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The Corruption of Civilizations

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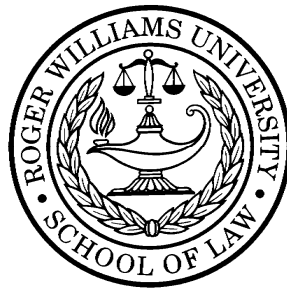
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ERRATUM

In the Introduction to the Symposium on Genuine Tort Reform in the Winter 2008 issue of the *Roger Williams University Law Review*, we erroneously stated that symposium was made possible by a generous grant of the Roscoe Pound Foundation. In fact, it was the American Association for Justice Robert L. Habush Endowment (hereinafter AAJ Endowment) that made that very generous grant.

We sincerely apologize for the error, and thank the AAJ Endowment for supporting our Symposium on Genuine Tort Reform and the important scholarship it produced.

We also take this opportunity to set forth the mission of the AAJ Endowment:

The mission of the AAJ Endowment, in conjunction with AAJ, is to preserve and protect the civil justice system and individual rights. It accomplishes this through the following priorities:

- *providing consistent public education and research to promote informed public dialogue on, understanding of and appreciation for the civil justice system;*
- *sponsoring prestigious education programs and well-received publications for judges and law professors; and,*
- *funding innovative scholarship and far reaching research on the civil justice system and individual rights.*

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Symposium

Introduction: The Emerging Power of Context over Conventional Wisdom in Scholarship on Law and Terrorism

Peter Margulies* and Laura Corbin**

Conventional wisdom has produced two schools of thought on legal responses to September 11. On the one hand, some scholars have argued that the law prior to September 11 provided all the flexibility that the government ever needed, and that measures such as the Patriot Act that increased government power were dangerous to the delicate balance between liberty and security.¹ Other scholars have been either apologists for or architects of the Bush administration's policies, arguing that the legal constraints in place before the attacks and pressed by administration critics today are a form of "lawfare" exploited by America's enemies.²

* Professor of Law, Roger Williams University School of Law. I thank Dean David Logan for his generous support of this symposium.

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1. See generally DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (New Press 2007). The description of this school of thought is, to be sure, a broad-brush portrayal that masks some concessions to the post-September 11 environment. See *id.* (acknowledging that intervention in Afghanistan was appropriate).

2. See, e.g., JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 106-08 (Atlantic Monthly Press 2006) (arguing that restrictions on wiretapping and data collection endanger national security). Some prominent commentators identified with this view nevertheless have voiced concern about the unilateralism of the Bush administration's moves and the failure of some legal opinions to address adverse authority. Compare JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 58 (W.W. Norton and Company 2007) (describing

Neither view does justice to the complexities of the post-9/11 world.

The participants in this symposium seek to avoid such stark stances.³ Their contributions, presented on November 9, 2007 at the Roger Williams University School of Law symposium on “Legal Dilemmas in a Dangerous World: Law, Terrorism and National Security,” cover a wide range of issues, including the habeas corpus rights of prisoners at Guantanamo Bay, the state secrets privilege, defense lawyering before the military commissions, and opportunities for Muslim-Americans to both comply with laws regulating the financing of terrorist groups and fulfill their faith-bound obligation of charitable giving. Running through each essay is a conviction that the rule of law is flexible enough to protect national security without endangering core freedoms.

In *The Corruption of Civilization*, Professor Timothy Kuhner denies that security and liberty are competing sides in a zero-sum game.⁴ Instead, Kuhner argues, our security is often best served by adhering to our political values, viewing war as a last resort, and seeking solutions through the application of “soft power,” including political, social, and cultural influence.⁵ According to Kuhner, preemptive war in Iraq, indefinite detention of terror suspects, and torture have simultaneously undermined both our hard won national tradition of human dignity and our end-game: national security.⁶ “War” fighters on both sides, Kuhner asserts, are violating international law as well as “norms of due process

concept of “lawfare” against American interests), *with id.* at 71 (noting displeasure of senior Bush administration official when author, former head of Justice Department’s Office of Legal Counsel, indicated legal doubts about counterterrorism initiative); *cf.* Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. (forthcoming 2008), *available at* <http://ssrn.com/abstract=1097314> (discussing influence of lawfare paradigm within Bush administration legal circles).

3. This striving for balance has also marked the best discussions of previous national security challenges. See Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 116 (1951) (contrasting “exaggerated claims of security” with opposing flaw of “contemptuously ignoring the reasonable anxieties of wartime”).

4. See Timothy K. Kuhner, *The Corruption of Civilization*, 13 ROGER WILLIAMS U. L. REV. 349, 371 & n.71 (2008).

5. *Id.* at 365 & n.56. Kuhner discusses the merits of JOSEPH S. NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (Public Affairs 2004).

6. *Id.* at 363 & n.47; *id.* at 362.

and civilized treatment.”⁷ After laying the legal and historical foundations for his premise that the identity of the United States rests on human rights, Kuhner reinforces the idea that protecting human rights, and therefore the strength of our appeal to the rest of the world, is the path to both freedom and security.⁸ His challenge to us “as citizens in a democracy [is] to produce something better than a war on terrorism.”⁹

Professor Nina Crimm argues in her essay, *Muslim-Americans’ Charitable Giving Dilemma: What About a Terror-free Donor Advised Fund?*, that terrorist financing restrictions can be counterproductive when they ignore the importance of core Islamic beliefs.¹⁰ Crimm notes that millions of Muslim-Americans face a dilemma in the aftermath of September 11 when they wish to uphold one of the pillars of their Islamic faith: the obligation of zakat or charity.¹¹ As Crimm explains, zakat is often focused on assisting the “world’s neediest Muslims.”¹² After September 11, however, donating to Muslim charities became a minefield.¹³ Through an analysis of the fallout after passage of the USA Patriot Act and other laws, Crimm demonstrates that Muslim-Americans fear investigation or prosecution for making a charitable contribution to impoverished Muslims overseas.¹⁴

7. *Id.* at 351 & n.7.

8. *Id.* at 372 (see text before n.72). For more of Professor Kuhner’s thoughts about human rights, see Timothy K. Kuhner, *Human Rights Treaties in U.S. Law: The Status Quo, Its Underlying Bases, and Pathways for Change*, 13 DUKE J. COMP. & INT’L L. 419 (2003). See also Harold Hongju Koh, *Restoring America’s Human Rights Reputation*, 40 CORNELL INT’L L.J. 635 (2007) (describing how the U.S. war on terror has undermined U.S. human rights policy and therefore its soft power).

9. *Id.* (see text after n.73).

10. See Nina J. Crimm, *Muslim Americans’ Charitable Giving Dilemma: What About a Terror-Free Donor Advised Fund?*, 13 ROGER WILLIAMS U. L. REV. 375, 392 (2008).

11. *Id.* at 377 (see text before n.11). Cf. Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT’L L. REV. 65 (2007) (discussing virtues and vices of terrorist financing statutes).

12. Crimm, *supra* note 10, at 378 & n.17.

13. For more of Crimm’s views on this topic, see Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy (High Alert)*, 45 WM. & MARY L. REV. 1341 (2004).

14. Crimm, *supra* note 10, at 385-392 & nn.60-95; See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, Title I, § 106, 115

To remedy this problem, Crimm proposes creation of a “terror-free Donor Advised Fund.”¹⁵ Such a fund, she suggests, would ensure that charitable contributions from Muslims in the U.S. are not supporting terrorism, but instead are helping to relieve poverty and suffering in parts of the world where those deprivations might “exacerbate terrorism.”¹⁶ Striking a balance on the financial front between Americans’ religious identity and national security enhances both.

In *Habeas Corpus, Alternative Remedies, and the Myth of Swain v. Pressley*,¹⁷ Professor Stephen Vladeck moves from policy to legal doctrine regarding terror detainees.¹⁸ Recent doctrinal clashes¹⁹ have centered on the availability to detainees of the writ of habeas corpus. The struggle over habeas came to a head with Congress’ passage of the Military Commissions Act, which purports to withhold access to the writ.²⁰ In earlier cases, the Supreme Court has typically cited to its decision in *Swain v. Pressley* for the proposition that when Congress limits the writ through some means short of outright suspension, it must provide an adequate substitute.²¹ Vladeck argues that the Supreme Court’s dutiful citation of *Pressley* in cases involving congressional efforts to limit access to habeas corpus masks a significant gap in habeas jurisprudence: the Court has repeatedly declined to define what procedures are adequate.²² According to Vladeck, Congress rushed into this vacuum with the Military

Stat. 272 (2001).

15. Crimm, *supra* note 10, at 395 (see text between nn.108-09).

16. *Id.* at 385 & n.57; cf. Garry W. Jenkins, *Soft Power, Strategic Security and International Philanthropy*, 85 N.C. L. REV. 773 (2007) (arguing that international philanthropy is an ally not an enemy in the war on terror).

17. 430 U.S. 372 (1977).

18. See Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies, and the Myth of Swain v. Pressley*, 13 ROGER WILLIAMS U. L. REV. 411. For more on Vladeck’s inquiry into the availability of habeas corpus in the context of the war on terror, see Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963 (2007).

19. See, e.g., *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007) (Nos. 06-1195, 06-1196); *Rasul v. Bush*, 542 U.S. 466, 485–88 (2004) (Kennedy, J., concurring in the judgment); *Gherebi v. Bush*, 352 F.3d 1278, 1285–99 (9th Cir. 2003).

20. 10 U.S.C.A. § 950j(b) (West Supp. 2007). In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Court struck down these restrictions on access to habeas corpus.

21. See Vladeck, *supra* note 18, at 412 & n.8.

22. *Id.* at 426-27.

Commissions Act.²³ To ensure that Congress does not “suffocate the writ,”²⁴ Vladeck concludes that the Court should relinquish the “myth” of *Pressley* and offer clear guidance.²⁵

Presenting doctrinal guidance on another important issue, Professor Robert Chesney squarely addresses the perceived conflict between our esteem for the rights of the individual and democratic accountability on the one hand and national security on the other in *Legislative Reform of the State Secrets Privilege*.²⁶ The administration has cited the state secrets privilege both as a shield, to ensure that litigation will not result in the disclosure of sensitive information, and as a sword, to persuade courts to dismiss litigation (for example, lawsuits based on the government’s Terrorist Surveillance Program).²⁷ Chesney recognizes that all too often government officials have exploited the state secrets privilege to shield the government from revelations of its own incompetence.²⁸ However, Chesney also acknowledges that wholesale disclosure of sensitive information could do real damage to national security interests.²⁹

In search of the right balance, Chesney focuses on the newly introduced State Secrets Protection Act.³⁰ He points out the Act’s benefits for plaintiffs: a mandate that the court examine evidence claimed as privileged, its provisions for substitute evidence when the privilege does attach, judicially appointed experts to advise the court, and the introduction of guardians ad litem to represent the non-government party in what are currently ex parte

23. *Id.* at 435-37 & nn.110-15.

24. *See* *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973).

25. Vladeck, *supra* note 18, at 441-42 & n.130.

26. Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 442 (2008). For further discussion of the state secrets privilege, see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007). The U.S. Supreme Court recognized the state secrets privilege in *United States v. Reynolds*, 345 U.S. 1 (1953).

27. *See e.g.*, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev’d*, 493 F.3d 644 (6th Cir. 2007); *Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

28. *See Reynolds*, 345 U.S. 1 (1953) (discussing privilege); *cf.* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1043 (Aspen Publisher 4th ed. 2006) (noting that information for which government claimed privilege in *Reynolds* concerned not advanced technology but mere pilot error).

29. Chesney, *supra* note 26, at 457-58.

30. *See* S. 2533, 110th Cong. (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2533is.txt.pdf.

hearings.³¹ He also suggests that the Act goes too far at times, potentially compromising national security by allowing attorneys for the non-government party to learn about evidence that is later found to be privileged.³² Chesney has submitted his commentary as testimony to the Senate Judiciary Committee which held a hearing on the legislation in February.³³

Professor Ellen Yaroshefsky takes on conventional wisdom about the role of lawyers in terrorism cases in her thoughtful contribution, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantanamo Bay*.³⁴ After President Bush issued his order establishing the military commissions, some progressives criticized the order (which the Supreme Court in *Hamdan*³⁵ ruled exceeded the president's authority) by raising doubts about the independence of military lawyers who would defend the detainees.³⁶ Indeed, supporters of the military commissions appeared to implicitly accept this premise, believing that military lawyers would be docile advocates at best. Yaroshefsky's essay counters this assumption with a compelling narrative about how the Hicks team succeeded by challenging the legitimacy of the commissions both in the tribunal itself and in the court of public opinion.³⁷ The Hicks team concentrated their efforts on Hicks' home country, Australia, which also happens to be an ally of the United States. The result was a negotiated plea for Hicks that secured his release from Guantanamo.³⁸ Yaroshefsky poignantly portrays the lawyers' anxiety that the plea would legitimize the Bush administration's overreaching.³⁹ Nevertheless, she argues

31. Chesney *supra* note 26, at 466.

32. *Id.* at 457-58.

33. STATE SECRETS PROTECTION ACT, S. Rep. No. 110-938 (2008).

34. See Ellen Yaroshefsky, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantanamo Bay*, 13 ROGER WILLIAMS U. L. REV. 468.

35. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

36. See Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL'Y 653, 656-57 (2002).

37. Yaroshefsky, *supra* note 34, at 479.

38. Yaroshefsky, *supra* note 34, at 490-92 & nn.106-17.

39. *Id.* at 478 & nn.49-50. For a further perspective on the ethics of lawyers representing clients in an arguably unfair system, see Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SECURITY L. & POL'Y 375 (2005).

convincingly that the plea not only helped Hicks but also underscored the ongoing problems with the military commissions.⁴⁰ Ironically, the committed and creative advocacy of the Hicks team furnished rare common ground for the Bush administration and its critics, each of whom had underestimated the institutional culture and pride of military lawyers.

As the authors in this Symposium demonstrate, conventional wisdom only goes so far in meeting the challenges of the post-September 11 legal environment. In place of the old ideologically entrenched positions, new approaches are necessary. The authors in this Symposium make substantial contributions to that crucial debate.

40. Yaroshefsky, *supra* note 34, at 490-92 & nn.108-114.

The Corruption of Civilizations

Timothy K. Kuhner*

Remarks by other panelists at today's conference¹ have clarified and problematized increases in executive power, detriments to human rights, and the emergence of an ever-more adversarial and evasive political environment that removes transparency, accountability, rationality, and even principle from legal discourse. These remarks eulogize the war on terrorism's non-human casualties. I wish to point out with acute remorse that these casualties all belonged to a single family and that this family constituted our tradition. This was a tradition of liberal democracy, where torture was off the table and procedural protections were a centerpiece. Aggressive warfare signaled criminality, not patriotism. Human dignity, the rule of law, and the intelligent pursuit of peace, prosperity, and stability emblazoned the halls of this place where we resided. This tradition was hard-won; its emergence costly and far-sighted, a precious gift of heritage that we were tasked with maintaining, or even improving.

I also wish to say that although the rhetoric of our tradition's demise is appealing for its dramatic excess, it is too conceited for me to maintain to the end, for it is not the demise of our tradition that we are witnessing but our abandonment of the same. The tradition will endure, at least in a cryogenically frozen state, until new adherents seek it out. My position, however, is that we should re-adhere to it now and save future generations the trouble. Here, focusing on our treatment of detainees and aggressive warfare—just two of the ways we have abandoned our

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1. Roger Williams University School of Law, Legal Dilemmas in a Dangerous World: Law, Terrorism, and National Security, (Nov. 9, 2007).

tradition—I will lay out a brief civilizational requiem. This redescribes the war on terrorism in a way that makes its excesses all the less appealing and its broader consequences all the more clear.

I. A DIALECTIC OF EXTREMISM

I submit that the supposed conflict between terrorists and the architects of our war on terrorism is in reality a collaborative relationship between two groups of extremists whose modes of action undermine civilizational commitments. The “clash of civilizations” predicted by Samuel Huntington and endorsed by Osama Bin Laden² and George Bush³ alike ought to be described

2. Referring to the U.S. invasion of Afghanistan post 9/11, Bin Laden sees a united front in the West: “[t]he entire West, with the exception of a few countries, supports this unfair, barbaric campaign, although there is no evidence of the involvement of the people of Afghanistan in what happened in America.” He then goes on to describe creed as the basis that divides the East from the West:

“This war is fundamentally religious. The people of the East are Muslims. They sympathized with Muslims against the people of the West, who are the crusaders. Those who try to cover this crystal clear fact, which the entire world has admitted, are deceiving the Islamic nation . . . Under no circumstances should we forget this enmity between us and the infidels. For, the enmity is based on creed . . . We should also renounce the atheists and infidels. It suffices me to seek God's help against them. God says: ‘Never will the Jews or the Christians be satisfied with thee unless thou follow their form of religion.’”

Also notable in this same speech is Bin Laden's characterization of the conflict itself, which he defines as religious and having nothing to do with terrorism, except the terrorism that he believes the West has consistently committed against Muslims. *Bin Laden Rails Against Crusaders and UN*, B.B.C. NEWS, Nov. 3, 2001, available at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1636782.stm. Phrases such as “the crusader-Zionist alliance” also deserve mention. *Statement of the World Islamic Front*, <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.

3. On the night September 11, 2001, the President addressed the nation: “Today . . . our way of life, our very freedom came under attack.” George W. Bush, President, United States, Address to the Nation (Sept. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>. Here, I wish to be cautious, because it is the case that Bush has been careful in his comments about Muslims generally and making a distinction between terrorists ideology and Islam. But little can be said to commend his description of terrorists' motives: he wants the American public to believe that we are being attacked because we are free, because of who we are, and what we represent, when in fact transnational Jihadis have always had a practical set of goals relating to concrete foreign policies relating to the

as the *corruption* of civilizations.⁴ Huntington famously predicted in 1993 that the primary source of conflict in the world we now inhabit would be cultural differences: “The fault lines between civilizations will be the battle lines of the future,” he warned; “[t]he great divisions among humankind and the dominating source of conflict will be cultural.”⁵ It quickly became fashionable to believe that we would inevitably generate conflict just by being ourselves and staying true to our own values. In reality, however, the diverse set of conflicts relating to terrorism world-wide have been spurred by actors who dishonor their own civilizational commitments. Leaders on both sides distinguish themselves not by being true to their civilizations, but by attempting to corrupt their civilizations.

The underlying values and tactics among both camps are fundamentally similar in their violation of foundational social mores and legal norms. The Bush administration and Al Qaeda⁶ employ unlawful modes of warfare—preemptive warfare and terrorism are violations of fundamental customary and treaty prohibitions in international law. Each denies civilized treatment to its captives—indefinite detention without charges, torture, and beheadings all contravene sacred norms of due process and civilized treatment.⁷ And yet, each camp proclaims itself the

Palestinian people, the U.S. military presence in Muslim lands, and so on.

4. Samuel P. Huntington, *The Clash of Civilizations*, FOREIGN AFF., Summer 1993, at 22. See also SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998).

5. *The Clash of Civilizations*, *supra* note 4, at 454.

6. By referring to Al Qaeda by name, I do not mean to exclude other transnational jihadis. There are of course multiple groups of doctrinaire jihadis, such as the Islamic Group, Islamic Jihad, and al-Tawhid wa al-Jihad. FAWAZ A. GERGES, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* 1 (2005).

7. It is in fact remarkable that the United States continues, post invasion of Afghanistan, to apply a war paradigm in the first place. At the time of the World Trade Center bombings, there was a legal presumption that terrorism was not an act of war. See *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1012 (2d Cir. 1974) (“The cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities.”). In a trial that ensued after 1993, a federal court of appeals upheld the conviction of a terrorist acting on U.S. soil for conspiracy to levy war against the United States. *United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999) (“To support a conviction for seditious conspiracy under 18 U.S.C. § 2384, the Government must demonstrate that: (1) in a State, or Territory, or place subject to the jurisdiction of the United States, (2) two or more persons conspired to ‘levy

guardian of sacred values—those of Western freedom on the one hand and Islamic faith on the other—while simultaneously employing tactics that can only be described as the gravemen of those same values. Just as the great majority of Muslims decry Al Qaeda⁸ (never mind suicide bombing and the beheading of hostages), the majority of Americans disapprove of the Bush Administration⁹ (never mind the use of torture and preemptive warfare).

The underlying similarity between both sides' derogations reveals another crucial clarification: the only *clash* to be seen is one between extremists on both sides, our extremists and their extremists. And upon closer examination, it may not be so much of a clash as a symbiosis. Each side proclaims to its respective constituencies that its actions undermine the enemy, while in reality each camp enthrones the other. The attacks of September 11th have triggered a new era of fear and executive power, giving President Bush and his neoconservative handlers the opportunity they needed to invade Iraq and weaken the American commitment to rights. The invasion of Iraq has succeeded in creating a strong

war against' or 'oppose by force the authority of' the United States government, and (3) that the defendant was a member of the conspiracy."'). Despite using the word "war," this is a criminal charge. The Government pressed criminal charges against those responsible, fighting terrorists in the United States in the Article III courts, not by employing the laws of war on its own territory. See Stacie D. Gorman, *In the Wake of Tragedy: The Citizens Cry Out for War, but Can the United States Legally Declare War on Terrorism?*, 21 PENN ST. INT'L. L. REV. 669, 676 (2003) ("the fact that the terrorists were tried in the court system--not fought on the battlefield--indicates that terrorists are criminals, and not soldiers of war. Although the charge against them was conspiracy to levy war against the United States, this was a criminal charge, punishable with jail time, not an act of warfare to be retaliated against with missiles."'). One might compare our shift in policy with Spain's staying the course, prosecuting in civilian courts those responsible for Al Qaeda's bombing of a Madrid train station. Some people were actually acquitted, but many were sentenced to long prison terms. But they held these trials under conditions of the rule of law.

8. GERGES, *supra* note 6, at 270 ("[T]he dominant response to Al Qaeda in the Muslim world was very hostile, and few activists, let alone ordinary Muslims, embraced its global jihad . . . [Moreover,] a broad representative spectrum of Arab and Muslim opinion makers and Islamists utterly rejected bin Laden and Zawahiri's justification for their attacks on America and debunked their religious and ideological rationale."').

9. In the most recent New York Times/CBS News poll, for example, only 28% of Americans approved of the job that President Bush is doing. David Leonhardt & Marjorie Connelly, *81% in Poll Say Nation is Headed on Wrong Track*, N.Y. TIMES, Apr. 4, 2008, at A1.

terrorist base where before there was none and elevated recruitment levels world-wide.¹⁰ Meanwhile, the American violation of civil and human rights has weakened core alliances and sympathies,¹¹ playing directly into the hands of the terrorists. Al Qaeda and the Bush administration have established a sort of dialectic, a dialectic of extremism, in which each camp legitimates and strengthens the other. And this is to say nothing of the operational and financial linkages between jihadis and Americans in Afghanistan during the 1980s, a theater of war where jihadis acquired “practical experience in combat, politics, and organizational matters.”¹²

II. OUR TRADITION

As this conflict escalates—the more we torture detainees and drop bombs that kill civilians, the more they send their operatives to our shores—hatred and fear will increasingly well up in our guts, and we, the collective human “we,” will come to forget who we are and what we stand for.¹³ It is imperative to remember and to repeat the observation that most fairly characterizes this new era: our extremists and their extremists undermine the core values that define Western and Islamic civilizations. Here, I mean only to comment on our fidelity to our own mores, not their fidelity to their own.

The treatment of prisoners makes inroads to certain mores. We might bristle at our mind-boggling rate of incarceration. We

10. See GERGES, *supra* note 6 and accompanying text.

11. See JOSEPH NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS*, x (2004).

12. See GERGES, *supra* note 6, at 12, 14 (“Despite subsequent denials by both jihadis and American officials, the two camps were in a marriage of convenience, united in opposition to godless Communism.”). Symbiosis indeed. Jihadis and American hawks exhibit a classic case: “a relationship between two people in which each person is dependent upon and receives reinforcement, whether beneficial or detrimental, from the other.” *RANDOM HOUSE COMPACT UNABRIDGED DICTIONARY* 1926 (Special 2d ed. 1996).

13. I do not believe it is coincidental, for example, that citizens of countries facing frequent terrorist attacks are far more tolerant of torture than citizens of countries that rarely face terrorist attacks. In a recent survey, Israelis and Iraqis were far more tolerant of torture as official policy (42-43% approving) than were citizens of the other twenty-three other countries polled (29% on average supporting some torture). See *One-Third Support ‘Some Torture,’* B.B.C. NEWS, Oct. 19, 2006, available at http://news.bbc.co.uk/2/hi/in_depth/6063386.stm#table.

are home to only 5% of the global population, but almost a quarter of the global prison population.¹⁴ But America never promised not to lock a lot of people up. This after all can partly be attributed to a democratic tradition of electing judges and prosecutors at the state level. “Law and order” remains a strong cultural value here.¹⁵ But our law and order culture is tempered by a commitment to rights that spans domestic and international law: due process, the prohibition on unlawful searches and seizures, equal protection, the prohibition on cruel and unusual punishment, adherence to the Geneva Conventions, the Torture Convention, the Civil and Political Rights convention, and so on. Although it is true that we did not promise not to lock them up, we have promised due process and civilized treatment.

Bring any great voice of our tradition to Abu Graib and Guantanamo Bay and each of us would hear expressed the civilizational agony we feel in our guts. Although on foreign ground, these are our prisons and Dostoyevsky said that it was here that “the degree of civilization in a society is revealed.”¹⁶ Even complex figures faced with the responsibilities of power beg us to consider the linkage between civil liberties and civil society, civilized treatment and civilization. As Chief Justice Burger put it, “the way a society treats those who have transgressed against it is evidence of the essential character of that society.”¹⁷ Churchill gives the point more of what is due to it:

A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminals against the state, a constant heart-searching by all

14. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at http://www.nytimes.com/2008/04/23/us/23prison.html?_r=1&oref=slogin.

15. See, e.g., MARSHALL SHAPO, TORT LAW AND CULTURE 278-79 (2003) (discussing the tensions between law and order culture and the notion, expressed in police misconduct actions, that nobody is above the law).

16. FYODOR DOSTOYEVSKY, THE HOUSE OF THE DEAD 76 (Constance Garnett trans., 1923). Winston S. Churchill said precisely the same thing: “[T]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.” See DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 215 n.4 (1990).

17. Hudson v. Palmer, 468 U.S. 517, 523-24 (1984) (“The continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society.”)

charged with the duty of punishment, a desire and eagerness to rehabilitate . . . , and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man, these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.¹⁸

We should hope that our unconscionable treatment of prisoners abroad indicates the sort of decline in strength and virtue that Churchill warned of, and not an abandonment of strength and virtue altogether.

Yet, the Administration's efforts to legitimate indefinite detention, change the definition of torture, and manufacture a doctrine embracing illegal warfare suggest the worst of these two scenarios. This would seem an effort to redefine strength—strength in power, strength in brutality, strength in shock and awe—and an effort to reshape virtue, now the vehemence of one's self protection and the zealotry of one's pursuit of national interest. And so aggression becomes strength, and single-minded pursuit of security and particular advantages reshapes the contours of virtue.

At one point, there was strength in reasoned restraint and virtue in the rare form of compassion one might feel for an enemy. Like many hard-won traditions of conscience, these meanings and the courage to pursue them are located not solely within one nation, but rather within a community of nations that has derived shared lessons from history. These lessons, too civilizational in scope to be proprietary, are forward looking. Their application is surely the great labor of civilizational belonging, surely a great benefit of civilizational belonging as well, for it is in living up to these lessons that we do what we know to be right and avoid the entanglements that flow, inevitably, from misdeed.

The basic ethics of the long-standing, but threatened, civilizational project in which Americans claim membership are special in substance, not function. Functionally, one is deontological and the other is consequentialist. The first tells us that the means matter; the second tells us that the ends do too.

18. Winston S. Churchill, *Address to the House of Commons* (July 20, 1910), in 2 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 1589, 1598 (Robert Rhodes James ed. 1974).

But the moral value, the substance, at the heart of our deontological ethic is nothing less than human dignity, and the goods that our consequentialism seeks to maximize are nothing less than peace, stability, and prosperity. Perhaps all traditions are the same when viewed at this high level of abstraction, varying only in how dignity and stability are defined, so let me be more specific: indefinite detention without charges, torture, and aggressive warfare violate both of our civilizational ethics. This becomes a gentle reminder that we consider such means wrong *per se* and that we already know that the ends professed for such means will remain elusive. This much our tradition has learned already at tremendous costs; this much we ignore only at the sake of losing ourselves and having to begin anew in a state of savagery.

Our deontological project of rights against the government is indeed civilizational in scope and importance. In our tradition, the protection of human dignity has undergone two separate revolutions—one American (1776), the other international (1945)—but its evolution began before either and has continued after both. The Supreme Court has said so quite clearly.¹⁹ “[O]wing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally.”²⁰ And since the conclusion of the American Revolution, we have been improving upon our “ancient liberties,” for these have been rooted in the “forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.”²¹

Our project of self-government of course began with the

19. The foregoing quotations and legal standards have evolved through the Court’s cruel and unusual punishment and due process jurisprudence—constitutional protections transplanted from the English Declaration of Rights of 1688 and the Magna Carta.

20. *Hurtado v. California*, 110 U.S. 516, 529 (1884).

21. *Id.* at 530 (“[I]t is better not to go too far back into antiquity for the best securities for our ‘ancient liberties.’ It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.”).

declaration of seemingly insincere ideas. How could we profess “unalienable” rights to life, liberty, and the pursuit of happiness while holding slaves? How could we declare consent of the governed the legitimizing feature of any government while considering a large portion of the population to be mere property, by nature ineligible for rights and self-authorship?²² Where were the political equality and popular sovereignty we professed? Because the Declaration of Independence was believed by the colonists to be compatible with slavery, we must recall its words at present. The improvement in our ancient liberties, this process that has given new expression and greater effect to our ideals, defines our civilizational commitment to rights as hard-won, as a series of lessons learned. We considered inhuman and unworthy of rights an entire class of human beings while simultaneously holding up human freedom as our master value, our claim to legitimacy and respect. It was not until the slaves were free that America could even begin to live up to her principles. This evolution of rights reunited us with our conscience and our tradition. Indeed, the tradition of rights in this country has all the makings of an identity, a politically and philosophically genealogical feature that connects America with a tradition that is at once of her and beyond her.

The Supreme Court has proven itself an astute genealogist in these regards. It has described those due process rights valid against the states as “implicit in the concept of ordered liberty,” and part of the “very essence of a scheme of ordered liberty.”²³ Due process rights are those that stand between a human being and indefinite detention without charges or trials without procedural guarantees. To abolish such rights, the Court has said is to “violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”²⁴ Justice Cardozo famously noted that a “fair and enlightened system of justice would be impossible without [such rights].”²⁵

22. And for many years after the Declaration of Independence, we might note that its principles posed no obstacle to treating Native Americans as a savage feature of the land that we were free to eradicate, another category of non-persons in which rights could not fully vest.

23. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

24. *Id.* (internal quotations omitted).

25. *Id.* Justice Cardozo died the next year. *Palko* is one testament to his judicial philosophy, one relevant aspect of which he gave to us in these words:

Eighth Amendment jurisprudence reflects a similar preoccupation with the civilizational pedigree, indeed identity-constituting importance, of fundamental rights. In explaining why expatriation is cruel and unusual, a plurality of the Court observed that “[t]he *civilized* nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”²⁶ A majority of the Court affirmed this comparative law method of analysis in 2005,²⁷ as well as the following progression of meanings. Underlying and flowing through the Eighth Amendment, the Court has found “*the* principle of civilized treatment”²⁸ and a process of “evolving standards of decency that mark the progress of a maturing society.”²⁹ Hearing these phrases alerts us that it is this clause in our Bill of Rights that prohibits torture and connects us with a notable trajectory from savagery to civilization. The Court contextualizes our tradition of Eighth Amendment protection within the “affirmation of certain fundamental rights by other nations and peoples;”³⁰ this, the Court believes, “simply underscores the centrality of those same rights within our own heritage of freedom.”³¹ These words ring of deep cultural and civilizational significance. All of this, in turn, can be grounded upon a transcendental source that would seem to explain cross-border similarities and complicate derogation: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”³²

“The great generalities of the Constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (Yale U. Press 1921).

26. *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (emphasis added).

27. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).

28. *Trop*, 356 U.S. at 99 (italics added).

29. *Id.* at 100; accord *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). Also of note are references to “our Anglo-American heritage.” See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830-32 (1988).

30. *Roper*, 543 U.S. at 578.

31. *Id.*

32. *Trop*, 356 U.S. at 100; accord *Atkins*, 536 U.S. at 311-12. I understand perfectly well, and doubt very much that this will be lost on readers, that as a formalistic matter the extraterritorial application of the Bill of Rights is generally dubious. I feel, however, that as a civilizational matter, and as a self-definitional matter, that the seriousness of the values

The dignity of man perhaps never received such a blow as during World War II. Retooled as human dignity, this basic concept came to underlie the United Nations Charter and the international revolution it codified.³³ The dropping of two atomic bombs within a month and a half after the signing of the Charter renders facile any descriptive claim of human dignity's triumph,³⁴ but its assent is, at least, normatively clear. "We the Peoples of the United Nations [are] Determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person," the preamble explains.³⁵ Responding to the ways in which human dignity and peace were compromised, the Charter prohibits aggressive force (i.e., preemptive war). Another body of law—including the Geneva Conventions and their protocols, the Hague Conventions, and customary law—regulates the conduct of warfare, requiring, *inter alia*, civilized treatment of detainees and minimization of civilian casualties.³⁶ Also responding to the causes of World War II, the Charter establishes international collaboration in promoting human rights.³⁷

And then, in the Universal Declaration of Human Rights, which itself was labeled "the common standard of achievement for

and the depth of the tradition cannot be so easily waved by a technicality which, importantly, is mostly rectified by our membership in human rights treaties and the Geneva Conventions.

33. It would also be fair to say that human dignity, together with pragmatic concern over Hitler's expansion, motivated U.S. involvement in World War II.

34. The Charter was signed on June 26, 1945, and ratified on October 24. August 6 and 9 of the same year stand as that moment in history when Hiroshima and Nagasaki were sacrificed to cause Japan's surrender. For commentary on these events, see Barton J. Bernstein, *Introducing the Interpretive Problems of Japan's 1945 Surrender: A Historiographical Essay on Recent Literature in the West*, in *THE END OF THE PACIFIC WAR: REAPPRAISALS* 36-37 (Tsuyoshi Hasegawa ed., 2007).

35. U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

36. Regarding the *jus ad bellum*, see U.N. Charter art. 2, para. 4, art. 51; regarding the *jus in bello*, see, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, and Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

37. See, e.g., U.N. Charter art. 1 ("The Purposes of the United Nations are: . . . To achieve international co-operation . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.").

all peoples and all nations,” there came a further solemn proclamation: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”³⁸ The Declaration admonishes governments that human rights are the entitlement of “[e]veryone . . . without distinction of any kind, such as race . . . religion, political or other opinion, national or social origin, property, birth or other status,” and that “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs . . . or under any other limitation of sovereignty.”³⁹ The International Convention on Civil and Political Rights (ICCPR), one of the foundational human rights treaties, reasserts the basic deontological thrust of human rights and connects up with the Eighth Amendment: “these rights derive from the inherent dignity of the human person.”⁴⁰

Through entangled treaty law and customary law that makes good on these precepts, the international revolution has established that governments are not free to treat people in their control however they please. This is the crucial limitation on sovereignty established in law by the human rights movement. The prohibition on torture, in fact, has been elevated to the status of a *jus cogens* norm, a rare international law designation holding derogation to be impermissible under any circumstance, including war.⁴¹ Indeed, if human dignity is inherent, then certain rights are inalienable, and accordingly some things simply cannot be

38. Universal Declaration of Human Rights, pmbl., G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.S. Doc A/810 (Dec. 12, 1948).

39. *Id.* at Art. 2.

40. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://heiwwww.unige.ch/humanrts/instreet/b3ccpr.htm>.

41. *See* Vienna Convention on the Law of Treaties, Art. 53, U.N. Doc.A/Conf.39/27. 1155 U.N.T.S. 171, *available at* <http://www1.umn.edu.edu/humanrt/instreet/b3ccpr.htm> (“a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”). On the *jus cogens* status of the prohibition on torture, see, for example, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (“while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status.”)

done. Sole, despotic dominion of territory and persons thereon is thus rescinded from states. The international revolution is an evolutionary leap in the “standards of decency that mark the progress of a maturing society.”⁴² How could our prerogatives to protect the dignity of man and make good on our own heritage of freedom be taken seriously if states were free to pursue genocidal policies or conquer each other at will? It follows in an essentially evolutionary way that new rules and structures had to be established to protect human dignity in an interdependent community of states.

And so respect for fundamental rights is part of the longstanding civilizational project in which we claim membership. From the Magna Carta to the United Nations Charter, the protection of human dignity through fundamental rights has figured in our heritage and best efforts at producing a just society. The rescinding of civil liberties at home, indefinite detention without trial and torture abroad—from waterboarding to extraordinary rendition—and the waging of preemptive warfare in Iraq all speak to an abandonment of our own heritage of freedom; the principle of civilized treatment forgotten, the principles of justice so rooted in the traditions and conscience of our people now uprooted, plucked. Civilization forsaken. Our authority, freed from civilizational constraints, knows no bounds—we are not constrained by human dignity any longer, not limited by constitutional law, perhaps not even aware of international law. What hubris! Our extremists have reclaimed the right of conquest over foreign lands and the ability to revoke the personhood of those who threaten us. They have returned to savagery and the country cannot long remain autonomous from the flavor of its official acts. The rights of adverse possession will soon flow to those who just recently began as unlawful occupiers of the American tradition. Granted, these disseisors’ occupation of our tradition has not always been obvious; indeed, secrecy has abounded. Nevertheless, the occupation has been notorious, hostile and brazen; our land has been altered. We must claim trespass, lest we acquiesce and cede title.

But perhaps the neoconservatives are right: in an era of terrorism, we cannot afford to maintain naïve principles, these

42. See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002).

inconvenient traditions, this outmoded quality of conscience, for it is the first duty of government—they remind us—to protect the homeland. Once all terrorist groups of global reach are defeated, then we can return to Eden. Here we come to the consequentialist ethic at the heart of our civilizational project: the search for the good ends of stability and peace. I suspect most of us might come around to this ethic eventually if it were not so empirically unsound when applied to torture and wars of aggression. General David Petraeus, Commanding General of Iraq, has refuted the argument made by our extremists:

“Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. That would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone ‘talk;’ however, what the individual says may be of questionable value.”⁴³

Indeed, the U.S. Army’s own field manual contains a long-standing prohibition on torture.⁴⁴

Besides producing bad intelligence, torture produces more terrorists. Fawaz Gerges, in his authoritative study of how doctrinaire jihadis turned their sights from local targets to the West and its allies, notes that “Arab/Muslim prisons, particularly their torture chambers, have served as incubators for generations of jihadis.”⁴⁵ He links this “bloody history of official torture” with a “culture of victimhood and desire for revenge [that] enables the movement to mobilize young recruits and constantly renew

43. Letter from General David A. Petraeus, (May 10, 2007) http://www.washingtonpost.com/wpser/nation/documents/petraeus_values_051007.pdf.

44. See FM 34-52, Ch. 1, Department of the U.S. Army, Washington, DC, May 8, 1987, available at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/chapter1.htm> (“PROHIBITION AGAINST USE OF FORCE[:] The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.”)

45. GERGES, *supra* note 6, at 9.

itself.”⁴⁶

Preemptive war has also proved spectacularly counterproductive for the goal of increased security. Gerges recounts study after study—including the findings of the director of the U.S. Defense Intelligence Agency, Saudi Arabia’s interior minister, and virtually all American, European, and Arab analysts to have considered the matter—that report an iron-clad consensus: U.S. policy pursuant to the war on terrorism, including the invasion and occupation of Iraq, “radicalizes Arab public opinion,” “fuel[s] Islamic resentment,” provides recruiting tools and a recruiting ground, and “play[s] directly into the hands of Al Qaeda and other militants.”⁴⁷ Admittedly, the security issue would be a more complicated one had Saddam Hussein indeed been tied to Al Qaeda or capable of threatening the United States, which of course he was not. The many spurious rationales for invading Iraq continue to produce distrust and sometimes animosity in those who value truth.

Beyond tilting public opinion in the Muslim world closer to Al Qaeda, U.S. policy has caused sizable changes in global public opinion. Respect for the United States has declined steeply since the invasion of Iraq, and not just in Muslim countries. For example, the number of people in Britain, France, and Germany holding favorable views of the United States has decreased by 20-30% between 2002 and 2007.⁴⁸ Meanwhile, in Indonesia, the world’s largest Muslim country, the percentage of citizens holding favorable views went from 61% in 2002 to 29% in the same time span.⁴⁹

This does not surprise Joseph Nye. In his book, *Soft Power*:

46. *Id.*

47. *Id.* at 264-76. See also Peter Margulies, *Making “Regime Change” Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT’L L. & POL’Y 389, 396 (2004) (“Unfortunately, the preemptive style, rooted in coercion and legal sanctions, does little to dislodge the processes of social identity construction and social comparison that create a fertile ground for asymmetric violence. Because of this negligible impact on underlying processes, the Administration’s approach to disrupting the social capital of groups practicing asymmetric violence is ineffective. Indeed, the punitive approach in some ways enhances the social capital available for asymmetric violence, by sharpening the social comparisons that serve as the best recruiting tools for those committed to extremism.”)

48. Meg Bortin, *U.S. Faces More Distrust From World, Poll Shows*, N.Y. TIMES, June 28, 2007, at A12.

49. *Id.*

The Means to Success in World Politics,⁵⁰ Nye cites the “plummeting” popularity of the United States and explains the growing practical problem of securing help from Islamic countries in locating and eliminating terrorists.⁵¹ This is a two-sided problem. As seen with Iraq, hard power policies increase the very problem with which we need the help of foreign leaders. Nye compares U.S. power to that of the Roman Empire and cautions that “Rome did not succumb to the rise of another empire, but to the onslaught of waves of barbarians. Modern high-tech terrorists are the new barbarians.”⁵² Relying on reports from American intelligence and law enforcement officials, Nye confirms Gerges’s findings, locating in the Iraq War a source of Al Qaeda’s growth: “Al Qaeda and other terrorist groups intensified their recruitment on three continents by ‘tapping into rising anger about the American campaign for war in Iraq.’”⁵³ But, thanks to the second part of the problem, declining U.S. popularity makes it politically unpopular for foreign leaders to collaborate. Beyond aggravating the problem of terrorism, the careless use of force and the savagery of torture are quickly destroying our good name.

Nye writes that soft power is “the ability to get what you want through attraction rather than coercion or payments.”⁵⁴ He specifies that this source of power emanates from “culture (in places where it is attractive to others), [] political values (when [a state] lives up to them at home and abroad), and [] foreign policies (when they are seen as legitimate and having moral authority).”⁵⁵ Indefinite detention, torture, and preemptive warfare have made short work of these last two sources of soft power. Our political values do not merely include rights and the rule of law; they reside in them. And yet, our extremists have been quick to discard them both at home and abroad. A foreign policy that includes aggressive warfare, extraordinary rendition, and indefinite detention is per se illegitimate and strategically

50. Nye, *supra* note 11.

51. *Id.* at xi. *See also id.* at 129 ([T]he United States cannot meet the new threat identified in the national security strategy without the cooperation of other countries. They will cooperate up to a point out of mere self-interest, but their degree of cooperation is also affected by the attractiveness of the United States.”).

52. Nye, *supra* note 11, at x.

53. *Id.* at 29.

54. *Id.* at x.

55. *Id.* at 11.

disastrous. It is to a nation's moral authority what the molestation of children by priests is to a church's moral authority, but perhaps worse since the imputed actions are for the most part orders from high in the chain of command. Even those whose eyes are fixed in precisely the right direction will have trouble seeing that beacon of freedom said to originate in the United States; even her greatest admirers now begin to doubt U.S. claims about representing lauded values; even lovers of this country become estranged.

War has this effect and an unlawful war of aggression doubles it. Love is lost. Claims fail to touch upon truth. Freedom becomes just an end, its extinction our daily bread. War, lawful or not, falls on the extreme end of the hard power spectrum—coercion through violence, payments in blood. Understandably, Nye counsels us to employ tools from the soft power spectrum more frequently to achieve the balance between attraction and coercion that he calls “smart power;”⁵⁶ however, we cannot even begin to do this until we hold true to our political values at home and abroad, and end our illegitimate and immoral foreign policies. Perhaps then we can begin to think about eliminating the causes of terrorism, instead of adding to them; perhaps then we can begin to think about defeating our radical adversaries instead of continuing to radicalize our moderate allies.

III. STAYING TRUE

Having examined the threat posed to the two ethics of our civilizational project by our own extremists, let us consider how to stay true to high-minded traditions in moments when we feel threatened. Ronald Dworkin understands the tensions inherent in upholding rights and political values in trying times. He supplies guidance for avoiding derogations that, like those we have seen, constitute a rescinding of the institution of rights itself. Through a few of his quotations, I hope to illustrate a few guideposts for how to re-adhere to our tradition—that is, to take rights seriously again. “The concept of rights,” says Dworkin, “has

56. See, e.g., the statement of the former Secretary General of NATO, Jaap De Hoop Scheffer: “There is no final military answer for Afghanistan. Afghanistan needs development, needs reconstruction, needs nation-building.” Jaap de Hoop Scheffer, NATO Secretary General, Press Point at Informal Meeting of NATO Defence Ministers (Feb. 8, 2007), <http://www.nato.int/docu/speech/2007/s070208e.html>.

its most natural use when a political society is divided, and appeals to co-operation or a common goal are pointless.”⁵⁷ Rights provide the ground rules for liberal democracy itself and for the discourse, stability, and values of civility and restraint that characterize it. Even if the political community driving U.S. policy is divided on how to combat terrorism, we ought to be able to find among the vast majority of the population common ground where rights lie. Taking rights seriously means taking the rule of law seriously and nobody, except extremists, believes this should be easily discarded.

But how do we interpret rights? We may assume that, in a democracy, a government’s action and inaction alike flow from popular opinion and the pursuit of general utility. Rights place certain courses of action off the table and require others. Our government may not, for example, inflict cruel and unusual punishment, while it must provide certain procedural protections at trial. In this way, rights circumscribe a government’s realms of action and passivity, and, thus, constitute a restraint on politically dominant preferences. Again, moderates in the United States, which is to say the great majority of the population, ought to be able to find common ground in twin convictions implied above and embraced by Dworkin: rights that can be overruled in light of shifting opinion are not rights at all; and rights that the majority can revoke at will in the interest of its general utility are similarly vacuous. Each situation, if taken as justifying the revocation of rights, reveals the institution of rights to be a sham.⁵⁸

But what if the political community is threatened? Surely

57. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1978). Although this book addresses the rights of citizens against their government, we have seen that this institution transcends U.S. borders. It must as an instrumental matter, Nye would tell us, in order for our values and foreign policy to generate soft power, but we know that it does as a formalistic matter, given the international revolution.

58. *Id.* at 191 (“normally it is a sufficient justification . . . that the act [of the Government] is calculated to increase . . . general utility [but] [w]hen individual citizens are said to have rights against the Government . . . that must mean that this sort of justification is not enough.”) *See also id.* at 193 (“There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient”) and 194 (“A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.”).

this is the reason we have given for discarding rights during our war on terrorism. There is a chance that someone released from Guantanamo was wrongly deemed innocent. This person will then rejoin the enemy and perhaps perpetrate a great attack against us. Even with Jose Padilla and Hamdi, the two American citizens famously denied for years any semblance of due process rights, the government's claims boiled down to these two individuals being tied to terrorists and that no chances should be taken in dealing with them. Dworkin is cautious. He writes that "There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient."⁵⁹ This is to say that general utility justifications for rights violations fall short. "Yes," we might respond, "but what if we are speaking not of marginal benefits but avoiding catastrophic harm?"

Dworkin concedes that a genuine emergency, one of "clear and present danger . . . of magnitude," may justify a curtailment of rights.⁶⁰ International law also conditions derogation on an emergency of certain magnitude. Consider the ICCPR derogation clause: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties . . . may take measures derogating from their obligations . . . to the extent strictly required by the exigencies of the situation."⁶¹ But this clause is subject to a sizable limitation: The ICCPR prohibits derogation from, *inter alia*, those articles concerning torture and cruel treatment, the right to life, and personhood.⁶² This may be the first difference between Dworkin and the international standard: the latter places some derogations off of the table, irregardless of magnitude. The second difference concerns magnitude itself. The ICCPR would seem to require the highest possible level of danger, perhaps beyond the reach of

59. DWORKIN, *supra* note 57, at 193.

60. *Id.* at 195. Dworkin also recognizes that preserving the rights of some may also justify the violation of the rights of others. *See id.* at 194 ("In order to save [rights], we must recognize as competing rights only the rights of other members of the society as individuals.").

61. Int'l Covenant on Civil and Political Rights, U.N. art. 4, 1966, 14668 U.N.T.S. 174, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

62. *See id.* at arts. 6-8, 11, 15, 16, and 18.

many 9/11s and in the realm of war against an enemy that could actually defeat the state. Let us be realistic, however, and concede that most states will not risk such outcomes.

So let us focus on the criteria most attune to the dilemmas of a permanent war on terrorism: clear and present danger as supplied by Dworkin—i.e., the certainty of the threat—and the notion of all derogations being permissible only to the extent strictly required by the situation. The latter requires that infringements on rights be narrowly tailored to accomplish a necessary objective. It immediately invalidates torture and the War in Iraq, since these derogations only aggravate terrorism. Rather than strictly required by the exigencies of the situation, such unreliable, costly, and counterproductive policies ought to be strictly prohibited by the exigencies of the situation.

But this logic would also eliminate the criterion of certainty, because it would view even an impending terrorist attack as irrelevant to a government interest in employing torture. Some in the administration, on the other hand, must be convinced that waterboarding and extraordinary rendition do provide some benefit; otherwise they would not permit these practices. For example, President Bush recently vetoed a bill that would have required the CIA to limit its interrogation tactics to those authorized by the Army Field Manual.⁶³ “Because the danger remains, we need to ensure our intelligence officials have all the tools they need to stop the terrorists,” the President remarked.⁶⁴ And to credit this foolishness further, surely a policy of indefinite detention would, assuming even a 1:1,000,000 ratio of terrorists to innocent bystanders in detention, provide some marginal benefit to immediate security interests. Support for torture is indeed an extreme view, even descriptively speaking, as seen in a recent BBC study. When asked whether they would support torture *if it could provide information that would save innocent lives*, only 36% of Americans said “yes.”⁶⁵

Because there is some chance that indefinite detention would prevent a loss or that torture would perhaps occasionally yield useful information, should we not therefore rescind the prohibition

63. Steven Lee Myers, *Bush Vetoes Bill on C.I.A. Tactics, Affirming Legacy*, N.Y. TIMES, Mar. 9, 2008, at A1.

64. See *id.* at 1.

65. *One-Third Support ‘Some Torture,’* B.B.C. News, Oct. 19, 2006, available at http://news.bbc.co.uk/2/hi/in_depth/6063386.stm#table.

on torture and the right to due process? Dworkin grows impatient:

[T]his argument ignores the primitive distinction between what may happen and what will happen. If we allow speculation to support the justification of emergency or decisive benefit, then, again, we have annihilated rights. We must, as Learned Hand said, discount the gravity of the evil threatened by the likelihood of reaching that evil.⁶⁶

For Bush, it is not just about clinging to torture; it is also about clinging to unfettered executive power to judge what is necessary in any given situation. The power to define the situation itself, though, must not be ceded. This is the power to define a state of constant emergency through speculation. If we are truly under grave and imminent threat, then a strong executive must do what he deems necessary to protect us. So let us turn to the criterion of certainty, clear and present danger. This is the guidepost to hold dear. Because this war on terrorism has no known endpoint, the constant threat of terrorism must not be taken as sufficient justification for overriding rights. Consider President Bush's introduction of the war on terror to a joint session of Congress:

Our war on terror begins with al-Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen.⁶⁷

If we are not to be in a permanent era of torture, indefinite detention, and revocation of the rule against aggressive warfare, then we must insist on a higher degree of certainty of harm before bowing to bald assertions of constant threat.

And, given the depth of our tradition of rights and its value to us and the world, something must be said about the type of harm grave enough to warrant casting aside our identity and

66. DWORKIN, *supra* note 57, at 195.

67. 147 CONG. REC. 107, 123 (daily ed. Sept. 20, 2001) (statement of President George W. Bush).

civilizational membership. Dworkin provides a test for determining whether a right can be defined narrowly in a particular case, to avoid its application in that case, without revealing as a sham the initial recognition of the right. First is the marginal situation where the values protected by the original right are not at stake or only partly at stake.⁶⁸ Surely our extremists have argued along these lines in maintaining Guantanamo Bay to be a legal blackhole where no law applies, and in insisting that the Geneva Conventions do not apply to unlawful combatants. Second is a situation where extension of the right would abridge some competing right.⁶⁹ This is important for the right to life of U.S. citizens, for all manner of rights really, that would be extinguished by a direct terrorist attack. But this returns us to the problem of certainty and exigency already discussed—can we be so sure that an attack is forthcoming and that torture and indefinite detention would do anything to prevent it? Third is a situation in which extending the right would occasion a cost to society “of a degree far beyond the cost paid to grant the original right.”⁷⁰ I read this to require a weighing of the historical struggles that culminated in our tradition of fundamental rights. Depending on the right in question, these might include the Revolutionary War, the movement to abolish slavery, the civil rights movement, the cost of World War II and the human rights movement, and all manner of wars over centuries that led to the *jus in bello* legal framework.

These costs should give us pause, a reason to reflect on just how precious the institution of rights is and how only the gravest of costs could justify derogation. Literally, only a traitor would hold that a marginal increase in the possibility of a terrorist attack justifies rescinding our tradition of rights. If clear and present danger of the first magnitude, coupled with a reasonable expectation of avoidance through derogation, then perhaps. But only then, lest we reveal ourselves to be imposters holding out a venerable tradition as our own.

Still one matter attends us, yet it is beset by nationalism and provincialism. Dworkin’s guidance was given with regard to the rights of citizens. I took it broadly and applied it to citizens

68. DWORKIN, *supra* note 57, at 200.

69. *Id.*

70. *Id.*

(Padilla, et. al) and non-citizens (Guantanamo, Abu Graib, extraordinary rendition, and etc.) alike. In the late 1940s, our tradition began to embrace human rights, not just U.S. constitutional rights. This much is formalistically clear from our membership in various treaties and the world community more generally, pursuant to which we have accepted the premise that human dignity matters, not just the dignity of Americans. But we must also recognize it to be pragmatically important, given that terrorist recruitment thrives on our abandonment of our own values and on the reasonable perceptions of U.S. foreign relations impropriety that follow. As we have seen, rights are part of the currency of soft power, a badge of belonging in the community of civilized nations, and a requirement for securing international collaboration to combat terrorism. Dworkin reminds us that:

[I]f rights make sense at all, then the invasion of a relatively important right [such as due process or freedom from cruel treatment] must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice . . . ”⁷¹

We must take this to heart with regard to all human beings if we wish to address terrorism and if, in the process, we wish to retain what is good in our identities and heritage, and what is indispensable for a desirable future.

In the end, we must consider whether the juxtaposition between human rights and national security is false. Perhaps the way to achieve freedom and security is via human rights. Perhaps the deontological and consequentialist ethics of our tradition have been improperly separated. Perhaps rights, rightly understood, are the foundation of both human dignity and peace. But for those who do not accept such a premise, which is implied in Jefferson’s hope for our shining city on the hill and specified outright by Wilsonian idealists, my hope is that they will at least value their tradition enough to not trade it in for scrap.

Though inconvenient at times, rights are part of who we are and our adherence to them gives us pride about who we are becoming. It is, after all, in each of our actions that civilization

71. *Id.* at 199.

lives or dies. Some would say that we know this by virtue of universal moral traits: “in the soul of man,” said Emerson, “there is a justice whose retributions are instant and entire. He who does a good deed, is instantly ennobled himself. He who does a mean deed, is by the action itself contracted.”⁷² Others would add that we know this by virtue of the consequences of our actions. The Arab poet Adonis sums these up when, referring to our infamous foreign policy actions, he cites an “anguish which transcends private passion and pain.”⁷³ This, he says, “creates civilizational agony for man and humanity.”⁷⁴ I would say that we know it through both means—deontology and pragmatism—and, thus confirmed twice over, it becomes our task as citizens in a democracy to produce something better than a war on terrorism.

In the beginning of this essay, I conceded that the prospect of our tradition’s demise at our own hands was a conceit. This is important to admit, because our piecemeal abandonment of a tradition should not be confused with that tradition’s demise, and much less with the demise of the principles on which that tradition was based. Walt Whitman said this about liberty, the organizing principle of our tradition:

Nothing has precedence of it and nothing can warp or degrade it. Liberty relies upon itself, invites no one, promises nothing, sits in calmness and light, is positive and composed, and knows no discouragement. The battle rages with many a loud alarm and frequent advance and retreat . . . the enemy triumphs . . . the prison, the handcuffs, the iron necklace and anklet, the scaffold, garrote and leadballs do their work . . . the cause is asleep . . . the strong throats are choked with their own blood . . . the young men drop their eyelashes toward the ground when they pass each other . . . and is liberty gone out of that place? No never. When liberty goes it is not the first to go nor the second or third to go . . . it waits for all the rest to go . . . it is the last . . . When . . . the laws of the free are grudgingly permitted and laws for informers and

72. Ralph Waldo Emerson, *Divinity School Address* (1838) in LAWRENCE BUELL, *THE AMERICAN TRANSCENDENTALISTS* 131 (2006).

73. GERGES, *supra* note 6, at 271 (quoting Adonis, *Beyond History, Without Future*, AL HAYAT, Dec. 4, 2003).

74. *Id.*

blood-money are sweet to the taste of the people. . .when the soul retires in the cool communion of the night and surveys its experience and has much extasy over the word and deed that put back a helpless innocent person into the gripe of the gripers . . . when the swarms of cringers, suckers, doughfaces, lice of politics, planners of sly involutions for their own preferment . . . obtain a response of love and natural deference from the people . . or rather when all life and all the souls of men and women are discharged from any part of the earth—then only shall the instinct of liberty be discharged from that part of the earth.⁷⁵

It is with Whitman's words that I close, because he is remarkably clear on a point that we, apparently, are not. Our sacred principles are above and beyond us, and yet by doing what we know to be right we connect with them, becoming of them and them of us, and it is in this connection that we and our country have shown notable, if yet inconstant, greatness. Greatness arises from challenges being met, especially that constant challenge of living up to one's principles. Slavery presented such a challenge, as did the subjugation of women and most recently homosexuals, and continued attention remains necessary on these fronts. The War on Terrorism presents a new front on which we are called to live up to our principles, and if we look carefully we see intertwined with these principles our own identities, fates, and legacies. And so it may be true that liberty, dignity, equality, and peace are beyond us, but we should not assume that we—in any form cognizable to us—are beyond them.

75. WALT WHITMAN, *LEAVES OF GRASS* (1855) in WALT WHITMAN: *COMPLETE POETRY AND COLLECTED PROSE* 17-18 (Library of America, 1982).

Muslim-Americans' Charitable Giving Dilemma: What About a Centralized Terror-Free Donor Advised Fund?

Nina J. Crimm*

INTRODUCTION

Islam and Judaism share numerous common beliefs and traditions. Like Judaism, some Islamic traditions and rituals can be traced to the Hebrew prophet Abraham (Ibrahim).¹ The Torah and the Qur'an both honor Abraham (Ibrahim) for his devotion and willingness to submit to, and sacrifice for, God.² One such shared form of religious sacrifice and spiritual tradition is obligatory charitable giving. Religious laws obligate Jews to give tzedakah.³ One of the five pillars of Islam is the imperative of

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1. See Mona Siddiqui, *Ibrahim—The Muslim View of Abraham*, BBC, <http://www.bbc.co.uk/religion/religions/islam/history/ibrahim.shtml> (last visited Sept. 13, 2007).

