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The Limits of Change: International Human Rights Under the Obama Administration

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ESSAY

THE LIMITS OF CHANGE: INTERNATIONAL HUMAN RIGHTS UNDER THE OBAMA ADMINISTRATION

*Paul B. Stephan**

INTRODUCTION	489
I. THE SHADOW OF THE NEXT ELECTION	490
II. THE PERMANENT BUREAUCRACY	492
III. THE DIFFICULTY OF THE ISSUES	494
IV. CONSTRAINTS IMPOSED BY CONGRESS AND THE JUDICIARY	496
V. HUMAN RIGHTS LITIGATION OUTSIDE THE TERRORISM CONTEXT	498
VI. TERRORISM OUTSIDE OF CAPTURE AND DETENTION: THE CASE OF THE PMOI	505
CONCLUSION	509

* John C. Jeffries, Jr., Distinguished Professor, University of Virginia School of Law. As a matter of full disclosure, I should reveal that in 2006–07 I served as Counselor on International Law to the Legal Adviser of the Department of State, and thus participated in the implementation of some of the policies that candidate Obama attacked in 2008. None of the views expressed here, however, should be attributed to the government of the United States, the State Department, or indeed any person, legal or physical, other than myself. In addition, as discussed in the body of the article, I filed an amicus brief on behalf of European Parliamentarians in *People’s Mojahedin Org. of Iran v. Dep’t of State*, 613 F.3d 220 (D.C. Cir. 2010). Again, the views expressed herein are mine alone, and not those of any of my clients in that matter. Finally, after finishing the first draft of this essay, I had the opportunity to review the manuscript of JACK L. GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (forthcoming 2012). There is considerable overlap in our observations and analysis, although Professor Goldsmith’s are much more fully developed and rest on a deeper engagement with government office than are my own. This Essay benefited from comments by Goldsmith, but responsibility for all errors is mine alone.

INTRODUCTION

As a candidate for president, Barack Obama made “change” a central theme of his campaign. In particular, he railed against the Bush administration’s human rights policy, including its resort to a war of choice that resulted in many civilian casualties, its detention of suspected terrorists at Guantanamo, its use of military tribunals instead of civilian courts to punish persons accused of terrorism, its expansive sense of what constitutes war crimes and who can be punished for committing them, and its general hostility to human rights litigants.¹ Three years into the Obama administration, we find the nation recently embroiled in a new war of choice in Libya as well as an expanded conflict in Afghanistan, while only at the beginning of a fraught extraction from Iraq. Guantanamo remains in business, military tribunals once again have become the preferred option for punishing foreign terrorist ringleaders whom our government cannot kill outright, the law of war remains the dominant model for framing the legal limits of US projections of force overseas, and courts have continued to narrow the scope of human rights litigation without serious resistance from the executive. At a glance, it appears that President Obama has become the person that candidate Obama ran against.

All of this is familiar. This Essay’s response is limited, but perhaps helpful. It does not consider whether the Bush or Obama administration responded better to the challenges posed by terrorist threats in light of our human rights values and commitments. This Essay does not excoriate the current administration for its human rights failures or defend it for its pragmatism. In 2008 it was not reasonable to expect candidate Obama, once elected, to reverse, or even change significantly, the course taken by the US government to meet terrorist threats or otherwise to address human rights issues. An expectation of continuity has largely been realized. This Essay will explore the institutional dynamics that brought about this result. Its objective, in other words, is positive, not normative. It explains

1. See Barack Obama, Democratic Presidential Candidate, Speech on Iraq (Mar. 19, 2008), *available at* <http://www.cfr.org/us-election-2008/obamas-speech-iraq-march-2008/p15761>.

why administrations behave the way they do and does not guide them to some other path than the one they have taken.

The institutional constraints that limit what actions a serving US president can take to advance human rights include: (1) the challenge to win re-election; (2) the policies and practices developed by career civil servants and military personnel; (3) the profound difficulty of the issues and the risks presented by all conceivable choices, due to the dynamic and uncertain environment surrounding and forming the modern national security presidency; and (4) the distinct and opposing interests of Congress and the judiciary. This Essay discusses how each limits the ability of a new administration to break with the past. This Essay then analyzes a particular human rights dispute in which I have done some work, and where the Obama administration has taken exactly the same approach as did the Bush administration.

I. *THE SHADOW OF THE NEXT ELECTION*

From the moment he takes office, a first-term president works in the shadow of the next election. Hypothetically, the president might hold the view that elections turn on factors largely outside his control and that he should concentrate on serving as effectively as possible to achieve the policies he prefers. At least in my lifetime (since 1950), no president has behaved this way. Rather, the president acts as if immediate and early impressions have lasting effects, and that shaping popular impressions of his conduct matters more than the objective impact of his work on people who will vote. During this period, seven presidents, Eisenhower, Nixon, Carter, Reagan, G.H.W. Bush, Clinton, and G.W. Bush, have run for reelection, five successfully. The sample is too small to prove anything, but it suggests that focusing on reelection rather than policy has some positive impact on the desired outcome.²

2. Excluded from this list are incumbents who attained the presidency other than by election (Johnson and Ford). Johnson in 1964 and Ford in 1976 sought election, not reelection. If one were to treat a decision not to run for reelection as equivalent to a defeat (Truman in 1952, Johnson in 1968), then the point in text becomes much weaker (only five victories out of nine chances).

