Introduction

Responding to Government Lawlessness:
What Does the Rule of Law Require?

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Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. The government is the potent omnipresent teacher. For good or ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.


Accountability is the first step toward deterrence. With criminal offenses like this, it is necessary to send a clear message: No one is above the law, no matter their intentions. The security of any country can only exist within the rule of law. The war on terror is no exception.

—Gonzalo Boyé, Spanish lawyer working to indict members of the Bush Administration, interview with *Mother Jones Magazine* (2009)

Today, as in the past, Americans pride themselves on their commitment to the rule of law. This commitment is deeply rooted in America’s history, or so the story goes, and it has been renewed from one generation to the next. From Tocqueville’s observation that “the spirit of the laws which is produced in the schools and courts of justice, gradually permeates . . . into the bosom of society” to the present, numerous commentators have said that America has the “principled character . . . of a Nation of people who aspire to live according to the rule of law.”
Invocations of the rule of law as a constitutive boundary separating this country from the rest of the world are pervasive. Thus Ronald Cass, former dean of the Boston University Law School, observes that the commitment to the rule of law is “central to our national self-definition. . . . For most of the world . . . the nation most immediately associated with the rule of law—is the United States of America. The story of America . . . is uniquely the story of law.” The philosopher Michael Oakeshott suggests that “[t]he rule of law is the single greatest condition of our freedom, removing from us that great fear which has overshadowed so many communities, the fear of the power of our own government.” Similarly, former Secretary of Housing and Urban Development Henry Cisneros argues that “the fundamental identity of the U.S. is not an identity based on how people look, what language they learnt first or over how many generations they absorbed Anglo-Protestant values. Rather it is based upon acceptance of the rule of law.”

Recent controversies surrounding the war on terror and American intervention in Iraq and Afghanistan have brought rule of law rhetoric to a fevered pitch, with public officials and commentators uncritically linking it to America’s boundary-marking values and arguments about America’s distinctiveness. Typical was the statement of Jonathan Lippman, Chief Administrative Judge of the State of New York, who said, “The rule of law is what separates us from those who seek to defeat our democratic institutions and way of life through violence and terror.” Commenting on the scandal at Abu Ghraib, former Defense Secretary William Cohen argued, “The strength of this country is its insistence that we adhere to the rule of law.” A particularly bellicose version of such arguments took the following form: “The rule of law separates civilized societies from despotic societies. Unlike Iraq, the United States is a nation of laws, not men. . . . Yet if we blatantly violate the Constitution by pursuing an undeclared war, we violate the rule of law.”

Similar invocations of the rule of law have framed the ongoing debate about prosecuting Bush Administration officials with regard to domestic surveillance, authorizing the use of torture, and falsifying the case for going to war. Thus Elaine Scarry argues that, “If the country is to renew its commitment to the rule of law, that outcome will require reeducating ourselves about what the law is. The law aspires to symmetry across cases. . . . The international rules against war crimes and torture do not allow prosecution to be thought of as discretionary; they do not allow an escape provision based on electoral euphoria or on one’s doubts about one’s own stamina in fighting injustice. . . . So too the Convention against Torture requires that states ‘sub-
mit’ cases to the ‘competent authorities for the purposes of prosecution.’ This means . . . that where persons under color of law commit acts of torture in a country that is a party to the Torture Convention, the Convention requires prosecution.”

Or, as the writer Glenn Greenwald puts it, “There is simply no way to (a) argue against investigation and prosecutions for Bush officials and simultaneously (b) claim with a straight face to believe in the rule of law, that no one is above the law, and that the U.S. should adhere to the same rules and values it attempts to impose on the rest of the world.”

More urgently, some worry that without legal consequences there will be no effective deterrence for the repetition of such acts in the future. Michael Ratner, President of the Center for Constitutional Rights, insists that “only prosecutions can draw the clear, bright line that is necessary to insure that this will never happen again.” For Ratner and others, putting the past behind us means leaving the historical record muddied, acquiescing in criminal wrongdoing, and turning the rule of law into an empty slogan.

Yet while President Obama has repeatedly emphasized his administration’s commitment to transparency and the rule of law, nowhere has this resolve been so quickly and severely tested than with the issue of the possible prosecution of Bush Administration officials. Before his inauguration, Obama asserted his “belief that we need to look forward as opposed to looking backwards.” Since then, the president has seemed unenthusiastic about the prospect of launching an investigation into allegations of criminal wrongdoing by former President Bush, Vice President Cheney, Secretary Rumsfeld, members of the Office of Legal Counsel, and so on.

Even some critics of the Bush Administration agree with Obama that we should avoid such confrontations, that the price of political division and of a bitter fight that could cripple Obama’s ability to achieve his priorities is too high. They also argue that the previous administration acted in the perilous context of a devastating attack and a new and confounding war and enemy.

New York Times columnist Thomas Friedman’s op-ed piece, “A Torturous Compromise” provides one example of this kind of argument. Friedman observes that President Obama’s decision to renounce torture, open up previous aspects of the program to public scrutiny, and yet reassure the lawyers and interrogators connected with the program of his intention not to pursue prosecutions is a justifiable compromise. This is because, according to Friedman, any prosecution down the chain, “taken to its logical end here would likely require bringing George W. Bush, Donald Rumsfeld and other senior officials to trial, which would rip our country apart.” To proponents of prosecution, of course, that would be the point of proceeding; even so Friedman
alerts us to the difficulty of fashioning a narrow inquiry, and to how complex and far-ranging such an effort could quickly become.

But Friedman’s main objection to prosecutions involves what he sees as a ruthless and murderous enemy, “undeterred by normal means.” Friedman here mixes familiar claims that emergencies require exceptions to the usual rules (an argument we will take up later) with a specific claim about the war on terror. “So, yes,” he admits, “people among us who went over the line may go unpunished, because we still have enemies who respect no lines at all. In such an ugly war, you do your best.”

The controversy surrounding the question of prosecution was vividly exemplified when Attorney General Eric Holder tasked a career prosecutor to investigate alleged CIA interrogation abuses, including episodes that resulted in prisoner deaths. Indeed Holder himself noted, “I fully realize that my decision to commence this preliminary review will be controversial.” However, he claimed that “As Attorney General, my duty is to examine the facts and to follow the law. In this case, given all of the information currently available, it is clear to me that this review is the only responsible course of action for me to take.”

Measured or partisan, scholarly or journalistic, clearly the debate about accountability for the alleged crimes of the Bush Administration will continue for some time. This book enters this debate not to advocate a single position on prosecution—our contributors take distinct positions for and against the proposition, offering revealing reasons and illuminating alternatives—but rather to use the debate as a prompt, as an invitation of sorts, to figure out what the commitment to a rule of law demands when governments break the law. The focus of our book, therefore, is not the substantive question of whether any Bush Administration officials, in fact, violated the law, but rather the procedural, legal, political, and cultural questions of what it would mean either to pursue criminal prosecutions or to refuse to do so. In short, by presuming that officials could be prosecuted, we ask, should they be prosecuted? By phrasing the demands of a rule of law as a question we hope to highlight the capacious nature of that concept, and the fact that the demands of a rule of law in the case of political crimes are not self-evident.

In what follows we summarize the principal charges against the Bush Administration and review factors that illuminate the question of how we should respond when governments break the law. We take up the meaning of a rule of law, the role of emergency, the relation of a rule of law to international law, and finally the lessons of transitional justice.
The Charges

Numerous and varied charges have been leveled against the Bush Administration. While some are uncorroborated, many others have been corroborated and confirmed. They have been public for some time, yet important details, such as the vice president’s possibly illegal concealment of a secret assassination program from Congress, have surfaced more recently. For the sake of clarity we divide the charges into three categories: unauthorized domestic surveillance; misrepresenting to Congress and the American people the case for going to war in Iraq; and the use of torture. While we address each in turn, we will not provide a comprehensive summary of each charge, for to do so would take us beyond the scope of this essay and also duplicate much existing scholarly and journalistic literature. We briefly survey each charge, paying attention to the particular laws under which an indictment might be fashioned and the contingent circumstances in each case that would effect choosing to move forward or not. We base our summary, wherever possible, on investigative reports by various agencies of the U.S. government, from congressional committees to reports of inspectors general.

