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CHAPTER ONE

and

THE POST

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>
> Robert C. Berring, *The Great Books: An Introduction to Chapter One*, 1 J.L. (1 Ch. One) 315 (2011).
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OPENING REMARKS

AN IRONY OF ELECTRONICS

ON A FORM OR TWO OF SERIOUS LEGAL SCHOLARSHIP

Ross E. Davies[†]

This opening essay begins with welcomes to new journals and contributors. It then wanders back to a topic touched on in the first issue of the *Journal of Law* – the relationship between ink-on-paper and on-line publication of legal scholarship. But first a reminder about the form and function of the *Journal of Law*: it looks like a conventional law review, but it is really a bundle of small, unconventional journals, all published together in one volume. It is an incubator of sorts, providing legal intellectuals with something akin to what business schools' incubators offer commercial entrepreneurs: friendly, small-scale, in-kind support for promising ideas for which (a) there might be a market, but (b) there is not yet backing among established, deep-pocketed powers-that-be.

Welcome to Matt Bodie (of St. Louis University), whose own opening essay follows this one. Blogging at PrawfsBlawg, he has had a lot of interesting things to say recently about the production and distribution of legal scholarship.[1] We asked him to expand on some of that work in a series of essays appropriate for our "Opening Remarks" section. His piece beginning on page 223 of this issue is the first of them.

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

[1] *See, e.g., Yes, law students select and create legal scholarship*, prawfsblawg.blogs.com/prawfsblawg/2011/06/students-and-scholarship.html (vis. Oct. 23, 2011); *Law Review Submissions: Superstitions and Expeditions*, prawfsblawg.blogs.com/prawfsblawg/2011/04/law-review-submissions-superstitions-and-expeditions.html (vis. Oct. 23, 2011).

Welcome also to *Chapter One: A Journal of Law Books*. As promised, we have here the inaugural installment, and as I explained before:

> *Chapter One* is a project of Robert C. Berring of Boalt Hall, in which he reintroduces underappreciated classic law books by publishing the first chapter of a book in the company of one or two or a few good essays about it. His hope is that access to a convenient and unintimidating portion of a great book, combined with accessible analyses of it, will lure readers into the whole book, or at least to give them some direct familiarity with slices of that original work and some of the best thinking about it.

The first beneficiary of Berring's attention is Benjamin N. Cardozo's *The Nature of the Judicial Process*. Lecture I of Cardozo's classic book is featured beginning on page 329, preceded by a foreword by Andrew Kaufman (of Harvard) and followed by old-but-still-good reviews by Learned Hand, Max Radin, and Harlan Fiske Stone.

In addition, we have another new journal: *The Post*. Editor-in-chief Anna Ivey and her editorial colleagues – Howard Bashman (of *How Appealing*), Adam Bonin (of Cozen O'Connor), Bridget Crawford (of Pace), Thom Lambert (of Missouri), David Schleicher (of George Mason), and Tung Yin (of Lewis & Clark) – have developed *The Post* as a vehicle for "showcasing the best of legal blogging."[2]

The first issue of *The Post* features the work of Randy Barnett (of Georgetown), Mitch Berman (of Texas), Rick Hills (of NYU), Richard Pildes (of NYU), Lawrence B. Solum (of Georgetown), and Josh Wright (of George Mason). I encourage you to pepper the editors of *The Post* with your own suggestions about what ought to appear in future issues of that journal. But only if your suggestions are good and you can explain why they are good.

• • •

It is the arrival of *The Post* that prompts a return to the topic of online versus ink-on-paper in the publication of legal scholarship, and in particular to the status of blogging. Why? Because *The Post* is

[2] Anna Ivey, *An Introduction to The Post*, 1 J.L. (1 THE POST) 367 (2011).

so obviously designed to blur whatever boundaries exist between blogging and traditional legal scholarship.

As I pointed out in the first issue of the *Journal of Law*, "the reluctance that greets calls to include such material [as blog posts] in, for example, promotion and tenure decisions suggests that while things other than law review articles (and books) might be interesting and even useful, the legal academy in general is not comfortable with funny-looking scholarship."[3] But what is to be done with a scholarly and moderately lengthy blog post, especially when its links are converted to footnotes and the whole thing is published in an ink-on-paper law review? What happens, in other words, when a substantively worthy blog post is dressed up to look like a law review article, and it passes?

The Post poses a serious challenge for devotees of the traditional law review form – a challenge that reminds me of a story retold by Richard Friedman (of Michigan), when he was puzzling through a discussion of change in American constitutional law:

> I thought of the story told me by my old colleague Leo Katz about the boy who had an irrational fear of kreplach, a Jewish dumpling that makes many mouths water. His mother, determined to overcome the problem, showed him the ingredients. "See," she said, "this is just meat and dough." The boy watched with equanimity as his mother folded one corner of the dough over the meat, and then a second and a third. Then the mother folded over the final corner. The boy's face turned red. "Kreplach!" he screamed, and ran in terror from the room.[4]

The editors of *The Post* are (admirably) too modest or too prudent to admit it,[5] but that may well be what they are doing with the good

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[3] Ross E. Davies, *Like Water for Law Reviews*, 1 J.L. 1, 3 (2011) (comparing Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 891 (2009), *with* Ellen S. Podgor, *Blogs and the Promotion and Tenure Letter*, 84 WASH. U.L. REV. 1109, 1110 (2006), and citing *Symposium, Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025-1261 (2006); Robert S. Boynton, *Attack of the Career-Killing Blogs: When academics post online, do they risk their jobs?*, SLATE, Nov. 16, 2005).

[4] Richard D. Friedman, . . . *A Rendezvous with Kreplach*, 5 GREEN BAG 2D 453, 458 (2002).

[5] *See* Ivey, *An Introduction to The Post*, 1 J.L. (1 THE POST) at 368-69.

work of professors Barnett, Berman, Hills, Pildes, Solum, and Wright – refolding it into law-review kreplach. Read it. Is it genuine legal scholarship, or not? You make the call.

And then, conversely, there is my experience over the past year or so with the launching of the *Journal of Law*. Most people I have approached about this project have been supportive. They like the idea of lending ink-on-paper credibility to innovative, promising approaches to the presentation of legal scholarship. But in almost every case that support has come with some version of this cautionary question-and-comment:

> Is this journal going to be on Westlaw? No one wants to put their work in something that isn't available on-line.

It seems that in the modern legal academy – or at least in substantial parts of it – legal writing is serious scholarship if it appears first in an ink-on-paper law review and then in a reputable electronic database. But writing that follows a different path is, well, something else.

And so I am pleased and relieved – and proud, even – to report that the *Journal of Law* will indeed be on Westlaw.

Now the *Journal of Law* can claim to be a legitimate, full-fledged ink-on-paper law review, in part because it is available on-line. And maybe selected works posted on-line by professors Barnett, Berman, Hills, Pildes, Solum, and Wright can qualify as legitimate, full-fledged legal scholarship now that they are appearing in print in a journal whose legitimacy is buttressed by its presence on-line. Crazy world. There is a great deal more that could be said about all of this, of course. Maybe later.[6]

• • •

Finally, thanks to Trevor Morrison and Jim Ho for putting together a second fine issue of *Pub. L. Misc.* (It starts on page 231.) That makes them the editors of our first genuine periodical.

[6] What, for example, will Stephen Bainbridge's experiment with direct-to-Kindle publication reveal? *See* Larry Ribstein, *Bainbridge's e-book experiment*, truthonthemarket.com/2011/07/14/bainbridges-e-book-experiment/ (vis. Oct. 25, 2011). Or what of ssrn.com?

LAW STUDENTS AND LEGAL SCHOLARSHIP

Matthew T. Bodie[†]

Legal scholarship has been largely the provenance of student-run law reviews for at least a century. However, that dominance has become increasingly controversial. In a world of interdisciplinary research, the unusual – shall we say troubling? – lack of peer review puts a shadow over the entire enterprise.[1] "Do you really trust your students to choose your articles?" our colleagues in the social sciences ask. Yes. Yes, we do.

Rather than shrinking from this proposition, law professors should own it. Yes, our students run our field's academic journals, and that is a good thing. A cynic might say we need to make this case just as a matter of realpolitik: law reviews are not going to go away anytime soon. In the alternative, one can make the "thousand articles bloom" argument: there are so many law journals out there, anyone can get published, and from there it's up to other scholars to cite and praise. But student-run law reviews offer benefits that go beyond path dependency and numerosity. They offer a chance for legal academia to inculcate the practice and value of legal scholarship upon a wide swath of their graduates.

[†] Professor and Associate Dean for Research and Faculty Development, St. Louis University School of Law.

[1] *See, e.g.*, Richard A. Posner, *Against the Law Reviews*, Legal Affairs, Nov.-Dec. 2004, at http://legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp (calling law reviews "so strange, even incomprehensible, to scholars in other fields"); Brian Leiter, *The Scandal of American Law Reviews*, Leiter Reports: A Philosophy Blog, Oct. 24, 2004, at: http://leiterreports.typepad.com/blog/2004/10/the_scandal_of_.html ("In fact, as everyone knows, the majority of the articles that the *Yale Law Journal* and *Harvard Law Review* publish in a given year are intellectually worthless.")

Law school students are in something of a strange place in the academy. They are graduate students, and they are getting the highest degree, presumably, in the field: a "juris doctor."[2] But unlike other doctoral students, the overwhelming majority will not go on to academia; they will go into practice. In the traditional path into legal academia, this dichotomy was embraced: the best students worked on legal scholarship at the law review, then went on to clerk for one of the top judges or justices, and then perhaps practiced a few years as a white-shoe firm before becoming a professor.[3] And scholarship was unapologetically designed to provide guidance to courts and practicing attorneys. The lament over the change from this doctrinally-heavy approach began in the early 1990s and continues through today.[4]

Student-run law reviews are seen as a holdover from that old approach, an outdated model that needs to be turned in. Legal scholarship and legal education have always been hybrid propositions: part graduate education, part professional school; part theoretical, part practical. But that goes not only for professors but for students as well. Law students are graduate students. They are learning professional skills, but they are also learning an academic discipline. Appreciation of and participation in scholarship is a critical part of that instruction.

As law professors have become more theoretical and more interdisciplinary, law students and alums have not always come along for the ride. Prominent reform efforts have focused on making graduates more practice-ready, teaching more legal "skills," and moving

[2] The S.J.D. is perhaps considered the highest degree to be earned in the field, but it is comparatively rare, not a requirement for the legal academy, and now largely pursued by foreign-trained academics. Gail J. Hupper, *The Academic Doctorate in Law: A Vehicle for Legal Transplants?*, 58 J. Legal Educ. 413, 454 (2008).

[3] The highest-regarded graduates were often invited back after their clerkships.

[4] See Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. Times, May 20, 2011, at: http://www.nytimes.com/2011/05/21/us/politics/21court.html ("'What the academy is doing, as far as I can tell," Chief Justice John G. Roberts Jr. said, "is largely of no use or interest to people who actually practice law.'").

classes away from esoteric themes.[5] Some of this critique, I think, is related to the growth of critical legal and races studies in the 1980s and 1990s, and has an ideological undertone.[6] And for the most part, the academy has shrugged off the criticism. If anything, becoming less doctrinal and more theoretical (or empirical, perhaps) has been the prestige play for at least the last twenty-five years.[7] As Gordon Smith felt moved to point out, in italics – "*legal scholars often are not writing for practicing lawyers*."[8]

That should not mean, however, that law students should not be involved, either. Law professors are missing an opportunity if they fail to take full advantage of the existing system to instill an understanding of and appreciation for legal scholarship in their students. Law students have three years of professional study. Part of that program of instruction should include an engagement with the most important works in the field. Although this observation is anecdotal, in my opinion law school teaching has become more, not less, doctrinally focused over the last ten years. Yes, there are seminars that cover less doctrinal topics. But in more and more casebooks, problems and examples are replacing law review excerpts. It is almost a point of pride that the legal literature is now too complicated to be grasped by the average student. This should instead be a grave concern. Part of legal instruction must include an ability to parse and utilize legal scholarship.

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[5] *See, e.g.*, William M. Sullivan et al., *Educating Lawyers* 87-125 (2007).

[6] *Cf.* Kimberle Williams Crenshaw, *Twenty Years Of Critical Race Theory: Looking Backwards to Move Forward*, 43 Conn. L. Rev. 1253, 1311 (2011) ("The conservative Crit-baiting isn't quite the preoccupation it used to be, as it turns out, because their ammunition is being reserved for far bigger game than CRT. Apoplectic hand-wringing about the role of the entire Critical project in bringing down Western civilization seems even more absurd than ever before.").

[7] Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. Contemp. Legal Issues 139, 161-62 (2008) ("The scholarship that receives most attention these days, and that brings its authors most renown, is largely disconnected from the required first year curriculum and increasingly remote from all but the most specialized and sophisticated upper class courses.").

[8] Gordon Smith, *Legal Scholarship Matters*, Conglomerate Blog, May 23, 2011, http://www.theconglomerate.org/2011/05/legal-scholarship.html.

The issue is even more pressing when it comes to law reviews. Law review editors are a special subset of law students. Most of them, too, will go on to practice. But they are even more engaged in the scholarly enterprise than their fellow graduate students. They choose which articles to publish and how to edit those works for publication. They work long nights tracking down sources or reviewing countless manuscripts. They are – like it or not – interwoven inextricably with the scholarly enterprise.

Is this a good thing or not? If nothing else, it is a tremendous opportunity – an opportunity to engage a chunk of the legal profession on the importance of what we do. They, like us, care about what a good article is, whether a pin cite demonstrates the proposition, and whether a *cf.* or a *but see* is more appropriate. They are working with us on our scholarship. Instead of treating the process as a necessary evil,[9] we should treat it as a chance to teach our students about what we do and how to do it well.

If we take this seriously – if we take it as part of our mission – what can we do differently to better educate our students and law review editors about scholarship? The most important thing, in my mind, is committing to the notion that law reviews are not necessary evils, or even embarrassing vestiges, but rather partners in the scholarly endeavor. When we start imagining the role of students in law reviews as a legitimate part of legal education and legal scholarship, we will start to think of ways to improve the overall process. To supplement this overall theme, I suggest three more particular reforms to start that conversation.

[9] Stephen Bainbridge has complained about the student-run editing process as part of his recent experiment to opt out of the law review system. Stephen Bainbridge, *Self-publishing Legal Scholarship*, ProfessorBainbridge.com, March 23, 2011, at: http://www.professorbainbridge.com/professorbainbridgecom/2011/03/self-publishing-legal-scholarship.html ("Unlike professional academic presses, which have multiple levels of grown-up editors that must be persuaded and make use of peer reviews, law reviews mostly are staffed by twenty-something second-and third-year law students whose knowledge of the law, legal profession, business, and so on is typically modest at best.").

TAKE STUDENT NOTES SERIOUSLY

Law review editors not only select and edit legal scholarship – they write it as well. Law review notes are direct opportunities for students to participate in the scholarly and professional conversations of the field. It has perhaps become less fashionable for academics to cite student notes, and they matter a lot less than they used to for those students who want to be scholars. But notes remain a way for students to contribute to legal scholarship. Scholars should not shy away from citing well-crafted student pieces that contribute to the conversation. And academics should not be afraid to look at student notes for prospective professors. In return, professors should spend the time and energy to help students work their way through their notes in an engaged and educated fashion. Notes should be written in the third year, when the students have had more education under their belts, and they should be written under the advisement of a professor who helps them understand the existing literature. This may mean that the notes receive substantial credit hours, and that the note is the only substantial project to be worked on, rather than one of two or three substantial papers to be completed that year. From a faculty perspective, credit for advising notes should be more than a pat on the back from the journal advisor; in fact, perhaps notes should be written as part of a course that would provide background understanding and the research tools to complete the job appropriately.

IMPROVE THE ARTICLE SELECTION PROCESS

The law-review article selection process is something of a Wild West: professors send their works to dozens if not hundreds of journals, and then use "expedite" requests to get the attention of law review editors confronted with thousands of submissions. In such an environment, it is not surprising that students would use any heuristic they can find to help them choose the right articles. As a result, we have seen peer review become more a part of the process, both formally and informally.[10] However, the continuing confusion and

[10] See Stephen Bainbridge, *Chicago Law Review Chutzpah*, ProfessorBainbridge.com,

anxiety surrounding the placement game has led to a sense of defeatism in many scholars, at the same time they continue to hope for high placements.

Law professors need to choose a path here. One approach would have professors place articles generally (or even exclusively) with their own school's review. Each school's law journal could be a showpiece for that school's scholars and scholarship. Having the editors in-house would provide professors with a chance to work much more closely with students on the editing process. There would likely need to be some exceptions: for symposia, certainly, but also for specialty journals that would need to look to a wider pool of contributors. But the "flagship" journal could publish scholarship from that school.

The other approach would have professors play a much more involved role in the selection process. Professors could give general advice, provide peer reviews, and oversee the overall selection process. Absolutely critical to this approach, however, would be the need for professors to be completely disinterested in the selection process. In order to preserve the integrity of the selections, professors would be barred from submitting articles to their own journals.[11] Their mission instead would be to assist the editors in selecting the best articles from the available pile.

Thus, my reforms head in two opposite directions: professors would either publish exclusively with their home law journals, or be completely barred from submitting to them. Although each has its own internal logic, either system would be preferable to the mishmosh of conflicting signals we have now. And in both cases, professors would play a stronger role in the selection of scholarship, while at the same time teaching students about choosing good scholarship.

Aug. 5, 2011, at: http://www.professorbainbridge.com/professorbainbridgecom/2011/08/chicago-law-review-chutzpah.html (describing the *University of Chicago Law Review*'s peer review process); Matt Bodie, *Stanford Law Review's Peer Review Process*, PrawfsBlawg.com, Aug. 16, 2011, at: http://prawfsblawg.blogs.com/prawfsblawg/2011/08/stanford-law-reviews-peer-review-process.html (interview with senior articles editor about peer-review process).

[11] Again, there could be exceptions for symposia.

EDUCATE STUDENTS ABOUT SCHOLARSHIP

Ed Rubin has proposed an ambitious reform for legal education. In acknowledging (but then diminishing) the notion that law students subsidize scholarship, Rubin argues that the fault is not with scholarship but rather the curriculum. He contends: "The scholarship is up-to-date with both the current practice of law, in its broadest sense, and with the current theories about what law is, and what it does, in our society. The curriculum has been obsolete, on both these fronts, for close to one hundred years."[12] In order to bring the curriculum into line with scholarship, Rubin proposes that the third year be based around a "capstone" course of ten to fifteen credits in which the student would work directly with a professor on an issue or issues relating to the professor's research.[13] He includes the potential for such capstone courses to encompass a clinical component and (in my view) is somewhat vague about the actual structure of the course. But Rubin's critical insight is that research and teaching are not separate, competing goods; they are synergistic goods that are both necessary to legal education.

Rubin's plan is ambitious, and it may seem to make sense at higher-ranked schools more than lower ones. But I believe such thinking underestimates the interest and perspicacity of students at all levels of the spectrum, and perhaps overestimates the complexity of our craft. Even law professors doing stochastic frontier analysis or multivariate regressions need to translate those results for those that would use the analysis, whether they be other academics in and out of the field, lawyers, courts, agencies, or legislators. Students could be taught the basics of even these complicated techniques, and then be taught how to use the results of such analyses as attorneys, government officials, or businesspeople. Bringing students in on the conversation would provide a richer and deeper educational experience, improve the students' ability to think critically, and increase the appreciation for scholarship among future alums. And it would not be as hard as we think. After all, we spend a large chunk of our

[12] Rubin, *supra* note 6, at 163.
[13] *Id.* at 165-67.

time on scholarship. Bringing it into the classroom, on scales large and small, would work in everyone's interest.

CONCLUSION

The new interdisciplinarity in legal scholarship has brought with it a sense of shame about our discipline's scholarly showcases. I do not intend to claim that the law review selection process is superior to the peer-review process, a claim that would be hard to evaluate empirically. Instead, I contend that the process is a wonderful opportunity to educate our students and, by extension, the profession about the value of our scholarship. As legal education faces a crisis unlike any other in perhaps the last century, now is the time to affirm and expound upon the work we do. If we do not, we cannot blame students and alums when they start asking why they should fund it in the first place.

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James C. Ho & Trevor W. Morrison, editors

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"HOSTILITIES"

Trevor W. Morrison[†]

The inspiration for this second edition of *Pub. L. Misc.* is the Obama Administration's legal defense of the ongoing U.S. military involvement in Libya, and in particular its claim that the operation does not rise to the level of "hostilities" under the War Powers Resolution.

On March 21, 2011, President Obama notified Congress that the U.S. military and various allied forces had commenced airstrikes against the Qadhafi regime in Libya. The stated aim was to avert a humanitarian crisis arising out of the regime's violent attempt to put down the growing popular rebellion within Libya. The air campaign was undertaken in furtherance of a United Nations Security Council Resolution but not pursuant to any domestic statutory authority.

The President's announcement raised questions in some quarters about whether he had the legal authority to direct this use of military force. In response, the Administration released an April 1, 2011 memorandum by the Justice Department's Office of Legal Counsel (OLC), memorializing oral advice OLC had given before the start of the Libya operation. We reproduce that memorandum here.

OLC took the position that, given what it understood to be the limited nature of the Libya operation, the President had the power to order its commencement without prior congressional approval. OLC placed great weight on historical practice, asserting that "[o]ur history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval" and that the Libya operation was comparable to many of those past engagements.

[†] Isidor and Seville Sulzbacher Professor of Law, Columbia Law School.

Reactions in Congress were mixed. A small contingent objected so strongly that it filed suit in federal court seeking to enjoin the operation. In the main, however, congressional leaders appeared to accept that the President had the inherent constitutional authority to commence the action. For example, in a March 23, 2011 letter to the President (reproduced here), Speaker Boehner raised numerous policy-based questions about the operation, but did not question the President's constitutional authority to commence it.

But there were other legal issues. The War Powers Resolution (WPR) provides that when the President directs the U.S. military to engage in "hostilities" without advance congressional authorization, the operation must cease within 60 days unless Congress authorizes it in the meantime. Passed in 1973 as a response to Vietnam and over President Nixon's veto, the WPR has long been controversial. Much of the controversy has focused on other parts of the WPR, including a provision specifying a limited set of circumstances in which the President may introduce armed forces into hostilities. As for the 60-day clock in particular, its status has been uncertain. Presidents following Nixon have not consistently conceded or denied its constitutionality, and executive offices like OLC have sent mixed signals.[1]

As the Libya operation approached and then passed the 60-day mark in mid-May 2011, the hostilities question took center stage. Was the U.S. military engaged in hostilities in Libya? If so, was the Obama Administration prepared to declare the 60-day clock uncon-

[1] *Compare Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 196 (1980) ("The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.") *with* John C. Yoo, *Applying the War Powers Resolution to the War on Terror*, 6 GREEN BAG 2D 175, 175 (2003) (reprinting 2002 testimony as Deputy Assistant Attorney General before the Senate Subcommittee on the Constitution, stating that "the President's power to engage U.S. Armed Forces in military hostilities is not limited by the War Powers Resolution"); *see also H. Con. Res. 82, Directing the President to Remove Armed Forces From Operations Against Yugoslavia, and H.J. Res. 44, Declaring War Between the United States and Yugoslavia: Markup Before the House Comm. on Int'l Relations*, 106th Cong. 37 (1999) (statement of State Department Legal Adviser Mike Matheson) ("This Administration has not taken a formal stance on the constitutionality of the 60-day provision to this point, but has taken the view that it is unwise and should be repealed.").

stitutional? Or did it take the position that the U.S. military's involvement in Libya was not hostilities?

The Administration chose the latter path. It maintained that when NATO assumed leadership of the operation in early April, the U.S. involvement receded to a supporting role that did not rise to the level of hostilities. This was met with incredulity in some quarters, especially in light of press reports that by mid-June, "American war-planes ha[d] struck at Libyan air defenses about 60 times, and remotely operated drones ha[d] fired missiles at Libyan forces about 30 times" since early April.[2]

A complete defense of the Administration's position came a few weeks later, in the form of testimony from State Department Legal Adviser Harold Koh before the Senate Foreign Relations Committee.[3] We reproduce it here. Koh underscored "the Administration['s] commitment to acting consistently with the Constitution and the War Powers Resolution," but did not quite explicitly concede the constitutionality of the WPR in all respects. Instead, he elaborated on the reasons why the Administration deemed the 60-day clock not to apply. The WPR, Koh argued, was intended largely to ensure that unilateral presidential action did not lead the country into another Vietnam. He concluded that "hostilities" should therefore be understood in reference to that purpose, and that the Libya operation was simply nothing like Vietnam. The Libya operation, Koh emphasized, was nothing of the sort. Instead it was limited in four key respects – mission, exposure of U.S. troops to danger, risk of escalation, and military means deployed – that, Koh concluded, kept the operation below the hostilities level.

Congress was skeptical. We reproduce some of its responses here. Perhaps most notably, after hearing Koh's testimony a bipartisan majority of the Senate Foreign Relations Committee approved a

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[2] Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 21, 2011, at A8.

[3] The process by which the Obama Administration arrived at its position on the hostilities issue raised its own questions, given press reports that OLC had concluded that the operation did constitute hostilities and that the White House had rejected that position in favor of the one advocated by the State Department. *See* Trevor W. Morrison, *Libya, "Hostilities," and the Process of Executive Branch Legal Interpretations*, 124 HARV. L. REV. F. 62 (2011).

resolution that provided statutory authorization for the Libya operation while also expressly declaring that it "constitute[d] hostilities within the meaning of the War Powers Resolution." That resolution never received a full Senate vote, nor did any other on this topic. So the Libya operation continued on, but without any clear legislative-executive agreement on the hostilities issue.

What *does* "hostilities" mean? The WPR itself does not define the term, and no court decision or subsequent legislation has done so. But there are some materials bearing on the question. We reproduce a small selection of them here, mindful that this is by no means a complete catalog.

At the time of the WPR's passage, some in Congress evidently read hostilities quite expansively. The House Report accompanying the WPR, for example, stated that "[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope." At the same time, colloquies in hearings suggested that some of the sponsors of the WPR could not agree, even after the fact, about when hostilities began in Vietnam.

Two years after the WPR was passed, Congress invited State Department Legal Adviser Monroe Leigh and Defense Department General Counsel Martin Hoffmann to provide their best understanding of hostilities. In their letter, Leigh and Hoffmann said that the Executive Branch understood the term "to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces," but that it did not include "irregular or infrequent violence which may occur in a particular area." In his testimony this past summer, Koh claimed that in the 36 years since the Leigh-Hoffmann letter, "the Executive Branch has repeatedly articulated and applied th[e] foundational understandings" articulated in it.

As with so many separation of powers issues, the practice over time of the Executive and Legislative Branches may indeed provide the best evidence of what hostilities has come to mean. The Libya episode is now part of that history. Precisely what meaning it assigns

to hostilities – and what life it leaves in the WPR – is sure to be debated the next time around.

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Jonathan Bingham – Jacob Javits colloquy (excerpt)

March 7, 1973

HEARINGS

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS

OF THE

COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

MARCH 7, 8, 13, 14, 15, 20, 1973

[*16]

PRESIDENT'S POWERS TO MAKE WAR ON HIS OWN

Mr. BINGHAM. Thank you very much.

Senator, I would like to compliment you most profoundly for your leadership in this field and for the eloquent way you have stated again and again your conviction that Congress must act and act in such a way that the President's powers to make war on his own are restrained effectively.

Having said that, I must confess that I have great reservations about the approach of your bill and the principal reservation I have is the requirement for a rigid 30-day period within which Congress must act affirmatively.

If such a bill as this requires that Congress act affirmatively to approve Presidential action initiating hostilities, then a deadline must be imposed. You cannot leave that open.

I see a lot of trouble and grief in the 30-day provision. First of all, the question may well arise in many cases, when does the 30-day period start. May I ask you this question: Assuming that bill had been in effect during the period of the Vietnam hostilities, when did our hostilities in Vietnam begin so as to start the 30-day period running?

Senator JAVITS. In my judgment the hostilities in Vietnam began when President Johnson deployed our forces in the combat situation to bail out the South Vietnamese which my best recollection is March 1965.

Mr. BINGHAM. You don't think that when President Kennedy sent 20,000 advisers to take part in the operations that that was the commencement?

Senator JAVITS. No. My initial reaction is that if I were President I would not define that as committing us to hostilities or imminent danger of hostilities. What it might have committed us to was having Americans in the area who could become involved with the imminent threat of hostilities and we might have to come to their rescue. However, my mind is not closed on this evaluation. Perhaps the best bench-[*17]mark would be the days President Kennedy ordered U.S. advisers to accompany the ARVN units on combat patrols, with orders to shoot back if attacked.

WHEN DO HOSTILITIES BEGIN?

Mr. BINGHAM. What about President Johnson's ordering of American planes into action against North Vietnam. Was that not the beginning of hostilities?

Senator JAVITS. I don't remember now whether that preceded –

Mr. BINGHAM. That preceded.

Senator JAVITS. If it did precede, I would say yes. I think that you are making a very important point in that regard. I think that it is ascertainable when you are in hostilities or imminent danger of hostilities.

For example, take the Cuban crisis. I think when President Kennedy sent planes over Cuba to take pictures, we were not in hostilities or in imminent danger of hostilities, but when we insisted on

inspecting ships, we may have been in imminent danger of hostilities, although it turned out that way because the Soviet ships were not stopped by us but stopped of their own accord.

I think historically there is enough of a line so you can fix the time. As you say yourself, Congressman, you have done a lot of thinking about this. You have a very interesting war powers bill of your own, and I am very gratified you are involved in this issue. I compliment you for participating in such an activity.

We have tried very hard in respect of the 30-day provision to develop some standards. I would be the first to affirm that by no means are we stripping the President of his constitutional powers in S. 440. There still remains great authority in the Office of the Presidency. For example, he can still deploy our forces generally at his discretion. Some have argued against this bill saying, for example, "Well, when the 7-day war occurred he moved the Navy closer to the theater of action." So what? He has a right to deploy them in international waters and put them in a position where they would be better postured if they are to be put into hostilities.

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Senate Foreign Relations Committee Report, submitted by James Fulbright (excerpt, reproduced as an appendix to Hearings before the Committee on Foreign Relations, United States Senate, Ninety-Fifth Congress, On a Review of the Operation and Effectiveness of the War Powers Resolution, July 13, 14 and 15, 1977, Senate Report No. 220, 93rd Congress, Ist Session)

June 14, 1973

[*238]

WAR POWERS

JUNE 14, 1973 – Ordered to be printed

Mr. Fulbright, from the Committee on Foreign Relations, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 440]

The Committee on Foreign Relations, to which was referred the bill (S. 440), to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress, having considered the same, reports favorably thereon and recommends that the bill do pass. . . .

[*265]

30-DAY AUTHORIZATION PERIOD

Section 5 (along with section 3) is the heart and core of the bill. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so

comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of the Constitution and thus represents, in an historic sense, a restoration of the constitution balance which has been distorted by practices in our history and, climatically, in recent decades.

Section 5 provides that actions taken under the provisions of section 3: "shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (2) Congress is physically unable to meet as a result of an armed attack upon the United States; or (3) the continued use of such Armed Forces in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof."

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

The choice of thirty days, in a sense, is arbitrary. However, it clearly appears to be an optimal length in time with respect to balancing two vital considerations. First, it is an important objective of this bill to bring the Congress, in the exercise of its constitutional war powers, into any situation involving U.S. forces in hostilities at an early enough moment so that Congress's actions can be meaningful and decisive in terms of a national decision respecting the carrying on of war. Second, recognizing the need for emergency action, and the crucial need of Congress to act with sufficient deliberation and to act on the basis of full information, thirty days is a time period which strikes a balance enabling Congress to act meaningfully as well as independently.

It should be noted further, that the thirty-day provision can be extended as Congress sees fit – or it can be foreshortened under section 6. The way the bill is constructed, however, the burden for obtaining an extension under section 5 rests on the President. He must obtain specific, affirmative, statutory action by the Congress in this respect. On the other hand, the burden for any effort to foreshorten the thirty-day period rests with the Congress, which would have to pass an act or joint resolution to do so. Any such measures to foreshorten the thirty-day period would have to reckon with the possibility of a Presidential veto, as his signature is required, unless there is sufficient Congressional support to override a veto with a two-thirds majority.

The issue has been raised quite properly, as to what would happen if our forces were still engaged in hot combat at the end of the thirtieth day – and there had been no Congressional extension of the thirty-day time limit. The answer is that, as specified by clause (1), the [page 266] President would not be required or expected to order the troops to lay down their arms.

The President would, however, be under statutory compulsion to begin to disengage in good faith to meet the thirty-day time limit. He would be under the injunction placed upon him by the Constitution, which requires of the President that: "he shall take care that the laws be faithfully executed."

The wording of Section 5(1) is very specific and tightly drawn. It is to be emphasized that Section 5(1) is in no sense to be construed as a loophole giving the President discretionary authority with respect to the thirty-day disengagement requirement. It is addressed exclusively to the narrow issue of the security of our forces in the process of prompt disengagement. The criterion involved is the security of forces under fire and it does not extend to withdrawal in conformity with some broader strategy or policy objective. No expansion of the thirty-day time frame is conveyed other than a brief period which might be required for the most expeditious disengagement consistent with security of the personnel engaged. Moreover, it requires the President's certification in writing that any such contingency had arisen from "unavoidable military necessity."

Section 5(2) provides for suspension of the thirty-day disengagement requirement in the event "Congress is physically unable to meet as a result of an armed attack upon the United States."

The question has been raised whether there can or should be any time limitation on the President's emergency authority to repel an attack upon the United States and take the related measures specified in Section 3(1). The bill rejects the hypothesis that the Congress, if it were physically able to meet, might not support fully all necessary measures to repel an attack upon the nation. Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the alleged attack or imminent threat of an attack. In this context, the admonition articulated in 1848 by Abraham Lincoln is most pertinent.

> Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose – and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent; I see it, if you don't.

Section 5(3) provides for: "the continued use [beyond thirty days] of such armed forces in such hostilities or in such situation [provided it] has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof." It is to be noted that authorization to continue using the Armed Forces is to come in the form of specific statutory action for this purpose. This is to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary authorization for "continued use." Moreover, just as the Congress [*267] under the Constitution is not intended to be under any obligation to declare war against its own better judgment,

so under Section 5(3) of the war powers bill there is no presumption, or obligation, upon the Congress to enact legislation for the continued use of the armed forces, as covered by the bill, except as it is persuaded by the merits of the case presented to it, and consequent to appropriate reflection and due deliberation.

It is further to be noted that any "continued use" which might be authorized by the Congress must be "pursuant to the provisions" of such authorization. The Congress is not faced with an all or nothing situation in considering authorization for "continued use." It can establish new time limits, provisions for further review by the Congress, as well as other limits and stipulations within the ambit of the constitutional powers of the Congress.

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

House Foreign Affairs Committee Report, submitted by Clement Zablocki (excerpt, reproduced as an appendix to Hearings before the Committee on Foreign Relations, United States Senate, Ninety-Fifth Congress, On a Review of the Operation and Effectiveness of the War Powers Resolution, July 13, 14 and 15, 1977)

June 15, 1963 [sic]

[*282]

WAR POWERS RESOLUTION OF 1973

June 15, 1963 [sic]. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. ZABLOCKI, from the Committee on Foreign Affairs, submitted the following

REPORT

TOGETHER WITH MINORITY AND SUPPLEMENTAL VIEWS

[To accompany H.J. Res. 542] . . .

[*page number unknown]

SECTION-BY-SECTION ANALYSIS. . . .

[*page number unknown]

Section 2. Consultation. . . .

[*288]

The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered

to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "*Imminent hostilities*" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Monroe Leigh – Clement Zablocki correspondence
(excerpt, War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident)

May 9 & June 3, 1975

[*37] COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES,
Washington, D.C. May 9, 1975

Hon. MONROE LEIGH,[1]
Legal, Adviser, Department of State,
Washington, D.C.

DEAR MR. LEIGH: Your testimony before the Subcommittee on International Security and Scientific Affairs Wednesday was most enlightening and helpful to the Subcommittee's purposes. Please accept my thanks for your cooperation.

As indicated at the close of the hearing, I would appreciate your answers to the following additional questions for inclusion in the hearing record:

(1) As you know, only those reports filed pursuant to Section 4(a)(1) trigger the balance of the Act, involving Congressional action. The obvious key word in section 4(a)(1) is "HOSTILITIES."

Can you tell us what your working definition of that word is as it related to each of the 3 reports which have been filed? Also, can you tell us what your working definition of "imminent" hostilities is?

[NOTE. – See p. 23 of Committee print regarding House Foreign Affairs Committee report definition of "hostilities"]

(2) Again in terms of relating the report of April 30 to your working definition of "hostilities," how precisely did the four U.S.

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[1] Same letter sent to Hon. Martin R. Hoffmann.

casualties noted in that report figure in to make it a Section 4 – and only a Section 4 – report?

REGARDING PRESIDENT'S AUTHORITY TO EVACUATE AMERICANS AND NON-AMERICANS:

(3) The three War Powers reports use essentially the same language in describing the President's authority for the action he took in committing troops. Basically, they all say the operations were ordered "pursuant to the President's Constitutional executive power and authority as Commander-in-Chief of United States Armed Forces." There is a great deal of dispute over what that term "Commander-in-Chief" means – especially within the context of the War Powers Resolution.

Would you give us briefly your legal interpretation of what precisely the President's authority is as Commander-in-Chief? [*38]

REGARDING REPORT OF APRIL 12 – EVACUATION OF PHNOM PENH:

(4) The President's report of April 12 said that "the last elements of the force to leave received hostile recoilless rifle fire." Was that "hostilities" and if not, why not?

REGARDING REPORT OF APRIL 30 – EVACUATION OF SAIGON:

(5) The report of April 30 also indicates that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters." It also notes that ground security forces "returned fire during the course of the evacuation operation." Did not those two incidents clearly constitute hostilities thereby necessitating a Section 4(a)(1) report?

(6) Did you or did you not consider the two Marines who were killed at Tan Son Nhut airport a part of the evacuation force? Were they not actually assisting directly in the evacuation operation?

(7) What were the detailed circumstances surrounding the loss of a Navy helicopter in which two crew members lost their lives? Were they directly assisting or participating in the evacuation operation?

(8) Does the phrase "taking note of . . ." appearing in each of the 3 reports suggest anything other than a full binding legal responsibility upon the President?

Sincerely,

CLEMENT J. ZABLOCKI,
Chairman, Subcommittee on International Security and Scientific Affairs.

DEPARTMENT OF STATE,
Washington, D.C., June 3[,] 1975.

