



National Security Law Report

Judge Laurence Silberman, Co-Chair of the WMD Commission, Discusses the Commission's Process and Conclusions

On April 14, at the University Club in Washington, DC, Judge Laurence Silberman discussed his experiences as co-chair of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction ("WMD Commission"), which investigated intelligence decisions in the run-up to the US-led war in Iraq. He responded to questions from three panelists: Markle Foundation President Zöe Baird, former Director of Central Intelligence R. James Woolsey, and Michael Smith, formerly of the NSA. Stewart Baker, Chair of the Committee and General Counsel to the WMD Commission, introduced Judge Silberman.

The jurisdiction of the Committee was limited to intelligence matters, Silberman said, which included considering if there was any political distortion, but did not extend to how the intelligence was used by the Executive and Congress. Many who served on the Commission, Silberman said, would have been uncomfortable with serving in such a political role.

The Commission received complete cooperation, Silberman said, even without subpoena power. Commissioners had the ability to threaten to resign, which proved just as effective when dealing with recalcitrant agency officials. Even some, like the Secretary of Defense, whose busy schedules made Commission requests difficult to accommodate, were able to provide information in the end.

The Commission staff included current and former intelligence officials. The Commissioners opted to split into two groups, the Review Group and the Plans Group, to be able to study past use of intelligence at the same time as they thought about plans for reform. Judge Silberman believed that a strong position such as the Director of National Intelligence (DNI) was the proper approach.

Woolsey said that the WMD Commission report compared favorably to the 9/11 Commission report because its recommendations followed from its factual findings. Woolsey expressed concern, though, that the report stressed sharing of intelligence among agencies at the expense of counterintelligence concerns. In response, Silberman noted



Judge Silberman speaks at an April 14 breakfast event.

that the report recommended that the person in charge of sharing also to be in charge of security. Also, the Commission had recommended tagging information so that there was always a record of who had access to which information.

Baird asked how the Commission dealt with the problem of guaranteeing the quantity and quality of information on persons located in the US while protecting their privacy. She also stressed the importance of an auditing system that tags who gets access to which information, and that information be taken apart and shared in a way that does not reveal sources and methods. Silberman said that the intelligence reorganization bill created a program manager responsible for sharing terrorism intelligence. He said that the DNI will have to lead the effort to create effective ground rules for distribution and security and for preservation of civil liberties.

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Silberman

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In the runup to the Iraq war, Silberman said, some analysts did not have access to enough information. Analysts of satellite photos noticed an increase in the incidence of trucks at suspected chemical facilities and concluded that Saddam Hussein was engaging in a renewed effort to manufacture chemical weapons. In reality, however, the satellites were simply taking more pictures—but the analysts didn't know it. Some in the intelligence community who had soured on Curveball—the Iraqi defector relied upon for some of the most inaccurate assumptions about Iraq's weapons programs—didn't realize how important he was to key conclusions about Iraq's programs.

Silberman said that there was general agreement that the only way to find the source of a leak is to ask the reporter. He suggested that policy might be best served by a qualified privilege for reporters. There could be a place for the reporter to ask whether information reveals aspects of sources and methods. Leaks are a cultural problem, Silberman said, because people don't have the same sense that we're at war that they did in World War II. He noted that he and co-chair Sen. Charles Robb had access to some information about ongoing operations that other Commissioners did not, and that they altered some language in the final report on the basis of this information.

Silberman expressed a strong preference for Congressional oversight rather than increased use of the FISA Court, citing his longtime skepticism of the FISA Court's value in theory and in practice. He had testified against the creation of the

court, and had later served on the court, undoing damage that lower courts had done, he said.

In response to Smith's concerns, Silberman said that the positions that the Commission had proposed were only notional, and were not intended to be a fixed organizational chart. The recommendations are about uniting functions, he said, not about boxes. For example, he recommended a deputy for collection, who would be able to make tradeoff decisions about use and acquisition of intelligence resources. There are often tradeoffs between immediate tactical benefits and long-term strategic benefits, he said, and one person should be in charge of assessing these costs and benefits. Collection and analysis should be fused in a deputy and at lower levels, he said.

Silberman also noted that the Commission had found no indication of White House pressure on intelligence agencies—which was not what he had expected. Silberman said it is important for decisionmakers to ask probing questions. In fact, according to Bob Woodward's book *Plan of Attack*, Silberman said, President Bush had asked hard questions, and was told in response that it was a "slam dunk" case.

Silberman said that joint ventures between different intelligence collectors had been successful, leading the Commission to emphasize integration. The US might not have sent Secretary of State Powell to make the case before the UN, which Silberman said hurt US credibility, had intelligence been better managed. Silberman said that the Commission's conclusions were not mere Monday morning quarterbacking—the intelligence community's conclusions were based on information that was wrong, on its face, at the time.

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Piracy Law as a Weapon in the War on Terror

Douglas R. Burgess Jr.

This article will argue that the existing international common law regarding piracy—particularly as a crime of universal jurisdiction—is the most useful framework for defining terrorism and determining a legitimate state response.

The analogy between the acts and motivations behind piracy and terrorism

Piracy is properly understood as a political as much as a commercial enterprise, in contrast to its popular image as mere “sea-robbery.” From the time of Republican Rome until the Declaration of 1858, governments employed pirates as privateers to hinder an enemy’s trade, distract its navy, frustrate its relations with its empire, deplete its coffers, and sometimes drive it towards open warfare. Simultaneously, pirates not in the employ of states furnished a striking counterexample, often regarding themselves as belligerent free agents “at war with all the world.” Though often courageous, sometimes merciful and occasionally even pious, these rebellious pirates were on the whole the dregs of England’s merchant marine. Cast out from the fold, these men regarded piracy as a means of exacting personal vengeance on civilization itself. Pirate Captain Charles Bellamy proclaimed, “I am a free prince and have as much authority to make war on the whole world as he who has a hundred sail of ships and an army of a hundred thousand men in the field.”

