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Keynote Address: The T-Team

Michael P. Scharf

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KEYNOTE ADDRESS: THE T-TEAM

*Michael P. Scharf**

Professor Michael Lawrence:

It's a real pleasure to welcome our Keynote Speaker, Professor Michael Scharf. Professor Scharf is the John Deaver Drinko–Baker and Hofstetler Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law.

In 2004 and 2005, Professor Scharf served as a member of the international team of experts that provided training to the Judges of the Iraqi High Tribunal. In 2006, he led the first training session for the Investigative Judges and Prosecutors of the newly established, UN–backed Cambodian Genocide Tribunal,¹ and in November 2008 he served as Special Assistant to the Prosecutor of the Cambodia Tribunal. He is currently co–leader of a USAID–funded project to assist the government of Uganda in establishing a special war crimes trials and truth commission. In February 2005, Professor Scharf and the Public International Law and Policy Group—an NGO he co–founded—were nominated for the Nobel Peace Prize for the work they have done to help in the prosecution of major war criminals, such as Slobodan Milosevic, Charles Taylor, and Sadaam Hussein. During the elder Bush and Clinton Administrations, Professor Scharf served in the Office of the Legal Advisor of the U.S. Department of State where he held the positions of Attorney–Advisor for Law Enforcement and Intelligence, Attorney–Advisor for UN Affairs, and Delegate to the UN Human Rights Commission.

A graduate of Duke University School of Law, where he graduated with high honors and Order of the Coif, he was Judicial Clerk on the 11th Circuit Federal Court of Appeals and is the author of over seventy scholarly articles and thirteen books, including three that have won National Book of the Year awards. His latest book is *Shaping Foreign Policy in Times of Crisis*, published by Cambridge University Press in 2010. Professor Scharf has also testified before the U.S. Senate Foreign Relations Committee and the House Armed Services Committee and appears frequently in the national and international media.

* This address by Michael P. Scharf was presented at the MSU Journal of International Law Symposium titled, “Is There a War on Terror? Torture, Rendition, Guantanamo, and Obama’s Preventive Detention” at Michigan State University College of Law in February 2010.

1. The official name of the Court is the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. It was established by the Cambodian National Assembly in 2001. Introduction: Extraordinary Chambers in the Courts of Cambodia, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Oct. 28, 2010).

It's a great honor, as I said, to have Professor Scharf with us here this evening. We really appreciate [him] coming. Please join me in welcoming Professor Scharf.

Professor Michael Scharf:

Thank you so much, Professor Lawrence, for that kind welcome. The topic I'm going to be speaking about today is related to my new book, *Shaping Foreign Policy in Times of Crisis*.² Based on qualitative empirical data, the book examines whether government legal advisers and policy-makers have perceived international law as real law, and whether they have ever passed up their foreign policy preferences so as not to violate international law.

The book includes a chapter called *Lawyering the War on Terror*, which I want to focus my remarks on this evening. The chapter tells the extraordinary story of how, in the months following the attacks of 9/11, the legal policy of the U.S. government with respect to the War on Terror was hijacked and dictated by a cabal of four government lawyers who called themselves the "War Council." They could just as easily have been called the "Torture Team," or "T-Team" for short because together, this team of highly-placed government lawyers produced a series of legal memoranda—which deliberately ignored adverse precedent, misrepresented legal authority, and were written to support a pre-ordained result.³

The ominous presence behind the group was Vice President Dick Cheney, who sought to unshackle the President from the restraints posed by the Geneva Conventions,⁴ the UN Convention against Torture,⁵ and the federal laws that implement those treaties. In his words, "[w]hen you contemplate the 9/11 [attack] with terrorists instead of being armed with box cutters and airline tickets, equipped with a nuclear weapon or a biological agent of some kind in the middle of one of our cities and think

2. MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* (2010).

3. Office of Prof'l Responsibility, U.S. Dept. of Justice, Report of Investigation into the Office of Legal Counsel's Memorandum Concerning Issues into the Cent. Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 160 (2009) [hereinafter Office of Prof'l Responsibility Report], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>. See also *id.* at 3, 9, 51-52, 159, 226, 227, 228.

