

The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"

*Catherine Powell**

One of the most visible symbols of the debate over human rights and national security in the context of the U.S. "War on Terrorism" has been the detainment of Taliban and Al Qaeda fighters at the U.S. naval base in Guantánamo Bay, Cuba, following the U.S. war in Afghanistan. The controversy concerning the fate of the nearly 600 prisoners demonstrates the emergence of new modes of democratic deliberation over how to strike the balance between rights and security. These new modes of deliberation involve nongovernmental organizations ("NGOs") and individuals who function as norm entrepreneurs, by mobilizing public opinion through transnational networks of opinion-makers and policymakers.

* Associate Professor of Law, Fordham Law School; JD, Yale Law School; MPA, Princeton University (Woodrow Wilson School of Public and International Affairs); BA, Yale College. I would like to thank the following people for their generous advice, support, and encouragement: Philip Alston, Eyal Benvenisti, David Cole, Michael Dorf, Martin Flaherty, Abner Greene, Sam Issacharoff, Thomas Lee, Henry Monaghan, Gerald Neuman, Russell Pearce, Mark Quarterman, Frances Raday, Judith Resnik, and Leti Volpp. I would also like to acknowledge Jessica Darpino, James Hyre, Leena Khandwala, Marny Requa for their invaluable research assistance. This paper also benefited enormously from the participants in the Cegla Center's symposium on "Liberty, Security and Equality" at Tel Aviv University Law School; the support of colleagues at the Hebrew University, where I was a Visiting Scholar, 2002-2003; and from the skillful editorial assistance of Dana Rothman and her editorial team at Theoretical Inquiries in Law. Finally, I would like to acknowledge the generous support of the Open Societies Institute, which provided me with a Soros Senior Fellowship, to, among other things, conduct the research for this Article.

Transnational networks of norm entrepreneurs have emerged where traditional avenues for foreign policymaking in the U.S. have failed to create a space for meaningful consideration of human rights in the rights/security balance. These traditional avenues are envisioned in the Constitution, which gives the President authority regarding foreign affairs, bounded by checks provided to Congress and the courts. While the goal of the constitutional process is to bring these institutional players into a dialogue, Congress and the judiciary have failed to engage the President in a conversation regarding the balance between human rights and national security. In the absence of initiatives by the government, nongovernmental actors have used communication structures within transnational networks to promote what this Article calls a dialogic approach to enforcement of human rights law.

INTRODUCTION

As has occurred during other periods of heightened risk to national security, the U.S. "War on Terrorism"¹ has spawned a debate over how to balance human rights and national security. In the aftermath of the September 11th terrorist attacks on the World Trade Center and the Pentagon, Americans have been faced with a dilemma regarding this debate. On the one hand, there is recognition that because terrorism is such a threat to the fabric of democracy, special tools may be required to fight terrorist threats. This may have implications for human rights if steps are taken to curtail liberty in the course of the fight against terrorism. On the other hand, if human rights are restricted, democracy itself may be weakened in the process of fighting for democracy. In fact, the international human rights framework includes tools for limiting rights during a "time of emergency which threatens the life of the nation."² However, a State must specifically declare when it is derogating from human rights on this basis (a declaration the United States has yet to

1 I use the phrase "War on Terrorism" because it is the rubric under which the policy undertaken by the Bush Administration in the aftermath of the terrorist attacks on September 11th is commonly known. However, as there is no declared war and the term could have infinite elasticity in its usage leading to imprecision, I prefer to place it within quotation marks.

2 See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 4(1), 999 U.N.T.S. 171, 173-74, 6 I.L.M. 368 (entered into force March 23, 1976) [hereinafter ICCPR]. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 15, E.T.S. No. 5, 213 U.N.T.S. 221, 227; American Convention

make), and not all rights are subject to derogation.³ Furthermore, derogation from rights is only permissible in "exceptional and temporary" circumstances and "may only last as long as the life of the nation is threatened."⁴

One of the most visible symbols of the debate over human rights and national security has been the detainment of Taliban and Al Qaeda fighters at the U.S. naval base in Guantánamo Bay, Cuba, following the U.S. war in Afghanistan. The controversy concerning the fate of the nearly 600 Taliban and Al Qaeda prisoners demonstrates the emergence of new modes of democratic deliberation over how to strike the balance between rights and security. These new modes of deliberation involve nongovernmental organizations ("NGOs") and individuals who function as norm entrepreneurs⁵ by mobilizing public opinion through transnational networks of opinion-makers and policymakers.⁶

on Human Rights, *adopted* Nov. 22, 1969, art. 27, O.A.S. Treaty Series No. 5, 1144 U.N.T.S. 143, 152, 9 I.L.M. 673, 683.

- 3 For example, while the ICCPR allows States to derogate from their obligations under the Covenant, it prohibits derogation from certain rights, such as the prohibition against torture. ICCPR, *supra* note 2, art. 4(2). Note that I capitalize "States" to refer to nation-states in the international law sense and de-capitalize "states" to refer to the fifty states of the United States.
- 4 U.N.H.R. Comm., 13th Sess., General Comment art. 4 at 5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 (1994).
- 5 The term "norm entrepreneurs" comes from Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 929 (1996) (identifying "norm entrepreneurs" as individuals who "can alert people to the existence of a shared complaint and can suggest a collective solution ... (a) signaling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial"). The term "transnational norm entrepreneurs" comes from Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 647 (1998) (adapting Cass Sunstein's concept to the international context, in describing the role of transnational norm entrepreneurs, which assists States to internalize norms in the transnational legal process).
- 6 For related discussion of the role of NGOs in the transnational context, see Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 Mich. L. Rev. 167, 170, 202-11 (1999) (advocating a "transnational conflict paradigm" that "shows how domestic interest groups often cooperate with similarly situated foreign interest groups in order to impose externalities on rival domestic groups"); Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 3-5 (1998) (describing transnational advocacy networks as communication structures that use information strategically "[t]o influence discourse, procedures, and policy" on an international scale).

NGOs have never played as prominent a role in past periods of conflict⁷ when rights have been suspended in the name of national security⁸ as they do today. In the current situation, transnational networks of NGOs, scholars and other opinion-makers have emerged as norm entrepreneurs where traditional avenues for foreign policymaking in the U.S. have failed to create a space for meaningful consideration of human rights in the rights/security balance. These traditional avenues are outlined in the Constitution, which requires that separate institutions share foreign policy powers where governmental decisions regarding foreign affairs "must transpire within a sphere of concurrent authority, under presidential management, but bounded by the checks provided by congressional consultation and judicial review."⁹ While "the" goal of a constitutional process is "to force the institutional players into a dialogue"¹⁰ by not considering human rights implications of the U.S. "War on Terrorism," Congress and courts have failed to engage the President in a conversation regarding the balance between human rights and national security.

Elsewhere I have argued that the dialogue concerning the role of international human rights norms in shaping legal rules on issues such as the death penalty in the U.S. should involve state and local governments as well as the federal government, in order to broaden and deepen consensus over these norms where many Americans believe their democratic legitimacy

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- 7 See Mary L. Dudziak, *Cold War Civil Rights* (2002) (discussing limited involvement of civil rights groups during the Cold War in lobbying the government to incorporate human rights treaties into U.S. law).
 - 8 For discussion of rights restrictions during past conflicts, see, e.g., Eyal Benvenisti, *Inter Armas Silent Legas? National Courts and the "War on Terrorism"* (2004) (unpublished manuscript, on file with author) (discussing U.S. Supreme Court jurisprudence concerning rights restrictions during World Wars I and II, as well as the Cold War); David Cole, *Enemy Aliens*, 54 *Stan. L. Rev.* 953, 958, 989-97 (2002) (discussing U.S. Supreme Court jurisprudence concerning rights restrictions in the context of the Enemy Aliens Act, the World War II internment of citizens of Japanese ancestry, and the McCarthy era); Sam Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *Theoretical Inquiries L* 1(2004) (discussing U.S. Supreme Court jurisprudence concerning rights restrictions in the context of assignment of military governors to the states of the former Confederacy following the Civil War and the internment of American citizens of Japanese descent during World War II).
 - 9 Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 69 (1990).
 - 10 Harold Hongju Koh, *War and Responsibility in the Dole/Gingrich Congress*, 50 *U. Miami L. Rev.* 1, 8 (1996) [hereinafter Koh, *War and Responsibility*].

is in doubt.¹¹ Dialogue among various levels of government is critical to meaningful implementation of international human rights law, because international law is often viewed as an alien source of law, lacking democratic legitimacy. While particular democratic deficits characterize lawmaking processes in the United States generally,¹² the problem is aggravated in the making and implementation of international law. There is a lack of transparency in the international processes in which treaties are negotiated as well as in the domestic processes in which treaties are ratified with input only from the Senate and not from the House, unlike purely domestic legislation.¹³ The means by which customary international law is formulated (through State practice reflecting legal obligation) and incorporated into U.S. law (largely through judicial interpretation) also discourages broad-based democratic deliberation.¹⁴ By allowing incorporation of international law through multiple points of entry, a dialogic approach between the federal government and subfederal actors facilitates translation of these standards at various sites, thereby ensuring broader participation and thicker, more complex understandings of human rights law.¹⁵

In this article, I examine how, in the absence of initiatives by the government to incorporate human rights — either federal or subfederal —

11 Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. Pa. L. Rev. 245 (2001).

12 See, e.g., Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* 12 (1997) ("[T]he message [of public choice literature] is ... about why political markets cannot work to satisfy the democratic wish, that is, to provide the people with the government that they want."); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1854 (1998) (describing domestic federal legislation as "a process notoriously dominated by committees, strong-willed individuals, collective action problems, and private rent-seeking").

13 Powell, *supra* note 11, at 251. In *Dialogic Federalism*, I argue that the primary institutions for incorporating international law — federal courts (in the context of litigation based on customary international law or treaty claims) and the Senate and executive branch (in the treaty-making context) — discourage direct broad-based participation. *Id.* The relative absence of public engagement in these institutions contributes to the failure of these institutions to fully translate international law into domestic law. *Id.* at 256.