Hon. CLEMENT J. ZABLOCKI,
Chairman, Subcommittee on International Security and Scientific Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We are writing in response to your letters to us of May 9, 1975, requesting amplification of our testimony before your Subcommittee on May 7.

Enclosed is a memorandum[2] which responds to questions asked by members of the Subcommittee during our testimony. Although this memorandum may also answer a few of the questions raised in your recent letter, we shall also address each of your questions individually.

1. Your first question inquires as to our working definition of the word "hostilities" in section 4(a)(1) of the War Powers Resolution. We are, of course aware of the comments made by the Committee on page 7 of H. Report 93-287, wherein the Committee attempted a general definition of that word, which had its origin in the Senate version of the Resolution. Even as so defined, however, there is of necessity a large measure of judgement [sic] which is required. We note in this connection that even when measured against certain past events, differing views as to when hostilities commence were expressed during the Hearings before the Committee in 1973. See for example the colloquies between Representatives Bingham and Du Pont and Senator Javits on pages 16-17 and 21-22 of the Hearings. You will also recall Professor Bickel's response to Mr. Du Pont with

[2] Memorandum appears on p. 29.

respect to the definition of "hostilities" that:

"There is no way in which one can define that term other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law." (Hearings, at 185)

Whether "imminent involvement in hostilities" is clearly indicated by the circumstances is similarly, in our view, definable in a meaningful way only in the context of an actual set of facts. To speculate about hypothetical situations is possible but would not seem desirable. Reasonable men might well differ as to the implications to be drawn from any such hypothetical situation. In this connection, you will no doubt recall the uncertainty of some members of the Congress as to whether the military alert of October 24, 1973 triggered the reporting provisions of the War Powers Resolution, and the conclusion expressed by you on the Floor on April 9, 1974 (Congressional Record, at H. 2726) that hostilities had not been imminent and that a report had not been required.

Subject to the foregoing caveats, we turn to our working definitions of these terms. As applied in the first three war powers reports, "hostilities" was used to [page 39] mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

You also ask which of the first three war powers reports referred to situations involving hostilities. In our view, the April 30, 1975 report refers to a situation where at least one incident of hostilities existed (see point 5 below); and in the Cambodia evacuation referred to in the April 12, 1975 report, an imminent involvement in hostilities may have existed (as to the factors that would enable one to reach a conclusion on whether hostilities did in fact exist see point 4 below). The April 4, 1975 report concerning the Danang evacuation, however, does not refer to a situation where hostilities existed.

2. Your letter uses the term, "a Section 4 report." As we read the War Powers Resolution, section 4 does not call for different types of reports depending on whether U.S. armed forces are introduced under subparagraphs (1), (2) or (3) of section 4(a). Instead, section 4 seems to require only that "a report" be filed in any of the subparagraphs (1), (2) or (3) situations, and that such report merely contain the information specified in subparagraphs (A), (B) and (C).

It seems that the real thrust of the question is why the President in his April 30, 1975 report referred to section 4 in general, and not to any particular subparagraphs in that section. We presume that the President did so because the events giving rise to that report did not seem to be limited to just one of the three subparagraphs in section 4(a).

Thus, although the events as known at that time indicated that hostilities may have existed between U.S. and communist forces, U.S. forces "equipped for combat" were also introduced in the "territory, airspace or waters" of South Vietnam – the situation apparently provided for in section 4(a)(2).

Furthermore, since the operation had terminated by the time the report was prepared, the question of possible congressional action under section 5 of the Resolution was moot; thus, a specific reference to 4(a)(1) was not needed to call attention to possible action under section 5.

3. Your letter refers to the President's authority as Commander-in-Chief. The three war powers reports you referred to all cite two sources of authority: Article II, Section 1 of the Constitution which provides that the "executive Power shall be vested" in the President, and the Commander-in-Chief clause (Article II, Section 2).

With respect to the Commander-in-Chief clause, we do not believe that any single definitional sentence could clearly encompass every aspect of the Commander-in-Chief authority. This authority would include such diverse things as the power to make armistices, to negotiate and conclude cease-fires, to effect deployments of the armed forces, to order the occupation of surrendered territory in time of war, to protect U.S. embassies and legations, to defend the United States against attack, to suppress civil insurrection, and the

like.

With respect to the specific question of protecting and rescuing U.S. citizens, the enclosed memorandum contains a discussion of both court opinions and historical precedents on this subject.

4. You refer to a portion of the April 12, 1975 report on the Cambodia evacuation which notes that the "last elements of the force to leave received hostile recoilless rifle fire." Whether or not this rifle fire constituted hostilities would seem to us to depend upon the nature of the source of this rifle fire – i.e., whether it came from a single individual or from a battalion of troops, the intensity of the fire, the proximity of hostile weapons and troops to the helicopter landing zone, and other evidence that might indicate an intent and ability to confront U.S. forces in armed combat. Our information concerning the source of this rifle fire is not sufficiently detailed to enable one to draw a conclusion as to whether this clearly amounted to "hostilities."

5. Your letter notes that the April 30, 1975 report relating to the Saigon evacuation indicates (a) that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters," and (b) that U.S. ground forces returned fire during the course of the evacuation. The first situation on its face constituted "hostilities." The evidence concerning the second situation is inconclusive as to whether the fire was of sufficient intensity so as to be part of a purposeful confrontation by opposing military forces; but in view of the actions of the U.S. fighter aircraft, a characterization of the second situation [page 40] may be academic. In any event, as discussed under point number 2 above, there were other circumstances present in the evacuation operation which precluded a conclusion that section 4(a)(1) alone, and no other provision of section 4, pertained to the operation.

6. The two marines who were killed at Tan Son Nhut airport that day before U.S. forces entered South Vietnamese airspace were not a part of the evacuation force. They were members of the marine guard at the American Embassy and were, at the time of their death, on regular duty in the compound of the Defense Attaché Office which was located at the airport. As you know, an evacuation

effort not involving our combat troops had been conducted for some time prior to the introduction of the evacuation forces. The fact that these marines, rather than civilian members of the Embassy, were killed was fortuitous and not a consequence of the introduction of the evacuation force.

7. The loss of the Navy helicopter was not directly related to the evacuation operation. Our understanding is that the helicopter was at the time, in accordance with standard operating procedures, involved in an ordinary search and rescue holding pattern near its home aircraft carrier. The purpose of its mission was to provide assistance to aircraft and helicopters that were participating in the evacuation operation, should such assistance become necessary. The helicopter crashed in the immediate vicinity of the carrier. The cause of the crash is not known, and the bodies of the crew were not recovered.

8. Your letter notes that the first three war powers reports contain the phrase "taking note of . . . ." You inquire whether this suggests anything other than a full binding legal responsibility upon the President. This phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution. No constitutional challenge to the appropriateness of the report called for by section 4 was intended. As you are aware, President Nixon in his veto message of October 24, 1973 indicated that portions of the War Powers Resolution, including sections 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4.

We hope we have covered each of the points raised not only in your letter, but also during our testimony before the Subcommittee on May 7. Please accept again our appreciation for the Subcommittee's careful inquiry into these very complex legal and constitutional questions.

Sincerely,

MONROE LEIGH,
Legal Adviser, Department of State.
MARTIN R. HOFFMAN,
General Counsel, Department of Defense.

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Letter from John A. Boehner to Barack Obama

March 23, 2011

JOHN A. BOEHNER
OHIO
SPEAKER

WASHINGTON OFFICE
H-232 U.S. CAPITOL BUILDING
WASHINGTON, DC 20515
(202) 225-0600

Congress of the United States
House of Representatives

March 23, 2011

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

Thank you for your letter dated March 21, 2011, outlining your Administration's actions regarding Libya and Operation Odyssey Dawn. The United States has long stood with those who seek freedom from oppression through self-government and an underlying structure of basic human rights. The news yesterday that a U.S. fighter jet involved in this operation crashed is a reminder of the high stakes of any military action abroad and the high price our Nation has paid in blood and treasure to advance the cause of freedom through our history.

I respect your authority as Commander-in-Chief and support our troops as they carry out their mission. But I and many other members of the House of Representatives are troubled that U.S. military resources were committed to war without clearly defining for the American people, the Congress, and our troops what the mission in Libya is and what America's role is in achieving that mission. In fact, the limited, sometimes contradictory, case made to the American people by members of your Administration has left some fundamental questions about our engagement unanswered. At the same time, by contrast, it appears your Administration has consulted extensively on these same matters with foreign entities such as the United Nations and the Arab League.

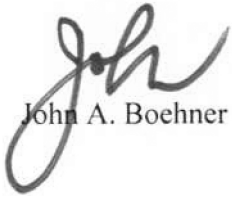
It is my hope that you will provide the American people and Congress a clear and robust assessment of the scope, objective, and purpose of our mission in Libya and how it will be achieved. Here are some of the questions I believe must be answered:

- A United Nations Security Council resolution does not substitute for a U.S. political and military strategy. You have stated that Libyan leader Muammar Qadhafi must go, consistent with U.S. policy goals. But the U.N. resolution the U.S. helped develop and signed onto makes clear that regime change is not part of this mission. In light of this contradiction, is it an acceptable outcome for Qadhafi to remain in power after the military effort concludes in Libya? If not, how will he be removed from power? Why would the U.S. commit American resources to enforcing a U.N. resolution that is inconsistent with our stated policy goals and national interests?
- In announcing that our Armed Forces would lead the preliminary strikes in Libya, you said it was necessary to "enable the enforcement of a no-fly zone that will be led by our [*2] international partners." Do we know which partners will be taking the lead? Are there clear lines of authority and responsibility and a chain of command? Operationally, does enforcement of a no-fly zone require U.S. forces to attack non-air or command and control operations for land-based battlefield activities, such as armored vehicles, tanks, and combatants?

- You have said that the support of the international community was critical to your decision to strike Libya. But, like many Americans, it appears many of our coalition partners are themselves unclear on the policy goals of this mission. If the coalition dissolves or partners continue to disengage, will the American military take on an increased role? Will we disengage?
- Since the stated U.S. policy goal is removing Qadhafi from power, do you have an engagement strategy for the opposition forces? If the strife in Libya becomes a protracted conflict, what are your Administration's objectives for engaging with opposition forces, and what standards must a new regime meet to be recognized by our government?
- Your Administration has repeatedly said our engagement in this military action will be a matter of "days, not weeks." After four days of U.S. military action, how soon do you expect to hand control to these other nations? After the transition to coalition forces is completed, how long will American military forces remain engaged in this action? If Qadhafi remains in power, how long will a no-fly zone will [sic] be enforced?
- We are currently in the process of setting priorities for the coming year in the budget. Has the Department of Defense estimated the total cost, direct and indirect, associated with this mission? While you said yesterday that the cost of this mission could be paid for out of already-appropriated funds, do you anticipate requesting any supplemental funds from Congress to pay for ongoing operations in Libya?
- Because of the conflicting messages from the Administration and our coalition partners, there is a lack of clarity over the objectives of this mission, what our national security interests are, and how it fits into our overarching policy for the Middle East. The American people deserve answers to these questions. And all of these concerns point to a fundamental question: what is your benchmark for success in Libya?

The American people take the use of military action seriously, as does the House of Representatives. It is regrettable that no opportunity was afforded to consult with Congressional leaders, as was the custom of your predecessors, before your decision as Commander-in-Chief to deploy into combat the men and women of our Armed Forces. Understanding some information required to respond may be classified, I look forward to a complete response.

Sincerely,



PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Letter from Caroline D. Krass to Eric H. Holder, Jr.

April 1, 2011

AUTHORITY TO USE MILITARY FORCE IN LIBYA

The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest.

Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

April 1, 2011

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum memorializes advice this Office provided to you, prior to the commencement of recent United States military operations in Libya, regarding the President's legal authority to conduct such operations. For the reasons explained below, we concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest. We also advised that prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

I.

In mid-February 2011, amid widespread popular demonstrations seeking governmental reform in the neighboring countries of Tunisia and Egypt, as well as elsewhere in the Middle East and North Africa, protests began in Libya against the autocratic government of Colonel Muammar Qadhafi, who has ruled Libya since taking power

in a 1969 coup. Qadhafi moved swiftly in an attempt to end the protests using military force. Some Libyan government officials and elements of the Libyan military left the Qadhafi regime, and by early March, Qadhafi had lost control over much of the eastern part of the country, including the city of Benghazi. The Libyan government's operations against its opponents reportedly included strafing of protesters and shelling, bombing, and other violence deliberately targeting civilians. Many refugees fled to Egypt and other neighboring countries to escape the violence, creating a serious crisis in the region.

On February 26, 2011, the United Nations Security Council ("UNSC") unanimously adopted Resolution 1970, which "[e]xpress[ed] grave concern at the situation in the Libyan Arab Jamahiriya," "condemn[ed] the violence and use of force against civilians," and "[d]eplor[ed] the gross and systematic violation of human rights" in Libya. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187/Rev. 1 (Feb. 26, 2011). The resolution called upon member states, among other things, to take "the necessary measures" to prevent arms transfers "from or through their territories or by their nationals, or using their flag vessels or aircraft"; to freeze the assets of Qadhafi and certain other close associates of the regime; and to "facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance" in Libya. S.C. Res. 1970, ¶¶ 9, 17, 26. The resolution did not, however, authorize members of the United Nations to use military force in Libya. [*2]

The Libyan government's violence against civilians continued, and even escalated, despite condemnation by the UNSC and strong expressions of disapproval from other regional and international bodies. *See, e.g.*, African Union, Communique of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV) (Mar. 10, 2011) (describing the "prevailing situation in Libya" as "pos[ing] a serious threat to peace and security in that country and in

the region as a whole" and "[r]eiterat[ing] AU's strong and unequivocal condemnation of the indiscriminate use of force and lethal weapons"); News Release, Organization of the Islamic Conference, OIC General Secretariat Condemns Strongly the Excessive Use of Force Against Civilians in the Libyan Jamahiriya (Feb. 22, 2011), *available at* http://www.oic-oci.org/ topic_detail.asp?t_id=4947&x_key= (reporting that "the General Secretariat of the Organization of the Islamic Conference (OIC) voiced its strong condemnation of the excessive use of force against civilians in the Arab Libyan Jamahiriya"). On March 1, 2011, the United States Senate passed by unanimous consent Senate Resolution 85. Among other things, the Resolution "strongly condemn[ed] the gross and systematic violations of human rights in Libya, including violent attacks on protesters demanding democratic reforms," "call[ed] on Muammar Gadhafi to desist from further violence," and "urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory." S. Res. 85, 112th Cong. §§ 2, 3, 7 (as passed by Senate, Mar. 1, 2011). On March 12, the Council of the League of Arab States similarly called on the UNSC "to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation" and "to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States." League of Arab States, The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in Its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position, Res. No. 7360, ¶ 1 (Mar. 12, 2011).

By March 17, 2011, Qadhafi's forces were preparing to retake the city of Benghazi. Pledging that his forces would begin an assault on the city that night and show "no mercy and no pity" to those who would not give up resistance, Qadhafi stated in a radio address: "We will come house by house, room by room. It's over. The issue has been decided." *See* Dan Bilefsky & Mark Landler, *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. Times, Mar. 18, 2011, at A1.

Qadhafi, President Obama later noted, "compared [his people] to rats, and threatened to go door to door to inflict punishment. . . . We knew that if we . . . waited one more day, Benghazi, a city nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world." Press Release, Office of the Press Secretary, The White House, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011) ("Obama March 28, 2011 Address"), *available at* http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya.

Later the same day, the UNSC addressed the situation in Libya again by adopting, by a vote of 10-0 (with five members abstaining), Resolution 1973, which imposed a no-fly zone and authorized the use of military force to protect civilians. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); Press Release, Security Council, Security Council Approves 'No- Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011). In this resolution, [*3] the UNSC determined that the "situation" in Libya "continues to constitute a threat to international peace and security" and "demand[ed] the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians." S.C. Res. 1973. Resolution 1973 authorized member states, acting individually or through regional organizations, "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory." *Id.* ¶ 4. The resolution also specifically authorized member states to enforce "a ban on all [unauthorized] flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians" and to take "all measures commensurate to the specific circumstances" to inspect vessels on the high seas suspected of violating the arms embargo imposed on Libya by Resolution 1970. *Id.* ¶¶ 6-8, 13.

In remarks on March 18, 2011, President Obama stated that, to avoid military intervention to enforce Resolution 1973, Qadhafi

needed to: implement an immediate ceasefire, including by ending all attacks on civilians; halt his troops' advance on Benghazi; pull his troops back from three other cities; and establish water, electricity, and gas supplies to all areas. Press Release, Office of the Press Secretary, The White House, Remarks by the President on the Situation in Libya (Mar. 18, 2011) ("Obama March 18, 2011 Remarks"), *available at* http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya. The President also identified several national interests supporting United States involvement in the planned operations:

> Now, here is why this matters to us. Left unchecked, we have every reason to believe that Qaddafi would commit atrocities against his people. Many thousands could die. A humanitarian crisis would ensue. The entire region could be destabilized, endangering many of our allies and partners. The calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be overrun. Moreover, the words of the international community would be rendered hollow.

Id. President Obama further noted the broader context of the Libyan uprising, describing it as "just one more chapter in the change that is unfolding across the Middle East and North Africa." *Id.*

Despite a statement from Libya's Foreign Minister that Libya would honor the requested ceasefire, the Libyan government continued to conduct offensive operations, including attacks on civilians and civilian-populated areas. *See* Press Release, Office of the Press Secretary, The White House, Letter from the President Regarding Commencement of Operations in Libya: Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 21, 2011) ("Obama March 21, 2011 Report to Congress"), *available at* http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya. In response, on March 19, 2011, the United States, with the support of a number of its coalition partners, launched airstrikes against Libyan targets to enforce Resolution 1973. Consistent with the reporting provisions of the

War Powers Resolution, 50 U.S.C. § 1543(a) (2006), President Obama provided a report to Congress less than forty-eight hours later, on March 21, 2011. The President explained: [*4]

> At approximately 3:00 p.m. Eastern Daylight Time, on March 19, 2011, at my direction, U.S. military forces commenced operations to assist an international effort authorized by the United Nations (U.N.) Security Council and undertaken with the support of European allies and Arab partners, to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya. As part of the multilateral response authorized under U.N. Security Council Resolution 1973, U.S. military forces, under the command of Commander, U.S. Africa Command, began a series of strikes against air defense systems and military airfields for the purposes of preparing a no-fly zone. These strikes will be limited in their nature, duration, and scope. Their purpose is to support an international coalition as it takes all necessary measures to enforce the terms of U.N. Security Council Resolution 1973. These limited U.S. actions will set the stage for further action by other coalition partners.

Obama March 21, 2011 Report to Congress. The report then described the background to the strikes, including UNSC Resolution 1973, the demand for a ceasefire, and Qadhafi's continued attacks.

The March 21 report also identified the risks to regional and international peace and security that, in the President's judgment, had justified military intervention:

> Qadhafi's continued attacks and threats against civilians and civilian populated areas are of grave concern to neighboring Arab nations and, as expressly stated in U.N. Security Council Resolution 1973, constitute a threat to the region and to international peace and security. His illegitimate use of force not only is causing the deaths of substantial numbers of civilians among his own people, but also is forcing many others to flee to neighboring countries, thereby destabilizing the peace and security of the region. Left unaddressed, the growing instability in Libya could ignite wid-

> er instability in the Middle East, with dangerous consequences to the national security interests of the United States. Qadhafi's defiance of the Arab League, as well as the broader international community . . . represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region. Qadhafi has forfeited his responsibility to protect his own citizens and created a serious need for immediate humanitarian assistance and protection, with any delay only putting more civilians at risk.

Id. Emphasizing that "[t]he United States has not deployed ground forces into Libya," the President explained that "United States forces are conducting a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster" and [*5] thus had targeted only "the Qadhafi regime's air defense systems, command and control structures, and other capabilities of Qadhafi's armed forces used to attack civilians and civilian populated areas." *Id.* The President also indicated that "[w]e will seek a rapid, but responsible, transition of operations to coalition, regional, or international organizations that are postured to continue activities as may be necessary to realize the objectives of U.N. Security Council Resolutions 1970 and 1973." *Id.* As authority for the military operations in Libya, President Obama invoked his "constitutional authority to conduct U.S. foreign relations" and his authority "as Commander in Chief and Chief Executive." *Id.*

Before the initiation of military operations in Libya, White House and other executive branch officials conducted multiple meetings and briefings on Libya with members of Congress and testified on the Administration's policy at congressional hearings. *See* Press Release, Office of the Press Secretary, Press Gaggle by Press Secretary Jay Carney (Mar. 24, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/24/press-gaggle-press-secretary-jay-carney-3242011. President Obama invited Republican and Democratic leaders of Congress to the White House for consultation on March 18, 2011 before launching United States military operations, *see id.*, and personally briefed members of Congress on the ongoing operations on March 25, 2011. Press Release, Office of the

Press Secretary, Readout of the President's Meeting with Members of Congress on Libya (Mar. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/25/readout-presidents-meeting-members-congress-libya. Senior executive branch officials are continuing to brief Senators and members of Congress on U.S. operations and events in Libya as they develop.

On March 28, 2011, President Obama addressed the nation regarding the situation in Libya. The President stated that the coalition had succeeded in averting a massacre in Libya and that the United States was now transferring "the lead in enforcing the no-fly zone and protecting civilians on the ground . . . to our allies and partners." Obama March 28, 2011 Address. In future coalition operations in Libya, the President continued, "the United States will play a supporting role – including intelligence, logistical support, search and rescue assistance, and capabilities to jam regime communications." *Id.* The President also reiterated the national interests supporting military action by the United States. "[G]iven the costs and risks of intervention," he explained, "we must always measure our interests against the need for action." *Id.* But, "[i]n this particular country – Libya – at this particular moment, we were faced with the prospect of violence on a horrific scale," and "[w]e had a unique ability to stop that violence." *Id.* Failure to prevent a slaughter would have disregarded America's "important strategic interest in preventing Qaddafi from overrunning those who oppose him":

> A massacre would have driven thousands of additional refugees across Libya's borders, putting enormous strains on the peaceful – yet fragile – transitions in Egypt and Tunisia. The democratic impulses that are dawning across the region would be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power. The writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security. So while I will never minimize the costs involved in military action, I am [*6] convinced that a failure to act in Libya would have carried a far greater price for America.

Id. As of March 31, 2011, the United States had transferred responsibility for all ongoing coalition military operations in Libya to the North Atlantic Treaty Alliance ("NATO").

II.

The President explained in his March 21, 2011 report to Congress that the use of military force in Libya serves important U.S. interests in preventing instability in the Middle East and preserving the credibility and effectiveness of the United Nations Security Council. The President also stated that he intended the anticipated United States military operations in Libya to be limited in nature, scope, and duration. The goal of action by the United States was to "set the stage" for further action by coalition partners in implementing UNSC Resolution 1973, particularly through destruction of Libyan military assets that could either threaten coalition aircraft policing the UNSC-declared no-fly zone or engage in attacks on civilians and civilian-populated areas. In addition, no U.S. ground forces would be deployed, except possibly for any search and rescue missions, and the risk of substantial casualties for U.S. forces would be low. As we advised you prior to the commencement of military operations, we believe that, under these circumstances, the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval.

A.

Earlier opinions of this Office and other historical precedents establish the framework for our analysis. As we explained in 1992, Attorneys General and this Office "have concluded that the President has the power to commit United States troops abroad," as well as to "take military action," "for the purpose of protecting important national interests," even without specific prior authorization from Congress. *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9 (1992) ("*Military Forces in Somalia*"). This independent authority of the President, which exists at least insofar as

Congress has not specifically restricted it, *see Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 176 n.4, 178 (1994) ("*Haiti Deployment*"), derives from the President's "unique responsibility," as Commander in Chief and Chief Executive, for "foreign and military affairs," as well as national security. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); U.S. Const. art. II, § 1, cl. 1, § 2, cl. 2.

The Constitution, to be sure, divides authority over the military between the President and Congress, assigning to Congress the authority to "declare War," "raise and support Armies," and "provide and maintain a Navy," as well as general authority over the appropriations on which any military operation necessarily depends. U.S. Const. art. I, § 8, cl. 1, 11-14. Yet, under "the historical gloss on the 'executive Power' vested in Article II of the Constitution," the President bears the "'vast share of responsibility for the conduct of our foreign relations,'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)), and accordingly holds "independent authority 'in the areas of foreign policy and national security.'" *Id.* at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); *see also, e.g.*, *Youngstown Sheet & Tube Co.*, 343 U.S. [*7] at 635-36 n.2 (Jackson, J., concurring) (noting President's constitutional power to "act in external affairs without congressional authority"). Moreover, the President as Commander in Chief "superintend[s] the military," *Loving v. United States*, 517 U.S. 748, 772 (1996), and "is authorized to direct the movements of the naval and military forces placed by law at his command." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); *see also Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 184 (1996). The President also holds "the implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action," given that imminent national security threats and rapidly evolving military and diplomatic circumstances may require a swift response by the United States without the opportunity for congressional deliberation and action. *Presidential Power to Use the Armed Forces Abroad Without Statutory Authoriza-*

tion, 4A Op. O.L.C. 185, 187 (1980) ("*Presidential Power*"); *see also Haig*, 453 U.S. at 292 (noting "'the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature'" (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). Accordingly, as Attorney General (later Justice) Robert Jackson observed over half a century ago, "the President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941).

This understanding of the President's constitutional authority reflects not only the express assignment of powers and responsibilities to the President and Congress in the Constitution, but also, as noted, the "historical gloss" placed on the Constitution by two centuries of practice. *Garamendi*, 539 U.S. at 414. "Our history," this Office observed in 1980, "is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval." *Presidential Power*, 4A Op. O.L.C. at 187; *see generally* Richard F. Grimmett, Cong. Research Serv., R41677, *Instances of Use of United States Armed Forces Abroad, 1798-2010* (2011). Since then, instances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia (1999), without specific prior authorizing legislation. *See* Grimmett, *supra*, at 13-31. This historical practice is an important indication of constitutional meaning, because it reflects the two political branches' practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense, and because "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig*, 453 U.S. at 292. In this con-

text, the "pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, 'evidences the existence of broad constitutional power.'" *Haiti Deployment*, 18 Op. O.L.C. at 178 (quoting *Presidential Power*, 4A Op. O.L.C. at 187); *see also Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 330-31 (1995) ("*Proposed Bosnia Deployment*") (noting that "[t]he scope and limits" of Congress's power to declare war "are not well defined by constitutional text, case law, or statute," but the relationship between that power and the President's authority as Commander in Chief and Chief Executive has been instead "clarified by 200 years of practice"). [*8]

Indeed, Congress itself has implicitly recognized this presidential authority. The War Powers Resolution ("WPR"), 50 U.S.C. §§ 1541-1548 (2006), a statute Congress described as intended "to fulfill the intent of the framers of the Constitution of the United States," *id.* § 1541(a), provides that, in the absence of a declaration of war, the President must report to Congress within 48 hours of taking certain actions, including introduction of U.S. forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." *Id.* § 1543(a). The Resolution further provides that the President generally must terminate such use of force within 60 days (or 90 days for military necessity) unless Congress extends this deadline, declares war, or "enact[s] a specific authorization." *Id.* § 1544(b). As this Office has explained, although the WPR does not itself provide affirmative statutory authority for military operations, *see id.* § 1547(d)(2), the Resolution's "structure . . . recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces" into hostilities or circumstances presenting an imminent risk of hostilities. *Haiti Deployment*, 18 Op. O.L.C. at 175; *see also Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334. That structure – requiring a report within 48 hours after the start of hostilities and their termination within 60 days after that – "makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress." *Haiti Deployment*, 18 Op.

O.L.C. at 175-76; *see also Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334-35.[1]

We have acknowledged one possible constitutionally-based limit on this presidential authority to employ military force in defense of important national interests – a planned military engagement that constitutes a "war" within the meaning of the Declaration of War Clause may require prior congressional authorization. *See Proposed Bosnia Deployment*, 19 Op. O.L.C. at 331; *Haiti Deployment*, 18 Op. O.L.C. at 177. But the historical practice of presidential military action without congressional approval precludes any suggestion that Congress's authority to declare war covers every military engagement, however limited, that the President initiates. In our view, determining whether a particular planned engagement constitutes a "war" for constitutional purposes instead requires a fact-specific assessment of the "anticipated nature, scope, and duration" of the planned military operations. *Haiti Deployment*, 18 Op. O.L.C. at 179. This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period. Again, Congress's own key enactment on the subject reflects this understanding. By allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it

[1] A policy statement in the WPR states that "[t]he constitutional powers of the President as Commander-in- Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c). But this policy statement "is not to be viewed as limiting presidential action in any substantive manner." *Presidential Power*, 4A Op. O.L.C. at 190. The conference committee report accompanying the WPR made clear that "[s]ubsequent sections of the [Resolution] are not dependent upon the language of" the policy statement. H.R. Rep. No. 93-547, at 8 (1973). Moreover, in a later, operative provision, the Resolution makes clear that nothing in it "is intended to alter the constitutional authority . . . of the President." 50 U.S.C. § 1547(d). As demonstrated by U.S. military interventions in Somalia, Haiti, Bosnia, and Kosovo, among many other examples, "the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution." *Proposed Bosnia Deployment*, 19 Op. O.LC. at 335; *see also Haiti Deployment*, 18 Op. O.L.C. at 176 & n.3.

considers congressional authorization most critical [*9] for "major, prolonged conflicts such as the wars in Vietnam and Korea," not more limited engagements. *Id.* at 176.

Applying this fact-specific analysis, we concluded in 1994 that a planned deployment of up to 20,000 United States troops to Haiti to oust military leaders and reinstall Haiti's legitimate government was not a "war" requiring advance congressional approval. *Id.* at 174 n.1, 178-79 & n.10; *see also Address to the Nation on Haiti*, 30 Weekly Comp. Pres. Doc. 1799 (Sept. 18, 1994); Maureen Taft-Morales & Clare Ribando Seelke, Cong. Research Serv., RL32294, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns* 4 (2008). "In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary," we observed, "the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment." *Haiti Deployment*, 18 Op. O.L.C. at 179. Similarly, a year later we concluded that a proposed deployment of approximately 20,000 ground troops to enforce a peace agreement in Bosnia and Herzegovina also was not a "war," even though this deployment involved some "risk that the United States [would] incur (and inflict) casualties." *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. For more than two years preceding this deployment, the United States had undertaken air operations over Bosnia to enforce a UNSC-declared "no-fly zone," protect United Nations peacekeeping forces, and secure "safe areas" for civilians, including one two-week operation in which NATO attacked hundreds of targets and the United States alone flew over 2300 sorties – all based on the President's "constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive," without a declaration of war or other specific prior approval from Congress. *Letter to Congressional Leaders Reporting on the Deployment of United States Aircraft to Bosnia-Herzegovina*, 1995 Pub. Papers of William J. Clinton 1279, 1280 (Sept. 1, 1995); *see also, e.g.*, *Letter to Congressional Leaders on Bosnia*,

30 Weekly Comp. Pres. Doc. 2431, 2431 (Nov. 22, 1994); *Letter to Congressional Leaders on Bosnia- Herzegovina*, 30 Weekly Comp. Pres. Doc. 1699, 1700 (Aug. 22, 1994); *Letter to Congressional Leaders on Protection of United Nations Personnel in Bosnia-Herzegovina*, 30 Weekly Comp. Pres. Doc. 793, 793 (Apr. 12, 1994); *Letter to Congressional Leaders Reporting on NATO Action in Bosnia*, 30 Weekly Comp. Pres. Doc. 406, 406 (Mar. 1, 1994); *Letter to Congressional Leaders on the Conflict in the Former Yugoslavia*, 30 Weekly Comp. Pres. Doc. 324, 325 (Feb. 17, 1994); *Letter to Congressional Leaders Reporting on the No-Fly Zone Over Bosnia*, 29 Weekly Comp. Pres. Doc. 586, 586 (Apr. 13, 1993); *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 328-29; *Deliberate Force: A Case Study in Effective Air Campaigning* 334, 341-44 (Col. Robert C. Owen, ed., 2000), *available at* http://purl.access.gpo.gov/GPO/LPS20446. This Office acknowledged that "deployment of 20,000 troops *on the ground* is an essentially different, and more problematic, type of intervention," than air or naval operations because of the increased risk of United States casualties and the far greater difficulty of withdrawing United States ground forces. But we nonetheless concluded that the anticipated risks were not sufficient to make the deployment a "'war' in any sense of the word." *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333-34. [*10]

B.

Under the framework of these precedents, the President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.

In prior opinions, this Office has identified a variety of national interests that, alone or in combination, may justify use of military force by the President. In 2004, for example, we found adequate

legal authority for the deployment of U.S. forces to Haiti based on national interests in protecting the lives and property of Americans in the country, preserving "regional stability," and maintaining the credibility of United Nations Security Council mandates. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Deployment of United States Armed Forces to Haiti* at 3-4 (Mar. 17, 2004) ("2004 Haiti Opinion"), *available at* http://www.justice.gov/olc/[The original piece includes a space here, which I believe is a typo]opinions.htm. In 1995, we similarly concluded that the President's authority to deploy approximately 20,000 ground troops to Bosnia, for purposes of enforcing a peace agreement ending the civil war there, rested on national interests in completing a "pattern of inter-allied cooperation and assistance" established by prior U.S. participation in NATO air and naval support for peacekeeping efforts, "preserving peace in the region and forestalling the threat of a wider conflict," and maintaining the credibility of the UNSC. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332-33. And in 1992, we explained the President's authority to deploy troops in Somalia in terms of national interests in providing security for American civilians and military personnel involved in UNSC- supported humanitarian relief efforts and (once again) enforcing UNSC mandates. *Military Forces in Somalia*, 16 Op. O.L.C. at 10-12.[2]

In our view, the combination of at least two national interests that the President reasonably determined were at stake here – preserving regional stability and supporting the UNSC's credibility and effectiveness – provided a sufficient basis for the President's exercise of his constitutional authority to order the use of military force.[3] First, the United States has a strong national security and

[2] As these examples make clear, defense of the United States to repel a direct and immediate military attack is by no means the only basis on which the President may use military force without congressional authorization. Accordingly, the absence of an immediate self-defense interest does not mean that the President lacked authority for the military operations in Libya.

[3] Although President Obama has expressed opposition to Qadhafi's continued leadership of Libya, we understand that regime change is not an objective of the coalition's military operations. *See* Obama March 28, 2011 Address ("Of course, there is no question that

foreign policy interest in security and stability in the Middle East that was threatened by Qadhafi's actions in Libya. As noted, we recognized similar regional stability interests as justifications for presidential military actions in Haiti and Bosnia. With respect to Haiti, we found "an obvious interest in maintaining peace and stability," "[g]iven the [*11] proximity of Haiti to the United States," and particularly considering that "past instances of unrest in Haiti have led to the mass emigration of refugees attempting to reach the United States." 2004 Haiti Opinion at 3. In the case of Bosnia, we noted (quoting prior statements by President Clinton justifying military action) the longstanding commitment of the United States to the "'principle that the security and stability of Europe is of fundamental interest to the United States,'" and we identified, as justification for the military action, the President's determination that "[i]f the war in the former Yugoslavia resumes, 'there is a very real risk that it could spread beyond Bosnia, and involve Europe's new democracies as well as our NATO allies.'" *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. In addition, in another important precedent, President Clinton justified extensive airstrikes in the Federal Republic of Yugoslavia ("FRY") in 1999 – military action later ratified by Congress but initially conducted without specific authorization, *see Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327 (2000) – based on concerns about the threat to regional security created by that government's repressive treatment of the ethnic Albanian population in Kosovo. "The FRY government's violence," President Clinton explained, "creates a conflict with no natural boundaries, pushing refugees across borders and potentially drawing in neighboring countries. The Kosovo region is a tinderbox that could ignite a wider European war with dangerous consequences to the United States." *Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and*

Libya – and the world – would be better off with Qaddafi out of power. I . . . will actively pursue [that goal] through non-military means. But broadening our military mission to include regime change would be a mistake."). We therefore do not consider any national interests relating to regime change in assessing the President's legal authority to order military operations in Libya.

Montenegro), 35 Weekly Comp. Pres. Doc. 527, 527 (Mar. 26, 1999).

As his statements make clear, President Obama determined in this case that the Libyan government's actions posed similar risks to regional peace and security. Much as violence in Bosnia and Kosovo in the 1990s risked creating large refugee movements, destabilizing neighboring countries, and inviting wider conflict, here the Libyan government's "illegitimate use of force . . . [was] forcing many [civilians] to flee to neighboring countries, thereby destabilizing the peace and security of the region." Obama March 21, 2011 Report to Congress. "Left unaddressed," the President noted in his report to Congress, "the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States." *Id.* Without outside intervention, Libya's civilian population faced a "humanitarian catastrophe," *id.*; as the President put it on another occasion, "innocent people" in Libya were "being brutalized" and Qadhafi "threaten[ed] a bloodbath that could destabilize an entire region." Press Release, Office of the Press Secretary, The White House, Weekly Address: President Obama Says the Mission in Libya is Succeeding (Mar. 26, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/26/weekly-address-president-obama-says-mission-libya-succeeding. The risk of regional destabilization in this case was also recognized by the UNSC, which determined in Resolution 1973 that the "situation" in Libya "constitute[d] a threat to international peace and security." S.C. Res. 1973. As this Office has previously observed, "[t]he President is entitled to rely on" such UNSC findings "in making his determination that the interests of the United States justify providing the military assistance that [the UNSC resolution] calls for." *Military Forces in Somalia*, 16 Op. O.L.C. at 12.[4] [*12]

Qadhafi's actions not only endangered regional stability by in-

[4] We note, however, that, at least for purposes of domestic law, a Security Council resolution is "not required as a precondition for Presidential action." *Military Forces in Somalia*, 16 Op. O.L.C. at 7. Rather, as we explained in 2004, "in exercising his authority as Commander in Chief and Chief Executive, the President [may] choose to take" the UNSC resolution into account "in evaluating the foreign policy and national security interests of the United States that are at stake." 2004 Haiti Opinion at 4.

creasing refugee flows and creating a humanitarian crisis, but, if unchecked, also could have encouraged the repression of other democratic uprisings that were part of a larger movement in the Middle East, thereby further undermining United States foreign policy goals in the region. Against the background of widespread popular unrest in the region, events in Libya formed "just one more chapter in the change that is unfolding across the Middle East and North Africa." Obama March 18, 2011 Remarks. Qadhafi's campaign of violence against his own country's citizens thus might have set an example for others in the region, causing "[t]he democratic impulses that are dawning across the region [to] be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power." Obama March 28, 2011 Address. At a minimum, a massacre in Libya could have imperiled transitions to democratic government underway in neighboring Egypt and Tunisia by driving "thousands of additional refugees across Libya's borders." *Id.* Based on these factors, we believe the President could reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region.

