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INTERNATIONAL LAW IN CRISIS:  
A QUALITATIVE EMPIRICAL CONTRIBUTION TO  
THE COMPLIANCE DEBATE

*Michael P. Scharf\**

ABSTRACT

*In the aftermath of the terrorist attacks of September 11, 2001, Professors Jack Goldsmith and Eric Posner published *The Limits of International Law*, a potentially revolutionary book that employs rational choice theory to argue that international law is really just “politics” and does not render a “compliance pull” on State decision-makers. Critics have pointed out that Goldsmith and Posner’s identification of the role of international law in each of their case studies is largely conjectural, and that what is needed is qualitative empirical data that identifies the international law-based arguments that were actually made and the policy-makers’ responses to such arguments. In an effort to fill this gap, with the support of a Carnegie Corporation grant, the author convened a series of meetings and exchanges with the ten living former State Department Legal Advisers to discuss the influence of international law in the formulation of foreign policy during times of crisis. This Article reviews the scholarly debate about the nature of international legal obligation, presents the*

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*results of the Legal Advisers' meetings, and provides an in depth examination of a modern case study involving the treatment of detainees in the war on terror which highlights the importance of these findings.*

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.

—Ambassador John Bolton<sup>1</sup>

## INTRODUCTION

The purpose of this Article is to ascertain the influence of international law in the formation of American foreign policy in times of crisis, using qualitative empirical data provided by a first-ever day-long meeting the author convened of all of the living former State Department Legal Advisers. While the author was working on this project, Professor Jack Goldsmith of Harvard Law School and Professor Eric Posner of University of Chicago Law School published *The Limits of International Law*,<sup>2</sup> a potentially revolutionary work<sup>3</sup> that 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.<sup>4</sup> In an age in which a growing number of academicians and even high level government officials deny there is truly such a thing as binding international law, an understanding of the role that the State Department Legal Advisor (L)<sup>5</sup> and international law

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<sup>1</sup> 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 United Nations during the George W. Bush Administration).

<sup>2</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>3</sup> 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. Edward Swaine, *Restoring and (Risking) Interest in International Law*, 100 *AM. J. INT’L L.* 259 (2006). University of Maryland Law Professor David Gray has opined that Goldsmith and Posner’s views “are sure to become standard currency in international law theory and practice.” David Gray, *Rule-Skepticism, “Strategery,” and the Limits of International Law*, 46 *VA. J. INT’L L.* 563, 583 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 2).

<sup>4</sup> GOLDSMITH & POSNER, *supra* note 2, at 90; *see also* Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 *STAN. L. REV.* 1901 (2003).

<sup>5</sup> “L” is the name by which the State Department Legal Adviser is known throughout the U.S. government. It is also the name of his office, which includes over 170 Attorney-Advisers stationed in Washington, D.C. and abroad. While L may be little known outside government circles, the importance of the office is considerable: virtually no major foreign policy decision can be made without first receiving L’s “clearance,” and no delegation can be sent to an international negotiation or international organization without a representative of L. Just as the Department of Justice Office of Legal Counsel (OLC) serves as the government’s authority on constitutional and

have played in shaping contemporary American foreign policy is more important now than ever before.

In their quest to analyze the impact of international law in America's response to major world events, scholars such as Goldsmith and Posner predictably pore over historic documents chronicling the details of a given crisis. Yet, viewing a crisis from the outside of an opaque box in this way presents a woefully incomplete and often misleading picture. For what John Chipman Gray wrote in 1927 remains true today: "On no subject of human interest, except theology, has there been so much loose writing and nebulous speculation as on International Law."<sup>6</sup> To fill this void, many commentators have opined that what is needed is qualitative empirical data that traces the contribution of the key individuals and the arguments they made from the genesis of the international dispute to its resolution.<sup>7</sup> A logical place to start such an examination is with the U.S. government official most responsible for advocating, interpreting, and applying international law: the State Department Legal Adviser.

Thus, with the support of a Carnegie Corporation grant, in 2004, the author, working with Dr. Paul Williams of American University, convened a historic day-long meeting of all the living former State Department Legal Advisers at the Carnegie Endowment for International Peace in Washington, D.C. Fortunately, the group has enjoyed exceptionally good health and longevity, and the author was able to assemble eight former Legal Advisers covering thirty years of experience: Herb Hansel (Carter Administration), Roberts Owen (Carter Administration), Davis Robinson (Reagan Administration), Abe Sofaer (Reagan and Bush Administrations), Edwin Williamson (Bush Administration), Michael Matheson (Bush and Clinton Administrations), Conrad Harper (Clinton Administration), and David Andrews (Clinton Administration). Subsequently, William H. Taft, IV and John Bellinger, the Legal Advisers in the George W. Bush Administration, provided extensive answers to the author's questions via an exchange of emails, which brought the project up to date.

In his seminal treatise, Professor Louis Henkin wrote: "[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."<sup>8</sup> While not taking issue

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statutory questions, L serves as the government's principal expert in international legal affairs. And just as the Solicitor General argues cases for the government before the U.S. Supreme Court, L argues on behalf of the United States at the International Court of Justice and other international tribunals. See Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 57 AM. J. INT'L L. 633, 634 (1963).

<sup>6</sup> JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 127 (1921).

<sup>7</sup> Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1441 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 2).

<sup>8</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979)

with the claim itself, Professor Posner dismisses the importance of Henkin's observation by arguing that this so-called widespread compliance only reflects a coincidence of interest. Posner compares the situation to a society where "there are only a few, weak laws that already reflect people's interests—you must eat at least once every day, you must wear clothes on cold days. The observation that people in this society frequently obey the law is of little value."<sup>9</sup> To rise to Posner's challenge, the conveners asked the Legal Advisers to focus the discussion on the hardest cases—those implicating essential national interests in times of international crisis.

Over the course of the day, each Legal Adviser was asked to recount the role that his office and international law played in responding to the three most important international crises occurring during his tenure. Each presentation was followed by a series of penetrating and provocative questions and comments posed by the other Legal Advisers, as well as by the conveners (who had, themselves, served as Attorney-Advisers in L during the Bush and Clinton Administrations). The presentations and Q&A were transcribed by a court reporter, and the Legal Advisers gave the conveners permission to reproduce the complete edited transcript in a forthcoming book to be published by Cambridge University Press.<sup>10</sup>

While the qualitative empirical data relied on for this Article provides a unique perspective into the question of whether international law exerts "a compliance pull" on government officials, certain limits must be recognized regarding the value of the author's approach.<sup>11</sup> Since the accounts of the Legal Advisers were not contemporaneous with the events that they describe, for example, there is the potential that the data has been affected by selective memory and revisionism. In addition, the conference format did not permit the Legal Advisers to discuss the role of international law in *every* crisis on their watch, but rather just those each Legal Adviser considered as the major crises, thus presenting a narrower and more subjective data set; this methodological deficiency was potentially compounded by the author's selection of the quotes from the lengthy transcript of the meeting to reproduce in this Article. Moreover, while L plays an important role with respect to the

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(emphasis omitted).

<sup>9</sup> Posner, *supra* note 4, at 1916.

<sup>10</sup> MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER (forthcoming 2010).

<sup>11</sup> For background about and a critique of qualitative research methods and techniques, see MATTHEW B. MILES & A. MICHAEL HUBERMAN, QUALITATIVE DATA ANALYSIS: AN EXPANDED SOURCEBOOK (2d ed. 1994); MICHAEL QUINN PATTON, QUALITATIVE RESEARCH AND EVALUATION METHODS (3d ed. 2002); THE SAGE HANDBOOK OF QUALITATIVE RESEARCH (Norman K. Denzin & Yvonna S. Lincoln eds., 3d ed. 2005).

U.S. government's interpretation and application of international law, there are other legal officers within the bureaucracy (such as at the White House, the National Security Council (NSC), the Department of Defense, the Department of Justice, and the Commerce Department), whose influence relative to L's rises and falls depending on the type of international issue or political factors. Thus, the focus on L only tells part of the story within a disaggregated government. Finally, the data is admittedly U.S.-centric, though the Article also draws from a panel of foreign ministry legal advisers from several different countries that the author organized in 2005 in an effort to add comparative insights to this project.

In discussing the role of international law during times of crisis, five fundamental questions about the nature of international law and the role of the Legal Adviser emerged from the day-long colloquy and subsequent emails with the Legal Advisers. The first is whether international law is really law, such that it should be treated as constraining what the United States, as the world's greatest economic and military power, seeks to accomplish on the world stage. The second is whether the international legal rules relevant to a particular situation or crisis are ever clear enough to be interpreted as dictating how the U.S. Government must act. The third is whether the Legal Adviser has a duty to oppose policies or proposed actions that conflict with international law in those situations where such conflict is objectively manifest. The fourth is whether the position taken by the Legal Adviser is seen as influential, if not controlling, within the government in such situations. And the fifth is whether international law is generally seen by the Legal Advisers to advance or to hinder the U.S. government's interests in times of crisis.

Before addressing these questions, the Article begins with a review of the scholarly debate about the nature of international legal obligation. This is followed by a discussion of the results of this study, as well as a modern case study involving the treatment of detainees in the war on terror which highlights the importance of these findings.

## I. 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 meaning of signs, symbols, and language is constructed and understood.<sup>12</sup> Umberto Eco made a wider audience aware of semiotics through several notable books including his best-selling novel, *The Name of the Rose*, which includes applied semiotic operations.<sup>13</sup> 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 . . . .”<sup>14</sup> Although not himself a semiotician, Oliver Wendell Holmes captured the essence of semiotics when he famously observed: “The life of the law has not been logic[;] it has been experience.”<sup>15</sup>

This Part therefore begins by examining the development of the major schools of compliance theory in the context of their historic setting and with reference to the relevant interpretive communities. Though scholars writing on this subject often perceive or present themselves as pure scientists examining the question solely in the abstract, the field is more akin to applied science and the conscious or subconscious agendas of those writing in it are comprehensible only in

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<sup>12</sup> See 5 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE: PRAGMATISM AND PRAGMATICISM (Charles Hartshorne & Paul Weiss eds., 1935).

<sup>13</sup> UMBERTO ECO, THE NAME OF THE ROSE (1983); UMBERTO ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE (1984); UMBERTO ECO, A THEORY OF SEMIOTICS (1976).