14 *Id.* For discussion of judicial reluctance toward applying international law, see Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 Eur. J. Int'l L. 159, 160-75 (1993) (discussing reasons that prompt most national courts to approach international norms apprehensively and limit their application within national legal systems).

15 Powell, *supra* note 11, at 251-52.

nongovernmental actors have functioned as norm entrepreneurs by initiating a dialogue with the federal government about whether the Guantánamo detainees are entitled to international human rights and humanitarian law protections. Utilizing transnational networks of nonprofits, scholars, foreign governments, and multilateral institutions, these nongovernmental norm entrepreneurs use communications structures within these networks to put human rights considerations more squarely on the government's agenda as it develops its response to terrorist threats. By using communication structures (the media, the web, and e-mail campaigns, for example) within these networks, norm entrepreneurs rely on what I call a dialogic approach to enforcement of human rights law where more traditional modes of enforcement (litigation, for example) are underdeveloped. The discussion here of a dialogic approach to human rights enforcement is part of a larger project I am developing on compliance with international law in an international system in which enforcement continues to rely heavily on consent by nation-states.¹⁶ This larger project — which is only briefly sketched here — can be usefully considered in the context of scholarship on the "disaggregation" of sovereignty enjoyed by nation-states,¹⁷ the permeability of national borders,¹⁸ the ascendancy of transnational civil society,¹⁹ and the normativity of the transnational legal

16 I have been developing this larger project through a series of articles, including Catherine Powell, *United States Human Rights Policy in the 21st Century in an Age of Multilateralism*, 46 St. Louis U. L.J. 421 (2002) (invited response to Professor Harold Koh) [hereinafter Powell, *United States Human Rights Policy*]; Powell, *supra* note 11; Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 Colum. Hum. Rts. L. Rev. 201 (1999) (Introduction: Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights).

17 See Anne-Marie Slaughter, *The Real New World Order*, Foreign Aff., Sept./Oct. 1997, at 183, 184 ("The [S]tate is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts ... are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order."); See also Saskia Sassen, *Globalization and Its Discontents* 92 (1998) ("[T]here is an unbundling of sovereignty[:] ... the relocation of various components of sovereignty onto supranational, nongovernmental, or private institutions."); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 Eur. J. Int'l L. 503, 505, 537 (1995) (envisioning "a world of liberal States," in which the State and sovereignty are disaggregated into "component political institutions"); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223 (1999) (extending Professor Slaughter's disaggregation thesis to include disaggregation of federal and subfederal actors).

18 See, e.g., Sassen, *supra* note 17.

19 See Tadashi Yamamoto & Jessica T. Mathews, Foreword to *The Third Force: The Rise of Transnational Civil Society* at vi (Ann M. Florini ed., 2000) (arguing that the "border-spanning networks" that comprise transnational civil society "are a

process.²⁰ Considered within this framework, the participation of transnational norm entrepreneurs in catalyzing dialogue over how to strike the balance between human rights and national security in the context of the "War on Terrorism" can be seen as an analog to U.S. domestic public law reform efforts. As has been true of domestic initiatives, such as prison reform and racial desegregation, the debate concerning the Guantánamo detainees has occurred within a process of institutional dialogue and reform involving an array of fora and actors, fueled by participation of nongovernmental actors.²¹

Against this backdrop, I should note that this article strives to understand law's role in the process of policy decision-making, even as legal process approaches have come under attack. This article shares with the Issacharoff and Pildes article in this issue a commitment to understanding the persistence of process-based approaches to constitutional law.²² However, my article asks

real and enduring force in the international relations of the twenty-first century"); Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 27 (1995) ("[E]ven [the largest and most powerful States] cannot achieve their principal purposes ... without the help and cooperation of many other participants in the system, including entities that are not [S]tates at all."); Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 3-5 (describing transnational advocacy networks as communication structures that use information strategically); Benvenisti, *supra* note 6, at 170, 202-11 (discussing the forging of alliances between domestic interest groups and similarly-situated foreign interest groups to compete with rival domestic groups).

20 Harold Hongju Koh, *Transnational Legal Process*, 75 *Neb. L. Rev.* 181, 183-84 (1996) [hereinafter Koh, *Transnational Legal Process*] ("Transnational legal process describes the theory and practice of how public and private actors — nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals — interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."); *See also* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 *Yale L.J.* 2391, 2395 n.20, 2406 (1994) [hereinafter Koh, *The "Haiti Paradigm"*] (describing the transnational legal process as a "complex process of rational self-interest and norm internalization — at times spurred by transnational litigation [and political pressure] — through which international legal norms seep into and become entrenched in domestic legal and political processes ... by provoking improved governmental practices positively affecting human lives").

21 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976); Owen M. Fiss, *Supreme Court 1978 Term, The Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1 (1979); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary in the Extraordinary Institutional Litigation*, 93 *Harv. L. Rev.* 465 (1980). *See also* Koh, *The "Haiti Paradigm"*, *supra* note 20, at 2401.

22 *See* Issacharoff & Pildes, *supra* note 7.

a different set of questions related to how transnational norm entrepreneurs fit into the legal process and play a role in shaping the normative content of law.²³ In domestic legal scholarship, the "old legal process" school²⁴ has given way to newer legal process approaches that regard the law's legitimacy as based on not only process but on its normative content as well.²⁵ These newer approaches view lawmaking as "not merely the rubberstamping of the pluralistic political process, but as a process of value-creation in which courts, agencies, and the people engage in a process of democratic dialogue."²⁶ In international legal scholarship, too, legal process approaches have come to focus on the normative power of law created through interaction of transnational players.²⁷ This scholarship views the interaction of the public and private, the domestic and international, as resulting in an iterative process in which legal rules emerge and are interpreted, internalized and enforced.²⁸ This iterative process

23 By contrast, the Issacharoff & Pildes article, *id.*, poses a thoughtful set of questions related to why process-based reasoning continues to have such a powerful grip on courts, despite theoretical questions raised about such reasoning.

24 See, e.g., Herbert Wechsler, *Foreword: Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* (1953); Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* (1994). See also Koh, *Transnational Legal Process*, *supra* note 20, at 188 nn.17-18, and accompanying text (describing how the early focus of the legal process movement was on the study of legal institutions, "reasoned elaboration," neutral principles, and the optimism that rational but orderly policy change could be achieved through pluralistic political process).

25 The newer school has a somewhat thicker approach to process insofar as its theorists frontload certain substantive values such as free speech rights and equality as preconditions of legitimate process. See, e.g., Cass Sunstein, *The Partial Constitution* (1993). See also Bruce Ackerman, *We the People: Foundations* (1991) (work on constitutional moments); Robert Burt, *The Constitution in Conflict* (1992); Guido Calabresi, *The Common Law for the Age of Statutes* (1982); Robert Cover et al., *Procedure* (1989); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); Jerry Mashaw, *Due Process in the Administrative State* (1985); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Robert Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Courts*, 86 Yale L.J. 1035 (1977); Fiss, *supra* note 21 (work on procedure); Laurence Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975) (though Tribe is typically thought of as a critic of legal process approaches, he posits an active role for courts in policing the process through which policies are created and applied). See also Koh, *Transnational Legal Process*, *supra* note 20, at 188.

26 Koh, *Transnational Legal Process*, *supra* note 20, at 188.

27 See, e.g., *id.* at 185-86.

28 *Id.* at 184.

"not only generat[es] law ... but generat[es] new interpretations of those rules and internaliz[es] them into domestic law that now guides and channels those actors' future conduct."²⁹ As with the earlier domestic legal process scholarship of Henry Hart and Albert Sacks,³⁰ the international legal process work of Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld posits that legal issues arise primarily in the process of making policy decisions, rather than in the courts, so that lawyers play a more central role than judges in the former.³¹

While a process-based view typically envisions intra-branch dialogue and deliberation *within* government, this article explores how the current debate over rights and security has largely relies on the initiative of *nongovernmental* actors. "Even when the branches do not conduct direct dialogue, ... academic debate can force valuable 'shadow dialogue' between private parties and government, particularly when lawyers and academics challenge particular government legal interpretations."³²

Before exploring the role of these non governmental actors, this article begins in Part I by briefly describing the legal status of the prisoners detained at Guantánamo Bay since the September 11th attacks. Part II considers how the Guantánamo detention demonstrates the failure of the legislative and judicial branches to provide a meaningful check on the President in the context of the current U.S. "War on Terrorism," even where these branches have obligations to implement and enforce human rights. Part III examines the role of transnational norm entrepreneurs in initiating a dialogic approach to human rights enforcement. In Part III, I also explore a way to theorize about the role of these norm entrepreneurs in the context of scholarship on compliance with international law.

This account of the dialogic approach initiated by transnational norm entrepreneurs is both descriptive and prescriptive. It is descriptive in that it theorizes by looking at emerging forms of dialogue in which norm

29 *Id.* at 186.

30 Hart & Sacks, *supra* note 24.

31 Koh, *Transnational Legal Process*, *supra* note 20, at 189 (citing Abram Chayes et al., *International Legal Process: Materials for an Introductory Course* (1968)). See also literature on the Constitution outside the courts, for example, Mark Tushnet, *Taking the Constitution Away from the Courts* (2000) (arguing that current representative arrangements, however flawed, are preferable to what passes as constitutional reasoning in the courts); Larry Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978) (finding that constitutional norms remain norms even where it is not advisable, practical, or likely for courts to implement them).

32 See Koh, *supra* note 10, at 9.

entrepreneurs have introduced human rights considerations into a policy debate where traditional avenues have failed to make room for these considerations. It is prescriptive in that it argues that a dialogue-based approach to human rights enforcement is beneficial and, indeed, necessary for the long-term sustainability of the human rights project.