Either as state-sponsored or private warfare, piracy through the ages provides a powerful precedent to contemporary terrorism. As state-sponsored, it served the same function which state-sponsored terrorism serves today: a means for states to strike at their enemies, distract their armies, terrorize their citizens, and yet still maintain the semblance of peaceful relations. As private warfare, the pirates’ “war against the world” offers the earliest historical example of non-state vs. state conflict, the same sort of “war” which al-Qaeda wages today. The precedent holds true in its inverse as well: just as the United States now seeks to root out terrorist cells across the globe, it once used its Navy, in 1804, to stamp out bands of corsairs at Tripoli. This form of conflict must be distinguished from revolutions and civil wars, which also might be termed state vs. non-state. Here, the aggressors detach themselves both politically and (more importantly) physically from the nation-state—leading the revolt from outside. For a terrorist organization to represent itself as a belligerent or revolutionary organization within the meaning of the law, it must therefore 1) confine its attacks to within the jurisdictional and/or territorial boundaries of a single state, 2) have no political objective beyond regime change and 3) represent itself as the alternative governmental regime. The size of the terrorist group and its chosen target are not material to this determination.

The methods of the contemporary terrorist likewise have much in common with their piratical forbears; the terrorist, like the pirate, appears suddenly, attacks his target, and disappears. Both view themselves as beyond the pale of state jurisdiction, “free princes” unto themselves, and both use this extra-nationality as a weapon against states.

Removed from the laws of society, pirates made their own, and lived by them scrupulously. These pirate articles foreshadow organized terrorism, in creating an organization with its own directors, codes of conduct and punishments, functioning for the sole purpose of disrupting trade and wreaking havoc. Moreover, both use the same tools—homicide, terror, wanton destruction, and disruption of trade—to achieve a common aim: gaining notice to themselves. The idea of attracting attention to one’s self and one’s cause is the *modus vivendi* of all terrorism, whether government-sponsored, organized, or anarchical. The pivotal issue is not whether the terrorists seek by their act to achieve a change on governmental policy, a revolution, or even (as with the 19th century anarchists) a collapse of all governments—it is rather whether they employ terror to achieve this notice. In doing so, they engage in their own private “war against the world.”

The legal history of piracy

Until the late 1600s, it was not uncommon for states—particularly England—to support piracy in order to further state goals. By 1718, though, there was a fundamental shift—a pirate could, by law, be captured and executed by “any one that takes them,” with the scant provision that the captors must first attempt to bring them to “some government” to be tried. As it had been in the Roman Republic, piracy was once again a crime of universal jurisdiction.

This change in English law removed piracy to the periphery of imperial affairs. The pirates of the eighteenth and nineteenth centuries were no longer the flotsam of Europe’s mercantile labor force, but tightly-woven bands of Eastern corsairs; succeeding generations of piratical clans sharing familial, tribal, ethnic, religious, or political identities. In the period of conflict between 1790 and 1820 there were numerous treaties between states pledging not to employ or encourage privateers unless actually at war. The most significant development occurred in 1858, when the Declaration of Paris—signed by nearly all the imperial powers—abolished all forms of piracy, privateering and government sponsorship. Pirates would thenceforth be *hostis humani generi*, subject

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to capture and trial wherever they were found. The central premise of *hostis humani generi* is that a pirate is not an enemy of the state, but of humankind itself. States had come to agree 1) that piracy as a political tool was beyond the pale of legitimate state behavior, and 2) that pirates themselves forfeited the right to the protections of citizenship. In order to create a just and lasting body of law on organized terrorism, states must apply a similar understanding of their own behavior and of the crime itself. By the early 20th century piracy for monetary ends was a peripheral problem, well within the jurisdictional and legislative purview of individual states. But piracy as an act of political coercion was coming into its own. As the number of unquestionably 'piratical' acts receded, states began on their own initiative to stretch the definition to include newer forms of menace. In 1922, in the aftermath of the First World War, the nations of France, Italy, Japan, Britain and the United States pledged in the Washington Declaration to punish "as an act of piracy" any unrestricted submarine attacks. The Spanish Civil War a decade later produced a second and even more revolutionary treaty, the Nyon Agreement of 1937. Concluded between Egypt, Greece, Turkey, Romania, France, Belgium, Britain and the USSR, it extended universal jurisdiction to any unidentified vessels or aircraft attacking merchant shipping on behalf of the Spanish insurgents, referring to such acts as "piratical." This politicized definition of piracy was extended still further by President Reagan during the *Achille Lauro* affair of 1985. Following the seizure of an Italian cruise liner by members of the Palestine Liberation Organization and the murder of one of its passengers—a wheelchair-bound American—Reagan declared the terrorists as "pirates" and demanded their extradition. This melding of terrorist and piratical crimes later resulted in the creation of a UN Convention that introduced the term "maritime terrorism" into the legal lexicon of piracy.

The legal analogy between piracy and terrorism

A crime, in municipal or international law, has three elements: the *mens rea*, the *actus reus*, and the *locus*. For terrorism to fall within the common definition of piracy, it must therefore be consistent in its requisite mental state, actions, and place of occurrence.

The *mens rea* of piracy, as codified by the UN Convention on the High Seas of 1982, is the desire to inflict death, destruction or depredation "for private ends." Recognizing the aforementioned distinction between the political motives and actions of a revolutionary government and those of a terrorist organization, we can now conclude that international terrorism falls outside the political exemption, and thus within the common understanding of piracy. As a "war against the world," it, too, seeks to inflict death, destruction and deprivation for "private ends," namely bringing international attention to one's own private cause.

The *actus reus* of piracy, which includes acts of homicide and destruction absent actual robbery, is likewise comparable to the *actus reus* of most forms of modern terrorism.