<sup>14</sup> Wouter Werner, *The Unnamed Third: Roberta Kevelson's Legal Semiotics and the Development of International Law*, 12 INT'L J. SEMIOTICS L. 309, 309 (1999); see also Susan W. Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89, 92 (1986) (“Legal practice is a general exercise in interpretation.”).

<sup>15</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW I (Dover 1991) (1881).

light of the background events and developments at the time of their publications and an understanding of the audience they are seeking to influence. With this in mind, the Article then focuses on the contemporary debate, while probing the underlying motivations of the major participants and their perceptions of the community that they are trying to influence with their arguments.

#### A. *Compliance Theory in Historical Context*

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.<sup>16</sup> 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.<sup>17</sup> The first was “an Austinian positivistic realist strand,” which held that nations never obey international law because it is not really law.<sup>18</sup> The second was a “Hobbesian utilitarian, rationalistic strand” which held that nations sometimes follow international law, but only when it serves their self-interest to do so.<sup>19</sup> 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.<sup>20</sup> The fourth was a Bentham “process-based strand,” which held

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<sup>16</sup> Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENVER J. INT'L L. & POL'Y 373, 375 n.20 (2003) (“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.”).

<sup>17</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2613 (1997).

<sup>18</sup> *Id.* at 2611; *see also* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 127, 201 (Weidenfeld & Nicolson 1954) (1832).

<sup>19</sup> Koh, *supra* note 17, at 2611; *see also* ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 58-59, 112-25 (1947) (discussing the contributions of Thomas Hobbes and other early positivists).

<sup>20</sup> Koh, *supra* note 17, at 2611; *see also* Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795), *reprinted in* PERPETUAL PEACE AND OTHER ESSAYS 107 (Ted Humphrey trans., 1983).

that nations are induced to obey from the encouragement and prodding of other nations through a discursive legal process.<sup>21</sup> 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 United Nations 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 on Tariffs and Trade, which ultimately led to the creation of the World Trade Organization.<sup>22</sup> 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.<sup>23</sup>

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 United States) “an image of international law as Weimar law writ large[:] formalistic, moralistic, and unable to influence the realities of international life.”<sup>24</sup> 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: “[T]he belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints [is an approach that] runs like a red skein through our foreign policy of the last fifty years.”<sup>25</sup>

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

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<sup>21</sup> 2 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 538, 540, 552-54 (John Bowring ed., 1843).

<sup>22</sup> Koh, *supra* note 17, at 2615.

<sup>23</sup> 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](https://www.ucl.ac.uk/laws/mishcon/docs/Mishcon_2005_Sands.pdf).

<sup>24</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 471 (2001).

<sup>25</sup> GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 95 (1951).

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.<sup>26</sup> 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.<sup>27</sup> The process approach was later refined by Harvard Law Professors Henry Steiner and Detlev Vagts and Yale Law Professor Harold Koh. This approach includes, 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.<sup>28</sup>

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 of 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.<sup>29</sup> At heart, the regime 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. N.Y.U. Law Professor Thomas Frank sought to answer the question, “Why do powerful nations obey powerless rules?,” in his path-breaking *The Power of Legitimacy Among Nations*.<sup>30</sup> Frank’s

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<sup>26</sup> 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. Koh, *supra* note 17, at 2623.

<sup>27</sup> 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) (containing cases and materials demonstrating the “legal process” approach).

<sup>28</sup> HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, *TRANSNATIONAL LEGAL PROBLEMS* (4th ed. 1994).

<sup>29</sup> *See* *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983); ROBERT O. KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY* (1989).

<sup>30</sup> THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3 (1990).

answer: “Because they perceive the rule and its institutional penumbra to have a high degree of legitimacy.”<sup>31</sup> According to Frank, it is the legitimacy of the process that “exerts a pull to compliance.”

The end of the Cold War and the collapse of the Soviet Union in 1989 had a significant effect 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, conflict 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 United States 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.<sup>32</sup> During this decade, scholarly writing about compliance with international law featured four prevailing views.

The first 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,<sup>33</sup> Duncan Snidal,<sup>34</sup> Kenneth Abbott,<sup>35</sup> and John Setear<sup>36</sup> 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 component parts, and incorporating notions of long-term as well as short-term interests.

The second 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).<sup>37</sup> Slaughter and other liberal theorists

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<sup>31</sup> *Id.* at 25.

<sup>32</sup> JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 7 (2004).

<sup>33</sup> Robert O. Keohane, Jr., *International Relations and International Law: Two Optics*, Sherrill Lecture at Yale Law School (Feb. 22, 1996), *quoted in* Koh, *supra* note 17, at 2632 n.171.

<sup>34</sup> Duncan Snidal, *Coordination Versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 *AM. POL. SCI. REV.* 923 (1985).

<sup>35</sup> Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335 (1989).

<sup>36</sup> 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).

<sup>37</sup> Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT’L L.* 503 (1995).

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, 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.<sup>38</sup> 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 approach was a refurbishment of the Harvard/New Haven “institutionalist approach,” as embodied in works by Abram and 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.”<sup>39</sup> 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 sophistication to process theory by explaining how and why States internalize the constraining norms through judicial incorporation, legislative embodiment, and executive acceptance.<sup>40</sup> 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. 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

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<sup>38</sup> THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 17-19 (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 (1989).

<sup>39</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 32-33, 197 (1995).

<sup>40</sup> Koh, *supra* note 17, at 2602-03, 2641.

internalized obedience.<sup>41</sup>

### B. *The Compliance Debate after 9/11*

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 United States launched a “preventive war” against Iraq that was widely viewed outside the United States as unjustifiable under international law and then implemented policies regarding the detention and treatment of suspected terrorists that were harshly criticized 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 United Nations, John Bolton, said:

It 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.<sup>42</sup>

The term “lawfare” was coined,<sup>43</sup> and the Bush Administration’s official National Defense Strategy compared the use of international “judicial processes” to terrorism, concluding that both are “strateg[ies] of the weak” that threaten “[o]ur strength as a nation state.”<sup>44</sup> 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 Guantanamo Bay.<sup>45</sup>

It was in this context that Harvard Law Professor Jack Goldsmith, who had served as Assistant Attorney General and head of the

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<sup>41</sup> *Id.* at 2655-56.

<sup>42</sup> Samantha Power, *Boltonism*, NEW YORKER, Mar. 21, 2005, at 23, available at [http://newyorker.com/archive/2005/03/21/050321ta\\_talk\\_power](http://newyorker.com/archive/2005/03/21/050321ta_talk_power).

<sup>43</sup> The term was apparently coined by Major General Charles J. Dunlap, Jr.—at a speech at Harvard’s Carr Center in 2001—who now defines it as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.” Major General Charles J. Dunlap, Jr., *Lawfare Today: A Prospective*, YALE J. INT’L AFFAIRS, Winter 2008, at 146, 146. 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, at 74, 74, available at <http://www.harpers.org/archive/2007/07/0081595>.

<sup>44</sup> U.S. DEP’T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 6 (2005), available at [http://www.defenselink.mil/news/Apr2005/d20050408\\_strategy.pdf](http://www.defenselink.mil/news/Apr2005/d20050408_strategy.pdf).

<sup>45</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

Department of Justice's (DOJ) Office of Legal Counsel (OLC) 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.<sup>46</sup> 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?*,<sup>47</sup> 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."<sup>48</sup> 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.<sup>49</sup>

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," 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. 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. The third model, "cooperation," applies to situations in which States reciprocally refrain from activities that would otherwise be in their short-term self-interest in order to reap larger long-term benefits. 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.

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

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<sup>46</sup> GOLDSMITH & POSNER, *supra* note 2.

<sup>47</sup> Posner, *supra* note 4, at 1918.

<sup>48</sup> GOLDSMITH & POSNER, *supra* note 2, at 43.

<sup>49</sup> *Id.* at 225.

powers, and domestic sovereignty.<sup>50</sup>

In *The Terror Presidency*, a 2007 memoir of his days as one of the Bush Administration's top lawyers, Goldsmith candidly 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.<sup>51</sup>

While Special Counsel to Secretary of Defense Donald Rumsfeld, and later as Assistant Attorney General in charge of the OLC, 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 on "the judicialization of international politics,"<sup>52</sup> 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. government] interests."<sup>53</sup> 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."<sup>54</sup> *The Limits of International Law* can therefore be understood as Goldsmith's effort to bring this "anti-lawfare" argument to a wider audience.

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."<sup>55</sup> Similarly, Professor Oona Hathaway of Yale Law School has concluded that there is a necessary connection

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<sup>50</sup> 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.

<sup>51</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 69 (2007).

<sup>52</sup> *Id.* at 63.

<sup>53</sup> *Id.* at 60.

<sup>54</sup> *Id.*

<sup>55</sup> Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L COMP. L. 305, 307-08 (2006).

between Goldsmith and Posner's underlying "revisionist" political agenda and their book's methodological approach and conclusions.<sup>56</sup> And as Professor Margaret McGuinness of the University of Missouri-Columbia observes: "[T]he book cannot be viewed as separate from the authors' broader normative 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."<sup>57</sup> Finally, Professor Mary Ellen O'Connell of Notre Dame warns: "A policy-maker reading the book might well conclude that compliance with international law, such as the 1949 Geneva Conventions or the Convention against Torture, is optional . . ."<sup>58</sup>

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. Their assertion that "[d]omestic law is enforced in well-ordered societies," whereas "international law is not reliably enforced,"<sup>59</sup> flies in the face of the actual data, including the fact that murder cases have only a sixty-five percent clearance rate in the United States.<sup>60</sup>

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."<sup>61</sup> 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 m.p.h. speed limit, international law may not exert a moral pull nor enjoy perfect compliance, but it does deter and constrain unlawful behavior at

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<sup>56</sup> Hathaway & Lavinbuk, *supra* note 7, at 1404.

<sup>57</sup> Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 421 (2006).

<sup>58</sup> MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* 104 (2009).

<sup>59</sup> GOLDSMITH & POSNER, *supra* note 2, at 195.

<sup>60</sup> Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445, 452 n.16 (2006).

<sup>61</sup> *Id.* at 451.