2. See *id.*

3. The word "tzedakah" is derived from the Hebrew word "tzedek," which means "righteousness, justice, fairness." Jewish Virtual Library, Tzedaka, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Tzedaka.html> (last visited Feb. 28, 2008). Perhaps the most important obligation Judaism imposes on the Jewish people is to perform deeds of justice. *Id.* The Torah commands: "Tzedek, tzedek, you shall pursue." Deuteronomy 16:20, *quoted in* Jewish Virtual Library, Tzedaka, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Tzedaka.html> (last visited Feb. 28, 2008). The Talmud instructs: "Tzedakah is equal to all the other commandments combined." TALMUD, Bava Batra 9b, *quoted in* Jewish Virtual Library, Tzedaka, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Tzedaka.html> (last visited Feb. 28, 2008). The Torah provides that Jews tithe ten % of their earnings to the poor every third year and annually give an additional percentage of their income.

zakat.⁴

Both Islam and Judaism also have been the inspiration for long-standing intellectual heritages. Each religion claims learned and esteemed philosophers who have attempted to unite religion, knowledge, and faith.⁵ The most influential Jewish philosopher of the Middle Ages was Moses Maimonides.⁶ Among the themes on which he expressed profound sentiments was the giving of charity. He articulated eight degrees of worthiness in unselfish charitable giving, the second highest degree of which is giving to an unknown recipient who does not know the benefactor's identity.⁷ The value of this proposition has long been debated in religious and non-religious fora, but since 9/11 such discussions have adopted a more anxious tenor. Maimonides, however, actually accompanied his

Deuteronomy 26:12.

4. See BBC, Religion & Ethics - Five Pillars of Islam, <http://www.bbc.co.uk/religion/religions/islam/practices/fivepillars.shtml> (last visited Feb. 28, 2008). The other four pillars, or tenets, of Islam are shahadah (reciting the basic statement of the Islamic faith), salat (performing the ritual prayer five times daily), sawm (fasting during daylight during the holy month of Ramadan), and hajj (making pilgrimage to Mecca). See *id.* These pillars are considered compulsory and not merely voluntary acts. See *id.* Indeed, the word "Islam" is Arabic for "submission," and the pillars are submissions to the deity, Allah. See James D. Davis, *Five Pillars Are Key to Keeping Faith: Responsibility, Prayer, Charity and Forgiveness Are Among Elements of Islam*, SUN SENTINEL (Ft. Lauderdale), Sept. 24, 2006, at 1J. The term "zakat" has its roots in the Arab word for "purification." See Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES, Oct. 30, 2006, at A1.

5. See, e.g., Muslim Philosophy, The Philosophers, <http://www.muslimphilosophy.com/#people> (last visited Feb. 28, 2008); Ibrahim Bayyumi Madkour, *The Study of Islamic Philosophy*, AL TAWHID (1983), available at <http://www.al-islam.org/al-tawhid/study-philosophy.htm> (last visited Feb. 28, 2008); Radical Academy, Jewish Philosophy, <http://www.radicalacademy.com/adiphiljewishindex.htm> (last visited Feb. 28, 2008).

6. See MileChai.com, Judaism, <http://www.milechai.com/judaism/rambam.html> (last visited Feb. 28, 2008). Reflecting the Jewish sentiment that the greatness of Maimonides was like that of Moses, Maimonides' grave is inscribed with "From Moses to Moses, there were none like Moses." See Ilil Arbel, *From Moses to Moses There Were None Like Moses: Prophecy of Maimonides' Birth*, ENCYCLOPEDIA MYTHICA, <http://www.pantheon.org/areas/featured/maimonides/mm-1.html> (last viewed Feb. 28, 2008).

7. See C.G. MONTEFIORE & H. LOEWE, A RABBINIC ANTHOLOGY 670 n.30 (1974); JACOB S. MINKIN, THE WORLD OF MOSES MAIMONIDES WITH SELECTIONS FROM HIS WRITINGS 370 (1957). Maimonides articulated the highest degree of almsgiving as helping a hurt fellow Jew by giving him a gift or loan, entering into a partnership with him, or finding work for him so that he can be self-dependent. See *id.* at 369.

first opinion with a less remembered and less frequently discussed comment: “Related to this [second highest] degree is the giving to the [public] alms-chest. One should not give to the alms-chest unless he knows that the officer in charge is reliable, wise, [scrupulous] and a capable administrator.”⁸

Since September 11, 2001, Maimonides’ wisdom rings particularly true, especially for Muslim-Americans who seek to fulfill their Quranic duty of charitable giving. In the post-9/11 national security oriented environment, many Muslim-Americans face the dilemma of how to satisfy their zakat obligation. Muslims’ stake in satisfying their duty of zakat cannot be overstated. They consider zakat a form of spiritual self purification and growth achievable by annually tithing at least 2.5% of their wealth to the needy.⁹ There is no substitute for zakat,¹⁰ and practicing zakat is essential for one’s prayers to be accepted by Allah.¹¹

The Islamic holy month of Ramadan, which in the 2007 calendar year began on September 13, is an especially important time for Muslim charitable giving. Muslims believe that they gain greater heavenly rewards for zakat contributed during Ramadan,¹² so many who have not fulfilled their zakat duty completely during the year will give the balance during Ramadan.¹³ Moreover, during Ramadan, a time when Muslims fast during daylight,¹⁴ they usually monetarily fulfill their

8. MINKIN, *supra* note 7, at 370.

9. See Davis, *supra* note 4; Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004) [hereinafter Crimm, *High Alert*]. Shia Muslims are obligated to tithe twenty percent of their income beyond living expenses. See KHALIL JASSEMM, ISLAMIC PERSPECTIVE ON CHARITY 19 (2006).

10. See JASSEMM, *supra* note 9, at 78–79.

11. See Alex Cohen, *Day to Day Show: Muslims Concerned About Donations, Interview of Imam Sayed Moustafa Al-Qazwini* (Nat’l Pub. Radio broadcast July 26, 2007) [hereinafter *Interview of Imam Sayed Moustafa Al-Qazwini*].

12. See Teresa Watanabe, *U.S. Muslims Temper Ramadan Giving with Caution*, L.A. TIMES, Nov. 6, 2004, at B2 (stating that “the blessings of all donations [during Ramadan] are multiplied 70 times in the book of God”).

13. Robert King, *Beneficence Built on Faith; Hoosiers Bestow the Bulk of Giving on Churches, Religious Charities*, THE INDIANAPOLIS STAR, Nov. 21, 2004, at 1A. One report states that humanitarian charities can collect 40%-50% of annual donations during Ramadan. JASSEMM, *supra* note 9, at 27.

14. BBC, Religion & Ethics—Five Pillars of Islam, *supra* note 4.

additional special benevolent obligation, zakat al-fitr. Zakat al-fitr is the duty of every Muslim, whether rich or poor, to feed a needy family during the three days of Eid, a celebration that marks the end of, and immediately follows, Ramadan.¹⁵

The Qur'an enumerates seven categories of people religiously sanctified and thus entitled to receive zakat: the poor, the deprived, the destitute, the homeless, the sick, the wayfarer, and others who are in need of help.¹⁶ There is widespread belief among Muslims that, according to the prophet Muhammad, the world's neediest Muslims, rather than persons of non-Islamic faiths, must be the recipients of obligatory zakat contributions.¹⁷ Potential Muslim recipients around the world have immeasurable stakes in receiving Muslim-Americans' zakat; without those donations they might suffer innumerable spiritual and physical deprivations, some life threatening.

In addition to zakat, many Muslims give sadaqah to aid the poor, to assist the incapacitated, to support social services, and to help other worthy recipients and causes.¹⁸ Sadaqah is voluntary and, in accordance with the Qur'an, should be given discreetly.¹⁹

15. JASSEMM, *supra* note 9, at 81; Aziz Junejo, *Eid al Fitr Celebrates End of Ramadan Fasting, Gift of Self-Control*, SEATTLE TIMES, Oct. 29, 2005, at B5; Watanabe, *supra* note 12, at B2 (stating that failure to pay zakat al-fitr means to many Muslims that "their spiritual benefits gained from fasting and praying [during Ramadan] will be forfeited.").

16. See Interview of Imam Sayed Moustafa Al-Qazwini, *supra* note 11; MacFarquhar, *supra* note 4. Islam teaches that these seven categories of qualified recipients actually have a right or an entitlement to receive zakat. See JASSEMM, *supra* note 9, at 77.

17. See Damien Henderson, *Shaking the Pillars of Islam*, HERALD (Glasgow), Dec. 7, 2004, at 12. Many Muslims believe that Muslims need not be the recipients of non-obligatory charitable giving, known as sadaqah. *Id.*; Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origin, Impact, and Limitations of the Waqf System*, 25 LAW & SOC'Y REV. 841, 859 (2001) (stating that freed slaves could be waqf beneficiaries); see also Kathryn A. Ruff, *Scared To Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 472 (2005).

18. See Imam Ghazaali, *Sadaqah—Giving in Charity*, <http://www.uwt.org/Sadaqah.asp> (last visited Feb. 29, 2008); Azim Nanji, *Charitable Giving in Islam*, 5 ALLIANCE 1 (2000), available at <http://www.islam.co.za/awqafsa/sorce/library/Article%209.htm> (last viewed Jan. 2, 2008).

19. See Nanji, *supra* note 18. The belief that sadaqah should be given anonymously and without publicity parallels Maimonides' opinion that unselfish, anonymous charitable giving to an unknown recipient signifies true charitable intentions. See *supra* note 7 and accompanying text.

For these reasons, it is considered true charity,²⁰ and its monetary value eludes calculation.²¹ Nonetheless, Muslim teachings, traditions, and culture, which regard the importance of sadaqah as “[o]n every bone of the fingers charity is incumbent every day,”²² suggest its possible magnitude.

Prior to 9/11, Muslim-Americans often transmitted their philanthropy by private channels or informal means, such as hawalas,²³ and sometimes through U.S.-based Islamic charities and mosques. Since 9/11, Muslim-Americans have been reluctant to make contributions through those intermediaries for fear that they might be subjected to surveillance, or, even worse, harassed, implicated, arrested, or prosecuted because of links to charities that the U.S. government currently deems, or in the future may consider, illegal providers of “material support” to terrorists and terrorist organizations.²⁴ Therefore, the ability to direct zakat—to

20. *See id.*

21. Sadaqah includes pecuniary as well as non-monetary charity, such as performing good deeds. *See* Ghazaali, *supra* note 18. Thus, just as a voluntary donation of currency to a needy individual or institution is sadaqah, so too is a visit to a sick person, physical assistance given a frail individual, or recitation of a prayer for a dying person. *See id.*

22. MULANA MUHAMMAD ALI, A MANUAL OF HADITH ch. 16, available at <http://aaiil.org/text/had/manhad/manhad.shtml> (last visited Jan. 2, 2008).

23. *See* Raja Kamal & Rosanne Model, *The Need for Smart Muslim Charities*, CHI. TRIB., Dec. 2, 2004, at C31. The hawala system is an informal paperless networked transfer money system (“hawala” means “trust”) used by Muslims throughout the world, including the United States. Alan Lambert, *Underground Banking and Financing of Terrorism, in Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT’L L. 3, 9, 14-15 (2002). A party pays cash to another person who immediately or later advances the equivalent funds to, or on behalf of, another designated party for a specified use abroad. *Id.* at 14-15. Thus, no official bank records are maintained, and the funds cannot be tracked by governmental authorities. *Id.* Some Muslim-Americans have thought that cash is harder to trace and thus more difficult to be tied to allegedly lending material support to a terrorist organization. Kim Vo, *Season of Charity: A Time of Scrutiny for U.S. Muslims*, SAN JOSE MERCURY NEWS (CA), Oct. 13, 2007, at 1B.

24. *See, e.g.*, Greg Krupa, *Muslims Seek “Safe” Charities for Giving*, DETROIT NEWS, Oct. 5, 2007, at 1A; Audrey Hudson, *CAIR Concedes Membership Down; Blames U.S. for Linking It to Charity on Trial for Terrorist Ties*, WASH. TIMES, Aug. 22, 2007, at A1; MacFarquhar, *supra* note 4; Alan Cooperman, *Muslim Charities Say Fear Is Damming Flow of Money*, WASH. POST, Aug. 9, 2006, at A3; *Talk of the Nation: Arab Americans Hesitant to Donate to Lebanese Charities* (Nat’l Pub. Radio broadcast Aug. 9, 2006); Caroline Preston, *Donations Trickle in to Charities Providing Middle East Aid*, CHRON. PHILANTHROPY, July 27, 2006, available at <http://philanthropy.com/free/update/2006/07/2006072701.htm>; Alex Cohen,

whom and by what means they choose—can protect Muslim-Americans against not only religious deprivations and spiritual disgraces but also long-term or permanent stains on their personal and business reputations, and even criminal prosecution.²⁵

This paper addresses the existing inhospitable philanthropic environment for Muslim-Americans. Part I reviews relevant demographic information on Muslim-Americans. It shows that Muslim-Americans' financial resources for, and interest in, diaspora philanthropy certainly support an exploration of possible devices to help them accomplish their charitable giving obligations and goals. Part II focuses on reasons for Muslim-Americans' fears of charitable giving through existing channels. It briefly discusses legislation, regulatory projects, and governmental agencies' post-9/11 initiatives aimed at combating terrorism. It concludes that Muslim-Americans' fears of being linked to terrorists and terrorist activities when engaging in charitable giving are not unfounded. Part III addresses the chilled philanthropic climate by suggesting that it might be moderated through the creation of a centralized terror-free donor advised fund (DAF) aimed specifically at enabling Muslim-Americans to direct their zakat and voluntary contributions to needy Muslims in a few targeted regions and communities abroad. This part presents the essential requirements for a "terror-free" DAF, including two checklists. Part III also sets forth a brief commentary on the financial feasibility of the proposed endeavor. The Conclusion suggests that the benefits of a terror-free DAF would inure not only to Muslim-

Marketplace: Giving to Muslim Charities (Minn. Pub. Radio broadcast Oct. 4, 2005); Crimm, *High Alert*, *supra* note 9, at 1349 n.16 (listing numerous 2001-2004 news articles reporting donors' fears).

Since 9/11, Muslim-Americans have been encouraged to give not only voluntary contributions but also their obligatory zakat domestically rather than overseas. See Jane Lampman, *U.S. Muslims in a Quandary over Charities*, CHRISTIAN SCI. MONITOR, Nov. 17, 2004, at 11. Some Muslim-Americans have followed this suggested approach. See *id.*; see also Laurie Goodstein, *Since 9/11, Muslims Look Closer to Home*, N.Y. TIMES, Nov. 15, 2004, at F1. This does not resolve, however, the tension most feel as a result of the Islamic beliefs that Muslims must give zakat to the neediest, with priority to Muslims, and that these people reside in developing and underdeveloped countries abroad. See *supra* note 17 and accompanying text.

25. See Crimm, *High Alert*, *supra* note 9, at 1349. With readily available internet archives, accusations against individuals, whether true or not, can permanently sully reputations. These harmful stains become non-removable because internet searches can produce recent and age-old, long-buried information that may be accurate, wrong, incomplete, or outdated.

Americans and the neediest Muslims abroad, but also to the American public.

I. DEMOGRAPHICS OF MUSLIM-AMERICANS

A definitive population count of Muslim-Americans has proved elusive, but estimates currently range from 2.35 million to seven million.²⁶ Nonetheless, a 2007 task force report for the Chicago Council on Global Affairs portrays the Muslim-American population as growing in number and diversity, representing many “ethnic, linguistic, ideological, social, economic, and religious groups.”²⁷ According to a 2007 survey by The Pew Research Center, 65% of Muslim-Americans are first generation immigrants to the United States, and another 7% are individuals whose parents are first generation immigrants.²⁸ Thus, fully 72% of Muslim-Americans are “foreign-born or have roots abroad.”²⁹ Nonetheless, The Pew Research Center found that Muslim-Americans are “highly assimilated into American Society.”³⁰

Most foreign-born Muslim-Americans have arrived in the United States since the beginning of the 1990s. Thirty-three percent immigrated to the United States in the 1990s, while 28%

26. See THE CHICAGO COUNCIL ON GLOBAL AFFAIRS, TASK FORCE SERIES, STRENGTHENING AMERICA: THE CIVIC AND POLITICAL INTEGRATION OF MUSLIM AMERICANS 23 (2007) [hereinafter STRENGTHENING AMERICA], *available at* http://www.thechicagocouncil.org/taskforce_details.php?taskforce_id=8; PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 10 (2007) [hereinafter PEW RESEARCH CENTER, MUSLIM AMERICANS], *available at* <http://people-press.org/reports/display.php3?ReportID=329>. One reason for the difficulty in accurately estimating the number of Muslim-Americans is that neither the Census Bureau nor the U.S. Citizenship and Immigration Services collects information on religious affiliation. STRENGTHENING AMERICA, *supra*, at 26. Another reason is that studies have relied on telephone calls to households that have landline service. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra*, at 26. There has been no way to include in the studies those households that have no telephone service or only cell phone service, which includes an estimated 13.5% of the public. *Id.* Finally, language skills of Muslims have proved challenging for researchers. *See id.* at 12–13. The 2.35 million estimate is that of the Pew Research Center. *Id.* at 10. The 7 million estimate is the result of a 2001 survey by the Hartford Institute for Religious Research. *See id.* at 13.

27. STRENGTHENING AMERICA, *supra* note 26, at 23.

28. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 15.

29. *Id.* at 10.

30. *Id.* at Report Summary.

came in the current millennium.³¹ Twenty-three percent of foreign-born Muslim-Americans arrived in the 1980s and only 16% came earlier.³² Most settled in large metropolitan areas, with the largest concentrations living in Los Angeles, New York, Detroit, Washington, D.C. and Chicago.³³

According to The Pew Research Center survey, these immigrants are ethnically diverse. They are from at least sixty-eight different countries, with more than 37% arriving from the “Arab region” and a large proportion from South Asia.³⁴ Reflective of this profile, the largest percentage of foreign-born Muslim-Americans who emigrated from one country came from Iran (12%) and Pakistan (12%).³⁵ Thirty-two percent arrived from Bangladesh (5%), Bosnia and Herzegovina (4%), India (7%), Iraq (4%), Lebanon (6%), and Yemen (6%) combined.³⁶

The educations and household incomes of foreign-born and native-born Muslim-Americans are comparable to those of the U.S. population as a whole.³⁷ Approximately 10% of Muslim-Americans have attended graduate schools, and 14% have earned college degrees.³⁸ Forty-one percent of Muslim-Americans report household incomes of at least \$50,000, and the percentages making \$25,000 and \$75,000 annually are approximately proportional to the same percentages for the U.S. population as a whole.³⁹ Nearly mirroring the sentiment of the general populace,

31. *Id.* at 15.

32. *Id.*

33. LEWIS MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL RESEARCH, UNIV. AT ALBANY, TOTAL MUSLIM POPULATION: METROPOLITAN REGIONS (2000), *available at* <http://mumford.albany.edu/census/data.html>.

34. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 15. The Arab region is based on a UNDP classification, which defines the region as including twenty-two Middle Eastern and North African countries. *Id.* The United States Department of State also has published demographic information on Muslim-Americans, with estimates fairly similar to those of the Pew Research Center survey. U.S. Department of State, Varieties of Worship, <http://usinfo.state.gov/products/pubs/muslimlife/demograp.htm> (last visited Sept. 5, 2007). By comparison, the Council on American-Islamic Relations (CAIR) estimates that 29% of Muslim-Americans immigrants are from Arab states. CAIR, U.S. Immigrants from Muslim Populated Regions, <http://www.cair.com/asp/populationstats.asp> (last visited Feb. 29, 2008).

35. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 15.

36. *Id.*

37. *Id.* at 18.

38. *Id.*

39. *Id.* Sixteen percent of Muslim-Americans indicate household incomes of at least \$100,000; 10% report incomes of between \$75,000 and \$99,999;

almost one-half of Muslim-Americans perceive their personal financial situations to be good or excellent despite the fact that a lower percentage reports full-time employment than the general U.S. population.⁴⁰

Like Americans of other religious beliefs, Muslim-Americans' religious devotion to Islam ranges from "very orthodox to moderate to secular."⁴¹ The largest portion of Muslim-Americans, about half, identify themselves as Sunni, the largest Muslim tradition worldwide.⁴² Only 16% identify with Shia Islam, the second largest Muslim tradition across the world.⁴³ Twenty-two percent report they are Muslim without identifying a particular sect with which they are affiliated.⁴⁴

Muslim-Americans regard the role of Islam in their lives as significant. Eighty-six percent of all Muslim-Americans regard the Qur'an as the word of Allah, and 50% consider that the Qur'an must be read "literally, word for word."⁴⁵ At least 90% report that religion is either a "very important" part of their lives (72%) or a "somewhat important" part of their lives (18%).⁴⁶ Nearly one-quarter have a high religious commitment.⁴⁷ Not surprisingly, 76% consider their duty of zakat "very important."⁴⁸ Nonetheless, many Muslim-Americans, slightly more than three-quarters, are concerned about the rise of Islamic extremism worldwide and disapprove of terrorists and their tactics.⁴⁹

From these demographics alone, it certainly is predictable

15% specified incomes of between \$50,000 and \$69,999. *Id.* Fifty-nine percent of Muslim-Americans report household incomes of less than \$50,000. *Id.* Muslim-Americans from South Asia, especially India and Pakistan, tend to have a higher socio-economic profile, and perhaps are more "privileged," than other Muslim-Americans. See ADIL NAJAM, PORTRAIT OF A GIVING COMMUNITY: PHILANTHROPY BY THE PAKISTANI-AMERICAN DIASPORA 32-34 (2006); Karen Leonard, *American Muslims, Before and After September 11*, 2001, 35 EC. & POL. WEEKLY 2293, 2293 (2002).

40. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 18-19.

41. STRENGTHENING AMERICA, *supra* note 26, at 23.

42. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 21.

43. *Id.* These Shia are expected to tithe more zakat than Sunnis. See *supra* note 9.

44. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 23.

45. *Id.*

46. *Id.* at 24.

47. *Id.* at 25. This includes attendance at mosque at least weekly and praying all five salahs daily. *Id.*

48. *Id.*

49. *Id.* at 49.

that Muslim-Americans worry about how to fulfill their zakat and zakat al-fitr obligations, as well as how to give sadaqah. It is impossible to estimate the monetary value of sadaqah donated and zakat required of, and given by,⁵⁰ Muslim-Americans. Despite the lack of actual data, anecdotal evidence suggests that the greatest portion of donated funds before 9/11 may have been directed overseas.⁵¹ This pattern would be consistent with the widespread belief that zakat must go to the neediest Muslims across the world.⁵² Moreover, nearly 40% of Muslim-Americans emigrated from abroad only during the past two decades.⁵³ Many of the immigrants are educated, a significant proportion of these consider themselves financially secure, and most are quite religious.⁵⁴ They have special desires to satisfy their obligatory and voluntary philanthropy by sending money to help individuals in their countries of origin, many of which are war-torn, impoverished, and perceived as home to the neediest Muslims.⁵⁵ As a result of their post-9/11 heightened awareness of the operations of terrorists and terrorist organizations, these foreign-born Muslim-Americans have become increasingly hesitant to undertake diaspora philanthropy.⁵⁶ Likewise, native-born Muslim-Americans have become wary of directing their sadaqah, zakat, and zakat al-fitr contributions abroad to help cure Muslims' deprivations, even deprivations that may give rise to or exacerbate

50. One researcher suggests that "if each of America's estimated six million Muslims were to donate at the rate of the average American, their total giving would exceed \$5.3 billion annually." JASSEMM, *supra* note 9, at 25. It is impossible, however, to determine whether American-Muslims donate at the average rate of all Americans, or to rely upon a population estimate of six million American-Muslims. See *supra* note 26 and accompanying text (indicating that population estimates range between 2.35 million and seven million).

51. See Goodstein, *supra* note 24, at F1. But see JASSEMM, *supra* note 9, at 31 (stating that at their peak before 9/11, Muslim-American charities annually directed less than \$23 million overseas, representing a small portion of Muslim-American donations).

52. See *supra* note 17 and accompanying text.

53. PEW RESEARCH CENTER, MUSLIM AMERICANS, *supra* note 26, at 1.

54. *Id.* at 2, 18-26.

55. See, e.g., Lampman, *supra* note 24, at 11; Goodstein, *supra* note 24, at F1; see Ruff, *supra* note 17, at 471. One researcher suggests that often diaspora donors prefer to give to needy individuals rather than to causes because of a low level of trust of government and institutions, including nonprofits. Adil Najam, *Diaspora Philanthropy to Asia* 119, 142-43, in BARBARA J. MERZ, ET AL., DIASPORAS AND DEVELOPMENT (2007).

56. See *supra* note 24 and accompanying text.

terrorism, such as poverty.⁵⁷ Consequently, many of these well-intentioned people cautiously have sought legitimate, safe, and accessible channels for their charitable giving. Some have turned to wiring money to people or villages through relatives;⁵⁸ others have searched for more formal channels but have encountered significant frustrations and challenges.⁵⁹

II. CONCERNS OF MUSLIM-AMERICANS ARE NOT UNFOUNDED

Keen on preventing further acts of terrorism after 9/11, the U.S. government expanded the scope and reach of legislation, regulatory projects, administrative enforcement initiatives, civil and criminal sanctions, and diplomatic efforts aimed at enhancing national security. These laws and programs have tremendously affected all Americans, but perhaps their greatest impacts have been on Muslim-Americans.

In response to the 9/11 attacks, on September 23, 2001, President George W. Bush issued an Executive Order⁶⁰ in which he declared a national emergency to deal with the threat of future terrorism. Although the sources of the financial resources of the 9/11 attackers were not then known,⁶¹ he surmised that they were expansive and included individuals, nongovernmental organizations (NGOs) and other entities.⁶² He provided for the

57. See Lampman, *supra* note 24, at 11; Goodstein, *supra* note 24. See also *supra* note 24 (commenting on the tension in giving domestically rather than abroad).

58. See Tom Pope, *Charity as a Duty*, NONPROFIT TIMES, Sept. 1, 2006, at 1(5).

59. See *supra* note 24 and accompanying text. Some Muslim-Americans have transmitted funds to zakat committees in the Middle East, but this approach is dangerous. Despite the U.S. government indirectly having transmitted humanitarian financial aid to Palestinian occupied territories in the Middle East through zakat committees, it alleges that such committees have ties to terrorist organizations, including Hamas. See MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. TIMES, July 17, 2007, at A14.

60. Exec. Order No. 13,224, § 1, 66 Fed. Reg. 49,079 (Sept. 23, 2001). For further discussion of Executive Order 13,224 and the authorizations it conferred, see Crimm, *High Alert*, *supra* note 9, at 1364-94.

61. The 9/11 Commission Report, issued in 2004, reported that investigations revealed that al Qaeda primarily financed the attacks through funds raised by individuals and charitable organizations in Saudi Arabia and other Gulf nations. THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 172 (2004).

62. 66 Fed. Reg. at 49,079.

application of future financial sanctions because he considered “dual organizations”⁶³—those having both military and charity operations—and other NGOs to be attractive targets for terrorists’ exploitation, and subsequently capable of funding terrorists.⁶⁴ The perceived susceptibility of charities results from their (1) public aura of trustworthiness combined with unwitting donors, (2) engagement in some legitimate charitable activities, (3) potential access to considerable financial resources, (4) cash-intensiveness, (5) possible global presence, (6) limited governmental oversight, especially abroad, and (7) typically one-directional transferal of donations and other funds.⁶⁵ Thus, pursuant to presidential powers under the International Emergency and Economic Powers Act, President Bush froze assets of individuals and groups on an annexed list of designated foreign persons,⁶⁶ persons acting on behalf of those on the list, and persons who have committed, or are significant risks for committing, terrorist acts.⁶⁷ The entire annexed list contained the names of twenty-seven Muslim and Arab persons, known as specially designated global terrorists (SDGTs) and specially designated nationals (SDNs), twelve individuals and fifteen groups, including three NGOs.⁶⁸ Moreover, the Executive Order authorized government officials to identify more SDNs and SDGTs

63. Such “dual organizations” include the well-established groups of Hamas and Hezbollah. Dual organizations can operate hospitals, schools, and religious institutions, and can provide public services and relief, but can also be fertile grounds to recruit extremists for terrorist activities. See *Violent Islamist Extremism, Government Efforts to Defeat It: Hearing of the S. Homeland Security Comm.* (May 10, 2007) [hereinafter *Testimony of Chip Poncy*] (testimony of Chip Poncy, Director of Strategic Policy, Treasury Department’s Office of Terrorist Financing and Financial Crimes), available at Federal News Service, LEXIS.

64. Press Release, Office of the Press Secretary, President Freezes Terrorists’ Assets (Sept. 24, 2001), available at <http://whitehouse.gov/news/releases/2001/09/20010924-4.html>; *Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism: Message from the President of the United States*, 147 CONG. REC. H5964 (Sept. 24, 2001).

65. See *Islamic Extremism: Hearing Before the Committee on S. Homeland Security and Governmental Affairs* (May 10, 2007) [hereinafter *Statement of Chip Poncy*] (statement of Chip Poncy, Director of Strategic Policy, Treasury Department’s Office of Terrorist Financing and Financial Crimes), available at CQ Congressional Testimony, LEXIS.

66. The term “person” includes individuals, groups, and entities.

67. Exec. Order No. 13,224, § 1, 66 Fed. Reg. at 49,079.

68. Annex, 66 Fed. Reg. at 49,083.

and to freeze the assets of any foreign or domestic person associated with SDNs and SDGTs or “determined to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of” terrorism.⁶⁹

Congress quickly followed by enacting the USA Patriot Act (Act) on October 26, 2001, to enlarge the president’s authority and the ability of government agencies to engage in an unconventional “war on terrorism.”⁷⁰ The Act permits the government to monitor, identify, investigate, regulate, disrupt, and dismantle not only terrorist operatives and their operations, but also their supporters.⁷¹ It enables the government to freeze and confiscate assets it perceives as destined to support terrorism.⁷² Individuals, as well as traditional and nontraditional structures, such as § 501(c)(3) charitable organizations, are subject to these laws, which provide civil and criminal sanctions.⁷³ Although later questioned by scholars and courts,⁷⁴ Congress purportedly intended to protect innocent, well-intentioned donors by predicating an individual donor’s violation of the laws upon actual or constructive knowledge⁷⁵ that the funds might be used for the support of terrorism, but without requiring a specific evil intent to facilitate terrorism.⁷⁶ Since 2001, Congress has extended antiterrorism

69. Exec. Order No. 13,224, § 1, 66 Fed. Reg. at 49,079.

70. Uniting and Strengthening America by Proving Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, Title I, § 106, 115 Stat. 272 (2001).

71. 50 U.S.C. §1702(a)(1) (2007), as amended by the USA Patriot Act. The USA Patriot Act expanded the authority of the President under the International Emergency and Economic Powers Act to regulate and impose sanctions with respect to a wide range of transactions.

72. *Id.*

73. For a broader discussion of the various laws, penalties, and their applications see Crimm, *High Alert*, *supra* note 9, at 1354-1437.

74. See, e.g., Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 61-71 (2005); Crimm, *High Alert*, *supra* note 9, at 1410-14.

75. 18 U.S.C. § 2339B requires “knowledge” for violation, but legislative history reveals the government standard of “knowledge” as including actual knowledge or situations in which a person “should have known.” *Administration’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary 107th Cong. 3-12 (2001)* (statement of John Ashcroft, Att’y Gen. of the United States), available at <http://www.house.gov/judiciary>.

76. Courts and scholars have suggested that a specific intent requirement for violation of the laws could permit persons to avoid liability. See Chesney, *supra* note 74, at 12-18, 61-71; Crimm, *High Alert*, *supra* note

laws,⁷⁷ some aimed directly at financing,⁷⁸ and government agencies have expanded their programs and initiatives to combat terrorism.⁷⁹

By September 11, 2007, implementation of counterterrorism plans by the Department of Treasury and other agencies had produced notable impacts. The government had designated forty-five Islamic-related charitable organizations, all of which have engaged in some charitable services or financial assistance to the needy, as proscribed SDNs or SDGTs.⁸⁰ Of these, eight currently have or formerly had offices in the United States.⁸¹ Additionally, the government had designated eight entities as potential fundraising front organizations.⁸² As part of its enforcement efforts, the government had seized and frozen the assets of several designated charitable organizations,⁸³ suspended the tax-exempt status of some Muslim-American charities without providing these entities any opportunity for prior challenge,⁸⁴ caused a number of

9, at 1410-14.

77. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (Mar. 9, 2006).

78. *Id.* §§ 401-410.

79. *See, e.g., Testimony of Chip Poncy, supra* note 63.

80. U.S. Department of the Treasury, Protecting Charitable Organizations, <http://www.treas.gov/offices/enforcement/key-issues/protecting/fto.shtml> (last visited Sept. 19, 2007). Some are considered al-Queda related; a few are listed as Hamas-related; several are designated as Hezbollah-related; and one is listed as Palestinian Islamic Jihad-related. *Id. See Statement of Chip Poncy, supra* note 65.

81. U.S. Department of the Treasury, Protecting Charitable Organizations, <http://www.treas.gov/offices/enforcement/key-issues/protecting/fto.shtml>.

82. *Id.*

83. In July 2007, the government designated Goodwill Charitable Organizations as an SDN and froze its assets, asserting that the organization was a fundraising arm for the Martyrs Foundation, which allegedly funnels money to Hezbollah, Hamas, and the Palestinian Islamic Jihad. *See* Paul Egan, *Feds Raid Charity Suspected of Aiding Hezbollah*, DETROIT NEWS, July 25, 2007, online edition, available at LEXIS; Suzanne Perry, *Federal Authorities Raid Two Mich. Muslim Charities*, CHRON. PHILANTHROPY, Aug. 9, 2007, at 26. Prior to July 2007, the government froze assets of numerous other Muslim nonprofits. *See, e.g., U.S. Freezes Assets of Hezbollah Unit, Donations to Militant Group Banned*, WASH. POST, Aug. 30, 2006, at A13.

84. *See IRS Suspends Tax-Exempt Status of Michigan Charity for Terrorist Activities*, DAILY TAX REP., July 31, 2007. 26 U.S.C. § 501(p), added by the Military Tax Family Relief Act of 2003, permits the I.R.S. to suspend the tax-exempt status of designated terrorist organizations. Pub. L. No. 108-121, § 108, 117 Stat. 1335, 1339 (2003). Suspension of tax-exempt status does not preclude the entity from continuing operations. For further

Muslim-American nonprofit organizations to close,⁸⁵ prosecuted a few charities,⁸⁶ and in a federal district court case named as unindicted co-conspirators more than three hundred Muslim organizations not on the government's SDN and SDGT lists.⁸⁷

In this same six-year period after 9/11, the U.S. government placed thousands of individuals, most with Muslim names, on its lists of SDNs and SDGTs.⁸⁸

The Department of Justice tried and won cases against Muslim individuals in federal courts for material support of terrorism and other related terrorism charges.⁸⁹ In some early

discussion of this statute, see Crimm, *High Alert*, *supra* note 9, at 1424–26.

85. See Robert Barnes, *Case Against Islamic Charity Opens; Now-Shuttered Organization Funneled Money to Militants, Prosecutors Say*, WASH. POST, July 25, 2007, at A6; Muslim Public Affairs Council, Muslim Groups Form National Council of American Muslim Non-Profits (Mar. 30, 2005), <http://www.mpac.org/article.php?id=74> (commenting that as of 2005, the government had shut down twenty-five Muslim-American nonprofit organizations).

86. Most recently, the trial of the Holy Land Foundation for Relief and Development, accused of indirectly aiding Hamas by sending millions of dollars to zakat committees—none of which has been placed on our government's lists of SDNs and SDGTs—opened in Texas on July 16, 2007. See Neil MacFarquahar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. TIMES, July 17, 2007, at A14; Leslie Eaton, *Prosecutors Say a Charity Aided Terrorists Indirectly*, N.Y. TIMES, Sept. 18, 2007, at A20; Jack Douglas, Jr., *Scrutinized for Years, Foundation Faces Trial*, FORT WORTH STAR-TELEGRAPH, July 15, 2007, available at LEXIS.

87. See Neil MacFarquhar, *Muslim Groups Oppose a List of Co-Conspirators*, N.Y. TIMES, Aug. 16, 2007, at A18 (reporting that the Department of Justice named as co-conspirators in the Texas trial of Holy Land Foundation for Relief and Development foreign and U.S.-based organizations, including the Council on American-Islamic Relations, Islamic Society of North America, and the North American Islamic Trust).

88. U.S. Department of the Treasury, Specially Designated Nationals List (SDN), <http://www.treas.gov/offices/enforcement/ofac/sdn/> (last visited Sept. 19, 2007). The Terrorist Screening Center, a multi-agency organization administered by the F.B.I., compiles a terrorist watchlist by consolidating domestic and international terrorist information from various governmental sources, including border patrols, visa reviewers, and other front-line law enforcement authorities. AUDIT DIV., OFFICE OF THE INSPECTOR GEN., U.S. DEPT. OF JUSTICE, AUDIT REPORT 07-41 1, iii (Sept. 2007). Presumably the compilation of more than 700,000 names, which a recent audit by the Office of the Inspector General of the Department of Justice reveals is faulty, contains many who are non-Muslim. See *id.* at xxi; Philip Shenon, *Inspection Notes Errors in Terror List*, N.Y. TIMES, Sept. 7, 2007, at A24.

89. See Bob Fernandez, *31 Wins, 6 Losses & 1 Tie*, A.B.A. J., Sept. 2007, at 24. In the trial of Holy Land Foundation for Relief and Development, five men are accused of illegally sending millions of dollars to Hamas through the

cases, court decisions left the impression that, despite the requisite “should have known” statutory intent,⁹⁰ even innocent donors can be prosecuted for supporting terrorism.⁹¹ Moreover, the government subjected mosques to surveillance, wiretapped phones, fingerprinted and registered more than eighty thousand Arab and non-national residents, identified eight thousand for questioning, and arrested or detained approximately five thousand.⁹²

The Federal Bureau of Investigation (“F.B.I.”) and Treasury Inspector General for Tax Administration added to uncertainties in the philanthropic environment. The F.B.I. contributed to the attitude that Middle Easterners and South Asians, some of whom are Muslims, are a population without certain legal rights and protections. It issued well over one hundred thousand secret warrantless demands, known as national security letters, to financial institutions, telecommunications companies, and other businesses to obtain data on unknowing targeted individuals, some of whom are likely Muslims, and networks of people with whom the targets purportedly had connections.⁹³ The Treasury Inspector General for Tax Administration discredited the completeness of the government’s official master list of terrorists.

organization, and those five defendants argue that they only wished to ease the deprivations of children and families in their Middle East homeland. *See* Jason Trahan, *Holy Land Case Starts with Focus on Intent: Dallas Lawyers Insist 5 Strived To Ease Suffering; Prosecutors Say Goal Was To Fund Terror*, DALLAS MORNING NEWS, July 25, 2007, at B1.

90. *See supra* note 75 and accompanying text.

91. *See, e.g.*, Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133–35 (9th Cir. 2000), *aff’d in part and rev’d in part* Humanitarian Law Project v. U.S. Dep’t of Justice, 352 F.3d 382 (9th Cir. 2003).

92. STRENGTHENING AMERICA, *supra* note 26, at 28.

93. Editorial, *The Wrong Balance on Civil Liberties*, N.Y. Times, Sept. 16, 2007, § 4, at 9 (indicating contents of a March 2007 report from the Department of Justice). *See* Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, N.Y. TIMES, Sept. 9, 2007, at A1 (commenting on the scope of the people impacted by the data mining resulting from issuance of national security letters); Eric Lichtblau & Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. TIMES, Jan. 14, 2007, at A1 (stating that according to a Department of Justice study, the Federal Bureau of Investigation (F.B.I.) issued more than 9,000 national security letters in 2005 alone). On September 6, 2007, Judge Victor Marrero declared unconstitutional revisions enacted in 2006 to the USA Patriot Act that expanded the F.B.I.’s power to use national security letters and the 1986 law that authorized the F.B.I. to issue the exigent letters without a warrant. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

During summer 2007, he released a report that indicated the processes for compiling the government's list of terrorists are deficient, and likely fail to identify all persons and groups whose names should be on the list.⁹⁴ This revelation further stimulated fears of donors and charitable organizations that, even if they consulted the list, they nevertheless might direct funds to persons who support terrorist activities. The resulting recommendations of the Treasury Inspector General suggested that the government considerably ramp up its efforts. This suggestion led to greater insecurity among donors unsure of what steps the government might take next.⁹⁵

These government actions have received substantial media coverage, which both Muslim and non-Muslim Americans have followed closely. The series of acts has been a strategically powerful means of repeatedly alarming many people, perhaps with escalating effect. While initial governmental measures created a significantly chilled philanthropic climate for well-intentioned Americans, especially Muslim-Americans, the unfriendliness of the environment seemed to increase as the government disclosed new actions and recommendations for changes. This climate of fear begs for us to explore whether there might be a feasible means of resolving the Muslim-Americans' poignant charitable giving dilemma.

III. CAN THE CHILL BE MODERATED, AND IF SO, HOW?

The U.S. government recently signaled some attempt to reverse the inhospitable philanthropic environment. It created and implemented various educational and community outreach programs targeted to Muslim-Americans, including initiatives aimed directly at assisting charitable organizations.⁹⁶ But those projects have received limited widespread press. In response to a

94. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, SCREENING TAX-EXEMPT ORGANIZATIONS' FILING INFORMATION PROVIDES MINIMAL ASSURANCE THAT POTENTIAL TERRORIST-RELATED ACTIVITIES ARE IDENTIFIED, May 21, 2007, *available at* <http://www.tigta.gov>.

95. *Id.*

96. *See Testimony of Chip Poncy, supra* note 63 (outreach programs include discussions of the government's counterterrorism policies, development of relationships with communities to develop guidance on means to promote charitable giving, and discussions with the nonprofit sector about developing mechanisms for delivering aid to places of need).

request by Muslim-American charities,⁹⁷ the Department of Treasury since 2002 has issued two iterations of “Anti-Terrorist Financing Guidelines”⁹⁸ (“Guidelines”) to assist U.S.-based charities in avoiding ties to terrorist organizations and “abuse” or “exploitation”⁹⁹ by terrorists. The Guidelines present broad governing, fiscal, and programmatic principles aimed at enhancing charities’ accountability and transparency. Although supportive of those goals, commentators in the nonprofit sector, practitioners, and academics have criticized the Guidelines as excessively burdensome and beyond the abilities of most charities, inappropriately discouraging of international charitable activities by U.S.-based nonprofits, unlikely to have a preventive impact on terrorist financing, taking an untenable one-size fits all approach in several important areas, suggesting principles irrelevant to the goal of preventing diversion of funds to terrorists, overlapping in certain respects with existing state and federal regulation of charities, and failing to assure protection against potential liability even when followed.¹⁰⁰ In March 2007, the Department

97. Press Release, U.S. Department of the Treasury, PO-30607: Response to Inquiries from Arab American and American Muslim Communities for Guidance on Charitable Best Practices (Nov. 7, 2002), <http://www.treas.gov/press/releases/po3607.htm>.

98. The Department of Treasury released its first version in November 2002. U.S. DEP’T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2002). Thereafter, it requested comments from the charitable sector, responded, and revised the Guidelines, and finally released a revised third version on September 29, 2006. U.S. DEP’T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006), *available at* http://www.treasury.gov/offices/enforcement/keyissues/protecting/docs/guidelines_charities.pdf; *see* U.S. Department of the Treasury, Treasury Updates Anti-Terrorist Financing Guidelines for Charitable Sector, <http://www.treas.gov/press/releases/hp122.htm> (last visited Feb. 29, 2008).

99. The term exploitation is seen to include the employment of “charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist organizations and activities.” ANNEX TO GUIDELINES, U.S. DEP’T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006), *available at* http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf. Examples given involve such “dual” militaristic and humanitarian organizations as Hezbollah, Hamas and others. *Id.*

100. *See, e.g.*, Press Release, OMB Watch, Treasury Releases Third Version of Anti-Terrorist Financing Guidelines, <http://www.ombwatch.org/article/articleview/3614/1/84/?TopicID=2> (commenting that the fundamental problems in the Guidelines’ first version remain in the third version); Barnett

of Treasury's Office of Foreign Assets Control (OFAC) released a "Risk Matrix for the Charitable Sector" (Matrix) based largely on the Guidelines. The Matrix attempts to help charities identify and categorize hazard susceptibilities connected with their processes of collecting and disbursing funds, including disbursement to high-risk areas abroad. OFAC intends that the Matrix assist charities in formulating risk-based approaches, compliant with U.S. laws and the Guidelines, for tackling their vulnerabilities to possible exploitation or abuse by terrorists.¹⁰¹ The Matrix may prove somewhat helpful to charities, but it neither guarantees protection against terrorist abuse of charitable organizations¹⁰² nor shields against criminal or civil liability for violation of any law or regulation.¹⁰³

The nonprofit sector, including nonprofit organizations specifically aimed at Muslim-Americans, has offered some limited ideas intended to improve the charitable giving climate. Muslim Advocates, a Muslim advocacy organization in the U.S., drafted guidance aimed at assisting Muslim-American donors in selecting reputable and effective charitable organizations that can direct donations to intended charitable causes.¹⁰⁴ The proffered suggestions highlight considerations to which donors should be attentive, but they are quite general and cannot give donors real comfort that ultimately their contributions will be protected from

F. Baron, *The Treasury Guidelines Have Had Little Impact Overall on U.S. International Philanthropy, But They Have Had a Chilling Impact on US-Based Muslim Charities*, 25 PACE L. REV. 308-10 (2004) (criticizing the first iteration of the Guidelines); Crimm, *High Alert*, *supra* note 9, at 1440-47 (commenting on criticisms of the first version of the Guidelines).

101. U.S. Department of the Treasury, Office of Foreign Assets Control, Risk Matrix for the Charitable Sector, www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

102. See Naomi Munk & Suzanne E. Coffman, *Blocking Terrorist Funding: Treasury's Risk Matrix for the Charitable Sector*, Aug. 2007, <http://www.guidestar.org/DisplayArticle.do?articleId=1153>. The process utilized by OFAC in producing the Risk Matrix has been criticized for failing to solicit input from the nonprofit sector. See Kay Guinane, *Treasury Posts Risk Matrix for Charities, Meant To Help Avoid Financing Terrorism*, April 10, 2007, <http://www.ombwatch.org/article/blogs/entry/3138/36>.

103. U.S. Department of the Treasury, Office of Foreign Assets Control, Risk Matrix for the Charitable Sector, at n. 3, www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

104. Muslim Advocates, Guidance on Charitable Giving for Muslim American Donors, www.muslimadvocates.org/docs/Donor-Guidance101106.pdf.

ties to terrorism. The National Council of American-Muslim Nonprofits, an umbrella organization, announced in 2005 that it would create guidelines to assist charities to protect against terrorist exploitation,¹⁰⁵ but they have not been produced. To date, Muslim-American charities have been unable to coordinate efforts to enable Muslim-Americans to give money lawfully to an acceptable menu of legitimate projects abroad.¹⁰⁶ Although Muslim-Americans and others have suggested that the Department of Treasury develop a “white list” of acceptable Muslim charities in compliance with its Guidelines,¹⁰⁷ the government has not done so.

Thus far, there is no safe and accessible giving vehicle that assures Muslim-Americans protections against surveillance, harassment, arrest, or prosecution by the government. Although some states have adopted terror-free investment policies to ensure that they do not invest tax dollars in a manner that could aid terrorism,¹⁰⁸ there is currently no terror-free channel constructed specifically for, and aimed at facilitating, Muslim-Americans in directing their charity discreetly to needy Muslims in specific regions and communities abroad.

Crafting such a mechanism could go a long way to moderating the current frosty charitable giving climate for Muslim-Americans. To ensure Muslim-Americans a safe mechanism for

105. Cohen, *supra* note 24.

106. One newspaper account suggests that the failure to orchestrate such a project is the result of isolated Muslim charities that do not have sophisticated management expertise and the fear of foreign governments and policymakers in empowering civil society through legislation or policymaking that could assist organized philanthropy. Kamal & Model, *supra* note 23. Additionally, it appears that there is not a profusion of domestic Islamic “friends of” charities, which would permit donor contributions to be redirected to specific projects abroad that the domestic “friends of” charities support.

107. See, e.g., Ruff, *supra* note 17, at 499.

108. For example, Ohio and Missouri have such a terror-free investment policy. See Richard Cordray, Ohio Treasurer of State, Terror-Free Investment Policy (Apr. 18, 2007), <http://www.tos.ohio.gov/content/view/285/39/>; Press Release, Richard Cordray, Ohio Treasurer of State, Treasurer Cordray Announces New Terror-Free Investment Policy for State Treasury (Apr. 18, 2007), <http://www.tos.ohio.gov/content/view/286/41/>; *Hearing Before the H. Comm. on Foreign Affairs’ Subcomm. on Terrorism, Nonproliferation, and Trade and the H. Comm. on Financial Services’ Subcomm. on Domestic and International Monetary Policy, Trade and Technology* (Apr. 18, 2007) (statement of Sarah Steelman, Missouri State Treasurer), <http://foreignaffairs.house.gov/110/ste041807.htm>; Sarah Steelman, *Terror-Free Investing*, WALL ST. J., Dec. 14, 2006, at A21.

giving and directing zakat contributions to the neediest Muslims abroad, a terror-free donor advised fund (DAF) could be developed specifically for Muslim-Americans, as explained below. At least initially, it might be wise to create one centralized, but accessible, terror-free DAF, and, depending on its success, others could follow.

A DAF is essentially a low cost, flexible alternative to a private foundation. A DAF operates as a charitable giving vehicle by enabling donors to contribute cash or assets to an intermediary entity, known as a sponsoring organization,¹⁰⁹ which redistributes the donors' contributions, without divulging the donors' identities, to qualified targeted recipients.¹¹⁰ The ultimate qualified recipients are generally organizations, either domestic or foreign,

109. The sponsoring organization is essentially a nongovernmental entity, other than a private foundation, that would be treated as a tax-exempt religious, charitable, or educational organization under Internal Revenue Code § 501(c)(3). 26 U.S.C. § 4966(d)(1)(A)–(C) (2007). Interestingly, the sponsoring organization can be either a domestic or foreign entity. 26 U.S.C. § 4966(d)(1)(A).

110. More technically under U.S. tax laws, a DAF is a pool of donated assets with three features. First, the assets contributed by the donor are owned and controlled by a sponsoring organization. *Id.* § 4966(d)(2)(A) (2007).

Second, the DAF is composed of separate accounts identified by reference to a donor's completed contributions but with respect to which the donor or the donor's appointee retains the privilege of providing nonbinding advice to the sponsoring organization of preferred organization-beneficiaries able to utilize the funds consistent with the donor's intended charitable purposes. *Id.* § 4966(d)(2)(A), as added by the Pension Protection Act of 2006, Pub. L. No. 109-280. To avoid excise taxes, distributions generally must be made to a qualified organization (1) that meets the requirements of 26 U.S.C. § 170(b)(1)(A), (2) that satisfies the conditions of 26 U.S.C. § 170(c)(2)(B), or (3) for which the sponsoring organization fulfills the expenditure responsibility requirements of 26 U.S.C. § 4945(h). *Id.* § 4966(c)(1)–(2). Basically, such recipient cannot be a natural person, and unless it is a domestic entity that qualifies for tax-exempt status as a § 501(c)(3), the sponsoring organization is obligated to undertake certain due diligence of the nongovernmental foreign organization-recipient. *Id.* § 4966(c)(1)(A), (c)(1)(B)(ii) referring to the expenditure responsibility rule of 26 U.S.C. § 4945(h). See Nina J. Crimm, *Through a Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations and Their Donors*, 23 VA. TAX REV. 1, 72-86 (2003) [hereinafter Crimm, *Through a Post-September 11 Looking Glass*] (discussing the expenditure responsibility rule of 26 U.S.C. § 4945(h). For a discussion of the expenditure responsibility rule, see *infra* note 130 and accompanying text.

Third, the assets are not distributable to a single organization or governmental entity. *Id.* § 4966(d)(2)(B)(i) (2007).

that must use the contributions for charitable purposes. The sponsoring organization is an intermediary for the specific purposes of receiving contributions, taking nonbinding advice from donors of preferred recipients for their donations,¹¹¹ investing and managing contributed funds,¹¹² and undertaking all of the necessary legal, accounting, and philanthropic functions to ensure that assets reach their intended recipients. Because the Internal Revenue Service considers these sponsoring organizations to be public charities, donors are entitled to charitable contribution deductions for their gifted assets, and their contributions can accrete in value without further taxation.¹¹³

There are considerable expenses associated with creating and maintaining DAFs.¹¹⁴ Because of the risks associated with giving abroad and the protective due diligence that would be needed on an ongoing basis, a DAF that could serve as a vehicle for diaspora philanthropy would be more costly than one targeted only for domestic giving.¹¹⁵ Donors today initially can contribute relatively low sums and thereafter can add reasonable donations to DAF accounts where the ultimate recipients are located in this country.¹¹⁶ Whether low contributions to a terror-free DAF

111. Research has shown that diaspora donors like “hands on” involvement in their philanthropic endeavors. See Najam, *supra* note 55, at 125. The advisory role that a donor to a DAF could exercise might serve to advance this aspiration.

112. A donor can plan to have the funds managed as either an endowment, which is invested to permit the funds’ growth and to enable them to be distributed annually in perpetuity, or a non-endowment, which is invested to permit sufficient growth for annual distributions to occur over a short or long period. See Elfrena Foord, *Philanthropy 101: Donor Advised Funds*, J. FIN. PLAN., Nov. 2003, available at http://www.fpanet.org/journal/articles/2003_Issues/jfp1103-art8.cfm.

113. Because the DAF is tax-exempt under § 501(c)(3), the income generated by its gifted holdings is not subjected to income taxation.

114. These expenses can include annual administrative, investment and management fees. Typically a sponsoring organization charges between .45% to 2.75% in fees for a \$100,000 account and less if the account is worth more. See Foord, *supra* note 112.

115. Discussions with several DAF administrators and private foundation officials revealed that actual costs would be quite high, but exact amounts are impossible to calculate because they depend on many variables.

116. Donor advised funds (DAFs) traditionally have been viewed as financially advantageous alternatives to private foundations. Because DAFs are less expensive to establish and maintain than private foundations, the initial funding of their donors’ accounts can be significantly lower. A number

targeted abroad would be feasible is beyond the scope of this article. The lower the initial and subsequent contribution thresholds and the ease by which Muslim-Americans can donate to a targeted terror-free DAF—perhaps by payroll deductions¹¹⁷—the greater the potential to attract more Muslim-Americans to use such DAF as their charitable giving vehicle of choice.

From a funding perspective, forming one centralized terror-free DAF could be a financially viable endeavor. All Muslims have zakat obligations to tithe at a minimum 2.5% of their incomes and other wealth; many also contribute financial aid as sadaqah.¹¹⁸ Between 2.35 and seven million Muslims live in the U.S., 41% of whom live in households with incomes exceeding \$50,000.¹¹⁹ As touched on briefly above, financial feasibility will also depend on the cost effectiveness of the DAF. From the perspective of limiting costs by targeting localities of collective interest to Muslim-Americans to receive redistributions, there are high degrees of concentration of Muslim-Americans who emigrated from the Arab region (37%) and from south Asia, with large proportions from specific countries, such as Iran and Pakistan. Consequently, even if only a portion of all Muslim-Americans contribute to one

of “commercial” DAFs, created by commercial financial businesses, as well as some community foundations and educational institutions that have formed charitable corporations for the principal purpose of offering DAFs, have been successful in establishing low expense DAFs. *See, e.g.*, Fidelity Charitable Gift Fund, <http://www.charitablegift.org>. Some commercial DAFs require only an initial contribution of \$5,000. Fidelity Charitable Gift Fund, The Gift Account Minimums and Fees, <http://www.charitablegift.org/charity-giving-programs/daf/fees.shtml> (last visited Feb. 29, 2008). Additionally, because the Internal Revenue Service has treated DAFs as charities, they have offered donors higher charitable contribution deductions than those available to donors of private foundations. 26 U.S.C. § 170 (2007). The Internal Revenue Service currently is studying whether, as a result of the advisory privilege that a donor can retain, the donor advised fund vehicle should continue to qualify for the currently available income, gift, and estate tax charitable contribution deductions, and if so, the appropriate level for the deductions. *See* Notice 2007-21, 2007-9 I.R.B. 611. It also is studying whether, like private foundations, donor advised funds should be required to distribute a specified amount for charitable purposes. *See id.*

117. *See* Noelle Barton & Peter Parepento, *A Surge in Assets; Donor-Advised Funds Are Growing Exponentially*, CHRON. PHILANTHROPY, <http://philanthropy.com/premium/articles/v19/i14/14000701.htm> (referring to DAFs established by the Renaissance Charitable Foundation for three companies).

118. *See supra* notes 18-22 and accompanying text.

119. *See supra* notes 26, 39 and accompanying text.

centralized terror-free DAF, demographics appear to support its creation and potential sustainability, especially if donors' contributions are aggregated in one DAF account for redistribution to a highly limited number of foreign recipients.¹²⁰

DAFs characteristically have the potential not only to distribute funds to qualified recipients but also to invest the accounts' corpus to produce income.¹²¹ Under Islamic law, however, giving or receiving interest is prohibited.¹²² Thus, even though the donated funds would be owned by the sponsoring organization, Muslim-American donors would likely want to honor the restriction. Muslim recipients also might not want to receive money derived as interest. Therefore, to accommodate this Muslim belief, the DAF funds simply would need to be devoted to accreting investments, such as stock, that do not produce interest, a manageable hurdle.

There appear to be more significant challenges, however, to the establishment of a terror-free DAF. First, a sponsoring organization would need to be formed. This task should not be underestimated. The risks related to investment, administration, and management responsibilities are enormous. Those who undertake the necessary due diligence for the DAF, described below, cannot fully protect themselves from civil or criminal liability.

There are several possible methods for forming a sponsoring organization. A commercial financial institution could form a charitable corporation to serve as the sponsoring organization.¹²³

120. See *infra* note 123 (discussing author's telephone conversation with Drew Hastings on this matter and explaining DAFs) and *supra* notes 109-17 and accompanying text (explaining the structure of DAFs).

Currently there are several U.S.-based Pakistani-American charities connected to specific projects in Pakistan. See, e.g., SOS-Children's Village USA, Inc., <http://www.sos-childrensvillages.org> (providing youth homes, schools, medical centers, and vocational centers) (last visited Feb. 29, 2008); The Human Development Foundation of North America, Project Pakistan, <http://www.yespakistan.com/hdf/whatwedo/projectpakistan-exsummary.asp> (establishing human development initiatives in Pakistan's underprivileged communities) (last visited Feb. 29, 2008). The Muslim Pakistani-American population may not be as underserved as other Muslim-Americans in having a safe means for their charitable giving.

121. See *supra* note 112 (explaining DAFs that operate as endowments and those that operate as non-endowments).

122. See Sheryl Jean, *Beliefs and Banking*, USINFO, <http://usinfo.state.gov/v/products/pubs/muslimlife/bank.htm>.

123. Such commercial for-profit financial entities include The Vanguard

This might be the most plausible approach because several for-profit financial institutions now offer DAFs and have experience in their operation.¹²⁴ Such an arrangement would not preclude advice and input from Muslim-American and secular nonprofits. Moreover, as discussed below, there are considerable costs associated with due diligence efforts that will be required of the sponsoring organization, and a commercial financial institution might be capable of the greatest efficiency, have the expertise in place, and have the deepest pockets.

Although Muslim-Americans appear hesitant to give charity through Muslim-American nonprofit organizations,¹²⁵ another possible arrangement is the creation of a sponsoring organization by an alliance of Muslim-American and highly respected secular U.S.-based nonprofit organizations.¹²⁶ An alternative but perhaps less viable approach in the current environment would be the formation of a sponsoring organization by a publicly respected Muslim-American umbrella organization or other large nonprofit that has the broad trust, and represents the interests, of many Muslim-American nonprofit entities and the Muslim-American

Group (Vanguard Charitable Endowment Fund), Fidelity Investments (Fidelity Charitable Gift Fund), Charles Schwab (Schwab Fund for Charitable Giving), and T. Rowe Price (T. Rowe Price Program for Charitable Giving) all of which have a number of years of experience in developing DAFs. A nonprofit organization with some experience as a sponsoring organization for grant making overseas is the National Philanthropic Trust (NPT). It has established DAFs for giving to select foreign organizations in several countries, such as India, Turkey, Israel, and Japan. Telephone interview with Drew Hastings, V.P., NPT (Oct. 4, 2007) [hereinafter Telephone Conversation]. To do so, it was required to undertake the necessary due diligence to ensure that the redistributed funds would not support terrorists or terrorist organizations. *Id.*; see also National Philanthropic Trust, <http://www.nptrust.org>.

