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# Sound Politicks

*Undergraduate Journal of Political Science*



UNIVERSITY of PENNSYLVANIA

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## Letter from the Editor

In his 1749 pamphlet on the aims of education, Ben Franklin expressed his wish that the “first principles of sound politicks be fix’d in the minds of youth.” Too often in today’s political debates, however, rhetoric replaces substance and partisan bickering drowns out reasoned debate. The meaning of “sound” that is characteristic of contemporary politics is a far cry from that which Ben Franklin desired. Keeping in mind the discrepancy between Ben Franklin’s vision and the reality we face as students at the University he founded, I present to you this issue of Sound Politicks.

The articles in this year’s journal address a wide range of issues. The first, written by Patrick Elyas, explores the roots of the Islamization of the Egyptian street. Andrew Silverstein’s piece follows, grappling with the legality of drone warfare. Bridging the gap between the international and the domestic, Sam Gersten’s piece addresses the constitutionality of the extended detainment of foreign combatants in the United States. The final two papers complete the transition to the domestic arena: Jonathan Fried’s piece explores the role of politics in the sustainability of the United States’ public debt, while Alice Xie’s focuses on the more local issue of public school reform.

The papers contained in this journal grapple with complex political questions. I hope that you find them to be thought-provoking—perhaps even controversial. More importantly, I hope that you find these political pieces to be sound in the sense that Ben Franklin intended.

Best,



**JONATHAN A. MESSING**

Editor-in-Chief

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Sound Politicks is the official Undergraduate Journal of Political Science at the University of Pennsylvania. It is published annually and covers a wide range of political topics.

Sound Politicks accepts submissions year-round from undergraduates of any class or major. Articles must include footnote citations and not exceed 4,000 words. Each year, the author of the best article will receive a \$100 prize.

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*“May the first principles of  
Sound Politicks be fix’d in  
the minds of youth.”*

—Benjamin Franklin, 1749

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# Exporting People, Importing Ideas: Egyptian Migration to the Gulf in the 1970s and 1980s

By **PATRICK ELYAS**

WHARTON/COLLEGE OF ARTS AND SCIENCES, MAY 2012

Major HUNTSMAN PROGRAM IN INTERNATIONAL STUDIES AND BUSINESS

When Egyptian protestors overthrew the Mubarak regime in February 2011, Egyptians of all backgrounds were optimistic about the future of a free and democratic Egypt. However, the dominance of Islamist parties in parliamentary elections held in January 2012, particularly the surprising performance of fundamentalist Salafi parties that captured around 25% of the seats in parliament, has many Egyptians wondering how Egyptian society became so conservative. As recently as the 1960s, Egyptian culture was liberal and westernized. Then, Egypt had a rich cultural heritage of music, film, and literature, whose creators were regularly pushing cultural bounds and were as socially progressive as their counterparts in the West. Urban Egyptian women would go out in public in miniskirts, the veil was almost non-existent, and sexual harassment was not prevalent. While the Muslim Brotherhood did exist at the time and had attained considerable strength in the 1940s, the majority of Egyptians did not share its views, and it existed on the fringes of a political system that was mostly secular and leftist. In just a few decades, however, Egyptian society changed to a point where today, almost 90% of women are veiled,<sup>1</sup> many men wear the *zebiba*,<sup>2</sup> sectarian tensions regularly boil over into violence, and Salafi beliefs,<sup>3</sup> once practically non-existent in Egypt, have reached the mainstream political discourse.

Many factors contributed to the Islamicization of the Egyptian street: insecurity resulting from the Arab defeat in the Six-Day War and the failure of Nasserism; inflation, unemployment, and income inequality resulting from Sadat's *infitah* policy;<sup>4</sup> Sadat's encouragement of Islamism and Islamist political organizations as a hedge against his socialist and Nasserist opposition; the exportation of Saudi Wahhabism through mosque construction and satellite television; the erosion of the quality of Egyptian education and the increasing emphasis on religion in the curriculum (a legacy of Nasser's Islamist education minister Kamel al-Din Husseini); and finally, the increasing dependence

of the poor masses on Islamic charities to fulfill their basic needs. This paper will focus on one factor that played a major role in the cultural transformation in Egypt: the migration of millions of Egyptian laborers to oil-producing countries in the 1970s and 1980s.