The impact of the shadow of the next election on national security decision making is exceptionally tricky. Conventional wisdom is that, *ceteris paribus*, domestic factors, in particular economic conditions, matter more than national security matters in determining the outcome of an election. G.H.W. Bush lost the 1992 election in spite of a surprisingly easy military triumph and general foreign policy success because the economy had weakened; Carter managed to combine both bad economic conditions and the public humiliation of the Iranian hostage crisis. But presidents still seem to act as if national security policy has significant electoral consequences. They appear to believe that, in the popular mind, the chain of causation between presidential actions and foreign interactions is clearer and more direct than that involving the domestic economy. The death of Americans, whether in combat or as victims of attacks by outsiders, also has high salience. The two presidents since World War II who did not seek reelection, Truman in 1952 and Johnson in 1968, both presided over costly wars that, as the election approached, seemed not to have achieved sufficient strategic, economic, or ideological benefits.

A president, therefore, is highly allergic to choices that increase the likelihood that he will be blamed for the death of a substantial number of Americans, especially if the victims include civilians. This does not mean that civilian deaths, by themselves, translate into presidential political damage. G.W. Bush managed to persuade a majority of voters, if not documentary film directors or law professors, that the 9/11 attack was a surprise for which he should not be held accountable and to which he made an appropriately forceful response. But if a terrorist attack on the United States no longer can be depicted as a surprise, then the president must worry that any decision he makes that in hindsight may be portrayed as reducing vigilance will come back to haunt him.

This does not mean that a president has no corresponding political costs from association with serious human rights abuses. But a strong commitment to human rights as a foundational element of foreign policy did not save Carter in 1980, and the publication of the Abu Ghraib photographs in the spring of 2004 did not sink G.W. Bush's reelection, any more than the nonintervention in the Rwanda genocide hurt Clinton in 1996.

Perhaps the public is more willing to accept the excuse that rogue subordinates, and not bad supervisors, are responsible for the abuse, or perhaps they do not care all that much about foreign victims. The point is only that the shadow of the next election appears to push a president confronted with tradeoffs more in the direction of countering national security threats and less in the direction of honoring human rights values.

Using this lens, the choices made by the Obama administration seem more understandable. Moving from an armed conflict model to a criminal justice model to manage terrorist threats, however appealing from a human rights perspective, increases the possibility of false negatives (failure to identify terrorist threats), even as it suppresses false positives (harassment and punishment of people who pose no serious threat). This change in risks would bother any administration mindful of the next election.

II. *THE PERMANENT BUREAUCRACY*

Compared to, say, Israel or the United Kingdom, political appointees go down fairly deep into a US administration.³ In the United States, the heads of cabinet departments, the deputy heads, the divisional heads (assistant secretaries), and in many cases the principal deputies to divisional heads are political appointees rather than career civil servants. In some other countries only the cabinet head and his or her special assistants will change with the election of a new government. Even so, US political appointees are vastly outnumbered by their civil service colleagues and subordinates. Moreover, in the Department of Defense and the various intelligence agencies, political penetration tends to be even thinner.⁴ Finally, for the first year

3. *Compare* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 110TH CONG., POLICY & SUPPORTING POSITIONS 36 (Comm. Print 2008) (enumerating over 7000 federal civil service positions that may be filled by presidential appointment), *with* CABINET OFFICE, LIST OF MINISTERIAL RESPONSIBILITIES INCLUDING EXECUTIVE AGENCIES AND NON-MINISTERIAL DEPARTMENTS 2 (2010), *available at* <http://www.cabinetoffice.gov.uk/sites/default/files/resources/lmr110311.pdf> (listing ministers appointed by the British Prime Minister), *and* ROTEM BRESLER-GONEN, POLITICAL APPOINTMENTS IN ISRAELI LOCAL GOVERNMENT 8–10 (2007) (describing the political appointment process and listing a number of appointees in Israel).

4. *See* CHERYL Y. MARCUM ET AL., RAND NAT'L DEF. RESEARCH INST., DEPARTMENT OF DEFENSE POLITICAL APPOINTMENTS: POSITIONS AND PROCESS xi (2001) (noting that

of a new administration, if not longer, many political appointees await Senate confirmation, blunting their ability to command and lead their agencies. Much of the burden of policy development and implementation thus falls to the permanent staff of the relevant agencies.

This bureaucratic check has at least two consequences. First, the career staff look to precedent for guidance and thus resist change. They understand that they, more likely than their political masters, will still be in government when the medium-range future arrives. They look to the past and lessons learned as more reliable sources of sound practice than the aspirations of the immediate leaders of the agency.