124. See *supra* note 123.

125. See *supra* notes 56-57 and accompanying text. If Muslim-Americans were inclined to contribute humanitarian aid to needy areas in homelands through non-Muslim U.S.-based charities, established vehicles do exist. For example, the American Red Cross has affiliates in many countries, including regions from which many Muslim-Americans emigrated.

126. For example, United Way and Grantmakers Without Borders might be explored as possible secular U.S.-based nonprofits. Some possibilities of Muslim-American nonprofits for exploration might include the National Council of American Muslim Non-Profits, Islamic Circle of North America, Islamic Society of North America, Islamic Relief-USA, Council of Islamic Organizations of Greater Chicago, and the Muslim Public Affairs Council.

population.¹²⁷ Finally, although also not entirely viable, a coalition of nonprofit Muslim-American organizations, including community foundations and highly respected nonprofits, might form a sponsoring organization. With respect to any of these three possible alternative arrangements, the management and administrative, operational, and technical support could be outsourced to an experienced third-party nonprofit or for-profit administrator.¹²⁸

The ability of a sponsoring organization to design a DAF that would qualify as terror-free is likely the most momentous hurdle. Because a purpose of creating such a DAF is to enable charitable contributions to fund legitimate charitable projects targeting the neediest Muslims abroad, appropriate foreign nongovernmental organizations (FNOs) must be recipients for, and re-distributors of, the DAF's distributions.¹²⁹ Advice and suggestions from Muslim-American and secular domestic private foundations and charities, as well as knowledgeable Muslim-Americans and other Americans who have worked or are working overseas, might help to solve this problem. Identifying suitable FNOs may not be an easy task, and the sponsoring organization's chore of performing adequate due diligence will be the most difficult and crucial challenge.

There are two components of due diligence currently

127. See *id.* (suggesting some potential Muslim-American nonprofit organizations).

128. See, e.g., Rockefeller Philanthropy Advisors (<http://www.rockpa.org/services/donor-advised-funds/>) and NPT (<http://www.nptrust.org>). Both organizations are nonprofit. See Telephone Conversation, *supra* note 123. NPT has limited experience as a third-party administrator for DAFs established for charitable giving to select foreign organizations abroad. *Id.* NPT's role has included the due diligence necessary to ensure that redistributions are protected from supporting terrorists and terrorist organizations. *Id.* A for-profit entity, Microedge (<http://www.microedge.com>), is also a third-party administrator.

129. Alternatively, the DAF could distribute funds to a domestic "friends of" organization, determined by the I.R.S. as a qualified charity under 26 U.S.C. § 501(c)(3), which would redistribute the money to a foreign organization that it supports. That chain would not remove or avoid the due diligence requirements from the organizational chain because the domestic "friends of" organization would be responsible under I.R.S. pronouncements. See Rev. Rul. 56-304, 1956-2 C.B. 306; Rev. Rul. 68-489, 1968-2 C.B. 210; Rev. Rul. 71-460, 1971-2 C.B. 231; I.R.S. Announcement 2003-29, 2003-1 C.B. 928. See also Marcus S. Owens, *Legal Framework of International Philanthropy: The Potential for Change*, 25 PACE L. REV. 193, 197-200 (2005).

necessary. The first is compliance with the federal tax rule of expenditure responsibility,¹³⁰ which is required if, as is most likely, the FNO is not recognized by the Internal Revenue Service (IRS) as a public charity under U.S. tax laws.¹³¹ The expenditure responsibility rule predates 9/11,¹³² and it is not specifically an antiterrorism measure. Its application was extended to DAFs in 2006.¹³³ The focus of the expenditure responsibility requirement is to determine whether each FNO is capable of utilizing the funds in a manner consistent with the charitable purposes for which the funds were intended, and whether the FNO does so in fact.¹³⁴ The expenditure responsibility rule mainly requires extensive paperwork documenting due diligence both before and after the DAF makes distributions to an FNO; this requirement prevents misuse of funds and promotes good business practices.¹³⁵

130. 26 U.S.C. § 4945(h) (2007); Treas. Reg. § 53.4945-6 (2007). For a discussion of the expenditure responsibility requirements, see Crimm, *Through a Post-September 11 Looking Glass*, *supra* note 110, at 81-86 (discussing the expenditure responsibility requirements in the context of private foundations).

131. 26 U.S.C. § 4966(c)(1)(B)(ii) (2007). Failure to comply with the expenditure responsibility rule would subject the sponsoring organization and fund manager to excise taxes. *Id.* § 4966(a)(1)-(2) (2007).

The foreign nongovernmental organization (FNO) can obtain a determination letter from the I.R.S. stating that it qualifies as a public charity under I.R.C. §§ 501(c)(3) and 509(a)(1), (a)(2), or (a)(3). Treas. Reg. § 53.4945-5(a)(3) (2007); I.R.C. § 508(a), (b); Treas. Reg. § 1.508-1 (2007). Few such non-governmental foreign organizations obtain such determination letters because the process of acquiring, as well as the requirements for maintaining, § 501(c)(3) status is time-consuming, costly, and administratively burdensome. See EXEMPT ORGANIZATIONS COMMITTEE, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION, [DRAFT] REPORT OF TASK FORCE ON REVISION AND SIMPLIFICATION OF RULES APPLICABLE TO PRIVATE FOUNDATIONS ("GALLAGHER-FERGUSON WHITE PAPER"), *reprinted in* 36 EXEMPT ORG. TAX REV. 262, 271-72 (May 2002).

An alternative to obtaining an I.R.S. determination letter is for the sponsoring organization to make a "good faith determination" that the foreign organization is equivalent to a § 501(c)(3) public charity. Treas. Reg. § 53.4942(a)-(3)(a)(6) (2007). This process is costly and can be administratively burdensome. See Crimm, *Through a Post-September 11 Looking Glass*, *supra*, note 110, at 75-81.

132. It was originally enacted as part of the Tax Reform Act of 1969, Pub. L. No. 91-172 (1969) and applied only to private foundations.

133. 26 U.S.C. § 4966(c)(1)(ii), added by the Pension Protection Act of 2006, Pub. L. No. 109-280, § 1231 (2006).

134. See Crimm, *Through a Post-September 11 Looking Glass*, *supra* note 110, at 83.

135. See *id.* at 82-87.

Basically the sponsoring organization would need to comply with the following checklist:¹³⁶

- The sponsoring organization must undertake a pre-distribution inquiry to determine that the FNO is capable of fulfilling the distribution's charitable purposes through the use of the funds.¹³⁷
- The sponsoring organization must enter into a pre-distribution written agreement with the FNO.¹³⁸
- The FNO should separate the funds according to the charitable purposes for which they were given, and must repay any portion not appropriately used.
- The sponsoring organization must obtain within a reasonable period annual reports from the FNO on how

136. Treasury regulations §§ 53.4945-5(b), -5(c), -5(d), -6(c) provide the specific expenditure responsibility requirements for private foundations. The checklist here is adapted for purposes of a sponsoring organization of a DAF.

137. The scope of the inquiry should depend on the size of the distributions, the purpose of the distributions, the distribution period, and prior experience with the FNO. Regardless, the inquiry should: (1) identify the FNO and its managers; (2) determine the history of the FNO and the experience of its management; and (3) focus on knowledge that the sponsoring organization possesses or can readily obtain from available information concerning the FNO's activities, practices, and management.

138. The written agreement must specify (1) the charitable purpose of the distributions and the FNO's agreement to repay the funds if not so utilized; (2) the FNO's agreement to provide annual reports; (3) the FNO's willingness to maintain books and records and to make them available to inspection by the domestic sponsoring organization at reasonable times; (4) the FNO's agreement to refrain from carrying on propaganda or otherwise influencing legislation, influencing the outcome of any specific public election or carrying on voter registration drives directly or indirectly, and undertaking any activity for a non-charitable purpose to the extent that such use of the funds would be considered a taxable expenditure. The agreement must prohibit the initial FNO from re-distributing the funds to another organization ("secondary FNO"), unless the secondary FNO complies with restrictions on distributions substantially equivalent to the restrictions imposed on a sponsoring organization. If the secondary distribution is to an organization that is not a public charity or treated as a public charity under I.R.C. § 501(c)(3), compliance with the expenditure responsibility requirements of I.R.C. § 4945(h) is required by the first FNO. These restrictions can be phrased in the agreement in appropriate terms under foreign law or custom, and they will ordinarily be considered sufficient if accompanied by an affidavit or opinion of counsel stating that the restrictions are substantially equivalent to restrictions that would be imposed on a sponsoring organization.

the FNO used the distributed funds.¹³⁹

- The sponsoring organization must determine that the FNO maintains adequate books and records and reviews those books and records as appropriate.
- During the taxable year in which the FNO gives distributions subject to the expenditure responsibility rule, the sponsoring organization must notify the I.R.S. of these distributions.

Compliance with the expenditure responsibility rule requires ongoing effort and can be expensive; therefore, for the creation of a terror-free DAF for Muslim-Americans' gifts abroad to be sensible and warranted, the sponsoring organization will need sufficient DAF contributions.¹⁴⁰ Moreover, the rules can be administratively burdensome, and compliance is more difficult where there are no sponsoring organization employees working in the field abroad.

There may be capacity, however, to reduce some of these challenges. This could be accomplished with respect to the pre-distribution inquiry of FNOs identified by the sponsoring organization with which private foundations and charities have had dealings in the past. If those entities are willing to share their experiences and information, and if the sponsoring organization comfortably can rely on that which is shared, the sponsoring organization can more easily satisfy its expenditure responsibility duties. Further possible support for accomplishing the expenditure responsibility requirements may be forthcoming. In July 2007, Information Age Associates released a status report on the feasibility of creating a centralized repository of information on non-U.S. based NGOs.¹⁴¹ The status report

139. The reports also must indicate that the FNO complied with the terms of its agreement and show the FNO's progress toward achievement of the purpose of the distributions. A final report, similar in nature to annual reports, must be made in the year that the funds are fully and finally expended or the distributions are otherwise terminated.

140. Drew Hastings, V.P. of NPT, has suggested that for any redistributions abroad to a single FNO, the administrative, management, investment, operational, and due diligence costs likely require a minimum of \$100,000 in a DAF account. See Telephone Conversation, *supra* note 123. One DAF account can have multiple contributors, who collectively could contribute the \$100,000 aggregate amount. *Id.*

141. INFORMATION AGE ASSOCIATES, POTENTIAL OF CREATING A CENTRALIZED

indicated a high level of support among grant-makers and nonprofit organizations' leaders for the creation of such a project.¹⁴² Information from others can be helpful only if it applies to the specific FNOs identified by the DAF's sponsoring organization. This constraint may limit the usefulness of a centralized repository because Muslim-American donors may want to direct their charitable giving to regions where there has not been broad and ongoing experience with FNOs, or to FNOs without connections to traditional domestic grant-makers and charities.

Assuming that the expenditure responsibility rule is not an insurmountable impediment, the sponsoring organization also must attempt to prevent the DAF from providing inadvertent financial support to terrorists and terrorist organizations. As discussed previously, there are numerous government-recommended antiterrorist measures, several of which overlap with the expenditure responsibility requirements, that must continually inform the charitable giving and redistribution cycles. They include the following cumulative checklist:

When selecting each FNO, the sponsoring organization should:

- Collect "basic information" about each FNO.
 - Name (in language of origin and English), acronyms used, jurisdiction(s) of physical presence, historical information, governing instruments, public filings, addresses and phone numbers, statement of principal purpose, names and postal, e-mail, and URL addresses of organizations that receive funding or support from the FNO, names and addresses of subcontracting organizations, public filings or releases by the FNO, and FNO's sources of income.
- Collect information about each FNO's key

employees, board members, and senior management at all locations.

- Name, nationality, citizenship, country of residence, place and date of birth.
- Search publicly available information to determine whether each FNO, or one of its key employees, is suspected of activity relating to terrorism.
 - OFAC Master List of SDNs¹⁴³
 - <http://www.treasury.gov/offices/enforcement/ofac/sdn/index.shtm>
 - OFAC Country Sanctions Programs¹⁴⁴
 - <http://www.treasury.gov/offices/enforcement/ofac/programs/>
 - No FNO should be “otherwise subject to OFAC sanctions.”¹⁴⁵
 - United Nations Terrorist List
 - <http://www.un.org/sc/committees/1267/consolist.shtml>
 - European Union Terrorist List
 - <http://eurlex.europa.eu/LexUriServ/>

143. This OFAC master list includes the State Department’s Foreign Terrorist List, which can be found separately at <http://www.state.gov/s/ct/rls/fs/2004/32678.htm>. This master list has been criticized as deficient. *See supra* note 88.

144. This lists countries and regions, but names of organizations previously listed in the executive orders for a country/region are now incorporated into the OFAC SDN master list.

145. U.S. DEP’T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES 10 (2006), *available at* http://www.treasury.gov/offices/enforcement/keyissues/protecting/docs/guidelines_charities.pdf

site/en/oj/2005/l_314/l_3142005113
0en00410045.pdf

- Terror lists maintained by other countries
 - United Kingdom's List of Proscribed Terrorist Groups
 - <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/proscribed-groups>
 - Canada's Terrorist List
 - <http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp>
 - Australia's List of Terrorist Organizations
 - <http://www.nationalsecurity.gov.au/> (select "Terrorist Organisations" from "Quick links" drop box).
 - Russia's Terrorist List¹⁴⁶
 - <http://www.cdi.org/russia/johnson/2007-102-42.cfm>
 - China's Terrorist List
 - http://english.peopledaily.com.cn/200312/15/eng20031215_130432.shtml¹⁴⁷

146. The Russian terrorist list apparently is updated annually and authorization is required to access the updated information.

147. Although the list that appears at this web site is dated 2003, the U.S. Department of State also has no information available on its web site as to a subsequently compiled Chinese terrorist list. See U.S. DEPT OF STATE, COUNTRY REPORTS ON TERRORISM (2005), *available at* <http://www.state.gov>

- South Asia Terrorism Portal¹⁴⁸
 - <http://www.satp.org/satporgtp/satp/index.html>
- Saudi Arabia's Most Wanted List
 - <http://www.saudiembassy.net/Issues/Terrorism/IssuesTerror.asp>

Before supplying resources to any FNO, the sponsoring organization should:

- Verify each FNO's ability to (1) accomplish the charitable purpose and (2) protect the resources from diversion.
- Obtain references on each FNO from trusted sources.
- Reduce terms of the disbursement to a written agreement.

When disbursing funds, the sponsoring organization should:

- Disburse funds in small increments as needed for specific projects or expenditures.
- Disburse funds via check or wire transfer, and by cash only if necessary.
- Maintain detailed internal records of disbursements.
- Require each FNO to use a reliable banking

/s/ct/rls/crt/c17689.htm.

148. This web site is not an official government web site. It contains, however, lists for Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka, perhaps assembled by the nongovernmental organization and based on government lists.

system or other regulated financial channels for transferring funds.

After disbursing the DAF funds to an FNO, the sponsoring organization should:

- Require periodic reports, preferably annually, from the FNO on all uses of the disbursed funds. With the periodic reports, require the FNO to provide specific documentation of the use of the funds.
 - E.g., receipts, video, photographs, testimonies, and written records.
- Require the FNO to take reasonable steps to ensure that funds have neither been distributed to terrorists nor used for activities that support terrorism. The FNO should apprise the sponsoring organization of the steps taken.
- Engage in ongoing monitoring of the FNO for the term of the distributions.
- Perform regular, periodic on-site audits of the FNO to the extent permissible by personnel and other constraints.
- Correct misuse of resources quickly and terminate relationship if misuse continues.
- Make appropriate reports to the U.S. government, including, but not limited to, filings with the Internal Revenue Service.

Although this list of tasks is perhaps daunting to the point of being overwhelming, the above checklist *may* be achievable by one entity formed proactively by Muslim-Americans to serve as the sponsoring organization as their sole dedicated and centralized terror-free DAF. Additionally, if a centralized repository of information on non-U.S. based NGOs were formed, the sponsoring organization could have streamlined access to otherwise scattered information. Nonetheless, such a repository would not relieve the

sponsoring organization from much of the due diligence required, such as obtaining periodic reports, checking the reliability of the reports, monitoring each FNO, undertaking audits, and making appropriate governmental filings. Therefore, targeting a very few FNOs abroad in one or two regions or communities of common interest to Muslim-Americans might be important, at least initially, to the financial viability of the project.

CONCLUSION

Unfortunately, even if well-intentioned, philanthropically minded Muslim-Americans created and used an appropriate terror-free DAF, there are no guarantees that these Muslim-Americans would be protected with absolute certainty against unwanted surveillance, inaccurate accusations, and worse. Nonetheless, a terror-free DAF could be strategically powerful for Muslim-Americans, inuring to their benefit in numerous ways. It could contribute to a more hospitable philanthropic environment by reducing fears of Muslim-Americans with the desire and religious obligation to help the neediest Muslims worldwide. Drawing on the thoughts of Moses Maimonides, the terror-free DAF structure would enable Muslim Americans to give to the alms-chest, knowing that the “officer in charge is reliable, wise, [scrupulous], and a capable administrator.”¹⁴⁹ And, by directing charitable giving through such a reputable manager, the intended recipients—those Muslims who are most needy and who live abroad—would gain financial support.

Moreover, benefits from a terror-free DAF could inure to the general American public. Giving charity through a terror-free DAF could reduce mistrust of Muslim-Americans by non-Muslims, and thus bolster public perceptions of them. Facilitating open and legitimate charitable giving by well-intentioned Muslim-Americans could send an unambiguous message that such people are not radical extremists, they neither espouse nor support terrorism, and they desire to contribute to U.S. national security.¹⁵⁰

149. See *supra* note 8, and accompanying text.

150. According to recommendations of the Chicago Council of Global Affairs task force, expanding and recognizing Muslim-American contributions to national security could be greatly beneficial to Muslim Americans. STRENGTHENING AMERICA, *supra* note 26, at 9-11.

Habeas Corpus, Alternative Remedies, and the Myth of *Swain v. Pressley*

Stephen I. Vladeck*

I. INTRODUCTION

The current debate over judicial review of the detention of “enemy combatants” is dominated by the question of whether the Constitution’s Suspension Clause¹ applies to non-citizens detained outside the territorial United States, including those held at Guantánamo Bay, Cuba.² But an equally important question is lurking just beneath the surface in *Boumediene v. Bush*, the lead case currently³ before the Supreme Court: If the Suspension

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1. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

2. See, e.g., *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007) (Nos. 06-1195, 06-1196). For two differing academic takes on the question, compare J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007), with Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275 (2008). See generally Paul Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 VA. L. REV. 575 (2008).

3. As this article went to print, the Supreme Court handed down its decision in *Boumediene*, holding that the Suspension Clause *does* apply to the Guantánamo detainees, and that the substitute for habeas corpus provided by the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 is an *inadequate* substitute for habeas corpus. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). For Justice Kennedy’s analysis of the latter issue, see *id.* at 2262–74, unquestionably merits a discussion that is simply not possible here. For now, though, it suffices to note the *Boumediene* majority’s

Clause does protect the right to habeas corpus for non-citizens held abroad (or at least at Guantánamo),⁴ is the jurisdiction-stripping provision of the Military Commissions Act of 2006 (MCA)⁵ actually inconsistent therewith?

The prevailing assumption is that this question necessarily reduces to whether the MCA, along with the Detainee Treatment Act of 2005 (DTA),⁶ provides an “adequate” and “effective” substitute for the remedy provided by the writ of habeas corpus. And the reason why *that* appears to be the ultimate question is the Supreme Court’s oft-cited—but seldom read—1977 decision in *Swain v. Pressley* (*Pressley*).⁷ *Pressley*, a case arising indirectly out of the 1970 reorganization of the D.C. judicial system, is commonly invoked for the proposition that the Suspension Clause is not implicated unless the relevant remedial scheme provides no adequate or effective substitute for habeas corpus.⁸

As significant as *Pressley* figures in current debates, very little has been written about the case itself, or the rule for which it has since become the standard citation.⁹ Thus, in attempting to

conclusion that “[t]he present cases . . . test the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not,” *id.* at 2266, for many of the same reasons articulated in more detail herein.

4. Indeed, much of the focus of the current litigation is whether Guantánamo is “different,” i.e., whether there is a colorable argument that non-citizens held in Cuba might have a stronger claim to constitutional protections, including those enmeshed with the Suspension Clause, than those held elsewhere outside the United States. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 485–88 (2004) (Kennedy, J., concurring in the judgment); *Gherebi v. Bush*, 352 F.3d 1278, 1285–99 (9th Cir. 2003).

5. Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006) (codified at 28 U.S.C. § 2241(e)(1)) (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”).

6. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739–44 (2005).

7. 430 U.S. 372 (1977). Although the case is usually referred to in shorthand as “*Swain*,” the habeas petitioner was Jasper Pressley, and so I refer to the case as *Pressley* throughout this essay.

8. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001) (citing *Pressley* for the proposition that “Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals”); *see also* *Boumediene v. Bush*, 127 S. Ct. 1478, 1480 (2007) (Breyer, J., dissenting from the denial of certiorari); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2818 (2006) (Scalia, J., dissenting).

9. Even recent academic discussions of the “adequate” and “effective”

analyze whether the remedy provided by the MCA and DTA to detained “enemy combatants” comports with the Suspension Clause, courts and commentators have little precedent or academic discussion to guide them. The animating purpose of this symposium essay, then, is to reconstruct the Court’s decision in *Pressley* so as to understand the implications of its holding, and its potential relevance both to the current Guantánamo cases and to other recent legislative attempts to provide a substitute remedy for habeas corpus.

To reconstruct *Pressley*, Part II begins with the Supreme Court’s 1952 decision in *United States v. Hayman*.¹⁰ In *Hayman*, the Court vacated a Ninth Circuit decision that had invalidated 28 U.S.C. § 2255, one of Congress’s first attempts to provide a statutory alternative to habeas corpus. The Court’s unanimous decision in *Hayman* nevertheless reserved any question as to the constitutional implications of such legislation. Thus, when the *Pressley* Court considered a statute modeled on § 2255—section 23-110(g) of the D.C. Code—it was resolving a question of first impression.

As Part II concludes, *Pressley* did not go much further than *Hayman* had, holding only that there is no constitutional defect with a statute that provides an “adequate” and “effective” means of challenging detention other than habeas corpus. Pointedly, the Court in *Pressley* did not decide whether “inadequate” or “ineffective” remedies were necessarily unconstitutional, leaving that question open for later courts.

In Part III, I turn to *Pressley*’s aftermath, and briefly survey those contexts wherein *Swain v. Pressley* has figured prominently since it was decided. Part III therefore begins with the Supreme Court’s 1996 decision in *Felker v. Turpin*,¹¹ in which the Court upheld the so-called “gatekeeper” provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹² on the ground

substitute issue have given short shrift to *Pressley* itself. See, e.g., Christopher J. Schatz & Noah A.F. Horst, *Will Justice Delayed Be Justice Denied? Crisis Jurisprudence, the Guantánamo Detainees, and the Imperiled Role of Habeas Corpus in Curbing Abusive Government Detention*, 11 LEWIS & CLARK L. REV. 539 (2007).

10. 342 U.S. 205 (1952).

11. 518 U.S. 651 (1996).

12. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

that an alternative remedy remained available. Part III next turns to the context of immigration law, where AEDPA, and later the REAL ID Act of 2005,¹³ attempted to preclude immigration habeas petitions in favor of direct review of administrative decisions. Finally, Part III concludes with the application of *Swain v. Pressley* to the current cases arising out of Guantánamo, and the question whether the review provided by the DTA and the MCA constitutes an “adequate” and “effective” substitute for habeas corpus.

Given that the Supreme Court is due to decide *Boumediene* later this year, and will quite likely reach the question of whether the DTA and MCA provide an “adequate” alternative to habeas corpus, Part III assiduously avoids handicapping the merits of this question. Instead, in Part IV, I turn to the “myth” of *Swain v. Pressley*—the extent to which the “rule” *Pressley* enunciates might actually serve to *distort* courts’ review of the adequacy of alternative remedies to habeas corpus. Because of this effect, Part IV suggests several reasons why *Pressley* is not nearly as helpful in defining the limits of Congress’s power to fashion alternative remedies to habeas corpus as is generally suggested. Whatever the Court ultimately holds in *Boumediene*, any discussion of the constitutional adequacy of the alternative remedy will, in reality, resolve a question of first impression.

II. ALTERNATIVE REMEDIES: FROM *HAYMAN* TO *PRESSLEY*

Arguably, the first time Congress ever provided a statutory substitute for the writ of habeas corpus was in the Judiciary Act of 1789, section 14 of which created a federal statutory cause of action by the same name:

That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the

13. Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23 (2005) (codified as amended in scattered sections of 8 U.S.C.).

purpose of an inquiry into the cause of commitment.—
Provided, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.¹⁴

As Chief Justice Marshall would explain less than two decades later, although federal courts could resort to the common law for the “meaning” of “habeas corpus,” they were only empowered to exercise that jurisdiction conferred by statute.¹⁵ Thus, at least in the federal courts, the federal “statutory” writ became a complete substitute for the “common-law” (or what is sometimes referred to as the “constitutional”) writ of habeas corpus.¹⁶

Notwithstanding *Bollman*’s elimination of common-law habeas in the federal courts, questions about the substantive sufficiency of the federal statutory writ did not arise until well into the twentieth century.¹⁷ Thus, Part II begins with Congress’s first attempt to provide a substitute remedy for the statutory writ of habeas corpus, before moving onto *Swain v. Pressley* and its implications.

A. *Hayman* and 28 U.S.C. § 2255

Perhaps ironically, the Supreme Court itself was largely responsible for the first concerted effort on Congress’s part to provide a substitute remedy for the federal statutory writ of habeas corpus. At the heart of the problem were a series of decisions during the 1940s that seemingly opened the door to potential abuses of the writ by prisoners.

14. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2241(a) (2000)).

15. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807).

16. On the constitutional origins of habeas corpus, see generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); and Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605 (1970).

17. For a discussion of why *Bollman*’s preclusion of federal common-law habeas did not raise more serious Suspension Clause problems, see Vladeck, *supra* note 2.

In *Waley v. Johnston*, for example, the Court for the first time allowed federal prisoners to contest their convictions even where the trial record itself was unassailable—a holding that necessarily contemplated review of facts *dehors* the record.¹⁸ In *Walker v. Johnston*, the Court held that in certain circumstances, habeas petitioners were entitled to a full evidentiary hearing in the habeas court.¹⁹ And in *Ahrens v. Clark*, the Court concluded that habeas petitions must be filed in the district of the prisoner’s confinement.²⁰

Taken together, *Ahrens*, *Waley*, and *Walker* created a logistical nightmare; at the time, most federal prisoners were held somewhere *other* than the district in which they were convicted. Between 1942 and 1948, for example, 63% of federal prisoners were held in just *five* districts.²¹ Thus, district courts considering (the growing number of) post-conviction habeas petitions brought by federal prisoners were beset by serious administrative problems, including the routine unavailability of the trial court record and of key witnesses.²²

In response to the problems posed by these decisions (combined with growing abuse of the writ by federal prisoners unintentionally emboldened by them), the Judicial Conference of the United States proposed legislation to create a statutory remedy for those in custody pursuant to a federal conviction. Such a motion for post-conviction relief would be filed in the district of conviction and sentence, rather than in the district of confinement.²³ Although there was little movement on the proposal between 1942 and 1948,²⁴ *Ahrens* apparently rekindled the momentum for such a measure, so that when the Judicial Code was re-codified in June 1948, it included new 28 U.S.C. §

18. 316 U.S. 101, 104 (1942) (per curiam).

19. 312 U.S. 275 (1941).

20. 335 U.S. 188 (1948).

21. See William H. Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949). In *Hayman*, the Court relied heavily upon Speck’s article. See, e.g., *United States v. Hayman*, 342 U.S. 205, 212 n.14, 214 n.18 (1952).

22. For an overview of the problems motivating § 2255, see John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949); Louis E. Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948).

23. See *Hayman*, 342 U.S. at 210–19 & nn.13–14, 17–19, 23, 25 (summarizing the evolution of what became § 2255).

24. See *id.*

2255.²⁵

Critically, while creating a statutory post-conviction remedy in the district of conviction, § 2255 also precluded post-conviction habeas corpus in the district of confinement:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.²⁶

Thus, for the first time, Congress displaced the statutory writ of habeas corpus unless “the remedy by motion is inadequate or ineffective to test the legality of [the petitioner’s] detention.” The statute was silent, though, on the criteria by which “adequacy” or “effectiveness” was to be measured.

The constitutionality of the preclusion of habeas corpus quickly came before the courts. Although the Fifth and Tenth Circuits explicitly upheld § 2255 against constitutional challenge,²⁷ the Ninth Circuit, in a controversial and divided opinion, disagreed.²⁸

At the heart of the complicated series of five opinions from the three judges in the Ninth Circuit was the argument that § 2255 was not in fact an adequate alternative to habeas corpus in the case before the court (an appeal of the denial of a § 2255 motion).²⁹ On the majority’s view, the district court correctly denied Hayman’s § 2255 motion because, *inter alia*, it lacked the authority to produce Hayman as a witness. But such a denial would prejudice (if not formally preclude) his ability to challenge

25. See *id.* at 218.

26. 28 U.S.C. § 2255(e) (2000).

27. See *Barrett v. Hunter*, 180 F.2d 510 (10th Cir. 1950); *Martin v. Hiatt*, 174 F.2d 350 (5th Cir. 1949).

28. See *Hayman v. United States*, 187 F.2d 456 (9th Cir. 1950), *vacated*, 342 U.S. 205 (1951).

29. The defendant, Herman Hayman, was convicted on six counts and sentenced to twenty years’ imprisonment by the United States District Court for the Central District of California. He was subsequently imprisoned in the federal prison at McNeil Island, Washington. See *id.* 457.

the constitutionality of his conviction via habeas corpus. Thus, because the § 2255 remedy was inadequate, and because habeas would not effectively be available, the court (eventually) concluded that § 2255 was unconstitutional.³⁰

On certiorari, the Supreme Court unanimously vacated the Ninth Circuit's decision.³¹ Conceding that "respondent's motion states grounds to support a collateral attack on his sentence,"³² the Court read § 2255 as *not* precluding resort to habeas corpus in such a case. After exhaustively recounting the background to § 2255, Chief Justice Vinson noted how:

[§ 2255] was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.³³

30. All three members of the panel filed opinions with respect to the initial decision: Chief Judge Denman wrote for the court, and held that the § 2255 remedy was inadequate on the ground that the defendant was unable to be a witness at his § 2255 hearing, which prejudiced his ability to assert his constitutional right to effective assistance of counsel. *See id.* at 457–66. Judge Stephens concurred in the result, but went further, reading the § 2255 hearing as having preclusive effect in any subsequent habeas petition, even if—as in the case sub judice—the § 2255 remedy was “inadequate” or “ineffective.” Thus, Judge Stephens concluded that the statute was an unconstitutional suspension of habeas corpus. *See id.* at 466–68 (Stephens, J., concurring in the result). Finally, Judge Pope dissented, arguing that, as Hayman had not yet attempted to file a federal habeas petition, resolution of the constitutional question was premature. Moreover, Judge Pope disagreed with Chief Judge Denman that the § 2255 remedy was inadequate. *See id.* at 468–71 (Pope, J., dissenting).

On rehearing, Chief Judge Denman came around to Judge Stephens's position, and concluded that § 2255 was unconstitutional. *See id.* at 471–74 (Denman, C.J., concurring in the denial of rehearing). Judge Pope reiterated his dissent. *See id.* at 474–75 (Pope, J., dissenting).

31. *Hayman v. United States*, 342 U.S. 205, 224 (1951). Technically, the vote in support of Chief Justice Vinson's opinion was 6-0. Justices Black and Douglas concurred in the result only (without explaining why), *see id.*, and Justice Minton did not participate. *See id.*

32. *Id.* at 210.

33. *Id.* at 219.

With that admonition in mind, the Court turned to the merits of the Ninth Circuit’s analysis. Disagreeing with the Ninth Circuit that the defendant would not have been able to appear before the sentencing court,³⁴ the Supreme Court concluded that the district court “did not proceed in conformity with Section 2255 when it made findings on controverted issues of fact relating to [Hayman’s] own knowledge without notice to [him] and without his being present.”³⁵ In other words, the Ninth Circuit’s conclusion that the § 2255 remedy was inadequate in Hayman’s case was correct, but only because the district court had misconstrued the scope of its authority under that section—not, as the Ninth Circuit had concluded, because the district court *lacked* the requisite authority. There was no need for the Ninth Circuit to decide that § 2255 was therefore unconstitutional; it needed only to have remanded the proceedings back to the lower court:

Nothing has been shown to warrant our holding at this stage of the proceeding that the Section 2255 procedure will be “inadequate or ineffective” if respondent is present for a hearing in the District Court on remand of this case. In a case where the Section 2255 procedure is shown to be “inadequate or ineffective,” the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing. Under such circumstances, we do not reach constitutional questions. This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable, much less anticipate constitutional questions.³⁶

Hayman thereby endorsed a broad reading of the scope of review that sentencing courts could undertake pursuant to § 2255, while reiterating that habeas *would* be available where the § 2255 proceedings were inadequate or ineffective. The Supreme Court did nothing to clarify what “inadequate” or “ineffective” might mean, but its broad construction of the sentencing court’s authority in entertaining § 2255 motions made that issue much

34. See *id.* at 220–21, 221 n.33 (noting the sentencing court’s authority under the All Writs Act, 28 U.S.C. § 1651).

35. *Hayman*, 342 U.S. at 220.

36. *Id.* at 223 (footnotes omitted).

less likely to arise.³⁷

B. *Swain v. Pressley* and the D.C. Courts

A quarter-century after *Hayman*, the Court again confronted the question of whether Congress could provide a substitute remedy for habeas corpus in the context of section 23-110(g) of the District of Columbia Code, a provision expressly modeled on 28 U.S.C. § 2255.³⁸

Section 23-110(g) was codified as part of the massive reorganization of the District of Columbia judicial system in 1970.³⁹ Prior to 1970, the District of Columbia had what was effectively a unitary court system,⁴⁰ pursuant to which the courts of the District of Columbia exercised both local *and* federal jurisdiction.⁴¹ Indeed, it was because of the unique “hybrid” nature of the D.C. courts’ jurisdiction that, from 1837 to 1962, those courts were the only tribunals in the country with the power to entertain petitions for writs of mandamus against federal officials.⁴²

37. Indeed, the Court would subsequently characterize *Hayman* as “avoid[ing] the constitutional question by holding that § 2255 was as broad as habeas corpus.” *Sanders v. United States*, 373 U.S. 1, 13 (1963).

38. See *Palmore v. Superior Court of D.C.*, 515 F.2d 1294, 1306 (D.C. Cir. 1975) (en banc).

39. See generally D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473. For cogent summaries, see JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 233–35 (2001); Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 561–63 (2002); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 387–89 (2006).

40. Technically, there *were* purely “local” courts in the District of Columbia prior to 1970, but they were courts of extremely limited subject-matter jurisdiction, and appeals could be taken from their decisions to the quasi-federal courts.

41. See generally Bloch & Ginsburg, *supra* note 39; Roberts, *supra* note 39.

42. In 1813, the Supreme Court held that the lower federal courts lacked the power to issue such common-law writs. See *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). Eight years later, the Court held that the state courts lacked the power to provide such relief against federal officials. See *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821). The clever solution, initially theorized by D.C. Circuit Chief Judge William Cranch, was that, because the D.C. district court was a federal court that could also exercise local jurisdiction, it alone had the power to issue writs of mandamus against

As part of a package of “home rule” measures (or, according to some, to curb the influence of the then-left-leaning D.C. Circuit over criminal law and criminal procedure), Congress bifurcated the courts into distinctly local and distinctly federal systems, and apportioned jurisdiction accordingly.⁴³ Along with the criminal jurisdiction allocated to the new D.C. local courts (and taken away from the D.C. federal district court), Congress provided for a post-conviction remedy mirroring that provided by 28 U.S.C. § 2255, and one that otherwise appeared to preclude post-conviction habeas corpus in the federal courts:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the

federal officers. *See* United States *ex rel.* Stokes v. Kendall, 5 D.C. (5 Cranch) 163 (1837), *aff'd*, 37 U.S. (12 Pet.) 524 (1838). *See generally* Roberts, *supra* note 39, at 380–82 (summarizing the background to the *Kendall* case). Finally, in 1962, Congress enacted the Mandamus and Venue Act, 28 U.S.C. § 1361, which confers jurisdiction on *all* federal district courts to entertain petitions for writs of mandamus against federal officers.

One point that bears mentioning, and that I have never seen discussed before, is whether the D.C. courts, *a fortiori*, would also have retained common-law *habeas* jurisdiction for federal prisoners during this same time period. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), only disavowed common-law habeas corpus in the *Article III* courts, and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), only disavowed habeas for federal prisoners in *state* courts. Although this is a fun academic question, the 1970 reorganization act appears to have closed this loophole and vitiated any potential contemporary significance. *See* D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. at 560 (codified at D.C. CODE § 16-1901(b)) (“Petitions for writs directed to Federal officers and employees shall be filed in the United States District Court for the District of Columbia.”). For more on this curious historical footnote, see Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 11 GREEN BAG 2d (forthcoming 2008).

43. On the partisan motives behind the bifurcation, see Bloch & Ginsburg, *supra* note 39, at 562 n.61; Patricia M. Wald, *Ghosts of Judges Past*, 62 GEO. WASH. L. REV. 675, 680–81 (1994). *See also* Patricia M. Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 509 (1988) (noting that “it is no secret that a major motivation for [the Act] was the Nixon Administration’s fierce opposition” to various decisions by liberal D.C. Circuit judges).

remedy by motion is inadequate or ineffective to test the legality of detention.⁴⁴

Unlike in *Hayman*, however, the post-conviction remedy under D.C. law was a motion before *local* D.C. judges—Article I judges not subject to Article III’s salary and tenure protections.⁴⁵ *Pressley* therefore raised the issue—not considered in *Hayman*—of whether a post-conviction remedy could be an “adequate” and “effective” substitute for habeas corpus if it did not include consideration by an Article III judge.

Interestingly, that issue was essentially sidestepped by the D.C. Circuit, which held in *Palmore v. Superior Court of the District of Columbia* that section 23-110(g) did not preclude the district court’s exercise of habeas jurisdiction, but only interposed a requirement for the exhaustion of local remedies *prior* to seeking federal habeas relief.⁴⁶ Noting that “the district court construed a statute which created a statutory remedy for post-conviction relief in the new court system as *eliminating* by implication a remedy which the inferior article III courts and the Supreme Court have exercised for two hundred years,”⁴⁷ the en banc court found insufficient indication that Congress meant to force such a potentially significant constitutional issue.⁴⁸ Instead, as Judge Tamm wrote for the court, “we find that Congress never intended to, nor does section 110 actually, affect the district court’s jurisdiction to entertain post-conviction habeas petitions from local prisoners. Instead, we hold that section 110(g) is an exhaustion of remedies statute, requiring initial submission of claims to the local courts . . .”⁴⁹

44. D.C. CODE § 23-110(g) (1970). There is little legislative history that explains why Congress would be concerned about remedying the same problem § 2255 was supposed to address. After all, a post-conviction remedy in the D.C. district court, as opposed to the D.C. Superior Court, would hardly raise comparable logistical difficulties. That being said, if part of the purpose for the reorganization of the D.C. courts was to undermine the D.C. Circuit’s role in shaping constitutional criminal procedure, it would have made little sense to allow that court to accomplish indirectly (by hearing habeas appeals of defendants convicted in the local D.C. courts) what the statute clearly precluded it from doing directly.

45. See *generally* *Palmore v. United States*, 411 U.S. 389 (1973).

46. 515 F.2d 1294 (D.C. Cir. 1975) (en banc).

47. *Id.* at 1307.

48. See *id.* at 1308–13.

49. *Id.* at 1313.

The same day, the en banc D.C. Circuit applied *Palmore* to the habeas petition of Jasper Pressley. Pressley was convicted in April 1971 by the D.C. Superior Court of grand larceny and larceny from the government. He was sentenced to concurrent prison sentences to run between twenty and ninety-six months, and was unsuccessful in two motions under section 23-110(g) for post-conviction relief.⁵⁰ After an interlocutory back-and-forth with the D.C. Circuit, the district court denied Pressley's habeas petition on the ground that "it appeared that appellant had not adequately exhausted his remedies in the local court system."⁵¹

The en banc D.C. Circuit reversed. Relying on *Palmore*, the court of appeals held that:

[T]he local courts fully considered the constitutional claims on the merits. Thus, the local courts "had a full opportunity to determine the federal constitutional issues before resort was made to a federal forum, and the policies served by the exhaustion requirement would not be furthered by requiring submission of the claims to the (local) courts."⁵²

The Supreme Court granted certiorari in both *Pressley* and *Palmore* and consolidated the cases for argument,⁵³ only to subsequently vacate and remand *Palmore* at the Solicitor General's request (in light of the Court's intervening decision in *Stone v. Powell*).⁵⁴ Thus, *Pressley* became the vehicle for resolving the meaning—and constitutionality—of section 23-110(g).

On certiorari, the Court emphatically rejected the D.C. Circuit's conclusion in *Palmore* that section 23-110(g) was merely an exhaustion requirement. First, the majority noted that the statute expressly covers the exhaustion of local remedies, and provides that habeas corpus should not be available unless the local remedy was "inadequate" or "ineffective."⁵⁵ Second, as

50. See *Pressley v. Swain*, 515 F.2d 1290, 1291–92 (D.C. Cir. 1975) (en banc) (summarizing the background).

51. *Id.* at 1292.

52. *Id.* at 1293 (quoting *Francisco v. Gathright*, 419 U.S. 59, 63 (1974)).

53. *Super. Ct. of D.C. v. Palmore*, 424 U.S. 907 (1976) (mem.).

54. See *Super. Ct. of D.C. v. Palmore*, 429 U.S. 915 (1976) (mem.) (citing *Stone v. Powell*, 428 U.S. 465 (1976)); see also *Swain v. Pressley*, 430 U.S. 372, 376 n.7 (1977) (summarizing the facts).

55. See *Pressley*, 430 U.S. at 377.

Justice Stevens observed, section 23-110(g) was patterned squarely on 28 U.S.C. § 2255, which was meant to preclude habeas corpus, and not just interpose an exhaustion requirement.⁵⁶

Thus, unlike the D.C. Circuit, the Supreme Court was squarely faced with the constitutional question of whether section 23-110(g), in divesting Pressley of the ability to pursue habeas corpus proceedings in the district court, violated the Suspension Clause. Justice Stevens made fairly quick work of this issue:

We are persuaded that the final clause in § 23-110(g) avoids any serious question about the constitutionality of the statute. That clause allows the District Court to entertain a habeas corpus application if it “appears that the remedy by motion is inadequate or ineffective to test the legality of [the applicant’s] detention.” Thus, the only constitutional question presented is whether the substitution of a new collateral remedy which is both adequate and effective should be regarded as a suspension of the Great Writ within the meaning of the Constitution.⁵⁷

That is to say, because section 23-110(g) precluded habeas unless the post-conviction remedy was “inadequate” and “ineffective,” the negative implication was that habeas *would* be available unless the post-conviction remedy was adequate and effective to test the legality of the defendant’s detention. And so, the only question was whether such a substitute for habeas—i.e., one that was both adequate *and* effective in challenging the legality of the defendant’s detention—violated the Suspension Clause. That question, according to Justice Stevens, had been answered in *Hayman*: “The Court implicitly held in *Hayman*, as we hold in this case, that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus.”⁵⁸ Thus, in one sentence, the Court in *Pressley* enunciated what appeared to be a constitutional rule.

Three points are worth flagging: First, *Hayman*, as we saw

56. See *id.* at 377–78.

57. *Id.* at 381 (alteration in original).

58. *Id.*

above, held no such thing. Instead, the Court in *Hayman* expressly *avoided* the question whether § 2255 was constitutional,⁵⁹ holding that the district court had simply misconstrued the scope of its authority to fashion post-conviction relief.⁶⁰

Second, there is an element of Justice Stevens’s analysis that seems tautological: under section 23-110(g), a defendant was only precluded from pursuing a federal habeas petition if his motion for local post-conviction relief was both “adequate” and “effective” in testing the legality of his detention. Thus, as a *statutory* matter, a defendant was entitled either to habeas, or to an adequate and effective substitute. So the only *constitutional* question the *Pressley* Court decided was whether Congress can replace habeas corpus with adequate and effective substitutes (which the Court answered in the affirmative). The Court said nothing at all about whether the replacement of habeas corpus with an inadequate or ineffective substitute would necessarily violate the Suspension Clause; under section 23-110(g), just as under 28 U.S.C. § 2255, that question simply could not ever arise.

Finally, although the requirement that the substitute remedy be “adequate” and “effective” came from the D.C. Code, as opposed to the Suspension Clause, the Court went on reach the question of D.C. law—whether, in *Pressley*’s case, the local post-conviction remedy was in fact an “adequate” and “effective” substitute. Rejecting the argument that Article I judges, as a general matter, could not be trusted to decide federal constitutional questions,⁶¹

59. See *United States v. Hayman*, 342 U.S. 205, 223 (1952) (“Under such circumstances, we do not reach constitutional questions. This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable, much less anticipate constitutional questions.”) (footnote omitted).

60. See *id.* at 223–24 (“We conclude that the District Court erred in determining the factual issues raised by respondent’s motion under Section 2255 without notice to respondent and without his presence. We hold that the required hearing can be afforded respondent under the procedure established in Section 2255.”).

61. See *Pressley*, 430 U.S. at 382–83 (citing *Palmore v. United States*, 411 U.S. 389, 410–22 (1973)). Justice Stevens also noted that defendants in *Pressley*’s position still had two opportunities for Article III review—to the Supreme Court on direct appeal from his conviction, and to the Court again on appeal of the denial of his motion for post-conviction relief under section 23-110(g). See *id.* at 382 n.16.

the Court noted that there were no specific allegations of insufficiency in *Pressley* itself. Thus:

[W]e have no occasion to consider what kind of showing would be required to demonstrate that the § 23-110 remedy is inadequate or ineffective in a particular case, or whether the character of the judge's tenure might be relevant to such a showing in a case presenting issues of extraordinary public concern.⁶²

In short, then, *Pressley* held that the mere presence of an Article I judge, by itself, was not enough to render the remedy provided by section 23-110(g) “inadequate” or “ineffective.” As such, *Pressley* was therefore not entitled to pursue habeas relief in the federal district court.⁶³ The Court said nothing about what *would* constitute an “inadequate” or “ineffective” substitute, and it also did not say that such a substitute would necessarily violate the Suspension Clause; at the heart of the decision was the statutory safety valve, i.e., that section 23-110(g) expressly reserved access to habeas corpus if the post-conviction remedy proved “inadequate” or “ineffective.”

In that regard, the majority opinion in *Pressley* is curiously cursory, for one might assume that those two points are related—that a court's analysis of whether a particular remedy is an “adequate” substitute for habeas corpus might depend to some degree on whether a negative holding would raise a serious constitutional question. Because of the language of section 23-110(g), however, *Pressley* did not need to address any of these weighty questions.

III. ALTERNATIVE REMEDIES AFTER *PRESSLEY*

For two decades, *Swain v. Pressley* languished in obscurity. Congress made no new attempts to provide a substitute remedy for habeas corpus, and the significance (or lack thereof) of the Court's discussion of the limitations on such legislation went

62. *Id.* at 383 n.20.

63. Concurring in the judgment, Chief Justice Burger—joined by Justices Blackmun and Rehnquist—would have upheld section 23-110(g) on the ground that the Constitution confers no right to habeas corpus to collaterally attack a criminal conviction by a court of competent jurisdiction. *See id.* at 384–86 (Burger, J., concurring in part and concurring in the judgment).

effectively unnoticed in both the courts and the academy. Instead, the potential significance of *Swain v. Pressley* did not become apparent until the enactment of a series of statutes constraining the habeas jurisdiction of the federal courts. First, of course, was the enactment of “AEDPA”,⁶⁴ which dramatically reworked the habeas corpus jurisdiction of the federal courts both in cases where prisoners sought to collaterally attack their state-court convictions and in immigration cases. Also of significance is the REAL ID Act of 2005,⁶⁵ which reapportioned jurisdiction between the Courts of Appeals (on direct review) and habeas proceedings in the district courts. After surveying the role *Swain v. Pressley* played in these sets of cases, Part III turns to the other major area where *Swain v. Pressley* has been invoked—the detention of non-citizens as “enemy combatants” as part of the “war on terrorism,” and Congress’s repeated attempts to constrain their access to the federal courts.

A. *Felker*: Alternative Remedies and Habeas Appeals

One of the major changes wrought by AEDPA was the creation of a “gatekeeper” system for “second or successive” federal habeas petitions filed by state prisoners seeking to collaterally attack their conviction.⁶⁶ Under 28 U.S.C. § 2244(b)(3), as added by AEDPA, a petitioner seeking to file a second or successive habeas petition challenging a state-court conviction must first obtain permission from the relevant Court of Appeals.⁶⁷ If the court grants permission, the petitioner may proceed to file his petition in the district court.⁶⁸ If the court denies permission, the statute expressly divests the Supreme Court of jurisdiction to review that denial either as an appeal or via a writ of certiorari.⁶⁹ In *Felker v. Turpin*,⁷⁰ the Court considered whether AEDPA was

64. Pub. L. No. 104-132, 110 Stat. 1214 (1996)(codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

65. Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23 (2005) (codified as amended in scattered sections of 8 U.S.C.).

66. See generally Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1556–62 (2000) (discussing *Felker v. Turpin*, 518 U.S. 651 (1996)).

67. See 28 U.S.C. § 2244(b)(3)(A) (2001).

68. *Id.* § 2244(b)(3)(C).

69. *Id.* § 2244(b)(3)(E).

70. 518 U.S. 651 (1996).

unconstitutional in so precluding the Court's review.

Writing for the Court, Chief Justice Rehnquist relied on the fact that Congress had not divested *all* of the Supreme Court's possible jurisdiction. Instead, Rehnquist invoked the Court's so-called "original" habeas jurisdiction, which AEDPA had left untouched:

Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication [in *Ex parte Yerger*⁷¹], we decline to find a similar repeal of § 2241 of Title 28—its descendant—by implication now.⁷²

Thus, because Felker could have sought habeas relief directly in the Supreme Court once his application was denied, the Court concluded that AEDPA's gatekeeping provision did not violate the Exceptions Clause of Article III.⁷³

One might also characterize such a holding in *Pressley*'s terms—i.e., that an "original" habeas petition in the Supreme Court was an adequate and effective substitute for an appeal of the denial of a habeas petition by the circuit court. As part of that implicit conclusion, Chief Justice Rehnquist emphasized that the substantive restrictions contained within AEDPA would not apply to the Supreme Court's review of an original habeas petition (suggesting that there might be a problem if they did).⁷⁴ Finally, the Court also rejected Felker's argument that AEDPA's gatekeeping provision violated the Suspension Clause, concluding that Congress was acting well within its authority in codifying necessary responses to the "abuse of the writ" by second and successive petitioners.⁷⁵

71. 75 U.S. (8 Wall.) 85 (1869).

72. *Felker*, 518 U.S. at 661 (citations omitted).

73. *See id.* at 662–63.

74. *See id.*

75. *See id.* at 663–64. The majority then considered—and quickly rejected—whether Felker would be entitled to original habeas relief. *See id.* at 664–65.

Although the decision was unanimous, Justice Souter—joined by Justices Stevens and Breyer—wrote separately “only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress’s Exceptions Clause power would be open.”⁷⁶ In other words, from Justice Souter’s perspective, if the alternative remedies turned out to be ineffective, the constitutional question avoided in *Felker* would be squarely presented.⁷⁷

B. The REAL ID Act of 2005: Alternative Remedies and Immigration Law

The harder questions raised by AEDPA vis-à-vis habeas corpus went to its constriction of the *substantive* grounds for relief in petitions filed by state prisoners,⁷⁸ and its attempted cabining of the federal courts’ habeas jurisdiction in immigration cases.⁷⁹ In *INS v. St. Cyr*,⁸⁰ the Supreme Court—following the lead of virtually all of the circuits—adopted a somewhat counter-textual interpretation of various provisions in AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁸¹ in holding that neither statute actually precluded access to habeas corpus.⁸² Instead, the Court held that only the

76. *Id.* at 667 (Souter, J., concurring).

77. Indeed, though it might seem perverse to rely on the availability of a remedy (an “original” habeas petition) that has not been successfully invoked in over eighty years, the Supreme Court has shown repeated awareness of the possibility of such relief as a last resort. *See, e.g.*, *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari); *see also* *Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (2007) (Stevens and Kennedy, JJ., respecting the denial of certiorari) (noting the potential availability of original relief “[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, or some other and ongoing injury” (citation omitted)).

78. *See generally* *Irons v. Carey*, 479 F.3d 658, 665–70 (9th Cir. 2007) (Noonan, J., concurring) (summarizing the problematic nature of post-AEDPA review).

79. *See generally* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555 (2002) (discussing the background to *St. Cyr* and the larger constitutional issues).

80. 533 U.S. 289 (2001).

81. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.).

82. *See St. Cyr*, 533 U.S. at 299–305.

clearest statement of congressional intent would compel reaching the serious constitutional questions that would arise if AEDPA and IIRIRA precluded habeas review.⁸³

Citing *Swain v. Pressley*, the majority in *St. Cyr* recognized Congress's power to displace habeas by providing adequate alternative remedies in the courts of appeals.⁸⁴ Nevertheless, the Court's holding suggested that the relevant provisions of AEDPA and IIRIRA instead *cabined* the jurisdiction of the courts of appeals to entertain petitions for review, shifting even more immigration claims into the habeas jurisdiction of the district courts (especially where "criminal aliens" were concerned).⁸⁵ Thus, in the ensuing years, there was mounting confusion over which claims had to be pressed on direct review from the Board of Immigration Appeals (BIA), and which claims could only be brought via habeas, a distinction that often turned on the very facts in dispute in individual cases.⁸⁶

Congress eventually responded through the REAL ID Act of 2005,⁸⁷ the jurisdiction-stripping provisions of which attempted to reverse the direction of immigration litigation.⁸⁸ Thus, the Act significantly *expands* the scope of the Courts of Appeals' jurisdiction over petitions for review, while otherwise purporting to preclude habeas petitions in any case where an immigrant seeks to challenge a final order of removal.⁸⁹ As new 8 U.S.C. § 1252(a)(2)(D) provides:

83. See, e.g., *id.* at 301 n.13 ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely."). See also *id.* at 326–27 (Scalia, J., dissenting) (referring to the majority's rationale as "a superclear statement, 'magic words' requirement").

84. See *id.* at 314 n.38 (majority opinion) ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.").

85. Indeed, the same day as *St. Cyr*, the Court rejected the argument that the courts of appeals could hear otherwise precluded claims as an alternative to habeas. See *Calcano-Martinez v. INS*, 533 U.S. 348 (2001). See generally Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 135 (2006).

86. See, e.g., *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 877–79 (9th Cir. 2003) (citing *Sareang Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000)).

87. Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23 (2005).

88. See 8 U.S.C. § 1252 (2005).

89. See Neuman, *supra* note 85, at 136–41.

Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.⁹⁰

In other words, the REAL ID Act of 2005 attempts to preclude the habeas review relied upon in *St. Cyr*, substituting for it the administrative review provided by the Courts of Appeals.⁹¹ As Professor Neuman cogently asks:

Will direct review in the courts of appeals, as reframed by the REAL ID Act, provide an adequate and effective substitute for the writ of habeas corpus sufficient to satisfy the requirements of the Suspension Clause? The answer depends on how the statutory structure will be interpreted, and on what the Suspension Clause requires.⁹²

Thus, Professor Neuman highlighted as major areas of concern “the effect of the thirty-day filing period in limiting the availability of review of removal orders, the fact-finding capacity of the courts of appeals, and the availability of review for questions that arise after a removal order has been issued.”⁹³

Professor Neuman was writing shortly after the REAL ID Act was enacted, and subsequent developments in the courts have not added too much to his cogent analysis. For the most part, the courts of appeals have upheld the REAL ID Act against constitutional challenge, focusing in almost every case on the

90. 8 U.S.C. § 1252(a)(2)(D); *see also* 8 U.S.C. § 1252(a)(5) (which provides that such review is exclusive).

91. *See, e.g.,* *Bonhomie v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005) (“These modifications effectively limit all aliens to one bite of the apple with regard to challenging an order of removal, in an effort to streamline what the Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas corpus) and the courts of appeals (petitions for review).”). The Conference Report for the statute even relies upon *Swain v. Pressley*. *See* H.R. REP. NO. 109-72, at 175 (2005), 2005 U.S.C.C.A.N. at 300.

92. Neuman, *supra* note 85, at 142.

93. *Id.*

REAL ID Act's expansion of the courts' jurisdiction to review the administrative decision on direct appeal.⁹⁴ Even when the adequacy of the remedy has been open to some question, courts have uniformly upheld the congressional displacement of habeas corpus.⁹⁵ In Part IV, I will return to the implications of some of these cases.

Ultimately, though, the REAL ID Act was really just a preview for the far more serious battle that was to come—the question of providing a substitute remedy for individuals detained in conjunction with the war on terrorism.

C. *Hamdan*: Alternative Remedies and Guantánamo, Part I

The scope of federal habeas jurisdiction has been at the heart of the United States' detention of non-citizen “enemy combatants” at Guantánamo Bay, Cuba, since the first detainees were transferred there early in 2002.⁹⁶ Although the lower courts divided over whether the habeas statute extended to petitions filed by the Guantánamo detainees,⁹⁷ the Supreme Court, in *Rasul v. Bush*, held that it did.⁹⁸ Shortly after the *Rasul* decision, and (arguably) motivated by the Court's same-day decision in *Hamdi v. Rumsfeld*,⁹⁹ the government established “Combatant Status Review Tribunals” (CSRTs) to provide administrative review of the detainees' claims that they were not “enemy combatants” in the first place.¹⁰⁰

94. See, e.g., *Iasu v. Smith*, 511 F.3d 881 (9th Cir. 2007); *Jean-Pierre v. U.S. Att'y Gen.*, 500 F.3d 1315 (11th Cir. 2007); *Kolkevich v. Att'y Gen.*, 501 F.3d 323 (3d Cir. 2007); *Dalombo Fontes v. Gonzales*, 498 F.3d 1 (1st Cir. 2007); *De Ping Wang v. D.H.S.*, 484 F.3d 615 (2d Cir. 2007); *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007); *Mohamed v. Gonzales*, 477 F.3d 522 (8th Cir. 2007).

95. Indeed, two decisions have expressly invoked *Swain v. Pressley*. See *Xiao Ji Chen v. U.S. D.O.J.*, 471 F.3d 315, 326 (2d Cir. 2006); *Enwonwu v. Gonzales*, 438 F.3d 22, 32 (1st Cir. 2006).

96. For an overview, see Richard H. Fallon, Jr., & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

97. Compare *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (rejecting jurisdiction), and *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (same), with *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003) (sustaining jurisdiction).

98. 542 U.S. 466 (2004).

99. 542 U.S. 507 (2004) (plurality).

100. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443,

But it was not until December 2005, after the Supreme Court granted certiorari in *Hamdan v. Rumsfeld*¹⁰¹—which challenged the legality of the military tribunals established pursuant to President Bush’s November 13, 2001 Military Order¹⁰²—that Congress attempted to cast the CSRTs as an “alternative” to habeas corpus. Thus, in the Detainee Treatment Act of 2005,¹⁰³ Congress attempted to restrict all judicial review of the detainees’ claims to two avenues: an appeal to the D.C. Circuit from the CSRT,¹⁰⁴ and, for certain detainees convicted by military commission, an appeal to the D.C. Circuit from the final judgment of conviction.¹⁰⁵

Critically, the DTA provided that such review would be

450–51 (D.D.C. 2005).

101. For the grant, see *Hamdan v. Rumsfeld*, 546 U.S. 1002 (2005) (mem.). The district court had struck down the commissions, only to be reversed by the D.C. Circuit. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.C. Cir. 2005).

102. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 16, 2001).

103. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44 (2005).

104. Under the DTA, the D.C. Circuit could only review:

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence); and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

DTA § 1005(e)(2)(C), 119 Stat. at 2742.

105. Again, the DTA limited the D.C. Circuit’s review to:

(i) whether the final decision was consistent with the standards and procedures specified in [Military Commission Order No. 1, dated August 31, 2005]; and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

Id. § 1005(e)(3)(D), 119 Stat. at 2743. Curiously, such appeals were only as of right for defendants convicted and sentenced to death or to imprisonment for 10 years or more. For defendants receiving lesser sentences, the statute provided that the appeal “shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.” *Id.* § 1005(e)(3)(B)(ii), 119 Stat. at 2743.

exclusive. The statute otherwise purported to oust the habeas jurisdiction of the federal courts—including the Supreme Court:

Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider. . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . . ¹⁰⁶

In *Hamdan*, the majority sidestepped all questions as to the constitutionality of the DTA's exclusive review scheme, holding that the statutory language was insufficiently clear concerning whether the jurisdiction-stripping provision should apply to pending cases (including *Hamdan* and most of the other petitions brought by the Guantánamo detainees).¹⁰⁷ Thus, the adequacy of DTA review was irrelevant; on the *Hamdan* Court's view, the DTA did not preclude access to habeas corpus in all cases pending on the date of the statute's enactment.

Although the majority therefore did not reach the *Swain v. Pressley* question, Justice Scalia—who concluded that the DTA's applicability to pending cases was beyond question—did. In his view, “even if petitioner were fully protected by the [Suspension] Clause, the DTA would create no suspension problem.”¹⁰⁸ In Justice Scalia's view:

[T]he “standards and procedures specified in” Order No. 1 include every aspect of the military commissions, including the fact of their existence and every respect in which they differ from courts-martial. Petitioner's claims that the President lacks legal authority to try him before a military commission constitute claims that “the use of such standards and procedures,” as specified in Order No. 1, is “[in]consistent with the Constitution and laws of the United States.” The D.C. Circuit thus retains jurisdiction to consider these claims on postdecision review . . . Thus, the DTA merely defers our jurisdiction to consider petitioner's claims; it does not eliminate that jurisdiction. It constitutes neither an “inadequate” nor an “ineffective”

106. DTA § 1005(e)(1), 119 Stat. at 2742.

107. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762–69 (2006).

108. *Id.* at 2818 (Scalia, J., dissenting).

substitute for petitioner's pending habeas application.¹⁰⁹

Whether Justice Scalia was correct or not, the DTA's lack of clarity ensured that the issue would be left for another day. As it turned out, that day came rather quickly.

D. *Boumediene* and *Bismullah*: Alternative Remedies and Guantánamo, Part II

In response to *Hamdan*, Congress enacted the MCA.¹¹⁰ In addition to providing statutory authority for trials by military commission and creating both trial-level courts and the Court of Military Commission Review (CMCR),¹¹¹ the MCA, in stronger statutory language, attempted to make the CSRT review scheme exclusive. Thus, section 7 of the MCA provides that:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.¹¹²

Although the MCA tweaks the appellate review of military commissions in several significant ways,¹¹³ it effectively leaves the DTA procedure intact with respect to judicial review of CSRT decisions. Thus, under the DTA/MCA, individuals determined to

109. *Id.* at 2818–19 (citations omitted) (alteration in original).

110. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

111. *See id.* § 3, 120 Stat. at 2621 (codified at 10 U.S.C. § 950(f)).

112. *Id.* § 7(a), 120 Stat. at 2635 (codified at 28 U.S.C. § 2241(e)(1)). The statute further provides that, except as provided by the DTA:

no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2).

113. *See id.* § 9, 120 Stat. at 2636–37. Although these amendments appear to be technical, they solve several potential problems with the DTA's review provisions, including the DTA's limitation to challenges to the "August 31, 2005" military commission order, its provision for discretionary appeals for detainees receiving sentences of less than ten years, and its limitation on applicability to those individuals detained at Guantánamo Bay.

be “enemy combatants” by CSRTs, but *not* subject to trial by military commission, have only one appeal to the D.C. Circuit to test the legality of their detention.¹¹⁴

Understandably, much of the focus on the MCA has been on the constitutionality of its foreclosure of habeas jurisdiction, which the D.C. Circuit addressed (and upheld) in *Boumediene v. Bush*.¹¹⁵ As Judge Randolph wrote for the majority, the Suspension Clause does not protect non-citizens outside the territorial United States, and so the MCA could not raise a constitutional question, even if the substitute remedy it provided were inadequate.¹¹⁶ Judge Rogers dissented as to the reach of the Suspension Clause,¹¹⁷ and also concluded that the DTA/MCA remedy was constitutionally inadequate.¹¹⁸ In her words:

Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court “can only direct [the prisoner] to be discharged.” But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants.¹¹⁹

As Judge Rogers’s dissent underscores, the question whether the MCA violates the Suspension Clause (to the extent it applies)¹²⁰ simply cannot be decoupled from questions as to the

114. One hard question is whether this provision applies to Ali Saleh Kahlah Al-Marri, the one non-citizen held as an “enemy combatant” *within* the territorial United States. A panel of the United States Court of Appeals for the Fourth Circuit held that it did not, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), but that decision has since been vacated and is pending rehearing en banc.

115. 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

116. *See id.* at 988–92.

117. *See id.* at 995–1004 (Rogers, J., dissenting).

118. *See id.* at 1004–07.

119. *Id.* at 1006 (citations omitted) (alteration in original).

120. On why the *Boumediene* majority’s argument that the Suspension Clause simply does not “apply” to Guantánamo is unconvincing, see Vladeck,

scope of review under the DTA/MCA, which a different panel of the D.C. Circuit has considered in a series of opinions in *Bismullah v. Gates*.¹²¹

In *Bismullah* “I,” the first appeal from a CSRT entertained by the D.C. Circuit, the court rejected the government’s argument that its review should be limited to the record produced by the CSRT. Thus, as Chief Judge Ginsburg wrote for the panel:

[T]he record on review consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense, hereinafter referred to as Government Information and defined by the Secretary of the Navy as “such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,” which includes any information presented to the Tribunal by the detainee or his Personal Representative.¹²²

The court went on to issue a series of orders governing the means by which that record should be disclosed to counsel for the detainees.¹²³ The upside of the decision, though, was that review of a CSRT appeal could include information outside the record. The court then denied the government’s petition for rehearing in *Bismullah* “II,” and a divided court denied rehearing en banc. Lest there be any doubt about *Bismullah*’s significance, consider the Supreme Court’s order granting certiorari in *Boumediene*: “As it would be of material assistance to consult any decision in *Bismullah* . . . currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon issuance of any decision in those cases.”¹²⁴

Thus, it is abundantly clear that the adequacy of DTA/MCA review *as a substitute* for habeas corpus is perhaps the most

supra note 2.

121. See *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007); *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007); see also *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008) (mem.) (denying rehearing en banc).

122. See *Bismullah*, 501 F.3d at 180.

123. See *id.* at 189–91.

124. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (mem.).

important issue before the Court in *Boumediene*. But inasmuch as the D.C. Circuit's focus has been on the scope of the *factual* record available for the court of appeals to review a CSRT decision, two hard *legal* questions remain unanswered as of this writing:

First, does the DTA/MCA review encompass claims challenging whether the detainee is subject to military detention in the first place, let alone whether he is an "enemy combatant," as defined by applicable regulations (and, now, the MCA)? That is to say, in challenging the procedures by which the CSRT arrives at its determination that a detainee is an "enemy combatant," does the detainee have the ability to contest his amenability to military detention (and military jurisdiction) in the first place?

Second, and separately, what is the significance of section 5 of the MCA, which provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding [against the United States or an officer thereof] . . . as a source of rights in any court of the United States or its States or territories"?¹²⁵ If habeas corpus, as a general matter, encompasses claims that detention is in violation of a duly-enacted federal treaty,¹²⁶ section 5 appears to preclude review of one (important) ground by which the detention of some—if not many—of the Guantánamo detainees might be unlawful.

One answer might be that Congress has the power to override (or at least "un-execute") treaties.¹²⁷ But if not, then the harder

125. Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631.

126. See, e.g., *Wildenhus's Case*, 120 U.S. 1 (1887) (recognizing the power to enforce treaties via the federal habeas statute); 28 U.S.C. § 2241(c)(3) (2008) (providing that habeas is available to prisoners "in custody in violation of the Constitution or laws or *treaties* of the United States" (emphasis added)). For an argument that habeas might therefore provide a cause of action for the enforcement of "non-self-executing" treaties, see Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007 (2004).

127. Such an argument might actually have more weight in light of the Supreme Court's decision in *Medellin v. Texas*, 128 S. Ct 1346 (2008), which appears to establish—for the first time—that "non-self-executing" treaties are *not* binding federal law. See, e.g., *id.* at 1356-57 n.2. Even if the MCA was intended to "un-execute" the Geneva Conventions, the Supreme Court has traditionally required a clear statement from Congress when it intends to so provide. See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Cook v. United States*, 288 U.S. 102, 120 (1933). Whatever else might be said about the MCA, it is hardly "clear" on this point. See

question remains: whether the rule of *Swain v. Pressley* includes the ability to press *all* possible claims that federal detention is unlawful. *Pressley* itself, again, is of little help in providing any answers.

IV. THE MYTH OF *SWAIN V. PRESSLEY*

Perhaps the most important characteristic of both *Swain v. Pressley* and its predecessor, *United States v. Hayman*, is that the statutes in question in each case had a habeas “safety-valve.” Thus, if the alternative remedy provided by § 2255 or D.C. Code section 23-110(g) proved to be “inadequate” or “ineffective,” the statutes expressly contemplated the continuing availability of habeas corpus to test the legality of detention.¹²⁸ Judges interpreting whether, in particular cases, the remedy had proven “adequate” or “effective” to test the legality of the petitioner’s confinement could therefore err on the side of caution, safe in the knowledge that their decision had no constitutional implications, and that habeas remained available in cases where the post-conviction remedy was deemed insufficient.

The modern substitutes, in contrast, contain no such safety valve. They create alternative remedies to habeas corpus, and then provide that those remedies are exclusive. Thus, statutes such as the REAL ID Act, the DTA, and the MCA, put judges in an incredibly difficult position, with enormous pressure to conclude that the substitute remedy provided by the statute is “adequate” and “effective,” even when (as in *Boumediene*, perhaps) there are considerable arguments to the contrary. Otherwise, jurists considering such claims would be left to strike down the

Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73, 76–92 (2007).

128. Compare 28 U.S.C. § 2255 (2008) (“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained . . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”), with D.C. CODE § 23-110(g) (“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court . . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”).

statute as violating the Suspension Clause, something the Supreme Court has never done.¹²⁹

As a result, in a number of cases arising under the REAL ID Act, courts have already gone out of their way to conclude that the restoration of direct review provided by the statute is an “adequate” and “effective” substitute to habeas corpus, even when the analysis seems somewhat counterintuitive. Thus, courts either read into the statute the ability to consider claims that the statute seems to preclude, or the court concludes that procedural limitations on direct review do not actually serve to render such review “inadequate” or “ineffective.”

The “myth” of *Swain v. Pressley*, then, is that it provides a meaningful test to apply to circumstances wherein Congress has attempted to provide an alternative remedy to habeas corpus. At most, it provides a useful example of how Congress might legislate responsibly to do so. But where Congress provides that the alternative remedy is exclusive, even where it might be inadequate or ineffective, the precedents suggest that *Swain v. Pressley*, coupled with the constitutional avoidance canon, actually distorts the courts’ analysis of the underlying issue.

* * *

Whatever the merits of the underlying claims in the Guantánamo cases, one point seems clear: If the Suspension Clause does “apply to” or otherwise protect the Guantánamo detainees, the central question before the Supreme Court will be whether the remedy provided by the DTA/MCA constitutes an “adequate” and “effective” substitute for habeas corpus. As the above discussion demonstrates, *Swain v. Pressley* holds that Congress has the power to so provide, but does little to elaborate upon what “adequate” means. Moreover, because of constitutional avoidance, the Court would be under enormous pressure to conclude that the remedy *is* adequate and effective, even if it has to adopt a strained interpretation to reach such a result.

At the very least, *Boumediene* provides the Court with an opportunity to shed light on questions that were avoided in *Hayman*, and only cursorily addressed in *Pressley*. And if the last decade is any indication, clarification of the limitations on

129. The Court has shied away from even *interpreting* the Suspension Clause. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001).

Congress's power to fashion alternative remedies to habeas corpus will have ramifications far afield of Guantánamo and the war on terrorism.

Given the unquestioned importance of the writ of habeas corpus, and the Supreme Court's repeated admonitions that "we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements,"¹³⁰ it is long-past time for greater clarity in delineating the limits on Congress's power to displace the writ with alternative remedies, lest that power become the means by which Congress further "suffocate[s] the writ."

130. *Hensley v. Mun. Court*, 411 U.S. 345, 350 (1973).

Legislative Reform of the State Secrets Privilege

Robert M. Chesney*

Few issues more directly implicate the tension between the rights of the individual and the government's interest in preserving national security than the state secrets privilege. This has long been true, but in recent years the use of the privilege in connection with high-profile litigation arising out of post-9/11 events and policies—most notably the activities within the United States of the National Security Agency and the Central Intelligence Agency's rendition program—has generated an unprecedented level of controversy, as reflected in litigation,¹ in the media,² in the work of interest groups,³ and in legal scholarship.⁴ This controversy has spurred interest in the

* Associate Professor, Wake Forest University School of Law. I wish to thank Peter Margulies, David Logan, and the other symposium participants for their thought-provoking comments and questions. A modified version of this essay also appears as written testimony before the Senate Judiciary Committee in connection with a hearing held on February 13, 2008, titled "Examining the State Secrets Privilege: Preserving National Security While Protecting Accountability."

1. See, e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying motion to dismiss suit relating to NSA activity on state secrets grounds); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (affirming dismissal of rendition lawsuit on state secrets grounds).

2. Various newspapers have criticized the use of the privilege by the Bush administration. See, e.g., Ben Wizner, *Shielded by Secrecy*, L.A. TIMES, Feb. 14, 2008, at A25; Editorial, *Balance of Powers*, S.F. CHRON., Feb. 3, 2008, at E6; Editorial, *Secrets and Rights*, N.Y. TIMES, Feb. 2, 2008, at A18.

3. See, e.g., The Constitution Project, *Reforming the State Secrets Privilege* (May 31, 2007), http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement.pdf; Robert E. Stein, *Section of Individual Rights and Responsibilities Association of the Bar of the City of New York: Report to the House of Delegates*, 2007 A.B.A. REVISED REPORT 116A, available at <http://fas.org/sgp/jud/statesec/aba081307.pdf>.

4. See, e.g., Robert M. Chesney, *State Secrets and the Limits of National*

prospects for legislative reform of the privilege, culminating recently in the introduction of the State Secrets Protection Act (SSPA), a bill that would both codify and reform key aspects of the privilege.⁵

The SSPA warrants attention both for narrow reasons relating to the privilege itself, and broad reasons relating more generally to the theory and practice of separation of powers. From the narrow perspective of the state secrets privilege, the SSPA would introduce a number of significant changes to current practice, including limitations on the government's ability to justify its assertion of the privilege through *ex parte* submissions and its ability to obtain dismissal at the pleading stage of suits implicating state secrets. From the broader perspective of the constitutional separation of powers, the SSPA raises difficult questions concerning the power of Congress to legislate substantive and procedural rules governing the disclosure of information relating to national security and diplomacy, and the degree of deference, if any, that judges should give to executive officials in connection with factual assertions relating to such topics.

I do not propose to resolve all of these issues in this essay. I do hope, however, to enrich the ongoing debate by distinguishing that which should be controversial in the SSPA from that which should not be, by proposing less problematic solutions in a few instances, and by highlighting the relationship of these somewhat technical questions to broad background considerations of constitutional structure.

I. A THUMBNAIL SKETCH OF THE PRIVILEGE IN CONTEXT WITH RECENT DEBATES

The privilege emerged gradually in U.S. jurisprudence during the 1800s, reaching maturity only after the Supreme Court acknowledged, elaborated, and applied it in its 1953 decision

Security Litigation, 75 GEO. WASH. L. REV. 1249, 1249-50 (2007); Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99 (2007); Amanda Frost, *The States Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85 (2005); LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 212, 245 (2006).

5. See State Secrets Protection Act, S. 2533, 110th Cong. (2008).

United States v. Reynolds.⁶ In its modern form, the privilege attaches when two conditions are met. It must be asserted with the requisite formalities,⁷ and a judge must be persuaded by the government's assertion that disclosure of the information at issue would pose a reasonable risk of harm to national security or diplomacy.⁸ In making that determination, the judge typically considers classified affidavits filed by the government on an *ex parte* basis.⁹ In those cases in which the privilege is asserted with respect to a particular document or item, the courts often will also examine that item itself on an *ex parte* basis (though *Reynolds* itself discourages courts from doing this when it can be avoided).¹⁰ Notably, the privilege is absolute rather than qualified and thus,

6. 345 U.S. 1 (1953). For an overview of the origins and evolution of the privilege, see Chesney, *supra* note 4.

7. The privilege can only be asserted by the head of the executive department charged with responsibility for the information in question, who must undertake a personal review of the matter at issue. See *Reynolds*, 345 U.S. at 7-8.

8. See *id.* at 8-10. In the petitioner's brief in *Reynolds*, the government had advanced the view that the government official's invocation of the privilege should be binding upon the court, citing an array of separation of powers arguments boiling down to a claim of exclusive executive authority under Article II with respect to national security and diplomatic matters. See Brief for the Petitioner at 15-16, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378 ("Our position is that under the doctrine of separation of powers and under the statute implementing this doctrine the courts have no power to compel the heads of the executive departments to produce such documents . . ."). The court in *Reynolds* concluded, however, that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10. And while it is true that elsewhere in the opinion the court stated that the government's position had "constitutional overtones which we find it unnecessary to pass upon," *id.* at 6, the conclusion the court actually reached regarding the role of the judge in adjudicating an assertion of the privilege nonetheless implicitly rejects the claim that judges constitutionally are bound to accept executive conclusions with respect to the harm that public disclosure might cause in a given case. See *id.* at 7-8.

9. See Chesney, *supra* note 4, at 1306.

10. See *Reynolds*, 345 U.S. at 10-11. The Supreme Court in *Reynolds* was dealing with a tort suit brought by widows whose husbands had died during the crash of an Air Force B-29 that had been engaged in a flight to test classified radar equipment. *Id.* at 2-3. The privilege issue arose when the widows sought production of the Air Force's post-accident investigative report. *Id.* at 3. Ultimately, the Supreme Court held that there was no need to review the report itself to reach the conclusion that public disclosure of the details of the radar equipment would be harmful to national security. See *id.* at 10-11. Many years later it was revealed, however, that the report did not actually contain details relating to the radar equipment in the first place. See FISHER, *supra* note 4, *passim*.

once it attaches, it cannot be overcome.¹¹

In some contexts application of the privilege merely tends to limit discovery, as occurred in *Reynolds* itself.¹² In such cases, the significance of the privilege is relatively limited; it functions as a ground for resisting discovery requests, permitting the suit to continue on the basis of the non-privileged evidence that may be available to the parties. In other contexts, however, the privilege can be fatal to the litigation, as where the “very subject matter” of the litigation itself constitutes privileged information or litigation of the case otherwise necessitates disclosure of such information.¹³ The *El-Masri* extraordinary rendition lawsuit, for example, was dismissed on this basis.¹⁴

As noted above, post-9/11 invocations of the privilege have generated considerable controversy.¹⁵ By and large, criticisms of the privilege tend to fall under either or both of two headings. First, some contend that the Bush administration elects to resort to the privilege significantly more frequently than did its predecessors.¹⁶ Framed in its most persuasive terms, this is a harmful development not just because it forces more individual litigants to suffer injustice in the name of the greater good, but also because it tends to shield a greater swath of executive branch conduct from judicial review and, hence, from democratic accountability. Second, some contend that apart from numbers, the Bush administration has used the privilege in a qualitatively different way than its predecessors, invoking it as grounds for dismissal at the pleading stage irrespective of whether the plaintiff ever would require discovery of protected information from the government in order to maintain his or her suit.¹⁷ Again, the cost is framed in terms both of the burden on individual litigants and society’s interest in ensuring that the judiciary is available to check unlawful executive branch conduct.¹⁸

I addressed both lines of argument in an earlier article, reaching conclusions unlikely to please either the administration

11. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007).

12. See *Reynolds*, 345 U.S. at 10.

13. See *id.* at 11 (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

14. See, e.g., *El-Masri*, 479 F.3d at 306.

15. See *supra* notes 2-5 and accompanying text.

16. See *supra* notes 2-5 and accompanying text.

17. See *supra* notes 2-5 and accompanying text.

18. See, e.g., *Frost*, *supra* note 4.

or its critics.¹⁹ On one hand, I concluded that the quantitative and qualitative critiques are mistaken insofar as they attribute the harms associated with the privilege to the Bush administration in particular.²⁰ Quantitative criticisms—that is, claims that the Bush administration has misused the privilege by invoking it with greater frequency than in the past—are misguided primarily because the number of suits potentially implicating the privilege vary from year to year, and thus there is no reason to expect the number of invocations to remain constant, or even relatively so, over time.²¹ Qualitative claims—that is, claims that the Bush administration is attempting to use the privilege in unprecedented contexts or in search of unprecedented forms of relief—also do not withstand scrutiny.²² The fact of the matter is that the privilege has had a similarly harsh impact on litigants for decades.²³

On the other hand, I also recognized that cautious legislative reform might be possible and appropriate in this area, particularly in light of the rule of law and democratic accountability issues bound up in some uses of the privilege.²⁴ “To say that the privilege has long been with us and has long been harsh is not to say . . . that it is desirable to continue with the status quo.”²⁵ The real question, then, is how to craft reforms that will improve the lot of meritorious litigants and enhance compliance with the rule of law while simultaneously preserving legitimate national security and diplomatic interests.

II. THE SCOPE OF CONGRESSIONAL POWER TO REFORM THE PRIVILEGE

Before examining the particular ways in which the SSPA seeks to achieve the aforementioned goals, it is worth pausing to

19. See Chesney, *supra* note 4, at 1301-07.

20. See *id.* at 1307.

21. We also have no way of knowing with confidence how many privilege invocations actually occurred in any given year, under this administration or its predecessors. Many invocations do ultimately result in published judicial opinions, but not all do so. Numerical claims therefore have to be taken with a rather large grain of salt. I say that advisedly, having provided in my own article a table identifying all of the published opinions adjudicating state secrets claims between 1954 and 2006. See *id.* at 1315-32.

22. See *id.* at 1306-07.

23. See *id.*

24. See *id.* at 1308.

25. *Id.*

ask whether there are limits to the power of Congress to reform the state secrets privilege.

Everyone agrees that there is a state secrets privilege, but there is sharp disagreement with respect to its actual nature. Those who favor reform tend to describe it as a mere evidentiary rule adopted by judges through the common law process, a conclusion suggesting plenary legislative power to amend or even eliminate the privilege.²⁶ From this perspective, the question of legislative authority in this context is merely an extension of the well-settled principle that Congress has “power under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution to prescribe regulations concerning the taking of evidence in the federal courts.”²⁷

Others take the view that the privilege is not mere common law creation, but instead a constitutionally-required doctrine emanating from Article II, with the consequence that Congress either cannot modify the privilege or at least is significantly constrained in doing so.²⁸ In this account, “the privilege is rooted in the constitutional authority of the President as Commander in Chief and representative of the Nation in foreign affairs to protect the national security of the United States,”²⁹ and “is not merely a common law evidentiary privilege subject to plenary regulation by Congress.”³⁰

26. See, e.g., *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Kevin S. Bankston) (“The state secrets privilege is an evidentiary privilege . . . well established in the law of evidence, not in Constitutional law . . . it is well within Congress’s prerogative to reform the common law of evidence by statute.”) (internal quotation marks omitted).

27. *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Hon. Patricia M. Wald).

28. See *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Patrick F. Philbin).

29. *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Hon. Patricia M. Wald).

30. *Id.*

The best explanation, arguably, incorporates both perspectives. As a historical matter, there is little doubt that the privilege emerged as a common law evidentiary rule, very much as did the attorney-client privilege and similar rules that function to exclude from litigation otherwise-relevant information in order to serve a higher public purpose.³¹ It does not follow, however, that the privilege has no constitutionally-required aspect. In at least some circumstances, for example, the state secrets privilege conceptually overlaps with executive privilege—a doctrine explicitly derived from constitutional considerations.³² And although executive privilege is merely a qualified rather than an absolute privilege in most contexts, the Supreme Court did go out of its way in *United States v. Nixon* to raise the possibility that the answer might differ with respect to an assertion of executive privilege pertaining to military or diplomatic secrets.³³

In any event, let us assume for the sake of argument that the state secrets privilege serves constitutionally-protected values relating to the executive branch's national security and diplomatic functions. Would it follow that Congress is disabled from regulating in this area? It is not obvious that it would. Indeed, some forms of regulation would seem clearly to remain within the control of Congress in the exercise of the authorities mentioned above, even if other forms of legislation might prove more controversial. The key is to distinguish between legislation regulating the *process* by which privilege assertions are to be adjudicated, and legislation that functions to override or waive the privilege itself.

31. For an account of the emergence of the privilege, highlighting the role that influential treatise writers played in constructing and spreading awareness of the concept in the 1800s, see Chesney, *supra* note 4, at 1270-80. For a different perspective, one that emphasizes the British experience with a comparable doctrine, see William G. Weaver & Danielle Escontrias, *Origins of the State Secrets Privilege* (on file with author), available at http://works.bepress.com/william_weaver/1/.

32. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705-13 (1974); Attorney General Janet Reno, Memorandum for the President: Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti (Sep. 20, 1996), available at <http://www.usdoj.gov/ole/haitipot.htm>; Morton Rosenberg, CRS Report for Congress: Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments (Sep. 17, 2007), at 1, available at <http://fas.org/sgp/crs/secrecy/RL30319.pdf>.

33. 418 U.S. at 706, 710.

At a minimum, Congress should have authority to regulate the process through which assertions of the privilege are adjudicated. This would include, for example, the power to codify prerequisites to the assertion of the privilege (such as the *Reynolds* requirement that the privilege be invoked by the head of the relevant department based on personal consideration of the matter)³⁴ or to require particular procedures to be followed by the court in the course of resolving the government's invocation. Whether Congress should be able to override the privilege once it attaches—for example, by compelling the executive branch to choose between conceding liability in civil litigation and disclosure of privileged information in a public setting—is far less clear. That question may be academic, however, at least so far as the SSPA is concerned. A close review of the bill suggests that most if not all of its provisions are best viewed as process regulations.

It does not follow, of course, that all the changes contemplated in the SSPA are wise. On the contrary, there are at least a few elements in the bill that go too far in seeking to ameliorate the impact of the privilege. Congress may have the authority to adopt these measures notwithstanding the competing constitutional values involved, but it is advisable to emphasize less-intrusive reform options whenever possible.

III. THE SSPA IN COMPARISON TO THE STATUS QUO

Perhaps the best way to come to grips with the SSPA is to compare its provisions to current practices relating to the privilege, with an eye towards distinguishing that which is mere codification of the status quo from that which constitutes a substantial change. It helps, moreover, to conduct this comparison in a way that corresponds to the conceptual sequence of questions a judge must resolve when confronted with an invocation of the privilege. This approach demonstrates that a substantial part of the SSPA merely codifies practices that either are required or at least are common under the status quo, and should not be objectionable now. That said, there are a few aspects of the legislation that constitute significant breaks with current practice. Those provisions warrant more careful consideration. In a few instances, there are alternative approaches that might strike a better—and more sustainable—

34. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

balance among the competing equities.

A. The Formalities of Invoking the Privilege

The threshold question in any state secrets privilege scenario is whether the privilege has been invoked with the requisite formalities. In theory, such requirements serve to reduce the risk that the privilege will be invoked gratuitously. The SSPA does not introduce any significant innovations under this heading, but rather codifies existing practice.

Under the SSPA, “the United States shall provide the court with an affidavit signed by the head of the executive branch agency with responsibility for, and control over, the state secrets involved explaining the factual basis for the claim of privilege.”³⁵ This closely tracks current practice. *Reynolds* requires a “formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”³⁶ Both the SSPA and current practice, moreover, limit invocation of the privilege to the United States.³⁷

B. The Substantive Test for Application of the Privilege

The substantive scope of the state secrets privilege is a function of three variables: subject matter, magnitude of harm that might follow from public disclosure, and the degree of risk that such harm might be realized. Though there is room for disagreement on this point, the best view is that the SSPA does not depart significantly from the status quo with respect to any of these three variables.

Consider first the question of subject matter. Under the SSPA, information must relate to “national defense or foreign relations” in order to qualify for privilege.³⁸ The status quo at least arguably encompasses a similar range of topics.³⁹

The next question is whether the SSPA tracks the status quo with respect to the magnitude of harm that might follow from

35. See State Secrets Protection Act, S. 2533, 110th Cong. § 4054(b) (2008).

36. *Reynolds*, 345 U.S. at 7-8.

37. Compare S. 2533, § 4054(a) with *Reynolds*, 345 U.S. at 7.

38. State Secrets Protection Act, S. 2533, § 4051.

39. See Chesney, *supra* note 4, at 1315-32 (specifying nature of information at issue in published state secrets adjudications between 1954 and 2006).

public disclosure of the information in question. The SSPA frames the inquiry in terms of “significant harm.”⁴⁰ There is no comparable terminology in *Reynolds*, nor has any standard terminology on this question of calibration emerged in that case’s progeny. Nonetheless, it is difficult to view the “significant harm” standard as a meaningful change from the status quo. *Reynolds* itself admonished that the privilege was “not to be lightly invoked,”⁴¹ implying that *de minimus* harms should not come within its scope.

The third issue under this heading concerns the probability that disclosure of the information actually will precipitate the feared harm. Under both the status quo and the SSPA, that variable is framed in terms of “reasonable” risk.⁴²

C. Authority to Decide Whether the Privilege Attaches: The Role of the Judge and the Question of Deference

In its brief to the Supreme Court in *Reynolds*, the government had contended, that “the power of determination is the Secretary’s alone.”⁴³ That is to say, the government argued that courts cannot and should not second-guess the determination of the relevant executive branch official that disclosure of the information in question would be harmful.⁴⁴ Among other things, the government reasoned that executive officials are far better situated than judges to assess the probable consequences of a disclosure.⁴⁵ On the other hand, unchecked authority to assert the privilege naturally would give rise to assert the privilege in

40. State Secrets Protection Act, S. 2533, § 4051.

41. *Reynolds*, 345 U.S. at 7.

42. State Secrets Protection Act, S. 2533, § 4051 (“[T]he term ‘state secrets’ refers to any information that, if disclosed publicly, would be *reasonably* likely to cause significant harm to the national defense or foreign relations of the United States.”) (emphasis added). *Reynolds* actually is vague with respect to the question of how strong the likelihood of harm from disclosure must be (most of its discussion of risk concerns the distinct question of whether and when judges should personally examine allegedly privileged documents en route to making a decision on the privilege), but courts nonetheless appear to understand *Reynolds* to require a reasonable-risk standard. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007).

43. See Brief for the Petitioner, *supra* note 8, at 47.

44. See *id.*

45. See *id.* (stating that the government’s position rests in part “on reasons of policy arising from the fact that the department head alone is truly qualified and in a position to make the determination”).

circumstances where the substantive standard is not met, whether out of an excess of caution or even as a shield for misfeasance. The Supreme Court ultimately gave greater weight to that offsetting concern, holding in *Reynolds* that “[j]udicial control over the evidence in the case cannot be abdicated to the caprice of executive officers,” and insisting that the judge have the final say with respect to whether the privilege attaches.⁴⁶

This general principle is no longer seriously contested, but the relative authority of the judge and the executive branch nonetheless continues to be a matter of controversy because of lingering questions regarding how much deference the judge should give to the executive’s claim, even if the claim is not strictly binding.⁴⁷ In *El-Masri*, for example, the Fourth Circuit concluded that the “court is obliged to accord the ‘utmost deference’ to the responsibilities of the executive branch” when determining the harm that might follow from a disclosure.⁴⁸ Such deference was owed both “for constitutional reasons” and for “practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information.”⁴⁹ Similarly, the Ninth Circuit stated in *Al-Haramain* that it “acknowledge[d] the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.”⁵⁰ In light of such statements, some might argue that judges have final authority to determine the applicability of the privilege only in formal terms, while the mechanism of deference shifts that authority back to the executive branch in practical terms.

The SSPA codifies the status quo insofar as it plainly contemplates that the judge shall have the ultimate responsibility for determining whether the privilege should attach.⁵¹ In its

46. *Reynolds*, 345 U.S. at 9-10.

47. See, e.g., *El-Marsi v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) (“The Executive bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met.”).

48. *Id.* (quoting *U.S. v. Nixon*, 418 U.S. 683, 710 (1974)).

49. *Id.*

50. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

51. See State Secrets Protection Act, S. 2533, 110th Cong. § 4054(e) (2008) (describing the judge’s role in determining whether the privilege

current form, however, it makes no attempt to regulate the degree of deference, if any, that judges should give to the executive branch's judgment regarding the consequences of a disclosure.

D. The Mechanics of the Judge's Review: Evidentiary Basis for the Ruling

1. When Specific Documents Are in Issue

The paradigm state secrets privilege scenario involves an attempt by a private litigant to obtain a particular item during discovery, as occurred with respect to the post-accident investigative report in *Reynolds*.⁵² When the government claims privilege in that context, it typically justifies its assertion with an explanatory affidavit from the official asserting the privilege.⁵³ But should the judge also review the item in question in the course of determining whether the privilege should apply?

The SSPA departs from the status quo to a small extent with respect to this issue. Under the SSPA, judges not only can, but *must* review the actual item of evidence.⁵⁴ Under the status quo, in contrast, they are expressly admonished in *Reynolds* to be reluctant to require such *in camera* production unless the litigant has shown great need for the document.⁵⁵

The SSPA's requirement of *in camera* disclosure reflects a lesson derived from the original *Reynolds* litigation. Famously, the plaintiffs in *Reynolds* had sought production of an Air Force post-accident investigative report in connection with their tort suit, prompting the government to invoke the state secrets privilege on the ground that the report contained details of classified radar equipment.⁵⁶ The Supreme Court concluded such details could not be disclosed publicly, which is a plausible conclusion under the substantive test described above.⁵⁷ Although

attaches).

52. See *United States v. Reynolds*, 345 U.S. 1, 3 (1953).

53. See, e.g., *Al-Haramain*, 507 F.3d at 1202 (referring to "classified and unclassified declarations" filed by the Director of National Intelligence and the Director of the NSA).

54. See State Secrets Protection Act, S. 2533, § 4054(d)(1) (requiring the United States to submit for the court's review not only an explanatory affidavit but also all evidence as to which the privilege has been asserted).

55. See *Reynolds*, 345 U.S. at 10-12.

56. See *id.* at 3-4.

57. *Id.* at 12.

it did not follow that the accident report necessarily contained such details, the court assumed that it did and found the privilege applicable on that basis.⁵⁸ Notoriously, it turned out much later that the report did not contain substantial details about the radar.⁵⁹ Thus conventional wisdom holds that the privilege ought not to have been invoked on that basis, something that almost certainly would have been revealed by judicial inspection of the document.⁶⁰

Reynolds thus has come to stand for an important, common-sense proposition: where the privilege is asserted in connection with a particular document the government seeks to withhold from discovery, the judge should ensure that the item in question actually contains the allegedly-sensitive information said by the government to warrant application of the privilege. It is important to note, however, that this type of mistake does not seem to occur frequently under the state secret privilege today. Notwithstanding language in *Reynolds* cautioning judges not to conduct *in camera* inspections unnecessarily, courts today routinely do examine documents personally in an effort to determine whether the privilege should attach.⁶¹ The change that would be wrought by the SSPA on this issue, accordingly, is to remove any question as to whether this should be done.

2. When Abstract Information Is in Issue

Not every invocation of the privilege arises in connection with requests for production of specific documents or records capable of being inspected. The government may also have occasion to

58. *Id.*

59. See FISHER, *supra* note 4, 167-68.

60. See *Reynolds*, 345 U.S. at 10-12. But see *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability*, 110th Cong. (2008) [hereinafter Nichols] (statement of Deputy Assistant Attorney General, Carl Nichols, House Comm. on the Judiciary), available at <http://www.usdoj.gov/ola/views-letters/110-2/02-26-08-s2449-sunshine-litigation-act.pdf> (arguing that the report in privilege invocation in *Reynolds* was proper because the report contained technical details relating to the operations of B-29 bombers, separate and apart from details relating to the radar equipment); *Herring v. United States*, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272, at *5-6, *9 (E.D. Pa. 2004) (holding that the Air Force had not committed fraud in *Reynolds* because the B-29 data justified application of the privilege), *aff'd*, 424 F.3d 384 (3d Cir. 2005).

61. See, e.g., *Al-Haramain*, 507 F.3d at 1203 (“We reviewed the Sealed Document *in camera* . . .”).

invoke the privilege in connection with discovery requests seeking protected information in the abstract, as with an interrogatory or a deposition question. In such cases there is no specific document or item for the court to review, other than the explanation offered by the government in the form of an affidavit from the official asserting the privilege. In that respect, the SSPA's requirement that such an affidavit be submitted merely codifies the status quo.⁶²

3. When Pleading Would Require Revelation of Privileged Information

A similar scenario arises at the pleading stage when the allegations in a complaint would reveal state secrets if admitted or denied. Here, however, the SSPA introduces a useful innovation that functions to put off the question of whether the privilege properly applies to the information at issue. Under SSPA § 4053(c), the government may simply plead the privilege in response to such allegations, rather than admitting or denying them as otherwise required by Federal Rule of Civil Procedure 8(b).⁶³ The allegation(s) in question presumably then would be deemed denied,⁶⁴ without any need for the judge at that stage to consider whether the privilege in fact attaches to the information at issue. Arguably the government could have achieved the same result under the status quo by objecting on privilege grounds to particular allegations in a complaint, though it is not clear that the government ever pursued such a course. In any event, this aspect of the SSPA at a minimum is a useful clarification, even if not an outright alteration of what is permitted under current

62. See State Secrets Protection Act, S. 2533, § 4054(b). In that sense, the SSPA's adoption of an affidavit requirement is unexceptionable. But there is a problem with respect to the related requirement that the classified affidavit be accompanied by an unclassified version for public release: one might read that provision to preclude the judge from being able to order the unclassified document to be sealed. As a general proposition, it seems unwise to deprive (or to risk depriving) judges of discretion to seal any particular document in this sensitive context.

63. Compare State Secrets Protection Act, S. 2533, § 4053(c) with FED. R. CIV. P. 8(b).

64. The text currently provides that "[n]o adverse inference shall be drawn from a pleading of state secrets in an answer to an item in a complaint." State Secrets Protection Act, S. 2533, § 4053(c). This language should be amended to more clearly state that a privilege plea should be treated as a denial for pleading purposes.

practice.

E. The Mechanics of the Judge's Review: *Ex Parte* and *In Camera* Procedures

When reviewing the government's invocation of the privilege, should the judge permit the government to submit some or all of its explanation on an *in camera*, *ex parte* basis? In current practice, the government routinely submits classified documents and affidavits on an *ex parte* basis in the course of asserting the privilege.⁶⁵ The court alone reviews these submissions; they are not made available to opposing counsel.⁶⁶ As a result, the process of determining whether the privilege attaches is in an important sense non-adversarial. This approach is optimal from the perspective of ensuring against an improper disclosure of the information, but it is far from optimal from the perspective of ensuring against inaccurate determinations by the court.

Both values are substantial. The question, therefore, is whether there are solutions that would sufficiently preserve the government's interest in security while simultaneously reducing the risk of error by introducing elements of adversariality in the review process. In a major departure from the status quo, the SSPA seeks to accomplish precisely this.

1. Ex Parte Proceedings

The SSPA would break with current practice significantly by limiting the ability of the government to justify its invocation of the privilege through *ex parte* submissions. First, § 4052(a)(3) recognizes that the judge has discretion as to whether *ex parte* submissions will be allowed at all, subject to the "interests of justice and national security."⁶⁷ There is little doubt that judges in most cases would exercise this authority wisely.⁶⁸ Even if the

65. See Chesney, *supra* note 4, at Appendix.

66. See *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

67. State Secrets Protection Act, S. 2533, § 4052(a)(3). As an alternative to precluding *ex parte* filings, § 4052(a)(2) permits the judge to order the government to provide the other litigants with a "redacted, unclassified, or summary substitute" of its *ex parte* submissions. State Secrets Protection Act, S. 2533, § 4052(a)(2). This authority in practice may turn out to track status quo procedures in which the government typically provides both a classified affidavit justifying its assertion of the privilege and also an unclassified version that can be made available to opposing parties and to the public.

68. The comparable provision in the Classified Information Procedures

judge decides to permit *ex parte* filings in the first instance, however, § 4052(c)(1) appears to ensure that before ruling upon the government's invocation of the privilege, the otherwise *ex parte* filings will be subject to at least some degree of adversarial testing:

A Federal court shall, at the request of the United States, limit participation in hearings conducted under this chapter, or access to motions or affidavits submitted under this chapter, to attorneys with appropriate security clearances, if the court determines that limiting participation in that manner would serve the interests of national security. The court may also appoint a guardian ad litem with the necessary security clearances to represent any party for the purposes of any hearing conducted under this chapter.⁶⁹

There is considerable wisdom in injecting some degree of adversariality into the *ex parte* portion of the privilege adjudication process. The trick, however, is to manage this without undermining the overriding goal of ensuring that there is no disclosure of the assertedly-protected information unless and until the judge determines that it is not in fact protected. Under the SSPA approach, the parties' own attorneys might be given direct access to the government's most sensitive secrets prior to determining whether they are in fact privileged. This goes too far, assuming that there are less intrusive alternatives available that might also address the accuracy considerations described above. And, as noted above, § 4052(c)(1) actually contains such a middle

Act (CIPA) permits but does not on its face require the government to submit its filings *ex parte*. See CIPA, 18 U.S.C. app. § 3, § 4 (1980). That said, it appears that no court has ever barred the government from making its application *ex parte*. See DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 24.7 (2007) (observing that “[a]lthough this procedure denies the defendant the ability to make a meaningful challenge to the government’s arguments, no court in a published decision has prevented the government from filing its Section 4 application *ex parte* and *in camera*.”). This suggests that judges can be trusted not to act rashly, but perhaps also that there is little point in providing an option to bar such filings. CIPA § 6 hearings, in contrast, are required to be *in camera* but are not normally *ex parte*. See CIPA, 18 U.S.C. app. § 6(a). Such hearings arise in a distinguishable context, however, insofar as the defendant in that scenario already possesses classified information, information that the government seeks to suppress.

69. State Secrets Protection Act, S. 2533, § 4052(c)(1).

ground alternative, in the form of a guardian ad litem mechanism.⁷⁰

The guardian ad litem approach has the virtue of ensuring at least some degree of adversarial testing, while reducing the risk of a leak (to the parties themselves or to the public at large) in comparison to having the party's own attorneys involved. For this reason, other countries are experimenting with precisely this approach in analogous contexts. Canada, for example, recently adopted a "special advocate" system in which attorneys are appointed for the specific purpose of contesting otherwise *ex parte* information used by the government in connection with removal of non-citizens from the country.⁷¹ The U.K. has a comparable system, originally designed for comparable immigration removals.⁷² Unlike the SSPA's guardian mechanism, however, the Canadian system does not allow the court to appoint just any attorney to this sensitive role, but instead requires the appointee to be chosen from a pre-determined list of screened and qualified individuals.⁷³

In order to strike a more reasonable and sustainable balance between the competing equities at stake in this sensitive context, § 4052(c) should be amended to focus attention on the guardian mechanism as a solution to the adversariality problem (that is to say, the more extreme alternative of ordering the government to provide access directly to the parties' attorneys should be removed). At the same time, the guardian mechanism should be amended to create a pre-selected list of attorneys eligible for such an appointment. Such a list could be created by the Chief Justice of the United States, for example, and following the Canadian example might also involve substantial training for the potential appointees.⁷⁴ This solution is not ideal from the litigant's perspective, but even from that viewpoint it does constitute a

70. *See id.*

71. *See* An Act to Amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, B. C-3, 39th Parliament, 2nd Sess. (2007) (as reported by Comm. on Pub. Safety and Nat'l Sec., Dec. 10, 2007) *available at* http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-3/C-3_2/C-3_2.PDF.

72. Special Immigration Appeals Act, 1997, c. 68, § 6 (Eng.).

73. *See supra* note 71, at B, C-3, § 85.

74. *See* Richard Foot, *Lawyers Line Up To Become Special "Terror" Advocates*, NAT. POST., Feb. 17, 2008, *available at* <http://www.nationalpost.com/news/canada/story.html?id=315669>.

substantial improvement over the status quo.⁷⁵

2. *In Camera* Proceedings

Beyond the question of whether filings and arguments will take place on an *ex parte* basis is the question of whether and when privilege litigation should take place *in camera*, without public access.⁷⁶ Under the status quo, judges typically employ a blend of ordinary and *in camera* procedures when adjudicating an assertion of the privilege.⁷⁷

The impact SSPA § 4052(b)(1) would have on this practice is unclear but it will likely not constitute a significant departure from the status quo. This section establishes a default presumption that hearings concerning the state secrets privilege will be conducted *in camera*, and permits public access only “if the court determines that the hearing relates only to a question of law and does not present a risk of revealing state secrets.”⁷⁸

F. The Mechanics of the Judge’s Review: Special Masters

One of the core difficulties associated with judicial review of the state secrets privilege involves the question of expertise. Critics of the status quo argue that judges in practice merely rubber-stamp executive invocations of the privilege because the judges do not feel confident that they can evaluate the executive’s claims regarding the impact of disclosure on security or diplomacy,⁷⁹ while others draw on the same notions to contend that judges should in fact be extremely, if not entirely, deferential.⁸⁰ And certainly it is true that a federal judge on average will not be as well-situated in terms of experience and fact-gathering resources as the Director of National Intelligence or

75. It is worth noting, in that regard, that nothing comparable is available to criminal defendants—whose very liberty is at stake—in the analogous context of § 4 proceedings under the CIPA, in which *ex parte* review is the rule. *See supra* note 68.

76. An *in camera* procedure is not necessarily *ex parte*, though the two concepts are conflated often. *See, e.g.*, CIPA, 18 U.S.C. app. § 4, § 6(a).

77. *See, e.g.*, *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (noting courts consideration of *ex parte* submissions in addition to public filings).

78. State Secrets Protection Act, S. 2533, § 4052(b)(1).

79. *See FISHER, supra* note 4, at 167-68.

80. *See Nichols, supra* note 60.

the Secretary of State to assess such impacts.⁸¹ At the same time, *Reynolds* itself acknowledges that the judge has ultimate responsibility for ensuring the validity and propriety of privilege assertions, lest the privilege become a temptation to abuse.⁸²

The tension between these values appears intractable at first glance, but there are mechanisms for ameliorating the problem. Some scholars point out, for example, that judges currently have authority to appoint expert advisers such as special masters under Federal Rule of Civil Procedure 53 and independent experts under Federal Rule of Evidence 706.⁸³ Section 4052(f) of the SSPA would clarify that such authorities in fact can be used in connection with state secrets litigation, an approach that may prove particularly valuable in cases involving assertion of the privilege with respect to voluminous materials.⁸⁴

G. Consequences Once the Privilege Attaches: Substitutions

SSPA § 4054(f) provides that where the privilege attaches, courts should consider whether it is “possible to craft a non-privileged substitute” that provides “a substantially equivalent opportunity to litigate the claim or defense.”⁸⁵ Drawing on the model set forth in the Classified Information Procedures Act (CIPA) § 6,⁸⁶ the SSPA goes on to specify several options that might be used in that context, including an unclassified summary, a redacted version of a particular item of evidence, and a statement of admitted facts.⁸⁷ Where the court believes that such an alternative is available, it may order the United States to produce it in lieu of the protected information.⁸⁸ The U.S. must comply with such an order if the issue arises in a suit to which the

81. See, e.g., *Al-Haramain*, 507 F.3d at 1203 (“[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.”).

82. See *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953).

83. See, e.g., Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, 28 A.B.A. NAT’L SECURITY L. REP. 1, 3-5 (2006), available at http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_11.pdf.

84. See State Secrets Protection Act, S. 2533, § 4052(f).

85. *Id.*

86. See CIPA, 18 U.S.C. App. 3, § 6.

87. State Secrets Protection Act, S. 2533m, 110th Cong. § 4052(f) (2008).

88. See State Secrets Protection Act, S. 2533, § 4054(f)(1)-(3).

U.S. is a party (or a U.S. official is a party in his or her official capacity), or else “the court shall resolve the disputed issue of fact or law to which the evidence pertains in the non-government party’s favor.”⁸⁹

It is not clear that any of these provisions depart from what a court could order even in the absence of the SSPA. But in any event, it is certainly advisable to codify the judge’s obligation to exhaust options that would permit relevant and otherwise-admissible information to be used without actually compelling disclosure of that which is subject to the protection of the privilege.

H. Consequences Once the Privilege Attaches: Ending Litigation

The most controversial aspect of current doctrine may well be the sometimes fatal impact it has on litigation once the privilege is found to attach to some item of evidence or information. As discussed earlier, this phenomenon is not new. The government has moved to dismiss (or in the alternative for summary judgment) in these circumstances with some frequency since the 1950s, and such motions frequently have been granted.⁹⁰ But the use of this approach in high-profile post-9/11 cases—particularly those relating to NSA surveillance and to rendition—has proven especially controversial, drawing attention to the fact that application of the state secrets privilege can have harsh consequences for litigants even where the litigants allege unlawful government conduct.⁹¹ Accordingly, one of the most important questions associated with the SSPA is whether it would limit the set of circumstances in which application of the privilege proves fatal to a suit.

1. When Denial of Discovery Precipitates Summary Judgment

Under current doctrine, application of the privilege can prove fatal to a suit in more than one way. First, the privilege may function to deprive a litigant of evidence needed in order to create

89. *Id.* § 4054(g). No sanction is provided by the SSPA for scenarios in which the U.S. is merely an intervenor. *See id.*

90. *See Chesney, supra* note 4, at 1306-07, 1315-32.

91. *See, e.g., Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying motion to dismiss suit relating to NSA activity on state secrets grounds); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (affirming dismissal of rendition lawsuit on state secrets grounds).

a triable issue of fact, and hence survive a summary judgment motion.

Let us assume that a judge has denied a discovery request based on the state secrets privilege. If it so happens that the plaintiff has no other admissible evidence sufficient to raise a triable issue of fact with respect to a necessary element of his or her claim, this discovery ruling necessarily exposes that plaintiff to summary judgment under Rule 56.⁹² In that setting, the Rule 56 ruling conceptually is subsequent to the state secrets ruling, rather than based directly on it. The discovery ruling is no less fatal to the plaintiff's case for that, however, and if the motions happen to be adjudicated simultaneously, it might even appear that the court has granted summary judgment "on" state secrets grounds. It does not appear that the SSPA is intended to alter the outcome in this scenario, though it might be wise to clarify that this is so in the text of the legislation.

2. When the Government Must Choose Between Disclosing Protected Information and Presenting a Defense

A second scenario that can prove fatal to a claim under current doctrine arises when the government would be obliged to reveal protected information in order to present a defense to a claim. This scenario differs from the first in that the plaintiff may be able to survive summary judgment with the evidence it has assembled. The problem here is not the plaintiff's efforts to acquire evidence, then, but the fact that the government must opt between presenting a defense and maintaining the secrecy of protected information. In that setting, current doctrine provides for dismissal on state secrets grounds.

In some senses, the SSPA codifies this result. Under § 4055 a judge may dismiss a claim on privilege grounds upon a determination that litigation in the absence of the privileged information "would substantially impair the ability of a party to pursue a valid defense,"⁹³ and that there is no viable option for creating a non-privileged substitute that would provide a "substantially equivalent opportunity to litigate" the issue.⁹⁴ But

92. See FED. R. CIV. P. 56.

93. State Secrets Protection Act, S. 2533, § 4055(3).

94. *Id.* § 4055(1). For what it is worth, § 4055(2) also requires a finding that dismissal of the claim or counterclaim "would not harm national

§ 4055 also mandates that the judge first review “all available evidence, privileged and non-privileged” before determining whether the “valid defense” standard has been met.⁹⁵ This suggests that the judge is not merely to assess the *legal* sufficiency of the defense (assuming the truth of the government’s version of events, in a style akin to adjudication of a Rule 12(b)(6) motion), but instead is to resolve the actual merits of the defense (including resolution of related factual disputes).⁹⁶ If that is the correct interpretation, it would seem to follow that § 4055 contemplates a mini-trial on the merits of the defense.⁹⁷

The problem with this approach is that the court may or may not permit the use of *ex parte* and *in camera* procedures in this context.⁹⁸ Denying either protection (but especially the latter) would put the government on the horns of a dilemma, forcing it to choose between waiving a potentially-meritorious defense, and revealing privileged information to persons other than the judge even in the face of the judge’s conclusion that the information is subject to the privilege. This approach is questionable from a policy perspective insofar as it would force the government to elect between partial or even complete exposure of concededly protected information and the loss of a meritorious defense and hence potential civil liability (including injunctive as well as financial consequences). And for similar reasons, this approach presumably will precipitate constitutional objections as well. At a minimum, therefore, § 4055 should be amended to provide that the judge’s assessment of the merits of a defense must take place on an *in camera* basis. Any move away from *ex parte* procedures in this context, moreover, should be limited to the modified guardian-ad-litem mechanism recommended above. Beyond that, it might also be wise to structure the judge’s review of the defense at issue in terms of a Rule 12(b)(6)-style legal-sufficiency inquiry rather than as a mini-trial.⁹⁹

security.” *Id.*

95. *See id.* § 4055.

96. *See id.*

97. *See id.*

98. *See id.*

99. *See* FED. R. CIV. P. 12(b)(6).

3. When the Very Subject Matter of the Action Implicates State Secrets

One scenario remains. Under current doctrine, “some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked.”¹⁰⁰ The idea here is not that certain discovery should be denied to the plaintiff, nor that the government has a defense it could present if only it were not necessary to preserve certain secrets. Rather, the notion is that some types of claims are not actionable as a matter of law because they inevitably would require disclosure or confirmation of state secrets in order to be properly adjudicated. Under this approach, a suit may be dismissed at the pleading stage even if the plaintiff could have assembled sufficient evidence to create triable issues of fact on all the necessary elements of a claim, and even if the government is not prevented by its secrecy obligation from presenting a defense to that claim. Not surprisingly, this is the most controversial dismissal scenario in current doctrine.

The SSPA overrides this result in the narrow sense that it permits suits to survive that under current doctrine would have been dismissed at the very outset. First, as noted above, the SSPA permits the government to avoid affirming or denying sensitive fact allegations by citing the privilege in its responsive pleading.¹⁰¹ Second, § 4053(b) plainly states that “the state secrets privilege shall not constitute grounds for dismissal of a case or claim” unless, as described above, the government has a “valid defense” it would present but for privilege concerns.¹⁰² Taken together, these provisions require cases in what might be called the “very subject matter”¹⁰³ category to go forward at least to the discovery stage.

Ultimately, however, the SSPA will not necessarily spare such suits from dismissal. During the course of discovery, the privilege remains wholly functional as a shield against production of protected documents or information, which may expose the plaintiff to summary judgment in the end. The SSPA expressly authorizes the government to use the privilege as a sword,

100. See *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007).

101. See State Secrets Protection Act, S. 2533, § 4053(c).

102. *Id.* § 4053(b).

103. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

moreover, enhancing the prospects for dismissal in the “very subject matter” scenario.¹⁰⁴ Specifically, § 4054(a) states that the government may not only use the privilege to resist discovery, but also “for preventing the introduction of evidence at trial.”¹⁰⁵ Much turns on the interpretation of this language.

This language appears to allow the government to move to suppress otherwise-admissible evidence in the plaintiff’s possession, on state secrets grounds. In that case, a plaintiff who is otherwise able to assemble sufficient evidence to create a triable issue of fact without discovery from the government, nonetheless, may find himself or herself without critical evidence at trial, necessitating judgment in the government’s favor. The only question then would be whether the government must await the plaintiff’s case-in-chief in order to exercise this suppression power, setting the stage for judgment as a matter of law pursuant to Rule 50(a), or if it, instead, could exercise this option prior to trial and thus proceed under Rule 56.¹⁰⁶ The language of § 4054(a) suggests the former, but if the option is to be allowed at all it makes far more sense from an efficiency perspective to permit pre-trial resolution.¹⁰⁷ Section 4054(a) accordingly should be amended to say as much.¹⁰⁸

The important point is that the “sword” aspect of § 4054(a)¹⁰⁹ will likely produce an end result comparable to that under the current doctrine’s “very subject matter” line of cases.¹¹⁰ The difference, which is by no means unimportant, is that under the SSPA the litigation process will proceed through the pleading and discovery stages, with the privilege being wielded as a scalpel rather than a bludgeon. Combined with the other procedural elements of the SSPA—including especially the role of special

104. See State Secrets Protection Act, S. 2533, § 4054(a).

105. *Id.*

106. See FED. R. CIV. P. 50(a) and 56.

107. See State Secrets Protection Act, S. 2533, § 4054(a).

108. The statute also needs to be amended to ensure that the government has an adequate opportunity to use the privilege in this fashion, meaning that some form of notice will have to be given to the government by a party intended to make use of information that may be subject to the privilege. This precise dilemma is addressed in the criminal prosecution context by CIPA § 5, which has been upheld against constitutional challenge on many occasions. Presumably a comparable procedure can be added to the SSPA.

109. See State Secrets Protection Act, S. 2533, § 4054(a).

110. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

masters, guardians-ad-litem, and the emphasis on finding substitutions when possible—the net effect of this “proceduralization” of the privilege should ensure more careful tailoring to the facts and evidence in a particular case. This in turn should reduce the risk of erroneous application (and thus injustice). Though this benefit will come at the cost of increased litigation expense and complexity, it is a cost that is most likely worth bearing. At the very least, the experiment is worth undertaking.

IV. CONCLUSION

The SSPA will not entirely please either critics or supporters of the state secrets status quo. By subjecting the privilege to a more rigorous procedural framework, the SSPA may reduce the range of cases in which the privilege is found to apply, and in some respects it may cause marginal increases in the risk that sensitive information will be disclosed (though with the amendments proposed above such risks would be significantly diminished). On the other hand, even under the SSPA, the privilege will continue to have a harsh impact on litigants who bring claims that implicate protected information: discovery will still be denied, complaints will still be dismissed, and summary judgment will still be granted. Such tradeoffs are inevitable, however, in crafting legislation designed to reconcile such important public values as national security, access to justice, and democratic accountability. The SSPA has its flaws, to be sure, but subject to the caveats noted above it marks an important step forward in the ongoing evolution of the state secrets privilege.

Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantánamo Bay

Ellen Yaroshefsky*

David Hicks, an Australian citizen, was detained in Afghanistan in December of 2001 and brought to Guantánamo Bay (Gitmo) in January of 2002. He was denied access to military and civilian lawyers for nearly two years, but eventually was permitted to have counsel only because the government believed that a lawyer would help secure a guilty plea,¹ and David agreed not to discuss the conditions of his captivity.² Eventually, more than five years later, and as a consequence of an international political campaign, he was charged and pleaded guilty to material support of terrorism for his association with al Qaeda operatives in Afghanistan. He was the first Guantánamo detainee to have his case presented to a military commission. He obtained an agreed-upon lenient sentence, served an additional six months, and was returned to Australia. He is now out of custody with restrictions that remain in force for one year from the date of

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1. Interview with Joshua Dratel, President, Joshua L. Dratel, P.C., in N.Y., N.Y. (Jun. 2007).