Unauthorized Domestic Surveillance

On December 16, 2005, the New York Times published a story about a decision by President Bush, following the attacks of 9/11, to ask the NSA to eavesdrop on Americans and others inside the United States, bypassing the existing procedure for obtaining warrants for such activity. Those procedures, stipulated by the 1978 Foreign Intelligence Surveillance Act or FISA, “provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes.”

The Act requires that a special court issue a warrant for any surveillance of communications for foreign intelligence purposes, permitting only court-authorized surveillance of American citizens if they are shown to be agents of a foreign power. While the proceedings of the Court are classified, we know that the Court has issued warrants in nearly all instances in which they were requested. Nonetheless, as the Times reported, the Bush Administration decided to bypass FISA, citing gaps in the law and delays in the system. Since the publication of the initial story there have been numerous investigations, culminating in a single comprehensive report by the inspectors general of the Department of Defense, Department of Justice, the CIA, the National Security Agency, and the Office of the Director of National Intelligence.
The Report traces the inception of the program, initially referred to by the Bush Administration as the Terrorist Surveillance Program (TSP), but now simply called the President’s Surveillance Program (PSP), to the months following 9/11. According to the Report, after 9/11 the NSA was pushed to produce more surveillance and information. NSA director Michael Hayden told the White House that “nothing more could be done within existing authorities” but that with additional authorization he could produce more information. Soon after, the president gave the go-ahead for the NSA to initiate new (still highly classified) activities under a single Presidential Authorization, which was renewed every forty-five days based on “scary” memos produced by the CIA outlining the continuing terrorist threat and the need for additional surveillance. According to the Report, “[S]everal different intelligence activities were authorized in Presidential Authorizations, and the details of these activities changed over time.”

The program was given legal cover by a November 2, 2001 memorandum prepared by John Yoo in the Justice Department’s Office of Legal Counsel, without the supervision or even knowledge of his immediate supervisor, Jay Bybee, a fact that left Bybee “surprised” and “a little disappointed.” The Report offers a sum and substance of the classified memo, in which Yoo argued that while FISA purported to be the exclusive mechanism for conducting surveillance for foreign intelligence, “such a reading of FISA would be an unconstitutional infringement on the President’s Article II authorities.” Ignoring a section of FISA that explicitly deals with wartime situations and created a fifteen-day exemption for obtaining warrants, Yoo argued that FISA did not mention or concern the president’s national security obligations as Commander-in-Chief.

Based on this memo alone, Attorney General Ashcroft certified the “legality” of the President’s Surveillance Program. Yet the Report suggests that the need for the Justice Department’s blessing was, in the words of Alberto Gonzales, who became attorney general after Ashcroft, “purely political,” as it would provide value “prospectively” in the event of a future investigation. Providing cover for a criminal act through a transparently false legal rationale does not, so the argument goes, immunize participants in that act. Indeed, some might argue that it evidences the kind of culpable intent necessary to prove criminal conspiracy.

While the inspectors general avoid calling either this threadbare legal justification, or the surveillance program itself, illegal, they make clear that many others certainly found them to be of questionable legality. Indeed, in March 2004 Yoo’s successors at the OLC, Patrick Philbin and Jack Goldsmith
(and Acting Attorney General Comey) refused to reauthorize the program based on Yoo's reasoning, forcing a showdown between the vice president's office and the Justice Department. When the White House suggested that the program continue without DOJ authorization, a number of officials, including FBI Director Mueller, threatened to resign.

The dénouement to this story of warrantless wiretapping came in July 2008, when Congress (with a yes vote from then-Senator and presidential candidate Barack Obama) passed the FISA Amendment Act. The Act allows the attorney general in concert with the director of national intelligence to authorize surveillance programs for up to one year. The Act also allows for emergency surveillance without a warrant for seven days, after which, if a warrant is not granted, the government may still continue the surveillance during the appeals process and retain the information it gathers. Finally, the FISA Amendment Act retroactively immunizes from liability communications service providers who participated in the original program—a signal that even if the original program was illegal, there is little interest in prosecuting those involved.

This last fact has direct implications for our discussion of the demands of the rule of law. On the one hand, the rule of law does not prohibit Congress from retroactively immunizing such a program; on the other hand, to the extent that specific officials have not been immunized by Congress, the question remains: is proceeding with further investigations and prosecutions for violating FISA still in order?

The Case for War with Iraq

By now the broad outlines of the various misrepresentations in the case for war with Iraq are well known. By all accounts, the Bush Administration was fixated on Iraq even before 9/11, but that event provided new impetus for their desire to take action. Their case for war depended ultimately on two claims which, when put together, would paint a scenario of a devastating and imminent threat: the first was that Saddam Hussein had, or was acquiring, weapons of mass destruction, including nuclear weapons, and the second was that Hussein had contacts with al-Qaida to whom he would potentially hand over these weapons for use in new and catastrophic attacks. We now know, of course, that both these claims were false. What constitutes the crux of the debate now, and what would be the main focus of any future investigation or prosecution, is whether the administration made a mistake based on faulty intelligence or knowingly distorted or fabricated intelligence findings in order to support its own position.
Over time information supporting the conclusion that intelligence was distorted has been trickling out. For example, in 2006 Michael Isikoff and David Corn published *Hubris*, an exhaustive account of one of the central claims in the lead-up to the Iraq war: the alleged sale by Niger of yellowcake uranium (a key ingredient in the making of nuclear weapons) to Saddam Hussein.\(^3^5\) Their book details how the claim was based on a file of documents acquired in 2002 by an operative in Italy. When Simon Dodge of the State Department reviewed the documents, he quickly declared them to be a hoax. That was not, however, the end of the story. As Isikoff and Corn explain it, partly by accident but also somewhat willfully (again the blurring of distortion and outright deception), the White House uncritically used the documents, enabling President Bush to say in his 2003 State of the Union address that Iraq was in the process of acquiring uranium to build nuclear weapons.

There have been many other accounts of this kind, but surely the most systematic and comprehensive is the Senate Intelligence Committee’s June 2008 “Report on Whether Public Statements Regarding Iraq by U.S. Government Officials Were Substantiated by Intelligence Information.”\(^3^6\) The result of a multiyear investigation, it chronicles a consistent gap between the Bush Administration’s statements on Iraq and the then-existing intelligence. Thus, on the question of Iraq’s acquisition of nuclear materials and capabilities, the Report describes several policy speeches by the president and vice president in which they made unequivocal claims that Iraq had restarted its nuclear program. In one speech in Cincinnati on October 7, 2002, President Bush claimed that Iraq had purchased aluminum tubes needed for the construction of centrifuges, and was “moving ever closer to developing a nuclear weapon.”\(^3^7\) This was, in fact, a clear distortion of the intelligence estimates. The Report notes that there was a split in the intelligence community (principally it seems between the State Department’s Bureau of Intelligence and Research and the CIA) over not just the particular purpose of the tubes, but also the general conclusion that Iraq had restarted its nuclear program. Some of this disagreement was recorded in the October 2002 National Intelligence Estimate. Yet none of it made it into any of the administration’s speeches. The Report goes on for dozens of pages with similar exercises, the cumulative effect of which is to reveal a consistent pattern of distortion and deception around the two main arguments that shaped the push for war: Iraq’s acquisition of WMDs and its association with al-Qaida.