Second, career staff tend to defend the interests of the agency rather than of the administration as a whole. They tend to believe that policies come and go but that agencies endure. This attitude, captured so exquisitely in the pronouncement ascribed to the then head of the Strategic Air Command General Curtis E. LeMay—"the Soviet Union is our adversary. Our enemy is the Navy"—produces interagency conflicts that retard government action and wear down policy enthusiasts.⁵

The permanent bureaucracy can obstruct policy changes in many ways. First, career employees have considerable control over the flow of information that reaches political appointees. Second, they have principal responsibility for implementing, and thus shaping, whatever policy emerges. Most obviously, they can generate bureaucratic inertia. Third, they can embarrass and intimidate their political masters by leaking to the press. Moreover, none of these powers requires actual exercise: the threat of taking any of these steps deters political appointees from pushing too hard for change.

National security concerns tend to amplify the bureaucracy's resistance to change. Information is critical to developing any kind of threat assessment. Obstruction is hard to distinguish from watchful waiting. And press disclosure has a disproportionate impact on policies that depend on secrecy for their effectiveness. We should expect, then, that policies

only forty-five individuals in the Department of Defense are appointed by the president subject to Senate confirmation).

5. See, e.g., George F. Will, Editorial, *Greenhorns of the Year*, WASH. POST, Nov. 23, 1995, at A23.

motivated by national security concerns will change more slowly than other approaches when a new administration comes to Washington.

These factors illuminate why so little has changed in the Obama administration. The approaches to terrorist threats and human rights worked out during the Bush administration changed significantly between 2002 and 2006 in the face of bureaucratic resistance, as well as judicial setbacks and legislative interventions. Whatever their flaws, by 2008 these practices had become those of the bureaucracy, of the defense and intelligence agencies in particular. They preferred the devil they knew—in particular, but not only, the internationally decried detention facility in Guantanamo—to the unknown alternatives. And their preferred outcome prevailed.

III. *THE DIFFICULTY OF THE ISSUES*

One explanation for the Obama administration's conservative approach to the national security-human rights tradeoff is the difficulty of demonstrating that any alternative is clearly superior. All choices are bad, because of the high likelihood of both false positives, (i.e., the abuse of innocents) and false negatives (i.e., the failure to detect a threat). The evidence of how any particular choice works is scant. As a result, once the government has settled on one approach, however random the process that produced it, officials face great difficulty in supporting other strategies.

Several factors explain this. First, adversaries exploit trickery and deception. Second, any single attack is a low-probability event. As a result, proponents of change necessarily will have little evidence to support their ideas. Any conceivable policy will rest mostly on surmise and guesswork.

This radical indeterminacy, coupled with highly salient but low probability outcomes, is not typical of all governance. In some fields—tax comes to mind—the application of policy involves millions of iterations. The multiplicity of applications allows for some averaging out of random errors and also presents opportunities for learning by doing. The contrast with national security policy is striking. The successful detection of a terrorist threat, as well as failures to detect, occurs rarely. This

means both that the government has a much smaller margin of error and few means of testing the validity of policy choices.

One might respond that values-based arguments do not depend on evidence. Certain core human rights commitments, for example a refusal to condone torture, might set boundaries on policies for reasons that do not depend on instrumental, cost-benefit arguments. But, such principled positions still need to be translated into concrete practice.

By torture, does one mean the core practices covered in the Convention Against Torture?⁶ What about cruel, inhuman, or degrading treatment, which Article 16 of that Convention separately regulates?⁷ What about the US constitutional test of behavior that “shocks the conscience”? What conduct fits into which category? Does waterboarding, a widely used training technique for military personnel at risk of enemy capture, fit one or more of these definitions when it is wielded against an adversary? Simple invocation of a commitment not to condone torture answers none of these questions.

At some point in the analysis, cost-benefit calculations must enter the picture with the inevitable difficulties of marshaling and assessing evidence. Suppose one has credible evidence, not obtained through torture, that a prisoner knows of plans to carry out a mass attack. How willing would a responsible decisionmaker be to allow aggressive interrogation of the sort that could never produce evidence admissible in judicial proceedings? By what criteria would one test the utility of such procedures, if used infrequently and in fraught contexts?

In asking these questions, this Essay does not take a stand on any of the claims and counterclaims about the role of waterboarding in producing information that thwarted planned Al Qaeda attacks. Nor does it assess the accuracy of the charge that the Obama administration, which unequivocally expressed its intolerance of waterboarding within months of taking office, used intelligence derived from waterboarding in its successful

6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (1988).

7. *Id.* art. 16.

attack on Osama Bin Laden.⁸ Again, the argument is positive, not normative: the low-frequency, high-risk context of the national security-human rights tradeoff makes it easy to grab handy tools and difficult to put them down in favor of something better.

The waterboarding episode, deplorable though it may be, seems to illustrate this point. Both “torture” and “condone” are plastic concepts that shrink or swell in response to context. When terrorist threats are involved, the context is necessarily dynamic, uncertain, and greatly consequential.

