The Dangers of Lawfare

Scott Horton

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THE DANGERS OF LAWFARE

Scott Horton*

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Édouard Manet, The Battle of the Kearsage and the Alabama, 1864.

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I. INTRODUCTION

This painting by Édouard Manet captures an important engagement of the American Civil War—a sea battle between the U.S.S. Kearsage and the C.S.S. raider Alabama, fought on June 19, 1864, off the coast of Cherbourg, France. The Alabama had, over the objections of the United States, been constructed secretly by an English firm in Merseyside and turned over to a Confederate crew. For several years, it had preyed on American shipping—clear evidence of Britain’s covert support for the Confederacy during the War, at least in the minds of many Americans. Eliminating this threat was a priority for the U.S. Navy, and when Americans learned that the Alabama had put to port at Cherbourg, the Kearsage blockaded it in the harbor. At length, the Alabama tried to fight its way out. But it was no match for the Kearsage, which won the engagement. The Alabama was sunk, and several days later, while the Kearsage was docked at Boulogne-sur-Mer, Manet visited it and began studies for his painting.

This is one of two politically themed paintings by Manet in this period. The other, of course, is the “Execution of the Emperor Maximilian” from 1867–68, which can be found in the Boston Museum of Fine Arts. We know a bit of Manet’s political sympathies at the time from his correspondence and from the recollections of his friends: he was a republican. He detested the fact that under the Emperor Napoléon III, who had betrayed the republican cause, France had sought to undermine the nascent democracies of the Americas by toppling the republic in Mexico to install the Emperor Maximilian. Further, France had covertly supported the Confederacy in the hopes that the United States, then the world’s democratic beacon,

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3 Id. at 46.
4 See Henze, supra note 1, at 96 (explaining that the Union’s “man-of-war Kearsarge” had been hunting the Alabama for many months and once word arrived that the Alabama had anchored in Cherbourg, the Kearsage rushed to confront it).
5 Id. at 97–99 (presenting a description and an account of the deadly battle that ensued between the Kearsage and the Alabama).
6 Id. at 99.
9 Id. at 29–30.
10 Id. at 37.
would be destroyed. 11 Although Manet is a realist in the strict sense, his choice of subject sends a clear message. He was celebrating the victory of the United States over the forces of slavery in one painting, just as he took pleasure in marking the final ignominious failure of Napoléon III’s Mexican escapade in the other. 12

But what does this wonderful painting have to do with the subject of lawfare? Its relevance is suggested by Mark Janis, who used it as the cover art for his recent magnificent book on the history of the U.S. engagement with international law. 13 The sinking of the Alabama and the final triumph of the Union over the Confederacy did not end the Union’s grievances about the losses America suffered from the British-built rebel raider ships, Janis reminds us. 14 At the end of the Civil War, America tallied its losses from British support for the Confederacy. Charles Sumner, then the chair of the Senate Foreign Relations Committee, demanded that Britain pay two billion dollars in damages—half the total cost to the Union of the war effort—or cede all of the newly formed Dominion of Canada to the United States. 15 Major American newspapers, led by Horace Greeley’s New York Tribune, beat the drums for war against Britain. They pointed out that America then possessed the largest and most experienced standing army in the world, and that British North America was defended by only a handful of soldiers. It would be child’s play for the Americans to simply sweep across the Great Lakes and add Canada to the United States—fulfilling a plan which, in a forgotten chapter of American history, George Washington himself had endorsed in 1775. These plans did not get very far, however.

The day was captured by other, more level-headed voices: a collection of lawyers, academics, and religious leaders who became known first as the American arbitration movement and then as the international law movement. 16 The American claims relating to the Alabama went to an arbi-