2. Raymond Bonner, *Australian Parents Have New Hope for U.S.-Detained Son*, N.Y. TIMES, Jan. 19, 2004, at A8. For a thorough analysis of the proceedings against Hicks, see LEX LASRY, THE UNITED STATES V. DAVID MATTHEW HICKS: FINAL REPORT OF THE INDEPENDENT OBSERVER FOR THE LAW COUNCIL OF AUSTRALIA (2004), available at <http://www.lawcouncil.asn.au/shared/2440377524.pdf>.

sentence; the most notable restriction is that he will not speak publicly about the conditions of confinement.

This essay describes the remarkable lawyering on behalf of David Hicks and demonstrates that zealous and strategic advocacy in the face of severe constraints can result in a successful resolution, even in a fundamentally unfair system. Operating within a structure of ad hoc procedures designed to produce guilty verdicts (termed a “rigged system” by many observers³), Hicks’ lawyers engaged in advocacy using a carefully coordinated legal, political, and media strategy that remained fine-tuned as the legal and political landscape shifted. Despite their firm and continual stance that the system was unauthorized by law and fundamentally unjust, Hicks’s lawyers successfully maneuvered that system for their client’s benefit. This essay focuses upon Hicks’s most visible and publicly touted attorney, Major Michael “Dan” Mori of the Marine Corps.⁴

Military lawyers are not typically perceived as being among the “brave band” of lawyers and others who go to the edge of the law for a “cause.”⁵ Yet, in this and many other cases, military lawyers were often at the edge of the law because zealous representation of their clients demanded such action.⁶ Their jobs

3. Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT’L SECURITY L. & POL’Y 375 (2005).

4. Hicks was represented by a number of military and civilian lawyers at various stages during the five years of his confinement. U.S. Military lawyers included Jeffery D. Lippert (2003-2005), and Rebecca Snyder (2006-2007). Australian attorneys include Steve Kenny (2003-2005), David McLeod and Michael Griffin (2006-2008). Joshua Dratel, discussed throughout this essay, was, along with Mori, a principal strategist and zealous advocate throughout the representation.

5. Lawyers for the Center for Constitutional Rights filed the first legal challenge to the Guantánamo detentions when it was highly unpopular to do so. See, e.g., CAUSE LAWYERS AND SOCIAL MOVEMENTS 54-55 (Austin Sarat & Stuart A. Scheingold eds., 2006); AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (1998); Adam Liptak & Michael Janofsky, *Scrappy Group of Lawyers Shows Way for Big Firms*, N.Y. TIMES, June 30, 2004, at A14; Philip Shenon, *Suit To Be Filed on Behalf of Three Detainees in Cuba*, N.Y. TIMES, Feb. 19, 2002, at A11.

6. Before 2003, military lawyers were summarily fired for refusing to comply with the conditions imposed upon their representation of Guantánamo prisoners. See, e.g., James Meek, *US Fires Guantánamo Defence Team*, THE GUARDIAN, Dec. 3, 2003, <http://www.guardian.co.uk/world/2003/dec/03/Guantánamo.usa>. See also

forced them to confront profound ethical dilemmas, rarely confronted by their civilian counterparts. While lawyers in all terrorism-related cases face significant challenges in their ability to represent their clients diligently, competently and zealously, the limitations on representation before military commissions after 9/11 are unparalleled in United States history.⁷ Under such a military commission system, Mori and other military lawyers were often unable to obtain evidence or share it with their clients. They were subject to a panoply of other restrictions that would be unthinkable in a typical court martial or case or courtroom in the United States.⁸

Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law in Guantánamo: Should Lawyers Be Permitted To Violate the Law?*, 37 HOFSTRA L. REV. (forthcoming 2008) (discussing representation at Guantánamo by Lieutenant Commander Charles Swift, Lieutenant Commander Matthew Diaz, and Major Michael Mori).

7. There is an expanding literature about challenges to ethical lawyering in terrorism cases in federal courts, courts martial, and military commissions. See generally Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81 (2003-2004); Joshua L. Dratel, *Sword or Shield? The Government's Selective Use of Its Declassification Authority for Tactical Advantage in Criminal Prosecutions*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 171 (2006); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003); Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynn Stewart*, 44 S. TEX. L. REV. 31 (2002); Ellen Yaroshefsky, *Introduction* to Symposium, *Secret Evidence and the Courts in the Age of National Security*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2006). See also David Luban, "The Vindication of Michael Mori," *Balkinization*, <http://balkin.blogspot.com/2007/04/vindication-of-major-mori.html> (April 1, 2007) (last visited May 15, 2008) (discussing the conflict of interest that arises when military defense lawyers are threatened with prosecution); Ben Wizner, "A Tailor-Made Guilty Plea," *ACLU Blog*, <http://blog.aclu.org/index.php?archives/159-A-Tailor-Made-Guilty-Plea.html> (March 27, 2007) (last visited May 15, 2008) (discussing Hicks defense attorney Josh Dratel's refusal to sign a commitment for compliance with the Guantánamo Military Commissions' rules). See also *United States v. Reid*, 214 F. Supp. 2d 84 (D. Mass. 2002) (striking down requirement that defense lawyers sign onto SAM's as a precondition for access to their client); *Saudi Convicted in Embassy Bombing Sues*, WASH. POST, May 9, 2002 (on the monitoring of attorney-client communications in over a dozen cases). For a riveting account of GTMO lawyering, see generally CLIVE STAFFORD SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* (2007).

8. One "glaring condition" of the military commissions noted by the Supreme Court in its *Hamdan v. Rumsfeld* decision is that "[t]he accused and

These commissions were so fundamentally flawed that in June 2006 the Supreme Court would find in its landmark *Hamdan v. Rumsfeld* decision that they were both in violation of the Uniform Military Code of Justice and Article 3 of the Geneva Conventions.⁹ It found that specific flaws of structure and procedure included the admissibility of hearsay and other evidence gained through coercion, and the fact that the defendant could be barred from hearing all evidence against him or even be barred from his own trial. The Court found that the [commissions] were not “regularly constituted courts” as understood by the Geneva Conventions.¹⁰

In 2003, a team of lawyers including Mori believed the military commissions to be fundamentally flawed, but they could not be assured of vindication by a court. It would be three years before the commissions would be struck down by the U.S. Supreme Court and replaced by yet another roundly criticized system. The Hicks team had a client to represent with the goal of his return to his native country.

This essay traces the lawyering of Major Mori and the Hicks team beginning in 2003, when it was an uphill struggle even to secure a hearing. It necessarily details, in chronological order, the defense team’s legal, political, and media strategy in confronting a government that claimed, as it still does today, that it could

his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’” *Hamdan v. Rumsfeld*, 548 U.S. 577, 614 (2006). *See also* Reply to Opposition to Petition for Rehearing app. at iv, *Al Odah v. United States*, 127 S. Ct. 3067 (2007) (No. 06-1196) [hereinafter Abraham] (Declaration of Stephen Abraham), *available at* <http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf>.

9. 548 U.S. 577, 577. The ruling states that *Hamdan's* military commission “lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions.” *Id.* at 567.

10. Lieutenant Colonel Stephen Abraham, a Judge Advocate General officer who had submitted a declaration in a previous suit in 2002, stated that, in [their proceedings], “[w]hat were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence.” Abraham, *supra* note 8, at vi. Moreover, Lt. Colonel Abraham noted that there was pressure from above to reach an “enemy combatant” verdict in the tribunals, which were often composed of personnel with limited or no intelligence experience. *Id.* at vii.

indefinitely hold detainees without access to a hearing or trial; and it addresses the ethics issues these lawyers confronted in ultimately securing an extremely favorable resolution for David Hicks.

THE BACKGROUND OF THE CASE

David Hicks, a twenty-four year old Australian national, had a fairly mundane background and history for a man described by President George W. Bush's administration as among "the worst of the worst."¹¹ Born and raised in Adelaide, Australia, Hicks would later be described as a "wanderlust in search of a purpose."¹² He did poorly in school and got expelled for trouble with drinking and drugs. He drifted around Australia, working a number of jobs, including stints as a kangaroo skinner and a hand on cattle ranches. He tried to join the Australian army but was rejected. After fathering two children with an aboriginal woman, he set off to travel the world.¹³ He went to Japan where he did very little except watch television. One of the ironies of his circumstances was that the only English language television station was CNN International which covered extensively the Balkan wars between the Serbs and Kosovars. This was the first time that David Hicks became interested in international affairs and his own brand of heroism:

I just had something inside that said I had to go and do that, like a spur of the moment sort of thing. . . . I found out there was one group . . . training in northern Albania.

11. Katty Kay, *No Fast Track at Guantánamo Bay*, BBC NEWS, Jan. 11, 2003, <http://news.bbc.co.uk/2/hi/americas/2648547.stm> (quote attributed generally to U.S. officials); *Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says*, N.Y. TIMES, Oct. 23, 2002, at A14; Neil A. Lewis & Eric Schmitt, *Cuba Detentions May Last Years*, NYTIMES.COM, Feb. 13, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9A06E5D8113AF930A25751C0A9629C8B63&scp=1&sq=cuba+detentions+may+last+years&st=nyt>). An admiral quoted in a Defense Department press release said, "They are the worst of the worst, and if let out in the street, they will go back to the proclivity of trying to kill Americans and others." Linda D. Kozaryn, *U.S. Gains Custody of More Detainees*, DEFENSELINK, Jan. 28, 2002, <http://www.defenselink.mil/news/newsarticle.aspx?id=43813>.

12. Raymond Bonner, *Australia Terrorism Detainee Leaves Prison*, N.Y. TIMES, Dec. 29, 2007, at A7.

13. *Id.*

They were going into Kosovo and I realised that maybe, at a wild guess, I could go there and try it and I did it. To me that was doing the impossible.¹⁴

In 1999 Hicks went to Albania, joined the Kosovo Liberation Army (KLA) and completed their basic military training.¹⁵ By the time Hicks got to Albania, the war was nearly over and he was sent home when the peace accord was in place. When he returned to Australia, he began to investigate and later convert to Islam. He soon left Australia for Pakistan with names of contacts to travel around Asia.¹⁶ Traveling to Afghanistan, he was invited to attend an Al Qaeda training camp. Beginning in January of 2001, he trained at various Al Qaeda camps. He spouted anti-U.S. rhetoric, supporting the Taliban. He claimed he met Osama bin Laden more than twenty times.¹⁷ He left Afghanistan on September 9, 2001, went to Pakistan to visit a friend, and watched the 9/11 attacks on television.¹⁸ He had no advance knowledge of the 9/11 attacks.¹⁹ He later told the Australian Federal Police, “It’s not Islam, is it? It’s like the opposite of what I was . . . wanted to do. Meant to help the people, stop oppression. And they did the opposite.”²⁰

On September 12, 2001, Hicks decided to return to Afghanistan. He later said that he wanted to gather his belongings. “It might sound stupid, but I’ve got lots of nice Islamic clothes I’d been saving. There’s lots of money in them with stuff I could have had home.” Had he not gone back, he says, “I would have lost my Islam.”²¹

Once in Afghanistan, Hicks joined Al Qaeda forces in the Kandahar airport. He was given an automatic rifle and, in

14. Debbie Whitmont, *The Case of David Hicks*, AUSTL. BROAD. CORP., Oct. 31, 2005, <http://www.abc.net.au/4corners/content/2005/s1494795.htm>.

15. See LASRY, *supra* note 2, ¶ 6.51 (these facts—stipulated to by the prosecution and defense—were the basis for David Hicks’s ultimate guilty plea).

16. *David Hicks: Nothing but an Echo*, CLARK CMTY NETWORK, Jan. 22, 2007, <http://securingamerica.com/ccn/node/10638> [hereinafter *Nothing but an Echo*].

17. He later told Australian federal police that he was “just trying to make himself sound important by boasting.” *Id.*

18. See LASRY, *supra* note 2, ¶ 9.4.

19. *Id.*

20. Whitmont, *supra* note 14.

21. *Id.*

October 2001, sent to guard a Taliban tank.²² After moving to other locations with Al Qaeda forces, he decided to leave the country for Pakistan when the United States closed the borders. He sold his weapons to pay for a taxi to Pakistan.²³ He was picked up by the Northern Alliance²⁴ which sold him to the United States for several thousand dollars.²⁵

Hicks was held on a Navy ship and then blindfolded and taken by chopper to an unknown place for interrogation. He claimed that he was brutally beaten and tortured.²⁶ In January 2002, he was brought to Guantánamo Bay, where the United States claimed that he and others could be held indefinitely without charge.²⁷ His treatment was severe, but less so than other detainees—David was white, Australian, and spoke English.²⁸ He became the first plaintiff in what ultimately became the landmark case of *Rasul v. Bush*, which established that Guantánamo detainees had the right to judicial review of their detention.²⁹

In December, 2003, nearly two years after his capture, Hicks was referred for a military commission. The authorities believed that Hicks would plead guilty, thereby legitimating the commissions.³⁰ They permitted him access to counsel solely for the purpose of entry of a guilty plea.³¹

22. LASRY, *supra* note 2, ¶ 6.64.

23. *Id.*

24. *Id.* at ¶¶ 46-49.

25. Bonner, *supra* note 12.

26. “New Evidence” Backs Hicks’s Torture Claim, AUSTL. BROAD. CORP., Oct. 31, 2005, <http://www.abc.net.au/news/newsitems/200510/s1494779.htm> (citing August 5, 2004 affidavit filed by David Hicks’s attorneys).

27. LASRY, *supra* note 2, at 3, 5 (citing the United States government’s position in *Rasul v. Bush*, 542 U.S. 466, 466 (2004)).

28. Whitmont, *supra* note 14.

29. Hicks was represented by the Center for Constitutional Rights and its cooperating attorney, Joseph Margulies. See *supra* note 4 and accompanying text.

30. Interview of Maj. Michael Dan Mori, United States Marine Corps, in N.Y., N.Y. (May 3, 2007).

31. See *infra* note 39.

LAWYERING IN THE “LEGAL BLACK HOLE”³²

Major Michael Dan Mori of the U.S. Marine Corps is a now-celebrated military officer who was detailed to represent David Hicks.³³ In June 2003 Mori returned from his station in Hawaii to do so. Hicks was also represented by FAC (Foreign Attorney Consultant) Australian attorney Steve Kenny.³⁴

Mori entered the case in a “court martial mindset.”³⁵ He expected that rules and procedures would be fair and that he would be able to obtain the facts and apply the law as he had been trained in the JAG corps to understand it. He was sorely surprised as he got into the commission system. The entire structure of the military commissions was, as he put it, “set up with a vested interest in convictions.”³⁶ There was no independent judge; hearsay was permitted, as was evidence

32. The press uses this term extensively. See, e.g., *Editorial: A Legal Black Hole; Guantánamo Detainees Deserve Habeas Relief*, L.A. TIMES, May 1, 2007; *Editorial: Black Hole: By Stripping Detainees of Legal Rights, U.S. Has Created a Judicial Conundrum*, HOUSTON CHRONICLE, June 8, 2007.

33. This was Mori’s sole assignment for nearly four years until the case was resolved. Mori traveled to Bosnia, Afghanistan, and Australia nearly ten times to conduct investigations and engage in other activities on behalf of Hicks.

34. The FAC’s were essentially Australian equivalents of military Judge Advocate General (JAG) officers and were allowed to “consult” with Hicks, subject to the U.S. Defense Department’s rules on security restrictions. For the Defense Department’s outline of these rules, see Press Release, United States Department of Defense, *U.S. and Australia announce agreements on Guantánamo Detainees* (Nov. 25 2003), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=5818>. The types of pressures and constraints imposed on Hicks’s American lawyers were echoed, if not amplified, for their Australian counterparts. Australian attorneys McLeod and Griffin, who replaced Kenny in 2005, had to sign lengthy agreements with the U.S. military including a provision saying that they would be extradited to the U.S. for prosecution if they were found to be violating commission rules on classified information. Kenny had signed a similar document in 2003, but was able to get the extradition clause taken out. McLeod said of the agreement, “I’ve never seen anything like it. It goes on for pages. It was very intimidating but the problem was, if you didn’t agree to sign it, you weren’t going to get access to David Hicks.” Fenella Souter, *Keep Quiet or Face Extradition to the U.S.: Hicks Lawyers Made To Sign Gag Order*, SYDNEY MORNING HERALD, Sept. 23, 2006, <http://www.smh.com.au/news/world/keep-quiet-or-face-extradition-to-us-hicks-lawyers-made-to-signgag-order/2006/09/22/1158431897922.html>.

35. Mori Interview, *supra* note 30.

36. *Id.*

obtained under coercion. Attorney client conversations could be monitored.³⁷ As Mori said:

Stepping into it, I thought I was going to be involved in courts martial. I have plenty of experience dealing with court martials and that's the laws we would be using. Unfortunately what I found out [was] that we were in something different, something completely made up and resurrected from 1492.³⁸

As many lawyers recognized, “basically there were no rules. They made them up as they went along.”³⁹ The highly respected Independent Observer for the Law Council of Australia, who was a former justice on the Supreme Court of Victoria, would later call these “ad hoc” procedures and term the ultimate proceedings “shambolic.”⁴⁰ Critical flaws included: (1) a person could be convicted based on secret evidence and summary evidence; (2) “evidence” could be based on rank hearsay (e.g., interrogators reading statements from other detainees whether obtained through abuse, coercion or torture) and without any defense access to those witnesses; (3) military officers were the judges and juries and the rules for who served on the judicial panels were arbitrary; (4) judges on the panel other than the presiding judge need not be lawyers; (5) civilian counsel could not readily gain access to the accused, witnesses, and evidence; (6) attorney client discussions could be monitored; and (7) counsel was restricted from speaking to the press.⁴¹

Representation before such a body presented the most profound of ethical dilemmas. How could a lawyer represent anyone in such a system? This was a front burner issue for the criminal defense bar, particularly just after March 2002 when the procedures for the operation of the commissions were established

37. *Id.*

38. Transcript from an interview with Maj. Mori on *Enough Rope*, with Andrew Denton, Australian Broadcasting Corporation, (Aug. 14 2006) available at <http://www.abc.net.au/tv/enoughrope/transcripts/s1709428.htm>.

39. Interview with attorney Joshua L. Dratel, in N. Y., N.Y. (Jun. & Nov. 2007) and Interview with attorney Joshua L. Dratel, in Washington, D.C. (Oct. 2007) [hereinafter Dratel Interviews].

40. LASRY, *supra* note 2, ¶ 5.64.

41. See Dratel Interview, *supra* note 39; Hamdan v. Rumsfeld, 548 U.S. 577, 614. See also Abraham, *supra* note 8; note 42, below.

by the Secretary of Defense.⁴² Significantly, in August 2003, the National Association of Criminal Defense Lawyers (NACDL) issued an Ethics Opinion declaring that it was unethical for a civilian lawyer to represent a detainee before the commissions with procedures that deny fundamental due process.⁴³ Mori, however, was detailed to represent Hicks. Mori and Steve Kenny visited him in December 2003. The appointing authority permitted this attorney client meeting solely for the purpose of discussing a plea bargain and imposed restrictions on Mori's ability to speak about the case with the media. Despite the press's intense interest in the Hicks case, Mori did not make public statements. He was cautious.⁴⁴

Mori had no experience in cases involving the law of war. He sought assistance. Shortly after this first Guantánamo visit, civilian defense attorney, Joshua Dratel, joined the Hicks defense team.⁴⁵ Dratel, then co-chair of the NACDL committee on military tribunals, was a highly respected civilian criminal defense lawyer who had handled the "embassy bombing" case in New York and marshaled expertise on terrorism cases.⁴⁶ He had previously obtained security clearance and thus, was readily available to consult with Hicks.⁴⁷

The government attempted to impose restrictions on Dratel's representation of Hicks—the precise terms that led to the NACDL Ethics Opinion that it was unethical to represent Gitmo detainees.

42. See Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9 (2008). The military commissions were created by Presidential Order on Nov. 13, 2001. See Press Release, The White House, President Issues Military Order (Nov. 13, 2001) *available at* <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. See also Williams Michael, Jr. & Joseph Margulies, *Trying Terrorists Before Military Commissions*, 59 BENCH & B. MINN. 20 (Feb. 2002).

43. Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Op. 03-04 (Aug. 2003), *available at* [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicso pinions/\\$file/ethics_op_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicso pinions/$file/ethics_op_03-04.pdf). See Cheh, *supra* note 3; see also Lasry, *supra* note 2.

44. Mori Interview, *supra* note 30.

45. "Civilian defense counsel" are private lawyers who apply to and must be approved by the Office of Military Commissions Chief Defense Counsel to defend detainees (along with military counsel) in the commissions.

46. See U.S. v. Bin Laden, 160 F. Supp. 2d 670 (S.D.N.Y. 2001).

47. Dratel Interview, *supra* note 39.

It presented Dratel with an affidavit that required him to acknowledge that his attorney-client consultations could be monitored, that all of his work on the case had to be completed at Guantánamo, and that the defense team would not include consultants. Dratel refused to sign. The government then negotiated the terms of the affidavit. Two days later, it withdrew nearly all conditions. The government backed down because it wanted Dratel to consult Hicks so the guilty plea could be secured.⁴⁸

Dratel and Mori visited Hicks on January 9, 2004.⁴⁹ No doubt, this case was unique and could not be treated like any other criminal case where a lawyer seeks to discuss disposition of criminal charges. On the one hand, the lawyers believed that a plea bargain might, as the government hoped, provide some legitimacy to the commission system and Hicks's detention.⁵⁰ They were loathe to serve as justification for this system. On the other hand, they were zealous advocates for an individual client, and as any zealous defense lawyer in a criminal case, had to discuss the potential benefit of a plea bargain.⁵¹ The lawyers acknowledged this classic potential conflict, discussed it, and then proceeded to discuss plea bargaining with Hicks. Of course, as

48. *Id.* The affidavit, known as Annex B, also contained a condition that defense counsel acknowledged that he would not be present during a hearing on the use of classified information. Dratel ultimately signed an affidavit that indicated that he could challenge his lack of presence at such a hearing.

49. Dratel Interview, *supra* note 39. Dratel was the first civilian lawyer permitted access to a client at Guantánamo Bay.

50. The government, expecting that a plea bargain with terms prohibiting Hicks from talking about conditions of his confinement, hoped this information would not become public knowledge. Dratel Interview, *supra* note 39. See p.492 *infra* regarding conditions of Hick's ultimate plea bargain.

51. This potential conflict between the lawyer's representation of an individual client and the lawyer's personal and political goals—often termed “cause lawyering”—was hardly unique. Criminal defense lawyers confront such potential conflicts in many settings. It is amplified in the Guantánamo cases where the system is viewed as, and ultimately adjudged to be, fundamentally unfair. See SARAT & SCHEINGOLD, *supra* note 5; Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantánamo Bay*, 30 FORDHAM. INT'L L.J. 491, 491 (2007); Margaret Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1195 (2005); MODEL RULES OF PROF'L CONDUCT R. 1.7. Ultimately there was no conflict of interest. See p.495 *infra*.

there were no existing criminal charges, there could not be a full discussion of disposition until the charges were concretized which they expected would be in April 2004. Hicks and the lawyers soon realized that a guilty plea was not an appropriate resolution, as there appeared to be no options to secure release within the military commission system, nor could the lawyers wait for the resolution of the civil cases that challenged the legality of the military commissions.⁵² “It would take years,” Mori later said, “and David would still languish at Guantánamo subject to abuse that is now well documented.”⁵³

With no meaningful recourse in the military commissions, Hicks’ legal team shifted their focus to the broader political context. They strategized that the route to securing Hicks’s release would be primarily through the court of public opinion. They would, of course, continue to zealously advocate in the commissions and in the United States courts, but they knew that the Hicks case had to be brought to the Australian people, as well. Only they could put pressure on their government to acknowledge the necessity for a meaningful legal process that conformed to requirements of law.⁵⁴

It was daunting to overcome the public’s perception of David Hicks because there was a strong and loud sentiment in Australia

52. Dratel Interview, *supra* note 39.

53. Mori Interview, *supra* note 30. Mori’s assessment was borne out by events. Despite Supreme Court rulings in *Rasul v. Bush*, 452 U.S. 466, and *Hamdan v. Rumsfeld*, 548 U.S. 557, many Guantánamo detainees still languish without ability to appear in fair proceedings. See, e.g., David Bowker & David Kaye, *Guantánamo by the Numbers*, N.Y. TIMES, Nov. 10, 2007, at A15 (noting that as of publication, over three hundred detainees remained at the camp, and not a single one had gone to trial); William Glaberson, *U.S. Mulls New Status Hearings for Guantánamo Inmates*, N.Y. TIMES, Oct. 15, 2007, at A16 (placing number of detainees at 330). In early February of 2008, the government announced military commission charges against six “high value” detainees. See William Glaberson, *6 at Guantánamo Said To Face Trial in 9/11 Case*, N.Y. TIMES, Feb. 9, 2008, at A1. It has since dropped the case of one, Mohammed al-Qahtani, without explanation. Qahtani’s military lawyer suspects this is because the evidence that would have been used against him was “derived by torture.” William Glaberson, *Case Against 9/11 Detainee Is Dismissed*, N.Y. TIMES, May 14, 2008. The proceedings in Qahtani’s case clearly demonstrate the “heads I win, tails you lose” logic of the military commissions: The fact that he is not being tried means simply that Qahtani can continue to expect indefinite detention at Guantánamo.

54. LASRY, *supra* note 2, at 16-17.

that Hicks was a dangerous and high-level terrorist.⁵⁵ Ultimately the blame for this sentiment was put on the United States' release of a photo of Hicks with a rocket launcher that implied that he was at a terrorist training camp. There was widespread and consistent publication of this photo in Australia. In fact, the photo was from his 1999 training with NATO allies in Albania. As Mori stated:

Unfortunately the photo makes it appear as if he is firing a rocket launcher. If they showed the whole picture, you'd see there is nothing in it, it's just the tube. I have my pictures in my military books, I'm holding my machine gun on my waist, and everybody's has got their buddy picture.⁵⁶

Media perception of Hicks had to be reversed.

Mori, who had only spoken to the media once before in his career, decided that such public comment was essential to zealous representation of his client. He discussed the idea of media commentary with military colleagues. He was nervous. Up to that point, no military lawyer had publicly criticized the military commissions. They said "are you sure that you want to do this?"⁵⁷ But Mori reasoned that the government itself had made his client a media case,⁵⁸ and that Hicks therefore had to be defended in the media—particularly because there was no actual court in which to do so.⁵⁹

55. See *id.* at ¶¶ [6.51-.52].

56. *Enough Rope with Andrew Denton* (ABC television broadcast Aug. 14, 2006) (transcript available at <http://www.abc.net.au/tv/enoughrope/transcripts/s1709428.htm>).

57. Mori Interview, *supra* note 30.

58. Through frequent press releases and public statements, as in the case of Jose Padilla, government officials had made David Hicks a household name; the popular media and the Defense Department itself simply referred to him as the "Australian Taliban." See *Australian-Taliban To Be Handed over to U.S. Military*, CNN.COM, Dec. 14, 2001, <http://archives.cnn.com/2001/WORLD/asiapcf/auspac/12/14/ret.australia.taliban/>; Kathleen T. Rhem, *Military Commission Proceedings To Resume for 'Australian Taliban,'* DEFENSELINK, Sept. 21, 2005, <http://www.defenselink.mil/news/newsarticle.aspx?id=17250>.

59. During 2004, the appointing authority slowly shifted its views on military counsel's ability to exercise First Amendment rights and to speak to the press. Initially, the legal affairs officer expressed skepticism about any statements to the press. Then Mori obtained permission to give his opinion

Mori carefully reviewed the Supreme Court's opinion in *Gentile v. State Bar of Nevada*.⁶⁰ *Gentile* and subsequent ethics rules that protect lawyers from discipline when the public statements about a pending case are made to overcome the prejudicial effect of publicity not initiated by the lawyer. He and others with whom he consulted believed that Mori's press statements were necessary to overcome the severe prejudice caused by the government's release of numerous statements and the resulting articles.⁶¹

The defense launched a three-country media strategy in Australia, Great Britain, and the United States, including a frontal attack on the system that would be used to try Hicks. Mori traveled to Australia numerous times in early 2004 and proceeded to speak out strongly against the legal regime in Guantánamo Bay. He believed that it was essential for Australians to understand the Guantánamo system that its government supported. His March 2004 trip made him a "minor celebrity."⁶² A self-described apolitical person, he said of the tribunals, "It offends my understanding of what justice is that's been ingrained in me by the Marine Corps and by my legal training."⁶³

In April 2004, he surprised an audience of Oxford University students with his candor when he spoke out, along with military lawyers Lieutenant Commander Swift and Major Mark Bridges, and denounced the tribunals. He told them that "the system is not set up to produce even the appearance of a fair trial," and declared that they were "kangaroo courts."⁶⁴ He argued that Hicks should be tried in conformity with international legal standards, or else returned to Australia.⁶⁵ Mori also spoke at public rallies in Australia. His statements and speeches harshly criticizing the

on the rules and procedures of the military commissions but was not permitted to make more specific comments about Guantánamo or the Hicks case. As the Hicks case began to receive significant media attention, these restrictions were relaxed. See Mori Interview, *supra* note 30.

60. 501 U.S. 1030 (1991); See MODEL RULES OF PROF'L CONDUCT R. 3.6.

61. Mori Interview, *supra* note 30; Dratel Interview, *supra* note 39.

62. Neil A. Lewis, *Military's Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

63. Raymond Bonner, *Marine Defends Guantánamo Detainee, and Surprises Australians*, N.Y. TIMES, Mar. 28, 2004, at 13.

64. Neil A. Lewis, *Military Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

65. *Id.*

tribunals rattled his superiors.⁶⁶ He still confined his comments to the lack of fundamental fairness in the commission process, however, and was careful not to discuss conditions of confinement or the specific facts of the Hicks case.

The defense worked closely with the human rights community in Australia. Geoff Robertson, one of Australia's highest profile human rights lawyers, challenged the Howard government for not demanding the release of an Australian citizen and said that it could face war crimes for "willfully depriving a prisoner of war of the right of a fair and regular trial."⁶⁷

Despite the media attention, the Australian government would not heed any requests that it should demand a fair legal process or the return of its citizen. Prime Minister Howard's rationale was that they could not bring him home because there was no crime that he could be charged with in Australia. The Howard government believed that the Bush administration had the situation "under control."⁶⁸

By spring 2004, Mori had become a minor celebrity in Australia. He visited regularly and his interviews appeared frequently. One reporter for a major national television network said that news accounts "compared Major Mori to Tom Cruise, who played a valiant military defense lawyer at Guantánamo in the film 'A Few Good Men.'" The Aussies loved him. "Mori has come to represent everything about Americans that Aussies love to admire."⁶⁹

In the United States Mori took reporters to the Lincoln Memorial in Washington D.C. to talk about the Hicks case. Though Mori's statements were confined to criticism of the commissions, his public stance and participation in rallies were angering his superiors.

April through June 2004 were watershed months for Hicks and Gitmo detainees. In April 2004, after the Supreme Court heard oral arguments in *Rasul v. Bush*, the government decided to permit habeas corpus lawyers into Guantánamo and leaked

66. Mori Interview, *supra* note 30.

67. Geoffrey Robertson, *In Thrall to the Bush Lawyers*, THE AGE, Aug. 17, 2006, <http://www.theage.com.au/news/opinion/in-thrall-to-the-bush-lawyers/2006/08/16/1155407878903.html> (last visited Apr. 2, 2008).

68. Dratel Interview, *supra* note 39.

69. *Nothing but an Echo*, *supra* note 16.

information about the conditions under which the detainees were held.⁷⁰ The Abu Ghraib scandal was front-page news and led to subsequent allegations and investigations of abuses in military prisons.⁷¹ In June of 2004, the Supreme Court decided *Rasul v. Bush*, declaring that detainees had the right to judicial review, and the infamous “Torture Memo” was leaked to the press.⁷² Slowly Dratel and Mori began to speak more openly with the press about the facts of Hicks’s confinement and his case.

In June 2004 official charges were finally filed against Hicks. These charges were unknown to the law of war and “inherently flawed.”⁷³ First, even though Hicks was an Australian who owed no formal allegiance to the United States, he was charged with “aiding the enemy.” He was also charged with the crime of conspiracy—which the Supreme Court noted in the *Hamdan* case was “not a recognized violation of a law of war”⁷⁴—and of attempted murder by an unprivileged belligerent.⁷⁵

Hicks was arraigned on the charges in August 2004 and preliminary motions were argued in October 2004. The day after arguments on the Hicks motions, the entire proceeding was stayed as a consequence of the District Court’s ruling in *Hamdan v. Rumsfeld* that the military commissions were violative of the Uniform Code of Military Justice.⁷⁶ Once again, Hicks had no legal recourse in the military commissions.

Relying upon *Hamdan*, the defense filed an amended complaint in federal court and in the military commissions attacking the structure and procedures of the commissions. These cases were stayed pending resolution of the *Hamdan* case. The Howard government, publicly criticized for its position in the Hicks case, said that the defense lawyers bore responsibility for

70. Dratel Interview, *supra* note 39.

71. Thom Shanker & Jacques Steinberg, *The Struggle for Iraq: Captives; Bush Voices ‘Disgust’ at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, at A1.

72. *Rasul v. Bush*, 542 U.S. 466 (2004); Dana Priest, *Justice Dept. Memo Says Torture ‘May Be Justified,’* WASHINGTONPOST.COM, June 13, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>; *The Military Archipelago*, N.Y. TIMES, May 7, 2004, at A30.

73. LASRY, *supra* note 2, ¶ 4.1.

74. *Hamdan v. Rumsfeld*, 548 U.S. 557, 563.

75. LASRY, *supra* note 2, ¶ 4.1.

76. 344 F. Supp. 2d 152 (D.D.C. 2004).

the delay.⁷⁷

By this time, however, the public perception of Howard's criticisms of the Hicks team had shifted. This resulted, in part, from comments from Lex Lasry, the prominent Australian lawyer who had attended the October 2004 preliminary hearings as an independent observer and representative of the Law Council of Australia. Upon his return to Australia, he roundly condemned the proceedings.⁷⁸ This provided impetus for the involvement of the established legal community.⁷⁹

The case had now become of widespread concern to the Australians as the public became increasingly knowledgeable about Hicks's case. With the shift in public perception and the pressure on the Howard government to utilize its "moral authority" to insure that the government's "integrity was not compromised by its support of [the military commission] process," the lawyers could now hopefully engage in behind the scenes negotiations with the government.⁸⁰ David McLeod and Michael Griffin, military reserve lawyers with private practices, became Australian counsel to the Hicks case.⁸¹

While pursuing negotiations in Australia and with legal proceedings stayed in the United States, the defense turned to the British legal system. During one GTMO meeting with Mori and Griffin, the lawyers learned that Hicks's grandparents were British citizens. Britain had recently changed its laws so that Hicks could now obtain British citizenship based upon his lineage. During 2005, the legal team secured the services of solicitors and barristers in London to file for Hicks's citizenship. The British government had demanded and successfully secured the release of nine of its citizens from Gitmo, and the legal team hoped that

77. LASRY, *supra* note 2, ¶ 3.38. The independent examiner concluded that this was "nonsense and demonstrates why Australia's moral authority has been compromised by the attitude of the Australian government." *Id.* at ¶ 3.38.

78. *Hicks Trial 'Shambolic,'* THE AGE, June 24, 2007, <http://www.theage.com.au/news/national/hicks-trial-shambolic/2007/07/24/118504308874.html?page=fullpage#contentSwap1>. Lasry's basic biography is available on the University of Sydney's website. <http://www.econ.usyd.edu.au/event/55.html>.

79. Dratel Interview, *supra* note 39.

80. *Id.*

81. These lawyers replaced Steve Kenny. *See supra* note 34.

when Hicks obtained citizenship, it would do so for him.⁸²

In December 2005, the British High Court, over the government's objection, ordered that Hicks should be registered as a British citizen.⁸³ The British Home Office appealed numerous times, and the High Court finally ordered that it would not allow additional appeals.⁸⁴ The Home Office complied and "secretly" made Hicks a citizen while in his cell at Guantánamo.⁸⁵ The next day the British Home Secretary personally revoked citizenship.⁸⁶ The defense then filed a legal action that was never resolved.⁸⁷ The Hicks citizenship issue led to increased awareness of the Hicks case in Britain, and exacerbated public concern in Australia.

In the summer of 2005, the D.C. Circuit reversed the district

82. *U.K. Guantánamo Four To Be Released*, BBC NEWS, Dec. 8, 2007, http://news.bbc.co.uk/2/hi/uk_news/7133760.stm. For a BBC News comprehensive timeline, see <http://news.bbc.co.uk/2/hi/americas/6241991.stm> (five British detainees released on March 19, 2004). See also *'Delight' at Release of Guantánamo Men*, BBC NEWS, Mar. 11, 2004, http://news.bbc.co.uk/2/hi/uk_news/3500156.stm (detailing release of the "Tipton Three"—which included Rasul—and two others); Jane Holroyd, *Government 'Pushed' for Hicks Trial*, THE AGE, Sept. 27, 2005, <http://www.theage.com.au/news/world/father-welcomes-david-hicks-trialdate/2005/09/27/1127586827641.html> (the Australian Foreign affairs minister, Alexander Downey, claimed that the attorneys were trying to "circumvent" justice by attempting to gain a British passport for Hicks).

83. See Annabel Crabb, *Hicks Wins Citizenship Fight*, SYDNEY MORNING HERALD, May 7, 2006, <http://www.smh.com.au/news/world/court-puts-hicks-back-on-track-for-british-citizenship/2006/05/06/1146335967064.html> [hereinafter Crabb, *Hicks Wins*]; Annabel Crabb, *Law Strips Hicks of UK Citizenship in Hours*, SYDNEY MORNING HERALD, Aug. 20, 2006, <http://www.smh.com.au/news/world/law-strips-hicks-of-uk-citizenship-in-hours/2006/08/19/1155408075077.html> [hereinafter Crabb, *Law Strips Hicks*].

84. Crabb, *Hicks Wins*, *supra* note 83.

85. *Id.*

86. Jeannie Shawl, *Gitmo Detainee Stripped of UK Citizenship One Day After Request Granted*, JURIST, Aug. 19, 2006, <http://64.41.216.61/paperchase/2006/08/gitmo-detainee-hicks-stripped-of-uk.php> (noting that the citizenship-stripping was pursuant to the Immigration, Asylum and Nationality Act of 2006 which allows the secretary to "deprive a person of citizenship if the Secretary of State is satisfied that deprivation is conducive to the public good." See Immigration, Asylum and Nationality Act 2006, S. 56 (1), available at http://www.opsi.gov.uk/acts/acts2006/ukpga_20060013_en_1#56).

87. Upon defense motion, the court ordered a hearing on the issue of whether Hicks had been tortured. The hearing was never held because of the resolution of Hicks's case in the military commission. Dratel Interview, *supra* note 39 (motions on file).

court in *Hamdan* thus permitting the resumption of the military commissions.⁸⁸ The hope faded for a negotiated return of Hicks to Australia, and the Howard government pressed for a hearing date.⁸⁹ First scheduled for September 2005, the date was adjourned until November 2005, with the Howard government maintaining that the defense lawyers were responsible for the delay.⁹⁰ The proceedings were soon stayed again when the United States Supreme Court then granted certiorari in *Hamdan*.

During 2006, the Australian public clamored for the Howard government to press for Hicks's return.⁹¹ There were rallies throughout the country and regular press accounts of Hick's unlawful detention. Events had progressed to the extent that Dratel and Mori, in an April 2006 trip to Australia, had meetings to discuss the rules and conditions for a transfer agreement if Hicks was returned to Australia. The defense team also engaged lawyers who began a legal action in Australia to order Hicks returned.⁹²

In June 2006, the historic *Hamdan* decision, which declared the military commissions to be violative of the Geneva Conventions and the Uniform Code of Military Justice, nullified the military commission proceedings against Hicks. The Military Commissions Act of 2006 (MCA) was passed in response to *Hamdan*.⁹³

Mori remained on the offensive in the media, attacking the structure and proceedings established under the new MCA. In

88. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005).

89. Holroyd, *supra* note 80.

90. LASRY, *supra* note 2, ¶ 3.38.

91. See, for example, *Seven Out of Ten Australians Want Hicks Home*, CANABERRA TIMES, Dec. 14, 2006; *Free-Hicks Rallies Roll On*, DAILY TELEGRAPH, Dec. 11, 2006; *Australians Believe Hicks Should Get Fair Trial Now*, TOWNSVILLE BULLETIN, Sept. 16, 2006. In November of 2006, the Upper House of the Australian Senate passed a motion urging the government to intervene in Hicks's case. *Senate Wants Hicks Home*, DAILY TELEGRAPH, Nov. 10, 2006. The sheer volume of coverage received by Hicks in 2006 is also worth noting: A search of Australian newspapers in which Hicks' name appeared in headlines reveals 408 hits for that year, with entire articles devoted to minute developments in the status of his case, his physical condition, and even his father's nomination for "Father of the Year."

92. A hearing on that case was scheduled for May 2007 and became moot upon the resolution of Hicks' case in the military commission. Dratel Interview, *supra* note 39 (motions on file).

93. 10 U.S.C. §§ 948a-950w (2007).

August 2006, he went on a lecture tour in Australia on behalf of Hicks, attending a rally in Adelaide and leading a march to the office of the Australian Foreign Minister. He charged the Bush administration with creating another illegal system that violated Hicks's rights and reiterated that the new military commission system—like the old one—was “rigged for convictions only.”⁹⁴ Speaking at an almost sold-out event organized by the Australian Lawyers' Alliance at the Brisbane Convention Center, Mori noted that “providing information to the public and elected officials had to become part of defending [Hicks].”⁹⁵ “I'm sure some ministers in the Australian Government would just like us to go away quietly and let David get done over by an unfair system,” Mori remarked, “but that wouldn't be doing justice to an Australian citizen.”⁹⁶

Howard's approval ratings continue to decline. Especially when joined with the issue of the Iraq war, Hicks's case seemed to symbolize the Howard government's willingness to acquiesce to American demands—a vulnerability particularly noted in Australia's 2007 elections that linked him to the increasingly unpopular President Bush.⁹⁷ In Australia in November 2006, Mori attended the signing of the Fremantle Declaration, a “declaration demanding the Commonwealth take action to ensure Guantánamo Bay detainee David Hicks is immediately brought to trial.”⁹⁸ All attorneys general of the States and territories of

94. *Hicks' Lawyer to Meet with Ministers in Canberra*, AUSTRALIAN ASSOCIATED PRESS, Aug. 13, 2006.

95. *Stealing a March: Hicks' Lawyer Pounds PR Trail To Win Over Hearts and Minds*, COURIER MAIL, November 14, 2006.

96. *Id.*

97. Steve Lewis, *Newspoll: Rudd Gains Ground on Howard*, THE AUSTRALIAN, Jan. 23, 2007, <http://www.theaustralian.news.com.au/story/0,20867,21102080-601,00.html> (“[a]s John Howard prepares to freshen up his ministry, voters have also criticised the Government's handling of the war in Iraq, with more than 70 percent saying it will influence their vote. The Government's handling of terror suspect David Hicks has also been denounced by voters” *Id.*); Nick Bryant, *Howard Faces Election Year Battle*, BBC NEWS, Feb. 15, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6361361.stm> (noting “one of the main effects of the row over Iraq has been to bind Mr. Howard even closer to George W. Bush, a U.S. president deeply unpopular in many quarters of the Australian electorate. Whether it is his reluctance to engineer the quick release of David Hicks, an Australian imprisoned for five years without trial at Guantánamo Bay, or his shared stance with the Bush administration over Kyoto, Mr. Howard would appear to be on the wrong side of public opinion.”).

98. *A-Gs Demand Immediate Action on Hicks Trial*, AUSTL. BROAD. NEWS

Australia attended with the pointed exception of the Federal Attorney General, Philip Ruddock, who refused to attend. His absence was highlighted in the press.⁹⁹

In February 2007 the charges were dismissed and two new charges were sworn against Hicks: (1) Attempted murder in violation of the law of war; and (2) providing material support for terrorism. The Convening Authority for the Military Commissions referred only the material support for terrorism charge for trial.¹⁰⁰ This charge was not available under the old military commissions, but was introduced in the MCA of 2006.

Just as Hicks was about to be arraigned on these new charges, Colonel Morris Davis, the then chief prosecutor for the military commissions, publicly warned that Mori's "politicking" on behalf of Hicks could result in prosecution for his actions under Article 88 of the Uniform Code of Military Justice (UCMJ), which forbids officers from speaking "contemptuous words" about the President, Vice President, or Secretary of Defense.¹⁰¹ Davis claimed, among other things, that "certainly in the U.S. it would not be tolerated having a U.S. marine in uniform actively inserting himself into the political process. It is very disappointing to see that happening in Australia and if that was one of my prosecutors, they would be held accountable."¹⁰²

ONLINE, Oct. 11, 2006,
<http://www.abc.net.au/news/newsitems/200611/s1785856.htm>.

99. *Id.*

100. See LASRY, *supra* note 2, ¶ 4.5. This charge had two specifications. The first provided that Hicks intentionally provided material support or resources to an international terrorist organization (al Qaeda) which was engaged in hostilities against the United States. The second specification alleged that Hicks provided that support knowing or intending that that it would be used in preparing for or carrying out an act of terrorism. Hicks ultimately pled only to the first specification.

101. Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, Mar. 5, 2007, at A10. See 10 U.S.C. § 888 (2006) ("Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.").

102. David Nason, *Mori Charges Could Be Laid After Trial*, THE AUSTRALIAN, Mar. 03, 2007, available at <http://www.news.com.au/story/0,23599,21315542-2,00.html>.

While Davis's notion that Mori could have been prosecuted¹⁰³ appears far-fetched—Article 88 has rarely been invoked in military courts-martial, and only in extreme cases¹⁰⁴—Davis's allegations were serious enough to cause Mori to worry that he might be impeding Hicks's case by continuing to represent him.¹⁰⁵

The defense once again went on the offensive. Dratel, in public comment, said that Davis's threats were the "latest example of the corrupt system that will try Hicks."¹⁰⁶ Dratel and Synder filed a motion to disqualify Davis based upon prosecutorial misconduct. They charged:

The curious timing of Col. Davis' initial accusations . . . suggests that Col. Davis made the accusation to chill and hinder Maj. Mori's representation of Mr. Hicks and to derail the defense shortly before the arraignment. These allegations diverted the defense team from preparing for Mr. Hicks' trial, forcing them to focus instead on assessing the potential conflict of interest between Maj. Mori and Mr. Hicks. They also required Maj. Mori to refrain from making public comments on behalf of Mr. Hicks until he could obtain legal advice on the issue.¹⁰⁷

The threat of a court martial of Mori led to press accounts that Hicks's case would be delayed yet again if Mori was recused from representation.

The defense filed numerous motions all the while, negotiating a plea bargain on favorable terms for Hicks. The anticipated plea, of course, would be premised upon a charge that was without

103. See, e.g., Morris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, <http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story> (ironically, Colonel Davis resigned as Chief Prosecutor over the "politicized" nature of the military commission's procedures and subsequently leveled his own criticisms of his former superiors.).

104. See Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW. 1, 2-3 (July 1999). See also Luban, *supra* note 7.

105. Tom Allard, *Hicks Trial at Risk If Mori Taken Off Case*, THE AGE, Mar. 5, 2007, <http://www.theage.com.au/articles/2007/03/04/1172943276209.html>.

106. *Id.*

107. Defense Motion for Appropriate Relief, Prosecutorial Misconduct, 19 March 2007 (on file with author). This was one of eighteen motions that remained unresolved at the time of the Hicks plea. Mori Interview, *supra* note 30.

foundation under the law of war—the very point made by the defense in one of its motions to dismiss. Nine eminent lawyers had provided affidavits to the commission to the effect that there was no such crime as material support for terrorism under the law of war, and that in any case, it was clearly “retrospective in its application to Hicks and was a *recently invented and new war crime*.”¹⁰⁸ Additional arguments provided convincing support that the charge was “brought and prosecuted in violation of international law.”¹⁰⁹

On March 26, 2007, Hicks pled guilty to providing material support for terrorism, notwithstanding the fact that the charge was arguably not sustainable and that the proceedings were held before a body without legal authority and lacking in fundamental due process.¹¹⁰

The proceedings demonstrated the arbitrariness of the process.¹¹¹ Two of Hicks’s three attorneys were dismissed by the Judge at the outset. Rebecca Snyder was dismissed because the Judge claimed that she was not on active duty and therefore could not qualify as military counsel, nor did he interpret the MCA to permit her to remain as civilian counsel.¹¹² The judge would not

108. LASRY, *supra* note 2, ¶4.14 (emphasis added).

109. *Id.* ¶ 4.16.

110. The defense entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) based upon stipulated facts. An *Alford* plea does not require the defendant to state that he is guilty. Rather it permits the entry of a guilty plea with a statement acknowledging that, based upon the particularized facts, the prosecution could prove their case beyond a reasonable doubt. The *Alford* plea avoids the issue of whether an attorney may assist a client in the entry of a guilty plea to a charge it “knows” to be not sustainable under law. Zealous advocacy for a criminal defendant should permit the entry of a guilty plea whether or not the attorney believes the charge is sustainable; however, this is an issue that has not been adequately addressed in legal ethics literature. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS (3d ed. 2004) (arguing that ethics rules are rooted in the moral values expressed in the Bill of Rights, not in moral philosophy.) *Id.* at 8; Steven Zeidman, *To Plead or Not To Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998); Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

111. LASRY, *supra* note 2 (calling the procedures “ad hoc”).

112. He also ruled that she could not qualify as civilian counsel and

permit Dratel to appear as counsel unless he would sign a consent agreement to be bound by all rules, including those which were not yet in existence. Dratel's argument that he could not sign a "blank check" but that he would sign an agreement to be bound by "all applicable rules presently in existence" was not acceptable to the Judge.¹¹³ Dratel left the courtroom as Hicks stated, "I am shocked. I just lost another lawyer."¹¹⁴ Mori remained at Hicks's side in the proceedings and ultimately entered a guilty plea in proceedings described by the independent observer as "shambolic."¹¹⁵

The plea agreement, worked out at the highest levels of government without knowledge of the prosecutor,¹¹⁶ provided for a sentence that permitted Hicks to return to Australia to serve only nine remaining months.¹¹⁷ Hicks also agreed to refrain from

suggested she remain as a "consultant." Hicks stated that he wanted her to be his attorney, not a consultant. For a full account of the legal arguments, see LASRY, *supra* note 2, ¶¶ 5.9-5.14.

113. *Id.* ¶¶ 5.15-5.25.

114. *Id.* ¶ 5.24.

115. *Hicks Trial Shambolic*, *supra* note 78.

116. The deal was negotiated between Mori and Susan Crawford, the "top military commission official" and one of Vice President Cheney's former deputies—notably, without prosecutor Morris Davis' input. Josh White, *Australian's Plea Deal Was Negotiated Without Prosecutors*, WASH. POST, Apr. 1, 2007, at A07. Vice President Dick Cheney had visited with Australian Prime Minister John Howard in early 2007, during which they discussed the Hicks case. The visit occurred in the context of wide protests over Hicks's treatment and a promise by Howard to press the issue. See, e.g., *U.S. Vice-President Pledge on Hicks*, BBC NEWS, Feb. 24, 2007, <http://news.bbc.co.uk/1/hi/world/asia-pacific/6392051.stm>; *Cheney Visit Prompts Protests*, SYDNEY MORNING HERALD, Feb. 22, 2007, <http://www.smh.com.au/news/national/cheney-visit-prompts-protests/2007/02/22/1171733922521.html>; James Grubel, *Australia To Press Cheney on Guantánamo Trial for Hicks*, REUTERS, Feb. 19, 2007, <http://www.reuters.com/article/politicsNews/idUSSYD10287820070219>; White, *supra* note 13. One Australian newspaper reports that a deal was directly brokered between Vice President Cheney and Prime Minister Howard during his visit to the country, even though the Australian government denied it. *'Deal' That Freed Hicks*, THE AGE, Oct. 23, 2007, <http://www.theage.com.au/news/national/cheney-howard-deal-freed-hicks/2007/10/23/1192941024047.html>.

117. Though Hicks was sentenced to seven years, the plea bargain permitted him to serve only nine remaining months after what had been five years in American custody. He was released on December 29, 2007. *Terror Detainee Back in Australia*, NYTIMES.COM, May 20, 2007, <http://www.nytimes.com/2007/05/20/world/asia/20hicks.html>; Raymond Bonner, *Australian Terrorism Detainee Leaves Prison*, NYTIMES.COM, Dec. 29,

speaking to the media for one year and, notably, to make a statement that he “has never been illegally treated,” along with a promise not to file any lawsuits pursuant to his treatment in Guantánamo.¹¹⁸ The “deal helped Australian Prime Minister John Howard, a U.S. ally, avoid a bruising domestic controversy.”¹¹⁹ The case was widely reported in the media. The U.S. Department of Defense issued a press release claiming, “Military commissions are regularly constituted courts, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Conventions.”¹²⁰

The Military Commissions spokeswoman said that the Hicks case showed that Guantánamo commissions offer a “fair, legitimate and transparent forum,”¹²¹ while the *Washington Post* reported that the guilty plea “marks a victory for the Bush administration.”¹²²

Hick’s father’s statement was, perhaps, more representative of the public’s view: Hicks pled guilty, he said, just to “escape the isolated prison.”¹²³ The press reported the dismay of military authorities when the imposed seven year sentence was reduced to nine months in accordance with the plea bargain.¹²⁴

Mori was made an honorary member of the Australian Bar

2007, <http://www.nytimes.com/2007/12/29/world/asia/29hicks.html?n=Top/Reference/Times%20Topics/People/B/Bonner,%20Raymond>.

118. William Glaberson, *Australian To Serve Nine Months in Terrorism Case*, NYTIMES.COM, May 31, 2007, <http://www.nytimes.com/2007/03/31/washington/31gitmo.html?ex=1333080000&en=5a6690d157e5ca31&ei=5124&partner=permalink&exprod=permalink>.

119. Scott Horton, *Military Lawyers and the Gitmo Commissions*, HARPER’S MAG., Oct. 30, 2007, <http://harpers.org/archive/2007/10/hbc-90001549>.

120. *Detainee Convicted of Terrorism Charge at Guantánamo Trial*, U.S. Department of Defense, March 30, 2007 (<http://www.defenselink.mil/releases/release.aspx?releaseid=10678>.)

121. *Some Bumps at Start of War Tribunals at Guantánamo*, N.Y. TIMES, April 1, 2007.

122. Josh White, *Australian’s Guilty Plea Is First at Guantánamo*, WASH. POST, Mar. 27, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/26/AR2007032602439.html>.

123. *Australian Guantánamo Detainee Hicks Sentenced to 9 Months After Plea Deal*, FOXNEWS.COM, Mar. 30, 2007, <http://www.foxnews.com/story/0,2933,262960,00.html>.

124. *Id.*

Association in a ceremony where he was touted for advocacy called “fearless and passionate.”¹²⁵ In the past year, he has received numerous awards for dedicated, zealous lawyering.¹²⁶ And while Major Mori avoided prosecution, his zealous advocacy was not rewarded by the military. He was reassigned to a base in San Diego as soon as Hicks left Guantánamo and has been passed over for promotion twice since taking on his case.¹²⁷ In January 2008 he was sent to Iraq.

LAWYERING IN HINDSIGHT

Mori and the defense team undertook a remarkable challenge in what was described by the Australian Law Council’s Independent Observer as an “inherently oppressive and coercive system” where “liberty is a bargaining chip that the State may use to avoid accountability and buy impunity.”¹²⁸

Recognizing that the case would be resolved in the political arena, a self-described apolitical military lawyer employed a strategy that is often described as “political lawyering” or “cause lawyering.”¹²⁹ Engaging in a relatively novel tactic for a military lawyer, Mori extensively utilized the media to overcome negative public perception of his client and promote the need for a fair process. The media strategy assisted the international campaign of human rights organizations and activists. Mori continued his

125. *Honorary Membership for Major Mori*, NEWS.COM.AU, June 29, 2007, <http://www.news.com.au/story/0,23599,21990165-1702,00.html>.

126. *Id.*

127. *Mori Reassigned to ‘Top Gun’ Marine Base*, AUSTL. BROAD. NEWS ONLINE, May 22, 2007, <http://www.abc.net.au/news/stories/2007/05/22/1929231.htm>.

128. LASRY, *supra* note 2, ¶ 7.3.

129. These terms are defined in varied ways and often used interchangeably. See, e.g., Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996) (deliberate efforts to use law to change society or to alter allocations of power); David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995) (articulating a theory of “moral activism” in which “lawyers have substantial moral responsibilities to parties other than the client.”); Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493 (1996) (arguing that individual client representation may be “cause lawyering”); Etienne, *supra* note 51 at 1196-97 (defining cause lawyers as those who “use the law as a means of creating social change in addition to a means of helping individual clients.”).

highly visible public advocacy even when threatened with prosecution that could have been a disqualifying conflict of interest.

Mori and the defense team successfully coordinated the legal strategy with the political one across three continents as the landscape shifted during five years.¹³⁰ They did so understanding that Hicks's situation presented potential conflicts. While the lawyers necessarily mounted a highly visible campaign to bring Hicks before a tribunal, all the lawyers believed that the military commissions were unlawful and that its processes were fundamentally unfair. They did not want to legitimate those commissions by participation in the process, especially because their client would be the first detainee to participate in a military commission. They correctly could predict that the U.S. government would claim legitimacy and victory by Hicks's participation and guilty plea. Moreover, the lawyers did not believe that the ultimate charge against Hicks was legally valid. Nevertheless, the duty to David Hicks was paramount; the end of his detention and his return to Australia were the goals.

These potential conflicts, present in many criminal cases and notably in those defined as "cause lawyering," did not become actual conflicts. Ultimately, the lawyers's goal was the traditional one for all criminal defendants: resolution of their case on the most favorable terms for their client. That goal was served by the defense team's creative and effective multi-pronged strategy employed for the "cause" of challenging the unlawful regime at Guantánamo Bay and upholding the rule of law. Both "causes" were served by the Hicks guilty plea and sentence. As Dratel said:

From the outset, there was always a tension between what we call "cause lawyering" vs. "client lawyering" and my hope was always that we could serve the client without undermining the cause. . . . As it turned out, we achieved that even in unanticipated ways. We have done as much as we can to demonstrate that it is an invalid

130. Similar strategies have been employed in a wide range of cases. See e.g., Michael D. Davis & Hunter R. Clark, *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench* 100-12 (1992); Arthur Kinoy, *RIGHTS ON TRIAL* (1983); Michael Ratner, *How We Closed the Guantánamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187 (1998).

system and we hope that was achieved At the same time there was disillusionment from the other side—this is the “worst of the worst” and you are freeing him?” . . . The “Hicks deal” is now a term of art. People say, “I want a Hicks deal.” It robbed the commissions of any authority.¹³¹

In these extraordinary circumstances, the judgment that the case had to be resolved in the political arena required the zealous lawyering undertaken by Mori and the defense team. It was, perhaps, the only way to provide meaningful legal representation at all.

131. Dratel Interview, *supra* note 39.

Notes & Comments

Fear Mongering, Filters, the Internet and the First Amendment: Why Congress Should Not Pass Legislation Similar to the Deleting Online Predators Act

“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹

I. INTRODUCTION

Congress maintains that “[t]hough the Internet represents tremendous potential in bringing previously unimaginable education and information opportunities to our nation’s children, there are very real risks associated with the use of the Internet.”² Accordingly, Congress has “repeatedly reaffirmed”³ the government’s compelling interest in protecting children from potentially harmful material on the Internet.⁴ Juxtaposed against this legitimate concern is the First Amendment, which guarantees Americans that “Congress shall make no law . . . abridging the

1. *Olmstead v. United States* 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. CHILDREN’S INTERNET PROTECTION ACT, S.REP. NO. 106-141, at 2 (1999).

3. *Id.* at 7.