I. LEGAL STATUS OF THE GUANTÁNAMO DETAINEES

As of October 10, 2002, 598 Taliban and Al Qaeda prisoners from 34 to 43 nations were detained at the U.S. naval base in Guantánamo Bay, Cuba.³³ The purpose of the confinement is not punishment, as the detainees have not been convicted of any crimes. Rather, the justification for the detention is to interrogate the prisoners (for intelligence-gathering regarding the September 11th attacks and any planned future attacks) and incapacitate them from committing future attacks. Because their confinement is based on national security and sits outside the regular criminal justice process, the detainees inhabit a sort of legal limbo.

The captives are held in chain link cages at Guantánamo.³⁴ A Defense Department photo that was widely circulated in the media portrayed transported prisoners, shackled and bound, mouths covered by surgical masks, eyes blinded by blackened goggles, hands manacled, kneeling on the ground before U.S. soldiers.³⁵ The photo reminded us of the underlining assumption

33 Joseph Lelyveld, *In Guantánamo*, N.Y. Rev. Books, Nov. 7, 2002, at 62, 63. The ambiguity as to the exact number of nations represented in the detention camps appears to be due to the secrecy with which the captives are held and the refusal of the U.S. to provide detailed information to the public regarding their identities. Once the U.S. Supreme Court granted certiorari in *Al Odah, Fawzi et al. v. United States et al.* — S. Ct. — (mem), 2003 WL 2070725 (U.S. Dist. Col.), 72 USLW 3171 (concerning federal court jurisdiction to consider the legality of the Guantánamo detentions), the U.S. began to accelerate the processing of the detainees, particularly of those captives with no clear connection to either the Taliban or Al Qaeda (National Public Radio, Morning Edition, Dec. 1, 2003).

34 *Id.* at 64. The first camp in which the captives were detained was constructed for \$9.7 million by private contractor, Brown and Root Services — a division of Vice President Cheney's former company, Halliburton. *Id.* At 6.8-foot-by-8-foot, the chain-link cages are slightly smaller than the cells on Death Row in Texas, the home state of Brown and Root. In Texas, prisoners are taken out one-by-one for an hour for exercise and showers *every day*, while at Guantánamo, the prisoners are taken out one-by-one for fifteen minutes of exercise and a fifteen-minute shower, *only twice a week. Id.*

35 Katharine Q. Seelye & Stephen Erlanger, *U.S. Suspends the Transport of Terror*

that the captives as a group were dangerous killers, even though the culpability of the prisoners had not been determined on an individual basis.³⁶ These prisoners, many of whom have endured captivity for over two years, have not been charged with any crime, provided access to counsel, or offered a hearing to determine their guilt or innocence as regards involvement in terrorism.

Both U.S. domestic law and international law forbid indefinite detention without trial in most contexts.³⁷ However, the U.S. has sought to justify

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- Suspects to Cuba*, N.Y. Times, Jan. 24, 2002, at A1. See also Katharine Q. Seelye, *For America's Captives, Home Is a Camp in Cuba, with Goggles and a Koran*, N.Y. Times, Jan. 20, 2002, at A14; Katharine Q. Seelye, *The Captives; on Defensive, General Says Prisoners Get Mats, Even Bagels*, N.Y. Times, Jan. 17, 2002, at A16.
- 36 President Bush has voiced his blanket conclusion that the Guantánamo detainees are "killers," and Defense Secretary Donald Rumsfeld has called them "hard-core, well-trained terrorists." Lelyveld, *supra* note 33, at 62. Attorney General John Ashcroft has said that the detainees are "uniquely dangerous." *Id.* at 62. And Assistant Attorney General John Yoo has asked rhetorically, "Does it make sense to release [the detainees] if you think they are going to continue to be dangerous even though you can't convict them of a crime?" *Id.* at 62 n.1. Following briefings he got on the way to Guantánamo, Alabama Republican Senator Jeff Sessions also assumed all of the detainees are dangerous, saying, "If these people are committed terrorists who are going to take release as an opportunity to attack again, then it would be insane to release them." *Id.* Eventually, some officials started to allow for the possibility that these broad-brushed characterizations might not apply to every single case. Deputy Secretary of Defense Paul Wolfowitz has said that "some of them may turn out to be completely harmless." *Id.* at 62.
- 37 The Supreme Court has held that indefinite detention of deportable aliens who could not be deported would pose a "serious constitutional problem." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). While the Court denied the government permission to hold deportable aliens indefinitely — even if the government said they were dangerous and did not have a right to remain in the United States — the Justices left open whether indefinite detention would be permissible in the context of terrorism. *Id.* at 690-91. Compare *Zadvydas v. Davis* with *A, X, Y v. Secretary of State*, [2002] EWCA Civ 1502 (Ct. App.) (in a case brought by foreign nationals indefinitely detained who challenged the U.K.'s suspension (or derogation) of Article 5 of the European Convention on Human Rights as unlawful on the grounds that such a detention without a criminal trial violates the right to liberty, the Court of Appeals allowed an appeal by the Home Secretary and declared the detention to be lawful). Indefinite detention also violates Article 9 (4) of the ICCPR. ICCPR, *supra* note 2, art. 9(4) 999 U.N.T.S. 176, 6 I.L.M. 371. Even so, when asked in a television interview whether the detainees might be held indefinitely, Deputy Secretary of Defense Paul Wolfowitz replied, "I think that's probably a good way to think about it." Lelyveld, *supra* note 33, at 62 n.1.

Arguably, neither U.S. constitutional protections nor international human rights protections apply to Guantánamo or anywhere else outside U.S. borders. See *infra* discussion at Part II.C. But see Report of the Human Rights Committee, U.N. GAOR, 46th Sess., Supp. No. 40, para. 618-656, U.N. Doc. A/46/40 (1991) (stating that

the detainment by declaring the prisoners "unlawful enemy combatants," ineligible for legal protections provided to prisoners of war ("POWs") under the Geneva Conventions, the cornerstone legal framework governing conduct during times of war.³⁸ The Geneva Conventions require that the detaining power provide a "competent tribunal" to make a threshold determination as to whether or not each detainee is a prisoner of war (where doubt exists concerning a combatant's status).³⁹ Despite this, the Bush Administration has made a blanket determination that *all* the detainees are illegal combatants (implicitly concluding that there is no doubt as to the status of any of the detainees) and are therefore not entitled to POW status.⁴⁰

Iraq had a clear responsibility under international law for the observance of human rights during its occupation of Kuwait); *Loizidou v. Turkey* (1995) 20 E.H.R.R. 99 (Eur.Ct. H.R). (same with regard to the European Convention on Human Rights in case involving the Turkish occupied part of Cyprus).

- 38 Protections for POWs are provided for in the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. Because it requires that POWs be returned once the hostilities have ceased, the Third Geneva Convention implicitly prohibits indefinite detention (unless, presumably, the hostilities are indefinite).

The term "enemy combatant" comes from *Ex Parte Quirin*, a U.S. Supreme Court case decided during World War II, in which the Court said that the government could detain enemy soldiers as illegal combatants because they slipped into the U.S. without any insignia identifying them as enemy soldiers. *Ex Parte Quirin*, 317 U.S. 1, 13 (1942) ("The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the laws of war subject to trial and punishment by military tribunals.").

Perhaps it would be more accurate for international law purposes if the U.S. called the detainees "unprivileged belligerents" to specify its position that the detainees do not qualify for prisoner-of-war status, even while other protections, such as the ICCPR or customary international law, may apply. *See* Lelyveld, *supra* note 33, at 67 (citing Sir Adams Roberts, an Oxford professor of international relations, who notes that even in the absence of POW protection, Article 75 of the First Protocol of 1977 covers the treatment of such prisoners); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 7, 1977, art. 75, 1125 U.N.T.S. 3. While the U.S. is not a party to the Protocol, Article 75 may arguably be customary international law.

- 39 Third Geneva Convention, *supra* note 38, art. 5, 6 U.S.T. 3322, 75 U.N.T.S. 140; art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.
- 40 The Bush Administration has also declared that at least two American citizens —

By declaring the captives illegal combatants, the U.S. raises concerns not entirely unfamiliar in Israel. But in Israel, where the government has also tried to indefinitely detain foreign captives in its war in Lebanon, the Israeli Supreme Court has said the government has acted illegally.⁴¹ By contrast, U.S. courts have expressed reservations about reviewing military decisions and have yet to consider the blanket declaration of the Guantánamo detainees as ineligible for prisoner-of-war status. The U.S. Congress also has acquiesced to the Bush Administration's approach to the detainees and has, in fact, expanded presidential authority to detain and interrogate suspected terrorists.

The detention of the prisoners in Guantánamo Bay and the tendency of the judiciary and Congress to defer to the executive branch's decisions regarding the indefinite detention of the prisoners demonstrates what Harold Koh calls a dysfunction in our national security system.⁴² Our national security system is characterized by "recurrent patterns of executive activism,

Jose Padilla and Yaser Esam Hamdi — are "unlawful combatants." Tom Jackman & Dan Eggen, *Combatants' Lack Rights, U.S. Argues*, Wash. Post, June 20, 2002, at A1.