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11 See Gordon Wright, Economic Conditions in the Confederacy as Seen by the French Consuls, 7 J.S. Hist. 195, 198 (1941) (presenting the important consular presence in the South and those consuls’ support for the Confederacy).
12 See Elderfield, supra note 8, at 55–70 (presenting Manet’s work celebrating the battle between the Union ship, Kearsarge, and the Confederate ship, Alabama, which preceded Manet’s subsequent interest in Napoleon’s quest in Mexico which led to his work, the Execution of the Emperor Maximilian).
13 See Janis, supra note 7.
14 Id. at 36.
16 Janis, supra note 7, at 138 (explaining that the International Code Committee led to the establishment of the Association for the Reform and Codification of the Law of Nations, which is now known as the International Law Association); Int’l Law Ass’n, Reports of the First Conference Held at Brussels, 1873, and of the Second Conference Held at
This was a decisive step in America’s history on the world stage. First, Britain in short order ceased to be viewed as America’s hereditary enemy—in the decades to come it would be viewed as an increasingly close ally. Second, in the fifty years following the arbitration, American administrations of both parties, but principally Republicans, took the lead globally in advocating arbitration as a means of resolving differences between nations, including resolving private claims. They also led the way in the formation of the International Law Association in Brussels in 1873, and the Hague Conferences, which codified the law of nations, and particularly the law of armed conflict.

In 1913, the Judge Advocate General of the Army presented a briefing to the American Society of International Law together with posters and indices. He demonstrated that the American concept of the laws of war, as originally laid down by President Lincoln, had been converted into accepted international legal norms through effective American diplomacy pursued at The Hague and in major capitals around the world. President Theodore Roosevelt received a Nobel Peace Prize for his critical role in brokering the peace between Russia and Japan following their 1904–05 war. This is a proud legacy of American foreign policy, a legacy forged over half a cen-

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18 JANIS, supra note 7, at 136.
19 See A. G. GARDINER, THE ANGLO-AMERICAN FUTURE 12 (1920) (discussing the up-and-down relationship between Britain and the United States which always ended in sensible agreement).
20 INT’L LAW ASS’N, supra note 16, at 1 (explaining how the Alabama claims had convinced American citizens of the need to develop arbitration).
21 JANIS, supra note 7, at 138–139 (presenting the development of the 1873 Conference by Reverend Miles); see INT’L LAW ASS’N, supra note 16; see generally Shelby M. Cullom, The Second International Peace Conference Held at the Hague From June 15 to October 18, 1907, S. Doc. No. 444 (1st Sess. 1908) (discussing the development of the law of nations and the law of armed conflict).
22 Elihu Root, Am. Soc’y Int’l Law, Seventh Annual Meeting of the American Society of International Law: Francis Lieber, 7 AM. SOC’Y INT’L L. PROC. 8, 22–24 (1913) (presenting Judge Advocate General, Major General George B. Davis’ memorandum regarding the adoption by the Hague conventions of a variety of President Lincoln’s “General Orders 100” as the international laws and customs of war).
23 Id. at 8–21 (celebrating Francis Lieber’s efforts that led to the adoption of President Lincoln’s “General Orders 100” into international law by the Hague conferences).
tury and involving administrations of both parties, and a legacy that advocated the peaceful resolution of disputes through arbitration as a vital tool for the avoidance of war.

But then we come to the Bush Administration’s 2005 National Defense Strategy:

“Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism,” it states in stark Neoconservative ideological terms.\(^\text{25}\) Note the equation of “international fora, judicial processes, and terrorism.”\(^\text{26}\) In other words, turning to courts for the enforcement of legal rights, appeals to international tribunals, and terrorism are seen as the elements of a single consistent enemy strategy.

There is no way to reconcile this attitude with the one that marked American governments between Abraham Lincoln and Franklin Roosevelt. It is a categorical repudiation of a century of American policy promoting the use of international legal process as a means of resolving disputes that might mature into armed conflict. It also marks the emergence of the Neoconservative doctrine of lawfare. Their real target is international law itself. But rather than attack international law, they choose instead to go after a far juicier proxy: lawyers, especially those who work within the international process and who argue for American fidelity to that process.\(^\text{27}\) This, the Neoconservatives argue, is an effort to usurp the Constitution and undermines popular sovereignty by imposing foreign ideas on a government elected freely by the U.S. population.\(^\text{28}\)

These arguments cannot really be reconciled at all with the ideas of the Founding Fathers. The Founders spoke of a “decent [r]espect to the [o]pinions of [m]ankind” in the Declaration of Independence—an instrument that was guided by very aggressive notions of the rights of peoples against states and the obligations of states amongst one another.\(^\text{29}\) And in the Constitution, the Founders gave prominent placement to the Law of Nations.\(^\text{30}\) It was clear that in the minds of many of the Founding Fathers,


\(^{26}\) \textit{Id.}


\(^{28}\) \textit{Id.}

\(^{29}\) The Declaration of Independence para. 1 (U.S. 1776).