The second important national interest implicated here, which reinforces the first, is the longstanding U.S. commitment to maintaining the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security. Since at least the Korean War, the United States government has recognized that "'[t]he continued existence of the United Nations as an effective international organization is a paramount United States interest.'" *Military Forces in Somalia*, 16 Op. O.L.C. at 11 (quoting *Authority of the President to Repel the Attack in Korea*, 23 Dep't St. Bull. 173, 177 (1950)). Accordingly, although of course the President is not required to direct the use of military force simply because the UNSC has authorized it, this Office has recognized that "'maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest'" on which the President may rely in determining that U.S. interests jus-

tify the use of military force. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333 (quoting *Military Forces in Somalia*, 16 Op. O.L.C. at 11). Here, the UNSC's credibility and effectiveness as an instrument of global peace and stability were at stake in Libya once the UNSC took action to impose a no-fly zone and ensure the safety of civilians – particularly after Qadhafi's forces ignored the UNSC's call for a cease fire and for the cessation of attacks on civilians. As President Obama noted, without military action to stop Qadhafi's repression, "[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security." Obama March 28, 2011 Address; *see also* Obama March 21, 2011 Report to Congress ("Qadhafi's defiance of the Arab League, as well as the broader international community . . . represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region."). We think the President could legitimately find that military action by the United States to assist the international coalition in giving effect to UNSC Resolution 1973 was needed to secure "a substantial national foreign policy objective." *Military Forces in Somalia*, 16 Op. O.L.C. at 12.

We conclude, therefore, that the use of military force in Libya was supported by sufficiently important national interests to fall within the President's constitutional power. At the same time, turning to the second element of the analysis, we do not believe that [*13] anticipated United States operations in Libya amounted to a "war" in the constitutional sense necessitating congressional approval under the Declaration of War Clause. This inquiry, as noted, is highly fact-specific and turns on no single factor. *See Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334 (reaching conclusion based on specific "circumstances"); *Haiti Deployment*, 18 Op. O.L.C. at 178 (same). Here, considering all the relevant circumstances, we believe applicable historical precedents demonstrate that the limited military operations the President anticipated directing were not a "war" for constitutional purposes.

As in the case of the no-fly zone patrols and periodic airstrikes in Bosnia before the deployment of ground troops in 1995 and the

NATO bombing campaign in connection with the Kosovo conflict in 1999 – two military campaigns initiated without a prior declaration of war or other specific congressional authorization – President Obama determined that the use of force in Libya by the United States would be limited to airstrikes and associated support missions; the President made clear that "[t]he United States is not going to deploy ground troops in Libya." Obama March 18, 2011 Remarks. The planned operations thus avoided the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces – two factors that this Office has identified as "arguably" indicating "a greater need for approval [from Congress] at the outset," to avoid creating a situation in which "Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed." *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. Furthermore, also as in prior operations conducted without a declaration of war or other specific authorizing legislation, the anticipated operations here served a "limited mission" and did not "aim at the conquest or occupation of territory." *Id.* at 332. President Obama directed United States forces to "conduct[] a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster"; American airstrikes accordingly were to be "limited in their nature, duration, and scope." Obama March 21, 2011 Report to Congress. As the President explained, "we are not going to use force to go beyond [this] well-defined goal." Obama March 18, 2011 Remarks. And although it might not be true here that "the risk of sustained military conflict was negligible," the anticipated operations also did not involve a "preparatory bombardment" in anticipation of a ground invasion – a form of military operation we distinguished from the deployment (without preparatory bombing) of 20,000 U.S. troops to Haiti in concluding that the latter operation did not require advance congressional approval. *Haiti Deployment*, 18 Op. O.L.C. at 176, 179. Considering the historical practice of even intensive military action – such as the 17-day-long 1995 campaign of NATO airstrikes in Bosnia and some two months of bombing in Yugoslavia in 1999 – without specific prior congressional approval, as

well as the limited means, objectives, and intended duration of the anticipated operations in Libya, we do not think the "anticipated nature, scope, and duration" of the use of force by the United States in Libya rose to the level of a "war" in the constitutional sense, requiring the President to seek a declaration of war or other prior authorization from Congress. [*14]

Accordingly, we conclude that President Obama could rely on his constitutional power to safeguard the national interest by directing the anticipated military operations in Libya – which were limited in their nature, scope, and duration – without prior congressional authorization.

/s/
CAROLINE D. KRASS
Principal Deputy Assistant Attorney General

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

John A. Boehner, House of Representatives Resolution

June 2, 2011*

.....
(Original Signature of Member)

112TH CONGRESS
1ST SESSION

H. RES. ___

Declaring that the President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. BOEHNER submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Declaring that the President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya, and for other purposes.

Resolved,

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* Editors' note: The running header in the original is "F:\M12\BOEHNE\BOEHNE_002.XML" and the running footer is "f:\VHLC\060211\060211.193.xml (499207|2) June 2, 2011 (4:33 p.m.)".

SECTION 1. STATEMENTS OF POLICY.

The House of Representatives makes the following statements of policy:

(1) The United States Armed Forces shall be used exclusively to defend and advance the national security interests of the United States. [*2]

(2) The President has failed to provide Congress with a compelling rationale based upon United States national security interests for current United States military activities regarding Libya.

(3) The President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya unless the purpose of the presence is to rescue a member of the Armed Forces from imminent danger.

SEC. 2. TRANSMITTAL OF EXECUTIVE BRANCH INFORMATION RELATING TO OPERATION ODYSSEY DAWN AND OPERATION UNIFIED PROTECTOR.

The House of Representatives directs the Secretary of State, the Secretary of Defense, and the Attorney General, respectively, to transmit to the House of Representatives, not later than 14 days after the date of the adoption of this resolution, copies of any official document, record, memo, correspondence, or other communication in the possession of each officer that was created on or after February 15, 2011, and refers or relates to–

(1) consultation or communication with Congress regarding the employment or deployment of the United States Armed Forces for Operation Od-[*3]yssey Dawn or NATO Operation Unified Protector; or

(2) the War Powers Resolution and Operation Odyssey Dawn or Operation Unified Protector.

SEC. 3. REPORT TO HOUSE OF REPRESENTATIVES.

(a) CONTENTS.–Not later than 14 days after the date of the adop-

tion of this resolution, the President shall transmit to the House of Representatives a report describing in detail United States security interests and objectives, and the activities of United States Armed Forces, in Libya since March 19, 2011, including a description of the following:

(1) The President's justification for not seeking authorization by Congress for the use of military force in Libya.

(2) United States political and military objectives regarding Libya, including the relationship between the intended objectives and the operational means being employed to achieve them.

(3) Changes in United States political and military objectives following the assumption of command by the North Atlantic Treaty Organization (NATO).

(4) Differences between United States political and military objectives regarding Libya and those of [*4] other NATO member states engaged in military activities.

(5) The specific commitments by the United States to ongoing NATO activities regarding Libya.

(6) The anticipated scope and duration of continued United States military involvement in support of NATO activities regarding Libya.

(7) The costs of United States military, political, and humanitarian efforts concerning Libya as of June 3, 2011.

(8) The total projected costs of United States military, political, and humanitarian efforts concerning Libya.

(9) The impact on United States activities in Iraq and Afghanistan.

(10) The role of the United States in the establishment of a political structure to succeed the current Libyan regime.

(11) An assessment of the current military capacity of opposition forces in Libya.

(12) An assessment of the ability of opposition forces in Libya to establish effective military and political control of Libya and a practicable timetable for accomplishing these objectives. [*5]

(13) An assessment of the consequences of a cessation of United States military activities on the viability of continued NATO operations regarding Libya and on the continued viability of groups opposing the Libyan regime.

(14) The composition and political agenda of the Interim Transitional National Council (ITNC) and its representation of the views of the Libyan people as a whole.

(15) The criteria to be used to determine United States recognition of the ITNC as the representative of the Libyan people, including the role of current and former members of the existing regime.

(16) Financial resources currently available to opposition groups and United States plans to facilitate their access to seized assets of the Libyan regime and proceeds from the sale of Libyan petroleum.

(17) The relationship between the ITNC and the Muslim Brotherhood, the members of the Libyan Islamic Fighting Group, al-Qaeda, Hezbollah, and any other group that has promoted an agenda that would negatively impact United States interests. [*6]

(18) Weapons acquired for use, and operations initiated, in Libya by the Muslim Brotherhood, the members of the Libyan Islamic Fighting Group, al-Qaeda, Hezbollah, and any other group that has promoted an agenda that would negatively impact United States interests.

(19) The status of the 20,000 MANPADS cited by the Commander of the U.S. Africa Command, as well as Libya's SCUD-Bs and chemical munitions, including mustard gas.

(20) Material, communication, coordination, financing and other forms of support between and among al-Qaeda operatives, its affiliates, and supporters in Yemen, the Horn of Africa, and North Africa.

(21) Contributions by Jordan, the United Arab Emirates, Qatar, and other regional states in support of NATO activities in Libya.

(b) TRANSMITTAL.–The report required by this section shall be

submitted in unclassified form, with a classified annex, as deemed necessary.

SEC. 4. FINDINGS.

(a) The President has not sought, and Congress has not provided, authorization for the introduction or contin-[*7]ued involvement of the United States Armed Forces in Libya.

(b) Congress has the constitutional prerogative to withhold funding for any unauthorized use of the United States Armed Forces, including for unauthorized activities regarding Libya.

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

John F. Kerry et al., Senate Joint Resolution 20

June 21, 2011

.....
(Original Signature of Member)

112TH CONGRESS
1ST SESSION

S.J. RES. 20

Authorizing the limited use of the United States Armed Forces in support of the NATO mission in Libya.

IN THE SENATE OF THE UNITED STATES

JUNE 21 (legislative day, JUNE 16), 2011

Mr. KERRY (for himself, Mr. MCCAIN, Mr. LEVIN, Mr. KYL, Mr. DURBIN, Mrs. FEINSTEIN, Mr. GRAHAM, Mr. LIEBERMAN, Mr. BLUNT, Mr. CARDIN, and Mr. KIRK) introduced the following joint resolution; which was read twice and referred to the Committee on Foreign Relations

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JOINT RESOLUTION

Authorizing the limited use of the United States Armed Forces in support of the NATO mission in Libya.

Whereas peaceful demonstrations that began in Libya, inspired by similar movements in Tunisia, Egypt, and elsewhere in the Middle East, quickly spread to cities around the country, calling for greater political reform, opportunity, justice, and the rule of law.

Whereas Muammar Qaddafi, his sons, and forces loyal to them re-

sponded to the peaceful demonstrations by authorizing and initiating violence against civilian non-combatants in Libya, including the use of airpower and foreign mercenaries; [*2]

Whereas, on February 25, 2011, President Barack Obama imposed unilateral economic sanctions on, and froze the assets of, Muammar Qaddafi and his family, as well as the Government of Libya and its agencies to hold the Qaddafi regime accountable for its continued use of violence against unarmed civilians and its human rights abuses and to safeguard the assets of the people of Libya;

Whereas, on February 26, 2011, the United Nations Security Council passed Resolution 1970, which mandates international economic sanctions and an arms embargo;

Whereas, in response to Qaddafi's assault on civilians in Libya, a "no-fly zone" in Libya was called for by the Gulf Cooperation Council on March 7, 2011; by the head of the Organization of the Islamic Conference on March 8, 2011; and by the Arab League on March 12, 2011;

Whereas Qaddafi's advancing forces, after recapturing cities in eastern Libya that had been liberated by the Libyan opposition, were preparing to attack Benghazi, a city of 700,000 people and the seat of the opposition government in Libya, the Interim Transitional National Council;

Whereas Qaddafi stated that he would show "no mercy" to his opponents in Benghazi, and that his forces would go "door to door" to find and kill dissidents;

Whereas, on March 17, 2011, the United Nations Security Council passed Resolution 1973, which mandates "all necessary measures" to protect civilians in Libya, implement a "no-fly zone", and enforce an arms embargo against the Qaddafi regime; [*3]

Whereas President Obama notified key congressional leaders in a meeting at the White House on March 18, 2011, of his intent to begin targeted military operations in Libya and made clear that the United States "is not going to deploy ground troops into Libya";

Whereas the United States Armed Forces, together with coalition partners, launched Operation Odyssey Dawn in Libya on March 19, 2011, to protect civilians in Libya from immediate danger and enforce an arms embargo and a "no-fly zone";

Whereas, on March 28, 2011, President Obama stated, "America has an important strategic interest in preventing Qaddafi from overrunning those who oppose him. A massacre would have driven thousands of additional refugees across Libya's borders, putting enormous strains on the peaceful – yet fragile – transitions in Egypt and Tunisia. The democratic impulses that are dawning across the region would be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power . . . So while I will never minimize the costs involved in military action, I am convinced that a failure to act in Libya would have carried a far greater price for America.";

Whereas, on March 31, 2011, the United States transferred authority for Operation Odyssey Dawn in Libya to NATO command, with the mission continuing as Operation Unified Protector;

Whereas, in a letter to joint bipartisan congressional leaders on May 20, 2011, President Obama expressed support for a Senate resolution on the use of force in Libya and stated that, "Since April 4, U.S. participation has consisted of: (1) non-kinetic support to the NATO-led oper-[*4]ation, including intelligence, logistical support, and search and rescue assistance (2) aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone and (3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition's efforts."; and

Whereas, on June 9, 2011, Secretary of State Hillary Clinton recognized the Transitional National Council "as the legitimate interlocutor for the Libyan people during this interim period.": Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SENSE OF CONGRESS.

It is the sense of Congress that–

(1) the men and women of the United States Armed Forces and coalition partners who are engaged in military operations to protect the people of Libya have demonstrated extraordinary bravery and should be commended;

(2) the United States Government should continue to support the aspirations of the people ofLibya for political reform and self-government based on democratic and human rights;

(3) the goal of United States policy in Libya, as stated by the President, is to achieve the departure from power of Muammar Qaddafi and his family, including through the use of diplomatic and eco-[*5]nomic pressure, so that a peaceful transition can begin to an inclusive government that ensures freedom, opportunity, andjustice for the people of Libya; and

(4) the funds of the Qaddafi regime that have been frozen by the United States should be returned to the people of Libya for their benefit, including humanitarian and reconstruction assistance, and the President should explore the possibility with the Transitional National Council of using some of such funds to reimburse NATO countries for expenses incurred in Operation Odyssey Dawn and Operation Unified Protector.

SEC. 2. AUTHORIZATION FOR THE LIMITED USE OF UNITED STATES ARMED FORCES IN LIBYA.

(a) AUTHORITY.–The President is authorized to continue the limited use of the United States Armed Forces in Libya, in support of United States national security policy interests, as part of the NATO mission to enforce United Nations Security Council Resolution 1973 (2011) as requested by the Transitional National Council, the Gulf Cooperation Council, and the Arab League.

(b) EXPIRATION OF AUTHORITY.–The authorization for such limited use of United States Armed Forces in [*6] Libya expires one year after the date of the enactment of this joint resolution.

SEC. 3. OPPOSITION TO THE USE OF UNITED STATES GROUND TROOPS.

Consistent with the policy and statements of the President, Congress does not support deploying, establishing, or maintaining the presence of units and members of the United States Armed Forces on the ground in Libya unless the purpose of the presence is limited to the immediate personal defense of United States Government officials (including diplomatic representatives) or to rescuing members of NATO forces from imminent danger.

SEC. 4. REPORTS TO CONGRESS.

The President shall consult frequently with Congress regarding United States efforts in Libya, including by providing regular briefings and reports as requested, and responding to inquiries promptly. Such briefings and reports shall include the following elements:

(1) An updated description of United States national security interests in Libya.

(2) An updated statement of United States policy objectives in Libya, both during and after Qaddafi's rule, and a detailed plan to achieve them. [*7]

(3) An updated and comprehensive list of the activities of the United States Armed Forces in Libya.

(4) An updated and detailed assessment of the groups in Libya that are opposed to the Qaddafi regime, including potential successor governments.

(5) A full and updated explanation of the President's legal and constitutional rationale for conducting military operations in Libya consistent with the War Powers Resolution (50 U.S.C. 1541 et seq.).

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Harold Hongju Koh, Testimony before the Senate Foreign Relations Committee

June 28, 2011

TESTIMONY BY LEGAL ADVISER HAROLD HONGJU KOH

U.S. Department of State
on
Libya and War Powers
Before the
Senate Foreign Relations Committee
June 28, 2011

Thank you, Mr. Chairman, Ranking Member Lugar, and members of the Committee, for this opportunity to testify before you on Libya and war powers. By so doing, I continue nearly four decades of dialogue between Congress and Legal Advisers of the State Department, since the War Powers Resolution was enacted, regarding the Executive Branch's legal position on war powers.[1]

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[1] In 1975, shortly after the enactment of the War Powers Resolution, Legal Adviser Monroe Leigh testified before Congress, and then responded to written questions, regarding the meaning and application of the Resolution. *See* Letter from State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann to Chairman Clement J. Zablocki (June 5, 1975), *reprinted in War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs of the H. Comm. on International Relations*, 94th Cong. (1975) [hereinafter "1975 Leigh-Hoffmann Letter"]. Subsequent Legal Advisers have carried on this tradition. *See, e.g.*, *War Powers Resolution: Hearings Before the S. Comm. on Foreign Relations*, 95th Cong. (1977) (testimony of Legal Adviser Herbert J. Hansell); *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int'l Security and Science of the H. Comm. on Foreign Affairs*, 99th Cong. (1986) (testimony of Legal Adviser Abraham D. Sofaer); *H. Con. Res. 82, Directing the President to Remove Armed Forces From Operations Against Yugoslavia, and H.J. Res. 44, Declaring War Between the United States and Yugoslavia: Markup Before the H. Comm. on Int'l Relations*, 106th Cong. (1999) (testimony of Principal Deputy Legal Adviser Michael J. Matheson). *Cf.* Legal Adviser Harold Hongju Koh, Statement Regarding the Use

We believe that the President is acting lawfully in Libya, consistent with both the Constitution and the War Powers Resolution, as well as with international law.[2] Our position is carefully limited to the facts of the present operation, supported by history, and respectful of both the letter of the Resolution and the spirit of consultation and collaboration that underlies it. We recognize that our approach has been a matter of important public debate, and that reasonable [*2] minds can disagree. But surely none of us believes that the best result is for Qadhafi to wait NATO out, leaving the Libyan people again exposed to his brutality. Given that, we ask that you swiftly approve Senate Joint Resolution 20, the bipartisan measure recently introduced by eleven Senators, including three members of this Committee.[3] The best way to show a united front to Qadhafi, our NATO allies, and the Libyan people is for Congress now to authorize under that Joint Resolution continued, constrained operations in Libya to enforce United Nations Security Council Resolution 1973.

As Secretary Clinton testified in March, the United States' engagement in Libya followed the Administration's strategy of "using the combined assets of diplomacy, development, and defense to protect our interests and advance our values."[4] Faced with brutal attacks and explicit threats of further imminent attacks by Muammar Qadhafi against his own people,[5] the United States and its in-

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of Force in Libya, American Society of International Law Annual Meeting (Mar. 26, 2011) (discussing "the historical practice of the Legal Adviser publicly explaining the legal basis for United States military actions that might occur in the international realm").

[2] For explanation of the lawfulness of our Libya actions under international law, see Koh, *supra* note 1.

[3] S.J. Res. 20 (introduced by Senators Kerry, McCain, Levin, Kyl, Durbin, Feinstein, Graham, Lieberman, Blunt, Cardin, and Kirk).

[4] *Hearing on FY2012 State Department Budget Before the Subcomm. on State, Foreign Operations, and Related Programs of the S. Comm. on Appropriations*, 112th Cong. (Mar. 2, 2011).

[5] Qadhafi's actions demonstrate his ongoing intent to suppress the democratic movement against him by lawlessly attacking Libyan civilians. On February 22, 2011, Qadhafi pledged on Libyan National Television to lead "millions to purge Libya inch by inch, house by house, household by household, alley by alley, and individual by individual until I purify this land." He called his opponents "rats," and said they would be executed. On March 17, 2011, in another televised address, Qadhafi promised, "We will come house by house, room by room. . . . We will find you in your closets. And we will have no mercy and no

ternational partners acted with unprecedented speed to secure a mandate, under [*3] Resolution 1973, to mobilize a broad coalition to protect civilians against attack by an advancing army and to establish a no-fly zone. In so doing, President Obama helped prevent an imminent massacre in Benghazi, protected critical U.S. interests in the region, and sent a strong message to the people not just of Libya – but of the entire Middle East and North Africa – that America stands with them at this historic moment of transition.

From the start, the Administration made clear its commitment to acting consistently with both the Constitution and the War Powers Resolution. The President submitted a report to Congress, consistent with the War Powers Resolution, within 48 hours of the commencement of operations in Libya. He framed our military mission narrowly, directing, among other things, that no ground troops would be deployed (except for necessary personnel recovery missions), and that U.S. armed forces would transition responsibility for leading and conducting the mission to an integrated NATO command. On April 4, 2011, U.S. forces did just that, shifting to a constrained and supporting role in a multinational civilian protection mission – in an action involving no U.S. ground presence or, to this point, U.S. casualties – authorized by a carefully tailored U.N. Security Council Resolution. As the War Powers Resolution con-

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pity." Qadhafi's widespread and systematic attacks against the civilian population led the United Nations Security Council, in Resolution 1970, to refer the situation in Libya to the Prosecutor of the International Criminal Court. The U.N. Human Rights Council's Commission of Inquiry into Libya subsequently concluded that since February, "[human rights] violations and crimes have been committed in large part by the Government of Libya in accordance with the command and control system established by Colonel Qadhafi through the different military, para-military, security and popular forces that he has employed in pursuit of a systematic and widespread policy of repression against opponents of his regime and of his leadership." At this moment, Qadhafi's forces continue to fire indiscriminately at residential areas with shells and rockets. Defecting Qadhafi forces have recounted orders "to show no mercy" to prisoners, and some recent reports indicate that the Qadhafi regime has been using rape as a tool of war. *See* Secretary of State Hillary Rodham Clinton, Press Statement, Sexual Violence in Libya, the Middle East and North Africa (June 16, 2011), http://www.state.gov/secretary/rm/2011/06/166369.htm. For all of these reasons, President Obama declared on March 26, "[W]hen someone like Qadhafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save thousands of lives – then it's in our national interest to act. And, it's our responsibility. This is one of those times."

templates, the Administration has consulted extensively with Congress about these operations, participating in more than ten hearings, thirty briefings, and dozens of additional exchanges since March 1 – an interbranch dialogue that my testimony today continues.

This background underscores the limits to our legal claims. Throughout the Libya episode, the President has never claimed the authority to take the nation to war without Congressional authorization, to violate the War Powers Resolution or any other statute, to violate international law, to use force abroad when doing so would not serve important national interests, or to refuse to consult with Congress on important war powers issues. The [*4] Administration recognizes that Congress has powers to regulate and terminate uses of force, and that the War Powers Resolution plays an important role in promoting interbranch dialogue and deliberation on these critical matters. The President has expressed his strong desire for Congressional support, and we have been working actively with Congress to ensure enactment of appropriate legislation.

Together with our NATO and Arab partners, we have made great progress in protecting Libya's civilian population, and we have isolated Qadhafi and set the stage for his departure. Although since early April we have confined our military involvement in Libya to a supporting role, the limited military assistance that we provide has been critical to the success of the mission, as has our political and diplomatic leadership. If the United States were to drop out of, or curtail its contributions to, this mission, it could not only compromise our international relationships and alliances and threaten regional instability, but also permit an emboldened and vengeful Qadhafi to return to attacking the very civilians whom our intervention has protected.

Where, against this background, does the War Powers Resolution fit in? The legal debate has focused on the Resolution's 60-day clock, which directs the President – absent express Congressional authorization (or the applicability of other limited exceptions) and following an initial 48-hour reporting period – to remove United States Armed Forces within 60 days from "hostilities" or "situations

where imminent involvement in hostilities is clearly indicated by the circumstances." But as virtually every lawyer recognizes, the operative term, "hostilities," is an ambiguous standard, which is nowhere defined in the statute. Nor has this standard ever been defined by the courts or by Congress in any subsequent war powers legislation. Indeed, the legislative history of the Resolution makes clear there was no fixed view on exactly what the [*5] term "hostilities" would encompass.[6] Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the Resolution a "one size fits all" straitjacket that would operate mechanically, without regard to particular circumstances.

From the start, lawyers and legislators have disagreed about the meaning of this term and the scope of the Resolution's 60-day pullout rule. Application of these provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad, without guidance from the courts, involving a Resolution passed by a Congress that could not have en-

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[6] When the Resolution was first considered, one of its principal sponsors, Senator Jacob K. Javits, stated that "[t]he bill . . . seeks to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it." *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong. 28 (1971); *see also id.* (statement of Professor Henry Steele Commager) (agreeing with Senator Javits that "there is peril in trying to be too exact in definitions," as "[s]omething must be left to the judgment, the intelligence, the wisdom, of those in command of the Congress, and of the President as well"). Asked at a House of Representatives hearing whether the term "hostilities" was problematic because of "the susceptibility of it to different interpretations," making this "a very fuzzy area," Senator Javits acknowledged the vagueness of the term but suggested that it was a necessary feature of the legislation: "There is no question about that, but that decision would be for the President to make. No one is trying to denude the President of authority." *War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs*, 93d Cong. 22 (1973). We recognize that the House report suggested that "[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope," but the report provided no clear direction on what either term was understood to mean. H.R. REP. NO. 93-287, at 7 (1973); *see also* Lowry v. Reagan, 676 F. Supp. 333, 340 n.53 (1997) (finding that "fixed legal standards were deliberately omitted from this statutory scheme," as "the very absence of a definitional section in the [War Powers] Resolution [was] coupled with debate suggesting that determinations of 'hostilities' were intended to be political decisions made by the President and Congress").

visioned many of the operations in which the United States has since become engaged. Because the War Powers Resolution represented a broad compromise between competing views on the proper division of constitutional authorities, the question whether a particular set of facts constitutes "hostilities" for purposes of the Resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions. Both branches have recognized that different situations may call for different responses, and that [*6] an overly mechanical reading of the statute could lead to unintended automatic cutoffs of military involvement in cases where more flexibility is required.

In the nearly forty years since the Resolution's enactment, successive Administrations have thus started from the premise that the term "hostilities" is "definable in a meaningful way only in the context of an actual set of facts."[7] And successive Congresses and Presidents have opted for a process through which the political branches have worked together to flesh out the law's meaning over time. By adopting this approach, the two branches have sought to avoid construing the statute mechanically, divorced from the realities that face them.

In this case, leaders of the current Congress have stressed this very concern in indicating that they do not believe that U.S. military operations in Libya amount to the kind of "hostilities" envisioned by the War Powers Resolution's 60-day pullout provision.[8] The histor-

[7] 1975 Leigh-Hoffmann Letter, *supra* note 1, at 38.

[8] Both before and after May 20, 2011, the 60th day following the President's initial letter to Congress on operations in Libya, few Members of Congress asserted that our participation in the NATO mission would trigger or had triggered the War Powers Resolution's pullout provision. House Speaker Boehner stated on June 1, 2011, that "[l]egally, [the Administration has] met the requirements of the War Powers Act." House Minority Leader Pelosi stated on June 16, 2011, that "[t]he limited nature of this engagement allows the President to go forward," as "the President has the authority he needs." Senate Majority Leader Reid stated on June 17, 2011, that "[t]he War Powers Act has no application to what's going on in Libya." Senate Foreign Relations Committee Chairman Kerry stated on June 21, 2011, that "I do not think our limited involvement rises to the level of hostilities defined by the War Powers Resolution," and on June 23, 2011, that "[w]e have not introduced our armed forces into hostilities. No American is being shot at. No American troop is at risk of being shot down today. That is not what we're doing. We are refueling. We are supporting NATO." Since May 20, the basic facts regarding the limited nature of our

ical practice supports this view. In 1975, Congress expressly invited the Executive Branch to provide its best understanding of the term "hostilities." My predecessor Monroe Leigh and Defense Department General Counsel Martin Hoffmann responded that, as a general matter, the Executive Branch understands the term "to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."[9] On the other hand, as Leigh [*7] and Hoffmann suggested, the term should not necessarily be read to include situations where the nature of the mission is limited (*i.e.*, situations that do not "involve the full military engagements with which the Resolution is primarily concerned"[10]); where the exposure of U.S. forces is limited (*e.g.*, situations involving "sporadic military or paramilitary attacks on our armed forces stationed abroad," in which the overall threat faced by our military is low[11]); and where the risk of escalation is therefore limited. Subsequently, the Executive Branch has reiterated the distinction between full military encounters and more constrained operations, stating that "intermittent military engagements" do not require withdrawal of forces under the Resolution's 60-day rule.[12] In the thirty-six years since Leigh and Hoffmann provided their analysis, the Executive Branch has repeatedly articulated and applied these foundational understandings. The President was thus operating within this longstanding tradition of Executive Branch interpretation when he relied on these understandings in his legal explanation to Congress on June 15, 2011.

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mission in Libya have not materially changed.

[9] 1975 Leigh-Hoffmann Letter, *supra* note 1, at 38-39.

[10] The quoted language comes from the Department of Justice, which in 1980 reaffirmed the Leigh-Hoffmann analysis. *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 194 (1980).

[11] *Id.*; *see also* Letter from Assistant Secretary of State J. Edward Fox to Chairman Dante B. Fascell (Mar. 30, 1988) (stating that "hostilities" determination must be "based on all the facts and circumstances *as they would relate to the threat to U.S. forces* at the time" (emphasis added)).

[12] Letter from Assistant Secretary of State for Legislative Affairs Wendy R. Sherman to Representative Benjamin Gilman, *reprinted in* 139 Cong. Rec. H7095 (daily ed. Sept. 28, 1993).

In light of this historical practice, a combination of four factors present in Libya suggests that the current situation does not constitute the kind of "hostilities" envisioned by the War Powers Resolution's 60-day automatic pullout provision.

First, the mission is limited: By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a U.N. Security Council Resolution tailored to that limited purpose. This is a very [*8] unusual set of circumstances, not found in any of the historic situations in which the "hostilities" question was previously debated, from the deployment of U.S. armed forces to Lebanon, Grenada, and El Salvador in the early 1980s, to the fighting with Iran in the Persian Gulf in the late 1980s, to the use of ground troops in Somalia in 1993. Of course, NATO forces as a whole are more deeply engaged in Libya than are U.S. forces, but the War Powers Resolution's 60-day pullout provision was designed to address the activities of the latter.[13]

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[13] A definitional section of the War Powers Resolution, 8(c), gives rise to a duty of Congressional notification, but not termination, upon the "assignment" of U.S. forces to command, coordinate, participate in the movement of, or accompany foreign forces that are themselves in hostilities. Section 8(c) is textually linked (through the term "introduction of United States Armed Forces") not to the "hostilities" language in section 4 that triggers the automatic pullout provision in section 5(b), but rather, to a different clause later down in that section that triggers a reporting requirement. According to the Senate report, the purpose of section 8(c) was "to prevent secret, unauthorized military support activities [such as the secret assignment of U.S. military 'advisers' to South Vietnam and Laos] and to prevent a repetition of many of the most controversial and regrettable actions in Indochina," S. REP. NO. 93-220, at 24 (1973) – actions that scarcely resemble NATO operations such as this one. Indeed, absurd results could ensue if section 8(c) were read to trigger the 60-day clock, as that could require termination of the "assignment" of even a single member of the U.S. military to assist a foreign government force, unless Congress passed legislation to authorize that one-person assignment. Moreover, section 8(c) must be read together with the immediately preceding section of the Resolution, 8(b). By grandfathering in pre-existing "high-level military commands," section 8(b) not only shows that Congress knew how to reference NATO operations when it wanted to, but also suggests that Congress recognized that NATO operations are generally less likely to raise the kinds of policy concerns that animated the Resolution. If anything, the international framework of cooperation within which this military mission is taking place creates a far greater risk that by withdrawing prematurely from Libya, as opposed to staying the course, we would generate the very foreign policy problems that the War Powers Resolution was meant to counteract: for example, international condemnation and strained relationships with key allies.

Second, the *exposure* of our armed forces is limited: To date, our operations have not involved U.S. casualties or a threat of significant U.S. casualties. Nor do our current operations involve active exchanges of fire with hostile forces, and members of our military have not been involved in significant armed confrontations or sustained confrontations of any kind with hostile forces.[14] Prior administrations have not found the 60-day rule to apply even in situations where [*9] significant fighting plainly did occur, as in Lebanon and Grenada in 1983 and Somalia in 1993.[15] By highlighting this point, we in no way advocate a legal theory that is indifferent to the loss of non-American lives. But here, there can be little doubt that the greatest threat to Libyan civilians comes not from NATO or the United States military, but from Qadhafi. The Congress that adopted the War Powers Resolution was principally concerned with the safety of U.S. *forces*,[16] and with the risk that the President would

[14] The fact that the Defense Department has decided to provide extra "danger pay" to those U.S. service members who fly planes over Libya or serve on ships within 110 nautical miles of Libya's shores does not mean that those service members are in "hostilities" for purposes of the War Powers Resolution. Similar danger pay is given to U.S. forces in Burundi, Greece, Haiti, Indonesia, Jordan, Montenegro, Saudi Arabia, Turkey, and dozens of other countries in which no one is seriously contending that "hostilities" are occurring under the War Powers Resolution.

[15] In Lebanon, the Reagan Administration argued that U.S. armed forces were not in "hostilities," though there were roughly 1,600 U.S. marines equipped for combat on a daily basis and roughly 2,000 more on ships and bases nearby; U.S. marine positions were attacked repeatedly; and four marines were killed and several dozen wounded in those attacks. *See* Richard F. Grimmett, Congressional Research Service, *The War Powers Resolution: After Thirty Six Years* 13-15 (Apr. 22, 2010); John H. Kelly, *Lebanon: 1982-1984*, *in* U.S. AND RUSSIAN POLICYMAKING WITH RESPECT TO THE USE OF FORCE 85, 96-99 (Jeremy R. Azrael & Emily A. Payin eds., 1996). In Grenada, the Administration did not acknowledge that "hostilities" had begun under the War Powers Resolution after 1,900 members of the U.S. armed forces had landed on the island, leading to combat that claimed the lives of nearly twenty Americans and wounded nearly 100 more. *See* Grimmett, *supra*, at 15; Ben Bradlee, Jr., *A Chronology on Grenada*, BOSTON GLOBE, Nov. 6, 1983. In Somalia, 25,000 troops were initially dispatched by the President, without Congressional authorization and without reference to the War Powers Resolution, as part of Operation Restore Hope. *See* Grimmett, *supra*, at 27. By May 1993, several thousand U.S. forces remained in the country or on ships offshore, including a Quick Reaction Force of some 1,300 marines. During the summer and into the fall of that year, ground combat led to the deaths of more than two dozen U.S. soldiers. JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING 112, 124-27 (1995).

[16] The text of the statute supports this widely held understanding, by linking the pullout

entangle them in an overseas conflict from which they could not readily be extricated. In this instance, the absence of U.S. ground troops, among other features of the Libya operation, significantly reduces both the risk to U.S. forces and the likelihood of a protracted entanglement that Congress may find itself practically powerless to end.[17] [*10]

Third, the *risk of escalation* is limited: U.S. military operations have not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or expanding geographical scope. Contrast this with the 1991 Desert Storm operation, which although also authorized by a United Nations Security Council Resolution, presented "over 400,000 [U.S.] troops in the area – the same order of magnitude as Vietnam at its peak – together with concomitant numbers of ships, planes, and tanks."[18] Prior administrations have found an absence of "hostilities" under the War Powers Resolution in situations ranging from Lebanon to Central America to Somalia to the Persian Gulf tanker controversy, although members of the United States Armed Forces were repeatedly engaged by the other side's forces and sustained casualties in volatile geopolitical circumstances, in some cases running a greater risk of possible escalation than here.[19]

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provision to the "introduction" of United States Armed Forces "into hostilities," suggesting that its primary focus is on the dangers confronted by members of our own military when deployed abroad into threatening circumstances. Section 5(c), by contrast, refers to United States Armed Forces who are "engaged in hostilities."

[17] *Cf.* Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982) ("The War Powers Resolution, which was considered and enacted as the Vietnam war was coming to an end, was intended to prevent another situation in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop.").

[18] JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 50 (1993).

[19] For example, in the Persian Gulf in 1987-88, the Reagan Administration found the War Powers Resolution's pullout provision inapplicable to a reflagging program that was conducted in the shadow of the Iran-Iraq war; that was preceded by an accidental attack on a U.S. Navy ship that killed 37 crewmen; and that led to repeated instances of active combat with Iranian forces. *See* Grimmett, *supra* note 15, at 16-18.

Fourth and finally, the *military means* we are using are limited: This situation does not present the kind of "full military engagement[] with which the [War Powers] Resolution is primarily concerned."[20] The violence that U.S. armed forces have directly inflicted or facilitated after the handoff to NATO has been modest in terms of its frequency, intensity, and severity. The air-to-ground strikes conducted by the United States in Libya are a far cry from the bombing campaign waged in Kosovo in 1999, which involved much more extensive and aggressive aerial [*11] strike operations led by U.S. armed forces.[21] The U.S. contribution to NATO is likewise far smaller than it was in the Balkans in the mid-1990s, where U.S. forces contributed the vast majority of aircraft and air strike sorties to an operation that lasted over two and a half years, featured repeated violations of the no-fly zone and episodic firefights with Serb aircraft and gunners, and paved the way for approximately 20,000 U.S. ground troops.[22] Here, by contrast, the bulk of U.S. contributions to the NATO effort has been providing intelligence capabilities and refueling assets. A very significant majority of the overall sorties are being flown by our coalition partners, and the overwhelming majority of strike sorties are being flown by our partners. American strikes have been confined, on an as-needed basis, to the suppression of enemy air defenses to enforce the no-fly

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[20] *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 194 (1980).

[21] In Kosovo, the NATO alliance set broader goals for its military mission and conducted a 78-day bombing campaign that involved more than 14,000 strike sorties, in which the United States provided two-thirds of the aircraft and delivered over 23,000 weapons. The NATO bombing campaign coincided with intensified fighting on the ground, and NATO forces, led by U.S. forces, "flew mission after mission into antiaircraft fire and in the face of over 700 missiles fired by Yugoslav air defense forces." *Hearing Before the S. Armed Servs. Comm.*, 106th Cong. (1999) (statement of Gen. Wesley Clark, Admiral James Ellis, Jr. & Lt. Gen. Michael Short).