4. The Geneva Conventions of 1949, <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/genevaconventions> (last visited Oct. 28, 2010).

5. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85.

about the consequences of that and then I think we're justified in taking bold action."⁶

The self-anointed "War Council" was led by Vice President Cheney's Chief Counsel and trusted lieutenant, David Addington—about whom it was said, "if you favored international law, you were in danger of being called 'soft on terrorism.'"⁷ The second dominant figure was Jim Haynes, the Chief Counsel of the Department of Defense—a political appointee who had served as Best Man at Addington's wedding.⁸ The third figure in this group was White House Chief Counsel Alberto Gonzales—a life-long friend of the President George W. Bush who famously declared after the 2001 U.S. invasion of Afghanistan that the Geneva Conventions were "quaint" and "outmoded" and did not apply to this new War on Terror.⁹

But the most important member of all turned out to be a young Berkeley Law Professor named John Yoo, a hired gun placed as Deputy Head of the Department of Justice's Office of Legal Counsel (OLC), a government office with extraordinary power to issue memos interpreting the government's requirements under the United States Constitution and federal statutes. Yoo had come to the White House's attention because he had authored a series of law review articles arguing for near limitless powers of the Presidency during crisis.¹⁰ He was a true believer and a prolific writer—and it was his work product that would in a few years garner the mantle "White House Torture Memos."¹¹

My book recounts the story about how these four individuals intentionally cut off the government's primary experts on the Geneva Conventions, the Torture Convention, and customary international law from the decision-making process, and thereby presented a one-sided and distorted view of U.S. obligations under international law that led to a widespread government policy and practice of torture. According to a bi-partisan December 2008 Senate Armed Services Committee Report, "[t]hose 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 for use during interrogations conducted by U.S. military personnel."¹²

6. Interview by Jonathan Karl with Dick Cheney, Vice President of the United States, in Wash., D.C. (Dec. 15, 2008), *available at* <http://abcnews.go.com/print?id=6464697>.

7. PHILIPPE SANDS, TORTURE TEAM 213 (2008).

8. *Id.*

9. Memorandum from Alberto R. Gonzales, Counsel to President George W. Bush, (Jan. 25, 2002), *reprinted in* 37 CASE W. RES. J. INT'L L. 615 app. (2006).

10. Office of Prof'l Responsibility Report, *supra* note 2, at 26, 122.

11. Office of Prof'l Responsibility Report, *supra* note 2, at 227 ("According to [CIA Director] Rizzo, there was never any doubt that waterboarding would be approved by Yoo, and the client clearly regarded OLC as willing to find a way to achieve the desired result.")

12. S. Armed Services Comm., 110th Cong., Inquiry into the Treatment of Detainees in U.S. Custody, xxvii (2008) [hereinafter Senate Armed Services Committee Inquiry].

How did they get away with it? To accomplish their goal, first the “War Council” sought to convince the President and other officials that international law was not real law. They discredited efforts to use law or legal institutions to challenge U.S. detention and interrogation policies by labeling it “lawfare.” Next, they took actions calculated to cut the State Department Legal Adviser out of the “clearance process” concerning treatment of detainees.

The State Department Legal Adviser has long been known as “[America’s] conscience on international law.”¹³ Unlike the lawyers involved in the “War Council,” the State Department Legal Adviser must be confirmed by the Senate, which ensures that persons with radical conceptions of the law will not be appointed to the post. The Legal Adviser’s opinion draws on the expertise of 170 international legal experts in the office, many of whom have been in the government for many years. Therefore, they not only have greater expertise in international law than attorneys in OLC or the White House, but also have more interactions with foreign counterparts and more experience regarding the consequences of violating international law on American foreign policy.