\(^{30}\) U.S. CONST. art. I, § 8, cl. 9.
particularly those most engaged in preparing foreign and national security policy for the fledgling nation, international law promised an essential shelter against the heavy hand of the British monarchy.\textsuperscript{31}

The Neoconservatives, however, have a totally different attitude towards international law. They believe that international law in general, and the laws of armed conflict in particular, unduly constrain the actions of America on the world stage.\textsuperscript{32} Consequently, they seek at every turn to eliminate or undermine it.\textsuperscript{33} Central to their argument is that, at least when presidents govern with Neoconservative advisors, international law imposes no meaningful limitations on their ability to act.\textsuperscript{34}

The notion of “lawfare” has been developed to buttress this attitude. “Lawfare,” as it has been applied recently, is intended to intimidate and silence lawyers; it equates them with the enemy and suggests that their arguments contain at least a seed of treason.\textsuperscript{35} Using the tactic common to authoritarian regimes around the world, the lawyers are presented as simple extensions of their clients.\textsuperscript{36} Their briefs are presented as a continuation of warfare into a courtroom, as former Bush Justice Department lawyer John Yoo has argued.\textsuperscript{37} The charge of lawfare is designed to short-circuit the

\textsuperscript{31} See Lawrence S. Kaplan, Entangling Alliances with None: American Foreign Policy in the Age of Jefferson 79–96 (1987) (discussing the development and ratification of the “Model Treaty of 1776,” which sought to use such an alliance with France as a means to defy Britain and ensure that Britain could not succeed in achieving commercial domination).


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legal process.\textsuperscript{38} It assumes the bad faith of the adversary from the outset; it counsels against engaging or answering the charges.

But if we examine the use of the “lawfare” charge in two powerful historical examples, we can discern a more troubling truth behind the label. The term was not used because the legal attack was frivolous, but rather because the government really had few solid arguments to make in its own defense. The charge of “lawfare” was brought to distract attention from the fact that a government was acting with reckless disregard for its legal duties.

II. A PERPLEXING NEOLOGISM

What does “lawfare” mean? At this point, it is confusing. I have used it in my own writings to refer to those who espouse the concept, to them as the “lawfare-theorists.”\textsuperscript{39} Major General Charles Dunlap gets credit for initiating the current American discussions, although a number of others have had a shot at it.\textsuperscript{40} Dunlap originally used it in a sometimes pejorative, sometimes positive sense.\textsuperscript{41} In a couple of later presentations, he has come to a more objective definition that accepts law as a tool used by states in pursuit of military objectives, and law as a tool used by adversaries to encumber military measures.\textsuperscript{42} His latest formulation holds that “lawfare” is a “strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”\textsuperscript{43} When the word surfaces in discussions of military doctrine, Dunlap’s usage controls. Consider, for instance, how the Department of Defense turned to a contractual approach to lock up satellite imagery of certain militarily sensitive sites around the world.\textsuperscript{44} Dunlap cites this expressly as an example of lawfare, and he means something very positive by this.\textsuperscript{45} The Pentagon is using ingenuity and dexterity within the system of civil law to accomplish a militarily significant objective. The same may be said with respect to the Pentagon’s recent deci-

\textsuperscript{38} Id.; see generally Tung Yin, Boumediene and Lawfare, 43 U. RICH. L. REV. 865 (2009) (examining whether al-Qaeda members are engaging in “lawfare” against the United States).
\textsuperscript{39} Horton, supra note 34.
\textsuperscript{41} Id.
\textsuperscript{43} Id. at 35.
\textsuperscript{44} Michael Gordon, Pentagon Corners Output of Special Afghan Images, N.Y. TIMES, Oct. 19, 2001, at B2 in Dunlap, supra note 40, at 11.
\textsuperscript{45} Dunlap, supra note 40, at 11.