Third, the *locus* of piracy, while traditionally confined to the high seas or other territories outside state jurisdiction, has been expanded to include acts of piracy committed in the air and on state territory "by descent from the sea." In the classic text *International Law*, James Hall explains that "piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the state through descent from the sea, by a body of men acting independently of any politically organized society." Melding this idea of 'descent by sea' to the reality of aerial piracy provides an exciting possibility. Attacks "descending" from the air could occur anywhere, provided that, in keeping with the 'descent by sea' requirement, the plane's flight path traversed some body of water. It might, defined broadly, even apply to any foreign national arriving in a state other than his own with the intent to commit piratical acts (remembering again that the crime of piracy is one of intent, not commission). With the *mens rea* and *actus reus* of piracy and terrorism otherwise synonymous, the locus too may be common to both.

Since piracy and terrorism share a *mens rea*, *actus reus*, and *locus*, we may conclude that they are, in effect, comparable crimes. They must also, accordingly, share a legal definition. Terrorists, like pirates, are *hostis humani generi* under international law.

A model international law of terrorism

As the United States and her allies pursue their war on terrorism across every continent, the international community struggles to respond to the two greatest challenges in its recent history: the unparalleled menace of organized terrorism that threatens to undermine the very foundations of established states, and the sudden emergence of an aggrieved, hegemonic world power that threatens longstanding alliances in its implacable hunt for those who wronged it. The rift between the United States and the United Nations has been termed an indication that "the gloves are off": in the face of a very real and entirely novel threat to its security, the United States no longer feels bound to defer to international consensus on the means by which it may protect itself.

After September 11, 2001, the United States, under President George W. Bush, embarked on a campaign to root out terrorism at its source, beginning with states known or suspected to have harbored terrorists. Gaining international consensus to remove the Taliban in the wake of September 11 was not difficult. Convincing an uneasy international community about the similar threat of Iraq one year later proved impossible. Yet the lesson that the United States has drawn from its failure to obtain U.N. support for Operation Iraqi Freedom may not be what the U.N. intended; a majority of Americans, among them many in the leadership, now question the efficacy of engaging the U.N. for actions regarding state security.

An internationally accepted definition of terrorists as international criminals will give terrorists legal status as enemies of the human race and subject them to universal

jurisdiction. Terrorists will not be enemies of *one* state but of *all* states. Only in this manner can the threat of global terrorism be successfully countered. Today, Americans question why we must give terrorists the benefit of international law. The answer is that we must do so for our own safety's sake.

Drawing from the 1982 United Nations Convention of the Law of the Sea as the most recent source of piracy law, and mindful of all the debates surrounding the question of political exemptions, piracy on land, and the problem of maritime terrorism, I recommend that the new definition of the crime of terrorism—including acts of piracy—be defined as follows:

- 1) The crime of terrorism is defined as:
 - a) any illegal acts of violence or detention, or any act of depredation, destruction of property or homicide;
 - b) as well conspiracy to commit such acts, membership in an organization which conspires to commit these acts, and any form of active sponsorship including financial support, refuge, or withholding knowledge of such activities from the authorities;
 - c) committed by persons not acting under the colour of a state, government, or revolutionary organization engaged in the replacement of an established regime within the borders of its own state;
 - d) against the citizens or property of another state;
 - e) with the purpose of inflicting terror on the citizens or government of that state or achieving international recognition for a private cause;
 - f) none of these provisions is meant to contradict or negate the existing terrorist offences currently proscribed by UN convention, covenant, treaty, agreement, or customary international law.
- 2) Terrorists do not lose their definition under the law if they are sponsored by a state, government or revolutionary organization acting in accordance with clause (1)(b):
 - a) political exemption is only to be inferred if the terrorists act as *de facto* agents of that state, government, etc. by committing their acts by its direct order and in furtherance of its policy;
 - b) in that event, criminal liability transfers from the terrorists as agents to the state as agency; and
 - c) the state is then inferred to have committed an act of war.
 - d) states which sponsor terrorist activities as outlined in clause (1)(b) are not inferred to have committed acts of war, but share criminal liability with the terrorists for any acts undertaken during their sponsorship.
- 3) The crime of piracy is defined as sharing the definition given in sections (1) and (2), specifically for crimes committed:

- a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- c) against persons or property within the jurisdiction of the State, where the pirates have:
 - i) descended by sea to a coastal port;
 - ii) descended by air to any city or township;
- d) the crime of piracy also includes acts committed for pecuniary gain.

- 4) Terrorists and pirates are defined as *hostis humani generis* under the law of nations, and therefore they are subject to universal jurisdiction, meaning:
 - i) as enemies of all nations, any state may effect the capture of a suspected offender;
 - ii) such capture must be made in accordance with international law;
 - iii) the capturing state must then either prosecute the offender under its own laws and in good faith, or;
 - iv) extradite the suspect to the jurisdiction of a requesting state, or to a requesting competent international tribunal.

Piracy provides the way out of the conundrum between political and non-political acts. In distinguishing between political and non-political piracy, the consensus is that for the political exemption to apply, the pirate must have some direct and appreciable nexus to a recognized government. This, in short, is the difference between pirating and privateering. While both acts are offences against international law, the latter criminalizes the *government* rather than the individual. The crucial difference between them is not in the culpability of the state, but of the individual: whereas a terrorist is defined above as *hostis humani generis*, persons acting under color of the state are regarded as agents of that state, and thus not individually liable for the crime of terrorism. A melding of piracy and terrorism settles the problem of political exemptions once and for all by removing the gray areas and reducing it to a simple question: does the suspect act as an agent of a state or revolutionary regime? If he does, then the other four offenses of the ICC govern his actions. If he does not, then he is a private actor and thus exempt from prosecution for these crimes. The central purpose of equating piracy with terrorism is to create a separate category specifically for these individuals.

