

## THE DANGERS OF LAWFARE

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

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## I. INTRODUCTION

This painting by Édouard Manet captures an important engagement of the American Civil War—a sea battle between the U.S.S. Kearsage and the C.S.S. raider Alabama, fought on June 19, 1864, off the coast of Cherbourg, France.<sup>1</sup> The Alabama had, over the objections of the United States, been constructed secretly by an English firm in Merseyside and turned over to a Confederate crew.<sup>2</sup> For several years, it had preyed on American shipping—clear evidence of Britain’s covert support for the Confederacy during the War, at least in the minds of many Americans.<sup>3</sup> Eliminating this threat was a priority for the U.S. Navy, and when Americans learned that the Alabama had put to port at Cherbourg, the Kearsage blockaded it in the harbor.<sup>4</sup> At length, the Alabama tried to fight its way out.<sup>5</sup> But it was no match for the Kearsage, which won the engagement.<sup>6</sup> The Alabama was sunk, and several days later, while the Kearsage was docked at Boulogne-sur-Mer, Manet visited it and began studies for his painting.<sup>7</sup>

This is one of two politically themed paintings by Manet in this period. The other, of course, is the “Execution of the Emperor Maximilian” from 1867–68, which can be found in the Boston Museum of Fine Arts.<sup>8</sup> We know a bit of Manet’s political sympathies at the time from his correspondence and from the recollections of his friends: he was a republican.<sup>9</sup> He detested the fact that under the Emperor Napoléon III, who had betrayed the republican cause, France had sought to undermine the nascent democracies of the Americas by toppling the republic in Mexico to install the Emperor Maximilian.<sup>10</sup> Further, France had covertly supported the Confederacy in the hopes that the United States, then the world’s democratic beacon,

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<sup>1</sup> See Christopher M. Henze, *The Saga of CSS Alabama*, 37 ALA. HERITAGE 6 (1995) (discussing the accomplishments and the ultimate demise of the CSS *Alabama*).

<sup>2</sup> FRANK J. MERLI, *THE ALABAMA, BRITISH NEUTRALITY, AND THE AMERICAN CIVIL WAR*, 46–47 (David M. Fahey ed., 2004) (presenting the Confederacy’s use of British shipbuilders based in Merseyside, England to construct a variety of cruisers for use against the Union).

<sup>3</sup> *Id.* at 46.

<sup>4</sup> See Henze, *supra* note 1, at 96 (explaining that the Union’s “man-of-war Kearsage” had been hunting the Alabama for many months and once word arrived that the Alabama had anchored in Cherbourg, the Kearsage rushed to confront it).

<sup>5</sup> *Id.* at 97–99 (presenting a description and an account of the deadly battle that ensued between the Kearsage and the Alabama).

<sup>6</sup> *Id.* at 99.

<sup>7</sup> *Id.*; MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS, 1789–1914* at vi (2004).

<sup>8</sup> JOHN ELDERFIELD, *MANET AND THE EXECUTION OF MAXIMILIAN* 60–61 fig. 21 (2006).

<sup>9</sup> *Id.* at 29–30.

<sup>10</sup> *Id.* at 37.

would be destroyed.<sup>11</sup> Although Manet is a realist in the strict sense, his choice of subject sends a clear message. He was celebrating the victory of the United States over the forces of slavery in one painting, just as he took pleasure in marking the final ignominious failure of Napoléon III's Mexican escapade in the other.<sup>12</sup>

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

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

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<sup>11</sup> See Gordon Wright, *Economic Conditions in the Confederacy as Seen by the French Consuls*, 7 J.S. HIST. 195, 198 (1941) (presenting the important consular presence in the South and those consuls' support for the Confederacy).

<sup>12</sup> See ELDERFIELD, *supra* note 8, at 55–70 (presenting Manet's work celebrating the battle between the Union ship, *Kearsarge*, and the Confederate ship, *Alabama*, which preceded Manet's subsequent interest in Napoleon's quest in Mexico which led to his work, the *Execution of the Emperor Maximilian*).

<sup>13</sup> See JANIS, *supra* note 7.

<sup>14</sup> *Id.* at 36.

<sup>15</sup> 4 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 1902-1903 (David S. Heidler & Jeanne T Heidler eds., 2000); Willis Fletcher Johnson, *Russia's Fifty-Billion Bill and the Story of America's Claim for "Indirect Damages" Fifty Years Ago*, 131 OUTLOOK 20, 21 (1922).