41 F.H. 7048/97, *Anon. v. Minister of Defence*, 54(1) P.D. 721, 743 (holding that Israel was not entitled to hold Lebanese prisoners in administrative detention under the Emergency Powers (Detention) Law of 1979, where the government had not demonstrated that the detainees posed an ongoing threat to national security, and finding that it was illegal for the State to hold the detainees as "bargaining chips" in an attempt to obtain release of an Israeli navigator who had been captured and transferred to terrorist organizations). In dissent, Justice Cheshin refused to accept the claim that the Lebanese detainees, who had been convicted and served their time for terrorist activities, posed no continuing threat, arguing that "as Hizbullah fighters, the Lebanese detainees had tied their fate to Israel's fight against Hizbullah." *Id.* (cited and translated into English in Emmanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists As Bargaining Chips?*, 18 *Ariz. J. Int'l & Comp. L.* 721 (2001)). Following the Israeli Supreme Court's decision, the Knesset adopted the Imprisonment of Combatants Not Entitled to Prisoner of War Status Law in March 2002, providing sweeping powers for the military to detain indefinitely, without charge or trial, "a person who belongs to a force fighting against Israel or a person taking part, directly or indirectly, in hostile activities of the said force," but who is not a prisoner of war under the Third Geneva Convention. See Human Rights Watch Background Briefing: Israel's Proposed "Imprisonment of Combatants Not Entitled to Prisoner of War Status Law," June 1, 2000, available at <http://www.hrw.org/backgrounder/mena/isr0622-back.htm> (last checked Oct. 23, 2003). For additional discussion, see Orna Ben-Naftali & Sean S. Gleichgevitch, *Missing in Legal Action: Lebanese Hostages in Israel*, 41 *Harv. Int'l L. Rev.* 185 (2000).

42 Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs:*

congressional [acquiescence], and judicial tolerance that push presidents successfully to press the limits of law in foreign affairs."⁴³ While "the President is our commander-in-chief, not the king,"⁴⁴ Congress and the courts have largely deferred to the Bush Administration's detention policies and have thus far avoided meaningful consideration of international human rights law in determining the fate of the detainees. In the absence of initiative from either Congress or the courts, a transnational network of norm entrepreneurs has engaged the Bush Administration in a dialogue concerning the applicability of these international standards to the detained prisoners.

II. EXECUTIVE ACTIVISM IN THE FACE OF CONGRESSIONAL AND JUDICIAL ACQUIESCENCE

[O]ur national security decisionmaking process has degenerated into one that forces the President to react to perceived crises, that permits Congress to acquiesce in and avoid accountability for important foreign policy decisions, and that encourages courts to condone these political decisions [resulting in a] process that places too great a burden upon the presidency [.]⁴⁵

The indefinite detention of close to 600 prisoners in Guantánamo and the violation of their rights to counsel and fair hearings reflect this pattern.

A. Executive Activism

Following the September 11th terrorist attacks, President George Bush launched a "War on Terrorism" in Afghanistan and other precincts, both to track down the perpetrators of the attacks and to deter future attacks. Foreign-born Taliban and Al Qaeda fighters captured presumably on the battlefield were brought to Guantánamo for interrogation to aid in the investigation of the attacks and provide information about future attacks. In November 2001, the President issued a military order providing that non-citizens suspected of terrorism could be subject to military tribunals, without any right to

Lessons of the Iran-Contra Affair, 97 Yale L.J. 1255 (1988). See also Koh, *supra* note 9.

43 Koh, *The "Haiti Paradigm," supra* note 20, at 2391.

44 Harold Hongju Koh, *The Spirit of the Laws*, 43 Harv. Int'l L.J. 23, 31 (2002).

45 Koh, *The "Haiti Paradigm," supra* note 20, at 2409.

appeal to a civilian court.⁴⁶ Two months later, President Bush announced that he had categorically determined that the Guantánamo detainees were not entitled to prisoner-of-war status under the Geneva Conventions.⁴⁷ Moreover, the Administration has failed to respect U.S. treaty obligations that prohibit indefinite detention and require: right to counsel; the right to be informed at the time of arrest of the reasons for the arrest and of charges being brought; the right to be promptly brought before a judge; the right to participate in proceedings before a court in order that a court may decide on the lawfulness of the detention as well as try the accused without undue delay; and the right to be presumed innocent until proven guilty.⁴⁸

Dismissing concerns about the treatment of the prisoners, Secretary of Defense Donald Rumsfeld asserted that it was better than the treatment the Taliban and Al Qaeda accorded anyone in Afghanistan.⁴⁹ In response to questions about rights obligations, Rumsfeld remarked that he would leave those questions to others who had not dropped out of law school as he had. Rumsfeld said, "I'm not a lawyer. I'm not into that end of the business."⁵⁰ Treating detention and rule of law as separable activities — detention being his end of the business and rule of law belonging to someone else — Rumsfeld's statement reflects that the Administration's detention policy takes place in a largely extra-legal sphere, particularly where international standards are concerned.⁵¹

B. Congressional Acquiescence

Pursuant to its authority to provide advice and consent in treaty matters, the Senate has participated in ratifying treaties prohibiting indefinite detention

46 Detention, Treatment, and Trial of Certain Non-Citizens and War against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

47 See Lelyveld, *supra* note 33, at 62; John Mintz, *Debate Continues on Legal Status of Detainees*, Wash. Post, Jan. 28, 2002, at A18.

48 See, e.g., ICCPR, *supra* note 2, arts. 9(2)-(4), 14(2), 14(3)(c), 14(3)(d), 999 U.N.T.S. 175-77, 6 I.L.M. 371-73.

49 Secretary of Defense Donald H. Rumsfeld Roundtable Briefing with Radio Media (As Released by the Pentagon), Fed. News Service, Jan. 15, 2002.

50 Dep't of Defense News Briefing, Secretary of Defense Donald H. Rumsfeld & General Peter Pace, Vice Chariman, Joint Chiefs of Staff, Tues., Jan. 22, 2002, 10:59 p.m. EST, *available at* http://www.defenselink.mil/news/Jan2002/t01172002_t0117sd.html.

51 Judith Butler, *Violence and Accountability 11* (2002) (unpublished manuscript, on file with author).

and requiring access to counsel and prompt hearings.⁵² By condoning the practice of declaring ratified treaties non-self-executing and by not enacting implementing legislation or taking other steps to ensure the substantive rights in these treaties, Congress shares responsibility with the executive branch in failing to follow through on international obligations that *require* States-parties to implement these human rights protections through legislation or other measures.⁵³ In the context of the U.S. "War on Terrorism," Congress has largely acquiesced to the Bush Administration's approach toward the September 11th detainees.⁵⁴

Implicitly sanctioning the President's particular approach to indefinitely detaining terrorism suspects, Congress passed, after little debate, the USA PATRIOT ACT,⁵⁵ an omnibus anti-terrorist bill enacted only six weeks after September 11th. While more relevant to detainment of terrorism suspects *within* the United States, the swift passage of the USA PATRIOT ACT indicates congressional approval of the executive branch's restrictions of the rights of

52 As regards the ICCPR, for example, see *supra* discussion at Part II.A.

53 See, e.g., ICCPR, *supra* note 2, art. 2(2), 999 U.N.T.S. 173, 6 I.L.M. 369. ("[E]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."); *id.* art. 2, para. 3 ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy..."). See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, arts. 4-5, S. Treaty Doc. No. 100-20, at 20, 1465 U.N.T.S. 113, 114 (using similar language, but including requirement that each State Party "ensure that all acts of torture are offences under its criminal law").

54 Cf. Jeffrey Rosen, *Holding Pattern; Why Congress Must Stop Ashcroft Alien Detentions*, New Republic, Dec. 10, 2001, at 16 (arguing that while steps taken by Attorney General John Ashcroft in the U.S. "War on Terrorism" do not violate the Constitution, Congress should play a more active role in ensuring that non-citizens are not unreasonably detained, because "[a]lthough it may be difficult in the current environment, our elected representatives in Congress are the only officials authorized to determine the fate and defend the interests of mistreated aliens"). Congress has challenged the White House approach to the detainment of suspected terrorists in extremely limited circumstances, and not in the context of the Guantánamo detainees. Some members of Congress requested information regarding the identity of those secretly detained within the continental United States. Cole, *supra* note 7, at 960. See *infra* discussion at Part III.

55 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT ACT].

non-citizens as a necessary component of the "War on Terrorism." The USA PATRIOT ACT makes non-citizens deportable for associational activity,⁵⁶ excludable for speech,⁵⁷ and potentially indefinitely detainable based on the Attorney General's discretion, without a hearing or a finding that they pose a danger or a flight risk.⁵⁸ The USA PATRIOT ACT also authorizes warrants for searches and wiretaps in criminal investigations without probable cause of criminal conduct.⁵⁹ It does this by amending the Foreign Intelligence Surveillance Act ("FISA"),⁶⁰ which had created a limited exception to the

56 *Id.* § 411. The USA PATRIOT ACT defines as a deportable offense the solicitation of members or funds for, or the provision of material support to, any group designated as a terrorist organization under the Immigration and Nationality Act. While the USA PATRIOT ACT requires a nexus between the alien's conduct and terrorist activity for support to nondesignated groups that engage in terrorism, this nexus requirement is eliminated for support offered to designated terrorist organizations. *Id.* § 411(a)(1)(B), (F) (redesignating and amending Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iii) (2000), which provided that aliens could be deported for providing material support to a *designated* terrorist organization only if they knew or reasonably should know that their activity would support the organization in conducting a terrorist activity). By eliminating the nexus requirement in the context of *designated* terrorist organizations, the USA PATRIOT ACT "makes aliens deportable for wholly innocent associational activity with a terrorist organization,' whether or not there is any connection between the alien's associational conduct and any act of violence, much less terrorism." Cole, *supra* note 7, at 966.

57 USA PATRIOT ACT, *supra* note 55, § 411. Congress had removed ideological exclusions from the Immigration and Nationality Act in 1990 "after years of embarrassing visa denials for political reasons." Cole, *supra* note 7, at 970. The USA PATRIOT ACT, however, bars admission to aliens who "endorse or espouse terrorist activity" or who "persuade others to support terrorist activity or a terrorist organization" in ways determined by the Secretary of State to undermine U.S. efforts to combat terrorism. USA PATRIOT ACT, *supra* note 55, § 411(a)(1)(A)(iii)(IV).