IV. CONSTRAINTS IMPOSED BY CONGRESS AND THE JUDICIARY

The principles of separation of powers, coupled with the constitutional scheme of checks and balances, significantly constrain any administration’s ability to make and implement new policy. One can see this at work in the G.W. Bush administration, where successive US Supreme Court decisions rejected the structural arguments underlying his administration’s approach to the detention and punishment of suspected terrorists.⁹ The government argued that the judiciary should play no role in supervising the process of capturing, detaining, and punishing alien enemy combatants encountered and held overseas.¹⁰ The government maintained that legislatively enacted authority to engage in military hostilities immunized the overseas detention of foreign nationals captured in those hostilities from judicial oversight.¹¹ In *Hamdi v. Rumsfeld*, the Supreme Court demanded that the executive go to Congress to get clearer authority for its detention practices.¹² In *Hamdan v. Rumsfeld*, the Court rejected the executive’s

8. See, e.g., Ariane de Vogue, *Osama Bin Laden Death Reignites Battle over Waterboarding, Enhanced Interrogation*, ABC NEWS (May 3, 2011), <http://abcnews.go.com/Politics/osama-bin-laden-dead-renews-debate-waterboarding-interrogation/story?id=13518686>.

9. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

10. *Hamdan*, 548 U.S. at 733.

11. *Hamdi*, 542 U.S. at 518.

12. *Id.* at 519–24. Congress responded by adopting the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1003, 1005, 119 Stat. 2680, 2739–45 (2006).

interpretation of the legislation that *Hamdi* provoked.¹³ Finally, in *Boumediene v. Bush*, the Court struck down as unconstitutional portions of the legislation that *Hamdan* incited.¹⁴ These cases established a fundamental right of at least some detainees held outside the mainland United States to obtain judicial review of their detention. New legislation adopted at the beginning of the Obama administration implemented these requirements.¹⁵

The complex interactions of legislative enactments and judicial review that already had unfolded by the time that President Obama took office had a somewhat surprising and perverse consequence for the new administration. Although the president promised to shut down Guantanamo within a year and to move the most dangerous detainees to the United States, a goal that the Bush administration also pursued in its second term, he encountered bipartisan opposition in Congress.¹⁶ Political pressure also forced the Justice Department to climb down from its announced intention to try Khalid Sheik Mohammed, the accused mastermind of the 9/11 attack, in a civilian court in New York. However odious Guantanamo and military tribunals remain in the eyes of the rest of the world, the Obama administration found itself stuck with them.

There are many reasons not to like the current detention regime and to seek alternatives. From the point of view of the government, judicial oversight consumes time, attention, and material resources and distracts from the search for better policy. From the point of view of detainees, the procedural rights developed by the Supreme Court and implemented by Congress seem toothless. Although the government has released a few dozen detainees under the pressure of litigation and a handful of district courts have ordered the release of others, the government has not lost a single appeal on the merits.¹⁷ One

13. 548 U.S. at 590–612. Congress responded by adopting the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

14. 553 U.S. at 732.

15. Military Commissions Act of 2009, *enacted by* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190, 2574–2614 (2009).

16. *Id.* § 1041, 123 Stat. 2454–55 (barring the use of funds to transfer Guantanamo detainees to the United States).

17. *See* *Latif v. Obama*, No. 10-5319, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011); *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011); *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir.

cannot look at the system without recalling William Stuntz's profound critique of constitutional criminal procedure, which, he persuasively argued, distracts from the pursuit of substantive justice without providing accused persons commensurate offsetting benefits.¹⁸ We seem to have arrived at the worst of all possible worlds, with litigation distracting the government from developing better criteria to distinguish the dangerous from the simply wayward without any evidence that the courts can make this distinction themselves.

Nor do military tribunals seem an ideal approach for punishing foreign nationals captured abroad. From the perspective of the accused, they smack of arbitrary justice. From the perspective of the government, they provoke international criticism while not providing the prosecution any greater speed, flexibility, or protection of secret intelligence than do regular criminal trials. Proponents of military tribunals, especially those in Congress today, picture them as superior to civilian trials, but the supporting evidence for this view is scant.

Yet, at the end of the day, the Guantánamo-and-military-tribunals solution prevailed. One reason is that, over the course of the *Hamdi-Hamdan-Boumediene* trilogy and the corresponding legislative responses, the status quo became entrenched. The courts endorsed the basic structure of indefinite detention and tribunals, just with a bit more judicial supervision than the Bush administration had wanted. Congress filled in the details through three successive enactments. The status quo, however unpalatable, rests on legislative approval backed up by judicial guidance. Anything else is a step into the unknown.

V. HUMAN RIGHTS LITIGATION OUTSIDE THE TERRORISM CONTEXT

Issues involving national security and terrorism have taken up much of the attention of the human rights community and

2011); *Almerfed v. Obama*, 654 F.3d 1 (D.C. Cir. 2011); *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011); *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Abdah v. Obama*, 630 F.3d 1047 (D.C. Cir. 2011); *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010).

18. See William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1 (1997).

the government. In the background, however, human rights litigation lumbers along. The executive branch seldom intervenes directly in these suits, and even more rarely urges a court to support a plaintiff's claim.¹⁹ In one case, the Obama administration intervened on the side of plaintiffs, albeit on the question of immunity rather than the merits.²⁰ Its position, while not inconsistent with that of the Bush administration, hints at a slightly wider window for civil suits based on human rights claims.