In his 2006 memoir of his days at OLC, John Yoo writes: “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 and the other members of the “War Council” did not hold to that view.¹⁴ William Taft, who was the State Department Legal Adviser at the time, observed that his office was likely excluded from the decision-making process due to the fear that “in light of some of the positions we had taken, that we would not agree with some of the conclusions other lawyers in the Bush Administration expected to reach and that we might ‘leak’ information about the work to the press.”¹⁵ The “War Council” even used heightened categories of classification in order to keep the State Department Legal Adviser out of the loop.¹⁶ In other words, they classified the draft torture memos as “need to know” and then maintained that the Legal Adviser did not actually have such a need.

From this case study, one might speculate that over the years State Department Legal Advisers have often been cut out of the clearance process by policy-makers who view international law as an obstacle to attaining national security goals. To test that supposition, my *Shaping Foreign Policy in Times of Crisis* co-author, Paul Williams, and I assembled the ten living former Legal Advisers—going all the way back to the Carter

13. SCHARF & WILLIAMS, *supra* note 2, at xv.

14. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 33 (2006).

15. SCHARF & WILLIAMS, *supra* note 2, at 130.

16. Office of Prof'l Responsibility Report, *supra* note 3, at 260, 122.

Administration—for a day-long discussion at the Carnegie Endowment. We asked them each to tell us about the role of international law during the crises that unfolded during their tenure in the Office.

Somewhat surprisingly, the Legal Advisers provided numerous examples of times they counseled the President against a proposed action which the Legal Adviser opined would violate international law. Sometimes the position of the Legal Adviser did not carry the day, but usually, they said, the President backed down. Often this led to the adoption of third options that did not contravene international law. As Michael Matheson, who spent thirty years in the State Department's Office of the Legal Advisor (several as Acting Legal Adviser), summed up: "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 policymakers."¹⁷

Sadly, the Legal Advisers also shared stories of a handful of other times—like the case of the torture memos—where the Legal Advisor was intentionally cut out of the process. It didn't happen often—in fact, they related only four occasions during the past thirty years. The Legal Advisers mentioned the following cases in which they were purposely cut out of the decision making process: the 1980s mining of Nicaraguan harbors and armed support for the Contras, the 1990 kidnapping of Dr. Alvarez-Machain from Mexico, and—as described above—the adoption of policies related to treatment of detainees in the aftermath of 9/11.¹⁸

Interestingly, in each such case, the same policy-makers that cut the State Department Legal Adviser out of the decision-making process ended up seeking the Legal Adviser's assistance in crafting after-the-fact legal justifications for the decisions and actions taken. As Stephen Schwebel, a former Deputy Legal Adviser who later served as President of the International Court of Justice, once remarked: "[t]he [Legal Adviser] is always called in to pick up the pieces even if he was not influentially involved in the initial decision."¹⁹ 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 blindsided.' I can only have wished that this sensible rule had applied to L [the Office of the Legal Adviser] as well."²⁰

17. SCHARF & WILLIAMS, *supra* note 2, at 155.

18. *Id.* at 211-12.

19. Stephen M. Schwebel, *Remarks on the Role of the Legal Advisor of the U.S. State Department*, 2 EUR. J. INT'L L. 132, 134 (1991).

20. SCHARF & WILLIAMS, *supra* note 2, at 212.

For a comparative perspective on this problem, we turned to former UK Foreign Ministry Legal Adviser Sir Frank Berman. He told us that “the most notorious incident where the UK Legal Adviser was deliberately cut out of the loop was the 1956 Suez invasion.”²¹ Berman said, however, that the UK government had learned from that mishap and had adopted policies to ensure against a repeat. In his words:

“[i]t is [now] considered a cardinal sin within the UK 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.”²²

The United States would do well to adopt a similar internal rule requiring the State Department Legal Adviser’s input on policy matters involving international law. As Davis Robinson summed up:

“The main lesson that I drew from my days [as Legal Adviser] is that, if the U.S. 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.”²³

Now let me turn to the big picture. As I mentioned earlier, one of the aims of the “War Council” was to convince policy-makers that international law is not real law. That quest was later taken to a larger audience by Professor Jack Goldsmith of Harvard Law School. 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.”²⁴ Together with Professor Eric Posner of University of Chicago Law School, in 2005 Goldsmith wrote *The Limits of International Law*,²⁵ a potentially revolutionary work²⁶ that employs rational

21. *Id.*

22. *Id.*

23. SCHARF & WILLIAMS, *supra* note 2, at 213.

24. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 21 (2007). (“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.”).