<sup>16</sup> JANIS, *supra* note 7, at 138 (explaining that the International Code Committee led to the establishment of the Association for the Reform and Codification of the Law of Nations, which is now known as the International Law Association); INT'L LAW ASS'N, REPORTS OF THE FIRST CONFERENCE HELD AT BRUSSELS, 1873, AND OF THE SECOND CONFERENCE HELD AT

tration tribunal, as *Harper's* reported in its November 1872 edition, which ultimately ruled for America.<sup>17</sup> Britain paid a damage award of \$15.5 million, a sum unprecedented up to that time (roughly \$1.25 billion in current dollars).<sup>18</sup>

This was a decisive step in America's history on the world stage. First, Britain in short order ceased to be viewed as America's hereditary enemy—in the decades to come it would be viewed as an increasingly close ally.<sup>19</sup> Second, in the fifty years following the arbitration, American administrations of both parties, but principally Republicans, took the lead globally in advocating arbitration as a means of resolving differences between nations, including resolving private claims.<sup>20</sup> They also led the way in the formation of the International Law Association in Brussels in 1873, and the Hague Conferences, which codified the law of nations, and particularly the law of armed conflict.<sup>21</sup>

In 1913, the Judge Advocate General of the Army presented a briefing to the American Society of International Law together with posters and indices.<sup>22</sup> He demonstrated that the American concept of the laws of war, as originally laid down by President Lincoln, had been converted into accepted international legal norms through effective American diplomacy pursued at The Hague and in major capitals around the world.<sup>23</sup> President Theodore Roosevelt received a Nobel Peace Prize for his critical role in brokering the peace between Russia and Japan following their 1904–05 war.<sup>24</sup> This is a proud legacy of American foreign policy, a legacy forged over half a cen-

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GENEVA, 1874 at iv (1903) (explaining that the Association emanated from America at the hand of a diverse group of individuals).

<sup>17</sup> See *The Treaty of Washington*, 45 HARPER'S NEW MONTHLY MAGAZINE 913, 915–932 (1872).

<sup>18</sup> JANIS, *supra* note 7, at 136.

<sup>19</sup> See A. G. GARDINER, *THE ANGLO-AMERICAN FUTURE* 12 (1920) (discussing the up-and-down relationship between Britain and the United States which always ended in sensible agreement).

<sup>20</sup> INT'L LAW ASS'N, *supra* note 16, at 1 (explaining how the Alabama claims had convinced American citizens of the need to develop arbitration).

<sup>21</sup> JANIS, *supra* note 7, at 138–139 (presenting the development of the 1873 Conference by Reverend Miles); see INT'L LAW ASS'N, *supra* note 16; see generally SHELBY M. CULLOM, *THE SECOND INTERNATIONAL PEACE CONFERENCE HELD AT THE HAGUE FROM JUNE 15 TO OCTOBER 18, 1907*, S. DOC. NO. 444 (1st Sess. 1908) (discussing the development of the law of nations and the law of armed conflict).

<sup>22</sup> Elihu Root, *Am. Soc'y Int'l Law, Seventh Annual Meeting of the American Society of International Law: Francis Lieber*, 7 AM. SOC'Y INT'L L. PROC. 8, 22–24 (1913) (presenting Judge Advocate General, Major George B. Davis' memorandum regarding the adoption by the Hague conventions of a variety of President Lincoln's "General Orders 100" as the international laws and customs of war).

<sup>23</sup> *Id.* at 8–21 (celebrating Francis Lieber's efforts that led to the adoption of President Lincoln's "General Orders 100" into international law by the Hague conferences).

<sup>24</sup> WILLIAM J. FEDERER, *TREASURY OF PRESIDENTIAL QUOTATIONS* 187 (2004).

tury and involving administrations of both parties, and a legacy that advocated the peaceful resolution of disputes through arbitration as a vital tool for the avoidance of war.

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

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

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

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

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<sup>25</sup> DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 4 (2005), available at <http://www.defense.gov/news/mar2005/d20050318nds1.pdf>.

<sup>26</sup> *Id.*

<sup>27</sup> Ignacio De La Rasilla Del Moral, *Review Essay: Remarks on Post Sovereignty and International Legal Neo-Conservatism: Reading Jeremy Rabkin*, 8 GER. L. J. 801, 807 (2007) (reviewing JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2007)); JEREMY A. RABKIN, THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE (2004) (explaining that, against the design of the Founding Fathers, international legal standards are jeopardizing the foundation of U.S. sovereignty).