The Pentagon had cleared the work for publication, the book was printed up, and then some people in the Pentagon apparently decided that the earlier review did not go far enough. Prior restraint forbade the seizure of the press run. But the Pentagon could negotiate for and buy the whole run. Again, the Pentagon is turning to the ingenuity of its lawyers to find its way out of a dilemma, this time one of its own making.

But as my earlier discussion shows, the term “lawfare” is widely used in a different sense from Dunlap’s. It is used as a pejorative concept. Brooke Goldstein of The Lawfare Project demonstrates this usage. She calls “lawfare” “the abuse of the law and legal systems for strategic political or military ends.”\footnote{“What is Lawfare?” THE LAWFARE PROJECT, http://www.thelawfareproject.org/ (last visited Nov. 27, 2010).}

She also specifically focuses on three specific categories of lawfare: (a) “Thwart and punish free speech about issues of national security and public concern”; (b) “De-legitimize the sovereignty of democratic states[;] and” (c) “Frustrate and hinder the ability of democracies to defend themselves against terrorism.”\footnote{Id.}

This matches the Neoconservative usage, limited to cases which are subjectively “bad” in the view of the user, almost always defined in terms of the interests of a particular government. Attempts by lawyers to advance the rights of their clients at the expense of the state constitute “lawfare.” The implication, often only half articulated, is that the presentation of their claims is illegitimate—an effort to take advantage of the weak underbelly of democratic society, which is unduly tolerant of frivolous lawsuits. This weakness, it argues, can and may be successfully exploited by “the enemy” using a battery of lawyers. In this coinage, lawyers filing writs for the benefit of their clients are just surrogates for enemy warriors or jihadi terrorists. The lawfare theorists are taking sharp aim at these lawyers, accusing them implicitly of disloyalty to their homeland and service as surrogate fighters for a cruel and barbaric enemy.\footnote{Horton, supra note 35. See David Luban, Lawfare and Legal Ethics in Guantanamo, 60 STAN. L. REV. 1981 (2008).} This use of lawfare assumes that our courts are weak or incapable of dealing with frivolous legal arguments.

So what does the word “lawfare” mean in American usage today? Ascertaining the meaning of a word is essentially an exercise in sociology. Those who coin a term cannot necessarily control the usage that subsequently develops. In the United States today, Dunlap’s definition has taken hold and dominates the military usage. But the Neoconservative usage has taken
broader root—“lawfare” is used to describe a legal maneuver that is, from the perspective of the speaker, abusive, and is used to further a broader hostile military agenda.

I will trace three waves of “lawfare” usage on the global stage and will examine the common traits of each.

A. Lawfare at Guantánamo

The first wave can be tied closely to the Rumsfeld Pentagon and to the 2005 National Defense Strategy I cited above. The Rumsfeld Pentagon was extremely defensive about criticisms of its radical legal policies, but its defensive strategy focused on efforts to surround themselves with silence. Only a small team of lawyers within the Administration—Jack Goldsmith dubbed them the “War Council”—even knew about these policies. Career military lawyers who would ordinarily have played a key role in shaping these policies were systematically shut out of the process. Only ideologically tested and loyal Neoconservatives were permitted to engage in these issues. Documents that have emerged out of the Justice Department show that this team advocated the creation of a special new detention facility at Guantánamo with a prime concern from the outset—that it would be beyond the reach of U.S. courts, the Red Cross, and meddlesome lawyers. In sum, the plan was to avoid the applicability of law and any kind of accountability for what transpired there.

When lawyers began to systematically assail these defenses and steadily piece together and expose the extraordinary new policies, including the use of torture and other enhanced interrogation techniques, they met with a harsh pushback from the Rumsfeld Pentagon that can be placed under the banner of “lawfare.” The habeas lawyers were tarred with ethnic slurs and accusations of homosexuality, accused of undermining national security, subjected to continual petty harassment. The Rumsfeld Pentagon made a strong effort to separate these lawyers from their livelihood—by appealing to their paying clients to abandon them over their pro bono work for Guantánamo prisoners.