Current US law defining terrorism

Section 808 of the Patriot Act offers a list of proscribed terrorist activities, which is striking in its inclusiveness; the Act proscribes offenses ranging from the destruction of an energy facility to the manufacture or use of biological weapons. The Patriot Act is a significant advance in domestic

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Debate: Non-Self-Executing Declarations by the Senate

Malvina Halberstam

I. BACKGROUND

Humberto Alvarez-Machain, a Mexican national, was kidnapped in Mexico and brought to the United States at the behest of U.S. Drug Enforcement Administration (DEA) agents for allegedly assisting in the torture and murder of a DEA agent in Mexico. He challenged the jurisdiction of U.S. courts to try him, arguing that his illegal seizure barred the trial. The Supreme Court rejected that contention, holding that “the power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’” However, the charges were later dismissed by the district court for insufficient evidence. Alvarez-Machain then brought a civil action for damages against the United States, based on the Federal Tort Claims Act (FTCA), and against Sosa, one of his abductors, and other Mexican nationals, based on the Alien Tort Statute (ATS). The Supreme Court held that the action under the FTCA was barred by the statute’s exclusion of “[a]ny claim arising in a foreign country.” Although the Court interpreted the ATS as providing a cause of action for a “narrow class of international norms today,” it concluded that Alvarez-

Machain’s claim that he was illegally arrested and detained for less than one day in Mexico did not implicate any such norms.

The Court’s interpretation of the FTCA and of the ATS was supported by an analysis of the history and purpose of these statutes, and established important new law on the scope of the FTCA and of the ATS, respectively. Its decision and the extensive reasoning in support of its interpretation of each of these statutes will no doubt be the subject of numerous articles. This article focuses, instead, on a single sentence in the Court’s opinion—the sentence referring to the non-self-executing declaration in the Senate resolution giving advice and consent to U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR) which is not supported by any reasoning or citation of authority, but which, in this commentator’s opinion, is of at least equal importance, and perhaps of even greater importance, than the Court’s interpretation of the statutes involved.

The ATS (28 U.S.C. § 1350) gives federal courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United

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terrorist legislation. Yet despite its breadth, the Act does little to recognize the crime of terrorism *per se*. There is no criminality attached to belonging to a terrorist organization. The domestic definition remains largely intact, with the significant addition of “mass destruction,” but no linkage is made or even attempted with any other form of criminal activity, nor does the law draw from any stated precedent. It is not, most emphatically, a definition applicable to *international* terrorism, as it confines itself merely (though understandably) to acts committed on American soil. Wedding the Patriot Act to American piracy law would help it gain recognition and legitimacy. This same function will be served on the international level, but it is vital in U.S. law; the United States is the principle actor in the war on terrorism, and hence its laws are the logical locus for the first reform to occur.

The primary reason for creating a cohesive American terrorist law must be to facilitate the pursuit, capture, extradition and adjudication of terrorists. All these aims would be vastly aided by a crime of terrorism that owes its source to piracy and shares its principles of universal jurisdiction and *hostis humani generis*. Under the current law, terrorists can only be tried for the crimes enumerated under Section 808 of the Patriot Act, not for the crime of terrorism itself.

Equally vital is a parallel recognition in international law, and the demarcation of jurisdiction to an international court to try offenders for the crime. Thus, I advocate the creation of a separate crime of terrorism in the ICC, with the definition stated above. First and foremost, the function of international criminal law is to recognize certain forms of conduct which the international community abjures as threats to society itself. Prosecution is only one aspect of this criminalization; equally important, if not more so, is the mere recognition of criminality, absent any mechanism for capture or enforcement.

This article has argued that the only effective means of addressing the problem of terrorism in law is through the precedent of piracy. Piracy is terrorism’s blood brother, raising the same problems of definition and political exception that have frustrated recent attempts to create an international crime of terrorism. Moreover, pirates share with terrorists the unique status of individual menaces to the international order, the only such criminals existing independent from state agency or sponsorship. The purpose of giving terrorism the precedent of piracy is not to offer a ‘quick fix’ to the problem of international organized terrorism, but rather to provide the parameters by which this ongoing conflict is understood, and the means by which it may one day be resolved. That resolution begins with the recognition among the nations of the world that terrorism is a threat to all states and all persons, the same recognition given to piracy in 1856. Terrorists, like pirates, must be given their proper status in law: *hostis humani generis*, enemies of the human race.

States.” Alvarez-Machain relied on provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights [ICCPR] to establish that his illegal arrest and detention in Mexico was a violation of the “law of nations,” or customary international law in today’s usage. The Court rejected both contentions. With respect to the Universal Declaration, the Court said, “the Declaration does not of its own force impose obligations as a matter of international law,” quoting the famous statement by Eleanor Roosevelt that the Declaration is “a statement of principles . . . setting up a common standard of achievement for all peoples and all nations . . . not a treaty or international agreement . . . impos[ing] legal obligations.”

With respect to the ICCPR, a treaty ratified by the United States, the Court said, “[A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing *and so did not itself create obligations enforceable in the federal courts.*” This statement is problematic in two respects: (1) a non-self-executing declaration in the Senate resolution giving advice and consent to ratification of a treaty that *by its terms* is self-executing is arguably inconsistent with the provision in Article VI of the U.S. Constitution that “all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land,” and (2) even if the non-self-executing declaration is valid, it does not bar consideration of the ICCPR as evidence that a well-defined rule of customary international law exists. It should also be noted that although the Court used the term “understanding,” the non-self-executing provision was included as a “declaration” in the Senate’s resolution, not as an understanding.

Although the Supreme Court has previously indicated that in the United States a treaty may be self-executing or not, it has never ruled on the enforceability of a treaty provision which by its terms was self-executing, but which the Senate declared to be non-self-executing. Thus, this statement could have very far-reaching consequences.

II. THE CONSTITUTIONALITY OF NON-SELF-EXECUTING DECLARATIONS BY THE SENATE

It has long been accepted as black letter law that in the United States treaties may be self-executing or non-self-executing, and that a declaration by the Senate in its resolution giving advice and consent to ratification that the treaty is non-self-executing makes it unenforceable in U.S. courts. Recently, such declarations have been routinely included by the Senate in its approval of human rights treaties.

Article VI of the U.S. Constitution provides, “This Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” This language, making treaties the supreme law of the land, and the provision in Article III giving federal courts jurisdiction in cases involving treaties, were adopted to avoid the problems created by the system that existed under the Articles of Confederation, which left the enforcement of treaties to the legislatures of each of the states.