What, however, is the crime here? The president lying to Congress is certainly a deeply corrosive element in any constitutional democracy; it is, however, an impeachable offense, not a crime, for which the Constitution lays
down detailed and specific procedures. However, the attorney and author Vincent Bugliosi argues that the crime with which President Bush could and, in his view, should, be charged is conspiracy to commit murder. Bugliosi proposes that jurisdiction for such prosecution might be lodged in any state from which at least one serviceman has died.38

The Minority Report, written by the Republicans on the Senate Intelligence Committee, raises some equally disturbing questions about Congress’s own lapses and rush to judgment, lapses which in the view of some commentators would doom any effort to prosecute Bush Administration officials.39 Thus, staying with the same example of the October 2002 NIE and claims made around that time about Iraq’s nuclear ambitions, the Republicans point out that numerous Democratic senators with access to the NIE, including senators Clinton, Schumer, Edwards, and Kerry, made equally forceful warnings about Iraq’s nuclear program in October 2002. In short, the Minority Report accuses the Democrats of “seeking cover.”40

Of course, this may just be partisan bickering, but we believe that it is important for two reasons. First, it points to a complete absence of any bipartisan support for an investigation or prosecution for misrepresentations in the run-up to the war. Second, and we think more importantly, the partisan flavor of the Minority Report reminds us of the important fact that Congress was a willing partner in the Bush Administration’s war effort. Individual senators may now claim that they were misled, but they did little to initiate any of their own investigations or to make any effort to slow down the rush to war.

The war efforts of modern governments are large scale and involve multiple political actors, complicating the legal case against the president alone. The trial at Nuremberg certainly highlights this fact, even as it involved a case of criminal conspiracy for crimes against peace by the leaders of the German Reich. While there may be a seductive simplicity in focusing responsibility on President Bush—such as Bugliosi’s call for indicting the president for conspiracy to commit murder—that approach raises legitimate questions. Thus in a response to Bugliosi, Professor Carl Boggs asks, “[W]hy limit criminal indictments to Bush alone when the trail of culpability is so lengthy?”41

Torture

Of all the charges against the Bush Administration, the charge of torture has gained the most traction, bringing inchoate moral, legal, and political objections into sharp focus. In some ways this is not surprising. Descriptions of torture and abuse, and even more so perhaps photographs, such as the pic-
tures from Abu Ghraib, provoke deep moral revulsion. Moreover, as Scarry noted, torture is a domestic and international crime, for which there are no exceptions for wartime or for national security. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that no exceptional circumstances whatsoever may be invoked as a justification for torture (Article 2); creates a universal jurisdiction by treating offenses “as if they had been committed not only in the place in which they occurred but also in the territories of states required to establish their jurisdiction” (Article 8); and demands that states incorporate the Convention into their domestic criminal law (Article 4). In accordance with the demands of Article 4, the United States prohibits torture in domestic law.

Given what we already know about practices such as waterboarding, there is also a pragmatic dimension to the focus on torture. Attorney Scott Horton accurately notes, “In weighing the enormity of the administration’s transgressions against the realistic prospect of justice, it is possible to determine not only the crime that calls most clearly for prosecution but also the crime that is most likely to be successfully prosecuted. In both cases, that crime is torture.”

There is by now a large literature on the use of torture or “enhanced interrogations,” including a substantial investigative report by the Senate’s Armed Services Committee. After 9/11, a number of administration officials believed that preventing another attack depended upon gathering information from “high value” detainees. This conclusion would not by itself have led to the interrogation practices we now know so much about but for the fact that the president had declared that the Geneva Conventions did not apply to the detainees, coupled with Vice President Cheney and Secretary of Defense Donald Rumsfeld’s belief, in stark disagreement with veteran FBI interrogators, that only a “gloves off” approach would produce needed information. In fact, even before the president’s decision not to apply Geneva to the detainees, the Department of Defense General Counsel’s office had approached the Joint Personal Recovery Agency (JPRA), which is responsible for overseeing the SERE (Survival Evasion Resistance and Escape) training program for captured U.S. servicemen. In effect, what JPRA produced was a “reverse engineering” of SERE’s tactics, which included sleep deprivation, stress positions, exposure to extreme temperatures, and waterboarding.

Just as questionable as the provenance of the new interrogation tactics used on detainees was the legal reasoning produced to justify them. Once the decision was made to “enhance” interrogations, lawyers at the Department of Defense and the Office of Legal Counsel in the Department of Justice went to work. The main policy memo, innocuously titled “Counter Resistance Tech-
niques,” was drafted by William Haynes, General Counsel to Donald Rumsfeld, and signed by the latter on December 2, 2002.48

Even before that memo, however, a series of memos were written by members of the Office of Legal Counsel. In particular, Jay Bybee’s August 2002 memo manipulates the definition of torture beyond recognition.49 Bybee argues that only something akin to “organ failure” would violate the injunction against severe physical pain; severe mental pain, he argues, should not be read as meaning mental suffering imposed at the moment but “significant psychological harm of significant duration, e.g. lasting for months or even years.”50 Even more explicit legal cover came later with John Yoo’s March 14, 2003 memo arguing that criminal laws such as the federal torture statute would not apply to military interrogations.51

The role of the OLC lawyers and their legal memoranda represents a particularly vexing aspect of the debate on prosecutions.52 While many other legal experts, including lawyers who came later to the Office of Legal Counsel, repudiated the reasoning of these opinions, it is still a large step from regarding these memos as examples of egregious legal thought (perhaps even warranting professional sanctions such as disbarment) to treating them as evidence of complicity in war crimes.53

The British lawyer Phillipe Sands takes up these questions in his book Torture Team, a careful reconstruction of the trail from the memos of Yoo and Bybee to the interrogation procedures drafted by Haynes and signed by Rumsfeld.54 Mindful of the difficulty of trying to assign criminal guilt to professional lawyers, Sands notes that there is only one real precedent for such an action—the Altsttoter case (also known as the Justices case) at Nuremberg that found “legal advisors who prepare legal advice that is so erroneous as to give rise to an international crime are themselves subject to the rules of international criminality.”55 Sands’s ultimate conclusion is that the OLC lawyers bear “direct responsibility” for policies that led to violations of the Geneva Convention.

Read together, various official reports offer a seemingly exhaustive catalog of questionable practices and possible legal violations throughout the Bush Administration. The sheer scope of these reports—the Senate reports on the case for war and on interrogation are multiyear, multivolume efforts—makes clear that legal violations were neither isolated nor confined to a couple of individuals. As Scott Horton puts it, “[T]he administration did more than commit crimes. It waged war against the law itself.”56

Horton’s argument leads to the sobering realization that the case for prosecutions will have to be made with care, for the “very breadth and audacity of the administration’s activities would make the process so complex as to defy
systems of justice far less fragmented than our own.” Horton advocates a two-part solution, beginning with an independent investigation, followed by prosecutions. Moreover, he warns that any effort to fashion a narrow prosecution by focusing on a deputy in the Office of Legal Counsel or a few CIA operatives will be both legally difficult and normatively suspect.

With regard to those who call for investigations instead of prosecutions, the scope of these reports seems already to have fulfilled that need. There is already sufficient knowledge, some would argue, for a prosecutor to be appointed, and calling for further investigations could only be seen as a way to delay and deflect. On the other hand, these reports equally make clear that the record is not complete, or at least not as complete as it would be with a commission set up with full subpoena powers. The Inspector General’s Report on the President’s Surveillance Program notes that key players, such as John Yoo, then White House Chief of Staff, Andrew Card, and Cheney’s legal counsel and Chief of Staff, David Addington, refused requests for interviews. Thus, even a cursory review of the charges reveals that the decision to prosecute or not is not an easy one, and requires a fuller consideration of the claims of law and justice, peace and security, memory and accountability. It is to these considerations that we now turn.

**Does the Rule of Law Require Prosecution?**

References to the rule of law point toward a set of related concepts summarized in the idea that, as Ronald Cass puts it, “[S]omething other than the mere will of the individual deputized to exercise government powers must have primacy.” Cass identifies several core ideas that compose the rule of law. The first, “fidelity to rules,” is that “rules tell officials how, to what ends, and within what limits they may exercise power,” or that “government in all its actions is bound by rules fixed and announced beforehand,” such that the rule of law makes possible a “principled predictability” in the actions of government. Where rules govern, they must emanate from “valid authority” and impose meaningful constraints on officials.