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

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.²⁷ 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. According to Goldsmith and Posner, States employ international law when it is convenient, are free to ignore it when it is not, and have every right to place their sovereign interests first—indeed, democratic States have an obligation to do so when international law threatens to undermine federalism, separation of powers, and domestic sovereignty.²⁸

While serving as Special Counsel to Secretary of Defense Donald Rumsfeld, and later as Assistant Attorney General in charge of the Office of Legal Counsel in the Bush Administration, Goldsmith saw it as his mission to convince those inside the government that international rules that constrain U.S. power—and thus compromise national security—are not really binding. A 2003 inter-agency memo prepared by Goldsmith, titled “The Judicialization of International Politics,” warns: “In the past quarter century, various nations, NGOs, academics, international organizations, and others in the ‘international community’ have been busily weaving a web of international laws and judicial institutions that today threatens US Government interests.” The memo continues:

“The US 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.”²⁹

The Limits of International Law can be understood as Goldsmith’s effort to bring this “anti-lawfare” argument to a wider audience.

26. George Washington University Law Professor Edward Swaine writes that U.S. elites may seize on Goldsmith/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/Posner’s views “are sure to become standard currency in international law theory and practice.” David Gray, *Rule-Skepticism, ‘Strategy,’ and the Limits of International Law*, 46 VA. J. INT’L L. 563, 583 (2006).

27. GOLDSMITH & POSNER, *supra* note 23, at 90; See also Eric Posner, *Do States Have a Moral Obligation to Obey International Law?* 55 STAN. L. REV. 1901, 1901 (2003).

28. 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. See GOLDSMITH & POSNER, *supra* note 25.

29. GOLDSMITH, *supra* note 24, at 60.

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."³⁰ Similarly, Professor Oona Hathaway of Yale Law School has concluded that there is a necessary connection between Goldsmith and Posner's underlying "revisionist" political agenda and their book's methodological approach and conclusions.³¹ And as Professor Margaret McGuinness of University of Missouri–Columbia observes: "The 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."³² Finally, Professor Mary Ellen O'Connell of Notre Dame warns, "[a] policymaker reading the book might well conclude that compliance with international law, such as the 1949 Geneva Conventions or the Convention against Torture, is optional...."³³

Goldsmith and Posner draw their conclusions by examining government decision-making from outside an opaque box. According to Professor Andrew T. Guzman of California–Berkeley's Boalt Hall School of Law, Goldsmith and Posner rely on a 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.³⁴ Professor David Golove of New York University 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 States acted as they did."³⁵ By employing the qualitative empirical data obtained from the day-long conference of State

30. Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 306, 307-08 (2006).

31. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1404 (2006).

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

33. MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* 104 (2009).

34. Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 540 (2006) (arguing that Goldsmith and Posner misrepresent the facts in their international trade case study); 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, 355-57 (2006) (arguing that Goldsmith and Posner's account is "cherry-picked and fails to present a fair picture of the 'Free Ships, Free Goods'" example).

35. Golove, *supra* note 34, at 348.

Department Legal Advisers, my book seeks to fill the void, enabling the reader to discern which side of the debate better reflects reality.

Goldsmith and Posner assert that the decision-makers do not perceive a moral commitment to comply with international law in the same way they do domestic law. The findings set forth in my book indicate that this might in fact be true. The Legal Advisers really weren't the type that would put much stock on the so-called "moral authority" of the law. They were a practical bunch, perhaps leaning toward the "realist" school. But at the same time, they would likely ascribe to Luis Henkin's observation that "realists who do not recognize the uses and the force of law are not realistic."³⁶ Thus, while not based on so-called "moral pull," it turned out that the Legal Advisers nonetheless felt a strong sense of obligation to comply with international law based on concerns about reputation as a law-abiding State, long-term self-interest in the maintenance of order, and/or long-term self-interest in a functioning legal system.