A clear example of this came on January 11, 2007, when Charles D. (Cully) Stimson, the Deputy Assistant Secretary of Defense for Detainee Affairs, gave an interview to Federal News Radio, a Washington, D.C., station that targets an audience of federal employees. “I think,” said Stimson,

52 Horton, supra note 51.
53 Id.
“the news story that you’re really going to start seeing in the next couple of weeks is this: As a result of a FOIA request through a major news organization, somebody asked, ‘Who are the lawyers around this country representing detainees down there?’ and you know what, it’s shocking.”

Stimson then proceeded to give the full names of a dozen of the nation’s most prominent law firms, adding:

I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.

The following morning, the Wall Street Journal published an editorial by Neoconservative Robert L. Pollock, a member of the Journal’s editorial board, who was on several occasions invited to travel on junkets arranged by the Rumsfeld Defense Department. Pollock’s piece also attacked the law firms providing pro-bono representation to the Guantánamo detainees. Pollock quoted an unnamed “senior U.S. official,” who made the following comment: “Corporate CEOs seeing this should ask firms to choose between lucrative retainers and representing terrorists.” Similar attacks appeared simultaneously on conservative talk radio programs. The timing, placement, and language used in these attacks suggests strongly that they were closely coordinated.

In an article in July 2007, I ran through a series of petty harassments that these lawyers were subjected to, including seizure of notes and limitations on access to the clients. Techniques were used to disrupt their relationship with clients: for instance, interrogators told their clients that their lawyers were “Jews,” “Zionists,” and “homosexuals.”

But all of this serves to distract our attention from the point on which we should really focus. Just who did the Bush Administration intern at Guantánamo? The Administration continually told us that they were the

56 Id.
58 Id.
59 Id.
61 Horton, supra note 34.
62 Id.
“worst of the worst,” or the sort of people who would “gnaw their way through hydraulic cables of a jet to bring it down,” as General Richard Myers said in a characteristic moment of melodrama. But were they really? The total historical population of Guantánamo was about 800. Of this number, exactly fifteen are high-value detainees, all of them transferred to Guantánamo in September 2006 from Central Intelligence Agency (CIA) black sites. Only fifty-three were found to have participated in “hostile acts” against U.S. or allied forces. Six hundred have been released. Of the roughly 200 remaining, a large portion would be released but for diplomatic complications. Many of these prisoners are Yemenis and the U.S.’ diplomatic relationship with Yemen—where we are now fighting a secret war—remains very complicated. Of the remaining prisoners—about twenty-five percent of the historical population—most are now seeking release by way of habeas corpus. As we meet, the scorecard tally shows fifty-five cases decided, but the government has won only a total of eighteen of these cases. This is notwithstanding absolutely extraordinary efforts by the Government, with Congressional support, to “stack the deck” in favor of the Government—picking its favorite court and appeals court, with strong conservative Republican majorities, and establishing legal standards that should make the process much easier for the Government. If you run the math, you will see that the estimates initially offered by CIA and Federal Bureau of Investigation experts, and confirmed by a Seton Hall study—that probably no more than twenty percent of the prisoners actually were al-Qaeda or Ta-

66 Id.
69 WITTES & WYNE ET. AL., supra note 65, at 7 (noting the weak diplomatic relationship and security concerns).
70 See id. at 8–11 (listing those still in detention and seeking habeas petitions as of October 2009).
71 CTR. FOR CONSTITUTIONAL RIGHTS, GUANTANAMO HABEAS SCORECARD 1 (2010) (Reflects total number of habeas cases as 55, and government losses as 18, as of October 21, 2010).
liban fighters—seems to be generous. In fact, the number is not likely to run much over ten percent.