This migration had both social and financial impacts on Egypt that contributed to an expanded role for Islam in daily life. Socially, many migrant laborers and their families adopted the conservative Wahhabist Islamic traditions found in Gulf states and retained them when they returned to Egypt. Financially, many conservative Egyptians who would have normally remained in lower classes in society and thus would have been denied political influence, including Muslim Brotherhood members who had been arrested by Nasser, were able to make sizable fortunes abroad to contribute to building an Islamist political apparatus in Egypt. Egyptians living and working in Arab countries were also dependent on Islamic money houses to transfer their wages to relatives back in Egypt, which normalized the role of Islam and Islamic institutions in daily life. Many of these money transfer companies also supported Islamic charities, using money from Egyptian laborers in the Gulf to maintain a network of clinics and food banks that filled a void in social services left by an ineffective government. These charities were explicitly Islamist in their orientation and often tied to Islamist political groups like the Muslim Brotherhood, significantly boosting the popularity of political Islam among the impoverished Egyptian masses who viewed the secular state as having failed them.

## Background of Migration

Historically, Egyptians had been renowned for their deep attachment to their land, and through most of the nineteenth and twentieth centuries Egypt was a net recipient country for immigrants. Even as late as 1967, the number of Egyptians living abroad was less than 100,000, most of whom had emigrated permanently,

which was roughly equivalent to the number of foreign citizens living in Egypt.<sup>5</sup> However, a variety of push-pull factors were at play in the 1970s that not only expedited labor migration out of Egypt but also made the Arab oil-producing countries the most attractive destinations for Egyptian migrants. Nasser's socialist economic policies had created a large population of lower-middle class university graduates who could not find jobs in a country lacking a strong private sector. After Sadat opened up the economy in the 1970s under his policy of *iniftah*, meaning open door, capital flowed back into the country, but inflation and unemployment were extremely high, making life increasingly difficult for the masses of underemployed Egyptians. Recognizing the gravity of the economic problems affecting most Egyptians, the Egyptian government completely shifted its policy regarding emigration in the 1970s. Whereas under most of Nasser's reign Egyptians needed exit visas to leave the country, a restriction that limited emigration opportunities to politically-connected elites, Sadat's administration liberalized the country's migration policies. In 1971, Sadat codified the right to emigrate in the country's new constitution, and a few years later the government annulled exit visas, allowed passports to be renewed in embassies abroad, allowed Egyptians to hold dual nationality, and exempted emigrant income earned abroad from Egyptian taxes.<sup>6</sup>

The Egyptian government had several economic motives for encouraging emigration. First, the more Egyptians that lived and worked abroad, the less food Egypt had to import and subsidize for its growing population. In 1977, Egypt spent \$2 billion on food imports, and even more money on subsidized bread and petroleum.<sup>7</sup> Simply put, emigration meant fewer mouths to feed for the Egyptian government at home. Furthermore, migrant remittances to Egypt became a valuable source of hard currency for the country while it was going through economic turmoil in the late 1970s and early 1980s. By 1983, when the number of Egyptian migrants working in the Gulf had begun to peak, remittances contributed \$4 billion to the Egyptian economy, accounting for an impressive 10% of all global remittances.<sup>8</sup> That year, remittances were Egypt's number one hard currency earner, equivalent to the total value of all Egyptian commercial exports for the year.<sup>9</sup> These remittances fueled a boom in consumption of consumer goods back in Egypt, as families spent the money buying automobiles or home appliances.

Simultaneously, a need for imported labor was occurring in the oil-producing Arab countries as they experienced an economic boom driven by high oil prices following the 1973 oil embargo. These countries had massive amounts of capital but small populations and thus required migrants from other countries to fill job vacancies at every level of qualification—from construction workers to teachers to doctors. Because Egypt had both a large population of underemployed college graduates and large numbers of illiterate rural workers, Egyptians were able to meet Gulf demand for both skilled and unskilled labor.

Economic conditions in the Gulf were far superior to those in Egypt. For instance, the GDP of the United Arab Emirates in the early 1980s was greater than Egypt's, despite a population less than one-fiftieth of the size of Egypt's population. As a result of sky-high oil revenues and a need for labor, Egyptians working in the Gulf were able to gain significantly better wages. In the 1970s, an average Egyptian teacher could expect to earn \$625 annually in Egypt, but over \$8,000 annually working in the Gulf—over 15 times more!<sup>10</sup> A similar ratio affected the salaries of college professors, making emigration an easy decision for middle-class Egyptians. During the 1970s, Gulf states also began formalizing a policy of preferring Arab migrants to Asian migrants.<sup>11</sup> Egypt, as the largest Arab country and being geographically close to the Gulf, was able to benefit from this policy, especially since many Arab countries preferred not to hire Palestinians because they presented a political liability. Iraq had a need for Egyptian laborers to fill the jobs vacated by Iraqis fighting in the Iran-Iraq war in the early 1980s, particularly since Egypt had cordial relations with Saddam Hussein's Iraq and was one of his major arms suppliers. For this reason, by 1983 over 1.25 million Egyptians were working in Iraq, and some Egyptians—15,000 by one Iraqi government estimate—were even found fighting in the Iraqi army against Iran.<sup>12</sup>