58 Prior to enactment of the USA PATRIOT ACT aliens in removal proceedings could be detained without bond if they posed a danger to the community or flight risk. Cole, *supra* note 7, at 970. Under the USA PATRIOT ACT, the Attorney General can detain aliens by merely certifying that he or she has "reasonable grounds to believe" (as opposed to probable cause — the constitutional minimum for arrest) that the alien is "described in" various anti-terrorism provisions of the Immigration and Nationality Act, in which case the alien can be subject to "mandatory detention." USA PATRIOT ACT, *supra* note 55, § 412(a)(3) (amending 8 U.S.C. § 1226A(a)(2001)). Because detention can be renewed every six months under the Attorney General's discretion, aliens can be potentially indefinitely detained. *Id.* § 412(a)(6)-(7).

59 USA PATRIOT ACT, *supra* note 55, § 218 (amending Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2001)).

60 50 U.S.C. §§ 1801-63.

criminal probable cause rule. FISA had authorized electronic surveillance and secret physical searches without a criminal predicate where the "primary purpose" of the investigation was the collection of foreign intelligence, not criminal law enforcement. Under the new law, a FISA warrant can be obtained for wiretaps and physical searches in criminal investigations without probable cause so long as "a significant purpose" of the investigation is to collect foreign intelligence.⁶¹

C. Judicial Tolerance

Ratified treaties and customary international law are federal law.⁶² However, courts have developed a variety of avoidance doctrines that prevent them from reaching the merits of particular cases. These avoidance doctrines include political question and non-justiciability doctrines, the doctrine of sovereign immunity, standing requirements, and separation of powers concerns. Cases involving foreign policy and military actions in particular raise these avoidance doctrines.⁶³ Thus, courts have frequently not reached the merits or otherwise intervened where the rights of the Guantánamo detainees have been

61 USA PATRIOT ACT, *supra* note 55, § 218 (amending Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2001)).

62 Regarding treaties, see U.S. Const. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ..."). Regarding customary international law, see *In re Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts ... as often as questions of right depending upon it are duly presented for their determination."); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1569 (1984) ("[T]he law of nations, which is the responsibility of the U.S. nation, should be seen as incorporated in our national jurisprudence as national (federal) law.").

63 See, e.g., *Korematsu v. U.S.*, 323 U.S. 245 (1944) (Jackson, J., dissenting) (dissenting in case upholding the detention order of American citizens of Japanese descent during World War II, Justice Jackson nevertheless cautioned, "In the nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved Hence courts can never have any real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a military viewpoint."); William H. Rehnquist, *All the Laws But One* 205 (1998) ("Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'").

asserted, deferring instead to the executive branch. In *Al Odah v. United States*, the D.C. Circuit refused to reach the merits of a request for habeas relief for Guantánamo detainees seeking relief in U.S. federal court, finding that there is no federal court jurisdiction for noncitizens outside the United States.⁶⁴ The Ninth Circuit also refused to reach the merits, on standing grounds, in a case brought by a coalition of clergy and other professionals who petitioned for a writ of habeas corpus alleging that the Guantánamo detentions were unconstitutional and in violation of laws and treaties of the United States.⁶⁵ Other countries, such as Israel, South Africa, and India, have developed looser standing requirements enabling human rights organizations to bring claims on behalf of detainees and other claimants.⁶⁶ For example, the Israeli Supreme

64 *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). Note that as this article was going to press, the U.S. Supreme Court granted certiorari in this case. *Al Odah, Fawzi et al. v. United States et al.* — S.Ct. — (Mem), 2003 WL 22070725 (U.S. Dist. Col.), 72 USLW 3171 (granting certiorari over "Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba."). Because the ultimate resolution of *Al Odah* and other cases was unclear as this article went to press, it was not possible to predict whether or not courts will be willing to second-guess the executive branch as the "U.S. War on Terrorism" further unfolds. Recent Second and Ninth Circuit cases critical of the President's detention policies suggest that courts may be more willing to engage in these cases on the merits after all. See *Gherebi v. Bush et al.*, Docket No. CV-03-01267-AHM, at 8 (9th Cir., Dec. 18, 2003); *Padilla v. Rumsfeld* _F.3d_, 2003 WL 22965085. This article, therefore, makes room for the possibility that while transnational norm entrepreneurs have initiated a dialogue over rights and security, courts may be eventual participants in the dialogue, albeit belatedly. Because of the lag time involved in litigation, courts may be latecomers to this dialogue.

65 *Coalition of Clergy, Lawyers, & Professors v. Bush*, 2002 WL 31545359 (9th Cir. Cal.). *But see* *Gherebi v. Bush et al.*, Docket No. CV-03-01267-AHM, at 8 ("even in times of national emergency — indeed, particularly in such times — it is the obligation of the judicial branch to ensure the preservation of our constitutional values and to prevent the executive branch from running roughshod over the rights of citizens and aliens alike.")

66 Aharon Barak, *Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 108-09 (2000). In his *Foreword* to the *Harvard Law Review*, Justice Barak (the President of the Israeli Supreme Court) discusses the more liberal standing rules applied in Israel, South Africa, and India.

I take issue with a standing doctrine under which someone who claims a public body unlawfully took his private money can resort to the courts, but someone who claims a public body unlawfully took public money cannot. What is the principal argument, based on jurisprudence and separation of powers, to justify this distinction?

Id. at 110. *But see* Antonin Scalia, *The Doctrine of Standing As an Essential Element*

Court has reached the merits in cases involving administrative detention even where human rights organizations stood in as the petitioner.⁶⁷

Where U.S. courts have reached the merits, the cases involve detainees *within* the United States. In these cases, courts have frequently upheld executive branch policies and practices regarding September 11th detentions. For example, the Third Circuit reversed a district court opinion granting press access to immigration hearings of post-September 11th detainees.⁶⁸ Other cases *within* the U.S. in which a court has reached the merits (and found for the government) involve detained U.S. citizens captured as terrorism suspects following the September 11th attacks.⁶⁹ In a potentially wide-reaching decision, the Fourth Circuit has deferred to the executive branch's declaration of a detained American, Yaser Esam Hamdi, as an unlawful enemy combatant.⁷⁰ Hamdi's case, which involves a detainee who had been transferred from Guantánamo to a Navy brig in Norfolk, Virginia, reflects that even in a case involving an American detained on U.S. soil, the Fourth Circuit is reluctant to second-guess decisions of the President

of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983). Cf. 1 Laurence Tribe, *American Constitutional Law* §§ 3-14, at 386 (3d ed. 2000) (noting the general requirement of "injury in fact" for standing in the United States).

67 See, e.g. H.C. 3278/02, *Hamoked Le'Haganat Haprat* [The Center for the Defence of the Individual] v. IDF Commander in the West Bank (unpublished), *available at* <http://www.cdissys.com/takdinetenglish/search/> (case brought by human rights groups requesting that lawyers be given access to inspect the Ofra Detention Facility in the West Bank and challenging conditions there). The Israeli Supreme Court has "virtually eliminated the requirement of standing and volunteered to review the policies of military authorities beyond Israel's boundaries despite the lack of explicit mandate for exercising such an authority." Benvenisti, *supra* note 8, at 13.

68 *New Jersey Free Press v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *reversing* 205 F. Supp. 2d 288 (D.N.J. 2002). *But see* *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (granting press access to immigration hearings related to post-September 11th detainees). In a rare step, the Supreme Court granted a stay of the preliminary injunction the District Court of New Jersey had granted in the Third Circuit case *Ashcroft v. North Jersey Media Group, Inc.*, 536 U.S. 954 (2002). A petition for certiorari was also filed in the Third Circuit case on February 28, 2003, *North Jersey Media Group v. Ashcroft*, 123 S.Ct 2215 (2003).

69 See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

70 *Hamdi*, 316 F.3d at 467 (noting that Hamdi was born in Louisiana and moved to Saudi Arabia as a small child). *But see* *Padilla v. Rumsfeld* _F.3d_, 2003 WL 22965085, Dec. 18, 2003 (holding that the president's power to detain an American citizen as an enemy combatant requires congressional authorization, which was lacking in this case).

in his Commander-in-Chief capacity. The Circuit Court saw Congress' Authorization for Use of Military Force⁷¹ and authorization for expenditure of funds for prisoners in military custody⁷² as reflecting congressional approval of the President's power to detain "enemy combatants."⁷³ Perhaps because Hamdi is an American citizen, the Fourth Circuit reached the merits of the case and gave at least some weight to the rights at stake, stating that the Bill of Rights "applies to *American* citizens regardless of race, color, or creed" and that "[t]o deprive any *American* citizen of its protection is not a step that any court would casually take."⁷⁴ While reaching the merits of the case, the Fourth Circuit noted that "the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs" and opined that "those branches most accountable to the people should be the ones to ... ask the ultimate sacrifice from"⁷⁵ Therefore, the Court of Appeals reversed a district court judgment ordering the Bush Administration to provide detailed information upon which it based its determination that Hamdi is an unlawful enemy combatant.⁷⁶ The Circuit Court stated, "Asking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to meaningful judicial review of th[e] question [of whether

71 Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks" or "harbored such organizations or persons").

72 10 U.S.C. § 956(5) (2002) (authorizing the expenditure of funds for "the maintenance, pay and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined ... to be similar to prisoners of war").

73 The court somewhat grudgingly pointed to these sources of legislative authority, stating, "Even if Hamdi were right that [18 U.S.C.] section 4001(a) [which prohibits citizens from being detained absent an Act of Congress] requires congressional authorization of his detention, Congress has authorized the President [to detain enemy combatants]." *Hamdi*, 316 F.3d at 467. *But see* Koh, *supra* note 10, at 14 (criticizing reliance on preexisting statutes to give a blank check to executive branch and criticizing *Dames v. Regan*, 453 U.S. 654 (1981), for example, as a case condoning this practice).

74 *Hamdi*, 316 F.3d at 464 (emphases added).

75 *Id.* at 463.

76 The district court found that the government's provision of an affidavit (by Michael Mobbs, Special Advisor to the Undersecretary of Defense Policy) as the sole evidence describing the circumstances under which Hamdi was seized and transferred to U.S. custody fell "far short" of supporting Hamdi's detention. *Id.* at 462 (4th Circuit quoting district court opinion).