4. *See New York v. Ferber*, 458 U.S. 747, 757-58 (1982).

freedom of speech, or of the press.”⁵ Early attempts at regulating the harmful material available to minors over the Internet were unsuccessful because the Supreme Court found each to be a flagrant violation of the First Amendment.⁶ Congress succeeded in balancing concern for child welfare with constitutional requirements when it passed the Children’s Internet Protection Act (CIPA) in 2000.⁷ For the first time, Congress addressed fears “that the E-rate and Library Services and Technology Act (LSTA) programs were facilitating access to illegal and harmful pornography.”⁸ To curtail growing concern, CIPA conditioned funding from these subsidized programs, requiring that schools and libraries have technology filters in place to prevent children from accessing obscene or harmful material on the Internet, and that these filters could be disabled if necessary.⁹ The filter requirement was upheld by the Supreme Court, and for the first time Congress believed it had made strides in adopting an effective policy of Internet safety.¹⁰

What Congress did not anticipate, given the rapidly evolving reach of the Internet, was the rise of social-networking sites, and the wave of panic that news stories regarding these sites would create.¹¹ As a result, the House of Representatives, in an attempt to “appear pro-child and pro-family,” introduced the Deleting Online Predator’s Act (DOPA) in 2006. Riding on a wave of “MySpace Madness,”¹² the House of Representatives fed off the mostly unwarranted fears of parents, which were promulgated by the media, and then accused dissenters of being weak on child protection.¹³ The DOPA departed from the constitutionally

5. U.S. CONST. amend. I.

6. See *Ashcroft v. ACLU (COPA II)*, 542 U.S. 656, 670 (2004); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002); *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

7. M. Megan McCune, Comment, *Virtual Lollipops and Lost Puppies: How Far Can States Go To Protect Minors Through the Use of Internet Luring Laws*, 14 *COMMLAW CONCEPTUS* 503, 520 (2006).

8. *United States v. Am. Library Ass’n*, 539 U.S. 194, 200 (2003).

9. Children’s Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified at 20 U.S.C. § 9134 (2000)).

10. *Am. Library Ass’n*, 539 U.S. at 201.

11. See Nat’l Coal. Against Censorship, *The Dangers of the Deleting Online Predators Act*, July 27, 2006, http://www.ncac.org/Internet/20060515~USA~Deleting_Online_Predators_Act.cfm.

12. Tom Zeller Jr., *Link by Link: A Lesson for Parents on MySpace Madness*, N.Y. TIMES, June 26, 2006, at C4.

13. See Nat’l Coal. Against Censorship, *supra* note 11.

acceptable filters required under the CIPA, and conditioned filters based on technology and not on content.¹⁴ The proposed filters under the DOPA are aimed at the dreaded commercial social-networking site, yet would not necessarily block all harmful material and would purposefully ensnare a tremendous number of valuable websites, which are protected by the First Amendment.¹⁵ This constitutional infirmity cannot be cured through the implementation of disabling features. “Treating MySpace sites like poison,”¹⁶ proponents of the DOPA touted it as “legislation not designed to limit speech or infringe on the rights of law-abiding adults,”¹⁷ but to combat social-networking sites which “have made it easier for pedophiles and child predators to contact children and to groom, or befriend, and seduce, them.”¹⁸ Luckily, a new session of Congress in January of 2007 assured that the DOPA would not become law.¹⁹ However, those who were concerned with the clear First Amendment violations of the DOPA cannot rest easy, for on January 4, 2007, Senator Ted Stevens of Alaska proposed the Protecting Children in the 21st Century Act, which includes a section that mirrors the DOPA word for word.²⁰ Protecting children from harm when they are often not capable to do it themselves is a vital goal of government and “every right-thinking and decent American;”²¹ however, Congress cannot partake in

14. See Alex Halperin, *No Space for MySpace?*, BUSINESS WEEK, May 12, 2006, http://www.businessweek.com/technology/content/may2006/tc20060512_299340.htm.

15. See Am. Library Ass’n Office for Intellectual Freedom, *Podcast Script: Online Social Networking and Intellectual Freedom*, <http://www.ala.org/ala/oif/ifissues/issuesrelatedlinks/podcastnetworking.htm> (last visited May 12, 2008).

16. Declan McCullagh, *Lawmakers Take Aim at Social-networking Sites*, CNET NEWS, Dec. 19, 2006, http://news.com.com/Lawmakers+take+aim+at+social-networking+sites/2100-1028_3-6071040.html?tag=sas.email.

17. 152 CONG. REC. H5883, H5886 (July 26, 2006) (statement of Rep. Fitzpatrick).

18. STAFF OF H.R. COMM. ON ENERGY AND COMMERCE, 109TH CONG., REPORT ON SEXUAL EXPLOITATION OF CHILDREN OVER THE INTERNET, 2 (Comm. Print 2007).

19. H.R. 5319 [109th]: Deleting Online Predators Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=h109-5319> (last visited May 12, 2007).

20. S. 49 [110th]: Protecting Children in the 21st Century Act, <http://www.govtrack.us/congress/bill.xpd?bill=s110-49> (last visited May 12, 2007).

21. 152 CONG. REC. H5883, H5888 (2006) (statement of Rep. Dingell).

“fear mongering”²² as motive to ignore the requirements of the First Amendment. The DOPA, and any similar legislation would fail to meet constitutional requirements due to the large burden placed on protected speech. Because the proposed filters target the technology of the site, and not necessarily the content, the reach of this legislation is so broad that it is irrational.

Part II of this Comment examines the ways in which Congress has attempted to protect children from potential harm on the Internet. Part III provides information on social-networking sites, and the fear that they have engendered. Part IV discusses the actual language of the DOPA, and Part V illustrates how the DOPA and similar subsequent legislation do not survive constitutional scrutiny on First Amendment grounds. In addition, Part VI alerts the reader to the newly proposed Protecting Children in the 21st Century Act, which mimics the DOPA word for word.

II. PREVIOUS CONGRESSIONAL ATTEMPTS TO PROTECT CHILDREN AGAINST HARMFUL MATERIAL ON THE INTERNET

Congress has a significant interest in protecting children from being harmed by material they view on the Internet.²³ Since the founding of the Internet, this concern has prompted Congress to pass legislation in an attempt to effectuate its paramount goal: protecting children from harm. Early Congressional attempts at regulating material on the Internet were promptly met with First Amendment challenges and were ultimately held unconstitutional by the Supreme Court,²⁴ and it was only when Congress focused on filtering material on the Internet, and linking these mandatory filters with federal subsidies, that it found success.²⁵

A. The Communications Decency Act of 1996

The Communications Decency Act (CDA), part of the Telecommunications Act of 1996, was Congress’s first attempt to regulate children’s access to harmful information on the

22. Halperin, *supra* note 14 (quoting Anne Collier, co-founder of BlogSafety.com).

23. *See Ferber*, 458 U.S. at 757-58.

24. *See COPA II*, 542 U.S. at 670; *Ashcroft v. Free Sp. Coal.*, 535 U.S. 234, 240 (2002); *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

25. *See McCune*, *supra* note 7.

Internet.²⁶ The CDA “criminalized the online transmission of ‘any comment, request, suggestion, proposal, image or other communication which is . . . indecent’ to a person known to be under the age of eighteen, as well as the display of ‘patently offensive’ material ‘in a manner available to’ a person under eighteen.”²⁷ Senator James Exon, sponsor of the legislation, argued before the Senate that “the most disgusting, repulsive pornography is only a few clicks away from any child with a computer,”²⁸ and not just “Playboy or Penthouse magazines,”²⁹ but “[t]he most hardcore, perverse types of pornography, photos and stories featuring torture, child abuse, and bestiality.”³⁰

The CDA was “quickly challenged”³¹ by the American Civil Liberties Union in *Reno v. ACLU*.³² The Supreme Court of the United States recognized “the legitimacy and importance of the congressional goal of protecting children from harmful materials,”³³ yet ultimately found that the CDA abridged the freedom of speech protected by the First Amendment.³⁴ The Court found the breadth of the CDA’s coverage wholly unprecedented,³⁵ and that the CDA differed from various laws and orders upheld in previous cases in that:

[I]t does not allow parents to consent to their children’s use of restricted materials; is not limited to commercial transactions; fails to provide any definition of ‘indecent’ and omits any requirement that ‘patently offensive’ material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium’s unique characteristics; is punitive; applies

26. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000)).

27. ROBERT S. PECK, LIBRARIES THE FIRST AMENDMENT AND CYBERSPACE 126 (Eloise L. Kinney ed., American Library Association 2000) (quoting CDA (internal quotations omitted)).

28. 141 CONG. REC. S8310, S8330 (June 14, 1995) (Statement of Sen. Exon).

29. *Id.*

30. *Id.*

31. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 167 (New York University Press 2003).

32. *Reno*, 521 U.S. at 845.

33. *Id.* at 849.

34. *See id.*

35. *Id.* at 877.

to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech.³⁶

The portion of the CDA prohibiting the knowing transmission of obscene materials was the only portion of the regulation that survived constitutional scrutiny, as obscenity does not enjoy First Amendment protection.³⁷

B. The Child Pornography Prevention Act

The Child Pornography Prevention Act (CPPA) attempted to expand the existing law regarding child pornography on the Internet to include computer generated images “of what appear to be children engaging in sexually explicit conduct, that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.”³⁸ The statute prohibited “possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging.”³⁹ Congress stressed that the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct

36. *Id.* at 845. The Court’s opinion compared the CDA to the rulings in three cases relied upon by the government: *Ginsberg v. New York*, 390 U.S. 629, 646 (1998) (Upholding the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults); *Renton v. Playtime Theaters*, 475 U.S. 41, 49 (1986) (Court upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the “secondary effects”—such as crime and deteriorating property values—that these theaters fostered); and *FCC v. Pacifica*, 438 U.S. 726, 730 (1978) (Court upheld a declaratory order of the FCC, holding that the broadcast of a recording of a 12-minute monologue entitled “Filthy Words” that had previously been delivered to a live audience “could have been the subject of administrative sanctions”). *Id.* at 845.

37. *Id.* at 883.

38. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 2251 (2000)).

39. *Free Speech Coal.*, 535 U.S. at 240.

and depictions produced by computer.”⁴⁰

The Free Speech Coalition challenged the constitutionality of the CPPA in *Ashcroft v. Free Speech Coalition*.⁴¹ The Court found that “by prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber*, which distinguished child pornography from other sexually explicit speech because of the State’s interest in protecting the children exploited by the production process.”⁴² The CPPA’s restrictions on images that appear to involve a minor, or images that convey the impression that person pictured is a minor, were overbroad, in that the statute “bans materials that are neither obscene nor produced by the exploitation of real children.”⁴³ Essentially, the CPPA criminalized speech “that records no crime and creates no victims by its production.”⁴⁴ Although the government argued that virtual child pornography “whets the appetites of pedophiles and encourages them to engage in illegal conduct,”⁴⁵ the Court held that “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”⁴⁶ Ultimately, the CPPA failed because the Court ruled that “[p]rotected speech does not become unprotected merely because it resembles the latter,”⁴⁷ and “[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”⁴⁸

C. The Child Online Protection Act

In direct response to the Court’s decision in *Reno v. ACLU*,⁴⁹ Congress passed the Child Online Protection Act (COPA) in 1998.⁵⁰ COPA was essentially “a bar on commercial Internet

40. *Id.*

41. *Id.* at 234.

42. *Id.* at 240 (citing *Ferber*, 45 U.S. at 757-58).

43. *Free Speech Coal.*, 535 U.S. at 240.

44. *Id.* at 250.

45. *Id.* at 253.

46. *Id.* (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

47. *Free Speech Coal.*, 535 U.S. at 255.

48. *Id.*

49. PECK, *supra* note 27, at 131-32.

50. Child Online Protection Act, Pub. L. No. 105-277, §§ 1401-1406, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 230-231 (2000)).

expression that is harmful to minors.”⁵¹ In an attempt to narrowly tailor the regulation, Congress “incorporated the Supreme Court’s test for obscenity, as stated in *Miller v. California*,”⁵² which hinges upon community standards to determine if the material is obscene.⁵³ With “[t]he limitation to commercial expression and the harmful to minors standard,”⁵⁴ Congress was anxiously trying to “fit within the rubric of the *Reno* decision.”⁵⁵ Committee reports evidence that Congress firmly believed “that the bill str[uck] the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web.”⁵⁶ In addition to providing much clearer terms, the COPA gives explicit examples of good faith affirmative defenses that would allow a commercial entity to protect itself from prosecution.⁵⁷ Under the COPA, these defenses consist of “requiring use of a credit card, debit account, adult access code, or adult personal identification number, or . . . any other reasonable measures that are feasible under available technology.”⁵⁸

The constitutionality of the COPA was challenged by the American Civil Liberties Union in *Ashcroft v. ACLU* (COPA I),⁵⁹ and was appealed to the Supreme Court after the Third Circuit affirmed the District Court’s ruling that the COPA’s use of contemporary community standards to identify material that is

51. PECK, *supra* note 27, at 131 (internal quotations omitted).

52. McCune, *supra* note 7, at 517 (citing *Miller v. California*, 413 U.S. 15, 24 (1973)). “The test announced by the Supreme Court to determine whether communications are obscene is:

(a) whether the average person applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”)

McCune, *supra* note 7, at 517 n.110.

53. McCune, *supra* note 7, at 518.

54. PECK, *supra* note 27, at 132.

55. *Id.*

56. Child Online Protection Act, H.R. Rep. No. 105-775 (1998) (alteration in the original).

57. Child Online Protection Act, Pub. L. No. 105-277, §§ 1401-1406, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 230-231 (2000)).

58. *Id.*

59. *Ashcroft v. ACLU* (COPA I), 535 U.S. 564, 585 (2002).

harmful to minors rendered the statute substantially overbroad.⁶⁰ The Court ultimately held that “the COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not by itself render the statute substantially overbroad for purposes of the First Amendment,”⁶¹ and remanded the case back to the Third Circuit to review the constitutionality of the COPA according to the ruling.⁶² The “second review by the Third Circuit found that the COPA did not use the least restrictive means to protect children from harmful material and consequently violated the First Amendment.”⁶³ In *Ashcroft v. ACLU* (COPA II),⁶⁴ the Supreme Court upheld the Third Circuit’s ruling on the COPA, but the “Court’s reasoning was based on a narrower, more specific rationale than the court of appeals.”⁶⁵ The Court agreed that, “the Government has failed, at this point, to rebut the plaintiffs’ contention that there are plausible, less restrictive alternatives to the statute,”⁶⁶ and that “filtering software may be a less restrictive means and more effective protection than the COPA in protecting children on the Internet.”⁶⁷ The Court again remanded the case to allow further evidence to “be introduced on the relative restrictiveness and effectiveness of alternatives to the statute.”⁶⁸

D. The Children’s Internet Protection Act

Notwithstanding the failure of the CDA, the CPPA, and the COPA, Congress passed the Children’s Internet Protection Act in 2000 (CIPA).⁶⁹ Unlike the other statutes, the CIPA reflected “Congress[s] fear that federal subsidies for the Internet were facilitating access in public libraries to obscenity, child

60. *Id.* at 564.

61. *Id.* at 585.

62. *See id.* at 586.

63. McCune, *supra* note 7, at 519.

64. *Ashcroft (COPA II)*, 542 U.S. at 656.

65. Sue Ann Mota, *Protecting Minors From Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court*, 7 TUL. J. TECH. & INTELL. PROP. 95, 103 (2005).

66. *Ashcroft (COPA II)*, 542 U.S. at 660.

67. McCune, *supra* note 7, at 519.

68. *Ashcroft (COPA II)*, 542 U.S. at 673.

69. Children’s Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-340 (2000) (codified at 20 U.S.C. § 9134 (2000)).

pornography, and other materials harmful to minors.”⁷⁰ While the CDA, the CPPA, and the COPA “focused primarily on Web site operators, CIPA focuses on Internet users.”⁷¹ Schools and libraries that “participate in certain federal programs,”⁷² namely the E-rate⁷³ program and programs under the Library Service and Technology Act of 1996⁷⁴ would be “obligated to comply” with the CIPA.⁷⁵ The E-rate program “ensure[s] that schools and libraries have affordable access to advanced telecommunications.”⁷⁶ The Library Service and Technology Act of 1996,” makes grants to state library administrative agencies to electronically lin[k] libraries with educational, social, or information services, assis[t] libraries in accessing information through electronic networks, and pa[y] costs for libraries to acquire or share computer systems and telecommunications technologies.”⁷⁷ The CIPA requires libraries and schools to have “in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are, obscene; child pornography; or harmful to minors.”⁷⁸ The term “technology protection measure” is defined as “a specific technology that blocks or filters Internet access”⁷⁹ to

70. Leah Wardak, Note, *Internet Filters and the First Amendment: Public Libraries After United States v. American Library Association*, 35 LOY. U. CHI. L.J. 657, 692 (2004).

71. Katherine A. Miltner, Note, *Discriminatory Filtering: CIPA's Effect on Our Nation's Youth and Why the Supreme Court Erred in Upholding the Constitutionality of the Children's Internet Protection Act*, 57 FED. COMM. L.J. 555, 560 (2005).

72. MADELINE SCHACHTER, LAW OF INTERNET SPEECH 267 (Carolina Academic Press 2002).

73. See 47 C.F.R. §§ 54.501-54.502 (2003).

74. See 20 U.S.C. § 9101 (2001).

75. Miltner, *supra* note 71, at 560.

76. The U.S. Department of Education, E-Rate Questions and Answers, <http://www.ed.gov/Technology/overview.html> (last visited Feb. 17, 2007) (eligible schools and libraries can receive discounts of 20-90 percent on telecommunication services, Internet access and internal connections necessary for deploying technology into the classroom). In the year ending June 30, 2002, libraries received \$58.5 million in such discounts. *Am. Library Ass'n Inc.*, 539 U.S. at 199.

77. *United States v. Am. Library Ass'n Inc.*, 539 U.S. 194, 199 (2003) (alteration in original) (internal quotations omitted). In fiscal year 2002, Congress appropriated more than \$149 million in LSTA grants. *Id.* at 199.

78. Children's Internet Protection Act, 47 U.S.C. § 254 (2001).

79. *Id.*

obscene material, child pornography or other material that may be harmful to minors. The “CIPA permits libraries to disable the filtering technology to allow access for bona fide research or other lawful purposes.”⁸⁰ When the library/school receives E-rate funding,⁸¹ the filters may only be disabled for adults, but when libraries receive LSTA funding, the filters can technically be disabled for both children and adults.⁸²

The American Library Association challenged the constitutionality of the CIPA in *United States v. American Library Association*.⁸³ Plaintiffs in the case “argued that the filtering requirement was overbroad and that it unconstitutionally infringed upon patrons’ First Amendment rights.”⁸⁴ The Court ruled that “Internet access in public libraries is neither a traditional nor a designated public forum,”⁸⁵ and that libraries do not provide access to the Internet in order to create a public forum, but “facilitate research, learning, and recreational pursuits by furnishing materials of the requisite and appropriate quality.”⁸⁶ The Court reasoned that “while a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable material,”⁸⁷ and “[g]iven that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content.”⁸⁸ The Court further held that any concerns over blocking protected speech were “dispelled by the ease with which patrons may have the filtering software disabled.”⁸⁹ The Court also determined that there were no valid issues concerning the funding correlation, because “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”⁹⁰ Ultimately the Court upheld the CIPA “[b]ecause public libraries’ use of Internet filtering software does not violate their patrons’ First Amendment

80. Wardak, *supra* note 70, at 693.

81. 47 U.S.C. § 254(h)(6)(D).

82. 20 U.S.C. § 9134(f)(3).

83. *United States v. Am. Library Ass’n Inc.*, 539 U.S. 194 (2003).

84. Miltner, *supra* note 71, at 561.

85. *Am. Library Ass’n*, 539 U.S. at 205 (internal quotations omitted).

86. *Id.* at 206.

87. *Id.* at 208.

88. *Id.* (alteration in original).

89. *Id.* at 209.

90. *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power."⁹¹ The CIPA "provoked tension between two competing interests: protecting minors from cyber pornography and safeguarding First Amendment rights,"⁹² and for the first time Congress was successful in tipping the scales in its favor.

Prior to the DOPA, Congress could pass legislation regulating the Internet if: the legislation is aimed at unprotected speech, the legislation does not prohibit speech just because it increases the chance that a crime will be committed in the future,⁹³ the legislation contains specific and narrowly tailored definitions regarding what material Congress is attempting to combat,⁹⁴ and the legislation contains disabling provisions that allow adults and/or children access to potentially overblocked material.⁹⁵ In addition, if the legislation is reviewed under heightened scrutiny, there will inevitably be problems if the legislation does not use the least restrictive means possible to prevent children from access to harmful material.⁹⁶

III. THE RISE OF SOCIAL-NETWORKING SITES AND THE SUBSEQUENT RISE OF THE DELETING ONLINE PREDATORS ACT

While the Internet had always contained potentially harmful material, the rise of social-networking sites and interactive web based applications presented a host of new challenges for Congress. Hyped up concern surrounding these new sites, particularly MySpace, and their possible link to online child predation, prompted Congress to once again introduce legislation aimed at regulating children's use of the Internet.

A. Interactive Web Applications and Social-Networking Sites

Interactive web application "is a broad term encompassing many types of online tools, many of which allow people to communicate with each other either in real time or through

91. *Id.* at 214.

92. Miltner, *supra* note 71, at 557.

93. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

94. *See* Reno v. ACLU, 521 U.S. at 845.

95. *See* Am. Library Ass'n., 539 U.S. at 208.

96. *See* Ashcroft v. ACLU (*COPA II*), 542 U.S. 656, 660 (2004).

posts.”⁹⁷ These applications include “online distance education, instant messaging, chat rooms, message boards, photo and video sharing sites, blogs that allow comments, and even sites like Amazon.com and Evite.”⁹⁸ These applications “are changing how we all work with the Web,”⁹⁹ but crucial to their success is the fact that the “people who use the tools make them even more useful by contributing their knowledge and data.”¹⁰⁰

“Interactive web application” also encompasses social-networking sites which “are, generally speaking, online spaces where people connect with others who share similar interests.”¹⁰¹ These sites were developed to allow members to “interact with current friends and to meet new ones,”¹⁰² while “sharing thoughts, ideas, and information.”¹⁰³ There are literally “hundreds of these sites on the Web, including Facebook, Friendster, LiveJournal, and MySpace.”¹⁰⁴ Facebook calls itself “a social utility that connects you with the people around you,”¹⁰⁵ that “is made up of many networks, each based around a company, region, high school or college,”¹⁰⁶ which will allow you to “share information with people you know, see what’s going on with your friends, and look up people around you.”¹⁰⁷ Friendster’s website states that “Friendster is the best way to stay in touch with your friends and it’s the fastest way to discover the people and things that matter to you most.”¹⁰⁸ LiveJournal “is a simple-to-use communication tool that lets you express yourself and connect with friends online,”¹⁰⁹ which you can use “in many different ways: as a private journal, a blog, a social network and much more.”¹¹⁰ Lastly,

97. Am. Library Ass’n Office for Intellectual Freedom, *supra* note 15.

98. *Id.*

99. Steve Apiki, *What You Need To Know About Web 2.0*, July 25, 2006, <http://www.smallbusinesscomputing.com/biztools/article.php/3622356>.

100. *Id.*

101. Am. Library Ass’n Office for Intellectual Freedom, *supra* note 15.

102. *Id.*

103. *See id.*

104. *Id.*

105. Welcome to Facebook, <http://www.facebook.com>, (last visited Feb. 17, 2007).

106. *Id.*

107. *Id.*

108. About Friendster, <http://www.friendster.com/info/index.php?statpos=footer> (last visited Feb. 17, 2007).

109. What is LiveJournal, <http://www.livejournal.com/> (last visited Feb. 17, 2007).

110. *Id.*

MySpace labels itself as “an online community that lets you meet your friends’ friends,”¹¹¹ where you can “share photos, journals and interests with your growing network of mutual friends.”¹¹² While most adults are dumfounded by these sites, “they function very much like the malls and burger joints of earlier eras,”¹¹³ where young people go “to hang out, gossip, posture, dare, and generally figure out how the world works.”¹¹⁴

Social-networking sites “have literally exploded in popularity in a few short years.”¹¹⁵ A recent poll shows that “87 percent of those aged 12 to 17 use the Internet on a regular basis.”¹¹⁶ In addition, “of this 87 percent, approximately 61 percent report having personal profiles on networking Web sites like MySpace[] [or] Facebook. . .”¹¹⁷ While other sites are certainly utilized, MySpace is the most popular of the social-networking sites.¹¹⁸ MySpace “currently has more than 100 million profiles, with 230,000 new members signing up everyday.”¹¹⁹ In July of 2006 MySpace “became the most-visited Web site in the United States over Google and Yahoo Mail,¹²⁰ and accounted for “81% of visitors to leading social-networking sites, according to Hitwise, a market research company.”¹²¹ The thoughts of one teenager, “[if] you are not on MySpace, you don’t exist,”¹²² demonstrate that MySpace is “a cultural requirement for American high school students.”¹²³

111. MySpace “About Us”, <http://collect.myspace.com/misc/about.html> (last visited Feb. 17, 2007).

112. *Id.*

113. Michelle Andrews, *Decoding MySpace*, U.S. NEWS AND WORLD REPORT, Sept. 18, 2006, at 48.

114. *Id.*

115. 152 CONG. REC. H5883, H5886 (daily ed. July 26, 2006) (statement of Rep. Fitzpatrick).

116. 152 CONG. REC. H5883, H5889 (daily ed. July 26, 2006) (statement of Rep. Biggert).

117. *Id.*

118. *See* Andrews, *supra* note 113.

119. *Id.*

120. Whitney McFerron, *Censoring MySpeech: Is the First Amendment Lost in the MySpace Debate*, STUDENT PRESS LAW CENTER, 2006, http://www.splc.org/report_detail.asp?id=1289&edition=40.

121. Andrews, *supra* note 113.

122. Danah Boyd & Henry Jenkins, *MySpace and Deleting Online Predators Act (DOPA)*, MIT TECH TALK, May 26, 2006, <http://www.danah.org/papers/MySpaceDOPA.html>.

123. *Id.*

B. Fears Over Social Networking Sites

Since social-networking sites have exploded in popularity they have become the focus of intense parental, and thus political, concern.¹²⁴ It is true that “[a]mong the many millions of people visiting these sites, some, indeed are sexual predators, and there have been some highly publicized accounts of teenagers who’ve been lured into offline meetings at which they have been [sexually] assaulted.”¹²⁵ In what has been deemed the first lawsuit of its kind, a fourteen-year-old girl and her mother sued MySpace and its parent company News Corporation Incorporated, alleging that the girl was raped after meeting a man she met on the site.¹²⁶ The complaint details how the girl, even though she was under the age of fourteen, created a profile and was soon contacted by Peter Solis (Solis), a nineteen-year-old community college student (who had told the girl he was fourteen), whom she then began communicating with on a regular basis.¹²⁷ The girl “eventually met him for dinner and a movie after which they drove in his car to the parking lot of an apartment complex, where, the complaint alleges, he sexually assaulted her.”¹²⁸ The complaint “makes claims against MySpace and News Corp[oration] for negligence, gross negligence, fraud and negligent misrepresentation and against Solis for sexual assault and intentional infliction of emotional distress,”¹²⁹ for which the plaintiff “seeks damages for present and future medical and psychological care, pecuniary loss, mental anguish, psychological trauma, pain and suffering, and emotional distress.”¹³⁰ The

124. Andrews, *supra* note 113, at 47.

125. *Id.* at 48 (alteration in original).

126. Jane Doe v. MySpace, Inc., No. D-1-GN-06-002209 (D.C. of Travis Cty., Tex. June 19, 2006) (Jane Doe MySpace complaint page 13). On February 14, 2007, a federal judge in Texas dismissed the lawsuit against MySpace that blamed the Web site for lacking proper safeguards to protect underage users. Peter Lattman, *Federal Judge Tosses MySpace Lawsuit*, THE WALL ST. J., February 15, 2007 available at <http://blogs.wsj.com/law/2007/02/15/federal-judge-tosses-myspace-lawsuit>. The judge ruled that expecting MySpace to verify every user’s age “would of course stop MySpace’s business in its tracks,” and if anyone had a duty to protect Julie Doe, it was her parents, not MySpace.” *Id.*

127. *Id.*

128. Rebecca Porter, *Advocates Look to Protect Kids From Web Networking Dangers*, 42 OCT. TRIAL 16 (2006).

129. *Id.* at 16, 18.

130. *Id.* at 18.

complaint details what the plaintiff deems to be “a disturbing number of incidents [that] have occurred nationwide in which adult MySpace users contacted young underage MySpace users on MySpace,”¹³¹ then “arranged to meet the minors, and often sexually assaulted them.”¹³² The plaintiff contends, “there are absolutely no meaningful protections or security measures to protect young underage users from being contacted by sexual predators on MySpace.”¹³³ Understandably “parents are traumatized by such stories,”¹³⁴ however there is real debate over whether these concerns are warranted.¹³⁵

Many argue that the “national media coverage of MySpace and other similar sites has overplayed a few instances of child predation online,”¹³⁶ and created a situation that is “ripe for moral panic.”¹³⁷ The media would have people believe that social-networking sites are “a haven for online sexual predators who have made these corners of the Web their own virtual hunting ground.”¹³⁸ “The latest wave of parental concern seems to have been largely spurred by ‘To Catch a Predator,’ a series on the NBC news magazine program ‘Dateline’ that began in September of 2004.”¹³⁹ Through the use of hidden cameras, this program has offered “visual evidence,”¹⁴⁰ of pedophiles coming to meet children they initially contacted over the Internet.¹⁴¹ Seen as the “complete and utter tipping point,”¹⁴² “To Catch A Predator,” has the American public “convinced the Internet Bogeyman is going to come into their window.”¹⁴³

Danah Boyd, a Ph.D student at the School of Information at

131. Jane Doe, et al. v. MySpace, Inc., No. D-1-GN-06-002209 (D.C. of Travis Cty., Tex June 19, 2006).

132. *Id.*

133. *Id.*

134. Andrews, *supra* note 113.

135. Boyd & Jenkins, *supra* note 122.

136. McFerron, *supra* note 120, at 1.

137. Boyd & Jenkins, *supra* note 122, at 7.

138. 152 CONG. REC. H5883, H5886 (2006) (statement of Rep. Fitzpatrick).

139. Anna Bahney, *Don't Talk to Invisible Strangers*, N.Y. TIMES, Mar. 9, 2006, at G2.

140. 152 CONG. REC. H5883, H5886 (July 26, 2006) (statement of Rep. Fitzpatrick).

141. Bahney, *supra* note 139. The men exposed in the “Dateline” series included a high-school teacher, a rabbi and a doctor. *Id.*

142. Bahney, *supra* note 139.

143. *Id.*

the University of California-Berkley, has done extensive research on social-networking sites, and argues that “[t]he media coverage of predators on MySpace implies that 1) all youth are at risk of being stalked and molested because of MySpace; 2) prohibiting youth from participating on MySpace will stop predators from attacking kids,”¹⁴⁴ and that “[b]oth are misleading; neither is true.”¹⁴⁵ Statistics prove that “kids are more at risk at a church picnic or a boy scout outing than they are when they go on MySpace.”¹⁴⁶ The risk is often covered extensively, while few actual cases emerge, exploiting anxiety and feeding fears.¹⁴⁷ When people are allowed to “indulge[] in fear mongering”¹⁴⁸ there is naturally “a call to take action, even if it is wrong, a call to action which races well ahead of any serious research or thoughtful reflection on the matters at hand.”¹⁴⁹

Unfortunately, “it was in this atmosphere that the House of Representatives passed the Deleting Online Predators Act, or DOPA.”¹⁵⁰ Given the fervor of “MySpace Madness,”¹⁵¹ the legislation was eagerly embraced by politicians who wished to appear “pro-child and pro-family.”¹⁵² The DOPA was proposed by Senator Michael Fitzpatrick, a Republican Senator from Pennsylvania,¹⁵³ who was a member of the Suburban Caucus, “a newly formed group of Republican representatives who are focused on addressing the concerns of suburban voters.”¹⁵⁴ Legislative history demonstrates that Congress played upon the fears promulgated by the media, and touted the DOPA as legislation that would combat “the dark underside of social networking Web sites, which have been stalking grounds for sexual predators who are preying on children all across the

144. Boyd & Jenkins, *supra* note 122.

145. *Id.*

146. *Id.*

147. *See id.*

148. Halperin, *supra* note 14.

149. Boyd & Jenkins, *supra* note 122 (internal quotations omitted).

150. Am. Library Ass’n Office for Intellectual Freedom, *supra* note 15.

151. Zeller, *supra* note 12.

152. Nat’l Coal Against Censorship, *supra* note 11.

153. H.R. 5319 [109th]: Deleting Online Predators Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=h109-5319> (last visited Feb. 17, 2007). Representative Fitzpatrick lost his bid for reelection in the November 2006 election. U.S. Politics Today, <http://uspolitics.einnews.com/news/mike-fitzpatrick>.

154. Nat’l Coal Against Censorship, *supra* note 11.

nation.”¹⁵⁵ Advocates of the legislation argued, “[s]ocial networking sites such as MySpace and chat rooms have allowed sexual predators to sneak into homes and solicit kids,”¹⁵⁶ and through these cyber-relationships, children are being victimized.¹⁵⁷ Reports to Congress detail the process of “grooming,” where “by communicating with children regularly over the Internet, the child predator is able to befriend the child and make him or her comfortable with sharing personal information with someone he or she has not met face-to-face,”¹⁵⁸ and then “[e]ventually these communications become sexual in nature, often as a precursor to asking the child to meet the predator or to share sexual images of herself or himself.”¹⁵⁹ The DOPA was described as a new tool to protect our children from online sexual predators, and its supporters challenged anyone to oppose. The truth is “[w]ith the media whipping the nation into hysteria about the perils of MySpace, what politician wouldn’t want to be seen as protecting kids?”¹⁶⁰ The fear factor was alive and well, and “whatever their real opinion, politicians. . . vote[d] for DOPA rather than risk being painted as pro-predator.”¹⁶¹ When panic is a component, “the Web gets censored in an increasingly broad, slipshod way,”¹⁶² which was clearly the case with the DOPA. The DOPA “raises questions about how much the federal government should regulate the Internet,”¹⁶³ and while protection is a necessary goal it should not be “pursued to the detriment of a legitimate and often vital exchange of ideas.”¹⁶⁴

155. 152 CONG. REC. H5883, H5884 (July 26, 2006) (statement of Rep. Upton).

156. 152 CONG. REC. H5883, H5885 (July 26, 2006) (statement of Rep. Poe).

157. Porter, *supra* note 128, at 16.

158. STAFF OF H.R. COMM. ON ENERGY AND COMMERCE, 109TH CONG., REPORT ON SEXUAL EXPLOITATION OF CHILDREN OVER THE INTERNET (Jan. 2007) at 11.

159. *Id.*

160. Brian Kenney, *The Deleting Online Predators Act Is Both Dopey and Dangerous*, 52 SCH. LIB. J. 6, 11 (2006).

161. *Id.*

162. Steven Barrie-Anthony, *Through Hell, High Water or Web Filters as Congress Mulls Action, Some Schools Already Limit MySpace Access. But It Hasn’t Kept Teens Off the Site*, L.A. TIMES, May 31, 2006, at E1.

163. Jim Puzzanghera, *Bill Seeks to Block Access to MySpace in Schools Legislation Is Prompted by Reports of Pedophiles Trolling Popular ‘Social Networking’ Sites*, L.A. TIMES, May 12, 2006, at A26.

164. Joan E. Bertin, *Moral Panic, Version 2.0*, THE NATIONAL COALITION

The DOPA raises “red flags for all First Amendment advocates,”¹⁶⁵ because it “threatens free speech and education online, while doing little to deter online predators.”¹⁶⁶

Congress, faced with growing media hype over isolated incidents of child predation, and genuine concern for child safety, passed the DOPA. While Congress’ intentions were undoubtedly righteous, the DOPA goes beyond the goal of protecting children and infringes on First Amendment rights.

IV. THE DELETING ONLINE PREDATORS ACT

Officially, the Deleting Online Predators Act would “amend the Communications Act of 1934 to require recipients of universal service support for schools and libraries to protect minors from commercial social networking sites and chat rooms.”¹⁶⁷ The legislation conditions E-rate funding for schools upon proof that they are:

Enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that (I) protects against access through such computers to visual depictions that are obscene; child pornography; or harmful to minors; and (II) protects against access to a commercial social networking website or chat room unless used for an educational purpose with adult supervision.¹⁶⁸

In addition, E-rate funding for libraries is conditioned upon certification that the library:

Is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene; child pornography; or

AGAINST CENSORSHIP NEWSLETTER – CENSORSHIP NEWS, SPECIAL ISSUE: FREE EXPRESSION ONLINE, (NCAC, New York, N.Y.) 2006.

165. Nat’l Coal Against Censorship, *supra* note 11.

166. *Id.*

167. Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006) (official title as introduced).

168. *Id.* § 3(a) at 2-3 (Certification by Schools).

harmful to minors; and protects against access by minors without parental authorization to a commercial social networking website or chat room, and informs parents that sexual predators can use these websites and chat rooms to prey on children.¹⁶⁹

While the final definition of a commercial social-networking website will be determined by the Federal Communications Commission, the DOPA suggests that the Commission:

Take into consideration the extent to which a website is offered by a commercial entity; permits registered users to create an on-line profile that includes detailed personal information; permits registered users to create an on-line journal and share such a journal with other users; elicits highly-personalized information from users; and enables communication among users.¹⁷⁰

The bill would allow access to these sites in schools with adult supervision and only if the site is being accessed for an educational purpose.¹⁷¹ In libraries access to the blocked sites would be allowed during use by an adult or by minors with adult supervision to enable access for educational purposes.¹⁷² Finally, the DOPA requires the Federal Trade Commission to:

Issue a consumer alert regarding the potential dangers to children of Internet child predators, including the potential danger of commercial social networking websites and chat rooms through which personal information about child users of such websites may be accessed by child predators, and establish a website to serve as a resource for information for parents, teachers and school administrators, and others regarding the potential dangers posed by the use of the Internet by children, including information about commercial social networking websites and chat rooms through which personal information about child users of such websites may be accessed by child predators.¹⁷³

169. *Id.* § 3(b) at 3-4 (Certification by Libraries).

170. *Id.* § (c) at 5 (Definitions).

171. *See id.* § 3(a) at 2-3.

172. *Id.* §3(b) at 3-4.

173. *Id.* §§ 4(a)(1)-(2) at 6.

V. FIRST AMENDMENT CONCERNS WITH THE DOPA IN LIGHT
OF THE RULING IN *UNITED STATES v. AMERICAN LIBRARY
ASSOCIATION*

In *Reno v. ACLU*, the Supreme Court held that unlike invasive radio or television, the Internet is not “subject to the type of government supervision and regulation that has attended the broadcast industry.”¹⁷⁴ For the Court, the Internet is entitled to the highest degree of First Amendment protection similar to the protection afforded to print media.¹⁷⁵ However, the Court has consistently acknowledged that the government has a compelling interest in protecting children from physical and psychological harm, including obscene and indecent material.¹⁷⁶ As a result, the government can apply restrictions for children in areas where they would not be allowed to limit adults, and these restrictions are often given deference by the courts.¹⁷⁷ According to the Court, Congress finally found an acceptable balance between these competing concerns when it passed the CIPA,¹⁷⁸ the only child protection Internet regulation to pass judicial scrutiny thus far.¹⁷⁹ The DOPA has been compared to the CIPA, as proponents see this new legislation as simply an extension of what had already been deemed constitutional by the Supreme Court.¹⁸⁰ The CIPA is considered “the dominant federal law in the area of schools, libraries, and the Internet,”¹⁸¹ so it seems crucial to analyze the constitutionality of the DOPA under the same framework utilized by the Court in *United States v. American Library Association*. Even when analyzed under the *American Library Association*

174. *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

175. *See id.* at 870.

176. *See Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). *See also* *Ginsberg v. New York*, 390 U.S. 629, 636-43 (1968); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 50 (1978); *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Denver Area Ed. Tel. Consortium v. FCC*, 518 U.S. 727, 755 (1996); and *Reno v. ACLU*, 521 U.S. at 878.

177. *See Ginsberg*, 390 U.S. at 636.

178. *See McCune*, *supra* note 7, at 519.

179. *Id.*

180. *See* George Pike, *MySpace and Library Filters*, INFO. TODAY, July 1, 2006, Volume 23; Issue 7 at 15, 19.

181. Anita Ramasastry, *Why the Delete Online Predators Act Won't Delete Predatory Behavior: Requiring Libraries and Schools To Block Access to Sites like MySpace.com and Facebook.com Isn't The Best Option To Solve the Problem*, Aug. 7, 2006, <http://writ.corporate.findlaw.com/ramasastry/20060807.html> (last visited Oct. 19, 2007).

structure the DOPA is constitutionally problematic because the filters lead to extensive overblocking of constitutionally protected speech.

A. Level of Scrutiny

With the CIPA, the Court held that “the government has broad discretion to make content based judgments in deciding what private speech to make available to the public.”¹⁸² The first crucial step in the Court’s analysis was determining whether a library is considered a public forum for purposes of First Amendment examination.¹⁸³ The public forum analysis determines the level of scrutiny the Court will apply to the challenged legislation.¹⁸⁴ Content-based restrictions aimed at a public forum require strict scrutiny, while content-based regulations aimed at a non-public forum only have to survive rational basis.¹⁸⁵ While examining the constitutionality of the CIPA, the Court held that libraries are not considered public forums for purposes of the First Amendment, and that libraries offer their resources “to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.”¹⁸⁶ Thus, the Court reviewed the CIPA under a rational basis standard, but only with a plurality of justices agreeing.¹⁸⁷ Although *American Library Association* did not discuss schools, the Court has held that “school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations.”¹⁸⁸ In addition, “[t]he government does not create a public forum by inactions or by permitting limited disclosure, but only by intentionally opening a non-traditional forum for public discourse.”¹⁸⁹ For the Court, “the Internet is simply another method for making information available in a

182. *United States v. Am. Library Ass’n Inc.*, 539 U.S. 194, 204 (2003).

183. *Id.*

184. *See Wardak, supra* note 70, at 667.

185. *Id.* at 666.

186. *Am. Library Ass’n*, 539 U.S. at 206.

187. *Miltner, supra* note 71, at 568.

188. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

189. *Am. Library Ass’n*, 539 U.S. at 206 (quoting *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

school or library.”¹⁹⁰ Therefore any constitutional challenge to the DOPA, which is aimed at both schools and libraries, will likely be subject to rational basis review. Rational basis review requires the government to only show a legitimate state interest and that the law in question is rationally related to that interest.¹⁹¹ Even under rational basis, which is viewed as an undemanding standard, the DOPA does not pass constitutional scrutiny because the commercial social-networking definition is so broad that it is irrational.

Some argue that the DOPA should be subject to a higher degree of scrutiny. This argument is analogous to Justice Breyer’s concurrence in *American Library Association*.¹⁹² For Breyer the CIPA should have been analyzed under “heightened, but not strict, scrutiny,”¹⁹³ where the Court should have “examin[ed] the statutory requirements in question with special care.”¹⁹⁴ This was especially necessary when “complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests.”¹⁹⁵ Under this heightened scrutiny, the Court must determine “whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives.”¹⁹⁶ To resolve this question the Court should consider “the legitimacy of the statute’s objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion.”¹⁹⁷ Ultimately Justice Breyer found that even under the heightened scrutiny, “[g]iven the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm

190. *Id.* (quoting S. Rep. No. 106-141, 7 (1999) (alteration in original)).

191. Robert Corn-Revere, *United States v. American Library Association: A Missed Opportunity for the Supreme Court to Clarify Application of First Amendment Law to Publicly Funded Expressive Institutions*, (CATO SUPREME COURT REV.) 105, 115 (2003).

192. *See Am. Library Ass’n*, 539 U.S. at 216-17 (Breyer, J. concurring).

193. *Id.* at 216.

194. *Id.*

195. *Id.*

196. *Id.* at 217.

197. *Id.* at 217-18.

that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives."¹⁹⁸ Because the decision in *American Library Association* was only a plurality opinion, many argue that rational basis review will not be the last word on such filtering issues. It is possible that in the future the Court might review legislation such as the DOPA under Breyer's heightened scrutiny standard, a view more in keeping with decisions prior to *American Library Association*.¹⁹⁹ Reviewing legislation under heightened scrutiny allows the Court to question the fit of the law and its objectives, as well as less onerous filtering alternatives.²⁰⁰ These issues were discussed at length in earlier cases deciding the constitutionality of Congressional attempts at regulating the Internet for children.²⁰¹ Logically if the DOPA fails rational basis, it also would be constitutionally infirm under a heightened scrutiny as well.

B. Broad Definition of Commercial Social-Networking Sites Leads to Overblocking

Critics challenged the CIPA because of "its tendency to overblock access to constitutionally protected speech that falls outside the categories software users intend to block."²⁰² The objective of the CIPA was to "block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them,"²⁰³ however challengers argued that the legislation screened out material that was constitutionally protected. This was of particular concern regarding adults, for they would "be denied access to a substantial amount of non-obscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one."²⁰⁴ The Court seemed to summarily dismiss this argument by holding that "such concerns are dispelled by the

198. *Id.* at 220 (alteration in original).

199. *See* Corn-Revere, *supra* note 191, at 116.

200. *United States v. Am. Library Ass'n Inc.*, 539 U.S. 194, 217 (2003).

201. *See Ashcroft v. ACLU (COPA II)*, 542 U.S. at 660. The Court held that the government failed to rebut the contention that there were plausible less restrictive alternatives available. *Id. See also Free Speech Coal.*, 535 U.S. 234, 255 (2002). The Court held that the CPPA failed constitutional muster because it prohibited protected speech. *Id.*

202. *Am. Library Ass'n*, 539 U.S. at 195-96.

203. *Id.* at 199.

204. *Id.* at 233-34.

ease with which patrons may have the filtering software disabled.”²⁰⁵ The CIPA allowed the filters to be disabled “to enable access for bona fide research or other lawful purposes,”²⁰⁶ and stated that adults can ask for the filters to be disabled at anytime.²⁰⁷

While a disabling feature salvaged the CIPA, it is unlikely that the DOPA’s disabling element would produce the same result. The CIPA filters were aimed at preventing certain types of harmful information to reach minors, so websites were filtered based on content,²⁰⁸ however, the DOPA proposed filters, created to prevent harmful information from reaching minors, appear more focused on technology than content. Instead of blocking sites that simply contain harmful information, the DOPA would make restrictions based on the technology of the website,²⁰⁹ under the assumption that sites utilizing this technology are “a haven for online sexual predators who have made these corners of the Web their own virtual hunting ground.”²¹⁰ Essentially the DOPA would require blocking access to the social-networking sites themselves, without even looking at whether there was harmful material on the site. This restriction would reach more constitutionally protected speech, for both minors and adults, than a filter that might prevent initial access to www.SuperBowlXXX.com because it contains the keywords “XXX.”²¹¹ While the majority of the speech blocked by the CIPA is harmful to minors, most of the speech blocked by the DOPA is not harmful, and thus constitutionally protected.²¹² Although the DOPA allows access to social-networking sites for educational purposes with adult supervision,²¹³ this is likely not enough when one considers the sheer magnitude of websites caught in the cross-

205. *Id.* at 209.

206. *Id.* at 201 (quoting 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254 (h)(6)(d)) (internal quotations omitted).

207. *See id.* (quoting U.S.C. § 254 (h)(6)(d)).

208. *See* Children’s Internet Protection Act, 47 U.S.C. § 254 (2001).

209. Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006).

210. 152 CONG. REC. H5883, H5884 (2006) (statement of Rep. Upton).

211. *See* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning*, ACLU Legal Department, Mar. 17, 2002, <http://www.aclu.org/privacy/speech/15145pub20020317.html>.

212. *See* 152 CONG. REC. H5885 (2006) (Mr. Stupak quoting the American Library Association).

213. *See* Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006).

fire. The majority of the blocked websites would contain speech that is protected both for children and adults. The language of the DOPA is “overly broad and too restrictive,”²¹⁴ and thus is irrational in scope.

Even with disabling provisions, the number and assortment of websites that would be ensnared in the DOPA’s proposed definition for commercial social-networking sites is intolerable even under a rational basis standard. The DOPA would “put off-limits a wide swath of the Internet: MySpace, but also Blogger, AIM, parts of Google and Yahoo!, and perhaps even news sites like the NYTimes.com (which allows visitors to create profiles and add comments).”²¹⁵ In addition the DOPA would block blogging tools, mailing lists, video and podcast sites, and photo sharing sites,²¹⁶ and even sites like Amazon.com (where you can make a wish list) and the government’s own First Gov website.²¹⁷ The potential for children to obtain or encounter harmful material through social-networking sites, “may not be enough to overcome the free speech problems that the bill creates by its broad restrictions on access to and use of this and similar sites,”²¹⁸ even under rational basis.

When one takes into consideration the potentially positive attributes of the material being overblocked by the DOPA, the lack of a rational relationship between the objective of protecting children, and the all encompassing commercial social-networking definition is clear. The DOPA’s description of a commercial social-networking site does not take into account the “real pedagogical value”²¹⁹ of Internet sites labeled under the definition. Teachers are beginning to:

Use blogs for knowledge sharing in schools; they use mailing lists to communicate expectations about homework with students and parents;²²⁰ “[t]hey are discovering that students take their assignments more seriously and write better if they are producing work which will reach a larger public rather than simply sit on

214. Kenney, *supra* note 160.

215. *Id.*

216. Boyd, *supra* note 122.

217. Ramasastry, *supra* note 181.

218. Pike, *supra* note 180.

219. Boyd, *supra* note 122.

220. *Id.*

a teacher's desks;"²²¹ and they are "linking together classrooms around the country and around the world, getting kids from different cultural backgrounds to share aspects of their everyday experience with each other."²²²

If according to the Court, the "worthy mission"²²³ of libraries and schools is to "facilitate learning and cultural enrichment,"²²⁴ it seems unlikely that it would accept such a tenuous link between protecting children, and blocking all social-networking sites.

In addition to the loss of educational tools, "there are countless positive uses for networking applications that are not necessarily related to formal education."²²⁵ The definition of a commercial social-net-working site would include "educational tools used to provide distance education, community forums that allow children to discuss issues of importance, online e-mail programs through which family members can communicate with each other and with teachers and librarians at their local schools and libraries, and even find one another in case of emergency."²²⁶ The commercial social-networking site definition found in the DOPA appears to assume that all sites that fit into the definition harbor some material that is harmful to children, but the definition fails to take into consideration "the value of Interactive Web applications."²²⁷ Social-networking sites "include support groups for teenagers with physical and emotional disabilities, forums for the exchange of ideas, and even tools to help kids become acclimated to new surroundings."²²⁸ For instance, "David Smith, executive director and founder of Mobilizing America's Youth, the Washington D.C. based group that operates Mobilize.org, said that many students . . . are finding that social networking sites can be a great tool for social activism."²²⁹ In

221. *Id.*

222. *Id.*

223. *United States v. Am. Library Ass'n Inc.*, 539 U.S. 194, 225 (2003).

224. *Id.*

225. Hearing Before the H. Sub. Comm. on Telecommunications and the Comm. on Energy and Commerce, 109th Cong. (2006) (testimony of Beth Yoke, Executive Director, Young Adult Library Services Association).

226. *Id.* at 2.

227. 152 CONG. REC. H5883, H5885 (2006) (statement of Rep. Stupak).

228. Hearing Before the H. Sub. Comm. on Telecommunications and the Comm. on Energy and Commerce, 109th Cong. (2006) (testimony of Beth Yoke, Executive Director, Young Adult Library Services Association).

229. McFerron, *supra* note 120.

March of 2006, “thousands of high school students across the country, including an estimated 40,000 in Southern California, walked out of school in protest of the anti-illegal immigration legislation, many of which were organized in part on MySpace.”²³⁰ Danah Boyd, argues that “giving youth access to a public of their peers, MySpace provides a fertile ground for identity development and cultural integration.”²³¹ In addition, the DOPA may “increase the digital divide,”²³² because “lower-income kids may have their only access [to the Internet] at schools or libraries,”²³³ and thus would be prevented from “participat[ing] in online communications, websites, and from learn[ing] the skills that come from the use of such sites.”²³⁴ Research proves that these “[n]ew Internet-based applications (also known as social-networking technologies) for collaboration, business, and learning are becoming increasingly important, and young people must be prepared to thrive in a work atmosphere where meetings take place online and where online social networks are essential communication tools.”²³⁵

In *American Library Association*, the Court determined that under the CIPA, the number of overblocked sites would not create a significant restraint on constitutionally protected speech, because the content-based filters were specifically targeted “to prevent computer users from gaining Internet access to child pornography, obscenity or material comparably harmful to minors,”²³⁶ and the ease with which the filters could be disabled.²³⁷ Alternatively, the DOPA would place a significant burden on protected speech because the technology-based filters have little rational connection to the proposed basis for the legislation, which is protecting minors from obscene material, child pornography, and any other material that might be deemed harmful to minors.²³⁸ While “it is important to protect children from predators, laws should not inflict the collateral damage of

230. *Id.*

231. Nat’l Coal Against Censorship, *supra* note 11.

232. Ramasastry, *supra* note 181.

233. *Id.* (alteration in the original).

234. Nat’l Coal Against Censorship, *supra* note 11.

235. American Library Association, *DOPA Information Packet: A Resource for Librarians and Library Workers*, Aug. 8, 2006, <http://www.ala.org/yalsa>.

236. *United States v. Am. Library Ass’n Inc.*, 539 U.S. 194, 215 (2003).

237. *Id.* at 209.

238. Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006).

preventing Internet use.”²³⁹ Given the widespread filtering authorized under the DOPA, even the disabling feature does little to cure the constitutional infirmity of overblocking. Because the DOPA would purposefully block access to many valuable “websites whose benefits outweigh their detriments,”²⁴⁰ a library patron or student would be forced to ask to release a significantly higher percentage of websites they wished to visit. This does not equate with the “ease with which patrons may have the software disabled,”²⁴¹ for inadvertently blocked websites under the CIPA. The DOPA as it was written would not survive constitutional scrutiny under rational basis because blocking access to all commercial social-networking sites is unreasonable when the focus of the legislation is to protect children from harmful material on the Internet. If the mandated filters from the CIPA are formatted to block harmful material, the definition espoused in the DOPA does not add additional safeguards; it simply blocks additional protected speech. The DOPA is so overbroad it is irrational, and thus does not pass constitutional muster.

VI. THE DEMISE OF THE DOPA AND THE BIRTH OF THE PROTECTING CHILDREN IN THE 21ST CENTURY ACT

Luckily the DOPA never became law.²⁴² However, even if it had, it would have been struck down on First Amendment grounds. After passing in the House of Representatives by an overwhelming majority thanks to unusual bipartisan support,²⁴³ the legislation lingered in the Senate after having been referred to the Committee on Commerce, Science, and Transportation.²⁴⁴ When a new session of Congress began in January of 2007, all proposed bills and resolutions that had not passed (including DOPA), were removed from consideration.²⁴⁵ In addition, the DOPA’s main sponsor, Michael Fitzpatrick, lost his bid for re-

239. Halperin, *supra* note 14.

240. 152 CONG. REC. H5883, H5885 (2006) (statement of Rep. Stupak quoting American Library Association).

241. *Am. Library Ass’n*, 539 U.S. at 209.

242. H.R. 5319 [109th]: Deleting Online Predators Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=h109-5319> (last visited Feb. 17, 2007).

243. *Id.* Vote totals were 410 ayes, 15 nays, and 7 present/not voting. *Id.* Role number was 405. *Id.*

244. *Id.*

245. *See id.*

election in November of 2006 when he was defeated by the Democratic challenger, Patrick Murphy.²⁴⁶ Although this momentarily allowed school children across the country to breathe a sigh of relief,²⁴⁷ commentators agreed that it was very “possible that in the next session . . . the issue of social networking technologies might come to the forefront again.”²⁴⁸ Harsh critics of the DOPA worry that another MySpace-related panic will lead to new legislation aimed at social-networking sites.²⁴⁹

These fears were cemented on January 4, 2007 when Senator Ted Stevens of Alaska proposed the Protecting Children in the 21st Century Act.²⁵⁰ Although the legislation is in its very early stages and has just recently been referred to the Senate Commerce, Science and Transportation Committee,²⁵¹ many are already labeling the legislation as the “DOPA Jr.,”²⁵² or “DOPA II.”²⁵³ The asserted purpose of the new legislation is “to amend the Communications Act of 1934 to prevent the carriage of child pornography by video service providers, to protect children from online predators, and to restrict the sale or purchase of children’s personal information in interstate commerce.”²⁵⁴ The second section of the new bill is even called “Deleting Online Predators,”²⁵⁵ and this section contains virtually the same language as the DOPA.²⁵⁶ In addition to the DOPA language, this section also calls for “a policy of Internet safety for minors that

246. Vikas Bajaj, *Northeast*, N.Y. TIMES, Nov. 9, 2006, at P10.

247. See Matthew Nelson, *DOPA Dead (Probably)*, Jan. 3, 2007, <http://blog.clickz.com/070103-182147.html>.

248. Young Adult Library Services Association, *DOPA (Deleting Online Predators Act)*, <http://teentechweek.wikispaces.com/DOPA> (last visited Feb. 17, 2007).

249. See LibraryJournal.com, *Why Did DOPA Die? The Senate, the Foley Scandal, and the Election*, Jan. 8, 2007, <http://www.libraryjournal.com/article/CA6404709.html>.

250. S. 49 [110th]: Protecting Children in the 21st Century Act, <http://www.govtrack.us/congress/bill.xpd?bill=s110-49> (last visited Feb. 17, 2007).

251. *Id.*

252. Andy Carvin, *The Birth of DOPA Jr.*, Jan. 23, 2007, http://www.pbs.org/teachersource/learning.now/2007/01/the_birth_of_dopa_jr.html.

253. Xendi Jardin, *Senator “Series of Tubes” Stevens Introduces DOPA II: The Sequel*, Jan. 23, 2007, <http://www.tuzworld.com/index.php/archives/954>.

254. Protecting Children in the 21st Century, S. 49, 110th Cong. (1st Sess. 2007).

255. *Id.*

256. *Id.*

prevents cyberbullying and includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access.”²⁵⁷ As written, the Protecting Children in the 21st Century Act would raise the exact same constitutional concerns as the DOPA, with the additional concern that this legislation is still viable and susceptible to the same fear mongering. On Tuesday, February 13, 2007, “Dateline” aired the results of its ninth undercover investigation in the “To Catch a Predator” series.²⁵⁸ The continual visibility of such remote threats is bound to keep “MySpace Madness”²⁵⁹ alive and well, and the pressure on Congress to protect our nation’s children will be stronger then ever.

VII. CONCLUSION

In addition to the constitutional questions surrounding the DOPA and similar legislation, there is the realization by many that this type of legislation would do little to protect children from danger on the Internet.²⁶⁰ The reality is, “Internet protection is a moving target, and social networking is evolving more quickly than the legislation aimed at regulating it.”²⁶¹ Many advocates of child safety believe that the most effective way to protect children is through education where children can “learn how to use all kinds of applications safely and effectively, and where young people can learn how to report and avoid unsafe sites.”²⁶² It is difficult to see the wisdom in legislation that would “actually drive children to go to unsupervised places, to go online, where they will become more vulnerable to child predators.”²⁶³ To truly shield children from harmful material, Congress cannot let emotion and fear play a predominant role in legislation, because “reacting in ignorance and fear. . . they increase the risks and discard the

257. *Id.*

258. Chris Hansen, *All Kinds of Men, All Kinds of Stories – Part One of the Texas Investigation*, DATELINE, Feb. 13, 2007, <http://www.msnbc.msn.com/id/17137110/>.

259. Zeller, *supra* note 12.

260. Ramasastry, *supra* note 181.

261. Halperin, *supra* note 14.

262. American Library Association, *DOPA Information Packet: A Resource for Librarians and Library Workers*, Aug. 8, 2006, <http://www.ala.org/yalsa>.

263. 152 CONG. REC. H5883, H5885 (2006) (statement of Rep. Stupak).

benefits of these emerging cultural practices.”²⁶⁴ Congress should “take the initiative to research, identify, and develop the most effective means to protect minors without restricting their access to constitutionally and socially essential materials.”²⁶⁵ The DOPA does not represent the most effective means to protect children from harmful material on the Internet because it would be struck down as a violation of the First Amendment due to pervasive needless overblocking.

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264. Boyd & Jenkins, *supra* note 122.

265. Miltner, *supra* note 71, at 578.

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Undocumented Immigrants and Their Personal Injury Actions: Keeping Immigration Policy Out of Lost Wage Awards and Enforcing the Compensatory and Deterrent Functions of Tort Law

Immigration is by definition a gesture of faith in social mobility. It is the expression in action of a positive belief in the possibility of a better life. It has thus contributed greatly to developing the spirit of personal betterment in American society and to strengthening the national confidence in change and the future. Such confidence, when widely shared, sets the national tone. The opportunities that America offered made the dream real, at least for a good many; but that dream itself was in large part the product of millions of plain people beginning a new life in the conviction that life could indeed be better, and each new wave of immigration rekindled the dream.