In addition to the 1.25 million Egyptians working in Iraq in 1983, there were 800,000 in Saudi Arabia, 300,000 in Libya, 200,000 in Kuwait, 150,000 in the U.A.E., 125,000 in Jordan, and smaller populations spread amongst other Arab countries, bringing the total numbers of Egyptians working abroad (by one estimate) to around three million.<sup>13</sup>

### Coming Back to Egypt

Through Gulf countries were rather accommodating of Egyptian laborers, their migration policy still discouraged permanent migration and the acquisition of citizenship was limited to natives of the country. Most legal employment opportunities in the Gulf countries were based on temporary fixed-term contracts, usually lasting five to ten years,<sup>14</sup> and as a result most of these Egyptian migrants and their families had returned to Egypt by the 1990s. Because of political conflicts with the Egyptian government, Libya had successfully expelled the nearly 300,000 Egyptian workers in the country by the 1990s.<sup>15</sup> Furthermore, once Egypt joined the Desert Storm coalition to push Saddam Hussein's forces out of Kuwait (Egypt was the third-largest contributor of forces to the coalition after the U.S. and the U.K.), Iraq expelled its large population of Egyptian workers, most of whom either came back to Egypt or went to work in other Gulf states. By the time the laborers from the Gulf states had returned to Egypt, they had already retained the local conservative religious practices in their host countries, particularly those working in Saudi Arabia, and brought these traditions back to Egypt.

Ramadan Ahmed cites two sociological studies focused on Egyptian migrants in Saudi Arabia in the late 1980s showing that these migrants, “experienced powerful cultural and social shocks, which later led them to attempt to adjust to the new society’s values and traditions.”<sup>16</sup> The adoption of these conservative Islamic traditions began to take hold in Egyptian urban areas among returning migrants and their families, a trend that occurred in conjunction with migrations of traditionally conservative rural families to Egypt’s urban centers. According to journalist Tarek Osman, the most visible impact of the cultural adoption of conservative Islam by emigrants to the Gulf was the prevalence of the veil. The proportion of women in Egypt wearing the veil went from 30% in the 1970s to 65% in the 1990s, with girls as young as twelve years old beginning to veil themselves in poorer urban quarters.<sup>17</sup> As discussed earlier, today the proportion of women wearing the veil in Egypt is closer to 90%. Osman even attributes the influence of Gulf cultural practices to the replacement of traditional Egyptian greetings for “good morning” or “good afternoon” with the Islamic “al-salamu aleikom” (peace be upon you) on the Egyptian street.<sup>18</sup> The influence of traditional Gulf Islamic practices also impacted Egyptian family life, particularly regarding the role of women. One study cites Gulf influence on migrant families as the primary cause of a decline in rates of economic activity among women in their twenties in Egypt, which fell from 24% in 1988 to 21% in 1998, contrary to expectations of increasing female activity in the economy as economic growth persists.<sup>19</sup> Furthermore, though fertility rates among Egyptian women have been trending downward for most of the latter half of the 20th century, researchers found a correlation between higher migration rates (measured by remittances to Egypt) and temporary increases in birth rates—suggesting that Egyptian emigrants were encouraging their families to adopt Gulf values of larger families.<sup>20</sup>

Another potential reason for the correlation between remittances and fertility increases is that Gulf salaries were enabling previously lower-class Egyptian families to sustain larger families and more comfortable lifestyles. Remittances from Egyptians in the Gulf to their families in Egypt, which were in the billions of dollars annually, stimulated a sharp rise in consumer spending and an increased consumerism in Egyptian society. By one estimate, during the 1980s remittances benefited over 2 million households in Egypt, representing about 12.5 million Egyptians based on average family size—roughly 23% of the population.<sup>21</sup> However, the consumption of the latest Western technologies and consumer goods did not translate into an appreciation for Western cultural values among the new Gulf-influenced Egyptian middle-class. Instead, the new Egyptian consumer class would merely consume Western goods while expanding the role of conservative Islam in their daily lives. As Osman explains, “The ‘modernization’ of the 1970s and 1980s...