Hamdi's detention conforms specifically with a legitimate exercise of the war powers granted to the executive by Article II, Section 2 of the Constitution and is generally consistent with the Constitution and laws of Congress].⁷⁷ While acknowledging that "the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal," the appellate court concluded that "the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally."⁷⁸ With a political branch trump card, the court foreclosed meaningful consideration of the underlying rights at stake.

The Fourth Circuit's discomfort with reviewing decisions of the military was even more clearly reflected during the oral argument. Chief Judge J. Harvie Wilkinson III expressed concern with the trial judge's order, stating, "With the document requests and the production requirements ... I think the burdens on the military would be considerable, litigating a capture that occurred halfway around the world."⁷⁹ Judge William B. Traxler added, "You would have judges making credibility decisions on actions taken during a war and overseeing decisions made by the military."⁸⁰ Also expressing unease, Judge William W. Wilkins Jr., pointed out that if an enemy combatant were to be granted a lawyer and a right to challenge his status, the lawyer would want a full-blown hearing. The government could prove its case only by "deposing soldiers or bringing them to court. Doesn't that just move the battlefield right to the courtroom?"⁸¹ The caution expressed by the judges echoes the Supreme Court's concern over a century ago in *Luther v. Bolden*,⁸² when the Court warned that judicial inquiry was not suitable for reviewing the terms in which a military struggle for control of Rhode Island was being conducted. The *Luther v. Bolden* Court asked rhetorically, "Could the court, while the parties were actually contending in arms for possession of the government, call witnesses before it and inquire which party represented a majority of people? ... The ordinary course of proceeding in courts of justice would be utterly unfit for the crisis."⁸³

77 *Id.* at 473.

78 *Id.* at 474.

79 Tom Jackman, *Judges Wary of Interference in Hamdi Case: U.S. Appeals Panel Uneasy about Judicial Review of Military Wartime Decisions*, Wash. Post, Oct. 29, 2002, at A16 (reporting on October 28th hearing before the Fourth Circuit Court of Appeals concerning *Hamdi*).

80 *Id.*

81 *Id.*

82 *Luther v. Bolden*, 48 U.S. (7 How.) 1 (1849).

83 *Id.* at 43-44.

Discussing the responsibility of judges to take human rights into account when weighing claims of national security against rights claims, Justice Barak, President of the Israeli Supreme Court, notes:

The maxim "When the canons roar, the muses are silent" is not correct. Cicero's aphorism that laws are silent during war does not reflect modern reality. ... [As I have said before,] even when the cannons roar, the Military Commander must uphold the law. The strength of society to withstand its enemies is based on its recognition that it is fighting for values worthy of defense. The rule of law is one of those values.⁸⁴

Because the Israeli Supreme Court exercises what Eyal Benvenisti refers to as a legitimating function, Benvenisti notes that "the Israeli government welcomed and in fact invited the court to pass judgment over its activities in the occupied territories."⁸⁵ By contrast, U.S. courts have historically shown great reluctance to review the merits of cases involving claims of national security and presidential power in foreign affairs.⁸⁶

Recall, however, that in a series of judicial decisions in the 1990s in the context of refugees detained there, U.S. courts split on whether the naval base in Guantánamo is a rights-free zone. While the Eleventh Circuit found that the U.S. Constitution, immigration laws, and international law protections stop at the waters edge rather than applying extraterritorially to Haitian refugees detained in Guantánamo, the Second Circuit found that constitutional due process rights do apply to the refugees detained at the U.S. naval base there⁸⁷ (where the U.S. exercises "complete jurisdiction and

84 H.C. 3451/02, *Almandi v. Minister of Defence*, available at http://62.90.71.124/eng/verdict/Search_ENG/verdict_by_case_rslt.asp?case_nbr_html=HCJ+3451%2F02 (citations omitted). "Since the Holocaust, all of us have learned that human rights are the core of substantive democracy." Barak, *supra* note 66, at 20 (considering the role of judges in balancing human rights and national security).

85 Benvenisti, *supra* note 8, at 18.

86 *See, e.g.*, *Dames v. Regan*, 453 U.S. 654 (1981) (upholding enforcement of executive orders that nullified judicial attachments of Iranian bank property as part of U.S.-Iran agreement that freed the hostages); *Regan v. Wald*, 468 U.S. 222, 104 S. Ct. 3026 (1984) (upholding the Reagan Administration's authority, without statutory change, to regulate travel to Cuba); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216 (1936). *See also* Rehnquist, *supra* note 63 at 202 ("The traditional unwillingness of courts to decide constitutional questions unnecessarily also illustrates in a rough way the Latin maxim *Inter arma silent leges*: In times of war the laws are silent.").

87 *Compare* Haitian Ctr. Council, Inc. v. Baker I, 949 F.2d 1109 (11th Cir. 1992) (holding that international law claims under the Refugee Convention do not apply to

control").⁸⁸ The government had tried to keep the Haitians beyond the reach of the Constitution, statutory rights, and U.S. obligations under international law, by stopping them on the High Seas and detaining them before they could reach the continental United States. So too, the detention of the Taliban and Al Qaeda prisoners at Guantánamo allows U.S. authorities to avoid the inconveniences of respecting legal protections, such as providing access to counsel and providing prompt hearings. A series of judicial opinions have rejected extraterritorial claims brought by non-citizens⁸⁹ and have upheld the government's argument that U.S. obligations under international law do not regulate the conduct of U.S. officials abroad.⁹⁰ Courts have been

refugees who have not yet reached the continental U.S.), *and* Haitian Ctr. Council, Inc. v. Baker III, 953 F.2d 1498 (11th Cir. 1992) (holding that Haitian refugees could not raise statutory or constitutional claims to challenge their repatriation to Haiti by the United States), *with* Haitian Ctr. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992) (holding that the due process claim advanced by Haitians detained at Guantánamo Bay Naval Base raised serious questions going to the merits), *vacated as moot sub nom.* Sale v. Haitian Ctr. Council, Inc., 509 U.S. 918 (1993). While the Second Circuit decision was vacated as moot when the case resulted in a final order and eventual settlement in favor of the refugees, its reasoning still provides guidance.

- 88 The United States occupies Guantánamo Bay under a lease entered into with the Cuban government in 1903. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III., T.S. 418. The lease provides:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantánamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise *complete jurisdiction and control* over and within said areas

Id. (emphasis added).

- 89 *See, e.g.,* Johnson v. Eizentrager, 339 U.S. 763 (1950) (holding that German nationals in the custody of the United States army in Germany following conviction by military commission had no right to writ of habeas corpus to test the legality of their detention). United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to the search conducted by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States); Harbury v. Deutch, 233 F.3d 596 (C.D.C. 2000) (finding that Fifth Amendment due process rights do not apply extraterritorially to a non-resident foreign national living abroad in a case brought by the widow of a foreign national who was tortured and murdered), *revised on other grounds sub nom* by Christopher v. Harbury, 536 U.S. 403 (2002).
- 90 Sale v. Haitian Ctr. Council, Inc., 509 U.S. 155 (1993) (holding that the extraterritorial application of the Refugee Convention to the forced return of Haitian refugees by U.S. Coast Guard cutters outside of United States borders would be inappropriate

particularly reluctant to apply rights protections if "circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interests."⁹¹ The attempt to banish U.S. and international human rights norms from the naval base at Guantánamo is part of an ongoing effort to strip detainees of the ability to challenge government conduct there.

III. DIALOGUE INITIATED BY TRANSNATIONAL NORM ENTREPRENEURS

Because the structure of foreign policymaking in the U.S. places great emphasis on presidential authority, while allowing Congress and courts to readily avoid providing a check on executive action, insertion of human rights considerations must often be carried out by the nongovernmental sector. In the context of the current "War on Terrorism," these norm entrepreneurs have used communications structures within transnational networks that link nongovernmental organizations, scholars, foreign governments, and human rights bodies, in order to mobilize and place various forms of pressure on the United States vis-à-vis its detention policy in Guantánamo. This pressure, spawned by dialogue initiated within these networks, has been effective in inviting President Bush to rethink aspects of the detention policy.

Transnational norm entrepreneurs can be either nongovernmental transnational organizations or individuals who:

- (1) "mobilize popular opinion and political support both within their host country and abroad";
- (2) "stimulate and assist in the creation of like-minded organizations in other countries";
- (3) "play a significant role in elevating their objective beyond its identification with the national interests of their government"; and

and would negate the very purpose of terms such as "deportation" and "return"); *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002) (relying on the executive branch's argument that the ICCPR does not regulate the extraterritorial conduct of U.S. government agents).

But see Report of the Human Rights Committee, U.N. GAOR, 46th Sess., Supp. No. 40, para. 618-656, U.N. Doc. A/46/40 (1991) (stating that Iraq had a clear responsibility under international law for the observance of human rights during its occupation of Kuwait); *Loizidou v. Turkey* (1995) 20 E.H.R.R. 99 (Eur.Ct. H.R) (same with regard to the European Convention on Human Rights in case involving the Turkish occupied part of Cyprus).

91 *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

(4) often direct their efforts "toward persuading foreign audiences, especially foreign elites, that a particular [normative] regime reflects a widely shared or even universal moral sense, rather than the particular moral code of one society."⁹²

Before turning to a discussion of how to theorize about dialogic approaches to human rights enforcement, I will briefly describe three examples where dialogue-based approaches initiated by transnational norm entrepreneurs have assisted in prompting the White House to consider human rights concerns within the rights/security balance.