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 choose 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/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. 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.”<sup>62</sup> 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 the University of Georgia notes, under 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.”<sup>63</sup>

Goldsmith and Posner attempt to answer this criticism by observing that in any event, reputational considerations have little impact on State behavior. But Professor David M. Golove of N.Y.U. 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.”<sup>64</sup> 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

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<sup>62</sup> Kenneth Anderson, *Remarks by an Idealist on the Realism of The Limits of International Law*, 34 GA. J. INT’L & COMP. L. 253, 280-81 (2006).

<sup>63</sup> Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT’L & COMP. L. 285, 295 (2006).

<sup>64</sup> 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).

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.<sup>65</sup>

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.<sup>66</sup> 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 domain; it would not mean that reputation is irrelevant. Nor does their self-evident assertion that "a reputation for compliance will not always be of paramount concern"<sup>67</sup> mean that reputation should automatically be dismissed as inconsequential. If compliance reputation makes a difference at the margins, putting a thumb on the scale in favor of compliance, then it is neither irrelevant nor inconsequential.

A further criticism of the Goldsmith/Posner approach is that in order to fit within their simplified prisoner dilemma game theory, they begin with the assumption that the relevant actor is the "State" as a unitary player, represented by what Goldsmith and Posner call its leaders. 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 in the Judiciary Branch, and nongovernmental organizations outside the government.<sup>68</sup>

A final critique concerns Goldsmith and Posner's methodology. According to Professor Andrew T. Guzman of U.C. 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. In addition, they 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

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<sup>65</sup> Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1294 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 2).

<sup>66</sup> GOLDSMITH & POSNER, *supra* note 2, at 102.

<sup>67</sup> *Id.* at 103.

<sup>68</sup> Spiro, *supra* note 60, at 454-62; Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, LAW & CONTEMP. PROBS., Autumn 2004, at 195.

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.”<sup>69</sup>

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 will often be one and the same.”<sup>70</sup> Professor Golove observes that “Goldsmith and Posner make little effort to 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 [S]tates acted as they did.”<sup>71</sup> By employing the qualitative empirical data obtained from the day-long conference of State Department Legal Advisers and follow-up emails, this project seeks to fill the void, enabling the reader to discern which side of the debate better reflects reality.

## II. FINDINGS AND ANALYSIS

### A. *L’s View of International Law*

This Article began with five questions about the nature of international law and the role of the State Department Legal Adviser. The following answers emerged from the discourse with the ten former State Department Legal Advisers.

1. Did the Legal Advisers perceive international law to be binding law?

Since the dawn of the Cold War, there has been a rich tradition of skepticism about the “legality” of international law on both ends of the

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<sup>69</sup> Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 540 (2006) (book review) (arguing that Goldsmith and Posner misrepresent the facts in their international trade case study); see also Golove, *supra* note 64, 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).

<sup>70</sup> Hathaway & Lavinbuk, *supra* note 7, at 1416 n.35.

<sup>71</sup> Golove, *supra* note 64, at 348.

political spectrum. This Article begins with a quote from John Bolton, the U.S. Ambassador to the U.N. during the Bush Administration, who declared: "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."<sup>72</sup> None of the ten former State Department Legal Advisers would agree with that proposition. They all perceived international law as real law that is binding on the United States and operates as a constraint on policy-makers, even where there are important national security interests at stake.<sup>73</sup> Moreover, even where international law seemed in the short-term to hinder U.S. foreign policy goals, the Legal Advisers agreed that America's longer-term interests in protecting U.S. citizens abroad and in effectively conducting foreign policy counsel for policies that uphold the integrity and stability of international law.

At the same time, they acknowledged that their clients were often leery of the relevance of international law, and with few exceptions, there were no extant domestic or international institutions with authority to opine on the legality of a particular U.S. foreign policy decision. This does not mean, however, that the Legal Advisers did not perceive that there were serious consequences that flow from violating bilateral treaties, multilateral conventions, or rules of customary international law. The Legal Advisers all recognized (and advised policy-makers) that violations can engender international condemnation, strain relations with allies, and interfere with the ability of the United States to obtain international support for important policy initiatives, such as fighting international terrorism, suppressing narcotics trafficking, controlling weapons of mass destruction, and achieving fair and free trade. Moreover, the Legal Advisers recognized that when a State elects to ignore or reinterpret an existing international rule according to its own short-term interests, it runs the risk of being unable to invoke the rule in the future, to its ultimate detriment.

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<sup>72</sup> Bolton, *supra* note 1, at 48.

<sup>73</sup> As former Acting Legal Adviser Michael Matheson explained:

I agree that the use-of-force cases are rather unusual situations where typically Presidents make decisions on the basis of what they consider to be overwhelming national security needs. And I agree on the other hand, that Presidents and other foreign policy decision-makers are perfectly willing to accept that they are more constrained in other areas by international law norms. This is certainly true in economic affairs and other situations where there are treaty obligations, such as environmental obligations. So there really is a spectrum in which perhaps only on the extreme end of the spectrum does international law always win the day, but even on other parts of the spectrum, international law is a definite constraint on policy makers.

Michael Matheson, Remarks at Day-Long Conference of Former Legal Advisers at the Carnegie Endowment for International Peace (Apr. 1, 2004) [hereinafter Day-Long Conference], in SCHARF & WILLIAMS, *supra* note 10, ch. 14.

2. Are international legal rules ever clear enough to constrain policy preferences?

The Legal Advisers all stressed that the vagueness of many areas of international law provided States with a great deal of latitude in foreign affairs. This was seen to be equally true with respect to treaty provisions and unwritten customary international law. Further, as political appointees (as opposed to career civil servants or foreign service officers), most of the Legal Advisers acknowledged that where international law is unsettled or legitimately open to differing interpretations, they would naturally favor the interpretation most consonant with the course of action advocated by policy-makers. Moreover, the Legal Advisers suggested that to maintain their clout within the Department it was important for L to be seen as trying to find a solution for every difficulty rather than a difficulty for every solution. As an example of such creativity, David Andrews described the catalogue of justifications L crafted for the 1999 NATO intervention to halt ethnic cleansing in Kosovo as “putting new wine into old bottles.”<sup>74</sup>

Historically, the United States government has never taken the position that international law is not binding upon it (though some Bush Administration officials came close in opining that the Geneva Conventions were outmoded in an age of global terrorism<sup>75</sup>). Nor has the United States ever openly admitted that it has breached international law, preferring instead to cloak what others view as transgressions in the rhetoric of permissible interpretations or exceptions. There was a limit, however, to how far the Legal Advisers were willing to push the bounds of interpretation to circumvent the law.

Under the international law principle of reciprocity, “what’s good for the goose is good for the gander,” meaning that other States can use American arguments to justify their actions when roles are reversed. While Goldsmith and Posner focus solely on bilateral reciprocity, the Legal Advisers suggested that “multilateral” or “systemic” reciprocity is also of concern.<sup>76</sup> If the United States ignores or interprets away a rule of international law, the precedent will be used by other States in the international community, both with respect to their relations with the United States and with each other, thereby weakening the general rule

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<sup>74</sup> *Id.*, ch. 17.

<sup>75</sup> *E.g.*, Memorandum from Alberto R. Gonzales, White House Counsel, to U.S. President George W. Bush, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Gonzales Memorandum], available at [http://dspace.wrlc.org/doc/bitstream/2041/70952/00173\\_020125\\_001display.pdf](http://dspace.wrlc.org/doc/bitstream/2041/70952/00173_020125_001display.pdf).

<sup>76</sup> For a detailed explanation of the concept of “systemic reciprocity,” see MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 368 (2009).

of law and rendering the international system less stable. As an example, in 2008, Russia cited the precedent of the 1999 NATO bombing campaign in Serbia to halt ethnic cleansing as its legal rationale for invading the Republic of Georgia to halt violence against ethnic Russians in the province of South Ossetia.<sup>77</sup>

3. Does the Legal Adviser have a duty to oppose proposed actions that conflict with international law?

One school of thought is that it is not the Legal Adviser's job to render "impartial" advice, any more than a corporate lawyer is expected to do so. The Government wants its international lawyer to promote rather than judge the aims of the administration.<sup>78</sup> A competing school maintains that the Legal Adviser has a special or higher professional responsibility to provide a disinterested assessment because his advice is not normally tested in courts of law or by other outside checks.<sup>79</sup> The following colloquy in answer to the query, "Who did you perceive as your client?," sheds light on the answer to the question of whether the Legal Adviser has a duty to oppose proposed actions that would clearly violate international law:

*Abe Sofaer* [Reagan and Bush Administrations]: [O]ne example of an instance in my career at L where this issue of who is the client arose very dramatically was during the Iran-Contra episode. I was working to try to stop the lies that were going on—the stonewalling that was going on in the Reagan administration about Iran-Contra. . . . And Schultz was led at a meeting to ask me point-blank the question you just asked. He said, "Who do you represent, Sofaer? Are you my lawyer? Whose lawyer are you?"

And I said, "I am the lawyer of the President of the United States. He's my client and through him, the people of the United States and the Congress of the United States. . . ."

*Davis Robinson* [Reagan Administration]: I think it's a very fundamental question—and of course, if you're going to survive as Legal Adviser, the Secretary of State had better also be your client—internally, again, within the department. . . . The Legal Adviser's office for many years was viewed in the government at large as the moral conscience of American foreign policy. That may be a grandiose view of one's role, but it was impressed upon me that the Legal Adviser has got to see to the observation of all of the

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<sup>77</sup> JIM NICHOL, CONG. RESEARCH SERV., RUSSIA-GEORGIA CONFLICT IN SOUTH OSSETIA: CONTEXT AND IMPLICATIONS FOR U.S. INTERESTS 18 (Sept. 22, 2008), available at <http://fpc.state.gov/documents/organization/110841.pdf>.

<sup>78</sup> Gerald Fitzmaurice, *Legal Advisers and Foreign Affairs*, 59 AM. J. INT'L L. 72, 73 (1965).

<sup>79</sup> John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992) (book review).

international agreements, the treaties, the customary international law—and so, the client is certainly the President. I would agree with Abe that if there is a conflict between the President and the Secretary of State—and that does indeed occur (and having been the Legal Adviser to Alexander Haig, I can assure you that it occurred with some frequency . . .)—you’d better then cast your lot with the President. But then you’ve also got a duty to the Senate, which confirmed you. You’ve got a duty to the public. It’s an extremely difficult question to answer and one that Legal Advisers should lose sleep over—and I think that probably every single one of us did on occasion.

