captured terrorists . . . [the State Department Legal Adviser] was instrumental in helping Secretary Rice persuade the rest of the Administration to move high-level al-Qaeda detainees held by the Central Intelligence Agency to Guantanamo in September, 2006, so that they could be prosecuted for their offenses, given access to counsel and the ICRC, and no longer held in undisclosed locations. [The State Department Legal Adviser] attorneys also tried hard to ensure that the CIA’s interrogation program and the President’s Executive Order applicable to it were consistent with the Detainee Treatment Act in 2005 and the *Hamdan*

¹⁹⁷ John Yoo has been quite open in explaining why the “war council” cut the State Department Office of Legal Adviser out of the decision making process concerning treatment of detainees: “The State Department and OLC often disagreed about international law. State believed that international law had a binding effect on the President, indeed on the United States, both internationally and domestically,” whereas Yoo did not hold to that view. See YOO, *supra* note 110, at 33. Rather than prove that international law was not relevant, the intentional circumvention of the State Department Legal Adviser indicates that Yoo and his fellow “war council” members believed that if the top policy makers were made aware of the State Department Legal Adviser’s views about the applicable international legal constraints they would be much less likely to approve the extraordinary interrogation tactics advocated by the “war council.”

decision in 2006, which concluded that Common Article 3 applied to the treatment of al-Qaeda detainees.¹⁹⁸

Third, consistent with institutionalist and constructivist models, the positions of the State Department Legal Adviser and his counterparts in the various branches of the armed services demonstrated that important bureaucratic players perceived the Torture Convention, Geneva Conventions, and customary international law as applicable and binding. Like the State Department Office of the Legal Adviser,¹⁹⁹ the legal offices of the various services were staffed by careerists who had internalized and absorbed a strong belief in the constraints and value of international law. George W. Bush's Chairman of the Joint Chiefs of Staff, General Richard Myers, explained the nature of this culture of compliance in the following terms: "[w]e train our people to obey the Geneva Conventions, it's not even a matter of whether it is reciprocated—it's a matter of who we are."²⁰⁰ Their views were reinforced by the positions taken by foreign bodies and international organizations. In particular, the U.N. Secretary-General, the U.N. Special Rapporteurs on Torture and Arbitrary Detention, the U.K. House of Commons, the International Committee of the Red Cross, and the Inter-American Commission on Human Rights all opined that the U.S.' treatment of detainees was inconsistent with the requirements of international law.²⁰¹

These same bureaucratic players repeatedly warned about reciprocity costs and the prospects of prosecution for violating the international prohibition against torture. Concern about bilateral retaliation adds credence to the Goldsmith and Posner paradigm but concern about long-term multilateral or systemic reciprocity suggests something else entirely. When career lawyers warn that third States will cite U.S. actions that dismiss or minimize international law as precedent in their relations with their neighbor coun-

¹⁹⁸ John Bellinger, E-mail Supplement to Day-Long Conference of Former Legal Advisers, Remarks at the Carnegie Endowment for International Peace, Mar. 7, 2009, reproduced in SCHARF & WILLIAMS, *supra* note 92.

¹⁹⁹ Davis Robinson, Remarks at Day-Long Conference of Former Legal Advisers at the Carnegie Endowment for International Peace, Apr. 1, 2004, transcript reproduced in SCHARF & WILLIAMS, *supra* note 92 (describing the State Department Legal Adviser as "the moral conscience of American foreign policy.").

²⁰⁰ SANDS, *supra* note 108, at 33. See also MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR 330–33 (2009).

²⁰¹ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on Arbitrary Detention, *Situation of Detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006); HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, HUMAN RIGHTS ANNUAL REPORT 2005, 2005–6, H.C. 574, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/574/57402.htm>; INTER-AM. COMM'N ON HUMAN RIGHTS, DETAINEES AT GUANTANAMO BAY, CUBA (Mar. 12, 2002), available at http://www.photius.com/rogue_nations/guantanamo.html; Neil Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N. Y. TIMES, Nov. 30, 2004, at A1.

tries, they are expressing concern about increasing international instability through the weakening of the rule of law at large.

While concern by government officials about criminal prosecution or civil suit under domestic statutes that also happen to incorporate international law may not constitute evidence disproving Goldsmith and Posner's claims, concern for prosecution in third States or international tribunals under the international law concept of universal jurisdiction as codified in the Torture Convention and Geneva Conventions does suggest an exogenous influence of international law. Moreover, when U.S. courts interpret international law as a limit to Executive Power, as the Supreme Court did in the *Hamdan* case, we are seeing the concrete effects of internalization of international law by a disaggregated State. Moreover, civil actions and criminal complaints cannot be so cavalierly dismissed as "lawfare" when they are brought by respected American-based lawyers groups and civil rights organizations or by allied democratic governments.²⁰²

Finally, influential players within the Executive and Legislative branches stressed the important role of reputation concerns in setting detainee policy. The bi-partisan Commission that investigated the 9/11 attacks concluded in a report in 2005 that "the U.S. policy on treating detainees is undermining the war on terrorism by tarnishing America's reputation as a moral leader."²⁰³ The 2008 Senate Bipartisan Committee Report similarly observed: "[t]he impact of those abuses has been significant."²⁰⁴ Citing polls indicating that Abu Ghraib and Guantánamo Bay have generated negative perceptions of the U.S. as a country that does not respect or abide by the rule of law by the populations and government officials of countries around the globe, including our closest democratic allies, the Committee concluded "[t]he fact that America is seen in a negative light by so many complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives."²⁰⁵ Consequently, concern about reputation is a much more important factor in determining compliance with international law than Goldsmith and Posner have acknowledged, especially in a situation where the initial decision to depart from international obligations produced such immediate and significant reputational costs.

²⁰² Neal Katyal, the lawyer who briefed and argued the *Hamdan* case before the federal courts, has described the motivation of the plaintiff's lawyers involved in litigating the detainee issue in the following terms: "This is the new civil rights movement. Now it's international law, and especially international humanitarian law." OSIEL, *supra* note 200, at 340.

²⁰³ Barbara Slavin, *Abuse of Detainees Undercuts U.S. Authority, 9/11 Panel Says*, USA TODAY, Nov. 15, 2005, at 8A.

²⁰⁴ *Committee Inquiry*, *supra* note 107, at xxv.

²⁰⁵ *Id.*

“Under our theory,” write Goldsmith and Posner in *The Limits of International Law*, “international law does not pull states toward compliance contrary to their interests”²⁰⁶ The case study of the treatment of detainees set forth above highlights the major flaws in Goldsmith and Posner’s approach, proving their theoretical model to be neither accurately descriptive nor predictive. In the final analysis, the torture memo case study has shown that international law is real because it plays a real role in shaping the conduct of States—even a superpower in times of crisis.

²⁰⁶ GOLDSMITH & POSNER, *supra* note 1, at 13.