The issue involves the scope of immunity from civil suits available to foreign officials. For roughly two decades, the executive had consistently argued that the Foreign Sovereign Immunities Act ("FSIA"), which applies to a "legal person," does not address this question. In 1990 the Ninth Circuit disagreed.²¹ Several circuits followed the Ninth in trying to shoehorn claims against individuals into the FSIA, but the Fourth Circuit finally broke ranks in 2009.²² The case involved human rights claims brought by Somali nationals against one of the leaders of the government that had ruled that country in the 1980s.²³ The Fourth Circuit held that FSIA had no bearing on the official's susceptibility to suit and left open the question of whether he enjoyed any nonstatutory immunity.²⁴

Before the Supreme Court, the Obama administration submitted an amicus brief that both defended its interpretation of the FSIA and explained its understanding of non-statutory immunity of foreign officials.²⁵ It argued that the executive had

19. The principal exceptions to the statement that the government rarely urges support for plaintiffs are the two most important Alien Tort Statute court of appeals decisions. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

20. Brief of the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031 [hereinafter Brief of the United States in *Samantar*].

21. *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990).

22. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009). Decisions that had followed *Chuidian* included *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380 (5th Cir. 1999); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020 (D.C. Cir. 1997).

23. *Id.* at 373–75 (describing the plaintiff's allegations of "torture and other abuses in violation of international law").

24. *Id.* at 383–84.

25. Brief of the United States in *Samantar*, *supra* note 20.

unreviewable authority to determine whether a foreign official should enjoy immunity from civil suit.²⁶ In remarkably guarded language, the Obama administration stated:

[I]n this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination. Respondents have not only relied on the [Alien Tort Statute] to assert a federal common law cause of action, but have also invoked the statutory right of action in the [Torture Victims Protection Act] for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.²⁷

The government thus hinted, although without any commitment, that it might not recognize the immunity rule for officials accused of grave human rights abuses.

This suggestion seemed to represent a break from the recent past. The Bush administration had filed an amicus brief in *Matar v. Dichter*,²⁸ a civil suit against an Israeli official accused of Alien Tort Statute and Torture Victims Protection Act violations.²⁹ That suit alleged that the defendant had committed grave war crimes and engaged in extrajudicial killing when, acting as head of Israel's Shin Bet security agency, he authorized missile attacks on terrorists.³⁰ There the United States argued that the willingness of the Israeli government to take responsibility for these actions disposed of the immunity issue.³¹ In particular, it noted that, "the Executive does not recognize any exception to a foreign official's immunity for civil suits alleging *jus cogens* violations."³² The *Samantar* brief, by contrast, at least left open the possibility that immunity might not apply in cases of grave human rights abuses.

26. *Id.* at 6.

27. *Id.* at 25.

28. 563 F.3d 9 (2d Cir. 2009).

29. Brief for the United States as Amicus Curiae Supporting Affirmance, *Matar v. Dichter*, 563 F.3d 9 (2009) (No. 07-2579-cv) [hereinafter Brief for the United States in *Matar*].

30. *See Matar*, 563 F.3d at 10–11.

31. *See* Brief for the United States in *Matar*, *supra* note 29, at 5.

32. *Id.*

In *Samantar v. Yousuf*, the Supreme Court unanimously agreed with the government that the Foreign Sovereign Immunities Act (“FSIA”) did not apply to government officials. It left the question of non-statutory immunity to the lower courts to decide, although language in the opinion suggests the Court’s disposition to embrace this concept.³³ On remand, the Justice Department submitted a statement of interest to the trial court asserting that Samantar should not enjoy immunity.³⁴ The government referred in passing to the language quoted above.³⁵ It based its determination regarding Samantar, however, on only two factors, namely the absence of a recognized government of Somalia and the fact of the defendant’s prolonged presence in the United States.³⁶ Because immunity belonged to the state, not the official, the absence of a recognized state with the capacity to assert or waive immunity mitigated against recognition of immunity here. In addition, Samantar’s long-term residence in the United States bolstered the US’s “right to exercise jurisdiction over its residents.”³⁷ The district court quickly embraced the government’s position.³⁸

The space between the Bush administration’s position in *Matar* and the Obama administration’s in *Samantar* is slight and subtle. The first categorically rejected any exception to immunity for grave human rights abuses. The latter hinted that the nature of the abuse might play a role in making the immunity determination, but made no definite commitment. The actual determination of the Obama administration rested on principles that essentially apply only to one set of persons, namely all former Somali officials who become long-term residents of the United States. It thus leaves open the imposition of immunity in suits such as that brought against Dichter.

33. 130 S. Ct. 2278, 2292–93 (2010).

34. See Statement of Interest of the United States of America, *Yousuf v. Samantar*, No. 1:04cv1360 (LMB) (E.D. Va. Feb. 14, 2011).

35. *Id.* at 4.

36. *Id.*

37. *Id.* at 9.

38. See Order, *Yousuf v. Samantar*, No. 1:04cv1360 (LMB/JFA) (E.D. Va. Feb. 15, 2011). The order does not make clear whether the court reached this result because it regarded the government’s determination as binding, or instead because it agreed with the government’s arguments. For criticism of the government’s position, see Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915 (2011).