Friedrich Hayek, an Austrian and British economist and philosopher, argues that the rule of law should not be confused with any specific content of law but is only meant to convey the more narrow sense of rules “applicable to all manner of persons.” Similarly, Justice Antonin Scalia says that the rule of law is a “law of rules.” For others, however, the rule of law is more than a collection of rules; it embodies an expansive normative vision that also includes ideals of individual freedom and of government without arbitrary discretion.
One of the earliest and most enduring modern expositions of a rule of law was provided by the nineteenth-century English constitutionalist, Albert Venn Dicey. His monumental *Introduction to the Study of the Law of the Constitution* focused on a couple of key features. First, that “everyman was subject to ordinary law administered by ordinary tribunals,” and second, that law rather than individual discretion reigned supreme in guiding official decisions. In Dicey’s hands, the rule of law appears as both an institutional structure and a normative vision.

As the concept has gained global currency, this dual emphasis has only been strengthened. In “The Rule of Law and Its Virtues,” Joseph Raz points to a 1959 statement by the International Congress of Jurists declaring that the purpose of a rule of law “is to create and maintain the conditions which will uphold the dignity of man as an individual.” Raz goes on to assert that given the multiple meanings associated with the rule of law, “we have now reached the stage in which no purist can claim truth on his side.”

The concept of a rule of law is a capacious one, made up of multiple and sometimes even conflicting norms and values. Even when faced with the more quotidian operations of the criminal justice system, the law cannot avoid interest balancing. While the rule of law requires adherence to legal norms, officials must sometimes contend with competing norms, such as balancing fairness with finality; while the rule of law favors fixed rules over discretion, nonetheless discretion pervades the system, from prosecutors deciding on indictments to judges deciding on punishments; finally, for any system to function, it will have to embrace the reality of less than full enforcement.

Focusing specifically on the question of prosecution for ordinary crimes, the recognition of discretion is not new. Then-Attorney General Robert Jackson might have been exaggerating when he said, in 1940, that the “prosecutor has more power over life, liberty, and reputation than any other person in America,” but he was certainly correct in observing, simply and matter-of-factly, that “[h]is discretion is tremendous.” In the more than sixty years since Jackson spoke these words to a group of federal prosecutors, little has changed.

Today it is widely recognized in both the academic literature and the mainstream media that prosecutors have substantial discretion. Some suggest that prosecutors are granted “considerable latitude in devising and executing . . . [their] own enforcement strategies” out of respect for the separation of powers. For others, discretion is a part of the prosecutor’s responsibility to “seek justice.” Still others see discretion as a necessary consequence of
legal imprecision: “Gaps in rules” create the need for someone to exercise discretionary power. Finally, some argue that prosecutorial discretion is a dangerously tyrannical power that must be contained. For this group, discretion is a threat to justice, fairness, and the rule of law.

And, of course, the issue of discretion and the impulse to engage in interest balancing become even more urgent and controversial in periods of political uncertainty and in cases of political crimes. While prosecutions of “normal crimes” can serve a range of purposes from retribution to deterrence, prosecutions for political crimes may involve a different calculus. There the importance of accounting for the past, how the alleged crime came about, and what could be done to prevent its recurrence, may take precedence over individual retribution.

**On the Logic of Emergency**

All theories of a rule of law acknowledge the periodic need during times of emergency for rights and rules to be suspended and for the powers of the government to be correspondingly enlarged. The maxim *salus populi suprema lex* (the safety of the people is the supreme law) has been a constant guiding principle in moments of crisis and danger. From Locke’s *Second Treatise* where he defines executive prerogative as the “power to act according to discretion, for the publick good, without the prescription of law and sometimes even against it,” to the so-called “derogation” provisions of the various United Nations covenants on human rights, allowance for such moments is found in all conceptions of lawful and legitimate rule.

While the need for emergency powers is universally acknowledged, the questions of who shall exercise these powers, under what conditions of review, and through what procedures, remain deeply vexing ones. Both the need for such powers and their inherently dangerous and corrosive potential were succinctly caught in C.L. Rossiter’s 1948 study of comparative emergency powers in France, Germany, Britain, and the United States, with the trenchant and, by Rossitter’s own admission, “disturbing” title, *Constitutional Dictatorship*.

Rossiter discusses a range of possible procedures for invoking emergency powers, from the express provisions for suspension in the French “state of siege” to the more implicit assumptions of power according to necessity that guide the Anglo-American common law tradition. With regard to the United States, while Article 1, Section 9 of the Constitution permits the suspension of habeas corpus by Congress when “in Cases of Rebellion or Invasion
the public Safety may require it,” in fact, emergency rule has almost always meant increased powers for the president. This is, as Rossiter explains, made possible not only because in most countries the response to an emergency is fundamentally the province of the executive, but also more specifically because of “the broad and flexible grants of power to the President found in the Constitution.” Thus, under the so-called “plenary Article II powers” theory, so often invoked by the Bush Administration, the president’s position as Commander in Chief entails the grant of large and unspecific powers considered necessary to fulfill those functions.

And history has only confirmed this constitutional design. Regardless of one’s position on the mythology surrounding Lincoln, there is no denying the breathtaking sweep of executive powers he assumed and exercised during the Civil War. From enlarging the army and navy to drawing money from the treasury and suspending habeas corpus, Lincoln undertook a series of actions expressly reserved for the legislative branch in the Constitution. He simply disregarded Chief Justice Taney’s decision denying the president’s claimed authority to suspend habeas corpus in the circuit court case of Ex parte Merryman. After its return, Congress, faced with a fait accompli, could only register its retroactive approval of the proclamations and orders of the president.

Presidential powers have amplified since the start of the twentieth century. The Cold War and the growth of what Harold Koh calls the “national security constitution” contributed to the “imperial presidency.” From C. Wright Mills’s 1950s classic, The Power Elite to the present, scholars have noted that presidential power has grown exponentially in the movement from World War II to the Cold War to the war on terror. And in times of crisis, especially of threats from abroad, presidential popularity spikes as the public rallies round the flag.

There have, of course, been countervailing forces at work as well. In the now famous 1952 case of Youngstown Co. v. Sawyer (commonly referred to as the Steel Seizure case), the Supreme Court limited President Truman’s power to seize private property under the guise of war needs. Justice Jackson’s concurring opinion is still used as the benchmark for understanding presidential powers and the role of Congress. Jackson refused to draw any sharp boundary between congressional and presidential powers. Instead, he offered three categories in order of legitimacy. The first category, in which presidential power was strongest, was when the president acted in concert with either the expressed or implied will of Congress; the second was made up of cases in which Congress was silent; and the final category, where the
president’s power was at its “lowest ebb,” was when the president acted in defiance of congressional will.

Attorney General Holder has often invoked this tripartite scheme, asserting, for example, that in the case of wire tapping, Congress’s passage of the FISA Amendment Act allows the president to act from a position of strength.93 Some conservatives, however, have criticized the invocation of Jackson, noting that not only does the opinion oversimplify the problem, but even Jackson understood that the “lowest ebb” was not an illegality.94 Throughout this debate, however, what is clear is that in the American rule of law, emergency powers are flexible at best and amorphous at worst. As a result, any effort to criminalize presidential actions with regard to an emergency situation will be a difficult one.

This does not mean, of course, that presidents have unlimited powers in emergency situations, that, as Richard Nixon once remarked (and Vice President Cheney recently reaffirmed), “when the President does it, that means it is not illegal.”95 In the aftermath of 9/11, the Supreme Court has on numerous occasions pushed back, holding in Hamdi v. Rumsfeld that the president does not have the right to hold a citizen indefinitely as an enemy combatant;96 granting in Boumediene v. Bush, the right of habeas corpus to alien detainees;97 and striking down in Hamdan v. Rumsfeld, the president’s military commission scheme which was initially constructed without congressional authorization.98 One could conceivably argue that these cases themselves provide evidence of a functioning rule of law, requiring no further congressional or criminal sanctions. Yet it is important to keep in mind that there have been no cases involving the most contentious accusations of torture and abuse. This leaves open the question of whether there is a way to accommodate the clearest excesses of the administration under the logic of emergency.