<sup>28</sup> *Id.*

<sup>29</sup> The Declaration of Independence para. 1 (U.S. 1776).

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 9.

particularly those most engaged in preparing foreign and national security policy for the fledgling nation, international law promised an essential shelter against the heavy hand of the British monarchy.<sup>31</sup>

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

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

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<sup>31</sup> See LAWRENCE S. KAPLAN, *ENTANGLING ALLIANCES WITH NONE: AMERICAN FOREIGN POLICY IN THE AGE OF JEFFERSON* 79–96 (1987) (discussing the development and ratification of the “Model Treaty of 1776,” which sought to use such an alliance with France as a means to defy Britain and ensure that Britain could not succeed in achieving commercial domination).

<sup>32</sup> RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 33 (2001).

<sup>33</sup> Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES, February 19, 2006, at E.62; Irving Kristol, *The Neoconservative Persuasion*, THE WEEKLY STANDARD, August 25, 2003, <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/000tzmlw.asp>.

See generally FRANCIS FUKUYAMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY* (2006) (criticizing the Bush administrations American foreign policy decisions).

<sup>34</sup> Bush’s first term in office demonstrated this lack of commitment to and respect for international treaties and law, ranging from abandoning the Anti-Ballistic Missile Treaty in 2001, to justifying waterboarding and other torture under international law. See M. Cherif Bassiouni, *The Institutionalization of Torture in the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 396 (2005) (arguing that the explicit approval of torture at Camp Delta abandoned principles of international law in favor of purely domestic interests); Rose Gottmoeller, *Arms Control in a New Era*, 25(2) THE WASHINGTON QUARTERLY 45 (2002) (describing the shift in arms control policy toward a self-interested perspective of unilateralism). Bush’s second term was marked similarly with a strong disregard for international law. Scott Horton, *State of Exception*, HARPER’S MAG., July 2007, at 74, available at <http://www.harpers.org/archive/2007/07/0081595>.

<sup>35</sup> See, e.g., Scott Horton, *Lawfare Redux*, HARPER’S MAG., March 2010, <http://www.harpers.org/archive/2010/03/hbc-90006694>; Scott Horton, *Bush’s Musharraf Envy*, HARPER’S MAG., Nov. 2007, <http://www.harpers.org/archive/2007/11/hbc-90001608>.

<sup>36</sup> Scott Horton, *Lawfare Redux*, HARPER’S MAG., March 2010, <http://www.harpers.org/archive/2010/03/hbc-90006694>.

<sup>37</sup> John C. Yoo, Op-Ed, *Terrorist Tort Travesty*, WALL ST. J., Jan. 19, 2008, at A13.

legal process.<sup>38</sup> It assumes the bad faith of the adversary from the outset; it counsels against engaging or answering the charges.

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

## II. A PERPLEXING NEOLOGISM

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

<sup>38</sup> *Id.*; see generally Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2009) (examining whether al-Qaeda members are engaging in “lawfare” against the United States).

<sup>39</sup> Horton, *supra* note 34.

<sup>40</sup> While not the first one to actually use the term, Major Dunlap’s paper has served as the launching point for the contemporary discussion of lawfare. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Ctr. for Human Rights Policy, Harvard Kennedy School of Gov’t, Workshop Paper, 2001), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> See Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21<sup>st</sup>-Century Conflicts?*, 54 JOINT FORCES QUARTERLY 34, 35 (2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515192&Location=U2&doc=GetTRDoc.pdf>.

<sup>43</sup> *Id.* at 35.

<sup>44</sup> Michael Gordon, *Pentagon Corners Output of Special Afghan Images*, N.Y. TIMES, Oct. 19, 2001, at B2 in Dunlap, *supra* note 40, at 11.

<sup>45</sup> Dunlap, *supra* note 40, at 11.

sion to purchase and pulp the entire first run of a new book brought out by St. Martin's Press and authored by a retired military intelligence officer.<sup>46</sup> The Pentagon had cleared the work for publication, the book was printed up, and then some people in the Pentagon apparently decided that the earlier review did not go far enough. Prior restraint forbade the seizure of the press run. But the Pentagon could negotiate for and buy the whole run. Again, the Pentagon is turning to the ingenuity of its lawyers to find its way out of a dilemma, this time one of its own making.