[22] *See Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995); Dean Simmons et al., U.S. Naval Institute, *Air Operations over Bosnia*, PROCEEDINGS MAGAZINE, May 1997, *available at* http://www.usni.org/magazines/proceedings/1997-05/air-operations-over-bosnia; NATO Fact Sheet, Operation Deny Flight (July 18, 2003), http://www.afsouth.nato.int/archives/operations/DenyFlight/DenyFlightFactSheet.htm . U.S. air operations over Bosnia "were among the largest scale military operations other than war conducted by U.S. forces since the end of the Cold War." Simmons et al., *supra*.

zone, and to limited strikes by Predator unmanned aerial vehicles against discrete targets in support of the civilian protection mission; since the handoff to NATO, the total number of U.S. munitions dropped has been a tiny fraction of the number dropped in Kosovo. All NATO targets, moreover, have been clearly linked to the Qadhafi regime's systematic attacks on the Libyan population and populated areas, with target sets engaged only when strictly necessary and with maximal precision.

Had any of these elements been absent in Libya, or present in different degrees, a different legal conclusion might have been drawn. But the unusual confluence of these four [*12] factors, in an operation that was expressly designed to be limited – limited in mission, exposure of U.S. troops, risk of escalation, and military means employed – led the President to conclude that the Libya operation did not fall within the War Powers Resolution's automatic 60-day pullout rule.

Nor is this action inconsistent with the spirit of the Resolution. Having studied this legislation for many years, I can confidently say that we are far from the core case that most Members of Congress had in mind in 1973. The Congress that passed the Resolution in that year had just been through a long, major, and searing war in Vietnam, with hundreds of thousands of boots on the ground, secret bombing campaigns, international condemnation, massive casualties, and no clear way out. In Libya, by contrast, we have been acting transparently and in close consultation with Congress for a brief period; with no casualties or ground troops; with international approval; and at the express request of and in cooperation with NATO, the Arab League, the Gulf Cooperation Council, and Libya's own Transitional National Council. We should not read into the 1973 Congress's adoption of what many have called a "No More Vietnams" resolution an intent to require the premature termination, nearly forty years later, of limited military force in support of an international coalition to prevent the resumption of atrocities in Libya. Given the limited risk of escalation, exchanges of fire, and U.S. casualties, we do not believe that the 1973 Congress intended that its Resolution be given such a rigid construction – absent a clear

Congressional stance – to stop the President from directing supporting actions in a NATO-led, Security Council-authorized operation, for the narrow purpose of preventing the slaughter of innocent civilians.[23] [*13]

Nor are we in a "war" for purposes of Article I of the Constitution. As the Office of Legal Counsel concluded in its April 1, 2011 opinion,[24] under longstanding precedent the President had the constitutional authority to direct the use of force in Libya, for two main reasons. First, he could reasonably determine that U.S. operations in Libya would serve important national interests in preserving regional stability and supporting the credibility and effectiveness of the U.N. Security Council. Second, the military operations that the President anticipated ordering were not sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific Congressional approval under the Declaration of War Clause. Although time has passed, the nature and scope of our operations have not evolved in a manner that would alter that conclusion. To the contrary, since the transfer to NATO command, the U.S. role in the mission has become even more limited.

Reasonable minds may read the Constitution and the War Powers Resolution differently – as they have for decades. Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us, which is not one of law but of policy: Will Congress provide its support for NATO's mission in Libya at this pivotal juncture, ensuring that Qadhafi does not regain the upper hand against the people of Libya? The President has repeatedly stated that it is better to take military action, even in limited scenarios such as this, with strong

[23] As President Obama noted in his June 22, 2011 speech on Afghanistan: "When innocents are being slaughtered and global security endangered, we don't have to choose between standing idly by or acting on our own. Instead, we must rally international action, which we're doing in Libya, where we do not have a single soldier on the ground, but are supporting allies in protecting the Libyan people and giving them the chance to determine their own destiny."

[24] Office of Legal Counsel, U.S. Dep't of Justice, *President's Authority to Use Military Force in Libya*, http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf (Apr. 1, 2011).

Congressional engagement and support. However we construe the War Powers Resolution, we can all agree that it serves only Qadhafi's interest for the United States to withdraw from this NATO operation before it is finished. [*14]

That is why, in closing, we ask all of you to take quick and decisive action to approve S.J. Res. 20, the bipartisan resolution introduced by Senators Kerry, McCain, Durbin, Cardin, and seven others to provide express Congressional authorization for continued, constrained operations in Libya to enforce U.N. Security Council Resolution 1973. Only by so doing, can this body affirm that the United States government is united in its commitment to support the NATO alliance, the safety and stability of this pivotal region, and the aspirations of the Libyan people for political reform and self-government.

Thank you. I look forward to answering your questions.

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Richard G. Lugar, Senate Joint Resolution 20 Amendment

no date

AMENDMENT NO. _____ Calendar No. _____

Purpose: To declare that the authority for the limited use of United States Armed Forces is intended to constitute specific statutory authorization under the War Powers Resolution.

IN THE SENATE OF THE UNITED STATES–112th Cong., 1st Sess.

S.J. RES. 20

Authorizing the limited use of the United States Armed Forces in support of the NATO mission in Libya.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. LUGAR

Viz:

On page 6, between lines 2 and 3, insert the following:

(c) WAR POWERS RESOLUTION REQUIREMENTS.–

(1) SPECIFIC STATUTORY AUTHORIZATION.–

Consistent with section 8(a)(1) of the War Powers Resolution (50 U.S.C. 1547(a)(1)), Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)). [*2]

(2) APPLICABILITY OF OTHER REQUIREMENTS.–

(A) RULE OF CONSTRUCTION.– Nothing in this joint

resolution supersedes any requirement of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(B) ENGAGEMENT IN HOSTILITIES.– United States military operations in Libya since April 4, 2011, which have included non-kinetic support to the NATO-led operations, including intelligence, logistical support, and search and rescue assistance, United States aircraft assisting in the suppression and destruction of air defenses in support of the no-fly zone, and precision strikes by unmanned aerial vehicles, constitute hostilities within the meaning of the War Powers Resolution, and may be carried out only under the conditions specified in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

CUMULATIVE INDEX 1: CHRONOLOGICAL

Date; Cite	Author	Recipient	Topic
1973-3-7; 1 J.L. (1 Pub. L. Misc.) 239	Bingham, Jonathan; Javits, Jacob	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers
1973-6-14; 1 J.L. (1 Pub. L. Misc.) 242	Fulbright, James	Senate Foreign Relations Committee	Presidential Powers – Hostilities and War Powers
1963-6-15 [sic]; 1 J.L. (1 Pub. L. Misc.) 247	Zablocki, Clement	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers
1975-5-9 & 6-3; 1 J.L. (1 Pub. L. Misc.) 249	Leigh, Monroe; Zablocki, Clement	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers
1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19	Fois, Andrew	Hatch, Orrin G.	Duty to Defend – National Defense Authorization Act, 110 Stat. 186
1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30	Hertling, Richard A.	Leahy, Patrick J.	Duty to Defend – Department of Justice Oversight
2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47	McMaster, Henry, et al.	Pelosi, Nancy; Reid, Harry	Potential Constitutional Problems with the "Nebraska Compromise"
2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51	Abbott, Greg	Hutchison, Kay Bailey; Cornyn, John	Potential Constitutional Problems with H.R. 3590
2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59	Harris, Kamala D.	Hudson, Henry E.	Constitutionality of the Individual Mandate
2011-3-23; 1 J.L. (1 Pub. L. Misc.) 256	Boehner, John A.	Obama, Barack	Presidential Powers – Hostilities and War Powers
2011-4-1; 1 J.L. (1 Pub. L. Misc.) 260	Krass, Caroline D.	Holder, Eric H.	Presidential Powers – Hostilities and War Powers
2011-6-2; 1 J.L. (1 Pub. L. Misc.) 282	Boehner, John A.	House of Representatives	Presidential Powers – Hostilities and War Powers
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Hatch, Orrin G.	Fois, Andrew	Duty to Defend – National Defense Authorization Act, 110 Stat. 186	1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19
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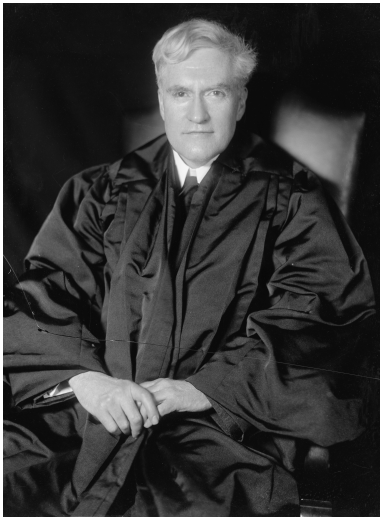
CHAPTER ONE

A JOURNAL OF LAW BOOKS



Benjamin N. Cardozo

AUTUMN 2011

CHAPTER ONE

Robert C. Berring, Editor

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THE GREAT LAW BOOKS

AN INTRODUCTION TO *CHAPTER ONE*

Robert C. Berring[†]

Chapter One is a series devoted to resuscitating interest in the best legal thinking from the past century. The great legal thinkers of the 20th Century are beginning to slip away from us, reduced to residing in the quotations above doorways. The law school graduate of today will recognize some of the names because of bits and pieces of their judicial opinions entombed in casebooks or because entire law schools have been named to honor them, but who reads the thought-provoking works that made them famous? While some of the books that were influential in their own time do not wear well, others remain vital and engaging. Some, like *The Nature of the Judicial Process,* remain both eminently readable and, almost a century after publication, on the cutting edge of controversy. When I assigned this book in a seminar at Berkeley Law School the students found it engaging and risky. As one student put it, "Cardozo would not make it through one day of Senate Judiciary Committee Hearings today." The collision of the modern metaphor of the judge as umpire simply enforcing the rules and Cardozo's portrait of the judge as a human engine of justice brings out the most contemporary of issues in sharp relief.

Our hope is that by presenting you with the first chapter of a great book, we can stimulate you to read the whole thing. It is an intentional tease. To sweeten the pot we include along with the first chapter, a *Foreword* by Professor Andrew Kaufman, author of *Cardozo*, Harvard University Press (2002) – the authoritative biography of the Justice, written especially for a new printing of the

[†] *Walter Perry Johnson Professor of Law at Boalt Hall.*

book in July 2010. This printing – part of the Legal Legends Series edited by Professor Alan Childress for Quid Pro Quo Press – makes quality paperback reprints of legal classics available. Though we conceived the *Chapter One* project without knowing of Professor Childress's project, we hear the same Siren's call. You can buy the book or read it digitally, but we hope that you will be inspired to read past the first chapter.

For further context on *The Nature of the Judicial Process*, and for fun, we include a handful of contemporary reviews. These are drawn from a time when law reviews were serious about the enterprise of book reviews, and when intellectual giants were willing to write short, pithy book reviews. For your delectation we offer Judge Learned Hand's assessment from the *Harvard Law Review*, Professor Max Radin's observations for the *California Law Review*, and those of then-Professor (later Supreme Court Associate Justice and then Chief Justice) Harlan Fiske Stone in the *Columbia Law Review*. Professor Kaufman's *Foreword* traces the book through its history. Citations to it continue to appear. As Professor Kim Wardlaw notes in *Umpires, Empathy and Activism: Lessons from Judge Cardozo*, the book has been cited over 2,000 times by law reviews.[1] It is worth a read. ❶

[1] 85 Notre Dame Law Review 1629 (2010).

FOREWORD

TO *THE NATURE OF THE JUDICIAL PROCESS*

Andrew L. Kaufman[†]

Why a new edition of *The Nature of the Judicial Process*? Presumably because in the world of law, Benjamin Cardozo still rocks, and his opinions and writings still send worthwhile messages as we near the 100th anniversary of his election to the bench. All law students and many academics continue to wrestle with a number of his common law opinions. Just this year Professor Lawrence Cunningham devoted many pages to comparing Cardozo's method of approach to decision-making to the more modern, economic-oriented approach of Judge Richard Posner and found Cardozo's method more helpful.[1] Cardozo's approach to constitutional law also continues to have many adherents on the bench and off; and, in a legal world filled with both strongly-held doubts and certainties, his nuanced, and I might say, ambiguous approach to the art of judging continues to beguile. *The Nature of the Judicial Process* was his major effort to address the subject of judicial decision-making out of the confines and constraints of a judicial opinion.

A new edition of *The Nature of Judicial Process* invites a new generation of readers to become familiar with a man who became one of the giants of twentieth century lawmaking by political accident after a most unpromising start. Benjamin Cardozo was born in 1870 into a political family. His father was a judge of the New York Supreme Court, New York's major trial court. His ancestors, the Cardozos

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[†] *Charles Stebbins Fairchild Professor of Law at Harvard Law School.* *Page numbers in footnotes 5, 6, and 7 of this article refer to the 2010 Quid Pro Quo Press edition edited by Alan Childress.*

[1] Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 Fla. L. Rev. 667 (2010).

and the Nathans, were prominent New York Sephardic Jews, who had fled Spain and Portugal during the Inquisition and had arrived in New York prior to the American Revolution via Holland and England. Their synagogue, Shearith Israel, was already over 125 years old when the Revolutionary War was won, and their rabbi, Gershom Seixas, was the first Jewish trustee of the college that was to become Columbia University. Benjamin Cardozo would be the second. His uncle, for whom he was named, was a Vice-President of the New York Stock Exchange. In Benjamin's generation, one first cousin, Emma Lazarus, was the author of the poem that graces the base of the Statue of Liberty; another first cousin, Maud Nathan, was a well-known suffragette, social reformer, and president for thirty years of the Consumer's League of New York; and yet a third first cousin, Annie Nathan Meyer, was a playwright and the founder of Barnard College.

Albert Cardozo, Benjamin's father, earned a different kind of distinction. His judicial career was the result of political connections with two rival and notorious New York City Democratic politicians, Fernando Wood and Boss Tweed. Widespread accusations of wrongdoing against a number of New York judges in one of the periodic public outcries against Tammany Hall domination of politics led to legislative hearings to consider charges of corruption against three justices of the New York Supreme Court (the state's trial court). Albert Cardozo was one of them, and he resigned his position just before the legislature would surely have voted to impeach and convict him, as they did his two colleagues. The evidence of political favoritism and personal corruption was compelling. Benjamin Cardozo was two years old at the time. The family fortunes, literally and figuratively, declined, and the family moved out of its splendid brownstone home just off Fifth Avenue to lesser quarters several times before Albert, aided by his political connections, was able to revive the family situation.

Benjamin grew up with a twin sister and four older siblings under the cloud of the family disgrace. He was particularly close to his older sister Nellie, who helped raise him, and with whom he lived in the family homes for his whole life, taking care of her in a very

long illness at the end of her life. He was home schooled, and the tutor who prepared him for his entrance examinations to Columbia was Horatio Alger, the popular author of rags to riches novels, whose early career as a Unitarian minister was marred by accusations of what today we would call sexual abuse.

Cardozo entered Columbia at the age of 15, where he was the youngest in the class. He lived at home with his sisters and an older brother, who was practicing law in their father's firm. Their father died during his first year at college. Benjamin did not participate much in the social life of the school. He worked hard, did very well, won several prizes, and went straight from college into Columbia Law School. The instruction there consisted mostly of lectures about the rules and doctrines of law without much analysis. The Socratic method of questioning students and analyzing doctrine critically that was associated with the Harvard Law School of Christopher Langdell arrived during Cardozo's second year. He did not much take to it. Columbia had recently added a third year of study, but Cardozo, along with two-thirds of the class, left at the end of his second year. He was not yet 21.

Cardozo was admitted to the bar as soon as he reached 21, joined his brother in their father's politically-oriented firm, and began practicing law. Almost immediately, he began to make a name for himself, arguing several cases in the New York Court of Appeals in the first years of his practice. The records from his years at the bar show a very active trial and appellate practice. As time went on and he demonstrated his ability, more and more lawyers referred their important or difficult matters to him. His practice was largely oriented toward commercial and family matters. His clients came from the Jewish community, and he often litigated their cases against lawyers from major firms.

The practice of law was very different then from what it has become. The bar was relatively small, and most major firms had just a few partners. A good lawyer could make his (and they were virtually all "his") way quickly, and Benjamin Cardozo established himself as a good lawyer very early in his career. Modern-style brief writing was not yet well established. Many, perhaps most, briefs consisted

of conclusory arguments coupled with citation of, and quotation from, relevant cases. Cardozo immediately adopted the modern, more useful style that began with a statement of the facts and the questions to be decided and then went on to argument based on critical analysis of doctrine and policy supporting the desired result. When the policy arguments were not strong, Cardozo argued from the facts, and he could make technical arguments with the best. In short, he used the best ammunition to support his case that he could find, and he argued persuasively, and with style. No wonder other lawyers sought him out. His career seemed destined to carry on in that fashion although, with time, the matters he handled involved larger sums of money and his practice became more varied. He never, however, became a Brandeis-type lawyer taking on large social issues of great public importance.

Then chance intervened. 1913 was the occasion for a periodic convulsion in the New York political world. A diverse group of reformers, anti-Tammany Democrats, and Republicans united to produce a joint Fusion ticket in the local elections to try to wrest control of the local government from Tammany Hall. Putting together a ticket for the various executive and judicial positions required considerable negotiation among the different groups. A subcommittee on judges was looking for a Jew to balance the ticket. Cardozo's name was eventually suggested to the subcommittee chair, Charles Burlingham, well-known as a "judgemaker" and later thought by many to be the dean of the New York bar. Burlingham made the case for Cardozo to the Fusion group, and although the Fusion ticket was generally successful, Cardozo, running against an incumbent, barely squeaked through with the aid of some Bronx County dissident Tammany Democrats.

As he took the bench in 1914, he had been a practicing lawyer for 23 years. I have earlier summarized the first 43 years of his life in the following paragraph:

> Twenty-three years of practice had a major impact in preparing Cardozo for his judicial career. His college and law school education furnished a substantial amount of intellectual capital and the habits of reading and study that lasted his

> whole life. His work matured him socially, and his colleagues soon discovered not only his ability but the strength of his character and personality. Having lived a sheltered personal life, he used his work as his window on the world. A good litigator gets to understand people, both their strengths and their weaknesses. His work gave him firsthand experience with the human condition, with human frailty, trickery, and deceit. A good litigator also learns a good deal about the subject matter of his cases. Cardozo read widely and was more familiar with new ideas than most practicing lawyers, but he came to the bench with a view of the judge's role as a resolver of disputes, not as a dispenser of legal theory. Even though his experience as a judge would enlarge his view of the judicial role, Cardozo never lost his lawyer's touch.[2]

Cardozo tried cases as a Supreme Court Justice for just one month before he was appointed by the Governor to fill one of the temporary Court of Appeals positions that existed to help that court clean up its backlog. Three years later he was appointed and then elected to a regular term on the Court of Appeals, the state's highest court. Cardozo's first few years on the Court of Appeals were a time of legal ferment. The realist movement roiled the academic world, and its critique influenced judicial decision-making. Some of Cardozo's early opinions were instant hits. *Wood v. Lucy, Lady Duff Gordon*,[3] involving interpretation of a contract with an eye to the nature of business relationships, and *MacPherson v. Buick Motor Co.*[4] found their way very quickly into law school curriculums. The latter especially was heralded as an example of adapting ancient common law doctrine to the needs of modern industrial society for its holding that an auto company was liable to a purchaser, through a dealer, of one of its cars for injuries resulting from an accident caused by a defective wheel even though the company had no direct contractual relationship with the purchaser.

In just a few years on the bench Cardozo made a name for him-

[2] Kaufman, *Cardozo*, at 112-113.
[3] 222 N.Y. 88 (1917).
[4] 217 N.Y. 382 (1916).

self. By 1921 his growing reputation was recognized in three distinct ways. He was selected to the Board of Overseers of Harvard University. He was invited to lend his support to a project of the Association of American Law Schools to organize what would become the American Law Institute, most known for regularly publishing "Restatements" of bodies of law such as contracts and torts. Finally, he delivered the Storrs Lectures at the Yale Law School. Those lectures have been read by hundreds of thousands in the succeeding years under the title of *The Nature of the Judicial Process*.

Dean Swan had issued the invitation the previous year and Cardozo had first declined on the ground that he had nothing to say. But the offer was renewed and Cardozo responded positively to the suggestion of a faculty member that he describe for his audience the process by which he decided a case. He spent many months working on the lectures and delivered them over four nights in February 1921. They were a spectacular success. The usual process is for audiences to diminish over the course of a lengthy lecture series. Not so with Cardozo's Storrs Lectures. Once word got around after the first lecture, the audience increased dramatically, and the series had to be moved from a room seating 250 to a hall seating 500. The latter room was completely filled for the remaining three lectures.

Although Cardozo read his lectures, he was a captivating speaker. The one known recording of his voice reveals the style of a nineteenth-century orator. Arthur Corbin, a leading realist member of the Yale faculty, reported that the substance of the remarks and the style of the speaker made an extraordinary impression. "Never again have I had such an experience. Both what he said and his manner of saying it held us spell-bound on four successive days." Cardozo was then persuaded to let them be published. Cardozo was the first judge in modern times to try his hand at describing what judging was all about. Indeed, *The Nature of the Judicial Process* helped create what has become a cottage industry as interest in the subject of judicial decision-making has grown not only in the academy but perhaps more importantly among the general public. First, Cardozo himself, in subsequent efforts in the 1920s entitled *The Growth of the Law* and then *The Paradoxes of Legal Science*, and then other judges and judicial

philosophers, have written in increasingly theoretical fashion about the subject. However, ninety years later Cardozo's initial effort is still being read, with profit.

When Cardozo delivered his lectures, the diverse academic movement known as "legal realism" was in full flower. A theme of that movement was its attack on what it portrayed as a formalist, mechanistic approach to judging. The previous half century had been characterized for its emphasis on judge-made law as having its own internal consistency, with doctrines derived from first principles independent of the politics of the day. Judges, it was said, "found" and did not "make" law, and they deduced the governing rules in a particular case from the decided precedents. The extent to which that portion of the realists' attack on their predecessor was based on inaccurate caricature is still a matter of some debate, but there is little doubt that one of Cardozo's purposes in delivering *The Nature of the Judicial Process* was to acknowledge the importance of sources beyond precedent for judicial decision-making as well as the inevitable element of "law-making" discretion that appellate court judges exercise in close cases.

Some of the major ideas in *The Nature of the Judicial Process* relied on the earlier work of Holmes' *The Common Law* (1881), John Chipman Gray's *The Nature and Sources of the Law* (1909), and the writings of Roscoe Pound. Cardozo described four major sources of material for judicial decision-making – logic, history, custom, and public policy. He devoted a lecture to each of these. It seems apparent that history and custom are more specialized doctrines that will be powerful factors in deciding a matter only in those relatively few cases when there is enough evidence of either from which to dispose of the case. He regarded logic, the use of deductive analysis from principles already established, as having a certain presumption in its favor and as governing absent strong arguments from history, custom, or public policy. While logic as he defined it was backward looking, his incorporation of the notion of deciding by analogy also had a forward looking aspect.

Cardozo was not content with such subtlety. The bulk of his lectures consisted of analysis of the effect of public policy considera-

tions – a normative approach based on contemporary values – on judicial decision-making. He both endorsed the importance of using law to achieve social justice and warned against the dangers that could accompany the abandonment of established principles, certainty, and order. Judges were agents of change, but not too much and not too often. The trick was to know when to innovate and when to refrain.

Cardozo was no revolutionary. His vision of the judicial role was a version of what English and American judges had done for centuries, reaffirmed and adapted for modern use. He believed that the major role in guiding social change in a democracy belonged to the legislature and the executive. Thus, he innovated most when the step to be taken was modest and when the innovation did not violate what he saw as the prerogatives of other institutions of government – and ideally when the legislative or executive branch had already pointed the way. While Cardozo often adapted law to new social conditions, he also often declined to make such adaptations. Fairness was important to him, but he did not believe that judges could always do what they thought was fair or just. Cardozo believed that he had to respect precedent, history, and the powers of other branches of government. Judging involved taking all these factors into account, methodically and as impartially as he could.

A common complaint, offered by judges, is that Cardozo's prescription does not help a judge to decide a particular case. Of course not. Indeed, in a way, a subtheme of Cardozo's lectures is that judicial decision-making involves a nuanced approach among different considerations, any one of which may be dominant with respect to a particular issue or in the context of particular facts. He was essentially an accommodationist, but the totality of the messages was ambiguous. That ambiguity, I think, has contributed to his enduring reputation. How one applies Cardozo to different situations depends on what strand of thought is emphasized in different contexts. Even judges who subscribe fully to his messages will put the elements of decision-making together in different ways in particular cases, each side citing different Cardozo words for support. As you will see from reading his lectures, Cardozo carried forth his pre-

scription into the field of constitutional law as well, expressing the view that public policy considerations had their strongest justification in that field. Indeed, he outlined a controversial view, which he expounded as a Justice of the United States Supreme Court, that "the content of constitutional immunities is not constant, but varies from age to age."[5]

The Nature of the Judicial Process was not a work of philosophy. Although Cardozo was well read in works of philosophy and often quoted or cited philosophers to support a particular insight, he was not interested in attempting to set out a comprehensive theory of judging that was grounded in philosophy. His purpose was to explain the art of judging from his perspective as a judge and former practicing lawyer. In a sense, the guts of *The Nature of the Judicial Process* can be found buried in three printed pages.[6] All the rest is elaboration and, at the end of the Lectures, he issued a word of caution about everything he said. While he refused to quarrel with the notion that a judge reflects "the spirit of the age," he was skeptical about what that was. "The spirit of the age," he wrote, "as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or occupation or fellowship have given us a place."[7]

The years following the delivery and publication of *The Nature of the Judicial Process* saw the transformation of Benjamin Cardozo from a well-known judge to a judge with a national reputation. The academy lionized him even before he became chief judge of the New York Court of Appeals, and the court itself was seen as the outstanding state court in the country. It had several notable judges, Cuthbert Pound, William Andrews, and Irving Lehman, to name just three of Cardozo's colleagues, but it was Cardozo's opinions that caught the academic public's eye and were incorporated into casebooks throughout the country. This was a time when virtually all judges, and not their law clerks, wrote judicial opinions. Cardozo wrote in a distinctive style, with many one-liners that

[5] Pp. 82-83.
[6] Pp. 112-114.
[7] Pp. 174-175.

sharpened his meaning. Occasionally flowery and ornate, at its best the style was crisp and persuasive, and it constitutes a large part of the explanation for his continuing popularity in the legal academy. He had the knack of making a great case out of what would have been humdrum in the hands of most judges.

Cardozo was induced to give two more Lecture series after *The Nature of the Judicial Process.* The first, *The Growth of the Law* (1924), was little more than a rehash of *The Nature of the Judicial Process.* The second, *The Paradoxes of Legal Science* (1928), was Cardozo's effort to place *The Nature of the Judicial Process* into more of a philosophical mode, but in essence it was *The Nature of the Judicial Process* once more. Cardozo also tried his hand at writing on such subjects as *Law and Literature and Other Essays and Addresses* (1931) and *What Medicine Can Do for Law* (1930), but the only other substantial piece of nonjudicial writing he did while a Court of Appeals judge was a long lecture entitled "Jurisprudence" that he delivered just before he joined the United States Supreme Court in 1932. There again he sought to deal with the phenomenon of legal realism, with which his approach had much in common, by playing down some of its more exuberant statements about the uncertainty and indeterminacy of legal principles as enthusiastic hyperbole.

All he achieved was to anger some of realism's leading exponents, notably Jerome Frank, a New Deal lawyer with academic pretensions who later became a judge of the U.S. Court of Appeals for the Second Circuit. Frank theretofore had been a strong admirer of Cardozo. Stung by Cardozo's talk, Frank wrote him a thirty-one page critique, with a thirty-page appendix, explaining his views, which he believed had been mischaracterized and misunderstood by Cardozo. Cardozo did not respond substantively, pleading the press of business associated with his appointment, and deprecating his own effort. Sixteen years later, after Cardozo had died, Frank published his criticisms of Cardozo's "Jurisprudence" lecture in a law review article that even criticized the title of *The Nature of the Judicial Process* for its emphasis on appellate opinions, as opposed to trials and fact-finding, which Frank took to be of greater significance to

the law as it actually affected people's lives.[8] Indeed, after Cardozo died, Frank, who was much influenced by Freudian psychology, published an anonymous critique with a psychological analysis of Cardozo.[9] Frank portrayed a man who cloaked the disgrace of his father's career in the garb of an eighteenth century English gentleman writing in an alien style. Clearly, the years had not dulled Frank's anger at Cardozo's criticism of his boldest claims about the indeterminacy of the law.

Appointment to the United States Supreme Court ended Cardozo's extrajudicial writing. Unlike many current Supreme Court Justices who regularly expound their judicial philosophies in off-the-bench settings, Cardozo immediately felt constrained by the press of business, by the need to conserve his energy, and perhaps also by a sense that the Court at that time was already embroiled in sufficient controversy concerning the legality of New Deal legislation. But Cardozo had one further contribution to make to larger issues of judicial decision-making, and he chose, what was for him an unusual forum, a judicial opinion. The subject was what we would today call originalism, the binding effect of the Framers' intent in constitutional interpretation. As we have already noticed, Cardozo had indicated a view in *The Nature of the Judicial Process*. But it is one thing to express a view off the bench, quite another to do so in an opinion. That was something Cardozo rarely did. His job as judge was to decide cases, not to issue pronouncements on current issues of jurisprudence. But he did so early in his career on the Supreme Court in the context of a hotly-contested, major piece of litigation.

The Minnesota Mortgage Moratorium Case (*Home Bldg. & Loan Insurance Co. v. Blaisdell*,[10] involved the power of a state to delay foreclosure of a defaulted mortgage by permitting the mortgagor to substitute rent based on reasonable value for the mortgage payments that were due. The debt owed would have to be paid off in full eventually. A closely-divided Supreme Court upheld the state stat-

[8] *Cardozo and the Upper-Court Myth*, 13 Law and Contemp. Probs. 369 (1948).
[9] Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 Va. L. Rev. 625 (1943).
[10] 290 U.S. 398 (1934).

ute against an argument that it impaired an "obligation" of contract in violation of Article I, section 10 of the Constitution, known as the Contract Clause. Chief Justice Hughes circulated a draft majority opinion distinguishing between statutes that interfered with the creditor's right and those that interfered merely with the remedy. That was insufficient for Cardozo, who circulated an opinion that dealt with the basics of constitutional interpretation. His opinion spelled out the approach he first set forth in *The Nature of the Judicial Process*. Interpretation of a constitutional provision, even one as narrow and focused as the Contract Clause, was not limited by what the Framers understood at the time of the adoption of the provisions. Echoing John Marshall, Cardozo expounded at some length his view that the Constitution had been designed to meet the needs of an expanding future and its meaning could change as society changed.

But Cardozo's opinion went unpublished. When Hughes saw it, he incorporated some of its substance, briefly, in his own opinion and the ever-collegial Cardozo withdrew his concurrence. His draft opinion, however, was a stirring defense of an expansive approach to constitutional interpretation that still resonates in modern constitutional discourse and constitutes a nice conclusion to the exposition he first set forth in *The Nature of the Judicial Process*. (Substantial excerpts from the draft opinion are published in Kaufman, *Benjamin Cardozo and the Supreme Court*.[11])

It was his final contribution to the subject of judicial decision-making. His career on the Supreme Court was all too short. He suffered a heart attack in late 1937, followed by a stroke shortly thereafter, and he died the following summer at age 68. But, as you will see in reading the following Lectures, he left behind, in *The Nature of the Judicial Process*, a series of insights and messages that still provide substance for anyone interested in the subject of how judges decide cases. ❶

[11] 20 Card. L. Rev. 1259 (1999).

THE NATURE OF THE JUDICIAL PROCESS

LECTURE I.
INTRODUCTION. THE METHOD OF PHILOSOPHY

Benjamin N. Cardozo[†]

The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there {10} is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common

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[†] *When The Nature of the Judicial Process was first published in 1921, he was an Associate Judge on the New York Court of Appeals. Numbers in {brackets} indicate pagination in the 2010 Quid Pro Quo Press edition edited by Alan Childress.*

standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, {11} is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis. In such attempt at analysis as I shall make, there will be need to distinguish between the conscious and the subconscious. I do not mean that even those considerations and motives which I shall class under the first head are always in consciousness distinctly, so that they will be recognized and named at sight. Not infrequently they hover near the surface. They may, however, with comparative readiness be isolated and tagged, and when thus labeled, are quickly acknowledged as guiding principles of conduct. More subtle are the forces so far beneath the {12} surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another. We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not,[1] which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is

[1] {*Lecture I, originally page 12, note 1*} Cf. N. M. Butler, "Philosophy," pp. 18, 43.

an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. {13} In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought – a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others. We must apply to the study of judge-made law that method of quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics.[2] A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be a passing interest in an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive. That must be my apology for these introspective searchings of the spirit. {14}

Before we can determine the proportions of a blend, we must know the ingredients to be blended. Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which,

[2] "Human Nature in Politics," p. 138.

however obscure and latent, had none the less a real and ascertainable pre-existence in {15} the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray in his lectures on the "Nature and Sources of the Law,"[3] "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."[4] So Brütt:[5] "One weighty task of the system of the application of law consists then in this, to make more profound the discovery of the latent meaning of positive law. Much more important, however, is the second task which the system serves, namely {16} the filling of the gaps which are found in every positive law in greater or less measure." You may call this process legislation, if you will. In any event, no system of *jus scriptum* has been able to escape the need of it. Today a great school of continental jurists is pleading for a still wider freedom of adaptation and construction. The statute, they say, is often fragmentary and ill-considered and unjust. The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision – "libre recherche scientifique." That is the view of Gény and Ehrlich and Gmelin and others.[6] Courts are to "search for light among the social elements of every kind that are the living force behind the facts they deal with."[7] The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. In the long run "there is no guaranty of

[3] Sec. 370, p. 165.
[4] Cf. Pound, "Courts and Legislation," 9 Modern Legal Philosophy Series, p. 226.
[5] "Die Kunst der Rechtsanwendung," p. 72.
[6] "Science of Legal Method," 9 Modern Legal Philosophy Series, pp. 4, 45, 65, 72, 124, 130, 159.
[7] Gény, "Methode d'Interprétation et Sources en droit privé positif," vol. II, p. 180, sec. 176, ed. 1919; transl. 9 Modern Legal Philosophy Series, p. 45.

{17} justice," says Ehrlich,[8] "except the personality of the judge."[9] The same problems of method, the same contrasts between the letter and the spirit, are living problems in our own land and law. Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law. Codes and other statutes may {18} threaten the judicial function with repression and disuse and atrophy. The function flourishes and persists by virtue of the human need to which it steadfastly responds. Justinian's prohibition of any commentary on the product of his codifiers is remembered only for its futility.[10]

I will dwell no further for the moment upon the significance of constitution and statute as sources of the law. The work of a judge in interpreting and developing them has indeed its problems and its difficulties, but they are problems and difficulties not different in kind or measure from those besetting him in other fields. I think they can be better studied when those fields have been explored. Sometimes the rule of constitution or of statute is clear, and then the difficulties vanish. Even when they are present, they lack at times some of that element of mystery which accompanies creative energy. We reach the land of mystery when constitution and statute are silent, and the judge must look to {19} the common law for the rule that fits the case. He is the "living oracle of the law" in Blackstone's vivid phrase. Looking at Sir Oracle in action, viewing his work in the dry light of realism, how does he set about his task?

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[8] P. 65, *supra*; "Freie Rechtsfindung und freie Rechtswissenschaft," 9 Modern Legal Philosophy Series.

[9] Cf. Gnaeus Flavius (Kantorowicz), "Der Kampf um Rechtswissenschaft," p. 48: "Von der Kultur des Richters hängt im letzten Grunde aller Fortschritt der Rechtsentwicklung ab."

[10] Gray, "Nature and Sources of the Law," sec. 395; Muirhead, "Roman Law," pp. 399, 400.

The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase,[11] "in the legal smithy." Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn.[12] None the less, in a system so highly developed as our {20} own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If {21} that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it

[11] Introduction to Gierke's "Political Theories of the Middle Age," p. viii.
[12] Saleilles, "De la Personnalité Juridique," p. 45; Ehrlich, "Grundlegung der Soziologie des Rechts," pp. 34, 35; Pound, "Proceedings of American Bar Assn. 1919," p. 455.

for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate."[13] The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition.

In the life of the mind as in life elsewhere, there is a tendency toward the reproduction of kind. Every judgment has a generative power. It begets in its own image. Every precedent, in {22} the words of Redlich, has a "directive force for future cases of the same or similar nature."[14] Until the sentence was pronounced, it was as yet in equilibrium. Its form and content were uncertain. Any one of many principles might lay hold of it and shape it. Once declared, it is a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter. If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit.[15] Whatever its psychological basis, it is one of the living forces of our law. Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the void. The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them {23} deductively. Its method is inductive, and it draws its generalizations from particulars. The process has been admirably stated by Munroe Smith: "In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories

[13] "Essay on Judicature."
[14] Redlich, "The Case Method in American Law Schools," Bulletin No. 8, Carnegie Foundation, p. 37.
[15] McDougall, "Social Psychology," p. 354; J. C. Gray, "Judicial Precedents," 9 Harvard L. R. 27.

of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined."[16] {24}

The way in which this process of retesting and reformulating works, may be followed in an example. Fifty years ago, I think it would have been stated as a general principle that A. may conduct his business as he pleases, even though the purpose is to cause loss to B., unless the act involves the creation of a nuisance.[17] Spite fences were the stock illustration, and the exemption from liability in such circumstances was supposed to illustrate not the exception, but the rule.[18] Such a rule may have been an adequate working principle to regulate the relations between individuals or classes in a simple or homogeneous community. With the growing complexity of social relations, its inadequacy was revealed. As particular controversies multiplied and the attempt was made to test them by the {25} old principle, it was found that there was something wrong in the results, and this led to a reformulation of the principle itself. Today, most judges are inclined to say that what was once thought to be the exception is the rule, and what was the rule is the exception. A. may never do anything in his business for the purpose of injuring another without reasonable and just excuse.[19] There has been a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare. This work of modification

[16] Munroe Smith, "Jurisprudence," Columbia University Press, 1909, p. 21; cf. Pound, "Courts and Legislation," 7 Am. Pol. Science Rev. 361; 9 Modern Legal Philosophy Series, p. 214; Pollock, "Essays in Jurisprudence and Ethics," p. 246.

[17] Cooley, "Torts," 1st ed., p. 93; Pollock, "Torts," 10th ed., p. 21.