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—in particular in 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.

Let me say a few words about reputation, which Goldsmith and Posner dismiss as undeserving of serious consideration. It turns out that America's controversial policies concerning treatment of detainees began to affect U.S. diplomatic power over a broad spectrum of issues, including gaining foreign support for efforts in the War on Terror, the war against drugs, the war against corruption, and global warming. It made it hard for America's negotiators—in a host of foreign and international forums—to do their job. The bi-partisan Commission that investigated the September 11th attacks concluded in a 2005 report that "[t]he U.S. policy on treating detainees is undermining the war on terrorism by tarnishing America's reputation as a moral leader."³⁷ The bi-partisan 2008 Senate Committee Report similarly observed: "The impact of those abuses has been significant."³⁸ Citing polls indicating that Abu Ghraib and Guantanamo Bay have generated negative

36. See SCHARF & WILLIAMS, *supra* note 2, at 214 (the author argues here, as he did in his cited work, that Luis Henkin's observation may be appropriately applied to international law).

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

38. Senate Armed Services Committee Inquiry, *supra* note 12, at xxv.

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 Committee concluded “[t]he fact that America is seen in a negative light by so many complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives.”³⁹ 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.

So, in the end, my book aims to confront head-on the argument that Goldsmith and Posner make in their book; it’s sort of the yin to their yang. It documents many cases in which, at the State Department Legal Adviser’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. Thank you. I’m now happy to answer your questions.

Question:

Did the Legal Advisers ever discuss whether they considered resigning when their advice was not followed?

Professor Scharf:

All of the Legal Advisers said that they considered resigning at some point during their tenure. They also said that you cannot have a job in government as a lawyer, especially at the top of an agency like the Office of the Legal Adviser, unless you go in knowing that you might have to resign one day on principle. They said that if you’re a lawyer and you aren’t willing to resign, you don’t have any cards to use against the policy-makers. And you will not have any moral authority—if you feel compelled to stay on—no matter what. Directly on point is the story of Elizabeth Wilmshurst—the Acting Legal Adviser of the UK Ministry of Foreign Affairs—who resigned when her memo concluding that it would be unlawful to invade Iraq in 2003 was disregarded by the Prime Minister. But Ms. Wilmshurst couldn’t go to the press and say “I’m resigning because they didn’t follow my advice and they’re breaking international law in a really big way.” Why? Because as a lawyer she was subject to the attorney-client privilege of confidentiality. So she quietly resigned, she joined

39. *Id.*

Chatham House as a professor, and nobody would have known about her memo if it were not for the fact that someone else in the government subsequently leaked it to the press. So why didn't the U.S. Legal Advisers resign? I think part of the explanation is that they realized that, in each case, the resignation would not have made a huge difference, and that their legal advice was needed to try to clean up the mess. But if things had gotten really bad, they all said that what Elizabeth Wilmshurst did was right.

Question:

I'd like to probe on the rule of law a little bit, and I wouldn't have expected you to cover this in your speech, but there is usually conflict between the State Department and the Defense Department and Justice Department. An example of the conflict over rule of law would be the case of *Medellin v. Texas*,⁴⁰ where President Bush did follow the advice of the State Department—against the advice of the Justice Department—to honor international law in terms of our consular treaty. But on the other hand, the way he chose to do it was a rather clear violation of our Constitution, and the Supreme Court so held. So do you have any reaction to that kind of situation?

Scharf:

The Legal Advisor at the time, who was John Bellinger, used that example as one where the President acted against his personal and political interests to try to uphold international law. Bellinger said that President Bush was from a state, Texas, where they are very much in favor of the death penalty. In fact when he ran for President, Bush bragged about how many times he had signed execution orders. And Bush personally thought that this awful guy, Medellin, who had been responsible for a terrible rape and murder, should be executed. On the other hand, the State Department Legal Adviser advised the President that the ICJ had ruled that the United States has to give Medellin a new sentencing hearing because he was not told upon his arrest that as a Mexican citizen he had the right to consult with a consular officer. It potentially could have made a difference in his case because his strategy at trial was to say, "look, I did a terrible, heinous thing, I'm awful, I hate myself, you should hate me too, I should be killed." In his culture that was how you show remorse and contrition, and how you seek forgiveness. But in Texas, if a murderer says to the jury, "I should be killed," they're going to oblige him. His consular officer could have explained all of that to him, so this really could have made a difference to the outcome of the case. And so Bellinger urged the President to issue an Executive Order that would implement the ICJ decision, requiring Texas to hold a new sentencing