Muslim Brotherhood supporters.

blended plain Wahhabi Islamism with Western popular culture, coexisting in an artificial comfort zone that numbed minds and discouraged examination and intellectual scrutiny.”<sup>22</sup>

The financial success of emigrants to the Gulf not only allowed an increase in consumption but also increased the financial resources of Islamic movements. Former Muslim Brotherhood members amassed fortunes in the Gulf, and the increased wealth of previously lower-class families with relatives in the Gulf allowed for a new base of middle-class financial and political support for Islamic ideals and institutions. The combination of increased religiosity among Egyptians and increased financial resources among Islamist movements led to an explosion in the construction of mosques and prayer rooms in Egypt. Whereas in the mid-1980s, there was one mosque for every 6,031 Egyptians, by the mid-2000s, there was one mosque for every 745 Egyptians.<sup>23</sup> Since the Egyptian population also grew from around 50 million people to 75 million during the same period, the growth in mosques exponentially exceeded population growth.

### Financial Impact of Migration

One of the most visible consequences of massive Egyptian migration to the Gulf was the ability of many conservative Egyptians, whether former Islamist prisoners or traditional rural Egyptians, to return to Egypt with sizable fortunes made in the Gulf. Many Muslim Brotherhood members that were imprisoned by Nasser were encouraged to immigrate to the Gulf upon their release from prison. Many former Muslim Brotherhood prisoners were sent abroad to work in Gulf branches of the Arab Contractors, the largest company in Egypt at the time, which was run by the millionaire Osman Ahmed Osman, a staunch supporter and financier of the Muslim Brotherhood, who leveraged his government connections to convince the intelligence services to authorize former Muslim Brotherhood prisoners to work in the Gulf.<sup>24</sup>

Saad Eddin Ibrahim argues that many of these former Muslim Brotherhood members amassed sizable fortunes in the Gulf and came back in the 1980s to take advantage of a newly liberalized economy and build large, successful businesses in

Egypt. Ibrahim cites the Al-Sherif brothers as examples of this expansion of Muslim Brotherhood wealth as they used Gulf money to grow a small plastics business into a conglomerate with hundreds of millions of dollars in assets.<sup>25</sup> Even beyond Muslim Brotherhood members, conservative rural and lower-middle class urban Egyptians who immigrated to the Gulf states often were able to return to Egypt with enough savings to propel them into the middle and upper-middle class. These Egyptians either came from conservative religious backgrounds (in the case of rural workers) or adopted the conservative religious traditions of the Gulf states. These members created a new middle class with religious conservative values, forming a cultural and financial base of support for the Muslim Brotherhood.<sup>26</sup>

The growing popularity of Islam also found its way to Egypt's corporate culture, as informal Islamic money transfer houses called *hiwala* became the preferred conduit for sending remittances back to Egypt for many migrants in the Gulf. One such *hiwala*, Al-Rayan Money Management, advertised its "halal" business as superior to the usury of normal banks and quickly became the leading transfer and money management company for migrants in the Gulf, amassing nearly \$1.3 billion in assets under management by 1986.<sup>27</sup> Al-Rayan, like other Islamic for-profit companies, began offering social services such as nurseries, schools, clinics, and food banks where customers were charged based on their ability to pay.<sup>28</sup> The provision of social services by various Islamic organizations became the most useful mechanism for the expansion of Islamism among Egypt's lower class. While funding for these projects came from a variety of sources, including from sympathetic businessmen with ties to the Brotherhood (like Osman Ahmed Osman) and direct donations from Gulf countries, remittances from workers in the Gulf were a major factor in the expansion of these Islamic services in the 1980s.