The real question that the public should be pursuing is what happened to the 800 al-Qaeda and Taliban leaders for whom Guantánamo was constructed? It is clear at this point that Pakistan’s Directorate for Inter-Services Intelligence (ISI) had been sheltering them and that the United States was furnished with so much chaff to throw them off the case. That story starts with Operation Evil Airlift. As the American campaign in Afghanistan moved quickly towards a crushing defeat of the Taliban and al-Qaeda in November 2001, the military leadership of Afghanistan took up its last redoubt in the northeastern city of Kunduz. The city was surrounded and bombarded. Then a curious plea was directed, personally from the Pakistani President, General Pervez Musharraf to Vice President Dick Cheney.

We assisted you with critical information about the movements of the Taliban, Musharraf stated. This was supplied by Pakistani attachés attached to the Taliban. They are now in Kunduz. Musharraf demanded that the United States stop its bombardment and open up an air corridor that would allow Pakistan to airlift its military advisors out of Kunduz. Overruling his military and intelligence advisors, Cheney directed that Musharraf be granted his request. The siege of Kunduz was briefly halted, and Pakistani transports ferried a precious load out of the city. Probably not less than 600 senior al-Qaeda and Taliban leaders were eva-
cuated from Kunduz in this manner shortly before it fell. Those 600 evacuees are the exact group for whom Guantánamo was constructed and which it should have held.

The bottom line here is that the cry of lawfare was designed not as a slogan for a battle over legal policies. It was intended to distract attention from a gross, unforgivable mistake made by the Bush Administration, namely, the decision to allow the evacuation from Kunduz—and to distract us from the recognition that the United States failed to apprehend Mullah Omar, Osama bin Laden, Ayman al-Zawahiri, and the other key leaders of the Taliban and Al Qaeda. Instead, we are supposed to focus on a debate between civil libertarians and national security advocates, designed to send a message that the Administration is ever zealous in the interests of our safety while civil libertarians would let free people likely to murder us in our sleep.

But the shoe belongs on the other foot. A prompt review of evidence would have sorted terrorists from those falsely imprisoned, and cleared bunks at Guantánamo for the people for whom it was built, and who have largely managed to remain free.

B. Pakistan’s Lawfare Coup

The lawfare rhetoric of the American Pentagon quickly found foreign imitators. General Pervez Musharraf, Pakistan’s strongman, had seized power in a coup d’état in 1999; he appointed himself president in June 2001. Musharraf promised that his military dictatorship would be a brief interlude and that democratic rule would be restored. In the meantime, however, he focused on building good rapport with America’s national security elite. Eight years later, Pakistan’s middle class, and its professionals in particular, pressed him relentlessly to make good on his promises to restore constitutional government. The legal profession and the judiciary came to lead this charge. Chief Justice Iftikhar Muhammad Chaudhry pressed corruption charges involving Musharraf and spoke forcefully in support of restoration of constitutional, democratic rule at a series of public events. Musharraf reacted by firing Chaudhry, and launching a repression

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85 Id.
87 Id.
89 Id.
campaign targeting the nation’s judges and lawyers.\textsuperscript{91} It reached its peak in a November 3, 2007, televised address.\textsuperscript{92}

Musharraf stated that this move was justified in order to deal with the lawfare of the Pakistani bar.\textsuperscript{93} He said that lawyers had flooded the Pakistani courts with thousands of writs on behalf of incarcerated terrorists, and that responding to these papers was severely hampering the nation’s fighting capabilities.\textsuperscript{94} In his mind, the only proper response to this lawfare was to declare a state of emergency, place the justices of the Pakistan Supreme Court under arrest, and hunt down, arrest, and beat senseless much of the leadership of the Pakistani bar.\textsuperscript{95} In a sense, Musharraf was right: the lawyers were his enemies.\textsuperscript{96} They were, however, not in support of the Taliban or al-Qaeda, which would be delighted to have a society without lawyers who speak English and quote Blackstone. They were in support of elections and a restoration of democratic rule—forcing Musharraf to live up to the pledges he had repeatedly made.\textsuperscript{97}

Musharraf reacted by attempting to link the entire legal profession to Islamist terrorists and by seeking to suppress them. Just how he did this in his speech is very revealing. He invoked the lawfare concept, and even quoted a speech by Abraham Lincoln.\textsuperscript{98} Moreover, although his speech was in Urdu, this particular passage was in English and turned to a different camera.\textsuperscript{99} He was addressing a different audience. Most of his speech was for Pakistanis, but this passage was for the foreign policy community in Washington, D.C. He was making use of the same rhetoric the Bush Administration had used, against the same target: irritating, meddling lawyers.\textsuperscript{100} Was lawfare being tapped as a justification for a coup against the Pakistani constitution—a coup that specifically targeted judges and lawyers? It looks that way to me.