As we have already noted, international law recognizes no national security exception to Common Article 3 of the Geneva Conventions or to the Torture Convention. That still leaves open the question of domestic law on not just detainee abuse but also on unauthorized surveillance. If illegalities occurred in order to avert imminent harm, Congress can always grant immunity from prosecution and/or the president can use his pardon power.

This is one option Oren Gross believes might be used to reconcile the demands of the rule of law and the exigencies of an emergency. Gross calls his model “the extra-legal measure” model, one in which due recognition is given to the sometimes overwhelming demands of safety while the bright line of inviolable rules is left intact.99 He imagines a scenario where public officials and functionaries break the law but then plead the defense of neces-
sity either directly to the public or to a court of law. While Gross offers an ingenious solution to reconciling the existence of rules and the demands of necessity, it is important to note that a theory such as his depends upon an admission of the violation of rules and only then the further defense of mitigation. The situation with the Bush Administration is, however, entirely to the contrary: the administration claimed that no rules were broken, that what was done was both necessary and legally correct.

**On the Claims and Requirements of International Law**

While classic rule of law theories focus on the domestic structure of legality, at least since the end of World War II, a state’s robust commitment to the rule of law includes its respect for international law, for multilateral institutions, and for human rights, concretely codified in treaty obligations. The interplay between domestic and international law is a dynamic one, with norms sometimes coinciding and sometimes colliding. The United States has, for example, accommodated international differences over the death penalty by stipulating a Reservation to the International Convention on Civil and Political Rights, whereby “the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.”

An even more pertinent example is the United States’s reservation to its ratification of the torture convention:

The Senate’s advice and consent is subject to the following reservations:

1. That the United States considers itself bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Some claim that such reservations do not in and of themselves pose a challenge to the rule of law. As Jeremy Waldron notes, in the case of “a state indicating that it prefers to be bound by the human rights constraints contained in its own constitution rather than by those contained in an international instrument—there is nothing incompatible with the rule of law in
that.” One may argue that Waldron moves too quickly over norm discrepancies and their consequences, but his main argument is that there is a large difference between arguing over whether domestic or international law has priority in placing constraints on state power and arguing that in the international realm the state should be free from constraint altogether. Skeptics of the role of international law tend to confuse the first argument with the second.

Skepticism about the binding quality of international law on the domestic rule of law sometimes makes reference to so-called “American exceptionalism.” According to Michael Ignatieff, the argument about American exceptionalism takes three specific forms: exemptions, whereby the United States either utilizes reservations to treaties or refuses to participate in institutions such as the International Criminal Court; double standards, whereby other countries are held accountable in a way that the United States itself is not; and finally, the denial of jurisdiction to human rights laws within U.S. domestic laws. Given a robust domestic culture of rights and even a history of liberal internationalism (one thinks of Woodrow Wilson’s Fourteen Points), Ignatieff stresses that for the United States, “what needs explaining is the paradox of being simultaneously a leader and an outlier.”

Most explanations of American exceptionalism tend to focus on institutional and political factors. The iconic, if not mythic, status of the Constitution, coupled with a strong tradition of judicial review, produce a suspicion of outside influences. Moreover, just as a matter of institutional design, ratification of treaties requires a two-thirds vote in the Senate, a higher hurdle than in other democracies. Finally, the rise to prominence of conservatism in the last few decades means that a program of liberal internationalism may have little “sustained electoral appeal among the American public.” For better or worse, the U.S. attitude toward international law and institutions has been, as Ignatieff correctly notes, “tied to the fortunes of American liberalism, and these fortunes have not fared well in the last thirty years.” What this means is that any decision to participate in or cooperate with an international investigation or tribunal in dealing with the alleged crimes of the Bush Administration will face significant domestic political opposition.

There is also, of course, a realist explanation for American exceptionalism, or indeed the posture of any major power, which in effect argues that it is not in its interest to submit to substantial international, legal constraints. It makes more sense for “middling” powers such as France or Canada to pursue a vigorous international regime, because as Ignatieff explains, “for middling powers the cost of their own compliance with human rights and humanitarian law instruments is offset by the advantages they believe they will derive
from international law regimes that constrain larger powers. For the U.S. the calculus is reversed.  

Today, given the ongoing fight against transnational terrorism, where strong allies and international cooperation are indispensable, the realist calculus may be shifting. This much has repeatedly been asserted by the Obama Administration, most recently in the decision to close Guantánamo, partly in order to restore U.S. credibility and standing in the world. But without some measure of accountability for crimes, particularly torture, such overtures may be insufficient.

Scott Horton notes that if “U.S. courts and prosecutors will not address the matter . . . foreign courts appear only too happy to step in.” For Horton and others, the international dimension to the domestic obligation to pursue accountability, combines pragmatic and normative concerns. Ruti Teitel suggests that foreign complaints “grounded in so-called universal jurisdiction would hardly have a leg to stand on were there credible investigations underway here. . . . [W]e risk foreign lawyers and judges (through processes already underway in Europe) supplanting a process of truth telling that, given our own political transition, we Americans owe ourselves.” Many of our European allies have indicated a willingness to move forward with their own criminal investigations and prosecutions in the absence of any domestic effort. If we are going to take a more expansive view of the rule of law, one that responds to arguments about security, then we have to take seriously claims about international credibility as an argument for prosecutions.

**Truth Commissions and the Lessons of Transitional Justice**

For some time now scholars and advocates have debated how to respond to government lawbreaking in the context of transitions from authoritarian to democratic regimes. Teitel offers the following succinct definition: “[T]ransitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes.” Drawing on historical examples from South Africa to Chile, the field of transitional jurisprudence considers the proper role of amnesty and reconciliation versus prosecution and explores alternatives to prosecution, from truth commissions to programs of lustration.

Can the theory of transitional justice be helpful in thinking about the alleged crimes of the Bush Administration? To the extent that the theory considers the range of questions and trade-offs embedded in fashioning a...
response to a previous regime’s wrongdoing, the answer would seem to be yes. But to the extent that transitional justice involves a move from an authoritarian to a democratic regime in a period where normal political accountability and transition have broken down, its utility seems less obvious.

Some would claim that because the United States is not a transitional regime, the considerations and compromises that are struck due to the precariousness of an emerging democracy have little relevance here. This is a criticism that we take seriously: since 2002–03, the period in which many of the more serious charges occurred, there have been two presidential elections, with the last one explicitly contested on an agenda of change in policy. In a mature functioning political system such as the United States, elections and stable transitions are mechanisms that provide for accountability.\(^{113}\)

In this regard, the election of President Obama and his subsequent efforts forcefully to realign national security issues with domestic and international law may be taken as a repudiation of the Bush Administration and a vindication of the rule of law. Here the democratic institutions of government remain fully functioning. Thus Kenneth Anderson dismisses calls for a truth commission and points out: “If Congress wants to hold hearings, it is always free to hold hearings. . . . If Congress were serious about criminalizing waterboarding and other interrogation tactics, all it has to do is draft a specific law.”\(^{114}\) Because many of the excesses of the Bush Administration have been, or can be, publicly disavowed and discontinued, the case for accountability and prosecutions—the preoccupations of transitional justice—becomes less pressing.