*Conrad Harper* [Clinton Administration]: . . . On a work-a-day basis, plainly the Secretary of State is the client. In the event of a fundamental disagreement between the Secretary and the Legal Adviser, then of course the Legal Adviser’s allegiance must go to the President. In the event of a fundamental disagreement with the President, then there is always of course the possibility of resignation on the one hand, but on the other there is the notion that there may be obligations to the Senate as the representative of the sovereignty—because, of course, in our system the sovereignty is with the people.

*Edwin Williamson* [Bush Administration]: I really beg to differ. I think your client is the State Department, and the person ultimately with the decision is the Secretary of State. Perhaps through the Secretary you serve the President, but I emphasize that [is] *through the [S]ecretary* . . . .

*Michael Matheson* [Bush and Clinton Administrations]: I don’t think it’s useful to think of this in terms of lawyer/client relationships. I think that lawyers in public service are public officials and they have responsibilities parallel to those [that] other public officials have. An intelligence officer has a duty to give the best reading of the facts in a situation that he can, regardless of what his clients (if you want to call them that) want to hear. It’s the same for a lawyer. He has a duty to give honest legal advice and not to change it based upon what the client may expect or desire. So I would say that in that sense, a government lawyer has a duty to the entire body of the public even though he obviously has direct working relationships with a hierarchy in his own agency.

*Conrad Harper* [Clinton Administration]: . . . Herb Wexler was very troubled by the fact that he knew, having worked in the War Department and then the Justice Department, that there had been misrepresentation at a fundamental level in the Japanese relocation cases. And for many, many years his view was that he could not speak because of the duty of confidentiality in the attorney-client privilege. But there came a time when he believed that the claims of history and justice required that he come forth—and that’s what I have in mind. At some point, depending on how serious the case is, one’s obligations may run in fact to the sovereignty.

*Herb Hansel* [Carter Administration]: I think that Mike Matheson has it right. To me, a number of different strains run through this question: who is the employer, to whom do you owe a duty[] of loyalty—but in the end, if there are disagreements up and down the line, the public interest is in the mind of the lawyer, and this applies to all lawyers that serve the public, not just at the State Department and not just the Legal Adviser. Clearly the ultimate decision has to be what's in the best interest of the public. It's important to keep in mind, as has already been said, that in 99.9% of the daily tasks, it's the Secretary of State or other officers of the Department for whom the Legal Adviser works; but ultimately it's the body of the public.

*David Andrews* [Clinton Administration]: . . . I [have to] agree with Ed . . . I [understood] my responsibilities were to the Secretary of . . . State and through her to the President. And for issues such as Conrad [Harper] mentions, those are the kinds of issues where resignation is the right path. If you have privilege and confidentiality problems, then you obviously do what Mr. Wexler did; but I think that if you feel a duty to resign, then it arises from the obligation to the people.<sup>80</sup>

When consulted at an early stage, the Legal Advisers saw their initial responsibility as providing a candid opinion of what the legal situation was, as well as spelling out the possible consequences for violating international law in the particular area and advocating policy choices that would not violate international law. Later, most of the Legal Advisers seemed quite comfortable to switch hats and play the role of advocate for the U.S. position, defending the decision made by policy-makers, even if the Legal Adviser personally thought it was at odds with international law. As Michael Matheson put it, "The Legal Adviser gives legal advice before decisions are made; he gives the best possible legal defense for the decision once it has been made; and he contributes to solving practical problems with his lawyering skills."<sup>81</sup> Even as national advocates, however, the Legal Advisers indicated that they sought to shape their arguments with an eye to interpreting rules in the manner most beneficial to the long-term and broad national interest.<sup>82</sup>

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<sup>80</sup> Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 14.

<sup>81</sup> Michael Matheson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

<sup>82</sup> In discussing the rationale L articulated for the Kosovo intervention, Michael Matheson concluded:

[W]hat this all illustrates is that although L doesn't really ever make a decision as to whether to use force or not; nonetheless, it does have a significant impact on how the decision is articulated, and that can be important in terms of what precedents are or are not created for the future. At the time, the concern was that if we articulated the broad self-defense or the humanitarian intervention rationale, it might be misused by others.

*Id.* ch. 11.

#### 4. How influential is the advice of the Legal Adviser?

There were times in each of the Legal Advisers' tenure where they advised against a course of action that they perceived to be in violation of international law. The clarity of a given international legal standard affected the degree to which each Legal Adviser was inclined to take such a position or how strongly to advocate it. Thus, the factors the Legal Advisers said they take into account in deciding whether to opine that a proposed course of action would violate international law include: the extent to which the relevant rules of international law are unambiguous, well established, and broadly accepted; as well as the extent to which an international or domestic forum exists that can pronounce judgment on the correctness of the administration's interpretation of the law in question. The Legal Advisers recognized, moreover, that the ability to claim that an act is not in violation of international law is limited by the credulity of both the domestic and international legal communities, as reflected in the public statements of governments, NGOs, international organizations, and scholars.

Generally speaking, policy-makers tended to accord substantial weight to L's legal opinions. The Legal Advisers mentioned several instances, including some cases involving questions of use of force, where policy-makers reluctantly heeded their legal advice despite policy preferences to the contrary.<sup>83</sup> Roberts Owen, for example, related the story of how in the middle of the Iranian hostage crisis, the policy-makers decided not to use force against the Iranian embassy in Washington because "Secretary Vance was a good law-abiding lawyer and, based on L's advice, he concluded that Iran's wrongdoing wouldn't justify wrongdoing by the United States."<sup>84</sup>

Abe Sofaer recalled how he successfully convinced the policy-makers not to attack Libya after it was disclosed that Libya had provided confiscated Tunisian passports to the terrorists that attacked airline passengers at the Rome and Vienna airports in 1985, because the United States had not yet publicly articulated its position that States that support terrorists would be subject to attack, and because it "had not fully exhausted non-forcible options."<sup>85</sup> In another case that same year,

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<sup>83</sup> As Abe Sofaer remarked: "I'm sure each one of us at one point or another has advised our clients not to use force in a situation and our advice was taken. Certainly it happened for me at least twice, and once at the very highest level imaginable." Abe Sofaer, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 14.

<sup>84</sup> Roberts Owen, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

<sup>85</sup> Abe Sofaer, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17. After such a warning had been issued and peaceful means exhausted,

Sofaer described how, following L's advice, President Reagan ordered U.S. fighter jets to divert an Egyptian airliner carrying the terrorist mastermind of the *Achille Lauro* hijacking to a NATO base in Italy, but "did not authorize the use of force in the event it did not comply."<sup>86</sup> Further, because the agreement governing the base precluded any non-NATO operation without Italy's consent, L advised and the President reluctantly agreed that "we had no legal alternative to turning over the terrorists" to the Italian authorities rather than seeking to transport them to the United States for prosecution.<sup>87</sup>

Conrad Harper, in turn, recounted:

While I was Legal Adviser during the spring of 1994, the United States agreed to supply the Peruvian Air Force with real-time intelligence, which ultimately resulted in the Peruvian Air Force mistakenly shooting down a civilian aircraft. My office informed the policy makers that this policy could not sustain itself under the Chicago Convention, and the practice was thereafter reluctantly discontinued.<sup>88</sup>

The importance of these incidents is manifest, for until now, scholars such as Goldsmith and Posner could only attempt to ascertain the role that international law played by examining the overt actions of the United States. The meeting of former Legal Advisers disclosed for the first time several instances in which policy-makers decided to forego the use of force as an option based on arguments that such action under the circumstances would violate international law.

In a particularly telling episode related by John Bellinger, L convinced the White House to issue a Presidential Memorandum to implement the International Court of Justice's decision in the *Avena/Medellin* case. The memo exhorted state courts to give effect to the ICJ's judgment that a new trial was necessary because the Texas authorities had not apprised the Mexican defendant of his right to consult a consular officer at the time of arrest as required by the Vienna Convention on Consular Relations. According to Bellinger:

[T]he significance of President Bush's decision cannot be overstated, given that the President was the former Governor of Texas and a supporter of the death penalty and that Mr. Medellin had been convicted of an especially grisly crime in Texas—the rape and murder of two teenage girls. Ordering review of his conviction and sentence in order to comply with a decision by an international

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however, with Sofaer's full support, the United States did launch an airstrike against Libya in response to Libyan involvement in the 1986 LaBelle Disco bombing in Germany, in which several U.S. service members were killed. *Id.* ch. 7.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Conrad Harper, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

tribunal in The Hague was not a popular decision in Texas.<sup>89</sup>

Although the strategy ultimately failed when the Supreme Court ruled that without federal legislation the President did not have the authority to implement a non-self-executing treaty and override the Tenth Amendment rights of Texas,<sup>90</sup> it is significant that the Bush Administration argued tenaciously in its briefs and during oral argument for enforcement of the ICJ judgment.

At other times, L was influential in shaping the modalities and articulating the rationale for use of force so that it would be accepted by the international community. As Michael Matheson explains:

I don't think it's realistic to think Presidents are often going to refrain from the use of force on what they consider to be essential security grounds because of the views of the Legal Adviser. On the other hand, I think there are important things that Legal Advisers *can* do with respect to the use of force. One is to see to it that the modalities used are as consistent with international law as possible. For example, the actions we took in Nicaragua, which were gratuitously in violation of international law need not necessarily have been so. Another aspect is that when the decision is made to use force, it's important what argument is made to justify that decision. There are some ways of justifying which will open up entirely new open-ended doctrines. There are others which are more consistent with past practices; the Legal Adviser can have a considerable amount of influence on what arguments are made, which in turn greatly influences what precedential effect that use of force might have.<sup>91</sup>

Davis Robinson described the 1983 "rescue mission" in Grenada as an example of this:

In our legal justification, we consciously avoided argument that might imply any weakening in the legal restraints that apply to the use of force. For example, we did not claim that we were exercising an inherent right of self-defense under the United Nations Charter. Furthermore, we did not assert any broad doctrine of humanitarian intervention.<sup>92</sup>

At the same time, the Legal Advisers recognized that L was not the government's leading voice on *all* matters of international law. This means that a study of the government's perception of international law that uses L as its focus has value but does not tell the whole story since

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<sup>89</sup> Supplement to Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17, E-mail Exchange between John Bellinger, Legal Adviser to President George W. Bush, and author (2009) (on file with author).