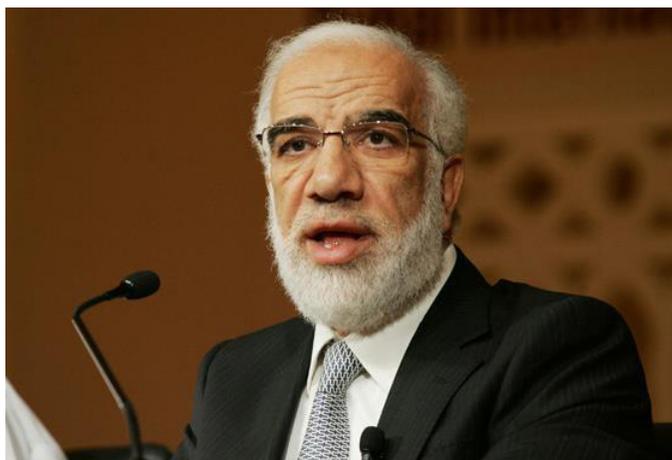
From the late 1980s until today, Islamic charities with ties to political Islamist groups like the Muslim Brotherhood filled the gap in social services left by an increasingly incompetent

government unable to keep up with a growing population and rising economic insecurity among the lower classes. These Islamic groups operated free medical clinics in thousands of mosques around the country,<sup>29</sup> set up food distribution centers in poor urban areas, and offered free career placement services to recent university graduates.<sup>30</sup> Sometimes, though far from always, provision of these services was explicitly tied to advocating stricter applications for Islam. For example, Islamic student groups in Egyptian universities organized free, gender-segregated buses to transport students from dorms and houses to their universities but limited access to women who adopted Islamic dress.<sup>31</sup> The provision of these services, particularly in the context of the secular state's failure to meet the basic needs of many of its citizens, popularized political Islamic groups on the Egyptian street and encouraged an expanded role for Islam in daily life. For many Egyptians who relied on Islamic charities for food and medical care, Islam seemed to actually be the solution to many of their problems.<sup>32</sup>

### **The Application of Islamist Power in Egyptian Society**

The growing popularity of conservative Islamic beliefs on the Egyptian street gave credibility to political Islamic forces seeking to subvert the traditional secularism of the Egyptian state and its elite beneficiaries. The rise in religiosity in the early 1990s coincided with the intensification of an Islamist insurrection undertaken by members of radical groups like Islamic Jihad and Al Gamaa Al Islamiyya, who returned to Egypt from aiding the mujahideen in fighting the Soviets in Afghanistan. Throughout the early 1990s these radical Islamic groups engaged in a violent conflict with the Egyptian state; fundamentalists assassinated the speaker of parliament in 1990, attempted to assassinate President Mubarak in Addis Ababa in 1995, targeted lower-level police and Interior Ministry employees all over Egypt, attacked foreign tourists, murdered the secular writer Farag Fouda in 1992, attempted to assassinate the Nobel laureate Naguib Mahfouz in 1994, targeted Christian-owned businesses in Upper Egypt, and even created an Islamist-governed enclave in the Cairene slum of Imbaba until a military intervention in 1992.<sup>33</sup> Through this violent Islamist insurrection never had the support of the majority of Egyptians—even those who were otherwise sympathetic to conservative political Islam—it was indicative of the intensity of Islamic fundamentalism in Egypt.

Even the Islamists that opposed the violence of the more radical groups were intent on imposing their vision of propriety on Egyptian society. Bolstered by increased public piety and ostensible public support for an expanded role for Islam in daily life, Islamist figures began explicitly targeting the secular elite culture that was still prevailing in Egypt. While some fundamentalists chose to violently oppose prominent secular Egyptian figures (Farag Fouda, Naguib Mahfouz), others opted to seek the



Dr. Omar Abd al-Kafi, ultra-conservative celebrity sheikh.

suppression of secular voices by censoring them.

By the late 1990s the growing trend of Islamic conservatism had begun to reach into the Egyptian upper class, previously a bastion of secularism. Because of pressures from Islamist figures, the author Tawfiq al-Hakeem could not get his books published in Cairo anymore, forcing him to go abroad to Beirut, and publishers even changed the endings of novels by Egypt's premiere romance novelist Ihsan Abdel Kodous to conform to new social norms.<sup>34</sup> Even al-Azhar used its authority to ban over 100 books and several movies, including Youssef Chahine's *The Emigrant*, a biopic about the life of Joseph.<sup>35</sup> Islamist lawyers also took prominent secular figures to court, citing the principle of *hisba* that allows concerned Muslims to take legal action against apostates and forcibly divorce them from their wives. Islamist lawyers used *hisba* often in the early 1990s, most famously against Nasr Hamad Abu Zeid, a professor of Islamic Studies who was accused of blasphemy for his revisionist interpretation of the Koran. The Egyptian Appellate Court (presided by a judge who had lived in Saudi Arabia for twelve years) sided with the Islamists and invalidated Abu Zeid's marriage, forcing him into exile in the Netherlands.<sup>36</sup> Even in 2012, Islamist lawyers have taken legal action against such prominent Egyptians as businessman Naguib Sawiris and the comedian Adel Imam under the accusation of insulting Islam.<sup>37</sup>