But it is curious. The lawfare mantra did not work in the United States, and it did not work in Pakistan. Musharraf’s speech served to conso-

\textsuperscript{92} Id.
\textsuperscript{93} Scott Horton, \textit{Lawfare Redux \textsc{Harper’s} \textsc{Mag.}} (Mar. 12, 2010), http://www.harpers.org/archive/2010/03/hbc-90006694.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{99} Horton, supra note 93.
lidate the lawyers and the judges against him. In fact, most of the nation’s educated middle class rallied against him. The Musharraf speech found resonance only with Neoconservatives in the Bush Administration and notably with figures like Dick Cheney and John Bolton—and at this point their power was waning. Condoleezza Rice’s State Department was horrified by Musharraf’s citation of U.S. examples to justify dictatorship. It pressed for Musharraf’s departure, and President Bush took the State Department’s advice. By March a new government was formed, Musharraf was forced from power, and was soon in New York making appearances on the Daily Show and selling his latest book. The lawfare card had been played to provide cover for a military coup. But the ploy didn’t even sit well with the Bush Administration.

C. The Netanyahu Initiative

This brings us to the third wave of lawfare advocacy—associated with the newly formed Lawfare Project. I am still in the process of trying to understand this version. But whereas the first wave is geared to the protection of the Bush Administration, the second to the continuation of the Musharraf dictatorship, this one appears to be closely linked to the Likud-led Government of Benjamin Netanyahu in Israel. Any effort to challenge the policies of this government drawing on international law appears to be the focuses of complaint. Examples include: the Goldstone Report on the conflict in the Gaza strip; the efforts to use international humanitarian law to bring criminal charges against Israeli officials; the use of libel statutes to bring civil cases against persons who publish books; and articles disparaging persons for funding or financing terrorism.
Obviously, these examples, and many others cited by the Lawfare Project, cover a wide array of topics and are pursued in many different fora. The only thing that seems to link them is hostility to the Netanyahu Government. The purpose of the Lawfare Project appears not to be to engage in a discussion of the merits of any of these legal efforts, but to contend *ab initio* that all such efforts are illegitimate and that they should be ignored.

It is not really possible to review and discuss all these varied claims. But it is strange to see such dramatic claims raised about efforts—as in the case of the universal jurisdiction claims, which have not only failed, but have also led to legislative measures to curtail them in the future. That points to the essential soundness of the system. Lawyers will always try to game the system, but a sound court system is perfectly capable of handling such abuses, and the legislature, too, will take notice of them. This iteration of the lawfare concept seems focused on avoiding discussions of the underlying merits of the claims—particularly claims that Israel violated the law of armed conflict.

But on this point, I think that John Stuart Mill provides the proper answer. 109 A democracy should never fear justifying its actions on the public stage, and it should never shrink in fear from answering its critics. 110 It draws its legitimacy from a democratic mandate, after all. But in the end a democracy is a government by men, and men may make mistakes and may violate the laws of armed conflict. 111 Wars seldom transpire without such violations. 112 It is common to argue that claims of violations are just a propaganda technique, but that alone is not a satisfactory answer. 113 A nation that is serious about upholding its obligations must be prepared to critically and carefully review its own conduct, just as it raises charges against its adversary. But the lawfare claim seems linked to a state of simple denial. It may have some limited resonance with a government’s core constituency, but it is not likely to persuade a broader audience.

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110 *Id.* at 34.
111 *Id.* at 34–35.
112 *Id.* at 35.
113 *Id.*
III. CONCLUSION

This is the ultimate danger of lawfare. It is a dangerous domestic political game that promotes an attitude of contempt towards important, earnest obligations. That attitude will never serve a democracy in the long run.