<sup>90</sup> *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

<sup>91</sup> Michael Matheson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 14.

<sup>92</sup> Davis Robinson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

legal offices within other government departments and agencies, including the Pentagon, the Commerce Department, the CIA, and the Department of Justice, have preeminence in certain areas of international law within their unique experience and expertise. As Abe Sofaer observed, “The fact of the matter is that American foreign policy has shifted from the State Department . . . to other agencies. As foreign policies become more specialized . . . [other agencies] have the lead in many international issues.”<sup>93</sup>

Where a significant international law-related issue came within the special purview of these other legal offices, the State Department lawyers were expected to work with their counterparts (and vice versa) through a “clearance process” in an attempt to ensure that a single legal position would emerge. Where this proved not to be possible, divergent legal opinions would ordinarily be presented to the President and Cabinet within the text of a decision memo. To maximize their legal influence, State Department Legal Advisers found that they had to be much more than gifted lawyers and administrators; they also had to be skillful and sometimes aggressive bureaucrats, unafraid to tackle the internecine turf battles that were inherent in the inter-agency process. Often the most important battle was simply to ensure that L had a proverbial “seat at the table.”

The Legal Advisers pointed out that the internal clearance procedure did not always operate in this prescribed manner, and on a handful of notable occasions L was intentionally kept out of the decision-making process, even on matters that turned entirely on interpretation of international law. This tended to happen when State Department officials from other bureaus or government officials from other departments or agencies foresaw that L would likely oppose a proposed course of action. As Davis Robinson put it: “Some policy makers will on occasion assume the following attitude: ‘Oh, let’s not involve L. First, they are likely to say no. Second, they will take forever—they are so slow. And, if you’re not careful, once they get involved, they will run away with your store.’”<sup>94</sup> The Legal Advisers mentioned the following cases in which L was cut out of the decision-making process: the 1980s mining of Nicaraguan harbors<sup>95</sup> and armed

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<sup>93</sup> Abe Sofaer, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 14.

<sup>94</sup> Davis Robinson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

<sup>95</sup> *Id.* ch. 14 (“That was a contrast with the mining of the Nicaraguan harbors where I’m sorry to say we knew absolutely nothing in advance. . . . [W]hen it comes to use of force . . . over the years, there’s been a lot [of] skepticism about including the lawyers—for example in planning covert operations. As far as I know, in a covert operation international law still applies, so if someone’s going to undertake some secret operation involving the use of force, it’s better to have the legal argument in place before undertaking it.”).

support for the “contras,”<sup>96</sup> the 1990 kidnapping of Dr. Alvarez-Machain from Mexico,<sup>97</sup> and the adoption of policies related to the treatment of “unlawful enemy combatants” detained in the aftermath of the attacks of September 11, 2001.<sup>98</sup>

The same policy-makers that cut L out of the decision-making process, however, display no hesitancy in seeking L’s assistance in crafting after-the-fact legal justifications for the decisions and actions taken. No matter his own opinion on the matter, the Legal Adviser is then asked to become advocate for the U.S. position.<sup>99</sup> As Stephen Schwebel, a former Deputy Legal Adviser who later served as President of the International Court of Justice, once remarked: “The [Legal Adviser] is always called in to pick up the pieces even if he was not influentially involved in the initial decision . . . .”<sup>100</sup> Thus, in relation to the mining of Nicaragua’s harbors, former Legal Adviser Davis Robinson said:

As it turned out, all that the lawyers could contribute was assistance in after-the-fact containment of a train wreck. I remember one Secretary of State under whom I served stating, “I have only one rigid rule and that is, don’t ever let me be blind-sided.” I can only have wished that this sensible rule had applied to L as well.<sup>101</sup>

During a roundtable discussion with foreign Legal Advisers, former U.K. Legal Adviser Sir Franklin Berman offered a comparative perspective on this problem:

Probably the most notorious incident where the U.K. Legal Adviser was deliberately cut out of the loop was the ‘56 Suez invasion. But I would say that the lessons of that experience have generally been

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<sup>96</sup> Abe Sofaer, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 7.

<sup>97</sup> *See id.* (“The *Alvarez-Machain* case is another example . . . [of] the strong correlation between disastrous policies and failure to consult in advance with the international lawyers. In the *Alvarez-Machain* case, not only was the Legal Adviser’s office not consulted, but the Justice Department didn’t even consult the White House. They went ahead and seized this doctor from Mexico in a secret operation and brought him to the United States, took the case all the way up [to] the Supreme Court, and then lost the trial. It had a negative [e]ffect on our foreign policy, and several countries required that we provide assurances that we would not kidnap citizens from their territory.”).

<sup>98</sup> SCHARF & WILLIAMS, *supra* note 10, ch. 16.

<sup>99</sup> Abe Sofaer recalled that he “privately recommended that the President adhere to the narrower interpretation of the [ABM] treaty” until the Senate consented to a broader interpretation that would not prevent the testing and development of President Reagan’s proposed Strategic Defense Initiative (also known as Star Wars). Abe Sofaer, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 7. Sofaer’s view was firmly conveyed and firmly rejected. *Id.* Sofaer was then left with the “futile” task of articulating the legal rationale for unilateral Executive Branch implementation of the new interpretation. *Id.*

<sup>100</sup> Stephen M. Schwebel, *Remarks on the Role of the Legal Adviser of the US State Department*, 2-1 EUR. J. INT’L L. 132, 134 (1991).

<sup>101</sup> Davis Robinson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

learned for the future. It is considered a cardinal sin within the U.K. Foreign Office to put up a policy submission that did not clearly recite that the Legal Adviser or his staff had been consulted, or which did not include an analysis of the legal questions which were relevant to the decision. If the submission did not contain this, then any legitimate senior official or minister would send it back for a complete analysis to know what the law stated.<sup>102</sup>

The former U.S. State Department Legal Advisers concluded that the United States would do well to adopt a similar iron-clad procedural requirement. As Davis Robinson summed up:

The main lesson that I drew from my days in L is that, if the United States Government is to realize the full benefit of the potential contribution of its international lawyers, the lawyers need to participate from the beginning of a take-off in policy and not just in a crash landing whenever things go wrong.<sup>103</sup>

Interestingly, none of the Legal Advisers said they ever seriously considered resigning from office when their legal advice was not heeded or when they were cut out of the loop, though all agreed that resignation might be necessary in an extreme case. In particular, the Legal Advisers discussed the case of U.K. Deputy Legal Adviser Elizabeth Wilmshurst, who resigned when the U.K. government decided to disregard her legal memo opining that the proposed 2003 invasion of Iraq was not lawful.<sup>104</sup> Conrad Harper remarked, "To be an effective Legal Adviser or Deputy Legal Adviser, one must recognize that the exit door must always be open. When there is a very important matter and the government refuses to follow advice that you consider to be essential, you are suppose[d] to resign."<sup>105</sup> In this regard, Roberts Owen related the story of Secretary of State Cyrus Vance's resignation to protest the Iranian hostage rescue mission that was launched over his opposition.<sup>106</sup>

##### 5. Do the Legal Advisers view international law as helpful or a hindrance?

No matter whether a particular Legal Adviser leaned more toward constructivist or political realist, they all embraced international law as

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<sup>102</sup> SCHARF & WILLIAMS, *supra* note 10, ch. 15.

<sup>103</sup> Davis Robinson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

<sup>104</sup> For background on Wilmshurst's resignation, see Paul Eastham, *Iraq: Is This the Smoking Gun?*, DAILY MAIL (London), Mar. 25, 2005, at 6.

<sup>105</sup> Conrad Harper, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 17.

<sup>106</sup> SCHARF & WILLIAMS, *supra* note 10, ch. 17.

a tool for achieving U.S. foreign policy goals. For, as Professor Louis Henkin has written, “[r]ealists’ who do not recognize the uses and the force of law are not realistic.”<sup>107</sup> At the same time, this author would add that constructivists who would approach international law as a straight jacket that precludes innovative interpretation are not constructive.

The Legal Advisers shared a number of instances where creative interpretation and use of international law furthered U.S. foreign policy aims and avoided the necessity of using force. These include L’s lead role in establishing the U.S.-Iran Claims Tribunal which was part of the deal for the release of U.S. hostages, and the Iraqi Compensation Commission and Boundary Dispute Commission which were part of the cease fire agreement in the aftermath of the 1991 Gulf War.<sup>108</sup>

In this regard, David Andrews detailed the role L played in negotiating the several international agreements and Security Council Resolutions that made it possible to try the two Libyan officials charged with blowing up Pan Am 103 before a special Scottish Court sitting in The Netherlands. This creative solution severed a thirty-year cycle of violence between the United States and Libya and facilitated the transformation of Libya from a terrorist-supporting State to a partner in the war against terrorism.<sup>109</sup>

Michael Matheson, in turn, recounted L’s pivotal role in the creation of the International Criminal Tribunal for the former Yugoslavia, the first international war crimes tribunal since Nuremberg.<sup>110</sup> It was L that came up with the idea of having the Security Council create the tribunal under its Chapter VII powers rather than seek to negotiate a treaty (as the Europeans had proposed) that would take a great deal more time and might yield unpredictable results. The Security Council had never before been used to establish a judicial body, but L succeeded in convincing the other members of the Council that such action was legitimate and would yield a better result than the treaty route.<sup>111</sup> The launch of the Yugoslavia War Crimes Tribunal in

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<sup>107</sup> HENKIN, *supra* note 8, at 337.

<sup>108</sup> Matheson explained:

The amounts claimed totaled well over \$200 million, and it was clear that the usual method by which such international claims problems are resolved (a formal case-by-case adjudication process in the adversarial mode, like the Iran-U.S. claims tribunal) would be wholly inadequate to deal with the problems presented here. So instead, the Legal Adviser’s office proposed and ultimately the Security Council agreed to an innovative system, which had a number of new features.

Michael Matheson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 9.

<sup>109</sup> SCHARF & WILLIAMS, *supra* note 10, ch. 11.

<sup>110</sup> *Id.* ch. 9.

<sup>111</sup> Conrad Harper adds:

Now there was something masquerading as something old that was in fact revolutionary—and the genius of it was that we were able to convince the world that it

1993 led to the Security Council's creation of the Rwanda Tribunal a year later and ultimately paved the way to the establishment of a permanent International Criminal Court (ICC) four years after that.