But as my earlier discussion shows, the term "lawfare" is widely used in a different sense from Dunlap's. It is used as a pejorative concept. Brooke Goldstein of The Lawfare Project demonstrates this usage. She calls "lawfare" "the abuse of the law and legal systems for strategic political or military ends."<sup>47</sup> She also specifically focuses on three specific categories of lawfare: (a) "Thwart and punish free speech about issues of national security and public concern"; (b) "De-legitimize the sovereignty of democratic states[;] and" (c) "Frustrate and hinder the ability of democracies to defend themselves against terrorism."<sup>48</sup>

This matches the Neoconservative usage, limited to cases which are subjectively "bad" in the view of the user, almost always defined in terms of the interests of a particular government. Attempts by lawyers to advance the rights of their clients at the expense of the state constitute "lawfare." The implication, often only half articulated, is that the presentation of their claims is illegitimate—an effort to take advantage of the weak underbelly of democratic society, which is unduly tolerant of frivolous lawsuits. This weakness, it argues, can and may be successfully exploited by "the enemy" using a battery of lawyers. In this coinage, lawyers filing writs for the benefit of their clients are just surrogates for enemy warriors or jihadi terrorists. The lawfare theorists are taking sharp aim at these lawyers, accusing them implicitly of disloyalty to their homeland and service as surrogate fighters for a cruel and barbaric enemy.<sup>49</sup> This use of lawfare assumes that our courts are weak or incapable of dealing with frivolous legal arguments.

So what does the word "lawfare" mean in American usage today? Ascertaining the meaning of a word is essentially an exercise in sociology. Those who coin a term cannot necessarily control the usage that subsequently develops. In the United States today, Dunlap's definition has taken hold and dominates the military usage. But the Neoconservative usage has taken

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<sup>46</sup> See, e.g., Scott Shane, *Pentagon Plan: Buying Books to Keep Secrets*, N.Y. TIMES, Sept. 9, 2010, at A16, available at <http://www.nytimes.com/2010/09/10/us/10books.html>.

<sup>47</sup> "What is Lawfare?" THE LAWFARE PROJECT, <http://www.thelawfareproject.org/> (last visited Nov. 27, 2010).

<sup>48</sup> *Id.*

<sup>49</sup> Horton, *supra* note 35. See David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981 (2008).

broader root—“lawfare” is used to describe a legal maneuver that is, from the perspective of the speaker, abusive, and is used to further a broader hostile military agenda.

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

A. *Lawfare at Guantánamo*

The first wave can be tied closely to the Rumsfeld Pentagon and to the 2005 National Defense Strategy I cited above. The Rumsfeld Pentagon was extremely defensive about criticisms of its radical legal policies, but its defensive strategy focused on efforts to surround themselves with silence. Only a small team of lawyers within the Administration—Jack Goldsmith dubbed them the “War Council”—even knew about these policies.<sup>50</sup> Career military lawyers who would ordinarily have played a key role in shaping these policies were systematically shut out of the process.<sup>51</sup> Only ideologically tested and loyal Neoconservatives were permitted to engage in these issues.<sup>52</sup> Documents that have emerged out of the Justice Department show that this team advocated the creation of a special new detention facility at Guantánamo with a prime concern from the outset—that it would be beyond the reach of U.S. courts, the Red Cross, and meddlesome lawyers.<sup>53</sup> In sum, the plan was to avoid the applicability of law and any kind of accountability for what transpired there.

When lawyers began to systematically assail these defenses and steadily piece together and expose the extraordinary new policies, including the use of torture and other enhanced interrogation techniques, they met with a harsh pushback from the Rumsfeld Pentagon that can be placed under the banner of “lawfare.” The habeas lawyers were tarred with ethnic slurs and accusations of homosexuality, accused of undermining national security, subjected to continual petty harassment.<sup>54</sup> The Rumsfeld Pentagon made a strong effort to separate these lawyers from their livelihood—by appealing to their paying clients to abandon them over their pro bono work for Guantánamo prisoners.

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

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<sup>50</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY* 22 (2008).

<sup>51</sup> *Id.*; Scott Horton, *Is International Law Really Law?—Six Questions for Michael Scharf*, *HARPER’S MAG.*, March 15, 2010, <http://www.harpers.org/archive/2010/03/hbc-90006695>.

<sup>52</sup> Horton, *supra* note 51.

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

<sup>54</sup> Scott Horton, *Silencing the Lawyers*, *HARPER’S MAG.*, May 26, 2010, <http://www.harpers.org/archive/2010/05/hbc-90007114>.