It seems unlikely that positions taken in human rights litigation would have much salience in the next election, unless perhaps the executive supported a lawsuit against Israel or one of its top officials. Nor do these issues present the same degree of fraught uncertainty that terrorism and detention do. Rather, the failure of the Obama administration to make a clean break with the Bush administration on questions of human rights litigation can be attributed more to the conservative influence of the permanent bureaucracy.

Once lawyers from the Departments of Justice and State take a position before the courts, they, to a certain extent, lock in their successors. While it is not unheard of for lawyers from one administration to repudiate positions taken in prior judicial filings, such reversals come at a considerable cost.³⁹ Government lawyers know that disavowing the work of their predecessors generally undermines the credibility of the government's legal representatives with the courts. This credibility is a valuable resource, especially to the senior career lawyers who will likely continue to appear before the courts even after their current political masters leave office. For all the reasons discussed above, they will push back at efforts by a new administration to change.

The Vienna Convention episode also illustrates the limits on an administration's willingness to spend political capital on human rights issues. Here the human rights claim arose as a defense against a criminal prosecution, rather than as the basis for a tort suit.⁴⁰ As followers of the controversy know, the Vienna Convention on Consular Relations obligates a state to notify a citizen of another signatory state of his or her right to contact a consular official after an arrest on criminal charges.⁴¹ The Convention's Optional Protocol, to which the United States is a

39. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (discussing the institutional stability of the executive's legal positions).

40. The dispute over the application of the Vienna Convention on Consular Relations in criminal trials entailed not less than six decisions of the Supreme Court: *Breard v. Greene*, 523 U.S. 371 (1998); *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999); *Medellín v. Dretke*, 544 U.S. 660 (2005); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellín v. Texas*, 552 U.S. 491 (2008); *Medellín v. Texas*, 554 U.S. 759 (2008).

41. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

party, provides for International Court of Justice (“ICJ”) adjudication of disputes regarding the Convention.⁴² In *Avena and Other Mexican Nationals*,⁴³ the ICJ ruled that these treaties obligated the United States to afford a hearing to foreign nationals sentenced to death in state criminal proceedings to determine whether they had suffered prejudice from a denial of their right to consular notification. In particular, the ICJ ruled that the obligation to provide this hearing existed even if the foreign national had forfeited his right to a hearing under state law by not raising the consular notification issue in a timely fashion.⁴⁴

The Texas courts refused to comply with the *Avena* decision on the ground that the ICJ lacked the power to override the state’s laws on the proper procedures for postconviction review of a sentence.⁴⁵ The Bush administration intervened in the spring of 2005. While it continued to adhere to the position first adopted by the Clinton administration that orders of the ICJ regarding the Vienna Convention did not have any direct effect in US domestic law, and therefore did not bind the states, it posited that the president had the authority under the various treaties and implementing legislation to issue an order binding on the states to implement an ICJ decision. Accordingly, President Bush required Texas to provide the hearing that the ICJ had demanded. The Texas Court of Criminal Appeals ruled that the president lacked the constitutional authority to make this order and the Supreme Court agreed.⁴⁶ Texas then

42. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

43. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 4).

44. For more on the dispute, and in particular the issue of procedural default, see Paul B. Stephan, *Rethinking the International Rule of Law: The Homogeneity Fallacy and International Law’s Threat to Itself*, 3 JERUSALEM REV. LEG. STUD. (forthcoming Dec. 2011).

45. *Ex parte Medellín*, No. WR-50, 191-01 (Tex. Crim. App. Oct. 3, 2001) (not designated for publication).

46. *Medellín v. Texas*, 552 U.S. 491 (2008), *aff’g Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006). In the interest of full disclosure, I should note that I took part in the preparation of the amicus brief of the United States defending the president’s order before the Supreme Court. I also submitted an amicus brief in the Texas Court of Criminal Appeals arguing that the International Court of Justice decision did not have direct effect in US law. In an earlier iteration of the case *Medellín v. Dretke*, 544 U.S. 660 (2005), I filed an amicus brief in the Supreme Court both noting a

proceeded to execute the first of several persons covered by the ICJ order after the Supreme Court refused to stay the proceeding.⁴⁷

The incoming Obama administration knew that the conflict between the ICJ and the United States remained an ongoing problem because other Mexican nationals covered by the ICJ order still awaited execution in Texas. Undoubtedly distracted by the economic crisis and the battle over health care, the administration largely did nothing. In particular, it did not seek from Congress the legislative authority to implement the ICJ order, even though the Supreme Court had made clear that this action was necessary and during the 111th Congress the president's party enjoyed strong majorities in both Houses.⁴⁸

The inevitable conflict arose in July 2011, when Humberto Leal Garcia, another of the Mexican nationals covered by the *Avena* decision, faced execution in Texas. Leal petitioned the Supreme Court for a stay. He argued, *inter alia*, that a bill just introduced in the Senate would create the prerequisite authority for honoring the ICJ mandate. The Obama administration, in an amicus brief in support of Leal, embraced this argument.⁴⁹ The Supreme Court, however, refused to delay the execution.⁵⁰ Its *per curiam* opinion, to which five Justices joined, questioned as a general matter the propriety of staying an otherwise authorized proceeding because of pending legislation, and then noted the lack of any evidence that congressional action on the bill was imminent.