### B. *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*<sup>112</sup>

If Goldsmith and Posner and other neo-realists and rationalists recognize that international legal rules exert influence on State behavior (through concern about negative publicity, diminution of reputation, reduced international cooperation, and retaliation),<sup>113</sup> and that as a consequence States usually act in accordance with customary international law and treaty law,<sup>114</sup> then what difference does it make 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 NSC during the administration of George H.W. Bush and subsequently as Legal Adviser of the U.S. Mission to the United Nations 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

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was just what everyone had always understood should be the case. While we were operating under Chapter 7, and the Security Council had created the tribunal, nonetheless people talked about Nuremberg and Tokyo and the post WWI war crimes efforts as if they were the lineal ancestry of the Yugoslavia war crimes tribunal—when in fact of course this tribunal was something that the world had never seen before. Now, having done it once we've done it again and it really is old.

Conrad Harper, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 14.

<sup>112</sup> LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE (1871), in THE ANNOTATED ALICE: THE DEFINITIVE EDITION 213 (Martin Gardner ed., 2000) (emphases omitted).

<sup>113</sup> GOLDSMITH & POSNER, *supra* note 2, at 90.

<sup>114</sup> *Id.* at 165.

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.

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.<sup>115</sup>

Rostow’s observation suggests that as long as policy-makers, 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.”<sup>116</sup> 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[s] of crisis,” Gonzales looked at him as if he were crazy.<sup>117</sup> 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.<sup>118</sup>

Distaining the perceived hypocrisy enshrined in the Bush Administration’s approach, in *The Limits of International Law*, Goldsmith and Posner have sought to put the idea of openly defying international law back on the table, by convincing policy-makers, bureaucrats, and the American public that international law is not real

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<sup>115</sup> Nicholas Rostow, *Law Abiding: Restoring America’s Global Reputation*, AM. INTEREST, Jan.-Feb. 2008, at 81, 81.

<sup>116</sup> GOLDSMITH, *supra* note 51, 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.*

<sup>117</sup> *Id.* at 80.

<sup>118</sup> *Id.* at 81 (emphasis added).

law but merely “a special kind of politics”<sup>119</sup> 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.<sup>120</sup>

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.<sup>121</sup> 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.<sup>122</sup> 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. He shared his findings with Republican leaders, who included the new formulation in the GOP’s “Contract with America.” 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 spearheaded the Republican effort to frame the debate on dozens of other salient political issues through the 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,” “healthcare reform” to “government takeover of healthcare,” 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.”<sup>123</sup>

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<sup>119</sup> GOLDSMITH & POSNER, *supra* note 2, at 202.

<sup>120</sup> McGuinness, *supra* note 57, at 421.

<sup>121</sup> Spiro, *supra* note 60, at 446.

<sup>122</sup> An excerpt of the *Frank Luntz Republican Playbook*, “Appendix: The 14 Words Never to Use,” was leaked and posted on the internet at <http://www.politicalstrategy.org/archives/001208.php>.

<sup>123</sup> See Matt Bai, *The Framing Wars*, N.Y. TIMES, July 17, 2005, § 6 (Magazine), at 38, available at <http://www.nytimes.com/2005/07/17/magazine/17DEMOCRATS.html>; see also FRANK LUNTZ, THE LANGUAGE OF HEALTHCARE 2009 (2009), available at <http://wonkroom.thinkprogress.org/wp-content/uploads/2009/05/frank-luntz-the-language-of-healthcare-20091.pdf>; Evan R. Goldstein, *Who Framed George Lakoff?*, CHRON. HIGHER EDUC.,

Over the years, Democratic politicians and liberal commentators have practiced these word games as well, though less frequently and with less success. 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 U.C. Berkely, best-selling author of *Don’t Think of an Elephant* and founder of a political consulting firm known as the Rockridge Institute.<sup>124</sup> 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.”<sup>125</sup>

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,<sup>126</sup> 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 United States and then by the United Nations. 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 “G-word.”<sup>127</sup> When asked

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Aug. 15, 2008, at B6, available at <http://www.chronicle.com/free/v54/i49/49b00601.htm>.

<sup>124</sup> Bai, *supra* note 123.

<sup>125</sup> See *id.*; Wayne Slater, *Democrats Realizing the War That Wins Votes Is One of Words*, DALLAS MORNING NEWS, May 20, 2007, at A3.

<sup>126</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

<sup>127</sup> Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistleblowing*, 38 CASE W. RES. J. INT’L L. 567, 569 (2006-07).

while testifying before Congress, “Doesn’t ethnic cleansing qualify as genocide?,” Secretary Christopher answered in the negative, insisting that “all sides had committed atrocities” and that Bosnia was essentially an “ethnic feud” and therefore “somewhat different from the Holocaust.”<sup>128</sup>

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.<sup>129</sup> Conrad Harper, the Legal Adviser at the time, recalls:

In my view they were genocides. 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.<sup>130</sup>

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.”<sup>131</sup> A subsequently leaked Pentagon discussion paper on the unfolding crisis in Rwanda revealed the purpose behind this strategy, warning that a “Genocide finding could commit [the U.S. government] to actually ‘do something.’”<sup>132</sup> 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

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<sup>128</sup> *Id.*; see also Elaine Sciolino, *U.S. Goal on Bosnia: Keeping War Within Borders*, N.Y. TIMES, May 19, 1993, at A10.

<sup>129</sup> 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. One of the officials who resigned, Marshall Harris, told the press, “It’s genocide and the [S]ecretary of [S]tate won’t identify it as such. That’s where we get beyond the political to the moral.” Daniel Williams, *A Third State Dept. Official Resigns over Balkan Policy*, WASH. POST, Aug. 24, 1993, at A1.

<sup>130</sup> Conrad Harper, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 10

<sup>131</sup> SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 359 (Perennial 2003).

<sup>132</sup> Joanne Mariner, *Talking About Darfur: Is Genocide Just a Word?*, COUNTERPUNCH, Sept. 15, 2004 (alteration in original), available at <http://www.counterpunch.org/mariner09152004.html>.

genocides.”<sup>133</sup> Concluding that “[t]he 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.”<sup>134</sup>

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 United States Congress and the State Department announced their determination that the atrocities in Darfur, Sudan amounted to genocide.<sup>135</sup> A year later, when France and the United Kingdom submitted a Security Council resolution to authorize the ICC to exercise jurisdiction over the Darfur situation, the Bush Administration realized that having labeled the atrocities genocide it could not get away with voting against the resolution despite its opposition to the ICC.<sup>136</sup> 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, “It’s not what you say, it’s what people hear.”<sup>137</sup> Thus, they 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,<sup>138</sup> “they themselves are nevertheless attempting to affect legal consciousness in the United States.”<sup>139</sup>

George Orwell discussed the power of language to alter societal

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<sup>133</sup> Rony Blum et al., ‘Ethnic Cleansing’ Bleaches the Atrocities of Genocide, 18 EUR. J. PUB. HEALTH 204, 204 (2008).

<sup>134</sup> *Id.*

<sup>135</sup> 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\\_%20.html](http://www.lrb.co.uk/v29/n05/mamd01_%20.html).

<sup>136</sup> 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).

<sup>137</sup> FRANK LUNTZ, WORDS THAT WORK: IT’S NOT WHAT YOU SAY, IT’S WHAT PEOPLE HEAR (2007).

<sup>138</sup> GOLDSMITH & POSNER, *supra* note 2, at 90; Posner, *supra* note 4, at 1901.

<sup>139</sup> Berman, *supra* note 65, at 1306.

conceptions in his famous 1946 essay, *Politics and the English Language*,<sup>140</sup> and then brought the theory to life in his fictional masterpiece *Nineteen Eighty-Four*.<sup>141</sup> Particularly prophetic was *Nineteen Eighty-Four*'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 that black is white when Party discipline demands this. . . . [I]t means also the ability to *believe* that black is white, and more, to *know* that black is white, and to forget that one has ever believed the contrary."<sup>142</sup>

Most political scientists who seek to discount the influence of international law tend to avoid even using the term "international law" or "international obligation," instead preferring to speak of international "principles," "norms," "standards," "precepts," "rules," and "procedures."<sup>143</sup> Goldsmith and Posner, in contrast, seek to reverse the meaning of the term altogether. Thus, under the Goldsmith/Posner paradigm, whenever one thinks of "binding" international legal obligations, one is expected to understand the term to actually mean "non-binding"; whenever one thinks of international "law," one is expected to understand the term to really mean international "politics."

### C. *A Modern Case Study: The Torture Memos and International Law*

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 Torture Memos in his later book, *The Terror Presidency*.<sup>144</sup> Because it reflects the contemporary state of the international community and current U.S. perceptions about the role of international

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<sup>140</sup> 4 GEORGE ORWELL, *Politics and the English Language* (1946), reprinted in THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127 (Sonia Orwell & Ian Angus eds., David R. Godine 2000).

<sup>141</sup> GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

<sup>142</sup> GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 218 (Plume 2003) (1949).

<sup>143</sup> See Koh, *supra* note 17, at 2625.

<sup>144</sup> GOLDSMITH, *supra* note 51, at 142, 172.

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 bipartisan panel of twenty-five Senators, following extensive hearings into the matter in the summer and fall of 2008.<sup>145</sup> In some cases, these findings are supplemented by interviews of the principal players conducted by Professor Philippe Sands,<sup>146</sup> the personal recollections of Jack Goldsmith<sup>147</sup> and John Yoo,<sup>148</sup> and the commentary of two of the Legal Advisers interviewed for this 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), John Yoo, who Goldsmith identifies as a fellow “new sovereigntist.”<sup>149</sup> David Addington was reportedly the dominant force among the group, and one high-level Bush Administration insider recounted that “if you favored international law, you were in danger of being called ‘soft on terrorism’ by Addington.”<sup>150</sup> 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 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.”<sup>151</sup>

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<sup>145</sup> U.S. SENATE ARMED SERVS. COMM., SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Dec. 11, 2008), available at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>. The full 263-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>.

<sup>146</sup> PHILIPPE SANDS, TORTURE TEAM (2008).

<sup>147</sup> GOLDSMITH, *supra* note 51.