“the news story that you’re really going to start seeing in the next couple of weeks is this: As a result of a FOIA request through a major news organization, somebody asked, ‘Who are the lawyers around this country representing detainees down there?’ and you know what, it’s shocking.”<sup>55</sup> Stimson then proceeded to give the full names of a dozen of the nation’s most prominent law firms, adding:

I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.<sup>56</sup>

The following morning, the *Wall Street Journal* published an editorial by Neoconservative Robert L. Pollock, a member of the *Journal*’s editorial board, who was on several occasions invited to travel on junkets arranged by the Rumsfeld Defense Department.<sup>57</sup> Pollock’s piece also attacked the law firms providing pro-bono representation to the Guantánamo detainees.<sup>58</sup> Pollock quoted an unnamed “senior U.S. official,” who made the following comment: “Corporate CEOs seeing this should ask firms to choose between lucrative retainers and representing terrorists.”<sup>59</sup> Similar attacks appeared simultaneously on conservative talk radio programs.<sup>60</sup> The timing, placement, and language used in these attacks suggests strongly that they were closely coordinated.

In an article in July 2007, I ran through a series of petty harassments that these lawyers were subjected to, including seizure of notes and limitations on access to the clients.<sup>61</sup> Techniques were used to disrupt their relationship with clients: for instance, interrogators told their clients that their lawyers were “Jews,” “Zionists,” and “homosexuals.”<sup>62</sup>

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

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<sup>55</sup> See Luban, *supra* note 49, at 1981n.1, 1982 (referring to the transcript of interview by Amy Goodman with Stephen Oleskey, Partner at WilmerHale, and Emily Spieler, Dean of Northeastern University School of Law (Jan. 17 2007), available at [http://www.democracynow.org/2007/1/17/top\\_pentagon\\_official\\_calls\\_for\\_boycott](http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott)).

<sup>56</sup> *Id.*

<sup>57</sup> Robert L. Pollock, *The Gitmo High Life*, WALL ST. J., Jan. 27, 2007, at A12.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N. Y. TIMES, Jan. 13, 2007, at A1.

<sup>61</sup> Horton, *supra* note 34.

<sup>62</sup> *Id.*

“worst of the worst,”<sup>63</sup> or the sort of people who would “gnaw their way through hydraulic cables of a jet to bring it down,” as General Richard Myers said in a characteristic moment of melodrama.<sup>64</sup> But were they really? The total historical population of Guantánamo was about 800.<sup>65</sup> Of this number, exactly fifteen are high-value detainees, all of them transferred to Guantánamo in September 2006 from Central Intelligence Agency (CIA) black sites.<sup>66</sup> Only fifty-three were found to have participated in “hostile acts” against U.S. or allied forces.<sup>67</sup> Six hundred have been released.<sup>68</sup> Of the roughly 200 remaining, a large portion would be released but for diplomatic complications. Many of these prisoners are Yemenis and the U.S.’ diplomatic relationship with Yemen—where we are now fighting a secret war—remains very complicated.<sup>69</sup> Of the remaining prisoners—about twenty-five percent of the historical population—most are now seeking release by way of habeas corpus.<sup>70</sup> As we meet, the scorecard tally shows fifty-five cases decided, but the government has won only a total of eighteen of these cases.<sup>71</sup> This is notwithstanding absolutely extraordinary efforts by the Government, with Congressional support, to “stack the deck” in favor of the Government—picking its favorite court and appeals court, with strong conservative Republican majorities, and establishing legal standards that should make the process much easier for the Government. If you run the math, you will see that the estimates initially offered by CIA and Federal Bureau of Investigation experts, and confirmed by a Seton Hall study—that probably no more than twenty percent of the prisoners actually were al-Qaeda or Ta-

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<sup>63</sup> Both Rumsfeld and Cheney made statements to this effect throughout the justification for continuing the detention facility at Guantanamo. See Scott Horton, *The Worst of the Worst?*, HARPER’S MAG., Oct. 2, 2009, <http://www.harpers.org/archive/2009/10/hbc-90058> 11.

<sup>64</sup> Richard Myers, *DoD News Briefing*, U.S. Dep’t of Defense (Jan. 11, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031>.

<sup>65</sup> BENJAMIN WITTES, THE DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY 23 (BROOKINGS INST., 2008), available at [http://www.brookings.edu/~media/Files/rc/reports/2008/1216\\_detainees\\_wittes/1216\\_detainees\\_wittes.pdf](http://www.brookings.edu/~media/Files/rc/reports/2008/1216_detainees_wittes/1216_detainees_wittes.pdf).