A treaty that is not self-executing is not the supreme law of the land. For example, if a treaty requires *a*, existing law requires *not-a*, the treaty is not self-executing, and no implementing legislation has been enacted, then a court will be required to apply *not-a*, rather than *a*. Thus, *not-a*, rather than *a*, is the supreme law of the land. Even if implementing legislation is enacted, it is the statute implementing the treaty that is the supreme law of the land, rather than the treaty, as provided for by Article VI.

It is only where the treaty by its terms requires further government action, that is, where the international obligation is to enact legislation, that a treaty can be said to be the supreme law of the land even though it cannot be invoked as the basis of a claim or defense. That is so because the treaty does not purport to establish any rights or obligations, but

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only to obligate the states parties to establish such rights and obligations. Numerous treaties do exactly that. For example, treaties dealing with specific aspects of terrorism provide, “Each Contracting State undertakes to make the offense punishable by severe penalties, or language to that effect.”

Although it is accepted black letter law that in the United States a treaty or treaty provision may be self-executing or non-self-executing, a number of prominent scholars and commentators have challenged or questioned the constitutionality of a Senate declaration that a treaty which is self-executing by its terms, is not self-executing. Professor Jordan Paust stated, “The distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that ‘all Treaties . . . shall be the supreme Law of the Land.’” Professors Stefan Riesenfeld and Frederick Abbott wrote, “The framers of the Constitution intended that treaties be given direct effect in U.S. law when by their terms and context they are self-executing. An ancillary power of the Senate to deny self-execution directly contradicts this intent.” Professor Lori Damrosch stated, “A Senate declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution.”

Some two hundred years ago, Justice Story declared: “It is . . . indispensable, that [treaties] should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. . . . If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied.” Although the Restatement (Third) of the Foreign Relations Law of the United States appears to accept the validity of a non-self-executing declaration by the Senate, Professor Louis Henkin, its Chief Reporter, later wrote that “such a declaration is against the spirit of the Constitution; it may be unconstitutional.” He added in a footnote, “If what I wrote might be interpreted as supporting a general principle that would allow the President, or the Senate, to declare all treaties non-self-executing, that is not my opinion.”

Professor John C. Yoo is probably the strongest proponent of non-self-execution. Yoo’s basic thesis is that the Supremacy Clause is a federalism clause, not a separation of powers clause, and that a treaty dealing with matters that are within Congress’s Article I powers is not self-executing; it must be implemented by Congress. Not only does he believe that non-self-executing declarations are constitutional, he argues for a presumption of non-self-execution. He wrote, “At the very least courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing.”

In a long and meticulously footnoted article Yoo marshaled arguments based on history, policy, and text to support his position that the intent of the Framers was to make treaties non-self-executing. For evidence of the “original understanding” he relied on British practice at the time of the

framing, pursuant to which the King made treaties but Parliament had to adopt legislation to implement them, and on the state ratification conventions. Yoo’s historical arguments were refuted by Martin Flaherty. He interpreted some of the documents cited by Yoo differently, cited other documents, and concluded that the intent of Article VI was to establish that treaties would be the supreme law of the land without implementing legislation. In Flaherty’s view, “history clearly supports the self-executing orthodoxy,” and “an examination of both the context and sources on which Yoo relies indicates that his revisionist conclusions are untenable.”

Yoo’s textual argument is that while the purpose of the Supremacy Clause was to make treaties supreme over state law, nothing in Article VI indicates that no implementing legislation would be required. There are several responses to this argument. First and foremost, Article VI states that “*all* treaties . . . shall be the supreme Law of the Land,” not that “treaties . . . shall be the supreme law *if Congress adopts implementing legislation.*” If the intent had been to condition supremacy on the adoption of implementing legislation by Congress, Article VI would have so provided. Second, Article VI provides that judges in every state “shall be bound” to enforce treaties, again without a requirement that there be implementing legislation. Third, it lists treaties together with the Constitution and statutes as supreme law, neither of which requires implementing legislation. Fourth, if treaties were meant to become law only by implementing legislation, there was no need to include treaties in the Supremacy Clause at all, because once the implementing legislation was adopted, the rights they established would be supreme law as statutes. Yoo’s interpretation—that treaties should be given domestic legal effect only if Congress adopts implementing legislation—in effect reads the treaty provision out of the Supremacy Clause, because under it treaties would never be the supreme law, only the statutes implementing them would be.

Yoo’s strongest argument against making treaties the law of the land without implementing legislation is the policy argument that treaties now regulate matters that were traditionally regulated by domestic law, and that if treaties become law automatically, the treaty process could be used to supplant the legislative process. Thus, Yoo argued, “If the United States forges multilateral agreements addressing problems that were once domestic in scope, treaties could replace legislation as a vehicle for domestic regulation. . . . [M]aking treaties self-executing [could] create a potentially limitless executive power.” Further, he argued, since under *Missouri v. Holland* (1920) the Tenth Amendment is not a limitation on the treaty power, as it is on Congress’s Article I powers, when *Missouri v. Holland* is combined with “claims that all treaties have the same legal force as statutes, that they automatically preempt inconsistent state law, and that they are to be immediately enforced by the federal and state courts, the treaty power becomes an unlimited authority to legislate on any subject.”

The possibility that the treaty process might supplant the state and federal legislative process should be taken seriously.

But, it does not require nullification of the Supremacy Clause. There are at least two methods (and no doubt others) that the Senate can use to preserve a role for the House when it wishes to do so. It can, as it did with the Genocide Convention, require that Congress adopt legislation *before* the President ratifies the treaty. That would have the additional benefit that the United States would not be breaking its international obligations if it failed to implement the treaty domestically. The Senate could also advise the President that he should negotiate a treaty that is non-self-executing by its terms.

Although the Supreme Court has previously indicated that in the United States a treaty may be self-executing or not, it has never ruled on the enforceability of a treaty provision which by its terms was self-executing, but which the Senate declared to be non-self-executing. In *Power Authority of New York v. Federal Power Commission* (1957), the United States Court of Appeals for the District of Columbia Circuit held that a reservation that would have had the effect of making a treaty provision non-self-executing was invalid. It did so, however, not on the ground that it violated the Supremacy Clause, but on the ground that since the reservation had no effect on the other party to the treaty it was not a valid reservation.