<sup>148</sup> JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR (2006).

<sup>149</sup> GOLDSMITH, *supra* note 51, at 21-22.

<sup>150</sup> SANDS, *supra* note 146, at 213.

<sup>151</sup> GOLDSMITH, *supra* note 51, at 23.

John Yoo believed “[t]he candid approach would be to admit that our old laws and policies did not address this new enemy [al Qaeda].”<sup>152</sup> 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)<sup>153</sup> 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. 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.<sup>154</sup> 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.”<sup>155</sup>

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.<sup>156</sup> Powell said that declaring the conventions inapplicable would “reverse over a century of U.S. policy and practice in supporting the Geneva [C]onventions and undermine the protections of the law of war for our troops.”<sup>157</sup> He added that it would “undermine public support among critical allies.”<sup>158</sup> An accompanying memorandum prepared by State Department Legal Adviser William Taft, opined that it is important for the United States 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 on its policy preferences.”<sup>159</sup> 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

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<sup>152</sup> YOO, *supra* note 148, at 47; *see also id.* at 22.

<sup>153</sup> Barton Gellman & Jo Becker, *The Unseen Path to Cruelty*, WASH. POST, June 25, 2007, at A1.

<sup>154</sup> 18 U.S.C. § 2441 (2006).

<sup>155</sup> Gonzales Memorandum, *supra* note 75, at 2.

<sup>156</sup> 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 app. (2006).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> 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 app. (2006).

prisoner of war status or the protections afforded by the Third Geneva Convention. 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.<sup>160</sup>

A few months later, on August 1, 2002, John Yoo issued two OLC memos, signed by his boss, Assistant Attorney General Jay Bybee. The first, addressed to Gonzales, opined that interrogators could inflict pain and suffering on detainees up to the level caused by "organ failure" without violating the domestic and international prohibitions on torture and cruel, inhumane, or degrading treatment.<sup>161</sup> 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.<sup>162</sup> Yoo's memo also advised that, under the doctrine of "necessity," the President could supersede national and international laws prohibiting torture. The second OLC memo, which responded to a request from the CIA, addressed the legality of specific interrogation tactics, including "waterboarding."<sup>163</sup>

Two months later, on October 11, 2002, after meeting with Gonzales, Addington, and Haynes in Cuba,<sup>164</sup> the Commander of Guantanamo 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. These included "stress positions," "exploitation of detainee fears," "removal of clothing," "hooding," "deprivation of light and sound," "deprivation of sleep," and "waterboarding."<sup>165</sup> 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.

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<sup>160</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xiii.

<sup>161</sup> 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 app. (2006).

<sup>162</sup> GOLDSMITH, *supra* note 51, at 145.

<sup>163</sup> 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 app. (2006).

<sup>164</sup> SANDS, *supra* note 146, at 63-64, 137, 222.

<sup>165</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xvii.

national security.<sup>166</sup>

Given a four-day deadline, and without access to international law books or databases, Guantanamo's Staff Judge Advocate Lt. Col. Diane Beaver wrote an analysis justifying the legality of the techniques. Lt. Col. Beaver expected that a broader legal review conducted at more senior levels would follow her own.<sup>167</sup> The Chairman of the Joint Chiefs of Staff General Richard Myers solicited the views of the several branches of the military. All stated their opposition. The Air Force cited "serious concerns regarding the legality of many of the proposed techniques."<sup>168</sup> The Chief of the Army's International and Operational Law Division wrote that the techniques "cross[] the line of 'humane' treatment," would "likely be considered maltreatment" under the Uniform Code of Military Justice, and "may violate the torture statute."<sup>169</sup> The Marine Corps stated that the requested techniques "arguably violate federal law, and would expose our service members to possible prosecution."<sup>170</sup>

During the meeting of the Legal Advisers, William Taft provided 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 memorandum 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 memorandum 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

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<sup>166</sup> SANDS, *supra* note 146, at 37.

<sup>167</sup> *Id.* at 65.

<sup>168</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xviii.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

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 [A]gainst Torture (CAT) 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 CAT that had been withdrawn earlier in the year, we were able to reach agreement on a very respectable opinion.<sup>171</sup>

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,<sup>172</sup> sent a one-page memo to Secretary of Defense Rumsfeld, recommending that he approve the techniques requested by Guantanamo Bay. 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?"<sup>173</sup> By December 30, 2002, the interrogators at Guantanamo 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.<sup>174</sup>

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.<sup>175</sup> 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."<sup>176</sup> According to the 2008 Senate bipartisan committee report, however:

The 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

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<sup>171</sup> Supplement to Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 12, E-mail Exchange between William Taft, Legal Adviser to President George W. Bush, and author (2006) (on file with author).

<sup>172</sup> SANDS, *supra* note 146, at 95.

<sup>173</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xix.

<sup>174</sup> *Id.* at xx-xxii.

<sup>175</sup> *Id.* at xxii-xxiii.

<sup>176</sup> YOO, *supra* note 148, at 168.

them appeared in Iraq only after they had been approved for use in Afghanistan and at [Guantanamo Bay].<sup>177</sup>

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 Guantanamo Bay, opining that they constituted “at a minimum, cruel and inhumane treatment” that could rise to the level of torture, and “probably will cause significant harm to our national legal, political, military and diplomatic interests.”<sup>178</sup> 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. Secretary of Defense Rumsfeld signed a memo rescinding authority for the techniques on January 15, 2003, though word of the suspension apparently never got to Afghanistan 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.

On March 14, 2003, John Yoo provided an OLC memorandum that repeated much of what the first Bybee memo had said six months earlier about the definition of torture. In addition, it stated that interrogators could not be prosecuted by the Justice Department for using interrogation methods that would otherwise violate the law. This part of the opinion can be reduced to the core proposition that, as Richard Nixon intimated in relation to Watergate, “if the president does it, then that means it’s legal.”<sup>179</sup> 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 Guantanamo Bay. In addition, the Secretary’s memo stated: “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.”<sup>180</sup> Rumsfeld subsequently approved specific requests for hooding, sensory deprivation, and “sleep adjustment.”<sup>181</sup>

In his memoir, Goldsmith describes the role he played as head of OLC from October 2003 to June 2004 in withdrawing the controversial August 1, 2002 and March 14, 2003 OLC opinions on what constitutes

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<sup>177</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xxiv.

<sup>178</sup> SANDS, *supra* note 146, at 140.

<sup>179</sup> *Cf.* Horton, *supra* note 43 (using the Guantanamo habeas context to examine the Bush Administration’s departure from well-settled principles of detainees’ rights to counsel and arguing that such departure amounts to “war on the rule of law itself”).

<sup>180</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xxii.

<sup>181</sup> *Id.*

prohibited acts of torture, and whether the federal torture statute would apply to military interrogations of “unlawful enemy combatants.”<sup>182</sup> When his memoir was published 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.”<sup>183</sup>

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.”<sup>184</sup> 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.”<sup>185</sup> Notably, the 2004 OLC memo that replaced Yoo’s 2002 work contained a footnote saying that “all interrogation methods that earlier opinions had found legal were still legal.”<sup>186</sup> 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.”<sup>187</sup>

More significantly, Goldsmith glosses over the tale of his own “Torture Memo,” a March 19, 2004 OLC memorandum that he authored and 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.<sup>188</sup> He also tries to downplay

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<sup>182</sup> GOLDSMITH, *supra* note 51, 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 United States, 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 seeking information to defend the nation from harm. The memos likely led to the use of waterboarding and other notorious abuses at Abu Ghraib prison and Guantanamo Bay.

<sup>183</sup> Daniel Klaidman, Stuart Taylor Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34, available at <http://www.newsweek.com/id/57101>.

<sup>184</sup> GOLDSMITH, *supra* note 51, at 151.

<sup>185</sup> *Id.* at 148.

<sup>186</sup> YOO, *supra* note 148, at 183 (emphasis removed).

<sup>187</sup> *Id.*

<sup>188</sup> 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.

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 on the same day, which concluded that specific, proposed techniques including waterboarding were compatible with international law.<sup>189</sup> Goldsmith left the memo to the CIA in place, with the effect of providing CIA personnel (who ended up waterboarding several detainees hundreds of times) with what Goldsmith describes as a “golden shield”<sup>190</sup> that would protect them against prosecutions under the Federal War Crimes Act (implementing U.S. obligations under the Geneva Conventions) and the Federal Anti-Torture Act (implementing U.S. obligations under the Torture Convention).<sup>191</sup>

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 Guantanamo Bay, Abu Ghraib, and elsewhere.<sup>192</sup> 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.”<sup>193</sup> 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 techniques were legal

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<sup>189</sup> GOLDSMITH, *supra* note 51, 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 yet know. 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://luxmedia.vo.llnwd.net/o10/clients/aclu/olc\\_08012002\\_bybee.pdf](http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf). A 2005 OLC Memo, which was released on the same day, documents that certain Guantanamo detainees were subjected to waterboarding as many as 183 times. See Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1.

<sup>190</sup> GOLDSMITH, *supra* note 51, at 144.

<sup>191</sup> Lawrence Velvel, *The Mainstream Media Anoints Jack Goldsmith a Hero*, OPEdNEWS, Oct. 12, 2007, [http://www.opednews.com/articles/1/opedne\\_lawrence\\_071012\\_the\\_mainstream\\_media.htm](http://www.opednews.com/articles/1/opedne_lawrence_071012_the_mainstream_media.htm).

<sup>192</sup> Joby Warrick & Karen DeYoung, *Report on Detainee Abuse Blames Top Bush Officials*, WASH. POST, Dec. 12, 2008, at A1.

<sup>193</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xii.

for use during interrogations conducted by U.S. military personnel.”<sup>194</sup>

Citing the Nuremberg-era *Alstoetter* case, Jose Alvarez, a Columbia Law School professor who had served as an Attorney-Adviser in L and later as President of the American Society of International Law, concluded: “[W]hen government lawyers torture the rule of law as gravely as [Yoo, Addington, Haynes, and Goldsmith] have done here, international as well as national crimes may have been committed, including by the lawyers themselves.”<sup>195</sup> “Men of law,” 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.”<sup>196</sup> 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 United States under federal statutes that criminalize torture and war crimes,<sup>197</sup> and some of the victims have lodged civil suits against them in federal court.<sup>198</sup> 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.<sup>199</sup>

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

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<sup>194</sup> *Id.* at xxvii.