40. 552 U.S. 491 (2008).

hearing. Ultimately the Supreme Court ruled that the President did not have the power to force the State of Texas to stay the execution because the Statute of the ICJ is a non-self-executing treaty and only the Congress can implement it through a federal statute. So in retrospect, Bellinger should have advised the President to go to Congress and get a law that implements the ICJ Statute, or authorizes the President to do so. And in fact, there is legislation pending right now that will do that, which hopefully Congress will approve soon. From reading the Executive's briefs, I don't think this was just a clever strategy to mollify the international community without enforcing the ICJ's decision. But perhaps it does suggest that Bellinger was a better international lawyer than a Constitutional lawyer.

Follow up Question:

So we ended up violating international law while upholding the Constitution. My question is, which law has priority?

Scharf:

Well, domestically, there have been a series of U.S. cases that uphold our Constitution over treaties and customary international law. That doesn't excuse us from violating international law, though. There is a well-accepted international law rule that a country can't use its internal Constitutional decisions or statutes as an excuse for non-performance of international obligations. So, the Legal Advisor serves as the government's conscience on international law. But it's absolutely right that there should be other government officials that focus on Constitutional law. And when there is a possible conflict, the important thing is for the Legal Adviser to advise the president that there will be international consequences.

Question from Scott Horton:

I'd like to ask you a little bit more about Jack Goldsmith and Eric Posner's book, which I think you make amazing use of here. There's a statement in their book, a contention put forward aggressively, that individuals may never be the subject of international law, and may never be punished under international law, which would be rather shocking to people who are put on trial at places like Nuremburg—not to mention the international criminal tribunals that you've worked so long with. And indeed, while you see at the beginning a passing reference to international humanitarian law to be developed in a later chapter, when you look through the book you discover it's not there. And it's like they've wished this into oblivion, because it doesn't seem to meet their prescriptions. But on the other hand, is it fair to say here they're not describing international law as it is, because they obliterated all that? Instead, are they trying to describe a new international

law that they want to create, in which there is no role for the Geneva Convention, the Convention against torture, and so forth?

Scharf:

I absolutely agree with your conclusion, Scott, and I want to share a quote with you that I think will explain what's going on. Before I do, however, I'd like to add something. When I mentioned the practical reasons the Legal Advisers perceive a compliance pull of international law, the one I forgot to mention was that the Legal Advisors believed that sometimes there would be domestic, foreign, or international criminal legal responsibility for violating international criminal law, and it was quite real. So, if we aren't going to prosecute in the United States under our own statutes that implement the Torture Conventions and the Geneva Convention which require prosecution, then perpetrators could still face prosecution abroad. For example, the International Criminal Court has jurisdiction over any war crimes or crimes against humanity committed in Afghanistan, which is a State Party to the Rome Treaty, whether the perpetrators are Afghans or Americans. Also, under the principle of universal jurisdiction, which applies to grave breaches of the Geneva Conventions and acts of torture, European and Latin American courts may issue an indictment and arrest warrant to individual Americans involved in war crimes and torture. And even just an indictment by one of those countries can render a person a prisoner in his own country. Reportedly, Henry Kissinger doesn't travel to certain countries anymore, because after Chris Hitchens wrote the book, *The Indictment of Henry Kissinger*, several countries opened up criminal investigations into his involvement in acts of torture and assassinations in Latin America during the Nixon Administration. And several countries have ongoing criminal investigations into Rumsfeld and Yoo. There is also the possibility of civil suits under the Alien Tort Statute in U.S. courts.