Some commentators have suggested that the non-self-executing declaration is too well-entrenched to be held unconstitutional. Although the proposition that a treaty that the Senate declares to be non-self-executing cannot be invoked in a U.S. court has long been accepted, the fact that a practice has long been *assumed* to be constitutional does not make it so, as the Supreme Court made clear in *Immigration and Naturalization Service v. Chadha* (1983). In that case, the Court found the use of the legislative veto unconstitutional, even though such provisions had been included in nearly 200 statutes between 1932 and 1975. The Court noted that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” That non-self-executing declarations have been *assumed* to be constitutional should not preclude the Court from holding that if a treaty (or treaty provision) by its terms establishes rights or imposes obligations that can be enforced by the courts directly, a Senate declaration that would bar the courts from enforcing those rights violates the Constitution.

Surprisingly, despite the considerable body of scholarly writing challenging the constitutionality of non-self-executing declarations, the Court in *Alvarez-Machain II* did not even discuss the question, and neither the concurring opinions nor the dissent addressed it. The majority’s reference to the Senate’s “understanding,” rather than declaration, also suggests that the statement may not have been given much thought. While the Court was probably not using “understanding” in its technical sense, its failure to distinguish between a declaration and an understanding, both terms of art in the treaty context, leaves the impression that this aspect of the case probably did not receive thorough consideration.

III. TREATIES AS A SOURCE OR EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

The doctrine that a Senate declaration providing that a treaty is non-self-executing renders it unenforceable in U.S. courts is so deeply ingrained that the plaintiff in *Alvarez-Machain II* did not even seek to base his action directly on the ICCPR. Rather, he relied on the treaty to establish a rule of customary international law. Thus, the Court stated:

the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. *Accordingly, Alvarez cannot say that the [Universal] Declaration [of Human Rights] and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law.*

Although the Court noted that Alvarez-Machain relied on the Covenant “to show that prohibition of arbitrary arrest has attained the status of binding customary international law,” it did not appear to consider the Covenant when it determined that the rule against arbitrary arrest has not achieved the level of acceptance as a rule of customary international law necessary to make it enforceable under the ATS. Even if the non-self-executing declaration bars enforcement of the Covenant in U.S. courts, however, it should not bar use of the Covenant—a treaty ratified by 152 States including the U.S. and all Western democracies—as a source of or evidence of the existence of a rule of customary international law. The point is not that the rule against arbitrary arrest is sufficiently clear and established to provide a basis for jurisdiction under the Court’s criteria for ATS actions, but that the Court gave almost no weight to inclusion of the rule in the Covenant in making that determination.

SUMMARY AND CONCLUSION

Commentators have differed considerably on the validity of non-self-executing declarations in Senate resolutions giving advice and consent to ratification of treaties, from those taking the position that non-self-executing declarations in treaties that are self-executing by their terms are inconsistent with the provision in Article VI that treaties are the supreme law of the land, to those arguing that even treaties lacking a non-self-executing declaration should be presumed to be non-self-executing. Until its recent decision in *Alvarez-Machain II*, however, the Supreme Court had never addressed the validity of non-self-executing declarations. In that decision the Court disposed of the question in one sentence, without any supporting analysis or citation of authority. It simply assumed that the declaration rendered provisions of the Covenant not “enforceable in the federal courts.”

Attorneys in various cases before the Court have failed to challenge the validity of this assumption, even where a determination that a non-self-executing declaration was invalid would have meant a ruling in their clients’ favor. In *Alvarez-*

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Machain II, for example, neither the briefs for the plaintiff nor those of any of the *amici* who supported him questioned the validity of the non-self-executing declaration in the Senate resolution giving advice and consent to ratification of the ICCPR. If the non-self-executing declaration had been found invalid, the action for damages would have come within the treaty language of the Alien Tort Statute. Yet, the plaintiff cited the Covenant only to show that the rule had attained the status of customary international law. Similarly, in *Sale v. Haitian Centers Council* neither the petitioners, who were seized by the United States on the high seas and forcibly returned to Haiti, nor any of the more than 20 *amici*, argued that the U.S. action was a violation of the ICCPR provision that “[e]veryone shall be free to leave any country, including his own.” Presumably, they did not make that argument because the Senate resolution giving advice and consent to ratification of the ICCPR included a non-self-executing declaration.

Attorneys should challenge the constitutionality of such declarations with respect to treaties or treaty provisions that are self-executing by their terms. The Supreme Court should not simply assume their validity, but should examine them carefully. Whatever one’s views on the validity and effect of a non-self-executing provision, the question is both important and controversial. The Court’s statement in *Alvarez-Machain II*, made without the benefit of argument by counsel, and supported by neither reasoning nor citation of authority, should not be considered dispositive on this question.

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Response to Professor Halberstam

David B. Rivkin, Jr. & Mark W. DeLaquil

Professor Halberstam’s attempt to create an “important and controversial” issue by attacking over two-hundred years of consistent Supreme Court and lower courts jurisprudence, affirming the constitutionality of non-self-executing treaties, is not just legally flawed; it is a bid to alter fundamentally America’s constitutional structure by disfranchising the two political branches of the federal government.

Her argument that all treaties must be self-executing because “they are the supreme law of the land” is premised on a faulty assumption that the Supremacy Clause necessarily ensures that all treaties ought to have some operational impact, so that they both override any inconsistent prior existing legislation and must be judicially enforceable. In this regard, Professor Halberstam argues that “[a] treaty that is not self-executing is not the supreme law of the land.” This reading of the Constitution is self-evidently incorrect. The Senate may, without running afoul of any constitutional proscription, give its advice and consent to a purely hortatory treaty that has no specific legal consequences whatsoever, just as

Congress may enact purely hortatory bills and resolutions, or statutory schemes that, while quite detailed and proscriptive, take effect only upon a condition subsequent that may or may not occur. (Indeed, regulatory statutes, *e.g.*, the Clean Air Act Amendments of 1990, are replete with provisions that vest powers in regulatory agencies to issue regulations and impose duties on private entities but would only take effect if certain future contingencies do arise.)