[18] Phelps v. Nowlen, 72 N. Y. 39; Rideout v. Knox, 148 Mass. 368.

[19] Lamb v. Cheney, 227 N. Y. 418; Aikens v. Wisconsin, 195 U. S. 194, 204; Pollock, "Torts," *supra*.

is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

We are not likely to underrate the force that has been exerted if we look back upon its work. "There is not a creed which is not shaken, not an accredited dogma which is not shown to be {26} questionable, not a received tradition which does not threaten to dissolve."[20] Those are the words of a critic of life and letters writing forty years ago, and watching the growing scepticism of his day. I am tempted to apply his words to the history of the law. Hardly a rule of today but may be matched by its opposite of yesterday. Absolute liability for one's acts is today the exception; there must commonly be some tinge of fault, whether willful or negligent. Time was, however, when absolute liability was the rule.[21] Occasional reversions to the earlier type may be found in recent legislation.[22] Mutual promises give rise to an obligation, and their breach to a right of action for damages. Time was when the {27} obligation and the remedy were unknown unless the promise was under seal.[23] Rights of action may be assigned, and the buyer prosecute them to judgment though he bought for purposes of suit. Time was when the assignment was impossible, and the maintenance of the suit a crime. It is no basis today for an action of deceit to show, without more, that there has been the breach of an executory promise; yet the breach of an executory promise came to have a remedy in our law because it was held to be a deceit.[24] These changes or most of them have been wrought by judges. The men who wrought them used the same tools as the judges of today. The changes, as they were made

[20] Arnold, "Essays in Criticism," second series, p. 1.

[21] Holdsworth, "History of English Law," 2, p. 41; Wigmore, "Responsibility for Tortious Acts," 7 Harvard L. R. 315, 383, 441; 3 Anglo-Am. Legal Essays 474; Smith, "Liability for Damage to Land," 33 Harvard L. R. 551; Ames, "Law and Morals," 22 Harvard L. R. 97, 99; Isaacs, "Fault and Liability," 31 Harvard L. R. 954.

[22] Cf. Duguit, "Les Transformations générales du droit privé depuis le Code Napoléon," Continental Legal Hist. Series, vol. XI, pp. 125, 126, secs. 40, 42.

[23] Holdsworth, *supra*, 2, p. 72; Ames, "History of Parol Contracts prior to Assumpsit," 3 Anglo-Am. Legal Essays 304.

[24] Holdsworth, *supra*, 3, pp. 330, 336; Ames, "History of Assumpsit," 3 Anglo-Am. Legal Essays 275, 276.

in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize {28} and transform. For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless "becoming." We are back with Heraclitus. That, I mean, is the average or aggregate impression which the picture leaves upon the mind. Doubtless in the last three centuries, some lines, once wavering, have become rigid. We leave more to legislatures today, and less perhaps to judges.[25] Yet even now there is change from decade to decade. The glacier still moves.

In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.

The first branch of the problem is the one to which we are accustomed to address ourselves {29} more consciously than to the other. Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside. Judges differ greatly in their reverence for the illustrations and comments and side-remarks of their predecessors, to make no mention of their own. All agree that there may be dissent when the opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. No one, of course, avows such a belief, and yet sometimes there is an approach to it in conduct. I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opin-

[25] F. C. Montague in "A Sketch of Legal History," Maitland and Montague, p. 161.

ions when picked up a few months after delivery, {30} and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others. But dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent. Let us assume, however, that this task has been achieved, and that the precedent is known as it really is. Let us assume too that the principle, latent within it, has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; {31} this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.

I have put first among the principles of selection to guide our choice of paths, the rule of analogy or the method of philosophy. In putting it first, I do not mean to rate it as most important. On the contrary, it is often sacrificed to others. I have put it first because it has, I think, a certain presumption in its favor. Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize. It has the primacy that comes from natural and orderly and logical succession. Homage is due to it over every competing principle that is unable by appeal to history or tradition or policy or justice to make out a {32} better right. All sorts of deflecting forces may appear to contest its sway and absorb its power. At least, it is the heir presumptive. A pretender to the title will have to fight his way.

Great judges have sometimes spoken as if the principle of philosophy, i.e., of logical development, meant little or nothing in our law. Probably none of them in conduct was ever true to such a faith. Lord Halsbury said in Quinn v. Leathem, 1901, A. C. 495, 506: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."[26] All this may be true, but we must not press the truth too far. Logical consistency does not cease to be a good because it is not the supreme good. Holmes has told us {33} in a sentence which is now classic that "the life of the law has not been logic; it has been experience."[27] But Holmes did not tell us that logic is to be ignored when experience is silent. I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical, just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an {34} infringement, material and moral, of my rights."[28] Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts. A sentiment like

[26] Cf. Bailhache, J., in Belfast Ropewalk Co. v. Bushell, 1918, 1 K. B. 210, 213: "Unfortunately or fortunately, I am not sure which, our law is not a science."
[27] "The Common Law," p. 1.
[28] W. G. Miller, "The Data of Jurisprudence," p. 335; cf. Gray, "Nature and Sources of the Law," sec. 420; Salmond, "Jurisprudence," p. 170.

in kind, though different in degree, is at the root of the tendency of precedent to extend itself along the lines of logical development.[29] No doubt the sentiment is powerfully reinforced by what is often nothing but an intellectual passion for *elegantia juris*, for symmetry of form and substance.[30] That is an ideal which can never fail to exert some measure of attraction upon the professional experts who make up the lawyer class. To the Roman lawyers, it meant much, more than it has meant to English lawyers or to ours, certainly more {35} than it has meant to clients. "The client," says Miller in his "Data of Jurisprudence,"[31] "cares little for a 'beautiful' case! He wishes it settled somehow on the most favorable terms he can obtain." Even that is not always true. But as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent. The judge who moulds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep-seated and imperious sentiment. Only experts perhaps may be able to gauge the quality of his work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith. In default of other tests, the method of philosophy must remain the organon of the courts if {36} chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law.

You will say that there is an intolerable vagueness in all this. If the method of philosophy is to be employed in the absence of a better one, some test of comparative fitness should be furnished. I hope, before I have ended, to sketch, though only in the broadest outline, the fundamental considerations by which the choice of

[29] Cf. Gény, "Méthode d'Interprétation et Sources en droit privé positif," vol. II, p. 119.
[30] W. G. Miller, *supra*, p. 281; Bryce, "Studies in History and Jurisprudence," vol. II, p. 629.
[31] P. 1.

methods should be governed. In the nature of things they can never be catalogued with precision. Much must be left to that deftness in the use of tools which the practice of an art develops. A few hints, a few suggestions, the rest must be trusted to the feeling of the artist. But for the moment, I am satisfied to establish the method of philosophy as one organon among several, leaving the choice of one or the other to be talked of later. Very likely I have labored unduly to establish its title to a place so modest. Above all, in the Law School of Yale University, the {37} title will not be challenged. I say that because in the work of a brilliant teacher of this school, the late Wesley Newcomb Hohfeld, I find impressive recognition of the importance of this method, when kept within due limits, and some of the happiest illustrations of its legitimate employment. His treatise on "Fundamental Conceptions Applied in Judicial Reasoning" is in reality a plea that fundamental conceptions be analyzed more clearly, and their philosophical implications, their logical conclusions, developed more consistently. I do not mean to represent him as holding to the view that logical conclusions must always follow the conceptions developed by analysis. "No one saw more clearly than he that while the analytical matter is an indispensable tool, it is not an all-sufficient one for the lawyer."[32] "He emphasized over and over again" that "analytical work merely paves the way for other branches of jurisprudence, and that without the aid of the latter, satisfactory solutions of {38} legal problems cannot be reached."[33] We must know where logic and philosophy lead even though we may determine to abandon them for other guides. The times will be many when we can do no better than follow where they point.

Example, if not better than precept, may at least prove to be easier. We may get some sense of the class of questions to which a method is adapted when we have studied the class of questions to which it has been applied. Let me give some haphazard illustrations of conclusions adopted by our law through the development of legal conceptions to logical conclusions. A. agrees to sell a chattel to B. Before title passes, the chattel is destroyed. The loss falls on the

[32] Introduction to Hohfeld's Treatise by W. W. Cook.
[33] Professor Cook's Introduction.

seller who has sued at law for the price.[34] A. agrees to sell a house and lot. Before title passes, the house is destroyed. The seller sues in equity for specific performance. The loss falls upon the {39} buyer.[35] That is probably the prevailing view, though its wisdom has been sharply criticized.[36] These variant conclusions are not dictated by variant considerations of policy or justice. They are projections of a principle to its logical outcome, or the outcome supposed to be logical. Equity treats that as done which ought to be done. Contracts for the sale of land, unlike most contracts for the sale of chattels, are within the jurisdiction of equity. The vendee is in equity the owner from the beginning. Therefore, the burdens as well as the benefits of ownership shall be his. Let me take as another illustration of my meaning the cases which define the rights of assignees of choses in action. In the discussion of these cases, you will find much conflict of opinion about fundamental conceptions. Some tell us that the assignee has a legal ownership.[37] Others say that his right is purely equitable.[38] {40} Given, however, the fundamental conception, all agree in deducing its consequences by methods in which the preponderating element is the method of philosophy. We may find kindred illustrations in the law of trusts and contracts and in many other fields. It would be wearisome to accumulate them.

The directive force of logic does not always exert itself, however, along a single and unobstructed path. One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. Let me take as an illustration of such conflict the famous case of Riggs v.

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[34] Higgins v. Murray, 73 N. Y. 252, 254; 2 Williston on Contracts, sec. 962; N. Y. Personal Prop. Law, sec. 103a.

[35] Paine v. Meller, 6 Ves. 349, 352; Sewell v. Underhill, 197 N. Y. 168; 2 Williston on Contracts, sec. 931.

[36] 2 Williston on Contracts, sec. 940.

[37] Cook, 29 Harvard L. R. 816, 836.

[38] Williston, 30 Harvard L. R. 97; 31 *ibid.* 822.

Palmer, 115 N. Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting {41} principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice. Analogies and {42} precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight. I am not greatly concerned about the particular formula through which justice was attained. Consistency was preserved, logic received its tribute, by holding that the legal title passed, but that it was subjected to a constructive trust.[39] A constructive trust is nothing but "the formula through which the conscience of equity finds expression."[40] Property is acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. Equity, to express its disapproval of his conduct, converts him into a trustee.[41] Such formulas are merely the remedial devices by which a result

[39] Ellerson v. Westcott, 148 N. Y. 149, 154; Ames, "Lectures on Legal History," pp. 313, 314.
[40] Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 386.
[41] Beatty v. Guggenheim Exploration Co., *supra*; Ames, *supra*.

conceived of as right and just is {43} made to square with principle and with the symmetry of the legal system. What concerns me now is not the remedial device, but rather the underlying motive, the indwelling, creative energy, which brings such devices into play. The murderer lost the legacy for which the murder was committed because the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership. My illustration, indeed, has brought me ahead of my story. The judicial process is there in microcosm. We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go. {44}

It is easy to accumulate examples of the process – of the constant checking and testing of philosophy by justice, and of justice by philosophy. Take the rule which permits recovery with compensation for defects in cases of substantial, though incomplete performance. We have often applied it for the protection of builders who in trifling details and without evil purpose have departed from their contracts. The courts had some trouble for a time, when they were deciding such cases, to square their justice with their logic. Even now, an uneasy feeling betrays itself in treatise and decision that the two fabrics do not fit. As I had occasion to say in a recent case: "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result" remain "troubled by a classification where the lines of division are so wavering and blurred."[42] I have no doubt that the inspiration of the rule is a mere sentiment of justice. That sentiment asserting itself, we have proceeded to surround it {45} with the halo of conformity to precedent. Some judges saw the unifying principle in the law of

[42] Jacobs & Youngs, Inc. v. Kent, 230 N. Y. 239.

quasi-contracts. Others saw it in the distinction between dependent and independent promises, or between promises and conditions. All found, however, in the end that there *was* a principle in the legal armory which, when taken down from the wall where it was rusting, was capable of furnishing a weapon for the fight and of hewing a path to justice. Justice reacted upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another. Reason in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to method and order and coherence and tradition.[43]

In this conception of the method of logic or philosophy as one organon among several, I find nothing hostile to the teachings of continental jurists who would dethrone it from its place and {46} power in systems of jurisprudence other than our own. They have combated an evil which has touched the common law only here and there, and lightly. I do not mean that there are not fields where we have stood in need of the same lesson. In some part, however, we have been saved by the inductive process through which our case law has developed from evils and dangers inseparable from the development of law, upon the basis of the *jus scriptum*, by a process of deduction.[44] Yet even continental jurists who emphasize the need of other methods, do not ask us to abstract from legal principles all their fructifying power. The misuse of logic or philosophy begins when its method and its ends are treated as supreme and final. They can never be banished altogether. "Assuredly," says François Gény,[45] "there should be no question of banishing ratiocination and logical methods from the {47} science of positive law." Even general principles may sometimes be followed rigorously in the deduction of their con-sequences. "The abuse," he says, "consists, if I do not mistake, in envisaging ideal conceptions, provisional and purely subjec-

[43] Cf. Hynes v. N. Y. Central R. R. Co. (231 N. Y. 229, 235).

[44] "Notre droit public, comme notre droit privé, est un *jus scriptum*" (Michoud, "La Responsibilité de l'état à raison des fautes de ses agents," Revue du droit public, 1895, p. 273, quoted by Gény, vol. I, p. 40, sec. 19).

[45] *Op. cit.*, vol. I, p. 127, sec. 61.

tive in their nature, as endowed with a permanent objective reality. And this false point of view, which, to my thinking, is a vestige of the absolute realism of the middle ages, ends in confining the entire system of positive law, *a priori*, within a limited number of logical categories, which are predetermined in essence, immovable in basis, governed by inflexible dogmas, and thus incapable of adapting themselves to the ever varied and changing exigencies of life."

In law, as in every other branch of knowledge, the truths given by induction tend to form the premises for new deductions. The lawyers and the judges of successive generations do not repeat for themselves the process of verification, any more than most of us repeat the demonstrations of the truths of astronomy or physics. A stock of juridical conceptions and formulas is {48} developed, and we take them, so to speak, ready-made. Such fundamental conceptions as contract and possession and ownership and testament and many others, are there, ready for use. How they came to be there, I do not need to inquire. I am writing, not a history of the evolution of law, but a sketch of the judicial process applied to law full grown. These fundamental conceptions once attained form the starting point from which are derived new consequences, which, at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic. So it is with the growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed. {49} Sometimes it is accepted as a postulate of later reasoning, its origins are forgotten, it becomes a new stock of descent, its issue unite with other strains, and persisting permeate the law. You may call the process one of analogy or of logic or of philosophy as you please. Its essence in any event is the derivation of a consequence from a rule or a principle or a precedent which, accepted as a datum, contains implicitly within itself the germ of the

conclusion. In all this, I do not use the word philosophy in any strict or formal sense. The method tapers down from the syllogism at one end to mere analogy at the other. Sometimes the extension of a precedent goes to the limit of its logic. Sometimes it does not go so far. Sometimes by a process of analogy it is carried even farther. That is a tool which no system of jurisprudence has been able to discard.[46] A rule which has worked well in one field, or which, in any event, is there whether its workings have been revealed or not, is carried over into another. Instances of such a process I group {50} under the same heading as those where the nexus of logic is closer and more binding.[47] At bottom and in their underlying motives, they are phases of the same method. They are inspired by the same yearning for consistency, for certainty, for uniformity of plan and structure. They have their roots in the constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish. ❶

[46] Ehrlich, "Die Juristische Logik," pp. 225, 227.
[47] Cf. Gény, *op. cit.*, vol. II, p. 121, sec. 165; also vol. I, p. 304, sec. 107.

BOOK REVIEW

THE NATURE OF THE JUDICIAL PROCESS

Learned Hand[†]

Judge Cardozo has in this book tried his hand at one of those problems which have fascinated the mind of mankind since it began to ponder upon the meaning of law. The position of an English speaking judge, especially, presents an apparent contradiction that has always exercised those who are speculatively inclined. The pretension of such a judge is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece; his judgment is the conclusion of a syllogism in which the major is to be found among fixed and ascertainable rules. Conceivably a machine of intricate enough complexity might deliver such a judgment automatically were it only to be fed with the proper findings of fact. Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.

We have grown more self-conscious of late and can no longer content ourselves with fictions; and candid men like Judge Cardozo will not stomach those equivocations which keep the promise to the ear and break it to the hope. So, while he is aware enough of the limitations upon a judge's freedom, he is more acutely aware than many of his contemporaries of the extent to which he must choose responsibly. His essay tells us of the different factors which may properly enter into a judge's consideration. He must be faithful to

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[†] *This review originally appeared at 35 Harv. L. Rev. 479 (1922). At that time, Hand was a District Judge on the United States District Court for the Southern District of New York.*

the past, of which he is the inheritor, but not too faithful; he must remember that he lays down a rule of general application, – consistency for him is a jewel; but beyond all he must remember that he is a priest of his time, the interpreterof an inarticulate will, which accepts the past only in part, – no more of it than the present has not yet awakened to repudiate.

No quantitative valuation of these elements is possible; the good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance. There are no *vade mecums* to this or any other art. It is in the end a question of more or less, and the judicial function lies in the interstices of the social tissues.

That a judge of Judge Cardozo's standing should so frankly own the way in which he works is itself a portent, though in fact he probably disposes of his cases by no saliently different methods from the judges who have preceded him. Indeed he is analyzing, not his own mind alone, but the ways in which all judges decide their cases. But the self-scrutiny which can learn how it works and the candor which will avow it, are rare in such high places. The masters assure us that ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding. If they are right – and who are we to question them? – the development will be self-conscious as never before. How Demos will accept it is another matter. Hitherto he has been lulled to rest by unctuous protests of docility from his judges. Will he awaken in a rage when they admit that they are not all "mind," but entertain a "will" as well? Perhaps not; most judges are more pious than Judge Cardozo – and less sincere.

We, who are born in the faith, learned to lisp in our cradles that this is a government of laws, not men. Only yesterday the thunder broke from Olympus and reassured such of us as may have been shaken. From this postulate indeed it followed that the writ of injunction is one of those fundamental rights, any experimentation

with which the Constitution forbids. I must confess that this book does not seem orthodox measured by that standard. There is a scandal in so much subjectivity. Mr. Justice Holmes has somewhere said that the lawyer's problem is one in psychology; he must find the personal equation of his judge, a compelx (it was before the days of Freud) of all those elements which may influence him, his dialectic propensity, his learning, his deference ot the past, his docility to the present, his traditions, his individual habit. It is as if a man were to study the disposition of a pet tiger, another pursuit interesting though perilous, like life. He must reckon with the fundamental biologic tropisms of all sentient creatures; he must know the limitations and capacities of the *Felidae;* he must acquaint himself with the acquired instinctive responses of *Felis tigris;* but chief of all he had better understand the partialities of that particular tiger.

I fancy that if all this be true, the law, which is the greatest common divisor of the sum total of concrete judgments, must in some measure retain a strain of warm humanity about it, which sits a little oddly upon the heights where the Constitution of Massachusetts has placed it. The law is indeed not the creation of this generation, and those who should feel so have no proper place in it. But then this generation was itself scarcely parthenogenetic; and to be human is necessarily to be more than individual. However, after making all allowances, there will be excellent people who cannot help feeling that the voice of this book is in a way the voice of heresy. It will disquiet them even more to know that it emanates from a judge who by the common consent of the bench and bar of his state has no equal within its borders; from one who by the gentleness and purity of his character, the acuteness and suppleness of his mind, by his learning, his moderation, and his sympathetic understanding of his time, has won an unrivaled esteem wherever else he is known. They will be troubled at learning all this; and they will be right to be troubled. When Brutus strikes, we had best fold our togas over our heads and resign our spirits to the darkness. Of course, there is always an escape by concession, by ceasing to climb towards the snowy heights of eternal principles; but they may be unwilling to surrender the truths which have descended to them from the Fa-

thers, tested in the furnaces of experience, burnished by the great hands of the dead, for an opportunism which seeks to cover its usurpation under an affectation of candor. Nor will it much reassure such loyal souls to point to the casual origin of all other institutions, or to let them peep into the unlovely undercurrents which run below the noble surfaces of even the great and 'good. But conversion is open to us all, and perhaps this book will prove to be a primer in introspection which may find a way even into the tents of righteousness. ❶

BOOK REVIEW

THE NATURE OF THE JUDICIAL PROCESS

Max Radin[†]

What is the judicial process? Kantorowicz (Rechtswissenschaft and Soziologie, p.5) tells us that according to popular conception in Germany, it consists, or ought to consist, in dropping an appropriate section of a statute into a hopper, turning the crank and pulling out the correct decision at the bottom. Doubtless the current American belief is very similar, except that we are likely to credit the judge with a perverse ingenuity in so turning the crank that a wrong decision comes out. In this admirable little volume, Mr. Justice Cardozo tells us that turning the crank is far from being a purely mechanical process, that it is a matter of minute and delicate adjustments, that in its conscious form it is an application of philosophy, history and sociology, and that subconsciously powerful forces direct and help determine it.

Judge Cardozo is a member of one of the busiest and most influential tribunals on the face of the earth, the Court of Appeals of New York State. That he can find time to subject his thinking and procedure to so close an analysis is a sign of high encouragement. He is quite abreast of the New Learning – new, that is to say, to lawyers trained in the common-law tradition – a learning that consists in treating the profoundly significant work of modern continental jurists not as a mischievous irrelevancy, but as a source of guidance and light. If he quotes mostly from the valuable series on legal philosophy and continental legal history issued by the American Association of Law Schools, that is apparently for the convenience of

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[†] *This review originally appeared at 10 Cal. L. Rev. 367 (1922). At that time, Radin was a professor of law at Boalt Hall.*

his readers, since he gives ample indication of being conversant with the original sources. All this is important to note, for the quite extraordinary width and depth of his learning have largely contributed in giving his decisions those qualities which have earned for them an almost general commendation. If any man can completely describe the nature of the judicial process, it will be a man like the Storrs lecturer of 1921.

Judge Cardozo somewhat over-dignifies the method which he calls that of philosophy. Properly it is rather the method of the formal syllogism. It is a way of dealing with facts that can never become obsolete. Drawing correct inferences from premises is a discipline that must always be valuable, but is limitations are obvious and over-emphasis of it has done real harm. For a syllogism can tell us nothing that was not already implicit in the major premise. Progress is impossible in a theory that recognizes no other method except by the surreptitious devices of fictions and verbal quibbles. It is a judicial method that too closely for comfort resembles the turning of the handle, and it deserves some of the odium into which it has recently fallen.

The historical, sociological, and psychological methods which the author sets forth are really different in kind. They assist the judge in performing his really judicial task – of selecting his major premise, or they constitute his apology and justification for selecting a bad one. Judge Cardozo overstates, I think, the force that a single precedent has had for common-law judges. The fiction that judges find and do not make the law had at least this advantage, that courts have not hesitated to leap over a fence consisting of but one case which did not commend itself to them. While they have not insisted on the *series longissima rerum similiter indicatarum,* it was always a course of decision, a weight of authority, that forced them to accept a rule they would otherwise have rejected, and the popular fancy of a judge in 1922 confronted with a single unreversed decision of 1422, or even of 1777, and helplessly succumbing to it, is not really borne out by the facts.

Judge Cardozo is inclined to limit the functions of the judge as a legislator to the "gaps in the law" which the "Free-law" school as

well as Zitelman's book, has made famous. Only in the obvious silence of statute or precedent, should the judge follow the injunction of the Swiss Civil Code and legislate, but then he should legislate consciously. However, determining the existence of a gap is itself the difficult task. A law which is the essence of reason has no gaps, and a law which makes no such profession may have none. Under the common-law writs, under the Roman *leglsaction*, there were no gaps. The law concerned itself with facts that could be fitted into rather unyielding frames. There were no gaps, not because there were no cases in which injuries were left without remedy, but because the system did not pretend to do more than classify the injuries it would consent to remedy. And again a system that refuses to admit the existence of *damnum absque iniuria* has no gaps.

When the facts of Riggs v Palmer 115 N.Y. 506 were presented to a New York court, was there a gap in the law? Should a legatee who murdered his testator take under the will? That question will be answered differently in exact accordance with the desire of the judge to assume legislative functions. If a judge decided that a gap existed, he would act as a legislator, that is, he would apply the sociological method; he would decide what public interest demanded and determine accordingly without troubling himself to construct a syllogism. But suppose he did not wish to legislate and did feel bound to construct a syllogism. He would have then to determine what his major premise should be. In this case at least three were open to him, one of which would have led to a result different from the others. Is it not obvious that he would – that he must – choose the premise which will secure what to him is a desirable result, and that the result will be desirable in accordance with his views of society?

That is, he is applying the sociological method quite as much as in the other case. He is doing so, even when he selects of three possible major premises the one he thinks most important without regard to its application in the particular case. For he has no criterion of importance in the abstract, and his only way of deciding that question is to be convinced of the greater or smaller advantage which the inferences from conflicting premises will bring. Howev-

er, if he will not recognize a gap, and selects his premise by its fancied intrinsic importance, he runs the danger of being unduly influenced by the accident of his own legal studies, and this is a greater danger than that of being influenced by the accident of one's own economic and social theories.

The judicial process, then, as presented by Judge Cardozo, may be said to consist in using history and sociology to select the principles of our reasoning and logic in applying it. Where history, that is, precedent, permits a choice, sociology will make it, and here logic will not help us, for it is the conclusion that consciously determines the premise. Logic, however, is of especial application to statutes, for our judges will scarcely have the hardihood of "le bon juge," Magnaud, who declared in his speech to the Chamber of Deputies: "The law cannot have wished an unjust result. Therefore, if an apparently unjust result follows, the words of the law must have a sense different from what they seem to have." Our courts have performed feats in this direction without so open an avowal; but a salutary change is noticeable and we are not likely to see repeated the methods by which statutes are wrested from their declared sense to secure a result opposite to what was intended.

Enough has been said to show that in the author's presentation the judicial process depends on the learning, humanity and philosophy of the judge. That is doubtless not a new doctrine. The book, however, makes clear that in a complicated age, rude integrity and formal logic will not suffice to carry the process to a desirable result. The learning must be great, the humanity finely tempered and broadly established, the philosophy acute. Judge Cardozo is himself an example that such qualities are ceasing to be rare in our judiciary. ❶

BOOK REVIEW

THE NATURE OF THE JUDICIAL PROCESS

Harlan F. Stone[†]

It is a singular fact that with the rapidly swelling volume of literature which may aptly be described by the title, "How and what we think about law," no one should hitherto have specifically directed his attention toward an analysis of the judicial process. There have been books innumerable about the nature and sources of law, about legal method, about systematic jurisprudence, all of them erudite and profound and some of them useful. But this is the first book which has sought in simple and understandable language to answer the question, what is the intellectual process by which the judge decides a case?

Its four chapters deal with: 1. The Method of Philosophy; II. The Methods of History, Tradition and Sociology; III. The Method of Sociology and the Judge as a Legislator; IV. Adherence to Precedent, the Subconscious Element in the Judicial Process. Together these chapters make up an unusual book, unusual in that within brief compass there is presented a survey of the subject which exhibits both originality of treatment and a grasp of the philosophic thought on the subject which the reader will seek for in vain in many more pretentious volumes dealing with the philosophy of law and legal method. He will be delighted to discover, moreover, in the two or three sittings required for the reading of this book, that the author has not found simplicity and clarity of statement incompatible with sound scholarship and profundity of thought.

[†] *This review originally appeared at 22 Colum. L. Rev. 382 (1922). At that time, Stone was Dean of the Columbia Law School. Page numbers appended to the quotations in this article refer to the original 1921 edition of The Nature of the Judicial Process.*

The judicial process in the vast number of cases which find their way to appellate courts is well understood. It consists in the sifting and analysis of facts and the application to them of accepted rules or doctrines of law. This is the function the performance of which absorbs for the most part the work-a-day life of the judge, a fact that should be emphasized in an attempt to analyze that process with any due sense of proportion. This the author clearly recognizes. He says:

> "In what I have said, I have thrown, perhaps too much, into the background and the shadow, the cases where the controversy turns not upon the rule of law, but upon its application to the facts. Those cases, after all, make up the bulk of the business of the courts. They are important for the litigants concerned in them. They call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before. As applied to such cases, the judicial process, as was said at the outset of these lectures, is a process of search and comparison, and little else. We have to distinguish between the precedents which are merely static, and those which are dynamic. Because the former outnumber the latter many times, a sketch of the judicial process which concerns itself almost exclusively with the creative or dynamic element, is likely to give a false impression, an overcolored picture, of uncertainty in the law and of free discretion in the judge. Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one" (pp.163-4).

Precedent is dynamic when it limits or overrules precedent which is static, that is, the precedent which expresses an established rule, or when it fills in the gaps of the law in those cases where judges, as Mr. Justice Holmes puts it, "legislate interstitially." It is the dynamic precedent, therefore, which is the constructive force in law, bearing within itself the germ of the growth and adaptability of law the *mores* of the times. The skill with which the judicial process is applied in creating it will determine whether law is to move toward or away from the ideal of social utility. But it is nevertheless in the rendering of the dynamic judgment that the judicial process is

not so clearly discerned. Hence it is the dynamic precedent with which this little book is mainly concerned.

Judge Cardozo does not share in in the opinion finding expression in current discussion, that the rule of adherence to precedent ought to be abandoned altogether. He believes that adherence to precedent should be the rule and not the exception, but he also believes

> ". . . that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance, or development with the process of the years" (p.150).

In filling the gaps in the law the judge must make use of three methods in varying combinations. The first of these is the method of philosophy which exerts a directing force along the lines of logical progression. It is the "logic" to which Holmes referred when he said that "the life of the law is not logic but experience." There is a certain presumption, the author believes, in favor of the philosophic method.

> "Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize" (p.31).

But the method of philosophy finds itself sometimes supported by and sometimes in competition with the method of history and tradition, which on occasion gives origin to the legal doctrine which

philosophy develops, and on occasion restricts its philosophical development within the limits of hits history. And finally there is the method which turns the directive force of principle along the lines of justice, morality, and moral and social welfare; in short, the method of sociology.

> "It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all" (p.98).

It is the admirable discussion of the interplay and of the action and reaction of history, logic and the judge's view of right and social need – the essential elements in the judicial process, which take place in the making of the relatively rare dynamic or "interstitial" precedent – which makes this book such stimulating reading and such an effective provocative of reflective thinking. One could wish that the author had expanded his concise and lucid statement of fundamentals with a wealth of illustration showing where again and again in the history of the law doctrines with an historical origin and sometimes with a philosophical basis have been finally rejected on sociological grounds or how a doctrine of historical origin and without any purely logical justification has been retained because of its social utility. And alas, how many are the instances where rules socially inconvenient and burdensome have been perpetuated and expanded because of a defective philosophy or too great a reverence for history; but this book contains well-chosen examples illustrating all of these phases of legal development and sufficient in number to prove the author's thesis.

Let us quote him in summarizing the procedure by which the sociological method is to moderate the demands of philosophy and of history.

> "My analysis of the juridical process comes then to this, and a little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value

> of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore, in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey" (p.112).

It would be exceedingly difficult to state in more admirable fashion the part which the judge's notions of social utility may properly play in the judicial process, and we find ourselves in cordial agreement with it. But can we dignify this procedure by terming it in any proper sense a "method"? Has sociological jurisprudence any formulae or any principles which can be taught or expounded so as to make it a methodical guide either to the student of law or to the judge? Judge Cardozo deals with this aspect of the matter with characteristic frankness.

> "If you ask how he is to know when one interest outweighs the other, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; . . .
>
> "So also the duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely. He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must

> determine, as wisely as he can, which weight shall tip the scales. If this seems a weak and inconclusive summary, I am not sure that the fault is mine. I know he is a wise pharmacist who from a recipe so general can compound a fitting remedy" (pp. 113, 161, 162).

In short the method of sociology is the method which the wise and competent judge uses in rendering the dynamic decision which makes the law a living force. Hardwick, Mansfield and Marshall employed it long before the phrase "sociological jurisprudence" was thought of. The weak and incompetent judge cannot use it and indeed in his hands it is a dangerous instrument, for the only guide for its use is judicial wisdom.

A vast deal has been written in recent years about sociological jurisprudence until it has become the fashion to refer to it glibly as though it were a cure for all the ills that our legal system is heir to. One who reads attentively Judge Cardozo's restrained and discriminating analysis will gain no illusion that the method affords any positive formula or guide which can ever make it a panacaea. At most its value is negative. It warns the judge and the student of law that logic and history cannot and ought not to have full sway when the dynamic judgment is to be rendered. It points out that in the choice of the particular legal device determining the result – social utility – the *mores* of the times objectively determined may properly turn the scale in favor of one and against the other, and it should lead us as lawyers and students of law to place an appropriate emphasis on the study of sociological data and on the effort to understand the relation of law to them, because by that process we may lay the foundation for a better understanding of what social utility is and where in a given case the path of social utility lies. But sociological jurisprudence will never tell us how to ascertain in any way, except by the exercise of a wise judgment, where the course of social utility lies or what are the *mores* of our times. The capacity to do that and to give them their appropriate place in judicial decision finds expression in the wisdom which characterizes the decision of the great judge and distinguishes him from his inferior brethren.

To those who have not passed beyond the Blackstonian concept

of a law which has always existed and which needs only to be discovered by the diligent judge, this book may seem to exhibit radical tendencies. To others it will seem no more radical than science itself which seeks always by the gathering of data and their accurate interpretation to penetrate a little nearer to the ultimate truth. In this sense the book is truly scientific in spirit and method, presenting its subject with the balance, restraint and clarity which have marked the author's distinguished service as a judge. ❶

The Post

GOOD SCHOLARSHIP FROM THE INTERNET

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AN INTRODUCTION TO *THE POST*

Anna Ivey[†]

To state the obvious, lawyers and law professors are a wordy bunch. For better or worse, they love to share what's on their minds, and they embrace new technologies, like blogs, to do so. The most popular legal blogs draw millions of visitors per year,[1] a readership that even the most widely read law reviews can envy.[2] The explosion of legal blogs in the last ten years or so[3] inspires us to ask: What constitutes good legal blog writing? And is it possible to identify the best of the best? In that spirit, we introduce *The Post*.

THE ELEMENTS OF GOOD LEGAL BLOGGING

Blogging

In showcasing the best of legal blogging – and we use "blogging" loosely to include whatever other digital platforms the future holds for short-form, real-time, public writing – we embrace blogging for what it is, no more and no less. We intentionally do not venture into larger debates about whether legal blogging, even at its best, rises (or descends, or congeals, or metastasizes) to the level of legal scholarship, and we accept that they are two different things, at least for now. We are, however, inspired by the debate.

[†] Founder and president, Ivey Consulting, Inc.

[1] Paul Caron, *Law Prof Blog Traffic Rankings*, Tax Prof Blog, http://taxprof.typepad.com/taxprof_blog/2011/06/law-prof-.html#tp (June 14, 2011).

[2] Davies, Ross E., *The Dipping Point: Law Review Circulation 2010*, Green Bag Almanac and Reader, 547-554 (2011); George Mason Law & Economics Research Paper No. 11-01, available at SSRN: http://ssrn.com/abstract=1738530.

[3] Early-adopter legal blogs that continue to thrive include Overlawyered (founded in 1999), Volokh Conspiracy (2002), and How Appealing (2002).

Five years ago, a number of prominent legal academics (most of them also rock-star bloggers) convened at Harvard Law School for a symposium[4] dedicated to the question of blogging as scholarship. A rough agreement emerged (with one dissent from the lone non-blogger) that legal blogging can seed and nurture "micro-discoveries"[5] or "pre-scholarship"[6] that has the potential to bloom into the longer-form, more sophisticated, more mediated, and more "mulled"[7] over scholarship than is typically featured in law reviews. They agreed on the shorthand "bloggership"[8] to describe this kind of proto-scholarly blogging. That concept of legal blogging fits nicely with the founding mission of the *Journal of Law*: to incubate promising ideas in the hope that a subset will merit and inspire further development by someone, somewhere.[9]

We therefore don't presume to elevate blogging into something it's not. Not every idea or observation merits 100 pages as an article, but some can influence courts, academics, practitioners, lawmakers, and the public nonetheless. (And then there are the ideas and observations that do not merit 100 words, or even ten, and yet find their way onto reputable blogs.) The aspects of blogging that

[4] "Bloggership: How Blogs are Transforming Legal Scholarship" symposium held at Harvard Law School on April 28, 2006. Papers available at SSRN: http://www.ssrn.com/link/Bloggership-2006.html.

[5] Eugene Volokh, *Scholarship, Blogging and Trade-offs: On Discovering, Disseminating, and Doing [Very Early Draft]* (April 2006). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference Paper; UCLA School of Law Research Paper No. 06-17, at 8. Available at SSRN: http://ssrn.com/abstract=898172.

[6] D. Gordon Smith, *A Case Study in Bloggership* (May 15, 2007). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference Paper; Univ. of Wisconsin Legal Studies Research Paper No. 1017, at 5; Washington University Law Review, Vol. 84, 2007. Available at SSRN: http://ssrn.com/abstract=898178.

[7] Orin S. Kerr, *Blogs and the Legal Academy* (April 14, 2006). GWU Law School Public Law Research Paper No. 203, at 6; Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference. Available at SSRN: http://ssrn.com/abstract=896994.

[8] Paul L. Caron, *Are Scholars Better Bloggers?* (November 1, 2007). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship; Washington University Law Review, Vol. 84, at 1025 (2006); U of Cincinnati Public Law Research Paper No. 07-12. Available at SSRN: http://ssrn.com/abstract=947637.

[9] Ross E. Davies, *Like Water for Law Reviews*, 1 J.L. 1 (2011).

arguably make it unsuitable for traditional scholarly publishing – its public stream of consciousness, its cheerful engagement with the wider world (however unsophisticated, from the perspective of academia), the trade-offs inherent in quick thinking and quick writing – those, we argue, are features rather than bugs.

For the same reason, we are also receptive to blog posts that nurture further discussion *after* and in response to publication of a true-blue law review article. Many law reviews are still Web 1.0 creatures: they put content up on their websites, and that's the end of their engagement with the wider world within those four corners. It's not common, as of now, for law reviews to provide a 2.0 experience, by putting up content and inviting conversation in the form of a discussion board or comments section. So as excited as we are about proto-scholarship that is born on a blog and matures into full scholarship in a law review article, we're also curious about the reverse: law review articles that inspire conversation which by necessity must migrate over to a blog to find a receptive online home for discussion.

Noteworthiness

Even if one accepts the merits of our project in principle, how does one determine good, let alone the *best*, legal blogging?