A. An Examination of Dialogic Approaches to Human Rights Enforcement

One example in which norm entrepreneurs have successfully initiated a dialogue with the White House and invited the President to rethink his approach to the Guantánamo detainees is in the context of the blanket declaration of the detainees as illegal combatants. The across-the-board determination that the detainees were ineligible for POW status came under intense criticism by human rights organizations,⁹³ European governments,⁹⁴ the International Committee of the Red Cross,⁹⁵ and multilateral institutions,⁹⁶ prompting Secretary of State Colin Powell to request a review of the Administration's policy.⁹⁷ The review led to an internal legal debate in two formal meetings

92 Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *Int'l Org.* 479, 482 (1990) (quoted in Koh, *supra* note 5, at 647).

93 See, e.g., Letter from Kenneth Roth, Human Rights Watch Executive Director, to Condoleeza Rice, National Security Adviser (Jan. 28, 2002), available at <http://www.hrw.org/press/2002/01/US012802-ltr.htm>.

94 David E. Sanger, *Prisoners Straddle an Ideological Chasm*, N.Y. Times, Jan. 22, 2002, at A16 ("[Powell] has told Mr. Bush, officials say, that acknowledging the supremacy of the Geneva Conventions is the only way to answer European criticism and to protect American soldiers who may be captured in the future.").

95 Marjorie Miller, *Red Cross and U.N. Leaders Call for Taliban and Al Qaeda Fighters Held at Guantánamo Bay to Be Treated As POWs*, L.A. Times, Jan. 18, 2002, at A22.

96 See, e.g., *id.*; Inter-American Commission on Human Rights, *Detainees at Guantánamo Bay, Cuba, Request for Precautionary Measures*, 41 *I.L.M.* 532, 534 (Mar. 13, 2002) (finding that the U.S. should provide a competent tribunal to determine whether or not each of the Guantánamo detainees is entitled to POW status).

97 Katharine Q. Seelye, *Powell Asks Bush to Review Stand on War Captives*, N.Y. Times, Jan. 27, 2002, at A1 ("Mr. Powell asked for the review after allies and

among members of President Bush's national security team.⁹⁸ Through this debate, Secretary Powell eventually won over Secretary of Defense Donald H. Rumsfeld and Chairman of the Joint Chiefs of Staff Richard B. Myers, "largely on the premise that American soldiers need Geneva protection."⁹⁹ Because of the reciprocal nature of the obligation to treat POWs humanely in accordance with the Geneva Conventions, States often view humane treatment of captured enemy soldiers as being in their own self-interest.¹⁰⁰ In the end, President Bush shifted gears and declared that he would apply the Geneva Conventions (though not actual POW status) to at least the Taliban captives and that, in any event, both Taliban and Al Qaeda detainees were already being treated humanely and in general accordance with the Geneva Conventions.¹⁰¹ The rationale behind treating the Taliban and Al Qaeda prisoners differently is reflected in the statement that Ari Fleischer, the White House spokesman, made in announcing the decision. He noted that although the United States

human rights advocates suggested that the United States had skirted some of the conventions' technical requirements.").

98 Katharine Q. Seelye, *In Shift, Bush Says Geneva Rule Fit Taliban Captives*, N.Y. Times, Feb. 8, 2002, at A1.

99 *Id.*

100 See Steven R. Ratner, *Jus Ad Bellum and Jus in Bello After September 11*, 96 Am. J. Int'l L. 905, 917 (2002) (citing Georges Scelle, *Le Phenomene juridique du dedoublement fonctionnel*, in *Rechtfragen Der Internationale Organisation* 324 (1956)) (noting that "Georges Scelle arrived at this insight long before regime theory when he wrote of the dedoublement fonctionnel, whereby governmental officials are both the maker of claims on behalf of states and the recipient and evaluator of claims made by other states").

101 Seelye, *supra* note 98, at A1. While the Bush Administration decided that it would apply the Geneva Conventions to the Taliban prisoners, the Administration decided to stand by its earlier decision not to grant prisoner-of-war status to any of the captives. This decision gives the Administration some flexibility in the types of crimes with which it can charge the captives. POWs can be tried only on charges of war crimes, not for acts committed before the conflict in Afghanistan, such as conspiring to attack the World Trade Center. The continued denial of POW status also allows the U.S. to continue detention beyond the end of the war in Afghanistan, rather than repatriate the captives promptly at the end of the hostilities. Furthermore, the Bush Administration can leave open the possibility of trying the detainees before military tribunals and sentencing them to death. *Id.* See also Ratner, *supra* note 100, at 917 ("[T]he fear of adverse precedent did not lead to recognition by the United States of actual POW status for the detainees, since the United States would not normally deploy military forces in the same manner as it did Taliban ... [a] position [that] would be shortsighted if the government were later to seek POW status for covert operatives or special forces, whose modus operandi is quite unconventional.").

did not recognize the Taliban as the legitimate government of Afghanistan, Afghanistan was still party to the Third Geneva Convention. Al Qaeda, on the other hand, is an international terrorist group, not a party to the convention and therefore undeserving of inclusion, according to Fleischer.¹⁰²

Another area in which the President has reshaped his approach toward the detainees due to the conversation norm entrepreneurs have initiated concerning human rights is in the context of military tribunals. Joining a chorus of criticism by human rights organizations and legal commentators, the U.N. Special Rapporteur on the Independence of the Judiciary, Param Cumaraswamy, sent an urgent appeal to the U.S. regarding the military order signed by President Bush on November 13, 2001, authorizing the use of military tribunals to try suspected terrorists.¹⁰³ Among other things, the Special Rapporteur raised concerns about the absence of a guarantee of the right to counsel, the establishment of an executive review process to replace the right to appeal, and the exclusion of jurisdiction of any other U.S. court or international tribunal.¹⁰⁴ After weeks of intense criticism by human rights groups, academics, and other norm entrepreneurs, the White House Legal Counsel, Alberto Gonzalez, outlined a much more limited proposal in an op-ed piece published in the *New York Times*. In the op-ed, Gonzalez asserted that the order "covers only foreign enemy war criminals," that "the president will refer to military commissions only noncitizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting

102 Seelye, *supra* note 98, at A1 (noting that the Bush national security team "took as precedent the distinction the Pentagon originally made in Vietnam, granting prisoner-of-war status to the North Vietnamese but not to the Vietcong" — a decision that was later reversed when both were granted POW status). *See also* Michael Walzer, *Just and Unjust Wars* 38-39 (2d ed. 1992) (implicitly distinguishing soldiers from terrorists in pointing out that "we don't blame a soldier, even a general, who fights for his own government [unless he violates the rules of war]. He is not a member of robber band, or willful wrongdoer, but a loyal and obedient subject and citizen"). While Geneva Conventions recognize that non-state actors (that is, in terms of irregular armies, including organized resistance movements) may obtain prisoner-of-war status for the purposes of the Third Geneva Convention, irregular armies must have certain indicia of regular armed forces (that is, a command structure, distinctive insignia, and so forth). Third Geneva Convention, *supra* note 38, art. 4A(2), 6 U.S.T. 3320, 75 U.N.T.S. 138, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

103 *See* United Nations, U.N. Human Rights Expert Concern over Military Order Signed by United States President (Nov. 16, 2001), United Nations News Center, *available at* <http://www.unhchr.ch/hurricane.nsf/view01/E386ABE037729FCFC1256B-060049CEB4>.

104 *Id.*

the United States," that defendants "must be chargeable with offenses against the international laws of war," that "the president's order ... does not require that any trial, or even portions of the trial, be conducted in secret," that "[e]veryone tried before military commission will know the charges against him, be represented by qualified counsel to be allowed to present a defense," and that "[u]nder the order, anyone arrested, detained or tried in the United States by military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in federal court."¹⁰⁵

A final example involves the extreme secrecy with which the Administration has treated the identity of hundreds of men of Middle Eastern and South Asian descent who have been detained.¹⁰⁶ While these men were found and detained within the continental U.S. (not found on a conventional battlefield as the Guantánamo detainees presumably were.) by the Immigration Naturalization Services ("INS") and other federal agencies, the debate surrounding them reflects the role of norm entrepreneurs in putting human rights considerations of post-September 11th detainees on the White House agenda. A Freedom of Information Act lawsuit filed by civil liberties groups challenged the secret detention of hundreds of immigrants by the INS and other agencies. Members of Congress also requested information regarding the identities of those secretly detained within the continental United States. Further, foreign governments were eager to gain access to their detained nationals, as detainees are entitled to consult with consular officials under the Vienna Convention for Consular Affairs.¹⁰⁷ While the U.S. government had initially refused to release any details regarding the identities of the detainees, in November 2001, due to growing criticism and substantial public pressure, the Justice Department was forced to release limited information regarding the approximately 600 individuals then in federal custody as part of the post-September 11th sweep to detain suspected terrorists. The vast majority of these detainees, it turns out, were being detained pending removal on

105 Alberto R. Gonzalez, *Martial Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27.

106 About 1200 foreign nationals living in the U.S. were arrested and detained by federal law enforcement agencies in the two months following September 11th. Stephen J. Shulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties In the Wake of September 11*, at 11 (2002) (a Century Foundation report). Approximately 40% of these detainees were Pakistani nationals, and most of the remaining were nationals of other predominantly Islamic countries. *Id.*

107 Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77.

immigration charges, as there was insufficient evidence to detain them on terrorism grounds.¹⁰⁸

Of course, the causal influence exerted by transnational norm entrepreneurs on Bush Administration policies as to the prisoners at Guantánamo should not be overstated. A range of other, more top-down factors influencing Administration policies from within were undoubtedly at work as well.¹⁰⁹ For example, officials in the State and Defense Departments concerned about reciprocal treatment of U.S. POWs also affected the policy shift toward applying the Geneva Conventions to the Taliban prisoners.¹¹⁰ Such top-down variables within the structure of decision-making clearly benefit from outside actors who helped reinforce particular views within government.¹¹¹

Similar to Harold Koh's transnational public law model,¹¹² the institutional dialogue initiated by norm entrepreneurs in these examples inevitably involves a transnational structure, both in terms of the parties involved and the claims that intertwine statutory, constitutional, international, and regional human rights law arguments. Consistent with this model, rather than relying exclusively on litigation alone, these norm entrepreneurs have bargained in the shadow of litigation¹¹³ and other forms of advocacy to leverage themselves into a dialogue about the role of human rights in the U.S. "War on Terrorism." This dialogue has helped reshape the President's approach to detention of suspected terrorists. By operating transnationally, these norm entrepreneurs have internationalized what are essentially domestic debates over rights and security. By moving these debates to the international stage, the international human rights considerations take on greater visibility and pull in a greater range of voices across national borders. Significantly, these networks of norm entrepreneurs also operate

108 Cole, *supra* note 7, at 960.

109 For a discussion of the shifting coalitions and bargaining that occurs within government, see Graham Allison, *Essence of Decision: Explaining the Cuban Missile Crisis (1971)* (describing the bargaining and coalition-building that occur within government to affect policy).