Such hortatory or contingent statutes and treaties, whatever their policy wisdom may be, are not enforceable in the courts, either here and now or at any point in time in the future. Yet, they do not in any way violate the Supremacy Clause. Correctly interpreted—which has been done by a number of scholars including Boalt Hall’s John Yoo—and, even more importantly, as understood by the Framers, the Supremacy Clause is meant to eliminate disuniformity caused by the Articles of Confederation, which effectively left States free to ignore national treaties. Yet, even if one ascribes a more robust role to the Supremacy Clause, as Professor Halberstam clearly does, it cannot transform a treaty, for purposes of domestic U.S. law, into something that it is not for purposes of international law.

It is well-settled that a treaty’s domestic effect is wholly predicated on its status as an international obligation; thus, for example, if that obligation ceases, by virtue of the President’s termination of the treaty or its denunciation, or is not properly consummated (because the Senate never gave its advice and consent), the treaty is a dead letter. Significantly, after over two centuries of experience with the unique American constitutional strictures, other state members of the international system understand and anticipate, when the President signs a treaty, the senatorial prerogative to consent to a treaty with substantive reservations, as well as the principle of non self-execution. They know full well that a treaty that emerges from the U.S. ratification process is often not the same treaty that the President signed. These states, of course, always have the opportunity, either upfront, before the treaty has even been signed, or after the U.S. ratifies it in such a manner as to ensure non-self execution, to accept or reject the revised agreement.

As such, when other nations fail to object to the United States’ ratification of a non self-executing treaty, they have accepted that the treaty will not be enforced in the U.S. courts without further legislation. This, by the way, often is the result they want with respect to their own judicial systems. (In this regard, while the U.S. is usually accused of not comporting with its international obligations, it is the case that most countries in the world, including many of our European allies, view international compacts as largely a diplomatic, as distinct from a legal, affair. This point has been made to one of the authors, who, during his years of government service which involved negotiating various international accords, was often told by his European interlocutors that they could not understand the seeming U.S. obsession with refining and fine-tuning the treaty language; after all, this is just a diplomatic commitment, not to be taken too literally.) Altering this understanding by

changing the United States' domestic law obligations in a situation where the treaty partners have acquiesced to a now self-executing treaty would vitiate this understanding, making the treaty mean something more domestically than it means internationally. This, of course, would result in a treaty that fundamentally exceeds the reach of the entire Treaty Clause and would trench upon Congress' Article I legislative powers. (If the treaty can have domestically binding provisions, which are not supported by parallel matching international obligations, the President and the Senate would be able to use any treaty as a vehicle for creating numerous additional domestic legal obligations, and can entirely short circuit the House of Representatives' role within our bicameral national legislature.)

Indeed, Professor Halberstam's response to Professor Yoo's observation, that the expansive view of the Supremacy Clause, with self-execution as the norm, rather than as the exception, would permit the treaty process "to supplant the legislative process," proves his objection rather than refuting it. The Framers would have either laughed or cried at her suggestion that, in order to avoid an undue diminution of the powers of the House of Representatives—which would occur if the President were to negotiate and sign and the Senate were to give routinely its advice and consent to detailed, self-executing treaties which deal with myriad of economic, environmental, energy, and other domestic matters—the Senate can "preserve a role for the House *when it wishes to do so*." The notion that one branch of government can be relied upon to act altruistically to protect the powers of another, in a situation where it otherwise has all of the leverage, is, to put it mildly, not in keeping with the American constitutional tradition of checks and balances, which enables each branch to defend its own prerogatives.

Halberstam's approach would also hamper the United States' foreign policy in general and the President's authority, in John Marshall's trenchant formulation "as the sole organ" of foreign affairs, to execute this policy by preventing our diplomats from agreeing, for the sake of diplomatic politesse and alliance harmony, to various treaties, knowing full well that the Senate would neuter them by attaching the non-self-execution language as a part of the advice and consent process. Indeed, since virtually all international conventions these days feature provisions that run afoul of one or more of the Constitution's core provisions, *e.g.*, various clauses banning incitement to genocide or hate speech derogate from the judicially-recognized broad First Amendment protections, to make self-execution of treaties the standard baseline, would make it impossible for the U.S. to sign any of them, leading to our diplomatic isolation.

Professor Halberstam's argument against non-self-execution is also fundamentally undemocratic. Democratically accountable branches of government, the President and Senate, create treaties believing that their understanding of the treaty would become law of the land, including whether or not the treaty is self-executing. Some commentators, including Tufts' Michael Glennon, believe in a legislative prerogative so expansive that the Senate need not even formalize its understanding of a given treaty for the Senate's understanding to become legally binding.

Indeed, during the contentious arms control debates of the 1980s, first, over the 1972 ABM Treaty interpretation (and later, over the interpretation of the 1988 INF Treaty), much of the legal academy took the view that, if the Senate believed a particular and rather obscure provision of that Treaty—having to do with the treatment of ballistic missile defense systems based upon "other," futuristic "physical principles" and not the standard radars and interceptors that were meticulously limited by the Treaty—was meant to be interpreted in a certain way, based upon nothing more than a single question offered by a Senator or ambiguous language in the testimony by an Administration witness, then that interpretation was forever cast in stone, irrespective of whether or not it was supported by the negotiating history or even reflected the international law bargain struck by the parties.

