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

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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
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("NGOs") and individuals who function as norm entrepreneurs, by
mobilizing public opinion through transnational networks of opinion-
makers and policymakers.

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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" 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." 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.

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make), and not all rights are subject to derogation. 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."

One of the most visible symbols of the debate over human rights and national security has been the detention 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 entrepreneurs by mobilizing public opinion through transnational networks of opinion-makers and policymakers.

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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.


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 conflict\(^7\) when rights have been suspended in the name of national security\(^8\) 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).


is in doubt. 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, 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. 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. 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.

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

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.
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. 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, the permeability of national borders, the ascendancy of transnational civil society, and the normativity of the transnational legal


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. 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.

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. 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) ("Even [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).

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").


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. In domestic legal scholarship, the "old legal process" school 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. 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." In international legal scholarship, too, legal process approaches have come to focus on the normative power of law created through interaction of transnational players. 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. 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.


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." As with the earlier domestic legal process scholarship of Henry Hart and Albert Sacks, 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.

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."

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...

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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. 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. 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. The photo reminded us of the underlining assumption

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
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. 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. However, the U.S. has sought to justify


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.

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.

the detention 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. 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). 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.


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.


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.\footnote{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.\footnote{42} Our national security system is characterized by "recurrent patterns of executive activism,}


\footnote{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).

\footnote{42} Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs*:}
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congressional [acquiescence], and judicial tolerance that push presidents successfully to press the limits of law in foreign affairs. While "the President is our commander-in-chief, not the king," 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 [.]

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

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43 Koh, The "Haiti Paradigm," supra note 20, at 2391.
45 Koh, The "Haiti Paradigm," supra note 20, at 2409.
appeal to a civilian court.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.
and requiring access to counsel and prompt hearings.\textsuperscript{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 \textit{require} States-parties to implement these human rights protections through legislation or other measures.\textsuperscript{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.\textsuperscript{54}

Implicitly sanctioning the President's particular approach to indefinitely detaining terrorism suspects, Congress passed, after little debate, the USA PATRIOT ACT,\textsuperscript{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

\textsuperscript{52} As regards the ICCPR, for example, see \textit{supra} discussion at Part II.A.

\textsuperscript{53} \textit{See}, \textit{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."); \textit{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... "). \textit{See also} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, \textit{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").

\textsuperscript{54} \textit{Cf.} Jeffrey Rosen, \textit{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, \textit{supra} note 7, at 960. \textit{See infra} discussion at Part III.

non-citizens as a necessary component of the "War on Terrorism." The USA PATRIOT ACT makes non-citizens deportable for associational activity, excludable for speech, 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. The USA PATRIOT ACT also authorizes warrants for searches and wiretaps in criminal investigations without probable cause of criminal conduct. It does this by amending the Foreign Intelligence Surveillance Act ("FISA"), 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 non-designated 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. § 1226(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)).

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

C. Judicial Tolerance

Ratified treaties and customary international law are federal law.\footnote{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 \textit{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, \textit{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.").} 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.\footnote{See, \textit{e.g.}, \textit{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."); \textit{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.'").} Thus, courts have frequently not reached the merits or otherwise intervened where the rights of the Guantánamo detainees have been
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.\(^6^4\) 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.\(^6^5\) 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.\(^6^6\) For example, the Israeli Supreme

\(^6^4\) *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.

\(^6^5\) 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.")

\(^6^6\) 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.\(^6\)

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.\(^7\) 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.\(^8\) 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.\(^9\) 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.

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\(^6\) 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.cdisys.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.


\(^9\) \textit{Hamdi}, 316 F.3d at 467 (noting that Hamdi was born in Louisiana and moved to Saudi Arabia as a small child). \textit{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 Force\(^1\) and authorization for expenditure of funds for prisoners in military custody\(^2\) as reflecting congressional approval of the President’s power to detain "enemy combatants."\(^3\) 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."\(^4\) 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 ... ."\(^5\) 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.\(^6\) 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

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\(^1\) 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").

\(^2\) 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").

\(^3\) 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).

\(^4\) Hamdi, 316 F.3d at 464 (emphases added).

\(^5\) Id. at 463.

\(^6\) 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." 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." 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." 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." 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?" The caution expressed by the judges echoes the Supreme Court's concern over a century ago in *Luther v. Bolden*, 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."

77 Id. at 473.
78 Id. at 474.
80 Id.
81 Id.
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

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
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-citizens and have upheld the government's argument that U.S. obligations under international law do not regulate the conduct of U.S. officials abroad. 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.

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).

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).

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." 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 detainment 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).


(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

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. 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." 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. 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. 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.


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

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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.


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.

immigration charges, as there was insufficient evidence to detain them on terrorism grounds.\footnote{\textsuperscript{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.\footnote{\textsuperscript{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.\footnote{\textsuperscript{110}} Such top-down variables within the structure of decision-making clearly benefit from outside actors who helped reinforce particular views within government.\footnote{\textsuperscript{111}}

Similar to Harold Koh’s transnational public law model,\footnote{\textsuperscript{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 litigation\footnote{\textsuperscript{113}} 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

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\begin{itemize}
\item \textsuperscript{108} Cole, \textit{supra} note 7, at 960.
\item \textsuperscript{109} For a discussion of the shifting coalitions and bargaining that occurs within government, see Graham Allison, \textit{Essence of Decision: Explaining the Cuban Missile Crisis} (1971) (describing the bargaining and coalition-building that occur within government to affect policy).
\item \textsuperscript{110} \textit{See} Sanger, \textit{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, \textit{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).
\item \textsuperscript{111} \textit{See} Ratner, \textit{supra} note 100, at 920 ("the self-restraint created by [reciprocity] requires something of a push from outside actors.").
\item \textsuperscript{112} Harold Koh, \textit{Transnational Public Law Litigation}, 100 Yale L.J. 2347 (1991).
\item \textsuperscript{113} Koh, \textit{The "Haiti Paradigm,"} \textit{supra} note 20, at 2401.
\end{itemize}
The Role of Transnational Norm Entrepreneurs

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."\(^{116}\)

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115 \textit{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, \textit{International Norm Dynamics and Political Change}, 52 Int’l Org. 887, 895 (1998).
116 Sunstein, \textit{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.\footnote{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").} This internalization process facilitates States' obedience to international law.\footnote{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.").} 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
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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 the time." 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," 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, 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. 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. Norm entrepreneurs,

120 Koh, The "Haiti Paradigm," supra note 20, at 2406.
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. 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. 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. Failure to do so risks winning battles against terrorism while steadily losing the rights and liberties for which the "War on Terror" is being fought.

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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.").