<sup>66</sup> *Id.*

<sup>67</sup> David Bowker & David Kaye, Op-Ed, *Guantánamo by the Numbers*, N. Y. TIMES, Nov. 10, 2007, available at [http://www.nytimes.com/2007/11/10/opinion/10kayeintro.html?\\_r=1&th&emc=th&oref=slogin](http://www.nytimes.com/2007/11/10/opinion/10kayeintro.html?_r=1&th&emc=th&oref=slogin).

<sup>68</sup> *Yemeni Returns Home After Guantanamo Bay Release*, BBC (Jul. 13, 2010), <http://www.bbc.co.uk/news/10624331>.

<sup>69</sup> WITTES & WYNE ET. AL, *supra* note 65, at 7 (noting the weak diplomatic relationship and security concerns).

<sup>70</sup> See *id.* at 8–11 (listing those still in detention and seeking habeas petitions as of October 2009).

<sup>71</sup> CTR. FOR CONSTITUTIONAL RIGHTS, GUANTANAMO HABEAS SCORECARD 1 (2010) (Reflects total number of habeas cases as 55, and government losses as 18, as of October 21, 2010).

liban fighters—seems to be generous.<sup>72</sup> In fact, the number is not likely to run much over ten percent.<sup>73</sup>

The real question that the public should be pursuing is what happened to the 800 al-Qaeda and Taliban leaders for whom Guantánamo was constructed? It is clear at this point that Pakistan's Directorate for Inter-Services Intelligence (ISI) had been sheltering them and that the United States was furnished with so much chaff to throw them off the case. That story starts with Operation Evil Airlift.<sup>74</sup> As the American campaign in Afghanistan moved quickly towards a crushing defeat of the Taliban and al-Qaeda in November 2001, the military leadership of Afghanistan took up its last redoubt in the northeastern city of Kunduz.<sup>75</sup> The city was surrounded and bombarded.<sup>76</sup> Then a curious plea was directed, personally from the Pakistani President, General Pervez Musharraf to Vice President Dick Cheney.<sup>77</sup> We assisted you with critical information about the movements of the Taliban, Musharraf stated.<sup>78</sup> This was supplied by Pakistani military attachés attached to the Taliban.<sup>79</sup> They are now in Kunduz.<sup>80</sup> Musharraf demanded that the United States stop its bombardment and open up an air corridor that would allow Pakistan to airlift its military advisors out of Kunduz.<sup>81</sup> Overruling his military and intelligence advisors, Cheney directed that Musharraf be granted his request.<sup>82</sup> The siege of Kunduz was briefly halted, and Pakistani transports ferried a precious load out of the city.<sup>83</sup> Probably not less than 600 senior al-Qaeda and Taliban leaders were eva-

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<sup>72</sup> MARK DENBEAUX ET. AL, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006).

<sup>73</sup> Peter Finn, *Most Guantanamo Detainees Low-level Fighters, Task Force Report Says*, WASH. POST, May 29, 2010, at A3.

<sup>74</sup> AHMED RASHID, DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 92 (2008).

<sup>75</sup> Seymour M. Hersh, *The Getaway: Questions Surround A Secret Pakistani Airlift*, NEW YORKER, Jan. 28, 2002, at 36.

<sup>76</sup> Marcus George, *Kunduz Celebrates End of Siege*, BBC (Nov. 26, 2001) [http://news.bbc.co.uk/2/hi/south\\_asia/1677157.stm](http://news.bbc.co.uk/2/hi/south_asia/1677157.stm).

<sup>77</sup> RASHID, *supra* note 74.

<sup>78</sup> *Id.* at 91 (While this particular exchange between former President Bush and former President Musharraf is not cited, support by the ISI was provided against the Taliban who then became trapped in Kunduz).

<sup>79</sup> Imad Ahmed, *Pakistan's Intelligence and Army Are on the Taliban's Side*, SKEPTICAL EMPIRICIST (May 9, 2009 9:07 AM), <http://www.imadahmed.com/701315414/pakistans-intelligence-agency-and-army-are-on-the-talibans-side/>.

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

<sup>81</sup> RASHID, *supra* note 74.

<sup>82</sup> Scott Horton, *Praise George W. Bush, Damn Richard B. Cheney*, HARPER'S MAG. (Dec. 1, 2009), <http://www.harpers.org/archive/2009/12/hbc-90006167>.