<sup>195</sup> Alvarez, *supra* note 188, 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 United States; 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.

<sup>196</sup> SANDS, *supra* note 146, at 26 (alteration in original).

<sup>197</sup> Press Release, Am. Civil Liberties Union, ACLU Asks Justice Department to Appoint Independent Prosecutor to Investigate Torture (Mar. 18, 2009), available at [http://www.aclu.org/safefree/torture/39060prs20090318.html?s\\_src=RSS](http://www.aclu.org/safefree/torture/39060prs20090318.html?s_src=RSS) (includes text of letter to Attorney General Eric Holder from ACLU Executive Director Anthony Romero).

<sup>198</sup> 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 14, 2009, at A16, available at <http://www.nytimes.com/2009/06/14/us/politics/14yoo.html>.

<sup>199</sup> The Center for Constitutional Rights named Rumsfeld, Bybee, Yoo, Goldsmith, and other former government lawyers in a complaint it filed in Karlsruhe, Germany. Sherwood Ross, *Many High Bush Officials Violated Anti-Torture Laws*, AM. CHRON., Jan. 13, 2009, available at <http://www.americanchronicle.com/articles/printfriendly/87739>. Similar criminal complaints have also been filed against Rumsfeld and others in Argentina, France, Sweden, and most recently in Spain. See 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](http://www.newyorker.com/talk/2009/04/13/090413ta_talk_mayer).

case of *Rasul v. Bush*, rejecting by a 6-to-3 majority the President's contention that Guantanamo 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.<sup>200</sup> The Bush Administration purported to implement the *Rasul* decision by establishing a Combatant Status Review Tribunal at Guantanamo Bay to determine on a case-by-case basis the status of the Guantanamo Bay detainees.<sup>201</sup> 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),<sup>202</sup> which prohibited inhumane treatment of detainees, including those at Guantanamo 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.<sup>203</sup>

Next, in the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court held by a 5-3 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 of 1949."<sup>204</sup> The Supreme Court confirmed that Common Article 3 of the Geneva Conventions applied to all Guantanamo detainees, whether they were Taliban or al-Qaeda. "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." The Court reached this conclusion by looking at the official commentaries to the Geneva Convention, which confirmed its wide scope. 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."<sup>205</sup> The

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<sup>200</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>201</sup> 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>.

<sup>202</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739. 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 a U.S. court.

<sup>203</sup> Press Release, President 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 148, at 200.

<sup>204</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>205</sup> *Id.* at 631 n.63.

Court also relied on decisions of the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia.

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 Guantanamo 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.<sup>206</sup> Two years later, in the case of *Boumediene v. Bush*, the Supreme Court declared parts of the Military Commissions Act unconstitutional, determined that the Combatant Status Review Tribunals were “inadequate,” and ruled that the 270 foreign detainees held for years at Guantanamo Bay have the right to appeal to U.S. civilian courts to challenge their indefinite imprisonment without charges.<sup>207</sup> Guantanamo 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 5-4 majority, acknowledged the terrorism threat the U.S. faces, but he declared: “The laws and Constitution are designed to survive, and remain in force, in extraordinary times.”<sup>208</sup>

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. Without equivocation, Crawford declared, “We tortured [Mohammed al-]Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer the case [for prosecution].”<sup>209</sup>

A week later, on January 20, 2009, Barack Obama was sworn in as the 44th President of the United States. Just two days into his presidency, on January 22, 2009, President Obama signed Executive Orders requiring the closure of the Guantanamo Bay facility within twelve months,<sup>210</sup> the dismantling of the CIA’s network of secret prisons

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<sup>206</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 3930, 120 Stat. 2600 (2006).

<sup>207</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>208</sup> *Id.* at 2277.

<sup>209</sup> Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1 (first alteration in original).

<sup>210</sup> Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009),

around the globe, and prohibiting the CIA from using coercive interrogation methods that deviate from the requirements of the Army Field Manual.<sup>211</sup> 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 Guantanamo will present significant challenges to the new Administration—but it is the beginning of the end.

#### D. *Lessons from this Modern Case Study*

What does this case study 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 United States’ commitment to comply with international law would be very different than the perception reflected by the legislative, judicial, and executive branch actions in 2008-09.

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. L 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 cabinet,” whose influence initially masked the considerable inter- and intra-departmental disagreement and dominated detainee policy.<sup>212</sup>

Eventually, both Congress and the Supreme Court inserted

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*available at* [http://www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities/](http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/).

<sup>211</sup> Ensuring Lawful Interrogations, Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

<sup>212</sup> John Yoo has been quite open in explaining why the “war cabinet” cut L 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. YOO, *supra* note 148, at 33. Rather than prove that international law was not relevant, the intentional circumvention of L indicates that Yoo and his fellow “war cabinet” members believed that if the top policy-makers were made aware of L’s views about the applicable international legal constraints, they would be much less likely to approve the extraordinary interrogation tactics advocated by the “war cabinet.”

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 (including L) that had been frozen out of the initial legal and policy decisions 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, L 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. . . .

. . . .  
L 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 [International Committee of the Red Cross], and no longer held in undisclosed locations. L 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* decision in 2006, which concluded that Common Article 3 applied to the treatment of al Qaeda detainees.<sup>213</sup>

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, 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.<sup>214</sup> George W. Bush's Chairman of the Joint Chiefs of Staff, General Richard Myers, explained the nature of this culture of

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<sup>213</sup> Supplement to Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 13, E-mail Exchange between John Bellinger, Legal Adviser to President George W. Bush, and author (2009) (on file with author).

<sup>214</sup> See Davis Robinson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 16 n.333 (describing L as "the moral conscience of American foreign policy").

compliance in the following terms: “We 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.”<sup>215</sup> 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 United Kingdom House of Commons, the International Committee of the Red Cross, and the Inter-American Commission on Human Rights all opined that the United States’ treatment of detainees was inconsistent with the requirements of international law.<sup>216</sup>

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/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 neighboring countries (e.g., Russia and Georgia), 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 *Hamdan*, we are seeing the concrete effects of internalization of international law by a disaggregated State. Furthermore, 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.<sup>217</sup>

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<sup>215</sup> SANDS, *supra* note 146, at 33; *see also* OSIEL, *supra* note 76, at 330-33.

<sup>216</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm’n. on Human Rights, Working Group on Arbitrary Detention, *Situation of Detainees at Guantanamo 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/cmfa/574/57402.htm>; ORG. OF AM. STATES, 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](http://www.photius.com/rogue_nations/guantanamo.html); Neil Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N. Y. TIMES, Nov. 30, 2004, at A1.

<sup>217</sup> 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

Finally, influential players within the Executive and Legislative branches stressed the important role of reputational concerns in setting detainee policy. The bipartisan commission that investigated the attacks of September 11, 2001 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.”<sup>218</sup> The 2008 Senate bipartisan committee report similarly observed: “The impact of those abuses has been significant.”<sup>219</sup> Citing polls indicating that Abu Ghraib and Guantanamo Bay have generated negative perceptions of the United States 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 report concluded: “The 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.”<sup>220</sup> 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.

#### CONCLUSION

“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.”<sup>221</sup> The qualitative empirical data and case study of the treatment of detainees set forth above highlight the major flaws in Goldsmith and Posner’s approach, proving their theoretical model to be neither accurately descriptive nor predictive.

In contrast to Goldsmith and Posner’s conjectural musings about State behavior in the historic case studies described in their book, this Article has provided a look inside the heretofore opaque box of U.S. foreign policy decision-making, spanning five Presidents. For many readers, this may be their first introduction to L—an influential office which has internalized international law and made its compliance part of its bureaucratic identity.

This Article has divulged for the first time several instances during

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especially international humanitarian law.” OSIEL, *supra* note 76, at 340.

<sup>218</sup> Barbara Slavin, *Abuse of Detainees Undercuts U.S. Authority, 9/11 Panel Says*, USA TODAY, Nov. 15, 2005, at 8A.

<sup>219</sup> U.S. SENATE ARMED SERVS. COMM., *supra* note 145, at xxv.

<sup>220</sup> *Id.*

<sup>221</sup> GOLDSMITH, *supra* note 51, at 13.

the past thirty years in which, at L's urging, U.S. policy-makers decided to forego the use of force or other policy preferences in order to comply with international law. It has also disclosed many cases in which, at L's counsel, the methods selected or the justifications employed were shaped to comply with international law. Contrary to Goldsmith and Posner's hypothesis, the Legal Advisers have managed to convince decision-makers that international law is real law, and that the advantages of complying with it almost always outweigh the short-term benefits of breaching it. As Michael Matheson, who spent thirty years in L, observed: "So there really is a spectrum in which perhaps only on the extreme end of the spectrum does international law always win the day, but even on other parts of the spectrum, international law is a definite constraint on policy makers."<sup>222</sup>

The Legal Advisers perceive multilateral reciprocity, reputation as a law-abiding State, and desire to maintain order and promote the rule of law as components of the compliance pull of international law. Goldsmith and Posner's economics-based rational choice approach would therefore be more valuable if they were to define "compliance pull" in these terms. We could then more accurately test whether international law has an independent causal impact on State behavior by examining cases such as the detainee issue where short-term self-interests predict one behavior and long-term interests, such as those identified by the Legal Advisers, predict another.<sup>223</sup>

In the final analysis, the qualitative empirical data 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). International law matters because government lawyers and policy-makers use it and are influenced by it. Rather than ask, "Did the relevant actors feel compelled to obey international law?," a more useful question is, "How did international law affect their behavior?"<sup>224</sup> In this regard, the observations of the Legal Advisers and the qualitative empirical data set forth in this Article tell us much about how international law is actually used for legitimating political actions, for rallying support, for imposing restraints, and for persuading policy-makers to choose a particular course to achieve their desired goals.

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<sup>222</sup> Michael Matheson, Remarks at Day-Long Conference, *supra* note 73, in SCHARF & WILLIAMS, *supra* note 10, ch. 14.

<sup>223</sup> Hathaway & Lavinbuk, *supra* note 7, at 1442.

<sup>224</sup> See AARON FICHTELBERG, LAW AT THE VANISHING POINT: A PHILOSOPHICAL ANALYSIS OF INTERNATIONAL LAW 146 (2008).