Beyond merely attacking the secularism that had long been a hallmark of Egypt's financial, political, and cultural elites, Islamist figures made major inroads in influencing large segments of the Egyptian elite to adopt a stricter interpretation of Islam. Genevieve Abdo recounts attending a *dars* or religious lesson by the ultra-conservative celebrity sheikh Omar Abd al-Kafi in the early 1990s. Al-Kafi had been known as a sheikh to Egypt's elite, having successfully convinced several prominent actresses and TV personalities to abandon their professional careers and adopt an Islamic lifestyle. Abdo attended the *dars* with dozens of students from the American University in Cairo, traditionally a bastion for the children of Egypt's secular elites, who were enamored with the teachings of Sheikh Al-Kafi. The *dars* was hosted by the niqab-clad daughter of a liberal Member of Parliament for the ruling NDP, who drank regularly.<sup>38</sup> The chasm between secular elite parents and their religious children, particularly those who would go to the lengths of wearing a niqab, is a testament to how deeply pervasive conservative Islam had become in Egyptian society, even among the traditionally liberal elites. Today, some of the biggest business families in Egypt—among them the Talaat Mostafa group,<sup>39</sup> the Seoudi group,<sup>40</sup> and the Mo'men group<sup>41</sup>—are outwardly conservative. The expansion of Islamism into elite Egyptian circles further legitimized conservative Islam in Egyptian society, provided an even stronger financial foundation for Islamic political and charitable activities in Egypt, and further marginalized the increasingly small population of Egyptian liberals pining for the more open society of the



Muslim Brotherhood symbol.

1950s and 1960s.

### Conclusion

The noticeable increase in religious conservatism in Egypt from the 1970s to today manifests itself in the near-universal adoption of the headscarf by Muslim Egyptian women, the sight of a growing number of niqabs, and the popularity of Salafi and Islamist political figures and television channels. The powerful influence of conservative Islam on most aspects of daily life in Egypt has very real political consequences for domestic and regional stability, as the growing power of Islamism has suppressed Egypt's previously vibrant cultural life, has contributed to increased sectarian tensions, and has inflamed the rhetoric of Egyptian government figures on sensitive regional issues such as the status of Jerusalem or the preservation of the Camp David accords. While there are a variety of factors that contributed to the beginnings of the rise of conservative Islamic beliefs in Egyptian society in the 1980s, the impact of Egyptian migration to traditionally conservative Gulf states cannot be overstated. Millions of Egyptian laborers working on fixed contracts in the Gulf, often with their families, were exposed to a society that was much wealthier than Egypt and followed a much more conservative brand of Islam where, unlike Egypt, all women were veiled, alcohol was banned, and religion played an intimate role in almost every aspect of daily life. Many Egyptian migrants and their families internalized this new brand of Islam, and the consumerism that accompanied it in the Gulf, and maintained these new religious beliefs upon returning to Egypt. Furthermore, many conservative, lower-middle class Egyptian migrants, including many Muslim Brotherhood members, were able to amass sizable fortunes working in the Gulf and used that money to fund Islamic charities and political activities in Egypt. Even the *hiwala* money transfer companies that migrants used to send remittances back to Egypt were involved in Islamic charity work.

Between the growing popularity of Gulf-based Salafist Islamic beliefs and practices and the well-financed charitable activities of Islamist political organizations, conservative Islam became a potent sociopolitical force in Egypt in the 1990s, even

finding a foothold among previously hostile elites. The spread of conservative Islam in Egyptian society continued unabated through 2011, when a surprisingly resounding victory for Islamist parties in Egypt's first parliamentary elections shocked secular Egyptians and foreign observers alike. The religiosity that permeates almost every aspect of visible life in modern Egypt is a stark departure from the socially liberal Egyptian culture of the 1970s. However, the growth of conservative Islam may well have hit its peak. As Islamist organizations have moved from the opposition to the government, they are now responsible for fulfilling the basic needs of Egyptians in a period of acute economic hardship and political instability. Failure on the part of Islamist government figures, which is already beginning to surface, will discredit Islamism as a political ideology and may well lead to a reversal of recent religious trends in Egypt and a gradual return to Egypt's more liberal roots.