<sup>83</sup> Michael Moran, *The "Airlift of Evil": Why Did We Let Pakistan Pull "Volunteers" out of Kunduz?*, MSNBC (Nov. 29, 2001), <http://www.msnbc.com/id/3340165>.

cuated from Kunduz in this manner shortly before it fell.<sup>84</sup> Those 600 evacuees are the exact group for whom Guantánamo was constructed and which it should have held.<sup>85</sup>

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

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

#### B. *Pakistan's Lawfare Coup*

The lawfare rhetoric of the American Pentagon quickly found foreign imitators. General Pervez Musharraf, Pakistan's strongman, had seized power in a coup d'état in 1999; he appointed himself president in June 2001.<sup>86</sup> Musharraf promised that his military dictatorship would be a brief interlude and that democratic rule would be restored.<sup>87</sup> In the meantime, however, he focused on building good rapport with America's national security elite.<sup>88</sup> Eight years later, Pakistan's middle class, and its professionals in particular, pressed him relentlessly to make good on his promises to restore constitutional government.<sup>89</sup> The legal profession and the judiciary came to lead this charge. Chief Justice Iftikhar Muhammad Chaudhry pressed corruption charges involving Musharraf and spoke forcefully in support of restoration of constitutional, democratic rule at a series of public events.<sup>90</sup> Musharraf reacted by firing Chaudhry, and launching a repression

<sup>84</sup> Scott Horton, *Silencing the Lawyers*, HARPER'S MAG. (May 26, 2010), <http://www.harpers.org/archive/2010/05/hbc-90007114>.

<sup>85</sup> *Id.*

<sup>86</sup> Amir Zia, *Musharraf to Take Over as Pakistan's President*, ABC NEWS (Jun. 20, 2001), <http://abcnews.go.com/print?id=80901>.

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

<sup>88</sup> *Pervez Musharraf News*, N.Y. TIMES (Oct. 4, 2010), [http://topics.nytimes.com/top/reference/timestopics/people/m/pervez\\_musharraf/index.html](http://topics.nytimes.com/top/reference/timestopics/people/m/pervez_musharraf/index.html).

<sup>89</sup> *Id.*

<sup>90</sup> *Justice Iftikhar "Stayed" Emergency, PCO*, DAILY TIMES (Nov. 4, 2007), [http://www.dailytimes.com.pk/default.asp?page=2007\11\04\story\\_4-11-2007\\_pg7\\_3](http://www.dailytimes.com.pk/default.asp?page=2007\11\04\story_4-11-2007_pg7_3).

campaign targeting the nation's judges and lawyers.<sup>91</sup> It reached its peak in a November 3, 2007, televised address.<sup>92</sup>

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

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

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

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<sup>91</sup> Zafar M. Sheikh & Paul Wiseman, *Emergency Declared in Pakistan*, USA TODAY (Nov. 3, 2007), [http://www.usatoday.com/news/world/2007-11-03-pakistanemergency\\_N.htm](http://www.usatoday.com/news/world/2007-11-03-pakistanemergency_N.htm).

<sup>92</sup> *Id.*

<sup>93</sup> Scott Horton, *Lawfare Redux* HARPER'S MAG. (Mar. 12, 2010), <http://www.harpers.org/archive/2010/03/hbc-90006694>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> James Traub, *The Lawyers' Crusade*, N.Y. TIMES, Jun. 1, 2008, at M46.

<sup>98</sup> Horton, *supra* note 93; *Does Musharraf's Comparison to Lincoln Hold Up?* (NPR Broadcast Nov. 5, 2007) available at <http://www.npr.org/templates/story/story.php?storyId=16019217>.

<sup>99</sup> Horton, *supra* note 93.

<sup>100</sup> Scott Horton, *Bush's Musharraf Envy*, HARPER'S MAG. (Nov. 6, 2007), <http://www.harpers.org/archive/2007/11/hbc-90001608>.

validate the lawyers and the judges against him.<sup>101</sup> In fact, most of the nation's educated middle class rallied against him.<sup>102</sup> The Musharraf speech found resonance only with Neoconservatives in the Bush Administration and notably with figures like Dick Cheney and John Bolton—and at this point their power was waning.<sup>103</sup> Condoleezza Rice's State Department was horrified by Musharraf's citation of U.S. examples to justify dictatorship.<sup>104</sup> It pressed for Musharraf's departure, and President Bush took the State Department's advice.<sup>105</sup> By March a new government was formed, Musharraf was forced from power, and was soon in New York making appearances on the Daily Show and selling his latest book.<sup>106</sup> The lawfare card had been played to provide cover for a military coup. But the ploy didn't even sit well with the Bush Administration.