John F. Kennedy¹

I. INTRODUCTION

Today approximately 10.5 million undocumented immigrants²

1. JOHN F. KENNEDY, A NATION OF IMMIGRANTS 67-68 (1964).

2. For the purposes of this article, the population of immigrants who do not have documentation to reside legally in the United States will be referred to as “undocumented immigrants.” Besides the negative social implications associated with the term, referring to a portion of the population as “illegal” can be equated with assuming one is guilty until proven innocent. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1192 (4th ed. 2002). When such dangerous assumptions are made, they negate the viability of immigration laws because just as in other areas of the law, people who must navigate through immigration proceedings may have valid legal claims which afford them remedies under the law. *See id.* Furthermore, the term “alien” even when used alone, carries its own negative implications. *Id.* The term is isolationist, relegating even “legal” immigrants to the outer

live within the borders of the United States and the number keeps growing.³ The undocumented population is increasing at the average rate of 408,000 people per year.⁴ Combined with the documented population, the immigrant population is at its largest level in history and continues to increase.⁵ It is against this backdrop that the topic of immigration receives extensive publicity via the media and, with the advent of the internet, public opinion is much more accessible.⁶ While at first glance, public sentiment about immigrants appears increasingly negative, public opinion fluctuates dramatically over short periods of time.⁷ This wavering opinion of and uncertainty about the immigrant population is not surprising, however, considering that the factual basis on which such opinions are premised is mixed and inconsistent at best.⁸

fringes of our society. *Id.*

3. MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES 1 (Jan. 2005), http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf.

4. *Id.*

5. MARC J. PERRY ET AL., U.S. CENSUS BUREAU, MIGRATION OF NATIVES AND THE FOREIGN BORN: 1995 TO 2000, at 1 (Aug. 2003), *available at* <http://www.census.gov/prod/2003pubs/censr-11.pdf>. The total immigrant population (documented and undocumented) in 2000 was 31.1 million, an increase of 57% in 10 years. *Id.*

6. The advent of the internet perhaps allows more fringe views on immigration to be accessible to the average citizen. There are innumerable websites devoted to anti-immigration policy which might give rise to an inference that Americans are anti-immigrant. *See, e.g.*, Border Guardians, <http://www.borderguardians.org> (promoting the burning of Mexican flags at anti-immigration rallies); Boycott Mexico, <http://www.boycothemexico.com> (calling Mexico the "neighbor from hell"); NoInvaders.org, <http://www.NoInvaders.org> (listing the names, addresses and related information of companies across the United States that allegedly hire undocumented immigrants).

7. In a recent Gallup Poll, people were asked whether they favored reducing immigration. Only 39% of respondents to the June 2006 poll favored a reduction in immigration. *See* Gallup's Pulse of Democracy: Immigration, <http://www.galluppoll.com/content/?ci=1660>. Compare this number with the results of the same poll in April 2006, in which 47% of respondents favored reducing immigration. *Id.* The number fluctuated, at times erratically, from 58% in October 2001 to 49% in 2002 to 38% in 2000, for example. *Id.*

8. Discourse as to the actual effects of immigration on the economic, social and environmental areas of American life is diverse. There is no consensus. Is it a wonder Americans are confused? For example, some argue that immigration causes economic disadvantage for low-skilled Americans who must compete for jobs with immigrants, *see, e.g.*, GEORGE J. BORJAS, HEAVEN'S DOOR – IMMIGRATION POLICY AND THE AMERICAN ECONOMY 63-64

This inconsistency seeps not only into the minds of Americans but also into the law. While controlling immigration, with an emphasis on undocumented immigration, is the traditional focus of immigration law,⁹ there is an insidious movement to address immigration issues through the back door of tort law by denying undocumented immigrants a full course of remedies for their injuries.¹⁰ Specifically, attempts have been made to deny undocumented immigrants the right to collect lost wages¹¹ in personal injury actions with varying results.¹² The result of focusing on immigration policy when awarding lost wages in tort actions is nothing less than erratic.¹³ Some undocumented immigrants are denied any right to collect lost wages,¹⁴ whereas others are allowed to collect lost wages based on American wage rates,¹⁵ while yet others are allowed to establish lost wages based on the wage rates of their country of origin.¹⁶ The focus on

(1999), while others argue that American workers are utilized in a more productive fashion, resulting in an efficiency that is beneficial to the economy. *See, e.g.*, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMY OF SCIENCES, THE NEW AMERICANS – ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 4-8 (James P. Smith et al. eds., 1997). As for social implications, some argue that we cannot be a sovereign nation because we are too diverse, *see, e.g.*, PETER BRIMELOW, ALIEN NATION – COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER 209-11 (1995), while others argue that it is our unique cultural differences that unify us. *See, e.g.* Stephen J. Legomsky, *Immigrants, Minorities and Pluralism: What Kind of Society Do We Really Want?*, 6 WILLAMETTE J. INT’L L. & DISP. RESOL. 153, 160-61 (1998).

9. *See infra* Part II.A.

10. *See infra* Part III.A-D.

11. For purposes of this article, the term “lost wages” includes both past and future lost wages unless otherwise indicated.

12. *See infra* Part III.A.

13. *See infra* Part III.A.

14. *See Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1334 (D. Fla. 2003).

15. *See Hernandez v. M/V Rajaan*, 848 F.2d 498, 500 (5th Cir. 1988); *Barros v. E.W. Bliss Co.*, Civ. A. No. 91-126330Z, 1993 WL 99930, at *2 (D. Mass. 1993); *Hagl v. Stern*, 396 F. Supp. 779, 779 (E.D. Pa. 1975); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1260 (N.Y. 2006); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 70 (App. Div. 2d Dep’t 2005), *aff’d sub nom.* *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246 (2006); *Collins v. N.Y. City Health and Hosp. Corp.*, 607 N.Y.S.2d 387, 388 (App. Div. 2d Dep’t 1994); *Klapa v. O&Y Liberty Plaza Co.*, 645 N.Y.S.2d 281, 282 (Sup. 1996); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 247 (Tex. App. 2003); *Peterson v. Neme*, 281 S.E.2d 869, 874 (Va. 1981).

16. *See Hernandez-Cortez v. Hernandez*, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. 2003); *Sanango v. 200 East 16th St. Housing Corp.*, 788 N.Y.S.2d 314, 316-19 (App. Div. 1st Dep’t 2004); *Jallow v. Kew*

immigration policy thus negates the compensatory nature of tort law by inadequately and sporadically compensating undocumented immigrants for injuries they suffer as a result of another's negligence.

As a hypothetical example, assume Ms. A, an undocumented immigrant from Guatemala, has resided in Rhode Island for 12 years. Ms. A has worked all twelve years at a local mill on a full-time basis at the rate of \$8.00 per hour. While walking home from work one evening, she is hit by a drunk driver. Ms. A sustains serious injuries and is out of work for one year, losing over \$16,000.00 in wages. Under the present system of awarding lost wages, there are three possible outcomes to this scenario. First, Ms. A finds herself before a court whose primary agenda is promoting federal immigration policy and is thus denied lost wages because she is in the country illegally. Alternately, Ms. A finds herself before a court that tries to balance tort policy and federal immigration policy resulting in an award of past lost wages based on the rate of pay she would earn in Guatemala, \$2.00 per hour, leaving her with a lost wage award of approximately \$4,000.00. Finally, Ms. A finds herself before of a court whose interest in a personal injury case is to abide by the compensatory and deterrence functions of tort law, in which case Ms. A is granted the opportunity to collect lost wages based on American wage rates, thus being fully compensated for her injury.

This Note argues that whether or not an immigrant is documented or undocumented, lost wage awards in personal injury actions should always be based on American wage rates. There is no legal basis for denying undocumented immigrants lost wage awards based on American wage rates in personal injury actions. The Supreme Court has never decided such a case. In addition, while the Federal Government is responsible for developing immigration law and policy, awarding lost wages to undocumented immigrants in personal injury actions is not preempted by federal immigration policy. Finally, when the courts fail to award lost wages based on American wage rates, the compensatory and deterrent functions of tort law, which should be the primary consideration in personal injury cases, are completely diminished. Not only do lost wage awards based on an

undocumented immigrant's home country wage rates diminish the efficacy of tort principles, but they also hinder the enforcement of immigration law. Awarding lost wages based on American wage rates serves a dual purpose in the enforcement of immigration law. First, it serves as a deterrent for employers who might otherwise be willing to hire undocumented immigrants to work in unsafe working conditions and take the risk knowing that even if an immigrant is injured, the employer may not have to pay lost wages. Second, even when the negligent party is not an employer, the backlash employers might face when a negligent party is forced to pay an undocumented immigrant lost wages serves as a secondary deterrence function which promotes immigration policy.

Part II of this Note outlines the historical development of the areas of immigration law and tort law, delineating the unique policies driving each area of the law. Part III of this Note examines the issue of awarding lost wages to undocumented immigrants and the bases of analysis in addressing the manner and method of awards. Specifically, there is a close examination of the Supreme Court case of *Hoffman Plastic Compounds, Inc. v. NLRB*¹⁷ and a discussion of why this lost wage case arising out of a conflict between two federal labor law statutes is not applicable to tort actions. Further, this Note addresses the preemption argument against awarding lost wages. This Note analyzes how, in fact, lost wage awards in personal injury actions are not preempted by federal immigration policy. Part III of this Note examines the policy arguments supporting awards of lost wages to undocumented immigrants. This Note concludes with the suggestion that lost wage awards in personal injury cases of undocumented immigrants should always be based on American wage rates in order to promote the policies of tort law and that, further, in promoting tort policy, immigration law and policy will be best served.

17. 535 U.S. 137 (2002).

II. HISTORICAL DEVELOPMENT OF IMMIGRATION LAW AND TORT LAW IN THE UNITED STATES

A. Evolution of Immigration Law

1. Early Developments

Prior to the 1800s, immigration law was primarily committed to the control of the states.¹⁸ Immigration legislation was largely unnecessary in a fledgling nation in need of populating itself.¹⁹ The policy of the time was come one, come all.²⁰ Unspoken promises of religious freedom and a tolerant government induced immigrants to leave their homelands.²¹ With undeveloped land and a new world came the knowledge that a hard-working person could create a new life and accumulate wealth.²² States passed few anti-immigration laws at this time because of the need for and value of labor.²³ Furthermore, early attempts by the federal government to restrict immigration met with animosity.²⁴ Thus, federal regulation was generally restricted to pro-immigrant legislation.²⁵ Under this policy of promoting the growth of a fledgling country, the nation grew exponentially.²⁶ From 1790 to 1850 approximately 2,515,000 foreigners migrated to the United States.²⁷

18. LEGOMSKY, *supra* note 2, at 2.

19. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02[1] (2004).

20. *Id.* There is some dissent as to how inclusive immigration laws were even under state control. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1835-36 (1993) (arguing that immigration was not as unrestricted as today's scholars purport it to be).

21. EMBERSON E. PROPER, COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA 9-10 (2003).

22. *Id.* at 10.

23. *Id.* at 17.

24. GORDON, *supra* note 19, § 2.02[1]. The Alien Act of 1798 gave the President power to remove any alien he thought to be dangerous from the U.S. *Id.* The Act was allowed to lapse after a two year time period because it was so unpopular. *Id.*

25. *Id.* For example, in 1819 federal legislation controlling conditions on ships carrying immigrants to the U.S. was passed. *Id.*

26. *Id.*

27. GEORGE M. STEPHENSON, A HISTORY OF AMERICAN IMMIGRATION: 1820-1924, at 99 (1926).

With the late 1800s came increased involvement by the federal government in the area of immigration. The first general immigration law²⁸ enacted by the Federal Government was a tax of 50 cents imposed on any non-citizen passenger coming by ship to the United States.²⁹ During this time period, labor groups were organizing with an agenda focused on limiting the influx of contracted labor from outside of the United States.³⁰ While the agenda was focused on labor issues, much of the labor group agendas also carried racial undertones.³¹ Under the pressure of labor groups and other anti-immigrant proponents, the rise of immigration restriction began in 1882 with the enactment of the Chinese Exclusion Act,³² which banned the entry of Chinese laborers into the United States.³³ In 1885, Congress passed a law³⁴ to discourage the importation of foreign laborers unless they were needed for a new industry in which there was unmet demand.³⁵ The law was amended in 1888³⁶ to allow for deportation of certain contract laborers.³⁷ It is important to note that much of this legislation passed during a period of time in which depletion of open land and the competitive labor force was increasing.³⁸ Thus, the open policy of immigration which incited

28. Act of August 3, 1882, ch. 376, 22 Stat. 214.

29. STEPHENSON, *supra* note 27, at 142.

30. *Id.* at 143.

31. ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882*, at 17 (2004). In the 1870s, the National Labor Union promoted the restriction of Chinese immigration, pressuring legislatures to stop the “evil” presence of Chinese laborers in the United States. *Id.* at 16-17.

32. Act of May 6, 1882, ch. 126, 22 Stat. 58.

33. DANIELS, *supra* note 31, at 19. The Chinese Exclusion Act included a provision that any Chinese person who was in the United States on November 17, 1880 or had come to the United States between November 17, 1880 and August 4, 1882 could leave the United States and return. *Id.* This provision was repealed in 1888, leaving many Chinese unable to return to the United States even though they fell within the date requirement of the Chinese Exclusion Act. *Id.* at 20. While the repealing act was challenged in *Chae Chan Ping v. United States*, the resulting decision produced further restrictions on immigration law with the court reasoning that exclusion of non-citizens was not a question for the judiciary, being a political issue and incident to sovereignty. *See* 130 U.S. 581, 609 (1889).

34. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332.

35. STEPHENSON, *supra* note 27, at 143.

36. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566.

37. GORDON, *supra* note 19, § 2.02[2].

38. STEPHENSON, *supra* note 27, at 145.

development of a nation quickly turned into immigration control. Even during this time period, the focal point of many of the immigration laws was not only centered on labor but, more importantly, on employers.³⁹ Finally, in 1891, immigration came under federal control⁴⁰ with the creation of the Bureau of Immigration.⁴¹

While earlier legislation generally focused on labor and employment issues, the development of the Bureau of Immigration brought about an even more exclusionist immigration policy. The Bureau's creation incidentally occurred in the "depression-scarred" 1890s.⁴² The 1891 act that created the Bureau also excluded from entering the United States various groups including paupers, people suffering from contagious diseases, and people convicted of crimes of moral turpitude.⁴³ The act further called for deportation proceedings against anyone who entered the country illegally.⁴⁴ In 1903, the list of excludable immigrants grew to include such groups as beggars and epileptics.⁴⁵ In 1907, the feeble-minded and children without parents were added to the ever-growing list of excludable immigrants.⁴⁶ While exclusion of the above classes of immigrants was originally intended to limit entry for those immigrants who were unable, due to physical or mental health problems, to care for themselves, the restrictions ultimately were used to exclude physically and mentally capable but poor immigrants.⁴⁷ Restrictive immigration regulation reached its zenith in 1917⁴⁸ with the passage of legislation requiring a literacy test for all incoming immigrants.⁴⁹ While the earlier exclusionist laws targeted what were thought to be "undesirables,"⁵⁰ the literacy

39. See DANIELS, *supra* note 31, at 28. Laws made it unlawful for employers to contract with or import immigrants, publish advertising that promoted immigration with promises of work or to pay for the importation of immigrants to the U.S. See STEPHENSON, *supra* note 27, at 145-48.

40. Act of March 3, 1891, ch. 551, 26 Stat. 1084.

41. See DANIELS, *supra* note 31, at 29.

42. *Id.* at 11.

43. GORDON, *supra* note 19, § 2.02[2].

44. *Id.*

45. Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213.

46. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898.

47. DANIELS, *supra* note 31, at 28.

48. Act of Feb. 5, 1917, ch. 29, 39 Stat. 874.

49. DANIELS, *supra* note 31, at 46.

50. STEPHENSON, *supra* note 27, at 156.

test was a general restriction on all immigrants to the United States signaling a nuanced shift in immigration policy in the United States. Even though the literacy test was only enacted in 1917, it was discussed and promoted as early as 1912,⁵¹ at which time immigration was reaching its peak.⁵² Compounding the problem was the fact that World War I brought with it a sharp decrease in immigration,⁵³ but people realized that the end of the War would bring along with it refugees from war-torn, ravaged countries,⁵⁴ resulting in mass immigration. Thus, the political climate of the times facilitated passage of the literacy requirement. While the literacy requirement was ineffective in limiting immigration to the United States, its significance lay in the fact that it garnered overwhelming support despite its restrictionist nature.⁵⁵

By the end of World War I, immigration began to increase but not at the “flood” rates that many anticipated.⁵⁶ Even so, the trend of restrictionist immigration policy continued influenced largely by the post-war economic depression.⁵⁷ Many of the unemployed were war veterans, and this fact combined with the threat of jobs being taken away from these men by immigrants, stirred up “anti-immigrant hysteria.”⁵⁸ At this time the United States adopted a quota system⁵⁹ to control immigration, beginning

51. *See id.* at 161.

52. 9.9 million immigrants entered the United States from 1905 to 1914, more than any other ten year period in the history of immigration. DANIELS, *supra* note 31, at 45.

53. STEPHENSON, *supra* note 27, at 157.

54. *See* DANIELS, *supra* note 31, at 45-47; STEPHENSON, *supra* note 27, at 157-58.

55. *See* DANIELS, *supra* note 31, at 46-47.

56. *See* STEPHENSON, *supra* note 27, at 178. 805,228 immigrants entered the United States by fiscal year end June 30, 1921, a lower number of immigrants than had entered the United States before the start of World War I when the average rate of entry between 1910 and 1914 was over one million immigrants per year. *Id.* It seems that fear of a mass immigration was unfounded.

57. GORDON, *supra* note 19, § 2.02[3].

58. *See* DANIELS, *supra* note 31, at 47.

59. The quota systems have always generated interesting scholarly debate. *See, e.g.,* KENNEDY, *supra* note 1, at 74-75 (arguing, among other things, that the system is illogical and unreasonable and discriminates among immigrants on “the basis of accident of birth”); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625 (2001) (discussing the racial undertones of the quota system).

with the Quota Law of 1921,⁶⁰ a temporary measure that remained in place until 1924 when a permanent quota policy⁶¹ was enacted by Congress.⁶² The quota laws signaled another subtle shift in immigration policy towards decreasing immigration altogether.⁶³ The quota policy implemented by the Immigration Act of 1924 limited immigration by nationality, based on the number of people of that nationality in the United States in 1920 up to 150,000.⁶⁴ The result was a decrease in immigration of nationalities governed by the quota system, particularly southern and eastern European immigrants.⁶⁵ The restrictive limitations on immigration that developed over the years remained largely unchanged until 1952.

2. The Immigration and Nationality Act

In 1952, Congress enacted the Immigration and Nationality Act (INA), which codified existing legislation, loosened some restrictions barring naturalization of East Asians, and simplified reunification of husbands and wives.⁶⁶ The most restrictive aspect of the previous immigration laws, however—the national origins quota system based on 1920 census statistics—remained intact.⁶⁷ While still largely restrictive, the more liberal elements of the legislation were the result of the post-Cold War sentiment which emphasized America’s role as the leader of the free world.⁶⁸ The national origins quota system was finally abolished in 1965 and replaced with a fixed quota system.⁶⁹ This change occurred as a result of pressure from the Democratic platform of the early 1960s which described the national origins quota system as “a policy of deliberate discrimination” contradicting “the founding

60. Act of May 19, 1921, ch.8, 42 Stat 5. The Act implemented a quota system which limited the number of aliens of any nationality that could immigrate to the United States at 3% of the number of foreign born people of the same nationality already residing in the United States as calculated by the 1910 U.S. Census. *Id.* at § 2(a).

61. Immigration Act of 1924, ch. 190, 43 Stat. 153.

62. GORDON, *supra* note 19, § 2.02[3].

63. See DANIELS, *supra* note 31, at 48-50.

64. Immigration Act of 1924, ch. 190, 43 Stat 153, sec. 11(b).

65. GORDON, *supra* note 19, § 2.02[3].

66. KENNEDY, *supra* note 1, at 77.

67. See GORDON, *supra* note 19, § 2.04[1].

68. DANIELS, *supra* note 31, at 113.

69. GORDON, *supra* note 19, § 2.04[3].

principles of this nation.”⁷⁰ The pressure for immigration reform continued under the administration of President John F. Kennedy, and abolition of the system came to fruition under the administration of President Lyndon B. Johnson.⁷¹ Other than abolition of the national origins quota system, however, immigration law remained largely restrictionist in scope, with the focus always on control.⁷² The system remained largely untouched until the mid-1980s, when the focus began to shift back to employment and labor concerns.⁷³

3. The Immigration Reform and Control Act

The Immigration Reform and Control Act of 1986⁷⁴ (IRCA) represents the single most extensive change to U.S. immigration laws since the demise of the quota system in 1965.⁷⁵ Fear of undocumented immigration was at a peak during the 1980s as a result of economic factors including inflation, recession, runaway interest rates, and the highest unemployment rates since the Depression.⁷⁶ Implemented as a result of national dissatisfaction with an immigration policy that was ineffective in preventing undocumented immigration,⁷⁷ the primary policy behind IRCA was to deter illegal immigration.⁷⁸ IRCA aimed to reduce undocumented immigration via a multi-directional approach emphasizing three areas: first, controlling illegal immigration;⁷⁹ second, imposing penalties on employers⁸⁰ who hired undocumented immigrants;⁸¹ and third, allowing legalization for certain undocumented immigrants already in the United States.⁸² While IRCA continued to place restrictions on immigration policy in the United States, Congress emphasized that employer

70. DANIELS, *supra* note 31, at 129.

71. *Id.* at 133-35.

72. *Id.* at 135.

73. GORDON, *supra* note 19, § 2.04[9][c].

74. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

75. UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980S, at 2 (Frank D. Bean et al. eds., 1990).

76. *See* DANIELS, *supra* note 31, at 220.

77. UNDOCUMENTED MIGRATION, *supra* note 75, at 1-3.

78. *Id.* at 2.

79. H.R. Rep. No. 99-682(I), at 45 (1986).

80. *Id.*

81. UNDOCUMENTED MIGRATION, *supra* note 75, at 2.

82. H.R. Rep. No. 99-682(I), at 49 (1986).

sanctions were the “most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.”⁸³ Thus, the focus of punitive sanctions was not on the immigrant as much as it was on the employer.⁸⁴ Furthermore, in making allowances for undocumented immigrants already in the United States, Congress focused not only on the contributions of these immigrants, but also on their victimization and exploitation.⁸⁵ While the focus of overall immigration policy remained on restriction, punishing undocumented immigrants was not in the minds of our legislature.⁸⁶

4. Developments After IRCA

Since IRCA, various legislative acts have continued to place controls on immigration to the United States. The Immigration Act of 1990, a great example of the historical ambivalence of the United States towards immigration, increased the number of immigrants allowed into the United States in future years while simultaneously restricting due process rights of deportees.⁸⁷ By the mid 1990s, the ambivalence tipped towards restriction with a proposed ballot initiative in California that prohibited undocumented immigrants from attending public schools.⁸⁸ The ambivalence culminated in 1996 with the passage of a series of restrictive acts. The Illegal Immigration Reform and Immigrant

83. *Id.* at 46.

84. *See id.* Jobs and the economic benefits that flow therefrom are a primary motivator for immigration to the United States. Take the story of Elmer Jacinto, for example. Adam Geller, *One Country's Loss Is Another's Gain*, THE STANDARD-TIMES, Jan. 14, 2007, at B6, available at <http://archive.southcoasttoday.com/daily/01-07/01-14-07/07perspective.htm>. Mr. Jacinto left the Philippines, where he was considered one of the nation's up and coming doctors, to work in the United States as a nurse. *Id.* A doctor in the Philippines makes between \$300 and \$800 per month whereas a nurse in the United States makes \$4,000 per month. *Id.*

85. H.R. Rep. No. 99-628(I), at 49 (1986).

86. Punishing undocumented immigrants is arguably counterproductive. *See, e.g.,* Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553 (1989) (arguing that demand for undocumented workers can be decreased by affording undocumented workers access to extensive remedies for employment law violations).

87. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

88. *See* Philip Martin, *Proposition 187 in California*, 29 INT'L MIGRATION REV. 255 (1995).

Responsibility Act of 1996⁸⁹ (IIRAIRA) restricted immigration by increasing border patrols, increasing punishments for immigration law violations, providing for the building of more barriers on the United States/Mexico border, and placing 10-year bans on admission for immigrants attempting to enter the United States after having been illegally in the United States at any time.⁹⁰ Other acts passed during this time decreased the rights of legal immigrants to food stamps and supplemental social security income.⁹¹ The tides had turned once again towards decreasing immigration to the United States.

B. Evolution of Tort Law⁹²

1. Early Developments

The political and economic pressures that influenced the development of American immigration policy emphasizing restriction and control lie in stark contrast to the amorphous policies underlying the development of tort law in the United States. While immigration law was slowly federalized in the late 1800s,⁹³ tort law evolved into its own distinct field of law.⁹⁴ The development of tort law was a direct result of the industrial revolution, which brought with it not only jobs but also modern machines and tools capable of crushing, slicing, and crippling

89. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

90. DANIELS, *supra* note 31, at 246.

91. *Id.* at 246-48.

92. The focus of Part II.B of this Note is the deterrence and compensation functions of tort law and development of those functions through history. This section is by no means meant to be an exhaustive analysis of tort doctrine, which is beyond the scope of this Note. There are varying thoughts on the purpose of tort law, theories behind tort law and whether the policies behind the development of tort law are successfully served. The depth and breadth of scholarly literature on the subject is limitless. *See generally* CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA* (2001) (discussing the regulatory nature of lawsuits); ROBERT L. RABIN, *PERSPECTIVES ON TORT LAW* (1976) (compiling essays of varying viewpoints on tort theory); Victor E. Schwartz et al., *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. REV. (2006) (discussing neutral principles available to judges to evaluate stare decisis while simultaneously changing tort law rules); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989) (discussing tort law theory from an instrumentalist viewpoint).

93. *See supra* Part II.A.

94. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3 (1980).

those who were unfortunate enough to cross their paths.⁹⁵ With modernization came increased risks, and by the late 1800s and early 1900s industrial accidents accounted for about 35,000 deaths and close to 2,000,000 injuries per year.⁹⁶ The development of tort law thus arose “out of the various and ever-increasing clashes of the activities of persons living in a common society.”⁹⁷ Increased modernization brought with it “losses, or injuries of many kinds sustained by one person as the result of the activities of others.”⁹⁸ “The purpose of the law of torts was to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another.”⁹⁹ The resulting system for combating these newfound risks was one focused on negligence, which arises when the conduct of one person fails to meet a standard of reasonable care and results in injury to another.¹⁰⁰ Thus, an important policy underlying the development of tort law was compensating individuals for injuries sustained as a result of another person’s faulty conduct.¹⁰¹

While compensating the injured for their injuries was a primary consideration of tort policy, there was some tension in the early period of tort law resulting from the desire to redress the injured as balanced against the economic growth and wealth which in the late 1800s were thought to be for the “greater good of society.”¹⁰² The same machines that happened to cut off one man’s finger were giving thousands of other men jobs, and producing, for example, railroad tracks that would be laid across the country by tens of thousands of other men.¹⁰³ There was concern about placing so much liability on companies that it would still the American economy.¹⁰⁴ The courts developed numerous doctrines to counter these concerns. The doctrine of contributory

95. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 262 (1973).

96. *Id.* at 422.

97. Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944).

98. *Id.*

99. *Id.*

100. HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW* 18 (1987).

101. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2 (4th ed. 1971).

102. FRIEDMAN, *supra* note 95, at 410.

103. This hypothetical is not based on any statistical information and is merely used as an example.

104. See FRIEDMAN, *supra* note 95, at 410-12.

negligence came into use in the United States in the 1850s, forcing any plaintiff in a personal injury case not only to prove that defendants were negligent but also to show that the plaintiff herself was faultless.¹⁰⁵ In 1842, the fellow-servant rule, which barred employees from suing their employers for injuries caused by the negligence of other employees, developed in American courts.¹⁰⁶ Other doctrines, such as the doctrine of immunity of charities,¹⁰⁷ assumption of risk,¹⁰⁸ and the doctrine of imputed negligence,¹⁰⁹ continued to immunize companies from tort actions.¹¹⁰ Negligence theory during this time period in history had a marked affect on the ability of tort law to function as a compensatory system.¹¹¹ Arguably, during these early stages, tort law was primarily about balancing economic interests against the welfare of the injured, with a slight tendency to favor industry.¹¹²

Despite the fact that tort law development in the 1800s was quite restrictionist, the courts were loath to encourage carelessness.¹¹³ After all, another equally important policy behind the development of tort law was that of impeding socially unreasonable conduct.¹¹⁴ The more that people are held liable for injuring others, the stronger the incentive to prevent similar harms from occurring.¹¹⁵ Therefore, the driving force behind liberal changes in tort policy during this time period was the goal to counter the restrictionist nature of early developments in tort law.¹¹⁶ Judges rejected the doctrine of imputed negligence.¹¹⁷

105. See Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 151 (1946).

106. See *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49 (1842).

107. The doctrine of immunity of charities protected charitable entities such as hospitals from liability as a result of the negligence of employees or others on their premises. See FRIEDMAN, *supra* note 95, at 416.

108. See, e.g., *Lamson v. Am. Axe & Tool Co.*, 58 N.E. 585, 585 (1900) (holding that an employee who understands a danger and takes the risk is barred from suing his employer for negligence).

109. This doctrine imputed the negligence of a parent to his child and a driver to his passenger resulting in the child or passenger being unable to recover for his or her injury. FRIEDMAN, *supra* note 95, at 417.

110. *Id.* at 416-17.

111. WHITE, *supra* note 94, at 61.

112. TORT LAW IN AMERICAN HISTORY: MAJOR HISTORICAL INTERPRETATIONS, at xiii, (Kermit L. Hall ed., 1987).

113. See FRIEDMAN, *supra* note 95, at 417.

114. PROSSER, *supra* note 101, § 5.

115. *Id.* § 4.

116. See FRIEDMAN, *supra* note 95, at 417-25.

The vice-principal doctrine developed, allowing injured employees to sue their employers if their injuries were due to the negligence of a supervisor.¹¹⁸ Legislative acts imposed higher standards of care on tortfeasors,¹¹⁹ created negligence *per se* laws,¹²⁰ and imposed safety regulations on corporations.¹²¹ Finally, many of the restrictionist rules were rejected by juries, who would “let their hearts dictate results.”¹²² While ultimately the restrictionist developments of the 1800s exceeded the expansionist developments, the policies of compensation and deterrence survived.

2. Early 20th Century Developments

The early 20th century saw a general stability in the system of tort law, with cases during this period tending to clarify tort doctrine.¹²³ Some change did occur during this period, however, particularly in the area of causation.¹²⁴ These developments resulted from a shift in theoretical legal thought, from a more scientific methodology to one largely influenced by the realism of the 1900s.¹²⁵ The nature of legal analysis took a turn toward more policy-oriented doctrine.¹²⁶ According to some scholars, the case of *Palsgraf v. Long Island Railroad*¹²⁷ marked the shift in the concept of causation, from a legal doctrine to an issue of public policy.¹²⁸ The *Palsgraf* case involved two men, one carrying a package, trying to board a train.¹²⁹ The guard on the train tried to help the men onto the train as it moved away and, in the process, dislodged the package, which fell to the rails and exploded.¹³⁰ Mrs. Palsgraf, who was standing near the platform

117. See *id.* at 417 (citing *Little v. Hackett*, 116 U.S. 366 (1885); *Bunting v. Hogsett*, 21 Atl. 31 (1891)).

118. See WHITE, *supra* note 94, at 51-55.

119. See FRIEDMAN, *supra* note 95, at 419.

120. *Id.* at 419-20.

121. *Id.* at 420-21.

122. *Id.* at 423.

123. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605 (1992).

124. See WHITE, *supra* note 94, at 93-102.

125. See *id.* at 91-93.

126. *Id.* at 98.

127. 162 N.E. 99 (N.Y. 1928).

128. See WHITE, *supra* note 94, at 101.

129. *Palsgraf*, 162 N.E. at 99.

130. *Id.*

but at a distance, was hit in the head by a scale that fell as a result of the explosion.¹³¹ The Cardozo majority opinion focused on the fact that the railroad owed no duty to Mrs. Palsgraf because she was not within the zone of danger, making her injury unforeseeable.¹³² The Andrews dissent was policy-driven, reasoning that everyone owed “to the world a large duty of refraining from those acts that may unreasonably threaten the safety of others.”¹³³ After this decision, causation was increasingly seen as an aspect of tort theory that involved policy considerations such as fairness and social justice.¹³⁴ This policy shift complemented the notions of redress and deterrence that had originally influenced the development of tort law.

3. The Mid to Late 20th Century Developments

Spurred by the public policy activism of the 1960s, which abolished the national origin quota system,¹³⁵ the mid to late 20th century signaled a further shift in tort theory, strengthening the deterrence and compensation policies of tort law with the expansion of tort liability.¹³⁶ The scope of liability broadened with the abolition of immunities for charities and government.¹³⁷ Comparative negligence replaced the contributory negligence; the latter had barred recovery for plaintiffs bearing any responsibility for the negligence, while the new doctrine merely apportioned liability, allowing plaintiffs some recovery.¹³⁸ The National Traffic and Motor Vehicle Safety Act of 1966¹³⁹ was a response to the realization that the most effective way to address highway safety and decrease injuries and deaths was through better product design.¹⁴⁰ The 1972 Consumer Product and Safety Act¹⁴¹

131. *Id.*

132. *Id.* at 100.

133. *Id.* at 102-03 (Andrews, J., dissenting).

134. WHITE, *supra* note 94, at 101.

135. *See supra* Part II.A.

136. Schwartz, *supra* note 123, at 601.

137. *Id.* at 605-06.

138. *See id.* at 606.

139. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966).

140. *See* Schwartz, *supra* note 123, at 612-13.

141. Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (1972).

placed a new emphasis on protecting consumers and deterring poor manufacturing practices.¹⁴² The policymakers of the era therefore emphasized and promoted the deterrence function of tort doctrine.

From the late 20th century to the present, the trend of expanding liability has slowed, largely as a result of lobbying by corporations concerned about the skyrocketing cost of liability.¹⁴³ There have been a couple of notable exceptions, one in the area of medical malpractice: the loss of chance doctrine allows patients to recover in instances where doctors negligently diagnose their conditions, even if their pre-diagnosis chances of recovery were less than 50%.¹⁴⁴ There was also an increase in the ability of crime victims to sue landlords, public agents, and agencies for negligence.¹⁴⁵ However, expansion of liability has been largely curtailed as a result of the legislative movement towards tort reform.¹⁴⁶ This type of tort reform focuses on reforming punitive damages and pain and suffering damages, and on revising rules for joint and several liability.¹⁴⁷ Even so, the principles of deterrence and compensation remain alive and well hundreds of years after their development.

C. Countervailing Interests of Immigration Law and Tort Law

When comparing the underlying purposes of immigration law and tort law, it is notable from the historical development of each area of law that each serves a separate and distinct function in our society.¹⁴⁸ Moreover, these functions lead in two very different directions. Immigration legislation, often influenced by the prevailing political winds, serves to appease the masses by excluding the powerless, whereas tort law serves to protect the masses by holding negligent companies and people accountable for their actions, and by allowing the injured to be compensated for the injuries they have suffered.¹⁴⁹ Because each area of law

142. See Schwartz, *supra* note 123, at 612-13.

143. *Id.* at 691.

144. Lars Noah, *An Inventory of Mathematical Blunders in Applying the Loss-of-Chance Doctrine*, 24 REV. LITIG. 369, 370-72 (2005).

145. See Schwartz, *supra* note 123, at 649-50.

146. *Id.* at 681.

147. *Id.*

148. See *supra* Part I.

149. *Id.*

serves a distinct and arguably useful¹⁵⁰ function, the question then becomes whether or not awarding lost wages to undocumented immigrants in personal injury actions serves the policies of each area of law. Despite what may seem like countervailing interests, the policies of both tort law and immigration law are best served by awarding lost wages to undocumented immigrants in personal injury actions based on American wage rates.

III. BASING LOST WAGE AWARDS ON AMERICAN WAGE RATES

A. The Country-Wide Inconsistencies

In awarding lost wages to undocumented immigrants in personal injury actions, courts across the country take four general routes. First, courts allow lost wages to be based on American wage rates.¹⁵¹ Second, courts limit the award of lost wages to wages immigrants would earn in their country of origin.¹⁵² Third, courts elect not to award any lost wages whatsoever for undocumented immigrants.¹⁵³ Finally, courts give

150. In implementing the term “useful” by no means is it my intent to support the current state of immigration law. It is likely that there are those who would disagree that tort law as it stands today serves any useful purpose. However, the purpose of this Note is to address the viability and utility of awarding lost wages in personal injury actions of undocumented immigrants only.

151. See *Hernandez v. M/V Rajaan*, 848 F.2d 498, 500 (5th Cir. 1988) (affirming award of future lost wages); *Barros v. E.W. Bliss Co.*, Civ. A. No. 91-126330Z, 1993 WL 99930, at *2 (D. Mass. 1993); *Hagl v. Stern*, 396 F. Supp. 779, 779 (E.D. Pa. 1975); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1260 (N.Y. 2006); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 70 (App. Div. 2d Dep’t 2005), *aff’d sub nom.* *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246 (2006); *Collins v. N.Y. City Health and Hosp. Corp.*, 607 N.Y.S.2d 387, 388 (App. Div. 2d Dep’t 1994); *Klapa v. O&Y Liberty Plaza Co.*, 645 N.Y.S.2d 281, 282 (Sup. 1996) (pertaining to future lost wages); *Tyson Foods, Inc. v. Guzman*, 116 S.W. 3d 233, 247 (Tex. App. 2003); *Peterson v. Neme*, 281 S.E.2d 869, 874 (Va. 1981).

152. See *Hernandez-Cortez v. Hernandez*, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. 2003) (pertaining to future lost wages); *Sanango v. 200 East 16th St. Housing Corp.*, 788 N.Y.S.2d 314, 316-19 (App. Div. 1st Dep’t 2004); *Jallow v. Kew Gardens Hills Apartments Owners*, No. 28907/2003, 2005 WL 1712206, at *2 (N.Y. Sup. Ct. 2005) (pertaining to both past and future lost wages).

153. See *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1334 (D. Fla. 2003).

juries¹⁵⁴ the opportunity to award wages based on either American wage rates or country of origin wage rates.¹⁵⁵ The inconsistencies in lost wage awards arise as a result of some courts emphasizing policies underlying immigration law¹⁵⁶ while other courts emphasize policies underlying tort law.¹⁵⁷ These inconsistencies reveal the tensions the courts face in both considering fairness to the injured and honoring the purposes of immigration law and tort law. To compound the problem, the Supreme Court has *never* addressed the issue of awarding lost wages in personal injury actions of undocumented immigrants; thus, the states are left to fend for themselves.¹⁵⁸

154. In these cases, juries are allowed to weigh evidence of immigration status. For an analysis of evidentiary issues relating to immigration status, see Benny Agosto, Jr. and Jason B. Ostrom, *Can the Injured Migrant Worker's Alien Status Be Introduced at Trial?*, 30 T. MARSHALL L. REV. 383 (2005) (examining how evidence of immigration status is used in American courts and ways to safeguard against admissibility of status).

155. See *Madeira v. Affordable Housing Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (conceding that immigration status was relevant to determining lost wages but holding that the jury's award based on U.S. wages should stand); *Mischalski v. Ford Motor Co.*, 935 F. Supp 203, 207 (E.D.N.Y. 1996) (holding that while immigration status could not be considered to calculate damages, it could be used in calculating lost wages); *Rodriguez v. Kline*, 232 Cal.Rptr. 157, 158 (Cal. App. 2d Dist. 1986) (discussing that it is for the court to decide whether or not lost wages shall be calculated based on U.S. rates or limited to country of citizenship); *Melendres v. Soales*, 306 N.W.2d 399, 402 (Mich. Ct. App. 1981) (allowing jury to consider immigration status in calculating lost wages); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994 (N.H. 2005); *Oro v. 23 East 79th St. Corp.*, 810 N.Y.S.2d 779, 781 (Sup. App. Term 2005) (holding that immigration status could be considered in awarding lost wages); *Echeverria v. Lindner*, No. 018666/2002, 2005 WL 1083704, at *12 (N.Y. Sup. Ct. 2005) (allowing immigration status to be considered in determining future lost wages).

156. See, e.g., *Veliz*, 313 F. Supp. 2d at 1335; *Hernandez-Cortez*, 2003 WL 22519678, at *6.

157. See, e.g., *Madeira*, 315 F. Supp. 2d at 507; *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, 577 (N.D. Ill. 1936); *Rosa*, 868 A.2d at 1000; *Majlinger* 802 N.Y.S.2d at 65.

158. However, the Supreme Court has addressed the issue of awarding lost wages to undocumented immigrants who were fired by their employers for participating in unions. The Court has held that awarding lost wages would be counter to federal immigration policy. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 137 (2002); *Sure-Tan v. NLRB*, 467 U.S. 883, 891 (1984). While advocates of prohibiting lost wage awards argued that *Hoffman* and *Sure-Tan* apply to personal injury actions, the courts have overwhelmingly rejected the argument. See *Rosa*, 868 A. 2d at 1000; *Tyson Foods, Inc. v. Guzman*, 116 S.W. 3d 233, 244 (Tex. 2003). *Hoffman* and *Sure-Tan* are discussed further *infra* Part III.C. For a further look at how lost

In considering awards of lost wages for undocumented immigrants in personal injury actions, a tri-focal pattern evolves: first, because there is no Supreme Court decision with respect to lost wages in personal injury actions, proponents rely on *Hoffman* as applicable to personal injury actions.¹⁵⁹ Second, the courts focus on preemption of state tort law by federal immigration policy.¹⁶⁰ Finally, the courts emphasize the policy arguments for and against both tort law and immigration law.¹⁶¹ However, a closer examination of cases across the United States will show that awarding “American” lost wages to undocumented immigrants promotes the policies behind both immigration law and tort law despite their countervailing interests.

B. The Role of Hoffman Plastics in Tort Actions

Although there is no Supreme Court decision on awarding lost wages to undocumented immigrants in personal injury actions, *Hoffman Plastic Compounds, Inc. v. NLRB*¹⁶² and its predecessor *Sure-Tan v. NLRB*¹⁶³ are often cited as a bar to such awards.¹⁶⁴ In the *Hoffman* case, Jose Castro, who was not legally authorized to work in the United States, was laid off from his employment with Hoffman Plastic Compounds as a result of his participation in a union organizing campaign.¹⁶⁵ Castro filed a complaint with the National Labor Relations Board (NLRB) arguing that the layoff violated the National Labor Relations Act.¹⁶⁶ The NLRB agreed with Castro and ordered back pay from the date of termination to the date the employer discovered Castro was

wage awards for undocumented immigrants are treated in various areas of law after *Sure-Tan*, see Timothy M. Cox, *A Call To Revisit Sure-Tan v. NLRB: Undocumented Workers and Their Right to Back Pay*, 30 SW. U. L. REV. 505 (2001).

159. See *supra* Part III.B.

160. See *supra* Part III.C.

161. See *supra* Part III.D.

162. 535 U.S. at 137.

163. 467 U.S. at 883.

164. See *Madeira v. Affordable Housing Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004); *Hernandez-Cortez v. Hernandez*, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *6 (D. Kan. 2003); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 60 (App. Div. 2d Dep’t 2005); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 243 (Tex. 2003).

165. *Hoffman*, 535 U.S. at 137.

166. *Id.*

unable to work.¹⁶⁷ Hoffman Plastic Compounds petitioned for review, arguing that IRCA, which made it unlawful to both employ undocumented immigrants and to use fraudulent documents to gain employment as an undocumented immigrant, precluded the NLRB from awarding back pay.¹⁶⁸ The Supreme Court agreed with the petitioner and held that “federal immigration policy, as expressed by Congress in IRCA, foreclosed the Board from awarding back pay to an undocumented alien who has never been legally authorized to work in the United States.”¹⁶⁹ The Court reasoned that in enacting IRCA, Congress had implemented a comprehensive scheme to deter the employment of undocumented immigrants, and that allowing a back pay award in a labor dispute violated specific prohibitions of federal immigration law.¹⁷⁰

While there have been numerous attempts to apply *Hoffman* in personal injury cases,¹⁷¹ such application poses several problems due to the limited holding of *Hoffman*. The *Hoffman* court’s decision involved resolving an apparent conflict between two federal statutes, IRCA and the National Labor Relations Act (“NLRA”).¹⁷² In contrast, tort actions are generally governed by state statutory regulation. Further, a prevailing issue in *Hoffman* was the conflict between IRCA’s purpose of deterring employment of undocumented workers and awarding lost wages as a result of employer violations of NLRA.¹⁷³ Federal labor law governs employer/employee relationships. The same cannot be said, however, for cases that arise under tort law. Tort law does not regulate employer/employee relationships but governs negligent behavior by negligent parties regardless of whether such a party

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 138.

171. *See* Hernandez-Cortez v. Hernandez, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *1 (D. Kan. 2003); Uribe v. Aviles, No. B166839, 2004 WL 2385135, at *1 (Cal. App. 2d Dist. 2004); Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1260 (N.Y. 2006); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 58 (App. Div. 2d Dep’t 2005); Sanango v. 200 East 16th St. Housing Corp., 788 N.Y.S.2d 314, 316 (App. Div. 1st Dep’t 2004); Jallow v. Kew Gardens Hills Apartments Owners, No. 28907/2003, 2005 WL 1712206, at *2 (N.Y. Sup. Ct. 2005); Gonzalez v. Franklin, 383 N.W.2d 907, 909 (Wis. 1986).

172. *Hoffman*, 535 U.S. at 137-41.

173. *Id.* at 137-39.

is an employer, a friend, or a stranger. Many personal injury cases arise as a result of car accidents,¹⁷⁴ medical malpractice,¹⁷⁵ fireworks injuries,¹⁷⁶ slips and falls,¹⁷⁷ and subcontractor work,¹⁷⁸ to name a few. Furthermore, while the undocumented immigrants in *Hoffman* were unnecessarily terminated from their employment, they did not suffer any physical injuries that prevented them from working or living their daily lives.¹⁷⁹ In contrast, when undocumented immigrants seek lost wages under tort law, they suffer physical, sometimes permanent injuries. *Hoffman*, which resolved a labor law conflict, is thus inapplicable in personal injury cases, and this view is supported by courts across the country.

Courts across the United States overwhelmingly reject application of *Hoffman* to tort actions of undocumented immigrants. While the court in a New York case, *Madeira v. Affordable Housing Foundation, Inc.*, found that the plaintiff's immigration status was relevant to determining the nature and extent of the lost wage award, the court explicitly rejected the defendant's argument that, pursuant to the decision in *Hoffman*, an award of lost wages would be in contravention of IRCA.¹⁸⁰ Beside the fact that the case was based on diversity jurisdiction, an award of lost wages to an undocumented immigrant in a personal injury action based on state common law does not offend the holding of *Hoffman*, the court held, because *Hoffman* does not bar undocumented immigrants from utilizing state courts to seek compensation for a defendant's tortious conduct.¹⁸¹ The *Majlinger* court dismissed *Hoffman* along the same lines, arguing that to read *Hoffman* as extending to personal injury actions would

174. *Hernandez-Cortez*, 2003 WL 22519678, at *1; *Uribe* 2004 WL 2385135, at *1; *Rodriguez*, 232 Cal. Rptr. at 157.

175. *Collins v. N.Y. City Health and Hosp. Corp.*, 607 N.Y.S.2d 387, 388 (App. Div. 2d Dep't 1994).

176. *Gonzalez*, 383 N.W.2d at 909.

177. *Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768, 769 (Tex. 1993).

178. *Madeira v. Affordable Housing Found., Inc.*, 315 F. Supp. 2d 504, 505 (S.D.N.Y. 2004); *Hagl v. Stern*, 396 F. Supp. 779, 781 (E.D. Pa. 1975); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 58 (App. Div. 2d Dep't 2005); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 817 (Sup. 2003).

179. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 137 (2002).

180. *Madeira*, 315 F. Supp. 2d at 506-07.

181. *Id.* at 507.

expand *Hoffman*'s limited holding.¹⁸² In *Tyson Foods Inc., v. Guzman*, the Texas Appellate Court also rejected application of *Hoffman* in personal injury actions.¹⁸³ While the defendant argued that *Hoffman* precluded awarding undocumented immigrants lost wages, the court's analysis of *Hoffman* limited its scope.¹⁸⁴ The *Tyson* case involved a common law personal injury claim, whereas *Hoffman* involved an employer's violation of labor laws.¹⁸⁵ Thus, the lower court's award of past and future lost wages was upheld as to Mr. Guzman, who was injured when hit by a forklift as he rounded up chickens.¹⁸⁶ Overall, the courts go to great lengths to distinguish between the *Hoffman* line of cases, which involved labor policy considerations, and personal injury cases, which involve disputes between two private citizens as a result of tortious conduct.¹⁸⁷

Even where a court applied *Hoffman* to a personal injury case, this application was limited in scope.¹⁸⁸ In *Hernandez-Cortez*, the only personal injury case to use *Hoffman*, the plaintiffs were injured in a car accident while being illegally transported from Mexico to North Carolina.¹⁸⁹ The plaintiffs sought past and future lost wages based on projected earnings rather than on actual earnings.¹⁹⁰ The court agreed with the plaintiffs' contention that *Hoffman* did not preclude the ability of undocumented immigrants to recover wages for work actually performed.¹⁹¹ However, the court distinguished the instant case from other personal injury cases which rejected the application of *Hoffman*, because in the instant case there were no wages earned and no actual work performed.¹⁹² The court was unwilling to

182. *Majlinger*, 802 N.Y.S.2d at 62.

183. *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 243-44 (Tex. 2003).

184. *Id.* at 244.

185. *Id.*

186. *Id.* at 237-47.

187. *Hernandez v. M/V Rajaan*, 848 F.2d 498, 500 (5th Cir. 1988).

188. See *Hernandez-Cortez v. Hernandez*, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *6 (D. Kan. 2003). Plaintiff who was injured in a motor vehicle accident sought an award of past and future lost wages and defendant argued that *Hoffman* precluded plaintiff from being awarded U.S. wages because he was not able to work legally in the United States; the court still allowed the plaintiff to claim lost wages based on earnings in Mexico. *Id.*

189. *Id.* at *1.

190. *Id.*

191. *Id.* at *6.

192. *Id.*

award lost wages based on an entirely imaginary figure.¹⁹³ The court relied heavily on the fact that the undocumented immigrants in this case did not work at all in the United States.¹⁹⁴ Application of *Hoffman* in this particular case did not, therefore, support any arguments that *Hoffman* should be applied generally in other personal injury actions because of the *Hernandez-Cortez* is so easily distinguished. Personal injury cases rejecting *Hoffman* have all involved injured parties who sought lost wage awards based on actual work in the United States,¹⁹⁵ unlike the instant case.

C. State Tort Law and the Preemption Argument

1. Preemption Basics

Courts which bar lost wage awards often rely on federal immigration legislation which allegedly preempts such awards. Deterring the employment of undocumented immigrants in the United States is a focal point of federal immigration law.¹⁹⁶ Specifically, 8 U.S.C. § 1324a¹⁹⁷ bars the employment of undocumented immigrants,¹⁹⁸ provides mechanisms by which an employer is to examine the appropriate documentation of employees,¹⁹⁹ and includes penalties for employers who fail to abide by the statutory provisions.²⁰⁰ The argument that develops in cases wherein undocumented immigrants seek lost wage awards for their personal injuries is that the “wages” earned in the past, or those that could be earned in the future, are a result of illegal employment in the United States.²⁰¹ Because immigration law seeks to deter employment of undocumented immigrants, courts have argued that federal immigration policy preempts any lost wage award based on illegal employment.²⁰²

Under the Supremacy Clause, Congress is empowered to

193. *Id.*

194. *See id.* at *3-*6.

195. *See supra* Part III.B.

196. *See* 8 U.S.C. § 1324a (2006).

197. *Id.*

198. *Id.* § 1324a(a)(1)(A) & (B).

199. *Id.* § 1324a(b).

200. *Id.* § 1324a(e)(4).

201. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1250 (N.Y. 2006).

202. *Id.* at 1254.

preempt state law.²⁰³ Preemption arises in one of three ways. First, state law may be preempted by explicit statutory language, known as express preemption.²⁰⁴ Second, “[i]n the absence of explicit statutory language signaling an intent to preempt, a court may infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation.”²⁰⁵ This type of preemption is known as field preemption. Third, federal law preempts a state law that stands as an obstacle to the purposes of the federal law, a type of preemption known as conflict preemption.²⁰⁶ Thus, unless a state statute is expressly preempted, field preempted, or conflict preempted, it will survive the Supremacy Clause. In the case of awarding lost wages to undocumented immigrants in personal injury actions, such awards survive all three prongs of the analysis.

2. Express Preemption

There is little contention as to whether or not a lost wage award to documented immigrants in personal injury actions is expressly preempted by federal immigration policy, particularly IRCA. Federal immigration statutes only preempt “any State or local law imposing civil or criminal sanctions upon those who employ”²⁰⁷ undocumented immigrants. Congress thus limited express preemption to sanctions against employers, not employees. For example, in summarily rejecting the express preemption argument, the *Majlinger* court reasoned that in enacting IRCA, Congress gave no indication nor did it provide that undocumented immigrants would be barred from their ability to sue in state courts for personal injuries or barred from the right to recover lost wages.²⁰⁸ What Congress did choose to do was to implement *employer* sanctions.²⁰⁹

203. U.S. CONST. art. VI, § 2.

204. P.G. & E. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 203 (1983).

205. Northwest Cent. Pipeline Corp. v. State Corp. Comm’n. of Kansas, 489 U.S. 493, 509 (1989).

206. Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000).

207. 8 U.S.C. § 1324a(h)(2) (2006).

208. *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 62 (App. Div. 2d Dep’t 2005).

209. *Id.* at 68.

3. Field Preemption

While the federal government has the exclusive authority to regulate immigration,²¹⁰ this authority cannot be construed to give the federal government exclusive authority to regulate immigration through tort law. The premise on which field preemption arguments are based is that field preemption prohibits an award of lost wages because the federal government has exclusive authority to regulate immigration, and this power was exercised by Congress in its enactment of INA and IRCA.²¹¹ While this may be true, such an argument fails to consider that lost wage awards in personal injury actions are based on state tort law which is not a regulatory “arm” or extension for immigration policy. Any lost wage awards that result from a personal injury action are a result of tort policy, not immigration policy. Take, for example, the case of Gorgonio Balbuena, a native of Mexico, who suffered severe head trauma after falling from a ramp while pushing a wheelbarrow, then sought redress under common law negligence and labor law theories.²¹² The court quickly dismissed the defense’s field preemption argument, noting that while IRCA occupied the spectrum of immigration law, the state law in this case occupied regulation of health and safety.²¹³ In fact, the federal government does not occupy the field of common-law torts, which is traditionally an area of state control.²¹⁴ Thus, an award of lost wages in personal injury actions does not fall within the scope of field preemption.

4. Conflict Preemption

Awarding lost wages to undocumented immigrants under state tort law is not an obstacle to Congress’ objectives in implementing IRCA or federal immigration policy in general.²¹⁵ The manner in which Congress intended to combat illegal immigration via adoption of IRCA and other immigration statutes supports the notion that such awards are not counter to federal

210. *See supra* Part II.A.

211. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1250 (N.Y. 2006).

212. *Id.*

213. *Id.* at 1256.

214. *Majlinger*, 802 N.Y.S.2d at 62.

215. *See id.* at 66.

immigration law.²¹⁶ As previously discussed, federal immigration law, including IRCA, places a burden on employers only.²¹⁷ It was never the intent of Congress to place immigrants, documented or undocumented, in a position of undue hardship or suffering.²¹⁸ Historically, Congress chose not to punish undocumented immigrants by making “their contracts void and thus unjustifiably enriching employers of such alien laborers.”²¹⁹ To the contrary, while Congress could very well implement legislation penalizing undocumented immigrants for accepting jobs or preventing undocumented immigrants from collecting lost wages, Congress has chosen not to do so.²²⁰

In addition, occupational health and safety falls under the broad police power of states, and barring access to lost wage claims by injured undocumented workers decreases employer incentives to abide by the state’s labor laws.²²¹ Rejection of the conflict preemption argument by the courts is even more understandable in light of the fact that IRCA’s legislative history expressly indicates that there was no intent “to undermine or diminish in any way labor protections in existing law.”²²² Furthermore, awarding lost wages in tort actions is complementary rather than contradictory to immigration policy because it makes the employment of undocumented immigrants less attractive to “unscrupulous employers.”²²³ “Only by equalizing defendants’ potential liability for injuries to authorized and unauthorized workers can the objectives underlying both federal immigration law and this State’s tort law and workplace safety statutes be realized.”²²⁴

D. Policy Battle: Immigration vs. Tort Law

1. Where to Draw the Line

If *Hoffman* is inapplicable to personal injury cases because of

216. *Id.* at 62.

217. *See supra* Part II.A.

218. *Id.*

219. *Majlinger*, 802 N.Y.S.2d at 62 (citing *Gates v. Rivers Constr. Co.*, 515 P.2d 1020, 1023 (Alaska 1973)).

220. *Id.*

221. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1257 (N.Y. 2006).

222. H.R. Rep. No. 99-682(I), at 58 (1986).

223. *Balbuena*, 845 N.E.2d at 1266.

224. *Majlinger*, 802 N.Y.S.2d at 70.

its limited scope and state tort law is not preempted by federal immigration law, then there should be no problem with awarding American rate lost wages to undocumented immigrants in personal injury actions. Furthermore, in addition to legal arguments that support awarding American lost wages to undocumented immigrants, policy factors support the theory. Underlying the majority of court decisions in such personal injury cases is the struggle to balance the countervailing interests in tort law and immigration law. Historically, tort law serves the function of compensating injured parties and deterring negligent behavior.²²⁵ Immigration law serves to control the flow of immigration into the United States. Strict enforcement of tort law principles will promote the policies behind both tort law and immigration law.²²⁶

2. Enforcement of Tort Policies

Juliet Neme was struck by a car while crossing the street.²²⁷ Mr. Rosa was severely injured when an aerial lift tipped over and fell on him while he was working.²²⁸ Mr. Hagl's employer was hired by a factory to do some welding work and, because of the factory's negligence, Mr. Hagl fell into an open grease pit.²²⁹ Mr. Melendres was enjoying an employee picnic when he decided to join in the fun of diving into a lake from the dock.²³⁰ The facility owners had not posted any signs barring diving or jumping into the lake.²³¹ Other people at the picnic had been diving into the lake.²³² Unfortunately, unlike the others, Mr. Melendres's last dive into murky waters of the lake left him paralyzed.²³³ All of these people have several things in common: they are all undocumented immigrants working in the United States, they were all seriously injured and, most importantly, they all lost wages as a result of their injuries.²³⁴ Under tort principles, the

225. *See supra* Part II.B.

226. *See supra* Part III.D.

227. *Peterson v. Neme*, 281 S.E.2d 869, 870 (Va. 1981).

228. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 996 (N.H. 2005).

229. *Hagl v. Stern*, 396 F. Supp. 779, 779 (E.D. Pa. 1975).

230. *Melendres v. Soales*, 306 N.W.2d 399, 401 (Mich. Ct. App. 1981).

231. *Id.*

232. *Id.*

233. *Id.*

234. *See supra* notes 174-178.

losses these injured parties bore, including lost wages, should be redressed.²³⁵ However, barring or decreasing recovery to the injured if they are undocumented immigrants places the emphasis on immigration control and not the principles of tort law.