While we hope to keep an open mind about different approaches to legal blogging, most fundamentally we are looking for blog posts that pose an interesting question or make a novel observation worthy of longer-term notice. (Blogs are like supermodels: as a practical matter, their longevity must be measured in dog years, and any single blog post that continues to make an impression even months later is something special.) That means we are looking for the best of "bloggership," but also for posts that do not necessarily aspire to become law review articles when they grow up. While scholars need to worry primarily, and perhaps solely, whether their academic colleagues find their ideas worthwhile, *The Post* will also take note if, for example, a court finds a blog posting persuasive or on point,[10]

[10] "Most law professors want their law review articles to influence courts . . . . Yet law clerks, I'm told, often read blogs." Volokh, supra note 5, at 5. However, it is probably

or a legal blog post inspires rambunctious and interesting conversation among astute commenters. The sphere of influence and audience is naturally wider for blogs than it is for long-form scholarship, and we embrace that wider radius.

Writing Style

We are also suckers for good writing in and of itself. It requires no daring to note that law review writing can verge on the sclerotic, the pompous, and the incomprehensible. By featuring the great writing that some bloggers manage to produce on the fly, we hope to inspire more writers and editors working on traditional platforms to adopt and encourage a fresher, more accessible writing style.

Authorship

And who is a legal *blogger* for our purposes? There we will also look beyond the boundaries of academia. Law school professors are prolific bloggers, but so are practitioners, and they too can have micro- and macro-discoveries worthy of notice. We welcome their observations about the law shaped by their experience in the trenches.

Subject Matter

By *legal* blogging, we mean blogging that relates to the law (in the capital-L sense), specific laws, or legal systems, as opposed to writing about the ins and outs of legal practice, the state of law school education, and other ancillary topics. There is much fine blogging to be found in that wider radius of subject matter, but *The Post* will focus on writing about law and laws and legal systems, full stop. The intended audience should also be legally trained rather than an educated public at large.

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worth keeping in mind the possibility that "[t]o be cited by a court on an issue laden with political implications is not to have influence, but to be used." Paul D. Carrington, *Stewards of Democracy: Law as a Public Profession* 70 (1999).

Format

We will take different approaches with format. Sometimes interesting ideas emerge within a single blog posting, but other times the real action happens in the back-and-forth of the comments section. Blogging beautifully takes care of Socrates' pre-2.0 objection to putting thoughts down in writing: Every word, once written, "is bandied about, alike among those who understand and those who have no interest in it" and "has no power to protect or help itself."[11] Perhaps only the smallest minority of blog comments rise to the level of Socratic dialogues, but the blog medium at least enables a written idea to evolve in dialectical fashion, assuming there's sufficient momentum and expertise among its readership. Perhaps Socrates would have cheered blogging? Who knows? Alternatively, perhaps the law-blogosphere is now so large and energetic that its denizens are participating in the legal equivalent of the Shakespearean Infinite Monkey Theorem.[12] We'll use our judgment in deciding whether to showcase blog postings in their stand-alone form, or to excerpt the most salient parts of longer, organic conversations.

OUR ESTEEMED JUDGES

Because the blogosphere is vast (even when restricted to law-related blogs), we rely on a small group of editor-experts to help us identify the posts that are likely to hold up, age well, and influence legal thinking in one way or another. These experts represent a mix of academics and practitioners, have some experience blogging themselves (although they will not be encouraged to nominate their own writing), and – most importantly – are voracious, appreciative, and intelligent consumers of legal blogs. They are donating their good judgment and eagle eyes in helping to curate our selections. Throughout the year, they will be nominating posts to be

[11] Plato, *Phaedrus* 275e (Fowler translation), http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0174%3Atext%3DPhaedrus%3Asection%3D275e.

[12] *Virtual Monkeys Write Shakespeare*, http://www.bbc.co.uk/news/technology-15060310 (September 26, 2011).

voted on by the panel; as editor-in-chief of *The Post*, I will determine how many votes are required for a post to be featured here, and I will aim to stay within a yearly range of 5-20 featured posts with a minimum of arbitrariness or capriciousness.

Beyond those guidelines, we won't try to circumscribe the elements of "best legal blogging" any further ex ante, but rather hope to distill a definition over time as our experts deduce the features that tie the finest examples together. We view *The Post* as a start-up to be incubated in its own right, and there will be course corrections and refinements along the way. There's a big, dynamic world of legal blogging out there, and through *The Post*, we hope to find and feature the best. //

FROM: THE VOLOKH CONSPIRACY

SO MUCH FOR THE COMMERCE CLAUSE CHALLENGE TO INDIVIDUAL MANDATE BEING "FRIVOLOUS"

Randy Barnett[†]

Remember when the Commerce Clause challenge to the individual insurance mandate was dismissed by all serious and knowledgeable constitutional law professors and Nancy Pelosi as "frivolous"? Well, as Jonathan notes below, the administration is now apparently telling the New York Times that the individual insurance "requirement" and "penalty" is really an exercise of the Tax Power of Congress.

> Administration officials say the tax argument is a linchpin of their legal case in defense of the health care overhaul and its individual mandate, now being challenged in court by more than 20 states and several private organizations.

Let that sink in for a moment. If the Commerce Clause claim of power were a slam dunk, as previously alleged, would there be any need now to change or supplement that theory? Maybe the administration lawyers confronted the inconvenient fact that the Commerce Clause has never in history been used to mandate that all Americans enter into a commercial relationship with a private company on pain of a "penalty" enforced by the IRS. So there is no Su-

[†] Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. Original at volokh.com/2010/07/18/so-much-for-frivolous-commerce-clause-challenge-to-individual-mandate/ (July 18, 2010; vis. Sept. 30, 2011).

preme Court ruling that such a claim of power is constitutional. In short, this claim of power is both factually and judicially unprecedented.

Remarkably, and to its credit, the NYT informs its readers about 2 key facts that pose a problem with the tax theory – and without even attributing these to the measure's opponents.

> Congress anticipated a constitutional challenge to the individual mandate. Accordingly, the law includes 10 detailed findings meant to show that the mandate regulates commercial activity important to the nation's economy. Nowhere does Congress cite its taxing power as a source of authority.

And

> The law describes the levy on the uninsured as a "penalty" rather than a tax.

This is a sign that NYT's reporter Robert Pear is on the ball. But wait! There is more that is not in the article.

The Supreme Court has defined a tax as having a revenue raising purpose – a requirement that is usually easy to satisfy. But in the section of the act that specifically identifies all of its revenue raising provisions for purposes of scoring its costs (which is a big deal), the insurance mandate "penalty" goes unmentioned.

Unlike any other tax, according to the act, the failure to pay the penalty "shall not be subject to any criminal prosecution or penalty with respect to such failure." Nor shall the IRS "file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section," or "levy on any such property with respect to such failure."

The article reports this response from the Justice Department:

> The Justice Department brushes aside the distinction, saying "the statutory label" does not matter. The constitutionality of a tax law depends on "its practical operation," not the precise form of words used to describe it, the department says, citing a long line of Supreme Court cases.

Now there are cases that say (1) when Congress does not invoke a specific power for a claim of power, the Supreme Court will look

for a basis on which to sustain the measure; (2) when Congress does invoke its Tax power, such a claim is not defeated by showing the measure would be outside its commerce power if enacted as a regulation (though there are some older, never-reversed precedents pointing the other way), and (3) the Courts will not look behind a claim by Congress that a measure is a tax with a revenue raising purpose.

But I have so far seen no case that says (4) when a measure is expressly justified in the statute itself as a regulation of commerce (as the NYT accurately reports), the courts will look look behind that characterization during litigation to ask if it could have been justified as a tax, or (5) when Congress fails to include a penalty among all the "revenue producing" measures in a bill, the Court will nevertheless impute a revenue purpose to the measure.

Now, of course, the Supreme Court can always adopt these two additional doctrines. It could decide that any measure passed and justified expressly as a regulation of commerce is constitutional if it could have been enacted as a tax. But if it upholds this act, it would also have to say that Congress can assert any power it wills over individuals so long as it delegates enforcement of the penalty to the IRS. Put another way since every "fine" collects money, the Tax Power gives Congress unlimited power to fine any activity or, as here, inactivity it wishes! (Do you doubt this will be a major line of questioning in oral argument?)

But it gets still worse. For calling this a tax does not change the nature of the "requirement" or mandate that is enforced by the "penalty." ALL previous cases of taxes upheld (when they may have exceeded the commerce power) involved "taxes" on conduct or activity. None involved taxes on the refusal to engage in conduct. In short, none of these tax cases involved using the Tax Power to impose a mandate.

So, like the invocation of the Commerce Clause, this invocation of the Tax Power is factually and judicially unprecedented. It is yet another unprecedented claim of Congressional power. Only this one is even more sweeping and dangerous than the Commerce Clause theory.

I responded to this theory in the Wall Street Journal back in April, in an op-ed the editors entitled The Insurance Mandate in Peril.[1] Here is a key passage from my op-ed:

> Supporters of the mandate cite *U.S. v. Kahriger* (1953), where the Court upheld a punitive tax on gambling by saying that "[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." Yet the Court in *Kahriger* also cited *Bailey* with approval. The key to understanding *Kahriger* is the proposition the Court there rejected: "it is said that Congress, under the *pretense* of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act" (emphasis added).
>
> In other words, the Court in *Kahriger* declined to look behind Congress's assertion that it was exercising its tax power to see whether a measure was really a regulatory penalty. As the Court said in *Sonzinsky v. U.S.* (1937), "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." But this principle cuts both ways. Neither will the Court look behind Congress's inadequate assertion of its commerce power to speculate as to whether a measure was "really" a tax. The Court will read the cards as Congress dealt them.

My piece is not behind a subscription wall so interested readers can read (or reread) the whole thing.

Now the usual caveat. Just because the constitutional challenge to the health insurance mandate is not frivolous does not mean it will prevail. *The odds are always that the Supreme Court will uphold an act of Congress.* Given the wording of the Act, however, the implications of doing so using the Tax Power are so sweeping and dangerous that I doubt a majority of the Court would adopt this claim of power on these facts.

But the argument is far from over. //

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[1] Randy E. Barnett, *The Insurance Mandate in Peril: First Congress said it was a regulation of commerce. Now it's supposed to be a tax. Neither claim will survive Supreme Court scrutiny.*, Wall St. J., Apr. 29, 2010, online.wsj.com/article/SB10001424052748704446704575206502199257916.html.

FROM: THE VOLOKH CONSPIRACY

"LET 'EM PLAY"

Mitch Berman[†]

OVERVIEW

Many thanks to Eugene for inviting me to discuss my just-published paper "Let 'em Play": A Study in the Jurisprudence of Sport,[1] in this forum. I'm grateful for the opportunity and look forward to your comments.

Recall the women's semifinal of the 2009 U.S. Open, pitting Serena Williams against Kim Clijsters. Having lost the first set, Williams was serving to Clijsters at 5–6 in the second. Down 15–30, Williams's first serve was wide. On Williams's second service, the line judge called a foot fault, putting her down double-match point.

Williams exploded at the call, shouting at and threatening the lineswoman. Because Williams had earlier committed a code violation for racket abuse, this second code violation called forth a mandatory one-point penalty. That gave the match to Clijsters.

Williams's outburst was indefensible. But put that aside and focus on the fault. CBS color commentator John McEnroe remarked at the time: "you don't call that there." His point was not that the call was factually mistaken, but that it was inappropriate at that point in the match even if factually correct: the lineswoman should have cut Williams a little slack. Many observers agreed. As another former tour professional put it,[2] a foot fault "is something you just

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[†] Richard Dale Endowed Chair in Law, University of Texas School of Law. Original at volokh.com/author/mitchberman/ (July 18-22, 2011; vis. Oct. 1, 2011).

[1] 99 Geo. L.J. 1325 (2011).

[2] Michael Wilbon, *A Call and a Response That Cannot Be Defended*, Wash. Post, Sept. 14, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/09/13/AR2009091302533.html.

don't call – not at that juncture of the match."

The McEnrovian position – that at least some rules of some sports should be enforced less strictly toward the end of close matches – is an endorsement of what might be termed "temporal variance." It is highly controversial. As one letter writer to the *New York Times* objected: "To suggest that an official not call a penalty just because it happens during a critical point in a contest would be considered absurd in any sport. Tennis should be no exception." On this view, which probably resonates with a common understanding of "the rule of law," sports rules should be enforced with resolute temporal invariance.

Perhaps McEnroe was wrong about Williams's foot fault. But the premise of the *Times* letter – that participants and fans of any other sport would reject temporal variance decisively – is demonstrably false. One letter appearing in *Sports Illustrated* objected to the disparity of attention focused on Williams as compared to U.S. Open officials, precisely on the grounds that "[r]eferees for the NFL, NHL and NBA have generally agreed that in the final moments, games should be won or lost by the players and not the officials."

Regardless of just how general this supposed agreement is, many NBA fans would affirm both that contact that would ordinarily constitute a foul is frequently not called during the critical last few possessions of a close contest and that that is how it should be. So insistence on rigid temporal invariance requires argument not just assertion.

However, advocates of temporal variance shouldn't be smug either. For while the negative import of temporal variance is clear – the *denial* of categorical temporal *in*variance – its positive import is not. Surely those who believe that Williams should not have been called for a fault implicitly invoke a principle broader than "don't call foot faults in the twelfth game of the second set of semifinal matches in grand slam tournaments."

But how much broader? Is the governing principle that *all* rules of *all* sports should be enforced less rigorously toward the end of contests? Presumably not. Few proponents of temporal variance would contend that pitchers should be awarded extra inches around

the plate in the ninth inning, or that a last-second touchdown pass should be called good if the receiver was only a little out of bounds. So even if categorical temporal invariance is too rigid, the contours and bases of optimal temporal variance remain to be argued for.

"Let 'em Play" is an attempt to think through this problem. My goal is *not* to establish whether and in what respects temporal variance is optimal, all things considered, for any given sport. That's too darn hard.

My goal at this early stage is merely to figure out whether "sense can be made" of such a practice. Instead of trying to determine conclusively just what optimal practices should be, I aim only to explain why temporally variant rule enforcement might be sensible – what can plausibly be said for it.

Furthermore, investigating temporal variance in sport is only the paper's surface agenda.

While econometricians are busily tackling sport, and while philosophers of sport occasionally draw on legal philosophy (in addition to, e.g., aesthetics, ethics, and metaphysics), legal theorists have paid sports only passing attention. Most jurisprudential appeals to sports and games have been ad hoc, and most legal writing on sports that does not pertain to sports law is intended more to entertain than to edify.[3]

The lack of sustained jurisprudential attention to games, and sports in particular, should surprise, for sports leagues constitute distinct legal systems. This is superficially apparent to non-Americans. While baseball, football, and basketball are governed by official "rule books," the most popular global team sports like soccer, cricket, and rugby are all formally governed by "laws," not "rules." More substantively, sports systems exhibit such essential institutional features as legislatures, adjudicators, and the union of primary and secondary rules.

Accordingly, my grander ambition is to help spur the growth of the jurisprudence of sport as a field worthy of more systematic attention by legal theorists and comparativists. In a sense, *"Let 'em*

[3] *Aside: The Common Law Origins of the Infield Fly Rule*, http://www.pennumbra.com/issues/pdfs/157-1/Infield_Fly_Rule.pdf, and 123 U. Pa. L. Rev, 1474 (1975).

Play" does double duty as a manifesto for an enlarged program of jurisprudential inquiry.

Importantly, it's not just that (municipal) legal systems and sports systems confront similar challenges. For several reasons, jurisprudential attention to sports is particularly likely to contribute to our understanding of phenomena and dynamics shared in common.

First, because sports' rules and practices have long been thought unworthy of serious philosophical investigation, even low-hanging fruit has yet to be harvested. Second, sports supply vastly many examples for the generation and testing of hypotheses. And third, our judgments and intuitions about certain practices – such as, to take the present topic, the propriety of context-variant enforcement of rules – are less likely in the sports courts than in the courts of law to be colored or tainted by possibly distracting substantive value commitments and preferences.

For all these reasons, sporting systems, though rarely explored with seriousness by legal theorists and comparative lawyers, comprise a worthy object of legal-theoretical study.

Here's my plan for the remainder of the week. Tomorrow, I will summarize my prima facie case for temporally variant enforcement of non-shooting fouls in basketball and, by extension, of similar violations in other sports. In a nutshell, that argument depends upon a growing gap between the competitive cost of the infraction and the cost of the sanction imposed for the infraction.

On Wednesday, I will explain why the argument that might explain and justify temporally variant enforcement of fouls in sports like basketball, hockey, and football most likely does not cover the rules governing faults in tennis. On Thursday I will propose a different account that might fill that need – one that draws on what I think are novel observations about the hoary rules/standards distinction.

On Friday, I will advance a modest proposal for improving the world's most popular sport.

Tags: basketball, discretion, foul, jurisprudence, penalty, sports, tennis. 45 Comments.

A FIRST SOLUTION

Although the Serena Williams episode provoked my interest in the puzzle of temporal variance, I'll start not with tennis, but with other sports in which a practice of temporal variance might seem more secure – sports like football, hockey, and basketball. In each, whistles for minor physical contact toward the end of tight contests predictably elicit a cry from the stands: "Let 'em play!" or "Swallow the whistle!"

Though the plea is familiar, its rationale is obscure. To be sure, the tighter the rules are enforced, the less physical contact there will be. And observers may reasonably disagree about the level of physicality that makes a sport the best it can be.

But however a league might answer that question, it is not self-evident why the optimal degree of laxity should differ in crunch time during an NBA game relative to ordinary time, or throughout the NHL playoffs relative to the regular season. It is not obvious what can be said for "letting them play" *at this particular time* different in character or force from what can be said *generally* for "letting them play."

Still, basketball remains a good place to start. I doubt that many tennis fans are justifiably confident that tennis officials do (or don't) allow players a little more foot faulting toward the end of close matches than earlier. Maybe they do (or don't), but foot faults just aren't called enough to permit those without intimate knowledge of the sport to be sure what the enforcement patterns are.

Basketball is different. That basketball referees respect some measure of temporal variance seems clear to many hoops fans. Maybe that's because the case for temporal variance in basketball is unusually clear. (Or maybe not.) If we can explain and justify slack in the calling of basketball fouls, we might be better able to assess whether temporal variance makes sense elsewhere too.

One rationale for temporal variance invokes essentially aesthetic considerations: the referee's whistle disrupts play, thereby reducing spectators' enjoyment of the action. And while disruption of play almost always incurs an aesthetic cost, disruption during crunch time is especially costly (aesthetically speaking) given heightened

dramatic tension.

There is something to this justification for temporal variance. It would seem to apply, though, only when play would continue uninterrupted but for the calling of a foul. However in some sports that arguably respect temporal variance play stops either way.

For example, it appears to me (and not only to me[4]) that football officials are often more reluctant to call defensive pass interference during crunch time even though an incompletion stops play just like a penalty flag. Because an aesthetic or dramatic preference that play continue unabated wouldn't seem to explain or justify temporal variance everywhere it appears, it might not provide the whole story even in basketball. So without denying that appreciation for dramatic excitement can help explain why officials should give the competitors somewhat greater slack during moments of high drama, we have reason to look for an alternative account too.

A second answer, recently advanced by Chicago economist Tobias Moskowitz and SI columnist L. Jon Wertheim in their book Scorecasting,[5] depends entirely on the omission bias. By relying entirely on a cognitive bias, however, the authors all but ensure that, even insofar as their account might help explain temporal variance, it is unlikely to *justify* it.

The alternative account I offer runs as follows:

(1) In the main, a sanction imposed for an infraction has a greater expected impact on contest outcome (against the rule-violator) than does the infraction itself (in the violator's favor). This must be so for the sanction to serve a deterrent function in addition to a restitutionary one.

(2) The expected impact of all outcome-affecting contest events – e.g., scores, base hits, yardage gains, infractions, penalties, etc. – are not constant, but context-variant. To start: the closer the contest, the greater the impact. The variance that matters for my purposes, however, is temporal: when the contest is close (and holding

[4] Peter King, *Monday Morning Quarterback*, Sports Illustrated, Nov. 23, 2009, sportsillustrated.cnn.com/2009/writers/peter_king/11/22/Week11/3.html.

[5] *Scorecasting: The Hidden Influences Behind How Sports Are Played and Games Are Won* (2011), scorecasting.com.

the closeness of the contest constant), the expected impact of outcome-affecting events varies in inverse proportion to the distance remaining to contest's completion.

For example, touchdowns and baskets, 15-yard penalties and free throw opportunities, all have greater impact on the expected outcome when occurring 2 minutes before the end of a then-tied game than when they occur 2 minutes from the start. (I expect pushback here, and look forward to debates in the comments.)

(3) From (1) and (2) it follows that the absolute magnitude of the gap between the competitive impact of the infraction (say, a non-shooting foul) and the competitive impact of the penalty imposed for the infraction (say, the award of free throws) is significantly greater in crunch time during close games than earlier in the same contest. The penalty becomes more overcompensatory in absolute terms.

(It does *not* become more overcompensatory in *relative* terms, which is why some of yesterday's posters rightly observed that if the stakes become higher for the competitor who would wish to invoke temporal variance, they become higher for their opponents too.)

(4) It is a general principle of competitive sport that athletic contests go better insofar as their outcomes reflect the competitors' relative excellence in executing the particular athletic virtues that the sport is centrally designed to showcase and reward. (This is a first cut; no doubt my proposed principle could be profitably refined further.) This is why we prefer to reduce the impact of luck on outcomes (e.g., we generally want playing surfaces to be regular thus reducing unpredictable bounces).

It is also why almost everybody agreed, in Casey Martin's lawsuit against the PGA,[6] that if (as the Supreme Court majority essentially concluded, but as the dissent denied) the central athletic challenge the PGA Tour presented was the ability to hole a ball by means of striking it with a club, in the fewest number of strokes, while battling fatigue, then golf is less good – it exemplifies a core value of sport less well – if it requires competitive golfers to walk

[6] *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), at http://www.law.cornell.edu/supct/html/00-24.ZS.html.

the course even when it is extraordinarily difficult for them to do so and when they are greatly fatigued without walking.

(5) From (3) and (4) we have a reason (not a conclusive reason) to enforce restrictions on minor or incidental contact less strictly toward the end of close contests if – as is contestable but surely plausible – the ability to refrain from minor bodily contact with opponents is a peripheral athletic virtue in basketball as we know it. If this is so, then a penalty of nominally constant magnitude that it is optimal to impose early in a contest may become suboptimal later in that same contest.

To be clear: I do not claim that the excellence of avoiding minor contact is something that no sport could wish most to valorize. My argument for temporal variance in basketball is explicitly contingent on its being the case that this particular excellence does not rank so highly among the excellences that basketball wishes to feature and encourage. Whether this is so is an interpretive question.

That's my proposed pro tanto argument for temporally variant enforcement of non-shooting fouls in basketball. The argument extends to similar fouls in sports like football and hockey. At bottom, it's based on an aversion to the awarding of windfall remedies disproportionate to the harm suffered. That's a principle the law frequently endorses – from the harmless error rule to contract law's material breach doctrine.

83 Comments.

OF CONSECUTIVE AND NEGATIVE RULES

At first blush, we might suppose that the analysis I provided yesterday applies, mutatis mutandis, to foot faults in tennis and therefore that tennis officials should call foot faults less strictly at crunch time. But this conclusion would be premature. It could be that foot faults in tennis differ from fouls and similar infractions in basketball, football and comparable sports in ways that make a difference.

I'll explain today why I believe that foot faults *do* differ in a way that matters. Tomorrow I'll argue that temporal variance in their enforcement might nonetheless be defensible on alternate

grounds. This afternoon I will respond to some of the many excellent comments already posted by VC readers.

The analysis I presented yesterday for temporal variance in the enforcement of penalties for fouls like those committed in basketball depended upon the claim that there are times when it might better serve the objectives of competitive sports to refrain from enforcing a penalty despite the occurrence of an infraction. That's because the competitive costs of an infraction and of the sanction or penalty that it begets are both temporally variant and the latter can become, at game's end, very much greater than the former.

Yet assessing the competitive costs of these two things – the infraction and the sanction – seems impossible in some cases. Take balls and strikes in baseball. The denomination of a pitch as a "ball" is not properly conceptualized as the penalty for an infraction; the concepts of infraction and penalty just don't apply here.

That not all undesired consequences that attach to nonconformity with the dictates of a rule are sanctions imposed for infractions was a central claim upon which Hart relied when critiquing the Austinian command theory of law.

Most of the rules of the criminal law impose duties and threaten sanctions for their violation. But other legal rules, like those specifying the conditions for valid wills or contracts, are of a different sort. These, Hart proposed, are "power-conferring rules" – rules that (somewhat simplified) provide that "if you wish to do this, this is the way to do it." In the case of rules that impose a duty, he explained, "we can distinguish clearly the rule prohibiting certain behaviour from the provision for penalties to be exacted if the rule is broken, and suppose the first to exist without the latter. We can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which it is designed to maintain."

But the distinction between the rule and the sanction is not intelligible in the case of power-conferring rules. It makes sense to say "do not kill" even when we leave off the part about what happens if you do. In contrast, we know we're leaving something critical out of the picture if we say "get two witnesses" but don't explain that the will will be invalid otherwise. The power-conferring/duty-

imposing distinction is, at a minimum, a close cousin to another distinction between rule types made famous by John Searle: the distinction between constitutive and regulative rules.

The Hartian analysis of power-conferring rules helps to explain why balls and strikes in baseball feel very different from the infractions I have discussed in basketball. In the case of the latter, we can sensibly ask both whether some type of contact ought to be proscribed (thus denominated as a "foul"), and, in addition, whether, if so, the penalty attached to commission of the foul – two free throws, say, or ten yards – is too great (or too small).

But every pitch is either a ball or a strike. The logical consequence of its being outside the strike zone is that it is a ball. While we can sensibly ask whether the strike zone is too small (or too large), or whether the number of balls that constitutes a walk is too great (or too small), or whether any number of balls should result in the award of a base, it seems nonsense to ask whether a pitch's being a ball is too high a price for its having narrowly missed the strike zone: that the pitch was a ball is just what it means for its not having been a strike.

In short, balls and strikes are not proper candidates for temporal variance on the analysis I sketched yesterday because (1) temporal variance depends upon the widening of a gap between the competitive cost of an infraction and the competitive cost of the penalty it incurs, but (2) there is no such gap between nonconformity with a power-conferring rule and the consequences that attach, and (3) the rules governing balls and strikes are power-conferring rules (or constitutive rules, or something of this sort).

If this is right, the question becomes whether the rules governing foot faults in tennis are power-conferring (or constitutive) as opposed to duty-imposing (or regulative). For want of space, I'll just assert that the former construal seems significantly more plausible. In order to successfully or "validly" put the ball into play, thus giving oneself an opportunity to win the point, the server must do several things: (1) start behind the baseline, (2) strike the ball before stepping on or over the baseline, and (3) by striking the ball, cause it to land in the service court diagonally opposite.

We might say that these are three components of the rule that defines a valid serve. A failure on any of these three grounds is just a failure to perfect the power conferred upon the server; none is a violation or an infraction.

Let's suppose that's correct. Even if so, here's the puzzling thing. If foot faults, just like ordinary "zone" faults (i.e., the failure to serve the ball into the service box), are governed by power-conferring rules, and if temporal variance could be defended only on the analysis developed to this point, then we should expect foot faults to be immune from temporal variance just as surely as are zone faults. But widespread intuitions are more equivocal.

I have not run across anybody who is tempted by temporal variance for zone faults. If, facing match point, the server hits a second service wide by a smidgen, well them's the breaks and that's the match. And yet some folks (McEnroe, for example) believe that foot faults should be enforced with temporal variance. Just as revealingly, many more feel that the temporal variance of foot faults is, at the least, more plausible, less obviously mistaken. The fact that even those who resist temporal variance for foot faults do not feel about foot faults quite as they do about zone faults – the fact that many of them at least feel the tug of temporal variance – requires explanation even if we end up concluding that, all things considered, foot faults should be enforced invariantly. That fact is inexplicable if the argument for temporal variance depends upon the widening of a gap between infraction and penalty and if faults aren't penalties for infractions.

I favor our taking widespread intuitions seriously. Doing so invites us to consider whether the analysis supplied thus far furnishes the only sound basis for temporal variance. Perhaps it doesn't. Perhaps temporal variance for some power-conferring (or constitutive) rules might be warranted on other (possibly related) grounds. That's my topic for tomorrow.

36 Comments.

SOME RESPONSES TO COMMENTS

First, let me thank the many readers who have commented these past few days. I did not know what to expect when I accepted Eugene's invitation to blog about my article, and have been impressed by, and grateful for, the number and incisiveness of the comments. Unfortunately, there have been too many to permit me to respond in a systematic manner, let alone in a comprehensive one. So here are a mess of somewhat random reactions.

1. I've agreed with many of the posts, and have been gratified to see that many readers anticipated arguments to come.

For example, Assistant Village Idiot observed that my analysis "would suggest that a possible strategy would be to reduce the penalty late in the game but call it more closely. I don't know if that would actually play out well, however."

Agreed on both counts. See p.1349 n.73 of my article for some remarks on just this score.

Soronel Haetir remarked on Tuesday: "I can see some argument for allowing more contact later in a game (an argument I don't particularly agree with), but I don't see any reason whatsoever for relaxing the basic rules of ball possession." I hope that this morning's post revealed my full agreement that the argument I offered on Tuesday would not support relaxing "the basic rules of ball possession." Those are constitutive rules.

Justin agreed with Tuesday's analysis but added: "except for fouling out in basketball and red cards in soccer. Two fouls called on a key player in the first 5 minutes of a basketball game can change the entire contest. And a soccer team playing 80 minutes while a man down is almost certain to lose."

So true. Wait for Friday. Incidentally, Friday's post will simplify matters by ignoring Visitor Again's observation that soccer refs might already respect temporal variance in the issuance of red cards. This is addressed in the article at p.1368 & n.116.

Guy and I seem to be on the same page. I agree with his observation on the regulative/constitutive distinction that "the distinction is

less something that can be derived by objective observation of the law in operation, but more by how people understand the law and what its purposes are." He then added: "the most obvious distinction between foot faults and zone faults is that most people think of the game as being a test of skill with respect to hitting the ball, not where you place your feet. Foot faults only exist because the game needs to prescribe a spot for you to serve from, but minor variations in the rule are unlikely to change the difficulty of performing a proper serve. Rigid adherence to the rule is probably thought of as more penal by the audience than rigid adherence to zone fault rules because the game is 'testing' your ability to hit the ball precisely to serve to a particular spot, but it isn't 'testing' your skill at putting your foot close to a line without going over."

Yep, that will a core piece of tomorrow's argument. Incidentally, Justin agreed with Guy, but added: "Unfortunately, I think one of the problems with your analysis is that you are looking at it through a legal philosophy prism when the answer you are looking for is an anthropological one." This puzzled me. Anthropology and philosophy needn't be at odds. I understand my philosophical analysis to point out which anthropological facts are relevant, in what ways, and why. Perhaps Justin might further explain why he thought his observation showed a problem with my analysis (or with Guy's?).

Lastly, I think Martinned is right, as against both Noah and Gentleman Farmer, that the relative distinction is not objective/subjective.

2. The problem of time-sensitive impact.

I received fewer challenges than I anticipated to my claim that outcome-affecting events have greater impact the later they occur in a close contest, holding closeness of contest contest. I believe only Bruce Boyden and Tom Swift objected.

Here are a few additional thoughts on the matter. I think almost all of us feel comfortable saying things like Team A has a .X probability of winning this game. We believe, for example, that the U.S. women's soccer team had a pretty high probability of victory immediately after Abby Wambach's goal. We believe that the team's

probability of victory was lower once Japan equalized. Almost all probability theorists believe that such statements are meaningful and that they must be some type of subjective probabilities. (The objective probability of a U.S. victory was, at all times, 0.)

If we then believe that events can affect outcome-probabilities, we must be comfortable assessing these things in terms of subjective probability. And once we're in subjective probability land, my claim that late events change the probabilities more than early events do is quite sound as a generalization, though there can be exceptions. (See, e.g., p. 1350 n.74.) Given all this, I'd need to hear more from Bruce Boyden regarding why he believes that the perspective of an omniscient observer supplies the "more relevant comparison."

Tom Swift is surely right in one sense that "points count the same at the beginning of a game as they do in the last 2 minutes." They count the same in terms of nominal additions to the score. But they don't count the same in terms of changes to probability of winning so long as the relevant probability is subjective – which, I've just said, it must be so long as we continue to make claims about probability less than 1 and greater than 0.

3. Miscellaneous thoughts.

Many of the remaining posts raised ideas that might not be strictly germane to my arguments thus far, but which I found interesting enough to merit some reaction.

tbaugh wrote:

> I've never understood how an official not calling a violation late in the game is "letting the players and not the officials decide the game." A non-call of a violation is an official influencing the game, perhaps decisively. I think the comment from James about uncertainly in the determination of an infraction is a good one, however, particularly in basketball. Perhaps some "temporal variance" is justifed in terms of the degree of certainty the official should have in making a late call (I've done a litte refereeing, and I'd say it's kind of a "felt" thing rather than a conscious decision).

I wonder whether the ideas in this post are in tension. Temporal

variance in degree of certainty (actually, the NBA has a rule about this!) would make sense if the costs of false positives and false negatives differ toward contest's end. But tbaugh seems to deny that. I happen to agree that temporal variance in the standard of proof makes sense. But the judgment that a false positive is worse than a false negative is (and must be, I think) parasitic on the supposition that the sanction and the penalty are differently costly as measured against the competitive desideratum. (Incidentally, James's different argument for why uncertainty might lead to temporal variance seems largely dependent upon omission bias.)

duffy pratt observed that "Baseball has a different time element than other games" and asked for examples "where this idea of "temporal variance" would apply in baseball?"

I'm disposed to think that baseball has few good examples not because it has a different time element (see 1336 n.32) but because it has few duty-imposing/regulative rules and many power-conferring/constitutive ones. I do think that balks provide a good potential example, though.

Ossus recalled

> baseball announcers advocating a form of situational (if not strictly temporal) variance with balls and strikes. For example, on 0–2 counts when the batter takes a close pitch, I have heard announcers talk about how the umpire either should have (when they call a third strike) or did (when they call a ball) take the situation into account. The implication is obviously that the penalty for a called strike to the batter is much greater than the penalty of a called ball to the pitcher, so I think this can actually fit into your analysis whereas you claim that it does not.

The analysis in a book I mentioned earlier, Scorecasting, reveals that umpires do take the situation into account in must this way. I am disposed to believe that they ought not to. More interestingly, as some commentators observed previously, Steven Jay Gould thought that home plate umpire Babe Pinelli rightly gave Don Larsen a few extra inches on his last called strike to end his perfect game in the 1956 World Series. I differ with Gould here. (See pp. 1352-54)

Lastly, Byomtov opined that "calling a pitch a ball is a penalty, or at least can be seen as one. If we say the idea of the game is for the batter to try to hit the ball, etc., then there needs to be a rule requiring the pitcher to throw it where the batter actually can reach it. The penalty for violating the rule four times is a walk." I think that's an interesting analysis. Balls could have arisen as Byomtov conjectures and still count as constitutive rules today. I'll think more about this.

Byomtov also remarked, presumably tongue-in-cheek, that he "wouldn't be surprised if the rule was established – by Abner Doubleday no doubt – precisely for this purpose, though of course it turned out that it often makes sense to violate it and suffer the penalty."

Interestingly, early baseball had no bases on balls. There were balls, but no number of balls resulted in a free pass to first. I believe that bases-on-balls were introduced in 1879. At that time, though, a pitcher had 9 balls for a walk. The current rule that awards a walk on 4 balls was introduced ten years later.

That's it for now. See you tomorrow.

24 Comments.

OF RULES AND STANDARDS

Recall Tuesday's contention: Competitive sports go better, all else equal, insofar as contest outcomes reflect the competitors' relative excellence in executing the particular athletic virtues that the sport is centrally designed to showcase, develop and reward. Call this "the competitive desideratum." If something like this is so, then we should identify the athletic challenges that the rules governing tennis serves are designed to hone and test.

To a first approximation, the challenge is to strike the ball with power and accuracy into a specified space. Yet serving while standing at the net would not conform to the athletic challenge that tennis service is meant to present. So a refinement is necessary. Perhaps this: the challenge is to strike the ball *into a precisely defined space from a precisely defined distance*.

Notice that if this is the best understanding of the athletic challenge presented by serving in tennis, then temporally variant enforcement of foot faults would not serve the competitive desideratum. If it's constitutive of a core athletic challenge in tennis to hit the serve without touching the line, then to forgive a server's having stepped on the line would frustrate that athletic ideal and would contravene the competitive desideratum.

But perhaps that is not quite the athletic challenge that the service rules embody. Perhaps the challenge is better formulated as the ability to serve the ball *into a precisely defined space from a generally defined distance*. That is, notwithstanding that the formal rules specify both the starting point and the landing space with precision, the underlying athletic challenge that the rules codify involves a precise target but a general launching site.

I am tempted to describe the challenge this way: "get the ball *in here* from *around there*." That puts things too loosely, but it conveys that the sport might care more about precision in the placement of the served ball than precision in the placement of the server's body.

Arguments could be mustered to bolster this interpretation of the core athletic challenge in serving. But I concede that it's debatable. Let's move on because my jurisprudential ambitions are served by exploring what might follow if this is the better conception of the athletic challenge; it's not essential to establish that this is the better interpretation of tennis.

Importantly, that the foot fault rule is *written* in hard-edged terms does not disprove that the real norm the rule implements is a standard that prohibits servers from going "too far" over the line, or that prohibits "unreasonable" encroachments. Even if the true norm is a standard, it doesn't follow that the formal norm should assume the same shape.

Because the factors that bear on reasonableness would be debatable in every case, considerations like predictability, certainty, and finality all forcefully favor implementing this norm by means of a rule rather than by means of a standard. This is Rules vs. Standards 101.

In short, I am suggesting a critical asymmetry. The written crite-

ria of valid service that govern the landing of the ball and the placement of the server's feet are, in both cases, rules rather than standards. But they are formulated as rules for different reasons.

The former is a rule because it reflects an aspect of the underlying athletic challenge that is *itself* sharp-edged and rule-like: get the ball in the pre-defined space. Tennis rules require that the ball go into the service court because that's the nature of the challenge of serving. It is how tennis instantiates one of the most commonly tested skills across all of sports: target-hitting. Horseshoes and curling notwithstanding, precision is generally part of the nature of targeting.