This episode illustrates not only the separation-of-powers limits on what an administration can do but also the significance of political constraints. Because of the constitutional distribution of powers, the president cannot intervene on behalf of the

jurisdictional defect in the appeal of a denial of federal habeas and arguing that ICJ decisions do not have direct effect in US law.

47. *Medellín v. Texas*, 554 U.S. 759 (2008).

48. For criticism of this inaction by a Bush administration lawyer who had played a central role in the *Medellín* case, see John B. Bellinger, *An International Treaty Congress Should Support*, WASH. POST (Mar. 4, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030304316.html>.

49. Brief for the United States as Amicus Curiae in Support of Applications for a Stay, *Leal v. Texas*, 131 S. Ct. 2866 (2011) (Nos. 11-5001 (11A1), 11-5002 (11A2), 11-5081 (11A21)), 2011 WL 2630156.

50. *Leal v. Texas*, 131 S. Ct. 2866 (2011).

United States in a state criminal proceeding, even if he has international law on his side. Political constraints, in particular the unpopularity of capital murderers and the lack of general sympathy for the ICJ among the American people, meant that neither administration spent political capital to induce Congress to do the right thing. The Bush administration tried to go around Congress; the Obama administration limited itself to what it surely knew was a quixotic gesture, in the form of an ill-fated amicus brief.

VI. *TERRORISM OUTSIDE OF CAPTURE AND DETENTION:
THE CASE OF THE PMOI*

A final illustration of continuity in policy between the Bush and Obama administrations is the treatment of the People's Mojahedin of Iran ("PMOI").⁵¹ This group fought against the Shah of Iran in the 1960s and 1970s, and in the course of that struggle had attributed to it the assassination of both Iranian and US officials. After the Shah's fall, it lost a bloody power struggle with the mullahs, resulting in the death of tens of thousands of its adherents. Most of its leadership fled to France, which later expelled them. They then ended up in Iraq, where they fought on the Iraqi side in its war with Iran. After that conflict ended in 1988, the PMOI conducted what it termed "military operations," and what the Iranians considered "terrorist attacks," on Iranian territory.

US efforts to attack terrorist organizations at the point of their financial base originated in the Antiterrorism and Effective Death Penalty Act of 1996.⁵² This regime, updated several times since, authorizes the secretary of state to designate persons or groups as terrorist. The designation triggers criminal prohibitions on the provision of support. The European Union ("EU") followed the US model with its own regime after 9/11.⁵³

51. My account of the dispute in text is based on my brief in the case. Brief Amici Curiae of the Honorable Alejo Vidal-Quadras, M.E.P. (Spain) et al. in Support of Petitioner, People's Mojahedin Org. of Iran v. U.S. Dep't of State, 613 F.3d 220, 227-30 (D.C. Cir. 2009) (No. 09-1059), 2009 WL 6084593.

52. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302(a), 110 Stat. 1214, 1248 (codified at 8 U.S.C. § 1189 (2006)).

53. Council Common Position of 27 Dec. 2001 on the Application of Specific Measures to Combat Terrorism No. 2001/931/CFSP, arts. 2-3, 2001 O.J. L 344/93.

Working within the new statutory framework, the United States designated the PMOI as terrorist in 1997.⁵⁴ The EU did so in 2002.

The US invasion of Iraq radically changed the PMOI's circumstances. The PMOI already had renounced all armed activity in 2001. Once the coalition forces arrived in Iraq, it sought to cooperate closely with them. The coalition forces disarmed the group completely and generally credited it with providing useful intelligence and support. Supporters in Europe launched a campaign to remove the group from the list of terrorist organizations, an effort that bore fruit in 2009.⁵⁵

In the United States, however, both the Bush and Obama administrations resisted all efforts to reclassify the organization. Secretary of State Condoleezza Rice renewed the terrorist designation shortly before leaving office in 2009 and the Obama administration stoutly defended the decision in court.⁵⁶ As of this writing, the group remains on the terrorist list.

For the PMOI, the practical consequences of the US designation are at least as significant as the legal ramifications. Several thousand core members have been confined to Camp Ashraf, an installation inside Iraq, since the 2003 invasion. The Shia-oriented Maliki government, since having taken office, has sought to improve ties with Iran; some would say it has tried to bring Iraq firmly into the Iranian camp. The Iranian government remains deeply hostile to the PMOI, partly because of the power struggle in 1980, partly because of its fighting on the Iraqi side during the war, and partly because of the intermittent attacks on Iranian targets carried out by the organization up to 2001. Accordingly, the Maliki government has at least tolerated, and perhaps organized, several violent incidents in Camp Ashraf resulting in dozens of deaths and has threatened to hand over the remaining PMOI adherents to Iran.

54. See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, MUJAHEDIN-E KHALQ CRIMINAL INVESTIGATION I (2009).

55. Council Decision No. 2009/62/EC (implementing Art. 2(3) of Regulation (EC) No. 2580/200), 2009 O.J. L 23/25.

56. The following year the court ruled that the secretary had failed to provide a legally sufficient justification for her ruling and ordered her to reconsider the decision. *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 227–30 (D.C. Cir. 2010). The designation as a terrorist organization remains in place pending the secretary's review, however.