In upholding an undocumented immigrant's right to lost wage awards based on American rates of pay, courts should emphasize the compensatory function of tort law. Someone who is injured as a result of another party's negligence has a right to recover damages for his injury.²³⁶ The right to recover lost wages is not limited to Americans but is a right that runs to immigrants regardless of whether or not they are appropriately documented.²³⁷ What is important is not the injured party's immigration status, but redressing a wrong that has occurred.²³⁸

Deterrence should also be a primary consideration in awarding lost wages to undocumented immigrants. Even courts that express some disfavor with the policy of awarding "American" lost wages come to the conclusion that doing so is important for the deterrence function of tort law. When Mr. Rosa filed a negligence claim against various defendants as a result of injuries he sustained when an aerial lift tipped over and fell on him, he sought damages which included a claim for lost wages at United States wage rates.²³⁹ The Superior Court of New Hampshire transferred questions to the Supreme Court of New Hampshire all surrounding the issue of whether or not the defendant was entitled to lost wages.²⁴⁰ The Supreme Court acknowledged the strong policies against awarding lost wages at U.S. rates in light of the policies underlying federal immigration law.²⁴¹ However, in the same instance, the court recognized that the deterrence principles of tort doctrine are in and of themselves an important enough policy to allow lost wage awards against employers who "knew or should have known" of the worker's status.²⁴² The court found the fact that tort liability acts as a deterrent to reduce the

235. *See supra* Part II.B.

236. *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, 577 (N.D. Ill. 1936).

237. *Id.*

238. *Id.*

239. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 996 (N.H. 2005).

240. *Id.*

241. *Id.* at 1000.

242. *Id.*

risk of injuries to be compelling.²⁴³ As Justice Dalianis so eloquently put it:

To refuse to allow recovery against a person responsible . . . would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles.²⁴⁴

Thus, the deterrence function of tort law has been a primary consideration when the courts undertake to allow lost wage awards in the personal injury actions of undocumented immigrants.

3. Immigration Policy in Tort Decisions

Even as they promote tort policy, lost wages awards also serve the secondary role of furthering federal immigration policy. Holding a defendant liable for lost wages regardless of the plaintiff's immigrant status is compatible with and promotes the IRCA's policy of deterring employment of undocumented immigrants.²⁴⁵ Preventing undocumented immigrants from access to all remedies would not promote federal immigration policy, but would create incentives for employers to hire undocumented immigrants, "secure in the knowledge that such employees would have no recourse in pursuing proper wages. . ." for their injuries.²⁴⁶ By holding a negligent party as accountable to an undocumented immigrant as that party would be to an American employee, courts can reduce the incentive to hire undocumented workers.²⁴⁷ Enforcement of tort law thus not only supports the deterrence and compensation principles of tort law, but also enforces deterrence of the hiring of undocumented immigrants—the actual purpose of IRCA.²⁴⁸

243. *See id.*

244. *Id.*

245. *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 58 (App. Div. 2d Dep't 2005).

246. *Id.* at 66.

247. *Id.*

248. *See id.*

In addition to serving as a deterrent to the hiring of undocumented immigrants, awarding lost wages in tort actions serves federal immigration policy by keeping the burden on employers, thus comporting with the intent of IRCA.²⁴⁹ Under IRCA, the emphasis is not on the duty of employees but on the affirmative duty of employers to make sure that employees are properly authorized to work in the United States.²⁵⁰ The intent of IRCA was to hold employers accountable for unauthorized employment; in fact, sanctions under IRCA are against employers, not undocumented immigrants.²⁵¹ Employers could avoid liability issues by not hiring undocumented immigrants.²⁵² As opposed to frustrating the policy objectives of IRCA, awarding lost wages supports these policies.²⁵³

IV. CONCLUSION

Injured plaintiffs who are deprived of their ability to work because of their injuries should be able to avail themselves of all tort remedies, including lost wage awards, regardless of their immigration status. Not only should undocumented immigrants be allowed to collect lost wage awards in tort actions, those awards must be based on American wage rates. Regardless of immigration status, undocumented immigrants who seek lost wage awards have, with limited exceptions, worked in the United States. As a result of injuries sustained due to another's negligence, they are prevented from continuing to work to their previous capacity. Tort law is about compensating the injured. When a plaintiff seeks a lost wage award, he is merely seeking to be compensated for his loss. Immigration status has absolutely nothing to do with the loss suffered. If an immigrant was earning an American wage before his injury, his compensation should be that same American wage.

Tort law also serves as a deterrent to future negligence. This deterrent effect in and of itself is an important reason to award American lost wages to undocumented immigrants. We send a

249. See *supra* Part II.A.

250. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1001 (N.H. 2005) (citing *Zamora v. Elite Logistics, Inc.*, 316 F. Supp. 2d 1107, 1119 (D. Kan. 2004)).

251. *Majlinger*, 802 N.Y.S.2d at 68.

252. *Rosa*, 868 A.2d at 1000.

253. See *id.*

dangerous message when we punish the injured and not the tortfeasor by limiting or rejecting their ability to collect lost wage awards. Not only are we sending the message that undocumented immigrants are a disposable commodity but we are also conveying the message that unsafe work conditions, unsafe products, poor driving skills, and other negligent behaviors are completely acceptable. To diminish the ability of undocumented immigrants to collect American lost wages is to eliminate the deterrence function of tort law.

Finally, awarding American lost wages to undocumented immigrants in personal injury actions keeps immigration as a secondary issue, which is where it should be in tort decisions. Basing tort law decisions on immigration policy is nothing less than dangerous. Such decisions diminish the efficacy of tort law. More importantly, decisions that focus on immigration policy remove the burden of setting immigration policy from its rightful owners, the legislature and the federal government. If, in fact, there is an immigration “problem,” it is the legislature’s job to fix it. “[E]nforcement of immigration laws is the role of the Immigration and Naturalization Service. . .”²⁵⁴ not the courts that are sought out by plaintiffs to remedy their injuries.

While immigration policy should take a back seat in tort law decisions, awarding American wages to undocumented immigrants in personal injury actions actually promotes principles of immigration law, diminishing the strength of any arguments to the contrary. A broad range of immigration legislation focuses on employers.²⁵⁵ In implementing IRCA, Congress emphasized that employer sanctions were the most appropriate way to deal with the issue of undocumented immigration, which is largely a function of economic necessity.²⁵⁶ Failing to award American lost wages in personal injury actions thus diminishes the deterrence function of employer sanctions imposed by immigration legislation further compounding the immigration “problem.” Employers have no reason to discontinue illegal hiring practices if those practices result in economic benefit

254. *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (Sup. 2003). The Immigration and Naturalization Service no longer exists and enforcement of federal immigration laws is the responsibility of the Department of Homeland Security.

255. *See supra* Part II.A.

256. *Id.*

to employers.

Perhaps the best way to enforce access to lost wages and other remedies in tort actions is for the states to implement legislation protecting the rights of immigrants in tort actions. Presently, California is the only state that legislates that all people, regardless of immigration status, have access to all “protections, rights and remedies available under state law.”²⁵⁷ This type of legislation protects immigrants and allows tort law to function as it was intended. Further, this type of legislation sends a message that may not have much to do with the law but says a great deal about our nation and its policies; that the injured should be treated fairly and with dignity regardless of who they are or where they come from. In the words of President Franklin D. Roosevelt, “remember, remember always that all of us, and you and I especially, are descended from immigrants and revolutionists.”²⁵⁸

Wendy Andre*

257. CAL. CIV. CODE § 3339(a) (2006).

258. FRANKLIN D. ROOSEVELT, REMARKS BEFORE THE DAUGHTERS OF THE AMERICAN REVOLUTION, WASHINGTON, D.C., APRIL 21, 1938, published in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 259 (1941).

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Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony

INTRODUCTION

Technological advancements have touched many aspects of our society, including the way we communicate with one another, the way we conduct business, and the way we entertain ourselves. Technology has also had an impact in the legal field.¹ E-mail provides lawyers with the luxury of immediate and constant contact with clients, the ability to exchange documents instantaneously with clients and opposing counsel, and the convenience of electronically filing documents with courts.² Technological advancements, however, have raised questions concerning the extent that such improvements will affect courtrooms. One issue that has been raised is the use of live two-way video testimony in criminal trials.

The Confrontation Clause of the Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”³ This clause, which is only applicable to criminal prosecutions, is incorporated in the Due Process Clause of the Fourteenth Amendment, thus making it binding among the states.⁴ The right to confront ones accusers has also long been held as an important aspect of a fair trial.⁵

There are several variations of electronic witness testimony in criminal trials. First, the United States Supreme Court has held

1. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 638 (2006).

2. *Id.* at 639.

3. U.S. CONST. amend. VI.

4. Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 101 (1972).

5. See *infra* Part II.

that under a “case-specific finding of necessity, the Confrontation Clause does not prohibit a [s]tate from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case.”⁶ Under this procedure, rather than testify in the courtroom, the child witness is examined in a separate room by the prosecutor and defense counsel during the trial.⁷ The examination is recorded and displayed on a video monitor for those in the courtroom to observe.⁸ Although the defendant can see the witness, the witness cannot see the defendant.⁹ The procedure permits the defendant to communicate electronically with defense counsel, and objections and rulings are made as though the child witness was present in the courtroom.¹⁰ Two-way closed circuit testimony is essentially the same set up and procedure, except the witness can see the defendant over a video monitor set up in the room where the witness is testifying.

While the Supreme Court has approved the use of one-way closed circuit television in child sexual abuse cases,¹¹ it has yet to hear a case concerning the use of live two-way video testimony. The circuit courts of appeals, however, are split on the issue. The Second Circuit held that the two-way closed-circuit television procedure, which permitted an ill witness in the Federal Witness Protection Program to testify from a remote location, did not violate the defendant’s right of confrontation.¹² More recently, however, the Eleventh Circuit held that witness testimony provided via two-way video conference at trial violated the defendant’s right of confrontation.¹³

In 2002, the Supreme Court considered a proposal to amend Rule 26(b) of the Federal Rules of Criminal Procedure that would have expressly permitted testimony via video transmission.¹⁴ The proposal provided:

In the interest of justice, the court may authorize

6. *Maryland v. Craig*, 497 U.S. 836, 860 (1990).

7. *Id.* at 841.

8. *Id.*

9. *Id.* at 841-42.

10. *Id.* at 842.

11. *Id.* at 860.

12. *United States v. Gigante*, 166 F.3d 75, 80-82 (2d Cir. 1999).

13. *United States v. Yates*, 438 F.3d 1307, 1315-19 (11th Cir. 2006).

14. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) [hereinafter *Amendments*] (statement of Scalia, J.).

contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) appropriate safeguards for the transmission are used; and
- (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).¹⁵

The Court declined to adopt the proposal, however, for failure to “limit the use of testimony via video transmission to instances where there has been a case-specific finding that it is necessary to further an important public policy.”¹⁶ In commenting on the proposal, Justice Scalia not only disagreed with the proposal’s acceptance of video conference testimony whenever the parties were unable to take a deposition pursuant to Federal Rule of Criminal Procedure 15, but also with the Advisory Committee’s suggestion that two-way video presentation “may be used generally as an alternative to depositions.”¹⁷ Thus, the Court rejected the proposed amendment, but more on the basis that it permitted liberal use of video transmission testimony, not because it would necessarily violate defendants’ right to confrontation in exceptional cases.¹⁸

This comment proposes that live two-way video testimony is constitutional under the Sixth Amendment for several reasons. First, its use is consistent with the goals and protections intended by the common law right of confrontation as it has been used throughout history. Second, the procedure is more protective of defendants’ interests under the Confrontation Clause than currently accepted methods of presenting testimony, such as Rule 15 depositions and evidentiary hearsay exceptions. Finally, the use of live two-way video testimony takes advantage of modern

15. *Id.* at 99 (appendix to statement of Breyer, J.).

16. *Id.* at 93 (statement of Scalia, J.) (internal quotations marks omitted).

17. *Id.* Rule 15 permits parties to substitute live witness testimony with a witness’s deposition when there are “exceptional circumstances” and it is “in the interest of justice” to do so. FED. R. CRIM. P. 15(a)(1).

18. *See Amendments, supra* note 14, at 93-94 (statement of Scalia, J.).

technology, making criminal trials more cost-efficient and convenient, and increases foreign witness participation in trials with foreign components not otherwise under the jurisdiction of United States courts.

HISTORY

There is some debate over the origins of the Confrontation Clause. Some scholars suggest that the right of confrontation became a common law right as a result of the Sir Walter Raleigh trial.¹⁹ Others claim that Raleigh's trial provides merely a "convenient but highly romantic myth"²⁰ rather than the impetus for the Sixth Amendment.²¹

The concept of confrontation can be traced back to biblical times.²² Over two thousand years ago, as Governor Festus and King Agrippa discussed the proper treatment of the prisoner Paul, Festus stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face[-]to[-]face, and have license to answer for himself concerning the crime laid against him."²³ At a trial arranged by Festus, Paul's accusers confronted him and "laid many and grievous complaints against [him], which they could not prove."²⁴

Face-to-face confrontation was also prevalent during the Roman Empire.²⁵ The Roman Emperor Trajan instructed the Governor of Bithynia that in prosecuting Christians "anonymous accusations must not be admitted in evidence as against any one, as it is introducing a dangerous precedent, and out of accord with the spirit of our times."²⁶

Confrontation surfaced in sixteenth century England when the English established a jury system in which jurors decided a

19. See FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 104 (1951).

20. Graham, *supra* note 4, at 100 n.4.

21. *Id.* at 104 n.23 ("[T]he Sixth Amendment was a reaction to the then-recent form of trial in the vice-admiralty courts . . .").

22. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959).

23. *Acts* 25:16 (King James); Pollitt, *supra* note 22, at 384.

24. *Acts* 25:7 (King James); Pollitt, *supra* note 22, at 384.

25. Pollitt, *supra* note 22, at 384; see also *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988).

26. Pollitt, *supra* note 22, at 384 (quoting JOHN LORD O'BRIAN, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM* 62 (1955)).

defendant's guilt or innocence by applying the facts presented.²⁷ Under this system, witnesses were sworn and asked to look upon the prisoner.²⁸ The witness then made his accusations against the accused face-to-face, which the jury would consider in deciding whether the accused was guilty or innocent.²⁹

Despite confrontation's crucial role in England's early judicial system, whether it was an absolute right was hotly debated.³⁰ Originally, confrontation extended only to ordinary trials in the assizes.³¹ In an attempt to protect the innocent, Parliament enacted a statute in 1552 that required two accusers to be brought before persons accused of treason.³² But because Parliament had little influence at the time, the Crown ignored the statute, thus "proof of treason usually consisted of confessions exacted from alleged coconspirators under torture," as the Sir Walter Raleigh trial demonstrates.³³

Raleigh was prosecuted in 1603 for the crime of high treason and accused of plotting to make Arabella Stuart the Queen of England.³⁴ The only evidence to support his conviction was a document containing the confession of an alleged coconspirator named Lord Cobham, whose confession was obtained by torture.³⁵ Raleigh, representing himself, demanded confrontation: "The proof of the [c]ommon [l]aw is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I have done."³⁶ Raleigh's request, however, was not honored, and he was convicted and executed.³⁷ Interestingly, Lord Cobham's confession proved to be false, as he recanted in a letter to Raleigh.³⁸

Political prisoners did not receive the right of confrontation until the John Lilburne trial, a man also known as "Freeborn

27. Jacqueline Miller Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L.J. 1605, 1609 (1994).

28. *Id.*

29. *Id.*

30. *Id.* at 1610.

31. *Id.*

32. *Id.* (citing Pollitt, *supra* note 22, at 388 n.26).

33. Pollitt, *supra* note 22, at 388; *see also* Beckett, *supra* note 27, at 1610.

34. Graham, *supra* note 4, at 99-100; Pollitt, *supra* note 22, at 388.

35. Graham, *supra* note 4, at 100; Pollitt, *supra* note 22, at 388.

36. Graham, *supra* note 4, at 100.

37. Pollitt, *supra* note 22, at 389.

38. Graham, *supra* note 4, at 100; Pollitt, *supra* note 22, at 388.

John.”³⁹ Lilburne, a Quaker minister, was accused of illegally smuggling books into England that attacked bishops.⁴⁰ At trial, Lilburne refused to answer questions regarding the activity of others in relation to the crime.⁴¹ Instead, he proclaimed:

I know it is warrantable by the law of God, and I think by the law of the land, that I may stand on my just defence, and not answer your interrogatories, and that my accusers ought to be brought face to face, to justify what they accuse me of.⁴²

For his silence, the Star Chamber sentenced him “to [a] fine, to stand in the pillory, to be whipped, and to stay in jail until he was willing to answer questions.”⁴³ But in a subsequent assembly with Charles I, Parliament demanded Lilburne’s release, stating that his sentence was “illegal, and against the liberty of the subject: and also bloody, cruel, barbarous, and tyrannical.”⁴⁴ As a result, England provided its accused with the right to confrontation.⁴⁵

The right to confrontation, however, did not travel with the English colonists to America, probably because many of them lacked training in the law.⁴⁶ Furthermore, problems inherent in traveling to distant and unknown lands to colonize prompted the colonial leaders to favor swift and rigorous execution of judgments.⁴⁷ Thus, the right to confrontation had to develop over time in the American colonies.

The Salem witch trials were influential in establishing the right to confrontation in the American legal system.⁴⁸ In the 1600s, the existence of witches was such a concern in Massachusetts that officials tortured individuals to learn the identity of alleged witches.⁴⁹ Many were accused of being witches

39. Pollitt, *supra* note 22, at 389.

40. *Id.*

41. *Id.*

42. *Id.* at 389-90.

43. *Id.* at 390.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Beckett, *supra* note 27, at 1612 (citing WITCH-HUNTING IN SEVENTEENTH-CENTURY NEW ENGLAND 8 (David D. Hall ed., 1st ed. 1991) [hereinafter WITCH-HUNTING]).

49. *Id.* (citing WITCH-HUNTING, *supra* note 48, at 8).

based on these largely unsupported accusations.⁵⁰ Once accused, the suspected witches were “tried [before] a special tribunal . . . in Salem without the opportunity to face their accusers, and hanged.”⁵¹ Judge Saltonstall, one of the judges on the tribunal, was so concerned with the methods and criteria used to convict the alleged witches that he resigned.⁵²

This tragic story, stained with false convictions and death, finally ended when the Massachusetts legislature got involved.⁵³ Troubled by the Salem witch trials, Reverend Increase Mather, Massachusetts Colony’s Ambassador to England, insisted that the Massachusetts legislature remedy the situation.⁵⁴ In response, the legislature issued a mandate requiring the tribunal to provide the accused with an opportunity to face his accusers before final conviction.⁵⁵ As a result, the accusations decreased substantially, because many were unwilling to face those they were accusing.⁵⁶ The lack of evidence which ensued caused the Governor to dismiss the Salem tribunal on October 29, 1692.⁵⁷

Many of the other colonies also realized the importance of confrontation. The Carolinas were one of the first colonies to adopt confrontation as a rule of procedure.⁵⁸ Connecticut used a jury system that incorporated the right to confront one’s accusers.⁵⁹ Moreover, the New Hampshire General Assembly recognized confrontation in a series of criminal laws, and New York, New Jersey, and Pennsylvania later followed.⁶⁰

Furthermore, the notion of confrontation played a part during the years leading up to the American Revolution. In 1774, the First Continental Congress published *Address to the Inhabitants of Quebec* to justify the American cause to the French settlers.⁶¹ The address stated:

50. *Id.*

51. *Id.* (citing THE SALEM WITCHCRAFT PAPERS (Paul Boyer & Stephen Nissenbaum eds., 1977)).

52. *Id.* (citing WITCH-HUNTING, *supra* note 48, at 9).

53. *Id.* at 1612-13.

54. *Id.* at 1612 & n.53 (citing WITCH-HUNTING, *supra* note 48, at 9).

55. *Id.* at 1612-13 (citing WITCH-HUNTING, *supra* note 48, at 130).

56. *Id.* at 1613 (citing WITCH-HUNTING, *supra* note 48, at 130).

57. *Id.*

58. *Id.* (citing Pollitt, *supra* note 22, at 395).

59. *Id.* (citing Pollitt, *supra* note 22, at 393).

60. *Id.*

61. Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 218 (2005); Pollitt, *supra* note 22, at 398.

The next great right is that of trial by jury. This provides, that neither life, liberty, nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full inquiry, face to face, in open court, before as many of the people as [choose] to attend, shall pass their sentence upon oath against him.⁶²

Prior to the Declaration of Independence on July 4, 1776, the Second Continental Congress recommended that the states set up new government structures to better serve their constituents.⁶³ Following the recommendation, Virginia's Bill of Rights provided:

In all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury.⁶⁴

Following Virginia's initiative, Pennsylvania's constitution provided that "in all prosecutions for criminal offences, a man hath a right to . . . demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial."⁶⁵ Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire also adopted similar clauses in their state constitutions.⁶⁶

Although the United States Constitution of 1778 provided for trials by jury in all criminal cases, the right to confrontation was only given in cases of treason.⁶⁷ Many states objected and wanted more procedural safeguards.⁶⁸ Patrick Henry, fighting against ratification in Virginia, maintained that without certain procedural safeguards, Congress may resort to civil law instead of

62. Graham, *supra* note 61, at 218; Pollitt, *supra* note 22, at 398.

63. Pollitt, *supra* note 22, at 398.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 399.

68. *Id.*

common law, or even torture to obtain confessions.⁶⁹ Several states, including Virginia, New York, Massachusetts, and New Hampshire, agreed to ratify the Constitution if the first Congress proposed a federal Bill of Rights.⁷⁰ As a result of the ensuing compromise, the Sixth Amendment was born and the right to confrontation was formally entrenched in the American legal system.⁷¹

CONFRONTATION CLAUSE AS INTERPRETED BY THE COURTS

The Supreme Court acknowledged in its earliest interpretations that the right of confrontation is not absolute, as it “must occasionally give way to considerations of public policy and the necessities of the case.”⁷² One of the oldest exceptions to confrontation is the hearsay exception.⁷³ As early as 1895, the Supreme Court considered in *Mattox v. United States* whether the defendant’s constitutional right to confrontation had been violated by admitting to the jury prior testimony of two deceased witnesses.⁷⁴ There, after a jury convicted the defendant of murder, the Court reversed the district court’s judgment pursuant to defendant’s writ of error and remanded the case for a new trial.⁷⁵ Because two government witnesses died during interim, at the second trial the government introduced into evidence “a transcribed copy of the reporter’s stenographic notes of their testimony [from the first] trial.”⁷⁶ The Court held that this procedure did not violate the defendant’s constitutional right to confrontation because “[t]he substance of the constitutional protection [was] preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.”⁷⁷

69. *Id.*

70. *Id.*

71. *Id.* at 399-400.

72. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

73. Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation* – *United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 143 (1998) (citing Michael G. Clarke, Comment, *Illinois' Confrontation with the Use of Closed Circuit Testimony in Child Sexual Abuse Cases: A Legislative Approach to the Supreme Court Decision of People v. Fitzpatrick*, 15 N. ILL. U. L. REV. 719, 722-23 (1995)).

74. *Mattox*, 156 U.S. at 240.

75. *Id.* at 237-38.

76. *Id.* at 240.

77. *Id.* at 244.

Since *Mattox*, the Court has continued to delineate how hearsay evidence may be admitted without violating the Confrontation Clause. In *California v. Green*,⁷⁸ the Court considered whether the admission of a witness's prior testimony from a preliminary hearing violated the defendant's right to confrontation.⁷⁹ The Court recognized that while the Confrontation Clause and the hearsay rules are designed to serve similar principles, the Confrontation Clause is not merely a codification of the common law hearsay rules and exceptions.⁸⁰ In any event, the Court held that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination."⁸¹ This is because the essential elements of confrontation have been adequately preserved; the witness is under oath and subject to cross-examination for the jury to observe.⁸²

Following *Green*, the Court again considered whether the admission of hearsay testimony violated the Confrontation Clause in *Ohio v. Roberts*.⁸³ This time, however, the witness whose testimony the prosecution admitted into evidence did not testify at trial.⁸⁴ In such a case, the Court found that the Confrontation Clause requires the prosecution to first "demonstrate the unavailability of . . . the declarant whose statement it wishes to use against the defendant."⁸⁵ A witness is not unavailable unless the prosecution has made a good-faith effort to produce him at trial.⁸⁶ Next, if the prosecution meets this burden, the statement can be admitted only if there is an "indicia of reliability" that serves the "underlying purpose to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence."⁸⁷ The reliability requirement is satisfied if the evidence "falls within a firmly rooted hearsay exception," or

78. 399 U.S. 149 (1970).

79. *Id.* at 155.

80. *Id.* at 155-56.

81. *Id.* at 158.

82. *Id.*

83. 448 U.S. 56 (1980).

84. *Id.* at 58-60.

85. *Id.* at 65.

86. *Id.* at 74 (citing *Barber v. Page*, 390 U.S. 719, 724-25 (1968)).

87. *Id.* at 65.

possesses “particularized guarantees of trustworthiness.”⁸⁸ The Court held that the defendant’s right to confrontation was not violated because the prosecution showed that the witness was constitutionally unavailable,⁸⁹ and because defense counsel cross-examined the witness at the preliminary hearing, thus providing the transcript with an indicia of reliability.⁹⁰

Then, in the landmark case *Crawford v. Washington*,⁹¹ the Court expounded the relationship between hearsay and the Confrontation Clause. In that case, Michael Crawford was charged with assault and attempted murder for stabbing a man who allegedly tried to rape his wife, Sylvia.⁹² Crawford claimed he acted in self-defense, but Sylvia’s statement to police contradicted his account of the incident.⁹³ The state marital privilege prevented the prosecution from compelling Sylvia to testify in court without Crawford’s consent, but the trial court allowed the prosecution to introduce Sylvia’s tape-recorded statement to the police.⁹⁴ With this evidence, the prosecution successfully convinced the jury that that Crawford did not act in self-defense.⁹⁵

The Court reversed Crawford’s conviction, finding that the introduction of Sylvia’s statement violated the Confrontation Clause.⁹⁶ In order to preserve the integrity of the Sixth Amendment, the Court – in concluding that the reliability prong of the *Roberts* standard was vague and manipulative – created a new rule.⁹⁷ The Court held that an out-of-court statement that is “testimonial” in nature may not be admitted in criminal cases unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine him.⁹⁸ Thus,

88. *Id.* at 66.

89. *Id.* at 74-77.

90. *Id.* at 67-73.

91. 541 U.S. 36 (2004).

92. *Id.* at 38-40.

93. *Id.* Specifically, Crawford told the police that the victim had something in his hands before Crawford stabbed him, while Sylvia recalled that the victim carried nothing. *Id.*

94. *Id.* at 40.

95. *Id.* at 40-41.

96. *Id.* at 68-69.

97. *Id.* at 67-68.

98. *Id.* at 68. In providing a rough sketch of what is testimonial, the Court stated that “it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police

the defendant's opportunity to cross-examine his accusers is at the core of the Confrontation Clause.

In addition to hearsay exceptions, the Court created another exception to face-to-face confrontation after a series of child sexual abuse cases. In the first case, *Coy v. Iowa*,⁹⁹ the Court considered whether the placement of a screen between testifying child victims and the defendant at trial violated the defendant's constitutional right to confrontation.¹⁰⁰ Coy was charged and convicted of sexually assaulting two thirteen-year-old girls.¹⁰¹ The trial court granted the state's motion for the placement of a screen between the defendant and the witness stand during the children's testimony.¹⁰² Once lighting adjustments were made, Coy could dimly see the children through the screen as they testified, but they could not see him at all.¹⁰³ On appeal before the Court, Coy argued that the procedure deprived him of his right to face-to-face confrontation with adverse witnesses.¹⁰⁴ The Court agreed, and reversed his conviction.¹⁰⁵

Writing for the majority, Justice Scalia focused on the importance of requiring face-to-face confrontation.¹⁰⁶ Scalia noted that physical confrontation makes it less likely that a witness will

interrogations." *Id.* The introduction of nontestimonial hearsay, however, is controlled by state law and *Roberts*. *Id.*

The Court subsequently held that out-of-court "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," *Davis v. Washington*, 547 U.S. 813, 822 (2006), while testimonial statements are ones made under "circumstances objectively indicat[ing] that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

99. 487 U.S. 1012 (1988).

100. *Id.* at 1014. The child witnesses were allowed to testify behind a screen pursuant to Iowa law. *Id.* The statute provided in part that "[t]he court may require a party be confined [sic] to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party." *Id.* at 1014 n.1.

101. *Id.* at 1014-15.

102. *Id.* at 1014.

103. *Id.* at 1014-15.

104. *Id.* at 1015.

105. *Id.* at 1022.

106. Justice Scalia's opinion was joined by Justices Brennan, White, Marshall, Stevens, and O'Connor. *Id.* at 1013.

lie on the stand as “[i]t is always more difficult to tell a lie about a person to his face than behind his back,”¹⁰⁷ and even if the witness does lie, it will likely be less convincing when recited before the defendant.¹⁰⁸ Furthermore, the trier of fact will have a better opportunity to draw its own conclusions on the veracity of the testimony based on the witness’s demeanor.¹⁰⁹ Therefore, because the children could not see Coy through the screen as they testified, the procedure violated Coy’s right to confrontation.¹¹⁰

While the Court noted that the “rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests,”¹¹¹ it declined to address whether there were any exceptions.¹¹² Rather, the Court expressed that if any exceptions existed, they would be permitted “only when necessary to further an important public policy.”¹¹³ Because there were no individualized findings justifying a need for special protection of the child witnesses, no plausible exception to the defendant’s right to confrontation existed.¹¹⁴

In a concurring opinion, Justice O’Connor opined that rights under the Confrontation Clause “may give way in . . . appropriate case[s] to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.”¹¹⁵ She suggested that the use of one- or two-way closed-circuit television for introducing child witness testimony – even if it does not adhere to the general requirement of face-to-face confrontation – may not violate the Confrontation Clause because such procedures may be necessary to further the compelling state interest of protecting child witnesses.¹¹⁶

Two years later, Justice O’Connor wrote the majority opinion for the decision that recognized the exception to the Confrontation

107. *Id.* at 1019 (internal quotation marks omitted).

108. *Id.*; *see also id.* at 1020 (face-to-face confrontation “may confound and undo the false accuser, or reveal the child coached by a malevolent adult”).

109. *See id.* at 1019 (“The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.”).

110. *Id.* at 1020.

111. *Id.*

112. *Id.* at 1021.

113. *Id.*

114. *Id.*

115. *Id.* at 1022 (O’Connor, J., concurring).

116. *Id.* at 1023-25.

Clause for child sexual abuse cases.¹¹⁷ In *Maryland v. Craig*, Sandra Craig was convicted of several sexual offenses involving a six-year old girl.¹¹⁸ Prior to trial, the state moved to have children who Craig allegedly abused testify via one-way closed circuit television as permitted by a Maryland statute.¹¹⁹ Craig objected, arguing that the procedure violated her rights under the Confrontation Clause.¹²⁰ The trial court overruled her objection and granted the state's request because it found that the children would suffer severe emotional distress if they testified in the courtroom.¹²¹ Additionally, the trial court noted that the procedure preserved the values confrontation promoted: permitting the defendant to observe and cross-examine the witnesses while the jury watched.¹²²

On appeal, the Court examined the Confrontation Clause, noting that the clause's central concern "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."¹²³ The Court reiterated the four essential elements imposed by the Confrontation Clause: (1) personal examination of witnesses, who are (2) testifying under oath, (3) subject to cross-examination, and (4) observed by a jury that will assess their credibility.¹²⁴ While the Court reaffirmed the importance of face-to-face confrontation – "the core of the values furthered by the Confrontation Clause"¹²⁵ – the Court also recognized that it is not an indispensable condition of the Sixth Amendment.¹²⁶ In other words, the Confrontation Clause does not provide an *absolute* right to face-to-face confrontation, but rather "a *preference* that must occasionally give way to

117. *Maryland v. Craig*, 497 U.S. 836 (1990).

118. *Id.* at 840, 843.

119. *Id.* at 840.

120. *Id.* at 842.

121. *Id.* at 842-43. The Maryland Court of Appeals reversed the trial court's judgment, holding that while the Sixth Amendment does not require face-to-face confrontation between the defendant and his accusers, the state failed to make a sufficient showing that the statutory procedure should be invoked in lieu of confrontation. *Id.* at 843.

122. *Id.* at 842.

123. *Id.* at 845.

124. *Id.* at 845-46 (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

125. *Id.* at 847 (quoting *Green*, 399 U.S. at 157).

126. *Id.*

considerations of public policy and the necessities of the case.”¹²⁷ In short, face-to-face confrontation should be dispensed with only when “necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”¹²⁸

In applying this test to Maryland’s one-way closed circuit television procedure, the Court first found that the procedure sufficiently assured the reliability of the fact-finding process because the testifying child had to be competent, was placed under oath, cross-examined, and could be observed by the judge, jury, and the defendant.¹²⁹ Next, the Court held that the state’s interest in protecting children in child abuse cases from the trauma of testifying is adequately important to justify the use of procedures that dispense with the defendant’s right to face-to-face confrontation, as long as the state makes a sufficient showing of necessity.¹³⁰ The finding of necessity is case-specific, and requires the trial court to determine whether the procedure (or one-way closed circuit television) is necessary to protect the particular child witness.¹³¹ Additionally, necessity requires a finding that the child witness would be traumatized by the defendant’s presence, not by courtrooms in general.¹³² Such trauma must be more than “mere nervousness or excitement or some reluctance to testify.”¹³³

USE OF CLOSED-CIRCUIT TESTIMONY OUTSIDE OF MINORS AND SEXUAL ASSAULT CASES

The use of alternative forms of testimony in child abuse cases

127. *Id.* at 849 (emphasis added) (internal quotation marks omitted) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)). For instance, the admission of certain hearsay statements of absent declarants at trial does not violate a defendant’s right to confrontation. *Id.* at 847-48.

128. *Id.* at 850.

129. *Id.* at 851-52.

130. *Id.* at 855.

131. *Id.*

132. *Id.* at 856.

133. *Id.* (quoting *Wildermuth v. State*, 530 A.2d 275, 289 (Md. 1987)). The Court added that the Maryland statute met this constitutional standard because it required a showing that the child witness would suffer “serious emotional distress such that the child cannot reasonably communicate.” *Id.* (quoting MD. CODE ANN., CTS. & JUD. PROC. §9-102(a)(1)(ii) (1989) (current version at MD. CODE ANN., CRIM. PROC. § 11-303(b)(1) (LexisNexis 2001 & Supp. 2007))).

has risen dramatically since *Craig*.¹³⁴ The federal government and nearly all states have enacted statutes providing for alternatives to face-to-face confrontation when necessary to shield child witnesses or other sensitive witnesses.¹³⁵ The protections provided by these statutes vary according to age, the nature of the underlying crime, and the extent of the victim's vulnerability.¹³⁶

Craig dealt only with child witnesses and their susceptibility to psychological trauma due to their immaturity. While *Craig* permits a defendant's right to confrontation to succumb to important state interests regarding child witnesses, the Court is yet to hear a case involving the use of alternative techniques with adult witnesses. Indeed, cases in the lower courts with adult witnesses testifying via closed-circuit television or videotape since *Craig* have been sparse.¹³⁷ But several states do have statutes that allow certain adults to testify via closed-circuit television, such as victims of physical attacks, victims of sexual abuse, and mentally infirm crime victims.¹³⁸

Several circuit courts have heard cases concerning closed-circuit testimony by adult witnesses, with various results. The Second Circuit considered the use of two-way closed circuit television testimony in *United States v. Gigante*.¹³⁹ In that case, the government charged Vincent Gigante with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), RICO conspiracy, conspiracy to murder, extortion conspiracy, and a labor payoff conspiracy.¹⁴⁰ Because Gigante was affiliated with the New York Mafia, the government's case naturally consisted mainly of testimony from former mafia members, which included Peter Savino, a former associate.¹⁴¹ At the time of Gigante's trial, Savino was in the Federal Witness Protection Program and in the final stages of an inoperable, fatal cancer at an undisclosed location where he was being medically supervised.¹⁴² Per the government's request, the trial judge held a hearing and found,

134. See, e.g., Cinella, *supra* note 73, at 152 & n.114.

135. See Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1020-24 tbl.1 (2003).

136. *Id.* at 1019 n.130.

137. Cinella, *supra* note 73, at 152.

138. Chase, *supra* note 135, at 1020 & n.134.

139. 166 F.3d 75 (2d Cir. 1999).

140. *Id.* at 78.

141. *Id.* at 78-79.

142. *Id.* at 79.

based on medical reports and testimony, that Savino could not appear in court due to his poor health.¹⁴³ Therefore, the trial judge permitted Savino to testify via two-way closed-circuit television at trial.¹⁴⁴ The procedure allowed the jury, defense counsel, judge, and defendant to see and hear Savino on video screens in the courtroom, and Savino could likewise see and hear the participants in the courtroom on a video screen from where he was testifying.¹⁴⁵ After the jury convicted Gigante, he challenged the procedure on appeal, claiming it violated his Sixth Amendment right to confrontation and that no compelling government interest justified the deprivation of this right.¹⁴⁶

The Second Circuit upheld the defendant's convictions and found that the trial court's use of two-way closed-circuit testimony did not violate Gigante's Sixth Amendment right to confrontation.¹⁴⁷ Despite the court's admonishment that closed-circuit television testimony "must be carefully circumscribed," it found that its use effectively preserved Gigante's confrontation rights.¹⁴⁸ First, the court noted that the closed-circuit procedure used for Savino's testimony preserved all of the necessary elements of in-court testimony: "Savino was sworn [under oath]; he was subjected to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [he] gave this testimony under the eye of Gigante himself."¹⁴⁹ Next, the court found that *Craig* did not apply, because while *Craig* restricted the use of one-way closed-circuit television testimony to instances in which the witness could not view the defendant, the trial judge in Gigante's case utilized a two-way system that effectively preserved face-to-face confrontation.¹⁵⁰ Free from *Craig*, the court held that "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit

143. *Id.* at 79-80. Specifically, a medical physician testified that it would be "medically unsafe" for Savino to travel to New York to testify. *Id.* at 79.

144. *Id.* at 80.

145. *Id.* There was some dispute as to whether Savino could see Gigante, but defense counsel waived the argument. *Id.* at 80 n.1. When the trial judge specifically asked defense counsel if he wanted the camera placed so that the defendant could "look directly eye-to-eye" with Savino, defense counsel responded that it was unnecessary. *Id.*

146. *Id.* at 79.

147. *Id.* at 81-82.

148. *Id.* at 80.

149. *Id.*

150. *Id.* at 80-81.

television when this furthers the interest of justice.”¹⁵¹ Savino’s terminal cancer diagnosis and participation in the Federal Witness Protection Program, along with Gigante’s own poor health and inability to travel for a distant deposition, presented exceptional circumstances, and therefore Savino’s testimony did not violate Gigante’s right to face his accuser.¹⁵²

Contrary to *Gigante*, the recent decision of *United States v. Yates* from the Eleventh Circuit held that trial testimony via two-way closed-circuit television violated the defendant’s Sixth Amendment rights.¹⁵³ There, Anton Puztai and Anita Yates faced charges of mail fraud, conspiracy to defraud the United States, conspiracy to commit money laundering, and several prescription-drug-related offenses arising out of their involvement in an internet pharmacy.¹⁵⁴ In a pre-trial motion, the government moved to permit two witnesses to testify at trial from Australia through live two-way video conference.¹⁵⁵ The government argued that the two witnesses were “essential witnesses to the government’s case-in-chief,” and although the witnesses agreed to testify by video conference, they were unwilling travel to the United States and were beyond the government’s power of subpoena.¹⁵⁶ The defendants opposed the motion, arguing that the testimony would deny them face-to-face confrontation and thus violate their Sixth Amendment rights.¹⁵⁷ The trial court granted the government’s motion because the two-way video conference procedure allowed the defendants and witnesses to see each other during the testimony, thus preserving the defendants’ right to confrontation.¹⁵⁸ The trial court also found that the government had an “important public policy of providing . . . [this] crucial evidence, and that the [g]overnment also ha[d] an interest in expeditiously and justly resolving the case.”¹⁵⁹ Similar to *Gigante*, the witnesses were sworn under oath and acknowledged that their testimony was subject to penalty for perjury.¹⁶⁰ As the

151. *Id.* at 81.

152. *Id.* at 81-82.

153. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

154. *Id.* at 1309-10.

155. *Id.* at 1310.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* (citations and internal quotations marks omitted).

160. *Id.*

witnesses testified via video conference, the defendants, jury, and judge could see them, and the witnesses could likewise see everyone in the temporary courtroom.¹⁶¹ At the conclusion of the trial, the jury found the defendants guilty on all counts.¹⁶²

On appeal to the Eleventh Circuit, the defendants argued that the video conference testimony violated their Sixth Amendment right to confrontation under *Craig* because it was not necessary to further an important public policy.¹⁶³ In response, the government argued that *Craig* did not apply for two reasons: (1) the witnesses testified via two-way rather than one-way video conference, and (2) because two-way video conference testimony protects defendants' confrontation rights more than depositions permitted under Federal Rule of Criminal Procedure 15,¹⁶⁴ whenever deposition testimony is admissible, two-way video conference testimony should be as well.¹⁶⁵ In rejecting both arguments, the court noted that *Craig* provided "the proper test for admissibility of two-way video conference testimony,"¹⁶⁶ and further emphasized that the Eighth, Sixth, Ninth, and Tenth Circuits agreed.¹⁶⁷

Next, the court found that the trial court failed to apply the *Craig* test, which required an evidentiary hearing to determine whether an important public policy existed that necessitated the denial of physical, face-to-face confrontation at trial, and whether the reliability of the testimony was otherwise guaranteed.¹⁶⁸ In examining the trial court's decision, the court held:

161. *Id.* The trial was temporarily moved to the United States Attorney's office for the video conference because the courtroom lacked the proper video equipment. *Id.*

162. *Id.*

163. *Id.* at 1312. For *Craig*'s holding, see *supra* Part III.

164. Federal Rule of Criminal Procedure 15 provides in part: "A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice." FED. R. CRIM. P. 15(a)(1).

165. *Yates*, 438 F.3d at 1312.

166. *Id.* at 1313 (citing *Harrell v. Butterworth*, 251 F.3d 926, 930 (11th Cir. 2001)).

167. *Id.* See, e.g., *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005); *United States v. Moses*, 137 F.3d 894, 897-98 (6th Cir. 1998); *United States v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993).

168. *Yates*, 438 F.3d at 1315 (citing *Maryland v. Craig*, 497 U.S. 836, 850, 855 (1990)).

[While] [t]he [g]overnment's interest in presenting the fact-finder with crucial evidence is . . . an important public policy[,] . . . under the circumstances of this case (which include the availability of a Rule 15 deposition), the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the [d]efendants' rights to confront their accusers face-to-face.¹⁶⁹

In other words, the court found it significant that the witnesses could have been deposed pursuant to Rule 15, which would have guaranteed the defendants an opportunity to confront their accusers face-to-face at the deposition.¹⁷⁰

In his dissent, Judge Tjoflat disagreed with the majority's analysis and holding, stating that "[i]t is beyond reproach that there is an important public policy in providing the fact-finder with crucial, reliable testimony and instituting procedures that ensure the integrity of the judicial process."¹⁷¹ Indeed, as Tjoflat emphasized, these are the same public policies the *Craig* Court found important enough to uphold the use of the one-way closed circuit television procedure.¹⁷² Moreover, he argued that the majority's position regarding the possibility of implementing a Rule 15 deposition was irrelevant as to the necessity of using the two-way video conference procedure in furthering the important public policy of providing reliable evidence at trial.¹⁷³ In fact, because the two procedures are "not equivalent," the trial court has the discretion to determine whether a deposition is an inadequate replacement for trial testimony.¹⁷⁴ According to Tjoflat, this is exactly what the trial court did in making a carefully "considered determination that live, two-way video transmission of unavailable witnesses' testimony was necessary to further the[se] important public polic[es] . . . that *Craig* demands."¹⁷⁵

Tjoflat also opined that the majority failed to properly analyze

169. *Id.* at 1316.

170. *Id.* at 1316-17. *See also* FED. R. CRIM. P. 15(c).

171. *Id.* at 1320 (Tjoflat, J., dissenting).

172. *Id.* at 1322.

173. *Id.*

174. *Id.* at 1323.

175. *Id.* at 1325.

the two-way video conference procedure. The court assessed the testimony as if it were given in court, as opposed to hearsay, which involves out-of-court statements.¹⁷⁶ Under *Crawford*, testimonial statements of witnesses not present at trial are admissible “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”¹⁷⁷ Tjoflat found that while the witnesses’ statements in this case were undeniably testimonial, they satisfied *Crawford* because the defendants were given a full opportunity to cross-examine the otherwise unavailable witnesses.¹⁷⁸ Thus, he concluded that the two-way video conference procedure “passes constitutional muster.”¹⁷⁹

Judge Marcus also dissented, arguing that the two-way video conference procedure “fully comported with the text, historical purpose, and modern understanding of the Confrontation Clause,” and that the majority erroneously applied *Craig*.¹⁸⁰ Even if *Craig* did apply to this case, however, Marcus believed the two-way video conference procedure was necessary to obtain the testimony of the foreign witnesses.¹⁸¹ Furthermore, he contended that the procedure satisfied the Confrontation Clause because “Yates and Pusztai had every opportunity to cross-examine the witnesses against them, and those witnesses testified under oath and under the gaze of the defendants, the judge, and the jury.”¹⁸² He artfully suggested that the majority’s conception of the Confrontation Clause imposed a “one-size-fits-all requirement,” in that so long as there is a face-to-face meeting between the defendant and the witness, it is sufficient regardless of whether the meeting takes place in the courtroom or in a Rule 15 deposition.¹⁸³ Like Tjoflat, Marcus also relied on *Crawford*, stating that if a face-to-face meeting is not possible due to the true unavailability of the witness, the Confrontation Clause imposes a “less stringent confrontation requirement,” requiring only that the defendant have an opportunity to cross-examine the witness.¹⁸⁴ Moreover,

176. *Id.* at 1325-26.

177. *Id.* at 1326 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

178. *Id.* at 1326-27.

179. *Id.* at 1327.

180. *Id.* at 1327 (Marcus, J., dissenting).

181. *Id.*

182. *Id.* at 1328.

183. *Id.* at 1332-33.

184. *Id.* at 1333.

Marcus advocated that cross-examination under the two-way video conference procedure is more effective than a Rule 15 deposition because it allows the trier of fact to observe the witness's demeanor.¹⁸⁵ In conclusion, he stated that "the majority's holding . . . disserves the Constitution and slights the paramount public interest of admitting competent and reliable testimony into evidence in criminal trials."¹⁸⁶

THE CONSTITUTIONALITY OF TWO-WAY VIDEO TESTIMONY

Two-way video conference testimony in criminal trials is constitutional because it provides the necessary protections and upholds the goals intended by the Confrontation Clause. The procedure is also more protective of defendants' right to confrontation than other accepted methods of testimony, such as Rule 15 depositions. Further, two-way video testimony is superior to one-way video testimony, which the Supreme Court has already deemed constitutional.¹⁸⁷ This alternative testimonial procedure should not be limited to situations similar to the facts in *Craig*, but instead should apply in situations "where necessary to further an important state interest, [while maintaining] the truth-seeking or symbolic purposes of the Confrontation Clause."¹⁸⁸

Video conference testimony fulfills the requirements of the Confrontation Clause as intended throughout history. As exemplified by Paul's trial in biblical times, the prosecution of Christians under Roman Emperor Trajan, the trials of Sir Walter Raleigh and Freeborn John in seventeenth century England, and by the Salem witch trials in colonial America, the main goals of the right to confrontation were (1) to afford the defendant the opportunity to receive accusations directly from the mouth of his accuser, (2) to prevent false accusations against the defendant by those unwilling to state such allegations to the defendant's face, and (3) to allow the judge and jury to view the demeanor of the witnesses testifying.¹⁸⁹ Each of these goals is safeguarded by the two-way video testimony procedure.

First, live video conference testimony provides the defendant

185. *Id.* at 1334.

186. *Id.* at 1336.

187. *Maryland v. Craig*, 497 U.S. 836, 860 (1990).

188. *Id.* at 852.

189. *See supra* Part II.

the opportunity to see the witness displayed upon the television screen set up in the courtroom as the witness testifies. This allows the defendant to hear the allegations directly from the witness – rather than a mere a second-hand account of the witness’s testimony – helping ensure that the testimony is accurate and the accusations are real. Second, the witness can see the defendant while testifying, which helps prevent false accusations. Specifically, a witness will likely be less inclined to provide false testimony if he must look upon the defendant, even if it is only through a television monitor. Third, the video conference procedure allows the judge and jury to observe the witness over the television screen, providing them with the opportunity to observe the witness’s demeanor to determine his credibility and the truthfulness of his testimony.

Some might argue that it is more difficult to judge the truthfulness and reliability of a witness testifying on a television screen. While truthfulness and reliability have long been considered goals of confrontation, psychological research has shown that “most people can do no better than chance in determining when a person is telling the truth from observing [him] in telling the story.”¹⁹⁰ Further, video communication has become ever more incorporated into our daily lives: corporations and firms use video conferencing to hold meetings in two cities at once, and friends and family members use cameras connected to their computers to communicate live over the internet everyday.¹⁹¹ Thus, there is certainly no reason to believe that jurors observing a witness testifying via televised video conference would be any more or less capable of making accurate determinations regarding the reliability of the testimony.¹⁹²

Video conference testimony also fulfills the four elements established in *Craig*: (1) personal examination, (2) testimony under oath, (3) cross-examination of the witness by defense counsel, and (4) observation of the witness by the jury.¹⁹³ The

190. Marcus, *supra* note 1, at 681.

191. See, e.g., Michel Marriott, *Waving Hello, From a Distance*, N.Y. TIMES, Nov. 25, 2004, at G1; Thomas C. Hayes, *Doing Business Screen to Screen*, N.Y. TIMES, Feb. 21, 1991, at D1.

192. Marcus, *supra* note 1, at 682.

193. See *Craig*, 497 U.S. at 845-46. The test delineated in *Craig* is an expansion of the purposes of confrontation set forth in *California v. Green*, 399 U.S. 149, 158 (1970). The *Green* Court noted that confrontation:

first element of personal examination prevents the usage of depositions or *ex parte* affidavits against the defendant.¹⁹⁴ Video conference testimony satisfies this element because it subjects the witness to personal examination by the parties for the defendant to fully observe. Next, the witness is placed under oath prior to the commencement of his testimony. Although the witness is not physically in the courtroom, he is placed under oath at a remote location by the same procedure he would be subjected to if he were in the courtroom giving his testimony.¹⁹⁵ Third, the defendant has the same opportunity to cross-examine the witness testifying via video conference that he would if the witness was in the courtroom. There is nothing lost when witnesses are cross-examined during this procedure because the defense counsel may still look directly at the witness during the examination, and the witness may likewise look directly at the defense counsel and the defendant just as he could if he were sitting in the courtroom. Finally, the jury is given a full opportunity, and quite possibly a *better* opportunity, to view the witness and his demeanor during video conference testimony, because the witness is projected onto a television or screen, potentially presenting him in a larger and closer light than the jurors would otherwise be able to see with the witness on the stand.

Nowhere in the text of the Sixth Amendment do the words “face-to-face” or “physical” appear.¹⁹⁶ In fact, the text of the Confrontation Clause only requires the “right . . . to be confronted with the witnesses against [the defendant].”¹⁹⁷ As scholar Akhil

(1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth;’ (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. *Craig* borrowed the first element, personal examination, from *Mattox*, 156 U.S. 237, 242 (1895).

194. *Mattox*, 156 U.S. at 242-43.

195. *See, e.g.*, *Harrell v. Butterworth*, 251 F.3d 926, 931 (11th Cir. 2001) (court found that use of satellite procedure satisfied the oath safeguard of the Confrontation Clause because the witnesses were placed under oath by the court clerk at the satellite location).

196. *See* U.S. CONST. amend. VI.

197. *Id.*

Reed Amar noted, “in a Constitution ratified by, subject to, and proclaimed in the name of, the people, it would be unfortunate if words generally could not be taken at face value.”¹⁹⁸ The concept of “face-to-face” confrontation is met by the use of live, two-way video conference testimony because both the defendant and the witness can see each other as the witness testifies.

Critics of the two-way video conference procedure claim that confrontation was meant to afford the defendant the opportunity to be in the physical presence of the testifying witness. Justice Scalia stated in *Coy* that “the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”¹⁹⁹ On the other hand, the concurrence and dissent both noted that the Confrontation Clause could not literally require physical presence because that would be inconsistent with deeply rooted hearsay exceptions.²⁰⁰ The *Craig* Court further clarified that “the word ‘confronted,’ . . . cannot simply mean face-to-face confrontation,” because it would prohibit the admission of hearsay statements made by absent declarants, contrary to the Court’s long history of hearsay jurisprudence.²⁰¹ If the Confrontation Clause was interpreted to mean physical presence in every situation, many long standing common law hearsay exceptions would become unconstitutional.²⁰² Thus, the Confrontation Clause “merely state[s] a principled *preference* for live testimony.”²⁰³

Two-way video testimony is more protective of the interests intended to be protected by the Confrontation Clause than already accepted methods of presenting testimony. Federal Rule of Criminal Procedure 15, for example, allows parties to substitute live witness testimony with deposition transcripts at trial.²⁰⁴

198. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 127-28 (1997).

199. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (citing *Kentucky v. Stincer*, 482 U.S. 730, 748-50 (1987) (Marshall, J., dissenting)).

200. *Id.* at 1024-25 (O’Connor, J., concurring); *id.* at 1030 (Blackmun, J., dissenting).

201. *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

202. *See* FED. R. EVID. 803 (listing twenty-three exceptions that apply regardless of whether the declarant is available and can testify in court in the physical presence of the defendant); FED. R. EVID. 804 (listing five exceptions that are applicable only when the declarant is unavailable).

203. AMAR, *supra* note 198, at 126.

204. *See* FED. R. CRIM. P. 15(f) (“A party may use all or part of a deposition as provided by the Federal Rules of Evidence.”); Lynn Helland, *Remote*

Under this rule, the testimony of the unavailable witness is taken either by stenographic or videographic record.²⁰⁵ Stenographic testimony is read to the jury, usually by having the attorney for the examining party read the deposition questions while another person plays the witness and reads the answers.²⁰⁶ If the acting witness makes any changes in tone of voice or reflects even a hint of emotion, the opposing party can object on the grounds that the reader is improperly interpreting the testimony.²⁰⁷ Under this method, the jury is deprived of the opportunity to assess the witness's demeanor.²⁰⁸ As Justice White explained in *Green*, an important policy of the Confrontation Clause is to “permit[] the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.”²⁰⁹

Videographic depositions under Rule 15 are no better than their stenographic counterpart. Although videotaped depositions allow the jury to observe the witness’s demeanor, the deposition is usually taken weeks, months, or even years before trial, often because the same circumstances making the witness unavailable for trial require the deposition be taken far in advance.²¹⁰ And even if the witness can testify by the time of trial, most judges will not want to interrupt the trial to take a deposition.²¹¹ Moreover, both stenographic and videographic depositions deprive attorneys the opportunity to adapt their examinations to the evidence that is presented during the course of trial.²¹²

Live two-way video testimony corrects many of the problems associated with the already approved and widely used Rule 15 deposition procedure. It allows the trier of fact to observe the witness’s demeanor as he is questioned, and also permits attorneys to craft their examination in light of the evidence and testimony that has been presented at trial. Additionally, cross-examination is more effective under the two-way video conference

Testimony – A Prosecutor’s Perspective, 35 U. MICH. J.L. REFORM 719, 721 (2002).

205. Helland, *supra* note 204, at 721.

206. *Id.*

207. *Id.*

208. *Id.*

209. *California v. Green*, 399 U.S. 149, 158 (1970).

210. Helland, *supra* note 204, at 721-22.

211. *Id.* at 722.

212. *Id.*

procedure than with Rule 15 depositions because it allows the judge to rule on objections as they are raised and to supervise the course of questioning and counsel's conduct.²¹³

Furthermore, two-way video testimony better serves the interests intended to be protected by the Confrontation Clause than the one-way closed-circuit television procedure approved in *Craig*.²¹⁴ It is superior because not only does it allow the defendant, the jury, and the judge to see the witness – just as one-way closed-circuit television – but it also allows the witness to see the defendant and the courtroom as he testifies. Thus, using two-way video testimony during trial “allows the witness to see the jury and the defendant, . . . achieving the Confrontation Clause’s important goal of bringing the accuser face[-]to[-]face with the accused *and* the factfinder, albeit through the medium of a television screen.”²¹⁵

There are also numerous other advantages to using video conference testimony in criminal trials. The procedure is convenient, cost-effective, efficient, and comports with modern notions of globalization and technological advancements. Indeed, globalization has had a significant impact on the practice of federal criminal law.²¹⁶ As the means of travel and communication have progressed, it has become easier to engage in international commerce.²¹⁷ Yet consequently, crimes such as fraud, which at times may utilize international commerce, have increased.²¹⁸ Unfortunately, “the ability of nations to work together to prevent or prosecute international crime has lagged far behind the ability of the criminally inclined to exploit their new economic opportunities.”²¹⁹ Therefore, it is often necessary in these cases to obtain evidence from any country in which the defendant may have conducted dealings in the course of committing the fraud.²²⁰ The prosecutor is often unable to subpoena key witnesses due to the fact that they are located outside of the United States and not subject to its jurisdiction.²²¹

213. *United States v. Yates*, 438 F.3d 1307, 1334 (Marcus, J., dissenting).

214. *See Maryland v. Craig*, 497 U.S. 836, 860 (1990).

215. *Yates*, 438 F.3d at 1327 (Marcus, J., dissenting).

216. *Helland*, *supra* note 204, at 723.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 724.

221. *Id.*

Moreover, one of the greatest advantages to using live two-way video testimony is that it provides a better alternative for obtaining foreign witness testimony.²²² *Yates* is a good example of when two-way video testimony becomes important. In his dissent, Judge Tjoflat argued that two-way video testimony was necessary because the witnesses were beyond the subpoena power of the trial court, as they were citizens of, and resided in, Australia at the time of trial.²²³ With the advent of improved technology that makes it easier to conduct business and commerce globally, procedures like two-way video conference will become increasingly important when foreign witnesses cannot be subpoenaed by courts. Two-way video testimony therefore presents the opportunity to obtain testimony from foreign witnesses in a manner that not only complies more fully with the Confrontation Clause than current methods – such as Rule 15 depositions – used by courts, but that is also more effective and efficient in today’s world.

Justice Scalia, among other critics, argues that video conference testimony “improperly substitute[s] ‘virtual confrontation’ for the real thing required by the Confrontation Clause in a criminal trial.”²²⁴ However, with the arrival of new technology, Americans have generally become increasingly less likely to participate in face-to-face interactions. Beginning with the telephone, where people no longer needed to meet face-to-face to verbally communicate, and expanded by the internet, people now regularly make decisions through digital communications.²²⁵ Further, studies have found that jurors respond the same to live witnesses as those testifying via video conference.²²⁶

CONCLUSION

Presenting testimony via two-way video conference is constitutional under the Confrontation Clause of the Sixth

222. *Id.* at 723.

223. *United States v. Yates*, 438 F.3d 1307, 1324 n.6 (Tjoflat, J., dissenting).

224. Marcus, *supra* note 1, at 676 (citing *Amendments*, *supra* note 14, at 93-94 (statement of Scalia, J.)).

225. *Id.* at 682.

226. *Id.* at 676 (citing Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today’s – and Tomorrow’s – High-Technology Courtrooms*, 50 S.C. L. REV. 799, 819 (1999)).

Amendment because it is consistent with the goals and protections intended by witness confrontation throughout history. It provides the defendant with the opportunity to see and hear the witness as he testifies, and the witness knows that the defendant is watching and listening. It further permits the judge and jury to observe the witness's demeanor. Additionally, live two-way video testimony is more protective of the defendant's right to confrontation than other currently accepted and widely used practices such as Rule 15 depositions and common hearsay exceptions under the Federal Rules of Evidence. Moreover, live two-way video testimony is superior to the one-way closed-circuit television procedure approved by the Supreme Court, and is more consistent with normal testimonial procedures. Finally, the two-way video conference procedure is more efficient and effective in the courtroom because it provides key witnesses who would otherwise be unable or unwilling to testify the opportunity to do so in a manner that still gives the defendant his basic right of confrontation. For these reasons, live two-way video testimony is consistent with the Confrontation Clause of the Sixth Amendment.

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