Or does it? There are those who argue that, absent prosecution, the government’s return to fuller compliance with national and international laws has the effect of reducing criminal wrongdoing to mere “policy differences.” This is precisely what Elaine Scarry has argued. In her view, a lasting injury to the rule of law would occur if we “trivialize into a matter of personal preference any future President’s adherence to the law. Will we become a country in which the rule of law is just another policy preference?”\(^{115}\)

Despite these concerns, some members of Congress, such as Senator Patrick Leahy, have called for a South African-style truth commission, making the idea of drawing on transitional jurisprudence less quixotic than it may first appear. Many scholars consider truth commissions as not just a second-best alternative to criminal trials but as possessing independent normative and practical value. Priscilla Hayner, a proponent of truth commissions, reminds us that the purpose of trials is not to expose the truth
in some large, contextual, and systematic way but only to verify that the facts meet a specific legal standard of credibility.\textsuperscript{116} Martha Minow argues that “only if we acknowledge that prosecutions are slow, partial, and preoccupied with the either/or simplifications of the adversary process can we recognize the independent value of commissions investigating the larger patterns of atrocity and the complex lines of responsibility and complicity.”\textsuperscript{117} Moreover, as Horton reminds us, perhaps it is the nomenclature of truth commissions that throws people off, for the United States has a long and somewhat successful history with commissions of inquiry, from the Warren Commission established in 1963 to investigate the assassination of President Kennedy to the more recent bipartisan and independent 9/11 Commission.\textsuperscript{118}

The genealogy of transitional justice stretches back to the Nuremberg trials, the first sustained and successful efforts to prosecute leaders of a sovereign government for war crimes. Nuremberg and the series of so-called “successor” trials set the bar for criminal accountability. But the postwar prosecutions gave way to a so-called second “realist” phase of transitional justice, marked by the appearance of truth commissions and debates about the proper role of amnesty in securing peace and reconciliation.\textsuperscript{119} As a result, some worry that in instances of transition “justice is all too frequently bartered away for political settlements.”\textsuperscript{120} While acknowledging a role for truth commissions and the importance of repairing a divided polity, M. Cherif Bassiouni insists, “[T]ruth commissions, however, should not be deemed a substitute for prosecution for the four \textit{jus cogens} crimes of genocide, crimes against humanity, war crimes and torture.”\textsuperscript{121}

It is worth remembering that truth commissions need not be linked with amnesty and bars to prosecution. While it is true that South Africa set up an exchange of “amnesty for truth,” in other situations prosecutions and truth commissions operated in tandem, and the discoveries of the truth commission have sometimes led to a call for the revocation of amnesties and a reopening of investigations.\textsuperscript{122} Horton notes that while we have examples of truth commissions eclipsing prosecutions, “in other cases, however, the commission’s fact-finding process gradually built a public consensus that prosecutorial action was needed. In Peru and Chile, prosecutions occurred even after comprehensive pardons had been granted, as the courts relied on international-law concepts to disregard those pardons.”\textsuperscript{123} The final contours of any given transitional solution will depend on the objectives that need to be achieved. These may range from reconciling a divided polity and providing justice to victims to creating a complete account of what transpired and
deterring future misconduct. As the United States contends with the excesses of the previous administration, the latter two objectives would be paramount. By raising the question of the wisdom of prosecutions as against amnesty and truth commissions, transitional jurisprudence forces us to pin down the values prosecutions provide, and whether some of these goals could be achieved through alternative means.

Another invaluable dimension to the debates within transitional jurisprudence involves the question of whom to prosecute. This question is a difficult one because of the immensely complicated nature of legal and moral culpability when governments break the law. Unlike individual crimes for personal enrichment, the person closest to the execution of torture may be the least culpable while the leaders and officials further away may be the most culpable. Larry May argues that political crimes are a special type precisely because they are crimes of policy and overall design. Even as a legal matter, May points out, while the so-called minor players may carry out acts that are themselves morally or legally proscribed, the overall crime is the policy itself. In that regard, we may say the person enacting the policy may have a “guilty mind” in relation to the particular act, but we cannot assume that they have a “guilty mind” in relation to the larger crime of the policy. And yet in many cases, leaders and policymakers are the more difficult targets of prosecution and, as a result, accountability settles on relatively minor players.

These considerations have special relevance for our discussion of accountability for the Bush Administration. To date, the only people court-martialed for the scandal of Abu Ghraib have been soldiers under the rank of staff sergeant; no officers have been held accountable, much less policy makers at the Pentagon. This same concern now attaches to Attorney General Holder’s decision to appoint a special prosecutor but only to investigate a very narrow category of persons who may have overstepped the guidelines for enhanced interrogations, leaving out the lawyers, politicians, and policymakers who were the undeniable architects of the policy. No doubt, Holder was deeply mindful and genuinely torn between the political considerations of the White House and the demands of justice.

But for some critics who have called for investigations and prosecutions, this investigation amounts to “something close to the worst of both worlds.” Glenn Greenwald argues that not only does such a narrow focus unfairly scapegoat the lowest officers but it actually presumes that the legally suspect guidelines offered by Yoo and company were settled law at the time. It is possible that as events unfold and the possibility of prosecutions becomes
more imminent, there will be renewed calls for a truth commission with subpoena and immunity-granting powers as a possible middle-ground solution. What is clear is that these debates greatly benefit by being considered within larger theoretical and historical contexts. Doing so is the task of this book.

The work collected here considers how we should respond to the alleged crimes of the Bush Administration. Some of our contributors make the case for prosecution, argue that the rule of law requires it, and explore different jurisdictional and procedural devices through which prosecution might occur. Others oppose prosecution and explore different avenues for holding Bush, Cheney, and Rumsfeld accountable and for preserving the memory of a “lawless” period in recent American history.

In the first chapter, Claire Finkelstein argues that the rule of law can only be vindicated by a criminal prosecution of Bush Administration officials. For her the rule of law requires that what the government does must be congruent with what the government says. Deception and the secrecy which accompanies it are incompatible with the rule of law’s requirement of public reason.

Finkelstein notes that in the case of torture, what the Bush Administration said was at great variance from what it did. She argues that the United States benefits significantly from being viewed by other nations as a leader in human rights: it makes it easier to secure the cooperation of those nations, and also gives us a secure position from which to insist on the humane treatment of our own POWs when captured by enemy forces. Other nations benefit similarly from the commitment to human rights in a variety of ways, and so it might be said that there are mutual gains to be had from the coordinated restraint of personal maximizing on the part of nation-states in favor of adherence to international norms of human rights.

Unfortunately, she argues, for the Bush Administration it was not the actual adherence to such norms that provided access to the benefits of international cooperation, but the appearance of adhering to such norms. And so it is not entirely surprising that while President Bush consistently and expressly rejected torture, lawyers for the Office of Legal Counsel issued a crucial memorandum seeking to defend extreme interrogation methods that had been used up to that point on terror suspects in Guantánamo Bay and in American prisons in Iraq.

At least one of the techniques authorized by the Justice Department, Finkelstein notes, namely, the infamous technique of “waterboarding,” had already been adjudged to violate the Convention against Torture and was
found by the international community more generally to provide a basis for prosecutions for war crimes at several points in the twentieth century. In addition to the highly questionable interpretation of the term “torture” in the Bybee memo, evidence continues to mount that the extreme interrogation methods that the memo sought to defend were not the only forms of harsh treatment to which detainees in Guantánamo and in Iraq were subjected. If this turns out to be the case, the Bybee memo seeking to justify waterboarding and other such practices as falling short of torture will, in Finkelstein’s view, present a particular puzzle: how should we understand the relationship among, first, the Bush Administration’s public rhetoric condemning torture; second, its private internal efforts to justify its own use of harsh interrogation methods to itself; and third, its actual practices, whose brutality appears to outstrip anything that government lawyers were themselves prepared to justify? And what bearing would this relationship have on whether officials who authorized such techniques should be subject to prosecution?

If it is really the case, Finkelstein argues, that such lawyers advocated and sought to justify the use of such techniques by making legal arguments they knew to be invalid, and hence knowingly advocated the commission of crimes under federal and international law, they ought to be prosecuted as accomplices. They would possess the mens rea for accomplice liability—purposely assisting in the commission of an offense—and also the actus reus—soliciting or encouraging the commission of such offenses. That is the correct legal analysis of the situation. The moral analysis would suggest as well that their position would be significantly worsened by the revelation that their attempts at legal argumentation were disingenuous, for by making false legal arguments, they show themselves to be intentional free riders on the international agreements of mutual benefit to which we paid such courteous lip service. And finally, from the standpoint of professional ethics, for a lawyer to render a legal opinion he knows to have little support from statutory and precedent sources would be a serious violation of professional ethics—a fact that arguably bolsters the call for criminal prosecution.