As the predicament of the group worsens, efforts have begun to organize the relocation of PMOI survivors to various points in Europe and the Middle East. But because the group remains on the US list of terrorist organizations, potential host countries have balked at providing asylum.

US law requires that a group present a current threat of terrorist acts for it to remain on the list, and the secretary of state in other cases has credited renunciations of past behavior by former terrorists. The secretary's reluctance to accept that the PMOI has lost both its capacity to launch terrorist attacks and the motivation to do so flies in the face of considerable evidence that the organization has changed with the times. It is hard to avoid the conclusion that factors other than the existence of a genuine terrorist threat explain the PMOI's continued presence on the terrorist organizations list.

The original designation of the PMOI in 1997 took place in the context of the Clinton administration's pursuit of a thaw in relations with Iran. The Bush administration reversed this conciliatory course, especially in the wake of the 9/11 attack. Its anti-Iranian position became even more strident after the exposure of Iran's nuclear program in 2002. Yet the designation of the PMOI as a terrorist organization continued. Alongside the public confrontation between the United States and the Iranian regime, there proceeded quiet efforts to explore ways of easing tensions. These efforts survived the 2005 election of Mahmoud Ahmadinejad, a conspicuously unpalatable populist, as president. In turn, candidate Obama pledged to improve US relations with Iran, a point he repeated in his inaugural address. In sum, the backdrop to the PMOI's designation as a terrorist organization included the government's desire to improve relations with a government that detests the PMOI, and the US executive's anxiety about the Iranian regime's ability to harm US interests, especially after the Iraq invasion and the violent disorder that followed. It is plausible, although by no means proven, that the PMOI's terrorist designation remains because Iran regards the PMOI as obnoxious, and not because the US government believes the organization is terrorist.

From a human rights perspective, how should one feel about such *realpolitik*? First, designating a group as terrorist significantly affects important human rights, such as engaging in

political activity, owning property, and contracting for goods and services. US courts recognize that the government must satisfy constitutional safeguards of due process in conferring the designation, and the European Court of Justice came to a similar conclusion under general European human rights law.⁵⁷

The issue raised by the PMOI case is not so much procedural as it is substantive: does an exaggeration of a security threat to satisfy a foreign relations interest infringe human rights? One would think that arbitrary infringements on liberty, even if achieved only after a full hearing, would transgress the nation's core values. May a state silence a group and seize its assets simply to please another state?

One can imagine the arguments for either side of this debate. A pragmatist might assert that foreign policy interests can accumulate to the point where a real national security problem arises, and that human rights must give way to the fundamental necessity of self-preservation. Appeasing Iran might have a chance of diminishing its nuclear threat as well as easing the exit of the United States from Iraq. An idealist might argue that human rights values go to the core of our national identity and that sacrificing those values for a hypothetical security threat is indefensible. We should not hold hostage the hapless residents of Camp Ashraf to please Iran, the idealist might say, any more than we should allow Iran to seize hostages for its own debased ends.

One would have thought that this debate might capture, however crudely, what distinguishes the Bush administration, elevating national security, from candidate Obama, defending human rights. Yet, the proof is in the pudding. In the case of the PMOI, both administrations have struck the same balance. It is hard not to see the hand of the permanent bureaucracy at work here, resisting whatever visions of human rights that the new folks in town might have brought with them. As a result, President Obama seems guilty of the sins that candidate Obama so eloquently decried.

57. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001); C-402/05 & C-415/05, *Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council*, Joined Cases C-402/05 & C-415/05, [2008] E.C.R. I-6351.

The PMOI episode also illustrates the difficulty of challenging security assessments once they have been made. Although new facts exist, their relevance to national security is hard to judge because of the generally murky, and yet highly salient, nature of security threats. One can hardly take an organization at its word that it has abandoned terrorism. Present incapacity to launch attacks, however well-supported by evidence, may not translate into future benevolence, as one cannot predict with certainty how a group might behave were it to regain its capacity for attacks. Accordingly, bureaucratic inertia prevails.

CONCLUSION

In 2009, supporters of candidate Obama believed that he would end Bush administration human rights policies that brought shame upon the nation and opprobrium from around the world. Opponents believed that his naïveté and inexperience would lead to dangerous national security blunders (“Who do you want answering the call at 3:00 am?” asked candidate Clinton.). Both of these conjectures seem to have been falsified by events. Both disregarded the deep structural forces that make it difficult to change government policy generally and national security policy in particular.

The burden of my argument is not that change never comes to Washington. The country that awoke on the morning of September 12, 2001, was profoundly different from that of the previous day, and nowhere was this truer than in Washington. Rather, the point is that change comes from outside forces, mostly unanticipated. How an administration responds to such challenges reveals much about its nature and capabilities, but political campaigns rarely help us to anticipate those qualities.

Happily for the nation, no great shocks to the system have erupted since the start of the Obama administration. In the absence of such trauma, one should anticipate continuity, not change. And this is what we have seen.