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

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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.<sup>1</sup> 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.<sup>2</sup>

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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*

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

The participants in this symposium seek to avoid such stark stances.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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:

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BUSH ADMINISTRATION 58 (W.W. Norton and Company 2007) (describing 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).

national security.<sup>6</sup> “War” fighters on both sides, Kuhner asserts, are violating international law as well as “norms of due process and civilized treatment.”<sup>7</sup> 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.<sup>8</sup> His challenge to us “as citizens in a democracy [is] to produce something better than a war on terrorism.”<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> As Crimm explains, zakat is often focused on assisting the “world’s neediest Muslims.”<sup>12</sup> After September 11, however, donating to Muslim charities became a minefield.<sup>13</sup> 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

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

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).

charitable contribution to impoverished Muslims overseas.<sup>14</sup>

To remedy this problem, Crimm proposes creation of a “terror-free Donor Advised Fund.”<sup>15</sup> 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.”<sup>16</sup> 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*,<sup>17</sup> Professor Stephen Vladeck moves from policy to legal doctrine regarding terror detainees.<sup>18</sup> Recent doctrinal clashes<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> Vladeck argues that the Supreme Court’s dutiful citation of *Pressley* in cases involving congressional efforts to limit access to habeas corpus masks a

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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 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.

significant gap in habeas jurisprudence: the Court has repeatedly declined to define what procedures are adequate.<sup>22</sup> According to Vladeck, Congress rushed into this vacuum with the Military Commissions Act.<sup>23</sup> To ensure that Congress does not “suffocate the writ,”<sup>24</sup> Vladeck concludes that the Court should relinquish the “myth” of *Pressley* and offer clear guidance.<sup>25</sup>

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*.<sup>26</sup> 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).<sup>27</sup> Chesney recognizes that all too often government officials have exploited the state secrets privilege to shield the government from revelations of its own incompetence.<sup>28</sup> However, Chesney also acknowledges that wholesale disclosure of sensitive information could do real damage to national security interests.<sup>29</sup>

In search of the right balance, Chesney focuses on the newly introduced State Secrets Protection Act.<sup>30</sup> He points out the Act’s

22. *Id.* at 426-27.

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](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2533is.txt.pdf).

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 hearings.<sup>31</sup> 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.<sup>32</sup> Chesney has submitted his commentary as testimony to the Senate Judiciary Committee which held a hearing on the legislation in February.<sup>33</sup>

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*.<sup>34</sup> After President Bush issued his order establishing the military commissions, some progressives criticized the order (which the Supreme Court in *Hamdan*<sup>35</sup> ruled exceeded the president's authority) by raising doubts about the independence of military lawyers who would defend the detainees.<sup>36</sup> 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.<sup>37</sup> 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

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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.

from Guantanamo.<sup>38</sup> Yaroshefsky poignantly portrays the lawyers' anxiety that the plea would legitimize the Bush administration's overreaching.<sup>39</sup> Nevertheless, she argues convincingly that the plea not only helped Hicks but also underscored the ongoing problems with the military commissions.<sup>40</sup> 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.

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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).

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