On the other hand, Finkelstein notes, in addressing the question of prosecution, we must also consider the possibility that what was actually coloring the thoughts of lawyers from the Office of Legal Counsel was that they thought there was a strong justification available for the violation of law in such cases, a justification that motivated them, but that they dared not fully articulate in honest terms. The idea that former Bush officials believed that the United States’s interrogation practices were illegal but nevertheless justified, is one that is only now slowly making its way into Republican defenses
of the Bush Administration’s policies. Yet it is this argument that provides the strongest defense such officials might have against prosecution, and hence the argument that most stands in need of examination. In her chapter Finkelstein examines the logic of justification in detail.

Taking the logic of self-defense and of necessity seriously, and imagining the defense that lawyers from the Office of Legal Counsel might make to any attempted prosecution, this chapter asks whether in democratic states, members of the reigning executive branch have a moral basis for regarding legal restrictions designed to defend personal rights as dispensable on grounds either of assertion of public right, or of the supremacy of public utility over individual rights. And if not, can and should they be prosecuted for the violation of federal and international norms in this connection?

Finally, to return briefly to President Bush’s statements condemning torture, Finkelstein observes, we might now be in a position to understand why the president would have been keen to make such statements, despite the fact that he was fully aware that the United States was making extensive use of techniques that had previously been prosecuted as torture and that provided a strong basis for thinking it violated the terms of the Convention. Since the United States was in effect clandestinely turning its back on its own normative commitment to other nations, it was crucial to the Bush Administration to deny its own status as free riding on basic social contracts with other nations. For the extreme disadvantages of free riding on human rights agreements would not make themselves felt if the free riding could be conducted in secret—or so the Bush Administration thought. Whether or not such secret free riding is destabilizing of cooperative agreements in the international arena, once it becomes known we impair our own advantages from cooperation if we do not discipline the agents who endorsed and advocated the free riding in the first place. As a result, Finkelstein concludes that President Obama’s firm statements that no one from the former administration would be prosecuted for condoning torture, and his later decision not to seek prosecution for the authors of the policies themselves, impairs the rule of law and the attempt by the United States to secure international cooperation in the war on terror.

In the next chapter Daniel Herwitz argues that certain abusive treatments of prisoners at Guantánamo may arguably be considered crimes against humanity. Not to deploy human rights instruments in the face of such abuses is to bury the crime and normalize the state of exception through which the United States arrogates unbridled power unto itself. While the deployment of American as well as international human rights instruments against the Bush
Administration might well have the ill-effect of further entrenching Bush-style unilateral positions, the cost of not deploying human rights instruments is to confirm a “state of exception” as “business as usual” and to erode faith in the rule of law. This is what Hannah Arendt called the banality of evil, serving to bury crimes under a tide of pragmatism, weakness, and fear.

Even if human rights instruments cannot achieve their goals, even if a Cheney will not show up in the Hague, it is important for international courts to make the gesture of saying: “This/he too must be judged, for this/him too a case must be mounted.” Herwitz argues that the culture of human rights demands such a gesture.

What then are the most appropriate human rights instruments to deploy in the face of U.S. alleged abuse in Guantánamo? Herwitz argues that a South African-style truth and reconciliation commission is not appropriate for reasons which come from the soul of that enterprise. Formed out of an agreement between warring factions (the National Party of South Africa and the African National Congress), the TRC centered around victim testimony, giving dignity to victim families who were given voice. Central to the TRC was “qualified amnesty” which occasioned “full confession” by perpetrators seeking it, while also allowing for the TRC to formulate itself as a religious enterprise aiming in a moment of political transition for a culture of reconciliation. The TRC served, Herwitz notes, the specific demands of transitional justice.

To restage such an event, or transpose its terms to the United States, first, the victims and families would have to be given similar voice, making the event clearly international; second, there is no agreement between international parties at war which could be imagined to serve as the starting point of the procedure; and third, it is therefore unclear who would be reconciled to whom.

More appropriate, Herwitz argues, would be a Senate/Congressional Commission of Inquiry into Guantánamo, along the lines of that used in the “Iran Contras” scandal. Nonetheless he does not think that this is going to take place. Equally unlikely and equally necessary would be a trial in the World Court. While alleged U.S. perpetrators would not show up and no trial would ensue, the gesture would be one of world solidarity, preserving the dignity and uniformity of the court as a human rights instrument at a contemporary moment when the authority and dignity of international law and the entire edifice of humanitarianism are in danger of collapse.

Agreeing on the importance of prosecuting members of the Bush Administration, Lisa Hajjar explores another avenue for doing so in her chapter.
The right not to be tortured, Hajjar notes, is universal and non-derogable: it applies to all people everywhere under all circumstances. The practice of torture, a gross crime under international law, attaches universal jurisdiction: perpetrators and abettors can be prosecuted in foreign or international courts if they are not prosecuted by their own state or the state with jurisdiction where torture occurred.

Hajjar’s chapter offers a brief account of the state of universal jurisdiction for torture and other gross crimes, followed by a consideration of the current state of investigations in Europe (mainly Spain) of alleged U.S. torturers. The second part of the chapter addresses the politics of legal accountability. Specifically, Hajjar considers first, the political implications of either prosecuting or not prosecuting the authors of the U.S. torture policy at home; second, the implications internationally if there is de facto impunity domestically as a result of no prosecutions; and third, the contested legitimacy of foreign prosecutions of officials on the basis of universal jurisdiction. Woven through this discussion is a consideration of domestic discourse and debates about torture, terror, and the law, and the international implications (diplomatic/political, legal, and security-related) of superpower immunity for prosecutable crimes. Hajjar concludes by arguing for the superiority of universal jurisdiction as a basis for prosecutions of torture as opposed to either domestic or international jurisdiction.

The next three chapters each present the case against prosecution. Unlike Finkelstein, Stephen Holmes sets out to show the various ways in which the rule of law offers protection for government officials who violate the law. For Holmes the reality is that the rule of law is not an effective constraint on official misconduct. Moreover, he believes that pursuing a prosecution would have the perverse effect of allowing Bush Administration officials to claim that they have been legally exonerated. Instead, we should acknowledge the way law serves power and pursue other avenues of redress.

As important as “the rule of law” is to the legal order, it is, Paul Horwitz contends, unlikely to take us very far in answering the question of whether it is advisable to pursue criminal prosecutions of former Bush Administration officials for their actions in the war on terror—or, to the extent that they continue any of the same policies, whether to pursue prosecutions of current Obama Administration officials. A more careful examination of the question will be needed. In pursuing that question, then, Horwitz says, we ought not to ask what the “rule of law” demands as such, but what the congeries of values and practices found within the broader term “rule of law” demand in any particular society with respect to any particular question.
To that end, Horwitz contends, it may be useful to think about what the rule of law demands with respect to the actions of government officials in societies with different forms of legal order and at different degrees of stability and development. Building on the role of “truth and reconciliation commissions,” international war crimes proceedings such as the Nuremberg trials, and other methods of addressing alleged national and international crimes, Horwitz suggests that there are reasons to think that the “rule of law” may not require the same actions in different states.

The rule of law in a properly functioning society, after all, includes not only judicial but also political processes. In transitional regimes, it may be necessary for pragmatic and political reasons to provide for formal proceedings such as war crimes tribunals and truth and reconciliation commissions if the state is to command adequate popular consent as it moves forward. Similar proceedings may be unnecessary in stable and well-developed democratic states like the United States, in which the political process itself, and the process of changing political leadership, commands widespread consent and obedience. Indeed, criminal prosecutions and other uses of the judicial process may be counterproductive, adding a destabilizing element to otherwise properly functioning states.

In Horwitz’s view while there are compelling reasons to conclude that, no matter what the rule of law might require with respect to states at other stages and levels of development, it will rarely require criminal prosecution of the relevant decision makers in a political system such as the United States. He concludes that we should think long and hard before following that path.