110 See Sanger, *supra* note 94, at A16 (noting that Secretary of State Colin Powell argued in favor of recognizing the application of the Geneva Conventions to respond to European criticism and protect American soldiers who may be captured in the future); Seelye, *supra* note 97, at A1 (noting that Secretary of State Colin Powell asked for a review of the Administration's position on the Geneva Conventions' applicability following criticism from allies and human rights advocates).

111 See Ratner, *supra* note 100, at 920 ("the self-restraint created by [reciprocity] requires something of a push from outside actors.").

112 Harold Koh, *Transnational Public Law Litigation*, 100 *Yale L.J.* 2347 (1991).

113 Koh, *The "Haiti Paradigm," supra* note 20, at 2401.

subnationally, pulling in constituents at a grassroots level (who may have little previous exposure to international law). By linking these grassroots constituents up to the international movement for human rights, transnational networks of norm entrepreneurs amplify the power of those whose voices may not otherwise be effectively channeled, organized, and therefore heard at the domestic level. The set of conversations carried out through these networks simultaneously functioning transnationally and subnationally represents a new mode of deliberation, which invites dialogue among the government, its citizens, and interested others.

B. Theorizing about Dialogic Approaches to Human Rights Enforcement

Analyzing dialogic approaches to human rights enforcement in the context of scholarship on compliance with international law assists in understanding why these approaches are beneficial and perhaps even necessary for compliance. Regardless of whether or not international human rights law is binding on the U.S. as a technical matter, as a practical matter, enforcement of these standards will not be effective unless the public understands what they are and accepts them as democratically legitimate. In this sense, human rights norms must live or die based on their merits, as reflected in acceptance or rejection of these merits through democratic means.

The process through which norms win approval is captured by Cass Sunstein's observation that "[n]orm cascades occur when societies are presented with rapid shifts toward new norms."¹¹⁴ This occurs "[w]hen the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms, to a 'tipping point' where it is adherence to the old norms that produces social disapproval."¹¹⁵ As examples of norm cascades, Professor Sunstein cites "the attack on apartheid in South Africa, the fall of Communism, the election of Ronald Reagan, the rise of the feminist movement, and the current assault on affirmative action."¹¹⁶

114 Cass R. Sunstein, *Free Markets and Social Justice* 38 (1997).

115 *Id.* In international relations theory, political scientists Martha Finnemore and Kathryn Sikkink describe a three-stage process through which a norm's influence in the international community can be understood: (1) the emergence of the norm; (2) the broad acceptance of the norm (or norm cascade) following a "tipping point," at which "a critical mass of relevant [S]tate actors adopt the norm"; and (3) the internalization of the norm. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 *Int'l Org.* 887, 895 (1998).

116 Sunstein, *supra* note 114.

The internalization of international norms into domestic law involves both vertical and horizontal communication among transnational networks of various government actors (including judges) as well as nongovernmental actors linked through technology, conferences, and other initiatives that facilitate globalization.¹¹⁷ This internalization process facilitates States' obedience to international law.¹¹⁸ This article suggests that dialogic approaches to human rights enforcement may be a vehicle for the cascading and internalization of norms to occur.

Where human rights considerations have been successfully factored into the rights/security balance, the benefit of a dialogue-based approach involving government and nongovernmental actors is that the very process of debating and trying to create consensus helps to clarify and convert abstract human rights norms that are weakly legitimated at the international level into concrete laws and policies that are more strongly legitimated at the domestic level. Even where international human rights norms are considered and rejected in the context of the U.S. "War on Terrorism," the very fact of dialogue leads to greater understanding of these standards.

As has been the case with affirmative action and other legal reforms that have come under assault, having been secured primarily through litigation or other top-down modes without broad-based participation, the adoption of international human rights laws in the U.S. will come under attack if they are imposed in a top-down fashion that fails to gain popular support in various sectors of society. A dialogic approach to human rights enforcement involving both governmental as well as nongovernmental actors would help to build popular support for human rights law and make it more sustainable in the long-run, even if in the short-run, human rights considerations are shunted aside to accommodate security concerns. A more complete drawing

117 Keck & Sikkink, *supra* note 6, at 3 (describing how activists, organized around a shared idea or cause, communicate transnationally to "promote norm implementation, by pressuring target actors to adopt new policies, and by monitoring compliance with international standards"). See also Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *Eur. J. Int'l L.* 503, 527-28 (1995) (discussing interactions among "the three domestic branches of government in each State transnationally with one another").

118 Koh, *supra* note 5, at 647-48 (explaining that nations obey international law "because of a transnational legal process of interaction, interpretation, and internalization"); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2659 (1997) ("A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system.").

down of international law depends on the development of more participatory mechanisms through which Americans can foster a deeper understanding of and appreciation for human rights norms. New methods of democratic deliberation are, therefore, necessary to enrich the community's understanding, even if in the end, the community decides to reject these norms.

Louis Henkin famously stated, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of time."¹¹⁹ How can a dialogic approach to human rights enforcement secure greater State compliance with international norms *more* of the time? A dialogic approach operates within what Harold Koh has called the transnational legal process. As Koh points out, because of the "normativity of transnational legal process ... [e]ven resisting nations cannot insulate themselves forever from complying with international law if they regularly participate, as all nations must, in transnational legal interactions,"¹²⁰ which, as repeat players in commercial and other transnational transactions, strengthens their interests in preserving their reputations as law-abiding. While Cold War legal realists were skeptical of the enforceability of international law, suggesting that States will live up to these norms only when it suits their narrow national interests,¹²¹ a number of international relations theorists now embrace the view that States employ cooperative strategies in which compliance with negotiated norms serves their long-term interests.¹²² Using game theory, these theorists point to the classic prisoners dilemma game where long-term cooperation has benefits over short-term cheating. According to this approach, States, as rational, self-interested actors, will consider the costs and benefits of competition, cooperation, or defection from a cooperative scheme. Even where competition or defection provides short-term benefits, patterns of cooperation nevertheless emerge because cooperation better serves States' interests in the long-run. As they respond to other States' reputations as law-abiding, States internalize norms of international lawfulness.¹²³ Norm entrepreneurs,

119 Louis Henkin, *How Nations Behave* 47 (2d ed. 1979).

120 Koh, *The "Haiti Paradigm," supra* note 20, at 2406.

121 *See, e.g.,* Hans J. Moregenthau, *Politics Among Nations: Struggle for Power and Peace* 560 (5th ed. 1978).

122 *See, e.g.,* Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984); Robert O. Keohane, *International Institutions: Two Approaches*, 32 *Int'l Stud. Q.* 379 (1988); Robert Axelrod, *The Evolution of Cooperation* (1984); Mancur Olson, *Logic of Collective Action* (1971). For a discussion contrasting different approaches taken by realists and institutionalists in international relations theory, see Powell, *United States Human Rights Policy, supra* note 16, at 424-27.

123 *See* Finnemore & Kathryn Sikkink, *supra* note 115, at 895 (describing

functioning within this transnational legal process, operate as communication vehicles, strategically using information to damage or enhance the reputation of States as violators or compliers with international law.

As Robert Putnam has suggested, the structure of international negotiations is a two-level game played by government representatives both at the international level with counterparts in foreign governments and at the domestic level with domestic interest groups.¹²⁴ In the context of the Guantánamo detainees, lobbying efforts aimed at affecting the debate over rights and security have occurred simultaneously on domestic and international levels in a mutually reinforcing way.

In fact, it *is* in the United States' interest to acknowledge human rights and humanitarian law protections, to advance rule of law globally. Clearly, we live in a world that is increasingly interdependent. Even terrorists opposed to the project of globalization ironically depend on the tools of globalization to undermine it. They used the Internet and other online technology to spread the message of hate underlying their plot; transnational money transfers to finance it; and commercial air carriers to execute it.¹²⁵ To fight this sinister side of globalization, which supports international terrorist networks, government and nongovernmental actors alike should promote constructive forms of global interdependence based on international standards, international institutions, and the rule of law.¹²⁶ Failure to do so risks winning battles against terrorism while steadily losing the rights and liberties for which the "War on Terrorism" is being fought.

internalization of a norm as part of a three-stage process through which a norm's influence can be understood); Koh, *supra* note 18, at 2659. ("A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system.").

124 Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *Int'l Org.* 427, 436 (1988).

125 See Powell, *United States Human Rights Policy*, *supra* note 16, at 421 (relying on Benjamin Barber, author of *Jihad vs. McWorld*, *Open Society Institute U.S. Programs*, in *Forum: Is Democratization a Response to Terrorism?* (Nov. 2001) (audio of remarks available at <http://www.soros.org/usprograms/forum/democracy/index.html>) [hereinafter *Forum*] (observing how the September 11th terrorists used tools of modernity against the project of modernity)).

126 See Benjamin Barber, *Open Society Institute U.S. Programs*, in *Forum*, *supra* note 125; Harold Koh, *A United States Human Rights Policy for the 21st Century*, 46 *St. Louis U. L.J.* 293 (2002).