### C. *The Netanyahu Initiative*

This brings us to the third wave of lawfare advocacy—associated with the newly formed Lawfare Project.<sup>107</sup> I am still in the process of trying to understand this version. But whereas the first wave is geared to the protection of the Bush Administration, the second to the continuation of the Musharraf dictatorship, this one appears to be closely linked to the Likud-led Government of Benjamin Netanyahu in Israel. Any effort to challenge the policies of this government drawing on international law appears to be the focus of complaint. Examples include: the Goldstone Report on the conflict in the Gaza strip; the efforts to use international humanitarian law to bring criminal charges against Israeli officials; the use of libel statutes to bring civil cases against persons who publish books; and articles disparaging persons for funding or financing terrorism.<sup>108</sup>

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<sup>101</sup> Asim Tanveer, *Pakistanis Jubilant Over Musharraf's Resignation*, REUTERS, Aug. 18, 2008, <http://www.reuters.com/article/idUSISL20840020080818>.

<sup>102</sup> Juan Cole, *The Fall of Bush's Man in Pakistan*, SALON (Aug. 19, 2008), <http://www.salon.com/news/opinion/feature/2008/08/19/musharraf>.

<sup>103</sup> See Greg Bruno & Jayshree Bajoria, *Backgrounder: US-Pakistan Military Cooperation*, COUNCIL ON FOREIGN RELATIONS (Jun. 26, 2008), [http://www.cfr.org/publication/16644/us\\_pakistan\\_military\\_cooperation.html](http://www.cfr.org/publication/16644/us_pakistan_military_cooperation.html) (commenting on continued praise of Musharraf by the Bush administration despite State Department reports).

<sup>104</sup> See Ali Eteraz, *Musharraf's Mini-martial Law*, GUARDIAN.CO.UK (Nov. 3, 2007), <http://www.guardian.co.uk/commentisfree/2007/nov/03/musharrafsmartiallaw> (noting Rice was not pleased with Musharraf's declaration of martial law).

<sup>105</sup> Juan Cole, *Pakistan Turns Scary for Bush's War on Terror*, SALON (Feb. 20, 2008), <http://www.salon.com/news/opinion/feature/2008/02/20/pakistan>.

<sup>106</sup> *Pakistan President Appears on "Daily Show"*, USA TODAY (Sept. 27, 2006), [http://www.usatoday.com/life/television/news/2006-09-26-musharraf-daily-show\\_x.htm](http://www.usatoday.com/life/television/news/2006-09-26-musharraf-daily-show_x.htm).

<sup>107</sup> Tzvi Ben Gedalyahu, *New Terrorist Weapon: "Lawfare" Twists the Law*, ISRAEL NAT. NEWS (Mar. 14, 2010) <http://www.israelnationalnews.com/News/news.aspx/136501>.

<sup>108</sup> See, e.g., U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Rep. of the United Nations Fact Finding Mission on the Gaza Conflict*,

Obviously, these examples, and many others cited by the Lawfare Project, cover a wide array of topics and are pursued in many different fora. The only thing that seems to link them is hostility to the Netanyahu Government. The purpose of the Lawfare Project appears not to be to engage in a discussion of the merits of any of these legal efforts, but to contend *ab initio* that all such efforts are illegitimate and that they should be ignored.

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

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

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Rep. on its 12<sup>th</sup> Sess., Sept. 14–Oct. 2, 2009, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009); Tony Karon, *Why Israeli Officials Are Limiting Their European Vacations*, TIME (Jul. 29, 2001), <http://www.time.com/time/printout/0,8816,169247,00.html> (exemplifying charges against Israeli officials); Rachel Ehrenfeld, *America Must Defend its Writers: A Bill in Congress is aiming to protect US-based authors from overseas libel judgments, not change British laws*, GUARDIAN.CO.UK (Mar. 1, 2010, 2:45 PM), <http://www.guardian.co.uk/commentisfree/libertycentral/2010/mar/01/congress-bill-protect-libel/print> (illustrating the use of libel statutes); *NY Man Sentenced in Terrorism Financing Case*, JERUSALEM POST (Apr. 20, 2010, 4:41 AM), <http://www.jpost.com/Headlines/Article.aspx?id=173523> (demonstrating disparaging articles toward terrorism financiers).

<sup>109</sup> JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* ON LIBERTY: WITH RELATED DOCUMENTS 31 (Alan S. Kahan ed., 2008)

<sup>110</sup> *Id.* at 34.

<sup>111</sup> *Id.* at 34–35.

<sup>112</sup> *Id.* at 35.

<sup>113</sup> *Id.*

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## III. CONCLUSION

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