Stephen Vladeck’s chapter invites us to think about how we should respond to the alleged crimes of the Bush Administration by revisiting a previous instance of government abuse of its power in the United States. Any accounting of the most serious human rights abuses committed by the U.S. government during the twentieth century, he says, must necessarily begin with the forcible relocation of over 100,000 Japanese and Japanese-American citizens to “internment camps” during World War II. Over time, the “moral judgments of history” to which Justice Jackson famously referred in his dissent in *Korematsu v. United States*, have been rather unkind, and condemnation of the camps has become all but universal—culminating in Congress’s decision in 1988 to formally apologize for the camps on behalf of the U.S. government, with over $1.6 billion in reparations subsequently appropriated for the internees and their heirs. And *Korematsu* itself, the 1944 Supreme Court decision in which the Court indirectly but unequivocally upheld the constitutionality of the camps, has been so soundly discred-
ited that it has effectively become an “anti-precedent,” that is, a decision so reviled that it is cited only to prove the incorrectness of the rule for which it purportedly stands.

Yet no one, Vladeck reminds us, was ever held personally liable for the policies leading to internment. No government official was prosecuted; no government lawyer was disbarred—even though the Justice Department affirmatively misled the courts as to the gravity of the military threat posed by Japan. Indeed, the conventional narrative is that the gravest harm to the “rule of law” resulting from internment was not caused by the camps themselves, nor by the failure to investigate those responsible for creating them, but by the Supreme Court’s legal rationalization thereof in Korematsu. As Justice Jackson put it, “A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.” Thus, and tellingly, the prevailing historical memory of internment was, Vladeck notes, created over time without the benefit of criminal prosecutions, truth commissions, or any other systematic effort to identify the role played by individual government officers in the policies behind the camps.

Vladeck’s chapter shows how the creation of internment’s historical memory might inform contemporary debates over whether senior Bush Administration officials should be investigated and/or prosecuted for their role in the torture of detainees held as part of the “war on terrorism.” In particular, in retracing the development of a critical narrative of the internment camps, Vladeck explores the relationship between individual accountability and concerns over the “rule of law.”

The historiography of internment suggests that abuses by the U.S. government can successfully be documented—and their justifications categorically debunked—without individual accountability. This chapter asks whether that assumption holds up under closer scrutiny, or whether the same Justice Jackson might have been closer to the mark in his closing statement at Nuremberg, where, after invoking the specter of Richard III, he concluded with the observation that, “If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.”

Taken together the work collected in this book illuminates the complexity that necessarily attaches to the question of how we should respond when governments break the law and when those violations occur in a systematic
fashion in the context of an ongoing “war on terror.” While some of our contributors worry about the effect on rule of law values of a decision not to prosecute, others do not think that the rule of law is very meaningful as a guide for action. How we should respond depends not just on our adherence to the rule of law but also on our respect for the transnational normative and legal order, on the ability of our political system to enforce real accountability, on our confidence in the ability of devices like investigative or truth commissions to flush out the truth of what the government did, and on the lessons we glean about how, in the absence of any particular response, history will render its judgments.

NOTES

Introduction: Responding to Government Lawlessness


15. Jordon J. Paust, “Above the Law: Unlawful, Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power,” Utah Law Review (2007), 348. See also Scott Horton, “We have a duty to posterity, and that is to bear witness to these events. We must document them carefully. We must act to avoid the destruction of valuable evidence—and recognize, as we have already seen, that it is in the character of those who commit crimes to destroy the evidence of their misdeeds. In this way we lay the path for the justice which will in good time be meted out to those who betrayed a nation’s trust. For I believe, like the Puritans, in the certainty that justice will triumph and that wrongdoers will be held to account, though I am not so foolish as to think that this will happen soon.” See “Torture, Secrecy and the Bush Administration,” http://velvelonnationalaffairs.blogspot.com/2007/04/remarks-on-torture-and-secrecy-by.html


23. We understand that this premise will be unacceptable to two types of readers. The first, such as John Yoo, who believed and continue to believe that no violations of the law occurred, will obviously find any discussion of whether prosecutions are a good idea to be entirely moot.
The second—we call them rule absolutists—believe that if one can presume that a violation of the law occurred then there is almost nothing further to be done and said—that any violation requires legal vindication. See, for example, Mike Farmer, “Why We MustProsecute Bush and His Administration for War Crimes,” Online Journal (December 16, 2008), http://onlinejournal.com/artman/publish/article_4135.shtml.

Farmer quotes Robert Jackson at Nuremberg, “Let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.”

Or, as Larry Cox puts it, “If the US fails to prosecute those responsible for torture, we can take our place alongside countries we have long criticized for privileging politics over justice and accountability by letting criminals go free.” “Obama Must Prosecute Bush-Era Torture Enablers,” Christian Science Monitor (June 15, 2009), http://www.csmonitor.com/2009/0615/p09s01-coop.html


28. The legislative history and scope of FISA can be found in the OIG of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, and Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Program (July 10, 2009). Report No. 2009-0013-AS.

29. Ibid., 5.
30. Ibid., 1.
31. Ibid., 14.
32. Ibid., 11.
33. Ibid., 7.

37. Ibid, 9.


Posner notes, “One can easily imagine the defense strategy, which will start by calling to the stand various Democratic senators and representatives who . . . did not publicly object . . . at the time.”


43. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Available at www.hrweb.org/legal/cat.html

44. USC, 113, S2340. www.law.cornell.edu/uscode/18/usc_sec-18_0002340


48. Greenberg and Dratel, eds., The Torture Papers, Memo 21, 237.

49. Greenberg and Dratel, eds., The Torture Papers, Memo 14, 172.

50. Senate Armed Services Committee, “Inquiry into the Treatment of Detainees,” xv. For the full text of the memo, see Greenberg and Dratel, eds., The Torture Papers, Memo 14, 172.

51. Ibid, xxii.

52. See Office of Professional Responsibility Report, “Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Related to the Central Intelligence Agency’s Use of ‘Enhanced Interrogation Techniques’ on Suspected Terrorists,” July 29, 2009, Washington, D.C.: U.S. Department of Justice. Also see Katherine Eban, “Torture Memos Link Lawyers and Psychologists,” Vanity Fair (April 17, 2009), http://www.vanityfair.com/online/politics/2009/04/torture-memos-link-lawyers-and-psychologists.html As Eban puts it, “Taken as a whole, the memos point up how much damage two sets of professionals with fancy-sounding degrees can accomplish when they join forces. Under the cloak of law and science, the Bush Administration lawyers and the SERE psychologists managed to evade the Geneva Conventions, subvert U.S. law, and sanction the torture of detainees.”


55. Ibid., 184.
57. Ibid.
http://roomfordebate.blogs.nytimes.com/2009/03/02/a-truth-commission/
59. Unclassified Report on the President’s Surveillance Program, 11.
62. Ibid., 7.
63. Ibid., 12.
64. Ibid., 17.
70. Ibid., 211.
74. Goldstein and Goldstein, Crime, Law, and Society.
76. Ibid.


84. Ibid., 217–18.

85. See ibid., 226–30.


92. Ibid., 647.


94. Andrew C. McCarthy, “Holder Should Heed Justice Jackson’s Words,” *National Review Online* (May 8, 2009), http://article.nationalreview.com/?q=MjIxOGJlYTdjOTc0YThiNzM5OTYyODc3ZWYxMjA3MmE=

95. For Nixon’s famous remark during an interview with David Frost in May 1977, see www.youtube.com/watch?v=ejvyDniTPr8. For Vice President Cheney’s reiteration, see www.huffingtonpost.com/.../cheney-if-president-does_n_152663.html


104. Ibid., 2.
105. Ibid., 17.
106. Ibid., 25.
107. Ibid.
108. Ibid., 12.
112. See Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston: Beacon Press, 1998); for a theoretical and country study account, see Neil Kritz, Transitional Justice, 3 vols.; for truth commissions and their role, see Priscilla Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions (New York: Routledge, 2002).
116. Hayner, Unspeakable Truths, 100.
117. Minow, Between Vengeance and Forgiveness, 87.
119. See Ruti Teitel, Transitional Justice Genealogy.
121. Ibid., 20.
125. Ibid., 126–27.