#### NOTES

1. Michael Slackman, "In Egypt a New Battle Begins Over the Veil." *New York Times*. January 28, 2007. Accessed at [www.nytimes.com](http://www.nytimes.com) on April 25, 2012.
2. A bruise on the forehead that is usually a result of intense prostration for the mandatory five daily prayers for Muslims—many Egyptian Muslims intentionally try to bruise their foreheads to create a *zebiba* as an outward display of piety.
3. The word "Salaf" means "ancient one" in Arabic and refers to the companions of the prophet Mohammed. Salafists believe that Islam should be practiced based on a fundamentalist interpretation of the Quran and the prophet's hadiths and believe in living by the example of the earliest followers of Islam—beard included.
4. *Infitah* was Sadat's "Open-door" economic policy in the 1970s where he liberalized the Egyptian economy, which created a new upper class but made life for the majority of Egyptians left behind more difficult.
5. Gil Feiler. *Economic Relations between Egypt and the Gulf Oil States, 1967-2000*. Brighton, UK: Sussex Academic Press, 2003. 98.
6. Feiler, 106.
7. *Ibid*, 107.
8. *Ibid*, 111.
9. *Ibid*, 112.
10. *Ibid*, 105.
11. *Ibid*, 108.
12. *Ibid*, 109.
13. *Ibid*, 101. These figures are from data provided by the Egyptian Foreign Ministry based on consular reports in the Arab oil-producing countries.
14. Ramadan Ahmed. "The Egyptian Migrations." *Migration: Immigration and Emigration in International Perspective*. Eds. Leonore Adler and Uwe Gielen. Westport, CT: Praeger Publishers, 2003. 313.
15. Ralph Sell. "The Egyptian International Labor Migration and Social Processes: Toward Regional Integration." *International Migration Review*, 22.iii. (Autumn 1988), p. 99.
16. Ahmed, 317.
17. Tarek Osman. *Egypt on the Brink: From Nasser to Mubarak*. New Haven: Yale UP, 2010. 80. This book provides an excellent and comprehensive analysis of the rise of Islamism in Egyptian society, among Egypt's other recent social ills.
18. *Ibid*, 81.
19. Philippe Fargues. "The Demographic Benefit of International Migration: A Hypothesis and its Application to Middle Eastern and North African Contexts." *International Migration, Economic Development, & Policy*. Eds. Caglar Ozden and Maurice Schiff. Washington, DC: World Bank, 2003. 171.
20. Fargues, 173.
21. Geneive Abdo. *No God But God: Egypt and the Triumph of Islam*. Oxford: Oxford UP, 2000. 81.
22. Osman, 87.
23. *Ibid*, 81.
24. Abdo, 91.
25. Saad Eddin Ibrahim. "The Egyptian Islamic Activism in the 1980s." *Third World Quarterly*, 10.ii. April 1988. 641.
26. Those who officially joined the Muslim Brotherhood were obliged to contribute 8% of their monthly income to the organization. Noha El-Hennawy. "Muslim Brotherhood: Operating Outside the Law?" *Egypt Independent*. February 16, 2012. Accessed at [www.egyptindependent.com](http://www.egyptindependent.com) on April 27, 2012.
27. Osman, 109.
28. Ibrahim, 643.
29. *Ibid*, 642.
30. Osman, 84.
31. Denis Joseph Sullivan. *Islam in Contemporary Egypt: Civil Society vs. the State*. Boulder, CO: L. Rienner, 1999. 114.
32. "Islam is the Solution" is the official slogan of the Muslim Brotherhood.
33. Osman, 97-98.
34. *Ibid*, 88.
35. Abdo, 68.
36. Abdo, 164. Another prominent victim of hisba lawsuits was the feminist Nawal El Saadawi.
37. Both suits against Sawiris were dismissed by the court. One suit against Imam was dismissed while the other resulted in a 3-month prison sentence and a fine but is pending appeal as of April 30, 2012.
38. Abdo, 140.
39. Tarek Talaat Mostafa ran for parliament as an independent candidate in Alexandria in November 2011 and courted the Salafi vote to try to outdo his Muslim Brotherhood opponent in the runoff.
40. The Seoudi group is a conglomerate of car dealerships and grocery stores that initiated the Muslim Brotherhood's businessmen council. Salma Hussein. "Brotherhood Business Heads Enter Spotlight." *Ahram Online*. March 25, 2012. Accessed at [english.ahram.org.eg](http://english.ahram.org.eg) on April 29th, 2012.
41. The Mo'men group is a regional food giant with several fast food chains. The founder and CEO Mohammed Mo'men is a known Islamist who is the director of the presidential campaign of Islamist scholar Selim el-Awa. Amira Howeid. "Working for a Would-Be President." *Al Ahram Weekly*. February 29, 2011. Accessed at [weekly.ahram.org.eg](http://weekly.ahram.org.eg) on April 29th, 2012.