Although a target's contours may be arbitrary, the demand that competitors hit the target and not merely come close is not arbitrary, for the rule is designed to test and reward that particular class of physical excellences (needed by, e.g., archers and riflemen) involving accuracy and precision in limb-eye coordination. The rules of tennis require that, for a serve to be valid, the ball must land within the defined service court because that is the nature of this particular athletic challenge.

In contrast, the formal norm governing foot placement is rule-like not standard-like, I suggest, because, although the aspect of the underlying athletic challenge that it captures is standard-like (start behind the line and don't go unreasonably over it), we have good institutional reasons to codify it in bright-line fashion.

To coin terms, we might say that that portion of the power-conferring rule of tennis service that requires the serve to land in the service court is a "true rule," whereas that portion of the rule that requires the server not to step on the baseline is a "rulified standard." It is often thought that norms are standard-like in what we might call their "natural" state, and that they become rules, when they do, in response to institutional pressures. I am suggesting that this is true of some norms but not all. Some of the rules we come across are rules naturally.

Granting me all this, does it follow that line judges should enforce the rule governing faults as though a foot fault could occur only when the server steps unreasonably far over the line? No. A

rulified standard is, after rulification, a rule, not a standard. To routinely pierce the rule and apply the underlying or animating standard would defeat the purposes served by having rulified it.

But that we must not *routinely* pierce a rulified standard does not mean that we must never pierce it. Whether to disregard the rule's form in favor of its underlying considerations is always at least askable with regard to rulified standards. That is a central upshot of the distinction between rulified standards and true rules.

At least two additional requirements must be satisfied to pierce a rulified standard: (1) that enforcing the rule as a rule would produce unusually high costs; and (2) that disregarding the rule's form on this occasion would incur low costs on the dimensions, such as predictability and the like, that warranted its rulification.

These two additional conditions are probably satisfied by foot faults in crunch time. Enforcing the rule as a rule is costly because doing so allows the foot fault to unduly impact the match outcome. That is, it undermines the "competitive desideratum." And the costs of piercing the rule are low because nonconformity with the rule is hidden, given that tennis does not employ its Hawk-Eye electronic system to judge foot faults.

From the perspective of optimal game design, that might be a good thing. Rule makers who want to preserve rule-enforcers' discretion to sometimes apply the standard that animates a rulified standard should arrange things so that non-compliance with the rule isn't apparent. Transparency is not always a virtue.

Of course, even if the ethos of tennis should permit line judges to assess crunch-time foot faults against the underlying standard of reasonableness, not against the nominal rule, that does not fully resolve the Serena Williams case. Her foot fault would have run afoul even of the standard if, for example, her transgression was substantial or repeated. I think it wasn't, but needn't argue about that here.

In sum, my analysis is doubly contingent: if the foot fault rule is a rulified standard not a true rule, and if Williams complied with the underlying standard-like norm governing service, we'd have promising support for McEnroe's contention: the line judge should have cut Williams some slack.

CONCLUDING THOUGHTS

I started on Monday with a puzzle – what might be said in favor of enforcing at least some rules of sports less strictly at crunch time? – and tried to develop a solution. That solution turned out to be two solutions, or two variants of a single solution.

All competitive sports, I have claimed, share a core interest that the outcomes of contests reward competitors' relative excellence in the performance of the sport's fundamental athletic tests. To further this interest, each sport has reasons – weighty but not decisive – (1) not to enforce penalties on infractions when, for contextual reasons, the penalty would be unusually over-compensatory, and (2) to sometimes disregard the rule-like form or surface of some norms in favor of the standard that underlies it.

These arguments are tentative and partial, only first steps toward a solution to the puzzle. But whether they ultimately justify the temporally variant enforcement of particular rules of particular sports, all things considered, is not greatly important to me. Think of this study as a search for what Robert Nozick called a philosophical explanation: not a defense of the thesis that temporal variance in sports is optimal, but an account of how that could be.

Philosophical explanations are not always the right goal. Often we want to know what some agent should do. In this case, however, I'm satisfied to identify factors and analytical devices that might prove useful for theoretical projects across reaches of law and sports.

For example, the analyses here might helpfully illuminate the lost chance doctrine in torts; the granting of equitable relief, near contest's end, from rules governing municipal and corporate elections, or appellate litigation; the difference between genuine "jurisdictional rules" and mere claim-processing rules; and possibly much else.

Those are just promissory notes at this point. So I'll conclude by offering one final non-obvious lesson – albeit one for gamewrights, not for legislators or judges. It concerns soccer.

Here are two much-noted problems with the beautiful game: there is too much diving, and refs make too many errors. The latter

is partly a consequence of the former, but it's also a consequence of there being only a single referee and FIFA's refusal to introduce any form of instant replay review. (Plug: my thoughts on instant replay are here.[7])

While these are familiar criticisms, I maintain that soccer harbors a third defect, one that works as a multiplier, exacerbating the first two problems and exacerbated by the fact (not itself a problem) of low scoring. That problem concerns the red card – in particular that it results in ejection of a player for the remainder of the match without allowance given for substitution.

This is an unusual complaint. But if it's a surprising charge, its connection to the issue of temporal variance might seem obscure.

Here's the connection. A central assumption undergirding the argument that basketball referees should "let 'em play" is that, presumptively, the competitive impact of a penalty should bear a stable relationship, over the course of a contest, to the competitive impact of the infraction that the penalty penalizes. We saw, however, that (holding closeness of contest constant) a contest event has a greater impact on outcome the closer it occurs toward contest's end. Non-enforcement of the penalty at crunch time aims to rectify this imbalance.

I'm not going to suggest that soccer's red card should be brandished more reluctantly at crunch time. Unfortunately, that's not because soccer ensures that the red card exerts a constant competitive effect regardless of when issued. It's because red cards exert a greater competitive effect the earlier they are awarded. Because a red card results in ejection of the offending player and a ban on his being replaced, it entails that the offender's team play short for the remainder of the match (or until the opposition is red-carded too).

So the more time remaining at point of infraction, the greater the penalty. In effect, a red card awarded at minute 15 reads "play shorthanded for 75 minutes" whereas one awarded for the very same infraction at minute 85 reads "play shorthanded for 5 minutes." The red card thus violates the sensible principle of game

[7] Mitchell N. Berman, *Replay*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1830403.

design that, presumptively, the same infraction should call forth the same penalty regardless of the time of occurrence.

This disparity in the effective magnitude of the red card sanction should occasion little concern if the optimal penalty for committing a red-card offense (serious fouls, spitting, handling the ball to deny an obvious goal-scoring opportunity, etc.) were to be shorthanded for 90 minutes. In that event, the sanction would never be too high, and the fact that it would generally be too low would be unavoidable. But that's not plausible.

To be sure, what would be an optimal period of shorthandedness is extraordinarily difficult to determine. But the basic parameters are plain: Because a red card is awarded for a serious offense, the offending team should incur a significant penalty, one that meaningfully affects its prospects for victory. Yet we don't want the penalty to be virtually outcome-determinative – all the more so given the prospect (exacerbated by the prevalence of diving, by the presence of a lone referee, and by the absence of replay) that some red cards will be issued in error.

Nobody would seriously entertain a proposal to replace the penalty of ejection with the award of two goals to the opposing team. Given soccer's very low average scores and margins of victory, a sanction of such magnitude would threaten to convert the sport into an extended exercise in penalty avoidance. Similarly, we might expect that sending off a player in, say, the 10th minute is apt to have such a significant impact on game outcome as to contravene the competitive desideratum.

The obvious solution is for soccer to unlink the penalty of ejection from the penalty of shorthandedness. Soccer already decouples the consequences of a red card for the player involved from the consequences for his team: The player is sent off for the remainder of the match and is disqualified for the next game too, but the team plays shorthanded only for the remainder of that game, not for the next.

Soccer's governing bodies should consider taking this decoupling further. That the offending player may not return does not entail that his team should play shorthanded for the rest of the contest re-

gardless of when the foul occurred. Many sports, not only hockey, allow a team to substitute for an ejected player after some period of penalty time. Perhaps soccer should follow their lead.

To require a team to play shorthanded for nearly a full game is draconian even when the offense really warranted dismissal. But it's heartbreaking when – as happens disappointingly often in this otherwise beautiful game – the red card should never have been issued.

Figuring out what would be an appropriate period of shorthandedness would prove challenging. I'll leave that to the econometricians. I claim only that the current system that makes the competitive impact of a red card so radically dependent on its time of issuance is unlikely to dominate the alternatives, and therefore that further investigation is warranted. More to the point: that we should think harder about soccer's red-card system is only one among the many and diverse lessons to be learned by reflecting on the puzzle of temporal variance in sport.

17 Comments. //

FROM: PRAWFSBLAWG

HEALTHCARE AND FEDERALISM

SHOULD COURTS STRICTLY SCRUTINIZE FEDERAL REGULATION OF MEDICAL SERVICES?

Rick Hills[†]

I am sick to death of arguing about functionally empty federalism theories. Therefore, if you want a detailed analysis of why the 11th Circuit's recent opinion in *Florida v. United States*[1] errs in accepting Randy's argument against the constitutionality of PACA's individual mandate, take a look at Mark Hall's excellent post at Balkinization[2] or David Orentlicher's post over at Health Law Profs blog.[3] (In the unlikely event that you are interested in my views, they're all over prawfsblawg – here,[4] here,[5] here,[6] and here,[7] for

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[†] William T. Comfort, III Professor of Law, NYU School of Law. Original at prawfsblawg.blogs.com/prawfsblawg/2011/08/healthcare-and-federalism-should-courts-strictly-scrutinize-federal-regulation-of-medical-services-.html (Aug. 14, 2011; vis. Oct. 1, 2011).

[1] aca-litigation.wikispaces.com/file/view/CA11+opinion.pdf.

[2] *Why the 11th Circuit's Opinion Self-Destructs*, balkin.blogspot.com/2011/08/why-11th-circuits-opinion-self.html.

[3] *Judge Sutton More Persuasive Than Judge Hull*, lawprofessors.typepad.com/healthlawprof_blog/2011/08/judge-sutton-more-persuasive-than-judge-hull.html.

[4] *Federalism & healthcare: The dangers & benefits of confusing individual rights with federalism*, prawfsblawg.blogs.com/prawfsblawg/2010/12/federalism-healthcare-the-dangers-benefits-of-confusing-individual-rights-with-federalism.html.

[5] *An economist's view of what is (charitably) called "legal reasoning,"* prawfsblawg.blogs.com/prawfsblawg/2011/02/an-economists-view-of-what-is-charitably-called-legal-reasoning.html

[6] *Judge Vinson's incoherent extension of Printz's anti-commandeering principle from states to private*

instance).

My objection to Randy's argument is that the action/inaction distinction is just more empty federalism etiquette born entirely of the need to distinguish precedents rather than the desire to construct a sensible division of powers in a federal system. The action/inaction distinction will not really limit federal power: As Randy concedes, Congress could impose precisely the same mandate through the taxing power or even conditional "prohibitions" on "actions" like buying insurance or being employed. Moreover, the distinction is not even very crisp, as Judge Sutton's concurring opinion in *Thomas More Law Center v. Obama*[8] explains with exemplary clarity and dispassionate good sense. So I'll be delighted when the SCOTUS finally upholds PACA's mandate and we can get on with the real business of figuring out how to limit the federal leviathan in ways that actually make a practical difference.

Which leads me to a question asked by Abby Moncrieff via e-mail: She asks me why a sensible theory of functional federalism would not suggest "devolution in the ACA case." As Abby puts the matter, "[h]ere is a case of deep and salient disagreement among local populations as to the propriety of insurance mandates," disagreement that would suggest that a one-size-fits-all national law would be a bad idea. Why not, instead, let the states go their different ways on the issues addressed by PACA?

Good question, Abby – and one blessedly free from the normatively vacuous precedent slalom that is the PACA litigation.[9] My answer, following the jump, is that sensible functional federalism (a) *would* devolve the regulation of medical practice to the states but (b) would give the national government substantial power to finance health care. Resolving the tension between (a) and (b), however,

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persons, prawfsblawg.blogs.com/prawfsblawg/2011/01/the-folly-of-extending-printzs-anti-commandeering-principle-from-states-to-private-persons.html.

[7] *Should libertarians applaud the Individual Mandate as a matter of policy?*, prawfsblawg.blogs.com/prawfsblawg/2011/02/should-libertarians-applaud-the-individual-mandate-as-a-matter-of-policy.html.

[8] aca-litigation.wikispaces.com/file/view/CA6+decision+%2806.29.11%29.pdf.

[9] Rick Hills, *What does it mean to have a theory of federalism?*, prawfsblawg.blogs.com/prawfsblawg/2010/12/what-does-it-mean-to-have-a-theory-of-federalism.html.

requires a little more elaboration as well as an explanation of where I stand regarding Abby's excellent theory of "federalization snowballs."[10]

First, why give subnational jurisdictions a lead role in the regulation of medical practice? Professional standards for the practice of medicine raise religiously and culturally sensitive issues of life and death, physical privacy, and acceptable risk-taking. National legislation on such matters invites unnecessarily divisive struggles for the commanding heights of federal power. Devolution of such issues reduces the acrimony of pitting Red State folks (who dislike med mal liability but hate *avaunt-garde* ethical innovations like physician-assisted suicide) against Blue State folks (who have opposite instincts). Given that the choice-of-law rules for medical malpractice and professional discipline predictably assign legislative jurisdiction to the state where medical services are performed, states can easily internalize the costs of their regulatory regimes in terms of inflated or reduced insurance premiums. (This latter point distinguishes standards of professional care from standards for the design of highly mobile pharmaceuticals – hence, the need for the Food, Drug, & Cosmetic Act).

Second, why give the feds the lead role in healthcare finance? The reason is the familiar point, set forth by Paul Peterson long ago,[11] that the subnational governments cannot redistribute wealth effectively in a federal system characterized by mobility of labor and capital. Any health insurance scheme will involve massive redistribution of wealth from the young to the old, from the rich to the poor, and from the sick to the healthy. The notion that subnational jurisdictions can take the lead in performing these financing functions strikes me as untenable.

But here's the rub: Limits on insurance coverage provided by the feds under Medicare (or PACA) will obviously affect the standards

[10] *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, at www.columbialawreview.org/assets/pdfs/109/4/Moncrieff.pdf, and 109 Colum. L. Rev. 844 (2009).

[11] Paul E. Peterson, *The Price of Federalism* (1995), books.google.com/books/about/The_price_of_federalism.html?id=_A-Dg_NnvakC.

of medical care provided by state-regulated doctors and hospitals. Costs imposed by those standards of care imposed by state law will obviously affect the costs of health care financed by the feds. Abby Moncrieff emphasizes this latter point in her article on "Federalization Snowballs": Because the feds foot the bill for medical services, the federal taxpayer ends up subsidizing states' medical malpractice regimes. Abby argues that the feds, therefore, might need to preempt state med mal regimes. But I'd argue that the feds need only do what private insurers do: Price the liability through higher premiums. Specifically, the federal spending power could legitimately impose special Medicare payroll taxes in states where the med mal liability really seems to impose an extra burden on the federal fisc. Differential payroll taxation has always been used to equalize spending between states with state-financed unemployment insurance systems and states without: Why could not such a tax system solve the problem of "federalization snowballs"?

So that's my 500-word theory of federalism and medicine. I do not pretend that it is comprehensive answer to the problems of dividing power over medicine in a federal regime. But these are the sorts of functional considerations that I would like to see being debated in the U.S. reports rather than the nonsense of whether "inaction" is "commerce."

COMMENTS

Hi Rick,

Thanks for the answer to the email question – and for the kind words on Snowballs. I have several reactions, not surprisingly, but I'll selfishly focus on the two that are most important to what I'm working on right now.

1. It's not clear, in your analysis of healthcare federalism, where the individual mandate ought to fall. The mandate is a financing measure that's intended to be redistributive, but it's a kind of financing regulation that isn't obviously outside of the states' competency to enact and enforce. Even when it works perfectly, a mandate redistributes only within the discrete private insurance pools that mandated individuals join, and the vast majority of those pools

remain state-specific after PACA (much to my chagrin). Furthermore, many of them do not do much by way of redistributing from young to old, rich to poor, or sick to healthy due to too much homogeny in the pools. This particular tool of redistribution, thus, might be less subject to the traditional failures of subnational government.

2. The problem with a national mandate is not just that it's contentious. It's that it has become contentious along a particular dimension that is highly "culturally sensitive" – in the invocation of constitutional liberty interests. I agree, of course, that the action/inaction distinction is deeply silly and problematic for federalism doctrine. But the action/inaction distinction, as I think all reasonable scholars have recognized, is merely a thin veneer for what the courts (and Barnett) really care about: substantive liberty interests in economic freedom – and also, I would argue, in healthcare autonomy. The question, then, is whether the scope and content of the constitutional freedom of contract and the constitutional freedom of health – both of which are substantive freedoms that have arguably been left to political protection (rather than simply abolished from the constitutional landscape) – should be decided at the state or national level. If that is the question, then the answer is obviously, I think, that the states could do a much better job, thanks to their advantages in voice, diversity, experimentation, and exit – i.e. for the same reasons that you think they'd do better at defining rules for medical practice. The courts therefore could hold, consistently with functional federalism of the kind you like, that Congress exceeded its authority by implementing a new and significant encroachment of constitutional liberty interests – interests that should be left to state elaboration. Like the action/inaction distinction, that holding would be a new kind of Commerce Clause holding for the courts, but it would not be a totally new kind of holding. It would be essentially identical to what the Court said in Glucksberg when it refused to set a uniform national right to physician assisted suicide, choosing instead to leave elaboration of that right to state political processes.

In my view, such a holding would essentially say that the best federalism for healthcare regulation should take a back seat to the best federalism for substantive libertarianism. I'm not sure whether that's how I would choose to organize the world if I were dictator of the Court, but it's not a crazy or vacuous idea.

Posted by: Abby Moncrieff | Aug 14, 2011 1:54:02 PM

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Abby writes:

The question, then, is whether the scope and content of the constitutional freedom of contract and the constitutional freedom of health – both of which are substantive freedoms that have arguably been left to political protection (rather than simply abolished from the constitutional landscape) – should be decided at the state or national level. If that is the question, then the answer is obviously, I think, that the states could do a much better job, thanks to their advantages in voice, diversity, experimentation, and exit….

Well, if I thought that that PACA's individual mandate really raised genuinely important issues of individual liberty, then I might be inclined to agree with you. I agree that, when a law burdens important liberty interests, then it makes sense for the SCOTUS to discourage Congress from enacting such a law through "plain statement rules" or even constitutional invalidation. For instance, I believe that the SCOTUS was right to construe the Controlled Substances Act narrowly in *Gonzales v. Oregon* to exclude the use of controlled substances to induce death rather than for recreational purposes. Just because the Court did not protect this right judicially through substantive due process doctrine in *Glucksberg* does not mean that the Court should not try to protect the right politically through federalism, by allowing different states to take different positions on the divisive and difficult question of private liberty's proper definition.

It just seems odd to me to consider the PACA's financial penalty for failure to buy insurance as similar to the criminalization of physician-assisted suicide. Yes, freedom of contract as a general matter enjoys some protection under the 5th and 14th Amendment. And, yes, I'd agree that judicial refusal to protect such freedoms directly

through judicial injunction on state and federal laws does not mean that the Court should not encourage a decentralized resolution of conflict over the definition of such freedoms.

But surely it is not the case that every single federal invasion of freedom of contract automatically constitutes an invasion of a sensitive liberty interest! How exactly is PACA's mandate different, from a libertarian point of view, from any number of financial penalties imposed by the tax code that encourage us not to "free ride" off of other people's expenditures? The Cato Institute wants to use tax credits to promote the purchase of insurance: How is the extra tax liability that the uninsured will bear under the Cato Institute's proposal any different in principle, from a libertarian point of view, from PACA's mandate?

Not every limit on private freedom constitutes a burden on a sensitive liberty interest sufficient to trigger some limit on Congress' power. So until I have some account of why PACA's burden is different from run-of-the-mill social welfare legislation that Congress routinely enacts (sometimes with "conditional prohibitions" like the Fair Labor Standards Act, sometimes with the tax code), I am not inclined to invoke constitutional limits on Congress' power to preserve the liberty of waiting until one is sick before purchasing insurance.

Posted by: Rick Hills | Aug 14, 2011 3:40:21 PM

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Okay, fair enough. I think there's a tiny little something to the argument that conditions of citizenship (really of residency, in this case) should look openly compulsory, like taxes, rather than being framed and sold as conditional penalties. That argument would lend a bit of credence to the Cato Institute's view. And I think there's a tiny little something in the notion that the penalty must raise constitutional concerns because it has raised concerns of a constitutional magnitude. I'm not quite willing to write off a massive populist groundswell as political opportunism, even though that might well be what it is (and even though this argument obviously renders the existence of a constitutional liberty interest conclusory in some

sense). But I've also said from the beginning of the ACA litigation that the insurance "mandate" is economically indistinguishable from the first time home buyers' tax credit and should therefore be unquestionably constitutional from a substantive libertarian point of view.

(The paper I'm working on argues that it would be better to protect liberty through structural holdings than through substantive holdings; it doesn't actually argue that the liberty interests exist or that the mandate violates them.)

Posted by: Abby Moncrieff | Aug 14, 2011 4:30:50 PM

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Rick, interesting post. I'm interested in health care and functional federalism myself,[12] and (2) unsurprisingly, have chatted with Abby about it. (Hi, Abby). Quick thoughts:

Speaking purely from a functional (rather than constitutional) perspective: prior to ACA, the health insurance market simply wasn't open to millions of people. For reasons of price or health condition, many could not buy insurance even if they wanted to. ACA addresses both market barriers, but I just want to say a quick word about the latter – preexisting condition exclusions –- because of the influence it's had on some of my thinking about federal and state power.

If I'm the federal government, and I federally bar preexisting condition exclusions, then I open the market, yes, but if I don't deal with the resulting adverse selection problem, then I might destroy the market I just opened. If I leave solving the adverse selection problem to the individual states, i.e., total devolution, some states might fail to solve – or take a very long time to solve – the problem. In the interim, significant damage could result both to insurance companies and their consumers.

So if, in addition to barring preexisting condition exclusions, I enact a federal individual mandate, then I've increased access to and preserved the health insurance market in one fell swoop. Once the

[12] papers.ssrn.com/sol3/papers.cfm?abstract_id=1798004.

market has been so opened, it seems to me the states may well be better at choosing the legal rules that govern the tort and insurance rules applicable in their specific markets. (I also think it would be great if states could experiment with private insurance arrangements explicitly incorporating cost-effectiveness thresholds into the insurance promise itself, but I digress). Opening state insurance markets also gives employees, at least theoretically, more choice between state law and federal ERISA law (although that choice is considerably complicated by other factors) in those areas about which ACA does not directly speak, which to me seems appealing, because ERISA does not represent modern thinking regarding what optimal legal rules are.

To me, then, a federal surcharge for states with certain legal rules could make sense to offset the externalities arising from federal subsidization Abby memorably discussed. But there's a measurement problem that's significant, I think, and it may make more sense administratively and politically to simply accept that federal subsidies frequently result, at some level, in state level inefficiencies. Perhaps, perhaps not.

I also don't know the degree to which ACA using federal power to "open and preserve markets" is meaningful from a big picture line-drawing perspective; I make no such claim. But I do think that's a difference between ACA's regulation of the insurance market and the frequently discussed hypothetical Congressional regulation of the "broccoli market."

Posted by: Brendan Maher | Aug 14, 2011 4:51:06 PM

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BDG writes:

"Will most customers recognize that state law is driving their insurance costs? If they don't, will state officials fully internalize the costs of their regulatory choices, given that all such costs will be off-budget?"

I haven't addressed the snowballing parts of Rick's original post yet, but I think these are excellent points. There are two other problems with using Medicare, too: (1) the mobility of the citizenry

and (2) the difficulty of calculating per-state costs. On (1), let's say that I spend my working life in Wyoming, a state that I'll postulate has low med-mal expenses, and therefore pay a low or zero med-mal penalty through my Medicare FICA contributions. Then I retire to Florida, a state that I'll postulate has high med-mal costs. I'm no longer paying into the system at that point but am now consuming healthcare in the higher-cost environment and thereby draining the federal fisc. So it seems to me that Medicare payroll is quite an imprecise way to go about the problem, even if placing the penalty on consumers rather than states would work. Maybe we could get around this mobility issue by adding a penalty to Medicare's cost-sharing provisions as well as the FICA contributions, so that the penalty kicks in at point of service as well, but then we're still not solving the off-budget problem that BDG (Brian?) points out.

On (2), the problem is that we just don't know how much we spend on med-mal-induced utilization, even overall, much less per-state, and we therefore can't calibrate the penalty well at all. It's not for lack of trying – it's just really, really hard to figure out. Maybe the feds could just rely on differentials as an incentive – force Texas to pay more for Medicare than Lousiana on the ground that Texas seems to have more med-mal troubles than Louisiana, without worrying whether the penalty is fully recapturing the federal portion. But that seems so unsatisfying…

Posted by: Abby Moncrieff | Aug 14, 2011 5:18:37 PM

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All of the above comments illustrate the basic point of my post: To discuss federalism intelligently, one needs to take a functional perspective, explaining why subnational resolution is especially important (such that federal law would not be "proper") or why subnational resolution might be impossible (such the federal law is "necessary"). Yet our constitutional doctrine and litigation wastes its time parsing indeterminate precedents and has a peculiar abhorrence for functional considerations. It is this weird obsession with distinguishing past cases rather than trying to explain what the federal regime is supposed to accomplish that leads to what I take to be hair-splitting

litigation about the alleged distinction between forcing and conditionally prohibiting "action" and the like.

Now, as to the various specifics . . . .

(1) Abby notes that "[i]t's not clear, in your analysis of healthcare federalism, where the individual mandate ought to fall. The mandate is a financing measure that's intended to be redistributive, but it's a kind of financing regulation that isn't obviously outside of the states' competency to enact and enforce."

Constitutional categories, being difficult to change and fine tune, have to be reasonably crude: If the actual purpose of a federal law is to engage in redistribution that is plausibly impeded by interstate competition, then that purpose would be good enough for me as a justification for federal legislation, barring some special reason to strictly scrutinize whether the federal law was "necessary." The purpose being "proper," I'd defer to Congress even if it were not "obvious" that states were incompetent to act. Under ordinary circumstances – e.g., no "sensitive" issue demanding subnational resolution because of its cultural sensitivity – so long as it was not obvious that state *were* competent, I'd uphold the law.

(2) Brian asks: ""Will most customers recognize that state law is driving their insurance costs? If they don't, will state officials fully internalize the costs of their regulatory choices, given that all such costs will be off-budget?"

I'd think that an extra tenth of a percentage point of a payroll tax in high liability states would focus attention of voters wonderfully. (It could even be labeled "unreasonable medical malpractice surcharge" on the voters' paycheck).

(3) I agree with Brendan's basic point that banning discrimination based on preexisting conditions requires or, at least, is obviously facilitated by, the individual mandate. It is this basic functional point that, I think, will in the end trump all of the scholastic pettifogging about whether "inaction" is "commerce."

I have a bit of a quibble with the idea that ACA greatly broadens our healthcare options by limiting ERISA preemption, simply because I think ERISA preemption is itself absurdly broad – far broader than anything Congress could reasonably have foreseen or in-

tended. "Opting in" from such a wacky judge-made regime of extremely spare fiduciary duties is hardly a great boon for decentralization, given the lousiness of the ERISA baseline. Instead, Congress ought to have simply repealed ERISA preemption, replacing it with a much narrower rule. The rejection of the Kucinich amendment to PACA exempting states' single-payer systems from ERISA was a blow to "opt-in federalism," not an advancement of it.

Posted by: Rick Hills | Aug 14, 2011 5:57:24 PM

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"My objection to Randy's argument is that the action/inaction distinction is just more empty federalism etiquette born entirely of the need to distinguish precedents rather than the desire to construct a sensible division of powers in a federal system."

Well said. I remain surprised that this rather obvious point has not penetrated the discussion further. What is the link between the action/inaction distinction and the division between state and federal power? I haven't heard it.

Posted by: John Greenman | Aug 15, 2011 2:03:30 AM //

FROM: ELECTION LAW BLOG

WHY JOHN EDWARDS PROBABLY DID NOT COMMIT A CRIME,

REGARDLESS OF HIS MOTIVES OR THOSE OF HIS DONORS

Richard Pildes[†]

Much of the initial reaction to the Edwards indictment from experts in campaign-finance law has been critical or skeptical of the government's theory. But in my view, the reaction has not been critical enough. Some skeptics think the problem with the government's case is figuring out what the "true motives" of Edwards and his supporters were when they gave large amounts of money to keep his affair secret. If their motives were to benefit Edward's campaign, then perhaps this money was an illegal campaign "contribution;" if their motives were anything else, like preserving Edward's family relationships, then the money was not a campaign contribution. On this view, the government has a difficult, but not impossible, problem on its hands only because sorting out mixed motives in a situation like this is extraordinarily complex. This is Rick Hasen's view[1] of the case: the government's case is difficult, but plausible, because if the government can prove Edwards

[†] Sudler Family Professor of Constitutional Law, NYU School of Law. Original at electionlawblog.org/?p=18735 (June 4, 2011; vis. Oct. 1, 2011).

[1] Richard L. Hasen, *A Cover-Up, Not a Crime. Why the case against John Edwards may be hard to prove.*, Slate, www.slate.com/articles/news_and_politics/jurisprudence/2011/06/a_coverup_not_a_crime.html.

and the donors "really intended" the money to benefit his campaign, then a crime will have been committed.

But I believe the government's case is even more tenuous than Hasen's view suggests. What constitutes a "campaign contribution" under the federal election law for criminal-law purposes must be defined in objective terms. The definition of a "contribution" cannot turn on the subjective motive of the actors involved. There are a limitless number of ways supporters of a candidate can spend money that could indirectly benefit the electoral prospects of that candidate. Whether any of these means are "contributions" or not should depend, for purposes of criminal law, on objective facts, not on whether those involved intended to benefit some candidate. For example, if a candidate has published an autobiography, a supporter could buy up thousands of copies of the book and help turn it into a bestseller, which could enhance the candidate's stature and visibility. Most forms of this kind of indirect activity will cost more than the $2300 cap on campaign contributions (at $25 a book, buying 93 books would exceed that cap). But the courts are unlikely to accept the view that whether buying up these books constitutes a crime turns on whether the purchases were motivated by a desire to help the campaign or, instead, a belief in the correctness of the ideas expressed and a desire to share those ideas with others. Motives are irrelevant. The FEC has already recognized[2] this in the flip-side of the Edwards case; when a donor gives money directly to a candidate, this will be treated as a contribution, regardless of whether the donor says my real motive is to give a gift to the candidate, not a campaign contribution. But just as subjective intent cannot turn a contribution into something else, it cannot turn something not a contribution into one. There are two points here: (1) not every form of spending that indirectly benefits a candidate is, in legal terms, a "campaign contribution;" (2) determining which forms of spending are contributions cannot turn on whether the actors involved are motivated to help the campaign or not – especially in the criminal-law context, where due process considerations require that

[2] Letter from Darryl R. Wold, Chairman, FEC, to Philip D. Harvey, DKT International, June 14, 2000, saos.nictusa.com/aodocs/2000-08.pdf.

potential defendants have clear notice of whether their conduct constitutes a crime or not.

The question in the Edwards case is thus whether money given to support a mistress is, under the law, a campaign "contribution," period, regardless of trying to sort out why the money was given. Based on my knowledge of the election laws, I find it hard to believe the courts will answer yes to that question. For one, the money involved here was not a substitute for money the campaign itself might otherwise have spent; indeed, if Edwards has used campaign money to support his mistress, that would itself have violated the criminal law. So the donors did not save the Edwards campaign from spending money it might otherwise have spent. Criminal prosecutions under the federal election laws are extremely rare to begin with; the government has never brought a criminal case involving an expansive notion of "contribution," let alone one as expansive as this case involves. Indeed, even in the civil context, the FEC has never tried to stretch the definition of "contribution" this far. The money spent here is almost certainly not a "contribution" within the meaning of the election laws, at least for criminal-law purposes. I believe at least nine out of ten election-law experts would have been of that view before this prosecution was announced. But even if there is uncertainty about that, the Constitution prohibits criminal prosecutions under statutes that are too vague to provide fair notice about the boundaries between lawful and criminal conduct.

The confusion on this issue might be a result of the fact that specific intent is *necessary* to establish a criminal violation of the federal campaign finance laws. Thus, the government must generally prove that the offender was aware of what the law required, and that he or she violated that law notwithstanding that knowledge. But the fact that intent is *necessary* doesn't mean it's *sufficient*: the payments either are contributions, within the meaning of the law, or they are not. Whatever motivated the donors or Edwards cannot turn spending that is not a contribution into a contribution. I have no sympathy as a moral matter for John Edwards, but regardless of his motives, I doubt the courts are going to accept the view that he can be prosecuted for criminal violations of the federal campaign-finance laws –

regardless of whether he or his donors intended to benefit his campaign through the payments. //

FROM: LEGAL THEORY BLOG

LEGAL THEORY LEXICON: LEGAL THEORY, JURISPRUDENCE, AND THE PHILOSOPHY OF LAW

Lawrence B. Solum[†]

INTRODUCTION

The *Legal Theory Lexicon* series usually explicates some concept in legal theory, jurisprudence, or philosophy of law. But what are those fields and how do they relate to each other? Is "jurisprudence" a synonym for "philosophy of law" or are these two overlapping but distinct fields? Is "legal theory" broader or narrower than jurisprudence? And why should we care about this terminology?

As always, this entry in the *Legal Theory Lexicon* series is aimed at law students, especially first-year law students with an interest in legal theory.

WHO CARES ABOUT TERMINOLOGY

Why should we care about terminology? Who cares what goes under the label "jurisprudence" or "philosophy of law" or "legal theory"? Well, of course, there is a sense in which we

[†] Professor of Law, Georgetown University Law Center. Original at lsolum.typepad.com/legaltheory/2011/04/introduction-thelegal-theory-lexiconseries-usually-explicates-some-concept-in-legal-theory-jurisprudence-or-philosophy-o.html (Apr. 24, 2011; vis. Oct. 1, 2011).

shouldn't care at all. What matters in a deep way is the *substance* of theorizing about law. On the other hand, these labels are important for a different reason – because their use tells us something about the *sociology* of the academy. When people argue about what "jurisprudence" really is, the terminological dispute may reflect a conflict over "turf" and "authority."

DISCIPLINARY LINES AND THEORIZING ABOUT LAW

Very broadly speaking, the turf of high-level legal theory is disputed by at least four groups. First and (still) foremost are the academic lawyers, those whose graduate-level training is exclusively (or almost exclusively) in law as it is taught in the legal academy. Second, there are the economists – some of whom are primarily (or exclusively) trained in economics; while others legal economists were trained primarily by law professors. Third, there is the "law and society" movement – broadly defined as the study of law from a social science (but noneconomic) perspective. Law-and-society theorists may have been trained in political science or sociology or criminology, but many may have been trained in the legal academy as well. Fourth, there is the law-and-philosophy movement, with "analytic legal philosophy" or "analytic jurisprudence" as the focal point of a variety of philosophical approaches. Many "philosophers of law" have formal philosophical training, but some were trained in law or political theory in a political science department. There are other approaches to the study of law (e.g., "law and courts" scholarship in political science dpeartments), but for the most part they do not claim to be doing "legal theory" or "jurisprudence."

So, what about the turf wars? Those who use the phrase "philosophy of law" tend to be philosophers, while the term "jurisprudence" is more strongly associated with the legal tradition of theorizing about the law, but there is frequently a blurring of the these two terms. From the 1960s on, a single figure had a dominant influence in defining the content of "philosophy of law" courses in philosophy departments and "jurisprudence" courses in the law schools – that figure was H.L.A. Hart. Of course, there were many, many

exceptions, but for quite a long time the standard course in both disciplines included as a central, organizing component, an examination of Hart's ideas, either *The Concept of Law*, Hart's great book, or the Hart-Fuller debate in the Harvard Law Review. When I was a student in the 70s and early 80s, I thought that "jurisprudence" and "philosophy of law" were synonymous – and that both were references to analytic philosophy of law in the tradition of Hart and included figures like Dworkin and Raz. One consequence of the "philosophicalization" of jurisprudence was the move to fold moral and political philosophy into jurisprudence. I have a very clear memory of browsing the law shelves of the textbook section of the UCLA bookstore in the mid to late 70s, and discovering John Rawls's *A Theory of Justice* and Robert Nozick's *Anarchy, State, and Utopia* as the texts for the jurisprudence course. I have always assumed that similar courses were offered elsewhere, although I could be wrong about that.

Philosophy is important as a matter of the sociology of the legal academy, but it is not the only important interdisciplinary influence: economics, political science, and sociology, each of these also has a major influence. Given that the "jurisprudence" course was "captured" by philosophers, how could these other approaches to legal theorizing express their theoretical framework in the law school curriculum. One mode of expression was the alternative theory course – "Law and Economics" and "Law and Society" were the two leading competitors of "Jurisprudence." Moreover, the tradition of distinctively legal thinking about high legal theory remains. American Legal Realism was largely the product of the law schools – although many other disciplines figured in the realist movement. Likewise, Critical Legal Studies was largely a phenomenon of the legal academy. Some jurisprudence or legal theory courses incorporate philosophy of law, law and economics, and law and society into a course that is taught from a distinctively legal point of view.

What can we say about our three terms – jurisprudence, philosophy of law, and legal theory?

JURISPRUDENCE

My sense is that most Anglo-American legal academics view "jurisprudence" as mostly synonymous with "philosophy of law". This is not a unanimous view. There is still a lingering sense of "jurisprudence" that encompasses high legal theory of a nonphilosophical sort – the elucidation of legal concepts and normative theory from within the discipline of law. Moreover, in other legal cultures, for example, in Europe and Latin America, my sense is that the move to identify jurisprudence with philosophy of law never really took root.

PHILOSOPHY OF LAW

The meaning of the phrase "philosophy of law" is inevitably tied up in the relationship between the two academic disciplines – philosophy and law. In the United States and the rest of the Anglophone world, "philosophy of law" is a subdiscipline of philosophy, a special branch of what is nowadays frequently called "normative theory" and closely related to political philosophy. Of course, there are many different tendencies within academic philosophy generally and the philosophy of law in particular. Still, the dominant approach to philosophy of law in the Anglophone world is represented by "analytic jurisprudence," which might be defined by the Hart-Dworkin-Raz tradition on the one hand and by the larger Austin-Wittgenstein-Quine-Davidson-Kripke tradition on the other. (In both cases, the list of names is arbitrary and illustrative – we could add Coleman or Finnis or drop Davidson or Wittgenstein and still refer to the same set of central tendencies.)