Now, here's the quote I was looking for. Nick Rostow, who served as the Chief Counsel at the National Security Council during the first Bush Administration and later as Chief Counsel to the U.S. Ambassador to the UN, wrote recently:

Criticism of the United States on international law grounds is especially notable because of the very nature of the United States as a country. The United States is defined by law. Its oaths or citizenship and office holding are pledges to the Constitution, not to a flag, not to a territory, not to the motherland 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 will ask "Is it legal?" before they ask

any other question about foreign policy actions short of self-defense against direct aggression.⁴¹

Rostow's observation suggests that as long as policymakers, bureaucrats, and the general public believe that compliance with international law is important, this belief will have a significant impact on State decision-making. To prevent that, Posner and Goldsmith employ something akin to George Orwell's concept of black/white.⁴² What they want to do is convince the American people that binding international law really means non-binding non-law. And they have a whole book that tries to explain that international law is just like a non-binding letter of credit. It's just politics. And if they say it over and over again, and if everybody reads it, if the elite start to read it, if the public starts to read it, if the academics start to buy into it, then maybe we'll just hear international law and think international politics. And that is absolutely key, because without doing that the American people won't stand for their government being a lawless government.

But what my book does is the exact opposite. It says, guess what? All this stuff that's in Goldsmith and Posner's book is not based on reality. If you look inside the black box, which for the first time ever we're opening up, you see that government policymakers have—for at least the past thirty years covered by our data—considered international law to be real and important. And their lawyers have thought that as well. And so, international law is not fake law. It's real law, and that's the moral of my story tonight, and of our book.

Question:

When Professor Yoo returned to Berkeley, he was subject to a lot of student protest, a lot of public protest, and I was wondering if you have followed any of the things that are going on with him now, as he tries to assimilate back into being just a professor, from the things he did.

Scharf:

Yes, there was an effort by his colleagues to try to have his tenure removed, but his Dean essentially said, "no, things that professors do when they work for governments or international organizations when they are on leave should not be held against them when they return." You know, in academia there are basically only two things that will cause you to lose tenure. One is

41. Nicholas Rostow, *Law Abiding: Restoring America's Global Reputation*, THE AMERICAN INTEREST, Jan./Feb. 2008, at 81.

42. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

to commit murder or rape. The other is to commit plagiarism. But apparently if you counsel people to torture, that's not enough. And that's what his Dean basically said—at least to the extent that it was done during a leave.

I also want to mention that the Department of Justice is currently undertaking an ethics probe into whether John Yoo violated ethical standards. What I've been hearing is that the probe is likely to exonerate him, and that scares me. I think this is part of the Obama Administration's policy; they want to be like Nelson Mandela after apartheid. They do not want to look back; they want to look only forward. They realize that the whole issue of trying to prosecute or punish Bush Administration officials for torture would be extremely politically divisive. It gives ammunition to the Republicans, and it will just mess up the message and derail health care, the stimulus package, and the other things on President Obama's agenda.

And so, I think we're going to see John Yoo and the others getting a pass. The reason that scares me can be summarized by the phrase, "those you cannot remember the past are condemned to repeat it." There needs to be an authoritative statement by the government, saying the legal advice of the "War Council" was wrong; and it was wrong of the "War Council" lawyers to cut the President off from the lawyers with the most expertise in interpreting international law. Without that type of message, we are likely to see something like this done again in the future.

[Editor's Note: A few months after Michael P. Scharf's speech, the results of the U.S. Department of Justice's ethics probe were published, finding that Yoo had in fact committed professional misconduct,⁴³ but the Associate Deputy Attorney General overruled the recommendations of the probe.⁴⁴]

43. Office of Prof'l Responsibility Report, *supra* note 3, at 252.

44. Memorandum from David Margolis, Assoc. Deputy Attorney Gen, to the Attorney Gen, on Decision Regarding Objections to the Findings of Prof'l Misconduct in the Office of Prof'l Responsibility Report 2 (Jan. 5, 2010), *available at* <http://judiciary.house.gov.hearings/pdf/DAGMargolisMemo100105.pdf>.