One does not have to subscribe to this rather exuberant interpretation of the Senate's powers—and we do not, believing that any treaty cannot mean something domestically that it does not mean internationally—to wonder how is it that legal academics have so readily swung from the notion that the Senate can work its will by a mere asking of a question during the ratification debates to the proposition that the Senate's explicit and unambiguous desire to render an entire given treaty non-self-executing has no weight whatsoever. This Halberstam-proposed virtual emasculation of the Senate's powers is all the more pronounced, because, in her book, the consequences of ignoring the Senate-added non-self-execution language are not to render the advice and consent null and the ratification deficient; rather, it is to keep the treaty involved alive and well and make it self-executing. Completely aside from the legal shortcomings of this position, advocating a judicial coup, vacating over two-hundred years of consistent practice, and stripping the President and Senate of their power to bring into existence non-self-executing treaties demonstrates ultimate disdain for both the Constitution and the workings of our elected representatives.

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Professor Halberstam's Reply

It is, of course, easy to create a straw man and destroy it. I am surprised, however, that David Rivkin, for whom I have a great deal of respect, and with whom I agree on many matters, including a number of propositions in the response, would do so.

I agree that the Senate may constitutionally give its advice and consent to a treaty that is not self-executing and that not all treaties are self-executing (by which I assume we both mean directly enforceable in a court). It would be absurd to argue otherwise.

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I also agree that a treaty must have the same meaning domestically that it has internationally. I wrote an article, *A Treaty is a Treaty is a Treaty* (1992), quoted extensively by Professor John Norton Moore in his excellent book, *Treaty Interpretation, The Constitution and the Rule of Law* (Oceana, 2001), making exactly that point. I also agree that the Senate can insist on reservations which the President must include in the instrument of ratification and to which other state parties may agree or not.

My point is that where a treaty or treaty provision is self-executing by its terms, as where the treaty or treaty provision establishes individual rights that otherwise would be judicially enforceable in the U.S. and there are no other jurisdictional barriers to such enforcement, the Senate cannot render it non-self-executing by a declaration to that effect. Whether a treaty establishes rights that can be enforced by the courts depends on the terms of the treaty. That was made clear by Justice Marshall in his decisions in *Foster and Elan v Nielson* (1829) and *Percheman v. United States* (1833), discussed in the Journal article but omitted from the abridged NSLR version.

In *Nielson*, Marshall interpreted the provision that the grants of land made by Spain, "shall be ratified and confirmed" to mean that they must be ratified by the legislature and therefore could not be enforced by the courts. In *Percheman*, Marshall interpreted the Spanish version of the same treaty, which provided that the land grants by Spain "shall remain ratified and confirmed" as being directly enforceable by the courts.

Although it has been recognized, at least since Marshall's decisions in *Nielson* and *Percheman* that in the U.S. treaties may be judicially enforceable or not (in today's terminology self-executing or not), the Supreme Court has never ruled on the enforceability of a treaty or treaty provision which by its terms were self-executing but which the Senate declared to be non-self-executing. My position (and that of a number of other commentators) is that the Senate cannot transform a treaty or treaty provision that is self-executing by its terms into a non self-executing treaty by a declaration to that effect in the resolution giving consent to ratification and that, at the very least, the Court should not dispose of such an important question, with a substantial body of scholarly writings on both sides of the issue, without analysis or discussion.

I never said that "all treaties must be self-executing," as the response claims. On the contrary, even the abridged version in the Newsletter states that there are "numerous treaties or treaty provisions" that are non-self-executing by their terms. The Journal article from which it was taken includes examples of such treaties and in an article on CEDAW, *United States Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women* (1997), I noted that most of the provisions of that treaty were non-self-executing by their terms and, therefore, a non-self-executing declaration was unnecessary. Finally, I suggest that an alternative to the non-self-executing declaration that the Senate can use when it wishes to preserve a role for the House is to "advise the President that he should negotiate a treaty that is non-self-executing by its terms." The other commentators quoted who

challenge the constitutionality of non-self-executing declarations similarly refer to "otherwise self-executing treaty provisions," (Damrosch) or treaties which "by their terms and context. . . are self-executing" (Riesenfeld and Abbott).

My statement that a treaty that is not self-executing is not the supreme law of the land is taken out of context. In context it is clear that it refers to a treaty that otherwise would be self-executing to which the Senate attaches a non-self-executing declaration. The first sentence of the following paragraph states, "[i]t is only where the treaty by its terms requires further government action, that a treaty can be said to be the Supreme law of the land even though it cannot be invoked as the basis of a claim or defense." Thus, the article recognizes that non-self-executing treaties may be the supreme law of the land.

In addition to mischaracterizing my position, the response seems to equate non-self-executing declarations with reservations and to argue that (1) since the Senate can include reservations in its advice and consent resolution it can include a non-self-execution declaration and (2) if other states don't object to the non-self-executing declaration it, like a reservation, is valid. There are several flaws in this argument. To the best of my knowledge (and contrary to what is stated in the response), non-self-executing declarations, unlike reservations, are not included in the instrument of ratification. But, quite apart from that, the validity of reservations is governed by international law, whereas whether a treaty is self-executing or not is generally a question of domestic law (European Union law may be an exception). The law of some states provides for direct enforcement of treaties, the law of others requires implementing legislation. In the U.S. some treaties are enforceable directly, others require implementing legislation. All that international law requires is that the treaty obligations be implemented, either directly or by appropriate legislation. My position (and that of a number of other commentators cited) is that a non-self-executing declaration in a treaty that is self-executing by its terms is invalid as a matter of U.S. constitutional law, not as a matter of international law.

Finally, Rivkin and DeLaquil attack my suggestion that there are other means that the Senate can use to "preserve a role for the House when it wishes to do so." They ridicule as laughable "[t]he notion that one branch of the government can be relied upon to act altruistically to protect the powers of another." However, the non-self-executing declaration also requires action by the Senate. If the Senate does not wish to do so, it does not have to include a non-self-executing declaration in the advice and consent resolution. So, even with the non-self-executing declaration, a role for the House is preserved only "when the Senate wishes to do so." The reason that the House is dependent on the Senate is, of course, that the Constitution does not give the House a direct role in the treaty making process.

For a more thorough reply to the Rivkin and DeLaquil response, I urge readers of the abridged version to read the full article in the *Journal of National Security Law and Policy*, which is only 22 pages long including footnotes.