Coexisting with the analytic tradition in the philosophy of law are many other philosophical approaches. These include Hegelianism, neo-Thomism, Marxism, as well as the contemporary continental philosophical tradition, ranging from Habermas (with close affinities to the analytic tradition) to Foucault and Derrida (with much more tenuous links).

The philosophy of law covers a lot of ground. An important line of development focuses on the "what is law?" question, but much

contemporary legal philosophy is focused on normative questions in specific doctrinal fields. The application of moral and political philosophy to questions in tort and criminal law is an example of this branch of contemporary legal philosophy.

My sense of the "lay of the land" is that debates over the "What is Law?" question have recently become more exciting (Scott Shapiro's work is just one example) – but in my opinion the center of attention has shifted from the nature of law to normative legal theory. A variety of potentially exiting developments that are very recent include the emergence of experimental jurisprudence and explorations of the connections between metaethics and metajurisprudence.

LEGAL THEORY

Legal theory is a much broader and encompassing term, encompassing the philosophy of law and jurisprudence as well as theorizing from a variety of other perspectives, including law and economics and the law and society movement. In my opinion, "legal theory" is currently the bestneutral term for referring to legal theorizing, broadly understood. It allows us to avoid the turf wars and sectarian disputes that make the word "jurisprudence" somewhat problematic.

CONCLUSION

When you start theorizing about law, you are likely to adopt some term or phrase to describe your activity. "I'm doing jurisprudence," or "I'm a philosopher of law." I hope that this entry in the *Legal Theory Lexicon* will help you use these labels with some awareness of their history and the controversies that surround their use.

RELATED LEXICON ENTRIES

Legal Theory Lexicon 065: The Nature of Law[1]
Legal Theory Lexicon 016: Positive and Normative Legal Theory[2]

[1] lsolum.typepad.com/legal_theory_lexicon/2008/05/legal-theory-le.html.
[2] lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le.html.

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FROM: TRUTH ON THE MARKET

ANTITRUST REMEDIES

Josh Wright[†]

BARNETT V. BARNETT ON ANTITRUST

Tom Barnett (Covington & Burling) represents Expedia in, among other things, its efforts to persuade a US antitrust agency to bring a case against Google involving the alleged use of its search engine results to harm competition. In that role, in a recent piece in Bloomberg,[1] Barnett wrote the following things:

- "The U.S. Justice Department stood up for consumers last month by requiring Google Inc. to submit to significant conditions on its takeover of ITA Software Inc., a company that specializes in organizing airline data."
- "According to the department, without the judicially monitored restrictions, Google's control over this key asset "would have substantially lessened competition among providers of comparative flight search websites in the United States, resulting in reduced choice and less innovation for consumers."
- "Now Google also offers services that compete with other sites to provide specialized "vertical" search services in particular segments (such as books, videos, maps and, soon, travel) and information sought by users (such as hotel and restaurant

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[†] Professor of Law, George Mason University School of Law. Originals at truthonthemarket.com/2011/05/10/barnett-v-barnett-on-antitrust/ (May 10, 2011), truthonthemarket.com/2011/07/11/searching-for-antitrust-remedies-part-i/ (July 11, 2011), and truthonthemarket.com/2011/07/13/searching-for-antitrust-remedies-part-ii/ (July 13, 2011) (all vis. Oct. 1, 2011).

[1] *Google's Search Tactics Warrant Antitrust Scrutiny: Commentary*, lammgl.files.wordpress.com/2011/03/google_s-search-tactics-warrant-antitrust-scrutiny_-commentary1.pdf.

> reviews in Google Places). So Google now has an incentive to use its control over search traffic to steer users to its own services and to foreclose the visibility of competing websites."
>
> • "Search Display: Google has led users to expect that the top results it displays are those that its search algorithm indicates are most likely to be relevant to their query. This is why the vast majority of user clicks are on the top three or four results. Google now steers users to its own pages by inserting links to its services at the top of the search results page, often without disclosing what it has done. If you search for hotels in a particular city, for example, Google frequently inserts links to its Places pages."
>
> • "All of these activities by Google warrant serious antitrust scrutiny. . . . It's important for consumers that antitrust enforcers thoroughly investigate Google's activities to ensure that competition and innovation on the Internet remain vibrant. The ITA decision is a great win for consumers; even bigger issues and threats remain."

The themes are fairly straightforward: (1) Google is a dominant search engine, and its size and share of the search market warrants concern, (2) Google is becoming vertically integrated, which also warrants concern, (3) Google uses its search engine results in manner that harms rivals through actions that "warrant serious antitrust scrutiny," and (4) Barnett appears to applaud judicial monitoring of Google's contracts involving one of its "key assets." Sigh.

The notion of firms "coming full circle"[2] in antitrust, a la Microsoft's journey from antitrust defendant to complainant, is nothing new. Neither is it too surprising or noteworthy when an antitrust lawyer, including very good ones like Barnett, say things when representing a client that are at tension with prior statements made when representing other clients. By itself, that is not really worth a post. What I think is interesting here is that the prior statements from Barnett about the appropriate scope of antitrust enforcement generally, and monopolization in the specific, were made as Assis-

[2] Geoffrey Manne, *Microsoft comes full circle*, truthonthemarket.com/2011/03/31/Microsoft-comes-full-circle/.

tant Attorney General for the Antitrust Division – and thus, I think are more likely to reflect Barnett's actual views on the law, economics, and competition policy than the statements that appear in Bloomberg. The comments also expose some shortcomings in the current debate over competition policy and the search market.

But lets get to it. Here is a list of statements that Barnett made in a variety of contexts while at the Antitrust Division.

- "Mere size does not demonstrate competitive harm." (Section 2 of the Sherman Act Presentation, June 20, 2006)[3]
- ". . . if the government is too willing to step in as a regulator, rivals will devote their resources to legal challenges rather than business innovation. This is entirely rational from an individual rival's perspective: seeking government help to grab a share of your competitor's profit is likely to be low cost and low risk, whereas innovating on your own is a risky, expensive proposition. But it is entirely irrational as a matter of antitrust policy to encourage such efforts. (Interoperability Between Antitrust and Intellectual Property, George Mason University School of Law Symposium, September 13, 2006)[4]
- "Rather, rivals should be encouraged to innovate on their own – to engage in leapfrog or Schumpeterian competition. New innovation expands the pie for rivals and consumers alike. We would do well to heed Justice Scalia's observation in Trinko, that creating a legal avenue for such challenges can 'distort investment' of both the dominant and the rival firms." (emphasis added) (Interoperability Between Antitrust and Intellectual Property, George Mason University School of Law Symposium, September 13, 2006)[5]
- "Because a Section 2 violation hurts competitors, they are often the focus of section 2 remedial efforts. But competitor well-being, in itself, is not the purpose of our antitrust laws. The Darwinian process of natural selection described by Judge Easterbrook and Professor Schumpeter cannot drive

[3] www.justice.gov/atr/public/hearings/single_firm/docs/218775.pdf.
[4] www.justice.gov/atr/public/speeches/218316.htm.
[5] *Id*.

growth and innovation unless tigers and other denizens of the jungle are forced to survive the crucible of competition." (Cite).[6]

- "Implementing a remedy that is too broad runs the risk of distorting markets, impairing competition, and prohibiting perfectly legal and efficient conduct." (same)
- "Access remedies also raise efficiency and innovation concerns. By forcing a firm to share the benefits of its investments and relieving its rivals of the incentive to develop comparable assets of their own, access remedies can reduce the competitive vitality of an industry." (same)
- "The extensively discussed problems with behavioral remedies need not be repeated in detail here. Suffice it to say that agencies and courts lack the resources and expertise to run businesses in an efficient manner. . . . [R]emedies that require government entities to make business decisions or that require extensive monitoring or other government activity should be avoided wherever possible." (Cite)[7]
- "We need to recognize the incentive created by imposing a duty on a defendant to provide competitors access to its assets. Such a remedy can undermine the incentive of those other competitors to develop their own assets as well as undermine the incentive for the defendant competitor to develop the assets in the first instance. If, for example, you compel access to the single bridge across the Missouri River, you might improve competitive options in the short term but harm competition in the longer term by ending up with only one bridge as opposed to two or three." (same)
- "There seems to be consensus that we should prohibit unilateral conduct only where it is demonstrated through rigorous economic analysis to harm competition and thereby harm consumer welfare." (same)

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[6] *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, American Bar Association Conference on Monopolization Remedies, Charlottesville, VA, June 4, 2008.

[7] *Section 2 Remedies: A Necessary Challenge*, Fordham Competition Law Institute 34th Annual Conference on International Antitrust Law & Policy New York, NY, Sept. 28, 2007.

I'll take Barnett (2006-08) over Barnett (2011) in a technical knockout. Concerns about administrable antitrust remedies, unintended consequences of those remedies, error costs, helping consumers and restoring competition rather than merely giving a handout to rivals, and maintaining the incentive to compete and innovate are all serious issues in the Section 2 context. Antitrust scholars from Epstein and Posner to Areeda and Hovenkamp and others have all recognized these issues – as did Barnett when he was at the DOJ (and no doubt still). I do not fault him for the inconsistency. But on the merits, the current claims about the role of Section 2 in altering competition in the search engine space, and the applause for judicially monitored business activities, runs afoul of the well grounded views on Section 2 and remedies that Barnett espoused while at the DOJ.

Let me end with one illustration that I think drives the point home. When one compares Barnett's column in Bloomberg to his speeches at DOJ, there is one difference that jumps off the page and I think is illustrative of a real problem in the search engine antitrust debate. Barnett's focus in the Bloomberg piece, as counsel for Expedia, is largely harm to rivals. Google is big. Google has engaged in practices that might harm various Internet businesses. The focus is not consumers, i.e. the users. They are mentioned here and there – but in the context of Google's practices that might "steer" users toward their own sites. As Barnett (2006-08) well knew, and no doubt continues to know, is that vertical integration and vertical contracts with preferential placement of this sort can well be (and often are) pro-competitive. This is precisely why Barnett (2006-08) counseled requiring hard proof of harm to consumers before he would recommend much less applaud an antitrust remedy tinkering with the way search business is conducted and running the risk of violating the "do no harm" principle. By way of contrast, Barnett's speeches at the DOJ frequently made clear that the notion that the antitrust laws "protection competition, not competitors," was not just a mantra, but a serious core of sensible Section 2 enforcement.

The focus can and should remain upon consumers rather than ri-

vals.[8] The economic question is whether, when and if Google uses search results to favor its own content, that conduct is efficient and pro-consumer or can plausibly cause antitrust injury. Those leaping from "harm to rivals" to harm to consumers should proceed with caution. Neither economic theory nor empirical evidence indicate that the leap is an easy one. Quite the contrary, the evidence[9] suggests these arrangements are generally pro-consumer and efficient. On a case-by-case analysis, the facts might suggest a competitive problem in any given case.

Barnett (2006-08) has got Expedia's antitrust lawyer dead to rights on this one. Consumers would be better off if the antitrust agencies took the advice of the former and ignored the latter.

SEARCHING FOR ANTITRUST REMEDIES, PART I

This is part one of a two part series of posts in which I'll address the problems associated with discerning an appropriate antitrust remedy to alleged search engine bias. The first problem – and part – is, of course, how we should conceptualize Google's allegedly anticompetitive conduct; in the next part, I will address how antitrust regulators should conceive of a potential remedy, assuming *arguendo* the existence of a problem at all. Despite some commentators' assumptions, I do not think the economics indicate any such problem exists.

The question of how to conceptualize Google's business practices – even its business model! – remains the indispensible starting point for antitrust analysis, including potential remedies; doubly so in the wake of the FTC's decision to formally investigate Google. While the next part will focus more directly upon potential remedies that have been proposed by various Google critics, there is a fundamental link between how we conceptualize Google's provision of search results for the purposes of antitrust analysis and the design

[8] Josh Wright, *Google, Antitrust, and First Principles*, truthonthemarket.com/2011/03/31/google-antitrust-and-first-principles/.

[9] Francine Lafontaine and Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, www.aeaweb.org/articles.php?doi=10.1257/jel.45.3.629, and 45 J. Econ. Literature 629 (2007).

of remedies. Indeed, antitrust enforcers and scholars have taught that thinking hard about remedies upfront can and frequently should influence how we think about the competitive nature of the conduct at issue. The question of how to conceptualize Google's organic search results has sparked serious debate, as some[10] have claimed that "Google's behavior is harder to define" than traditional anti-competitive actions and represents "a new kind of competition." Some have also focused upon "search bias" itself as the relevant conduct for antitrust purposes. Of course, as I've pointed out,[11] these statements are not in line with modern antitrust economics and usually precede calls to deviate from traditional consumer-welfare-focused antitrust analysis.

I see two useful conceptual constructs in evaluating "search bias" within the antitrust framework. Recall that "search bias" typically translates to allegations that Google favors its own affiliated content over that of rivals. For example, a search query on Google for "map of Arlington, VA" might turn up a map of Arlington from Google Maps in the top link. These allegations usually concede that we would expect Bing Maps if we ran the same search on Bing. The complaints from vertical search engines and travel services like Expedia particularly center around the notion that Google's "entry" into various spaces – such as travel services – supported by prominent search rankings disadvantages rivals and may lead to their exit.

Observant readers will note my use of scare quotes around "entry." This is not coincidental. It is not obvious to me that Google necessarily *enters* a new sector (much less a well-defined antitrust product market) when it directs a user to content in a new format– such as a map, video, or place page. Google's primary function is search; users rely on search engines to reduce search and information costs. I think it is at least as likely that Google's attempts to provide this content by *any* chosen metric is simply an attempt to do their cardinal job better: answering user queries with relevant in-

[10] *Google antitrust probe could bring out enemies*, www.politico.com/news/stories/0711/58464_Page2.html.

[11] *Sacrificing Consumer Welfare in the Search Bias Debate, Part II*, truthonthemarket.com/2011/06/28/sacrificing-consumer-welfare-in-the-search-bias-debate-part-ii/.

formation at a minimum of cost. Holding that threshold issue aside for a moment, in my mind, there are two ways to classify that conduct in the antitrust framework.

First, one might conceive of search bias allegations as "vertical integration" or vertical contractual activity. I've explored this conception at significant length both in blog posts (see, e.g. here[12] and here[13]) as well as a longer article with Geoff.[14] The classic antitrust concern in this setting is that a monopolist might foreclose rivals from an input the rivals need to compete effectively. For example, Google owns YouTube; Google could prominently place YouTube results when users enter queries seeking video content. (Ignore for the moment that YouTube will necessarily rank highly on other search engines because it is the leading site for video content). Within this vertical integration framework, there is a standard analysis for understanding when competitive concerns might arise, the conditions that must be satisfied for those concerns to warrant scrutiny, a deeply embedded understanding that harm to rivals must be distinguished from demonstrable harm to competition, and an equally deeply held understanding that these vertical arrangements and relationships are often, even typically, pro-competitive (e.g., in the YouTube example vertical integration likely leads to reduced latency and faster provision of video content).

Second, one might conceptualize organic search results as the product of Google's algorithm and thus falling into the category of conduct analyzed as "product design" for antitrust purposes. This algorithm faces competition from other search algorithms and vertical search engines to deliver relevant results to consumers. It is the design of the algorithm that ranks Google-affiliated content, according to the complaints, preferentially and to the disadvantage of rivals. I explore both beneath the fold.

The two conceptions are not mutually exclusive. The antitrust

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[12] *Id.*

[13] *Sacrificing Consumer Welfare in the Search Bias Debate*, truthonthemarket.com/2011/04/22/sacrificing-consumer-welfare-in-the-search-bias-debate/.

[14] Geoffrey A. Manne and Joshua D. Wright, *If Search Neutrality is the Answer, What's the Question?*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1807951.

implications of the two different conceptions of Google's organic search are significant. Courts and agencies generally give wide latitude to product design decisions, through with some prominent exceptions (Microsoft, FTC v. Intel). Courts are skeptical to intervene on the basis of complaints about product design by rivals because they concerned that such intervention will chill innovation. Concern for false positives play a central part in the analysis, as do concerns that any remedy will involve judicial oversight of product innovation. Plaintiffs can and do, from time to time, win these cases, but the product-design conception carries with it a heavy deference for design decisions.

The "vertical" (in the antitrust sense) conception of Google's search results requires us to think about the economics of algorithmic search ranking, placement choices, and the economics of vertical relationships between a content provider and a search engine. There are many economic reasons for vertical contractual relationships between such content or product providers and retailers. Coca-Cola pays retailers for promotional shelf space, manufacturers compensate retailers by granting them exclusive territories, and product manufacturers and distributors often enter into exclusive relationships in which the distributor does not simply feature or promote the manufacturer's product, but does so to the exclusion of all of the manufacturer's rivals.

The anticompetitive narrative of Google's conduct focuses heavily on that prominent placement within Google's rankings, e.g. the first link or one towards the top of the page, results in a substantial amount of traffic. This is no doubt true; it is not a sufficient condition for proving competitive harm. It is equally true that eye-level and other premium level shelf space in the supermarket generates more sales than other placements within the store. There is good economic reason for manufacturers to pay retailers for premium shelf space (see Klein and Wright, 2007[15]) and evidence that these arrangements are good for consumers (Wright, 2008[16]). Retailers'

[15] Benjamin Klein and Joshua D. Wright, *The Economics of Slotting Contracts*, papers.ssrn.com/sol3/papers.cfm?abstract_id=773464.

[16] Joshua D. Wright, *Slotting Contracts and Consumer Welfare*, papers.ssrn.com/sol3/papers.

shelf space decisions, and decisions to promote one product over another, are often influenced by contractual incentives; and it is a good thing for consumers. Now consider the case when the retailer shelf space decision is influenced not by contractual incentive and compensation, but by ownership. This is really just a special case – as ownership aligns the incentives (like the contract would) of the manufacturer and retailer. For example, a supermarket might promote its own private label brand in eye-level shelf space. Alternatively, in a category management relationship,[17] a retailer might delegate a specific manufacturer as "category captain" and allow it significant influence over product selection and shelf space placement decisions. Note that in the case of exclusive relationships, the presumption that such arrangements are pro-competitive applies to shelf placement that would entirely exclude a rival from the shelf, not just demote it.

In economics, the theoretical and empirical verdict is in about these sorts of vertical contractual relationships: while they can be anticompetitive under some circumstances, the appropriate presumption is that they are generally pro-competitive and a part of the normal competitive process until proven otherwise. How we conceptualize placement of search results, including those affiliated with the search engine (e.g. Google Maps on Google or Bing Maps on Bing), should influence how we think about the appropriate burden of production facing would-be antitrust plaintiffs, including the Federal Trade Commission.

Indeed, these two models offer important trade-offs for antitrust analysis. To wit, in my view, the vertical integration model provides a still difficult, but relatively easier case for potential rivals to make under existing case law, but it also integrates efficiencies directly into the analysis. For example, vertical integration and exclusive dealing cases accept as a starting point the notion that such arrangements are often efficient. On the other hand, while potential plaintiffs have a tougher initial burden in a product design case, the focus

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cfm?abstract_id=897394.

[17] Joshua D. Wright, *Antitrust Analysis of Category Management: Conwood v. United States Tobacco Co.*, papers.ssrn.com/sol3/papers.cfm?abstract_id=945178.

often turns to how the design impacts interoperability and whether the defendant can defend its technical design choices. Having explored the potential conceptual constructs for characterizing Google's conduct for the purpose of antitrust analysis, my next post will link those concepts to a discussion of potential remedies, exploring the proposed remedies for Google's conduct, a relevant historical parallel to today's "search bias" debate raised by some as a model of regulatory success, and a discussion of the economic non sequiturs surrounding the case against Google as juxtaposed against these proposed remedies.

SEARCHING FOR ANTITRUST REMEDIES, PART II

In the last post,[18] I discussed possible characterizations of Google's conduct for purposes of antitrust analysis. A firm grasp of the economic implications of the different conceptualizations of Google's conduct is a necessary – but not sufficient – precondition for appreciating the inconsistencies underlying the proposed remedies for Google's alleged competitive harms. In this post, I want to turn to a different question: assuming *arguendo* a competitive problem associated with Google's algorithmic rankings – an assumption I do not think is warranted, supported by the evidence, or even consistent with the relevant literature on vertical contractual relationships – how might antitrust enforcers conceive of an appropriate and consumer-welfare-conscious remedy? Antitrust agencies, economists, and competition policy scholars have all appropriately stressed the importance of considering a potential remedy prior to, rather than following, an antitrust investigation; this is good advice not only because of the benefits of thinking rigorously and realistically about remedial design, but also because clear thinking about remedies upfront might illuminate something about the competitive nature of the conduct at issue.

Somewhat ironically,[19] former DOJ Antitrust Division Assistant Attorney General Tom Barnett – now counsel for Expedia, one of

[18] "Searching for Antitrust Remedies, Part I" above.
[19] "Barnett v. Barnett on Antitrust" above.

the most prominent would-be antitrust plaintiffs against Google – warned (in his prior, rather than his present, role) that "[i]mplementing a remedy that is too broad runs the risk of distorting markets, impairing competition, and prohibiting perfectly legal and efficient conduct," and that "forcing a firm to share the benefits of its investments and relieving its rivals of the incentive to develop comparable assets of their own, access remedies can reduce the competitive vitality of an industry." Barnett also noted that "[t]here seems to be consensus that we should prohibit unilateral conduct only where it is demonstrated through rigorous economic analysis to harm competition and thereby harm consumer welfare." Well said. With these warnings well in-hand, we must turn to two inter-related concerns necessary to appreciating the potential consequences of a remedy for Google's conduct: (1) the menu of *potential* remedies available for an antitrust suit against Google, and (2) the efficacy of these potential remedies from a consumer-welfare, rather than firm-welfare, perspective.

What are the potential remedies?

The burgeoning search neutrality crowd presents no lack of proposed remedies; indeed, if there is one segment in which Google's critics have proven themselves prolific, it is in their constant ingenuity conceiving ways to bring governmental intervention to bear upon Google. Professor Ben Edelman has usefully aggregated and discussed several of the alternatives, four of which bear mention: (1) a la Frank Pasquale and Oren Bracha, the creation of a "Federal Search Commission,"[20] (2) a la the regulations[21] surrounding the Customer Reservation Systems (CRS) in the 1990s, a prohibition on rankings that order listings "us[ing] any factors directly or indirectly relating to" whether the search engine is affiliated with the link, (3) mandatory disclosure of all manual adjustments to algorithmic search, and (4) transfer of the "browser choice" menu of the

[20] Frank A. Pasquale III and Oren Bracha, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1002453.
[21] 14 C.F.R. pt. 255 – Airline Computer Reservations Systems.

EC Microsoft litigation to the Google search context, requiring Google to offer users a choice of five or so rivals whenever a user enters particular queries.

Geoff and I discuss several of these potential remedies in our paper, *If Search Neutrality is the Answer, What's the Question?*[22] It suffices to say that we find significant consumer welfare threats from the creation of a new regulatory agency designed to impose "neutral" search results. For now, I prefer to focus on the second of these remedies – analogized to CRS technology in the 1990s – here; Professor Edelman not only explains proposed CRS-inspired regulation, but does so in effusive terms:

> A first insight comes from recognizing that regulators have already – *successfully!* – addressed the problem of bias in information services. One key area of intervention was customer reservation systems (CRS's), the computer networks that let travel agents see flight availability and pricing for various major airlines. Three decades ago, when CRS's were largely owned by the various airlines, some airlines favored their own flights. For example, when a travel agent searched for flights through Apollo, a CRS then owned by United Airlines, United flights would come up first – even if other carriers offered lower prices or nonstop service. The Department of Justice intervened, culminating in rules[23] prohibiting any CRS owned by an airline from ordering listings "us[ing] any factors directly or indirectly relating to carrier identity" (14 CFR 255.4). Certainly one could argue that these rules were an undue intrusion: A travel agent was always free to find a different CRS, and further additional searches could have uncovered alternative flights. Yet most travel agents hesitated to switch CRS's, and extra searches would be both time-consuming and error-prone. Prohibiting biased listings was the better approach.
>
> The same principle applies in the context of web search. On this theory, Google ought not rank results by any metric that distinctively favors Google. I credit that web search considers

[22] See above at note 18.

[23] 14 C.F.R. pt. 255 – Airline Computer Reservations Systems, law.justia.com/cfr/title 14/14-4.0.1.1.32.html#14:4.0.1.1.32.0.8.4.

> myriad web sites – far more than the number of airlines, flights, or fares. And I credit that web search considers more attributes of each web page – not just airfare price, transit time, and number of stops. But these differences only grant a search engine more room to innovate. These differences don't change the underlying reasoning, so compelling in the CRS context, that a system provider must not design its rules to systematically put itself first.

The analogy is a superficially attractive one, and we're tempted to entertain it, so far as it goes. Organizational questions inhere in both settings, and similarly so: both flights and search results must be ordinally ranked, and before CRS regulation, a host airline's flights often appeared before those of rival airlines. Indeed, we will take Edelman's analogy at face value. Problematically for Professor Edelman and others pushing the CRS-style remedy, a fuller exploration of CRS regulation reveals this market intervention – well, put simply, wasn't so successful after all. Not for consumers anyway. It did, however, generate (economically) predictable consequences: reduced consumer welfare through reduced innovation. Let's explore the consequences of Edelman's analogy further below the fold.

History of CRS Antitrust Suits and Regulation

Early air travel primarily consisted of "interline" flights – flights on more than one carrier to reach a final destination. CRSs arose to enable airlines to coordinate these trips for their customers across multiple airlines, which necessitated compiling information about rival airlines, their routes, fares, and other price- and quality-relevant information. Major airlines predominantly owned CRSs at this time, which served both competitive and cooperative ends; this combination of economic forces naturally drew antitrust advocates' attention.

CRS regulation proponents proffered numerous arguments as to the potentially anticompetitive nature and behavior of CRS-owning airlines. For example, they claimed that CRS-owning airlines engaged in "dirty tricks," such as using their CRSs to terminate passengers' reservations on smaller, rival airlines and to rebook customers

on their own flights, and refusing to allow smaller airlines to become CRS co-hosts, thereby preventing these smaller airlines from being listed in search results. CRS-owning airlines faced further allegations of excluding rivals through contractual provisions, such as long-term commitments from travel agents. Proponents of antitrust enforcement alleged that the nature of the CRS market created significant barriers to entry and provided CRS-owning airlines with significant cost advantages to selling their own flights. These cost advantages purportedly derived from two main sources: (1) quality advantages that airline-owned CRSs enjoyed, as they could commit to providing comprehensive and accurate information about the owner airline's flight schedule, and (2) joint ownership of CRSs, which facilitated coordination between airlines and CRSs, thereby decreasing the distribution and information costs.

These claims suffered from serious shortcomings including both a failure to demonstrate harm to competition rather than injury to specific rivals as well as insufficient appreciation for the value of dynamic efficiency and innovation to consumer welfare. These latter concerns were especially pertinent in the CRS context, as CRSs arose at a time of incredible change – the deregulated airline industry, joined with novel computer technology, necessitated significant and constant innovation. Courts accordingly generally denied antitrust remedies in these cases – rejecting claims that CRSs imposed unreasonable restraints on competition, denied access to an essential facility, or facilitated monopoly leverage.

Yet, particularly relevant for present purposes, one of the most popular anticompetitive stories was that CRSs practiced "display bias," defined as ranking the owner airline's flights above those of all other airlines. Proponents claimed display bias was particularly harmful in the CRS setting, because only the travel agent, and not the customer, could see the search results, and travel agents might have incentives to book passengers on more expensive flights for which they receive more commission. Fred Smith[24] describes the

[24] Fred L. Smith, Jr., *The Case for Repealing the Antitrust Regulations*, cei.org/pdf/3261.pdf ("Based Upon 'The Case For Reforming the Antitrust Regulations (If Repeal Is Not an Option)' in *The Harvard Journal of Law and Public Policy,* Vol. 23, No. 1, Fall 1999. pp. 23-

investigations surrounding this claim:

> These initial CRS services were used mostly by sophisticated travel agents, who could quickly scroll down to a customer's preferred airline. But this extra "effort" was considered discriminatory by some at the DOJ and the DOT, and hearings were held to investigate this threat to competition. Great attention was paid to the "time" required to execute only a few keystrokes, to the "complexity" of re-designing first screens by computer-proficient travel agents, and to the "barriers" placed on such practices by the host CRS provider.

CRS Rules

While courts declined to intervene in the CRS market, the Department of Transportation (DOT) eagerly crafted rules to govern CRS operations. The DOT's two primary goals in enacting the 1984 CRS regulations were (1) to incentivize entry into the CRS market and (2) to prevent airline ownership of CRSs from decreasing competition in the downstream passenger air travel market. One of the most notable rules introduced in the 1984 CRS regulations prohibited display bias. The DOT changed both this rule and CRS rules as a whole significantly, and by 1997, the DOT required each CRS "(i) to offer at least one integrated display that uses the same criteria for both online and interline connections and (ii) to use elapsed time or non-stop itinerary as a significant factor in selecting the flight options from the database" (Alexander, 2004). However, the DOT did not categorically forbid display bias; rather, it created several exceptions to this rule – and even allowed airlines to disseminate software that introduced bias into displays. Additionally, the DOT expressly refused to enforce its anti-bias rules against travel agent displays.

Other CRS rules attempted to reinforce these two goals of additional market entry and preservation of downstream competition. CRS rules specifically focused on mitigating travel agent switching costs between CRS vendors and reducing any quality advantage in-

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cumbent CRSs allegedly had. Rules prohibited discriminatory booking fees and the tying of travel agent commissions to CRS use, limited contract lengths, prohibited minimum uses and rollover clauses, and required CRSs to give all participating carriers equal service upgrades.

Evidence of CRS Regulation "Success"?

The CRS regulatory experiment had years to run its course; despite the extent and commitment of its regulatory sweep, these rules failed to improve consumer outcomes in any meaningful way. CRS regulations precipitated neither innovation nor entry, and likely incurred serious allocative efficiency and consumer welfare losses by attempting to prohibit display bias.

First, CRS regulations unambiguously failed in their goal of increasing ease of entry:

> Only six CRS vendors offered their services to domestic airlines and travel agents in the mid-1980s . . . If the rules had actually facilitated entry, the number of CRS vendors should have grown or some new entrants should have been seen during the past twenty years. The evidence, however, is to the contrary. It remains that '[s]ince the [CAB] first adopted CRS rules, no firm has entered the CRS business.' Meanwhile, there has been a series of mergers coupled with introduction of multinational CRS; the cumulative effect was to *reduce* the number of CRSs . . . Even if a regulation could successfully facilitate entry by a supplier of CRS services, the gain from such entry would at this point be relatively small, and possibly negative. (Alexander and Lee, 2004) (emphasis added).

As such, CRS regulations did not achieve one of their primary objectives – a fact which stands in stark contrast to Edelman's declaration that CRS rules represent an unequivocal regulatory success.

Most relevant to the search engine bias analogy, the CRS regulations prohibiting bias did not positively affect consumer welfare. To the contrary, by ignoring the reality that most travel agents took consumer interests into account in their initial choice of CRS operator (even if they do so to a lesser extent in each individual search

they conduct for consumers), and that even if residual bias remained, consumers were "informed and repeat players who have their own preferences," CRS regulations imposed unjustified costs. As Alexander and Lee[25] describe it

> [T]he social value of prohibiting display . . . bias solely to improve the quality of information that consumers receive about travel options appears to be low and may be negative. Travel agents have strong incentives to protect consumers from poor information, through how they customize their internal display screens, and in their choices of CRS vendors.

Moreover, and predictably, CRS regulations appear to have caused serious harm to the competitive process:

> The major competitive advantage of the pre-regulation CRS was that it permitted the leading airlines to slightly disadvantage their leading competitors by placing them a bit farther down on the list of available flights. United would place American slightly farther down the list, and American would return the favor for United flights. The result, of course, was that the other airlines received slightly higher ranks than they would have otherwise. When "bias" was eliminated, United moved up on the American system and vice versa, while all other airlines moved down somewhat. The antitrust restriction on competitive use of the CRS, then, actually reduced competition. Moreover, the rules ensured that the United/American market leadership would endure fewer challenges from creative newcomers, since any changes to the system would have to undergo DOT oversight, thus making "sneak attacks" impossible. The resulting slowdown of CRS technology damaged the competitiveness of these systems. Much of the innovative lead that these systems had enjoyed slowly eroded as the internet evolved. Today, much of the air travel business has moved to the internet (as have the airlines themselves) (Smith, 1999).

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[25] Cindy R. Alexander and Yoon-Ho Alex Lee, *The Economics of Regulatory Reform: Termination of Airline Computer Reservation System Rules*, litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=21+Yale+J.+on+Reg.+369&srctype=smi&srcid=3B15&key=c8729641e598741bc2a21a40e62a99ba, and 21 Yale J. on Reg. 369 (2004).

These competitive losses occurred despite evidence suggesting that CRSs themselves enhanced competition and thus had the predictable positive impact for consumers. For example, one study found that CRS usage increased travel agents' productivity by an average of 41% and that in the early 1990s over 95% of travel agents used a CRS – indicating that travel agents were able to assist consumers far more effectively once CRSs became available (Ellig, 1991). The rules governing contractual terms fared no better; indeed, these also likely reduced consumer welfare:

> The prohibited contract practices – long-term contracting and exclusive dealing – that had been regarded as exclusionary might not have proved to be such a critical barrier to entry: entry did not occur, independently of those practices. Evidence on the dealings between travel agents and CRS vendors, post-regulation, suggests that these practices may have enhanced overall allocative efficiency. Travel agents appear to have agreed to some, if not all, restrictive contracts with CRS vendors as a means of providing those vendors with assurance that they would be repaid gradually, over time, for their up-front investments in the travel agent, such as investments in equipment or training (Alexander and Lee, 2004).

Accordingly, CRS regulations seem to have threatened innovation by decreasing the likelihood that CRS vendors would recover research and development expenditures without providing a commensurate consumer benefit.

Termination of Rules

The DOT terminated CRS regulations in 2004 in light of their failure to improve competitive outcomes in the CRS market and a growing sense that they were making things worse, not better – which Edelman fails to acknowledge and which certainly undermines his claim that regulators addressed this problem "successfully." From the time CRS regulations were first adopted in 1984 until 2004, the CRS market and the associated technology changed significantly, rapidly becoming more complex. As the market increased in complexity, it became increasingly more difficult for the DOT to

effectively regulate. Two occurrences in particular precipitated deregulation: (1) the major airlines divested themselves of CRS ownership (despite the absence of any CRS regulations requiring or encouraging divestiture!), and (2) the commercialization of the internet introduced novel forms of substitutes to the CRS system that the CRS regulations did not govern. Online direct-to-traveler services, such as Travelocity, Expedia and Orbitz provide consumers with a method to choose their own flights, entirely absent travel agent assistance. More importantly, Expedia and Orbitz each developed direct connection technologies that allow them to make reservations directly with an airline's internal reservation system – bypassing CRS systems almost completely. Moreover, Travelocity, Expedia, and Orbitz were never forced to comply with CRS regulations, which allowed them to adopt more consumer-friendly products and innovate in meaningful ways, obsoleting traditional CRSs. It is unsurprising that Expedia has warned against overly broad regulations in the search engine bias debate – it has first-hand knowledge of how crucial the ability to innovate is.)

These developments, taken in harmony, mean that in order to cause any antitrust harm in the first instance, a hypothetical CRS monopolist must have been interacting with (1) airlines, (2) travel agents, and (3) consumers who *all* had an insufficient incentive to switch to another alternative in the face of a significant price increase. Given this nearly insurmountable burden, and the failure of CRS regulations to improve consumer welfare in even the earlier and simpler state of the world, Alexander and Lee find that, by the time CRS regulations were terminated in 2004, they failed to pass a cost-benefit analysis.

Overall, CRS regulations incurred significant consumer welfare losses and rendered the entire CRS system nearly obsolete by stifling its ability to compete with dynamic and innovative online services. As Ellig notes, "[t]he legal and economic debate over CRS. . . frequently overlooked the peculiar economics of innovation and entrepreneurship." Those who claim search engine bias exists (as distinct from valuable product differentiation between engines) and can be meaningfully regulated rely upon this same flawed analysis

and expect the same flawed regulatory approach to "fix" whatever issues they perceive as ailing the search engine market. Search engine regulation will make consumers worse off. In the meantime, proponents of so-called search neutrality and heavy-handed regulation of organic search results battle over which of a menu of cumbersome and costly regulatory schemes should be adopted in the face of evidence that the approaches are more likely to harm consumers than help them, and even stronger evidence that there is no competitive problem with search in the first place.

Indeed, one benefit of thinking hard about remedies in the first instance is that it may illuminate something about the competitive nature of the conduct one seeks to regulate. I defer to former AAG Barnett in explaining this point:[26]

> Put another way, a bad section 2 remedy risks hurting consumers and competition and thus is worse than no remedy at all. That is why it is important to consider remedies at the outset, before deciding whether a tiger needs catching. Doing so has a number of benefits. . . .
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> Furthermore, contemplation of the remedy may reveal that there is no competitive harm in the first place. Judge Posner has noted that "[t]he nature of the remedy sought in an antitrust case is often . . . an important clue to the soundness of the antitrust claim."[27] The classic non-section 2 example is *Pueblo Bowl-O-Mat*, where plaintiffs claimed that the antitrust laws prohibited a firm from buying and reinvigorating failing bowling alleys and prayed for an award of the "profits that would have been earned had the acquired centers closed."[28] The Supreme Court correctly noted that condemning conduct that increased competition "is inimical to the purposes of [the antitrust] laws"[29] – more competition is not a competitive harm to be remedied. In the section 2 context, one might wish that the Supreme Court had focused on the injunctive relief issued in *Aspen Skiing* – a compelled joint venture whose ability to enhance competition

[26] *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, June 4, 2008, www.justice.gov/atr/public/speeches/233884.htm.
[27] *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 267 (7th Cir. 1984).
[28] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 490 (1977).
[29] *Id.* at 488.

> among ski resorts was not discussed[30] – in assessing whether discontinuing a similar joint venture harmed competition in the first place.[31]

A review of my paper with Geoff reveals several common themes among proposed remedies intimated by the above discussion of CRS regulations. The proposed remedies consistently: (1) disadvantage Google, (2) advantage its rivals, and (3) have little if anything to do with consumers. Neither economics nor antitrust history supports such a regulatory scheme; unfortunately, it is consumers that might again ultimately pay the inevitable tax for clumsy regulatory tinkering with product design and competition. //

[30] *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 598 n.23 (1985).

[31] *See generally* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal – Why* Aspen *and* Kodak *Are Misguided*, 68 Antitrust L.J. 659, 662 (2001) (maintaining that "the only outcome to expect from court intervention" in situations like *Aspen Skiing* "is inefficiency").