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# Flying Combat Drones Within the Bounds of International Humanitarian Law

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*Major* POLITICAL SCIENCE

War brings death, and a lot of it. This is a well-established truth. With war comes tragedy. In fact, war has no intrinsic value, but is instead a means of achieving a political goal, argued Carl Von Clausewitz.<sup>2</sup> States pursue conflict to achieve societal objectives. Civilian casualties have always been a deplorable consequence of warfare. It has been the practice and responsibility of the most ethical actors to attempt to mitigate this corollary. The rise of unmanned aerial vehicles, commonly known as pilotless drones, demonstrates society's quest to reduce the casualties of war; however, not without raising serious questions and concerns in international humanitarian law.

The United States has every right to limit the casualties of war on its own side, which is a positive product of removing a pilot from a combat operation. By definition, UAVs remove any threat to the pilot's life. The pilot will operate the UAV from a comfortable distance from the conflict, sometimes even thousands of miles away. But the United States has not only the responsibility but also the directive to conduct its program within the bounds of international humanitarian law.

In this paper, I argue that the United States' ongoing use of combat drones in the Federally Administered Tribal Areas (FATA) of northwest Pakistan violates current international laws of armed conflict. I consider this relatively novel technology in the context of current doctrines and principles of international law—in law enforcement relative to armed conflict, in proportionate response and in self-defense, in targeted killings compared to assassinations, and in weapons usage. I argue that the current laws of war fail to reflect recent fundamental changes in war—that is, conflict against transnational, non-state actors. Lastly, I will offer reforms in order to fit this innovative weapon system within the bounds of the law.

Since 2001, the United States under both the Bush and Obama administrations has employed this weapon system—including the MQ-1 Predator and MQ-9 Reaper drones—throughout

the Middle East and North Africa in order to combat terrorist activity. In June 2004, the United States began targeting Taliban and al-Qaeda elements in Pakistan. Under the control of the Central Intelligence Agency's Special Activities Division, the Obama administration has exponentially increased the use of predator drones since 2009.<sup>3</sup> Currently, the CIA operates this program in Pakistan's FATA as well as Afghanistan, Iraq, Libya, Somalia, and Yemen. Despite concerns of legality, the United States does not plan to circumscribe drone attacks in the Pashtun tribal areas of Pakistan. In this time period, the United States "increased its drone fleet 13-fold," especially unmanned combat aerial vehicles (UCAV) with AGM-114 hellfire missile capabilities.<sup>4</sup> The Pentagon plans to add at least \$5 billion every year to this program.<sup>5</sup>

The UCAV program has been an incredibly successful contribution to the global war on terror. Expanding attacks to outside Afghanistan and Iraq has served to "degrade [al-Qaeda's] central leadership and operational capability in Pakistan." Under the Obama administration, the program has successfully targeted and killed "scores of lower ranking" as well as mid- and upper-level al-Qaeda and Taliban leaders in FATA.<sup>6</sup> Perhaps the greatest success was the August 2009 killing of Baitullah Mehsud, Pakistan's most wanted man, who was accused of the assassination of Pakistani Prime Minister Benazir Bhutto.<sup>7</sup> The drone program additionally undercuts terrorist propaganda by raising uncertainty among prospective recruits. Former CIA director Michael Hayden said of the drone program, "By making a safe haven feel less safe, we keep al-Qaeda guessing. We make them doubt their allies; question their methods, their plans, even their priorities."<sup>8</sup>

While it may be one of the "most effective tools in killing terrorists," it is driving Pakistanis to new levels of anti-American sentiment.<sup>4</sup> The United States has conducted approximately 350 drone strikes in the northwestern region of Pakistan, which has

successfully killed many terrorists.<sup>9</sup> However, the Pakistani government has not publicly supported these campaigns. Instead, Pakistan publicly criticizes the American military presence in the Middle East, while the Pakistani Inter-Services Intelligence surreptitiously helps locate terrorists within its borders. While Pakistani intelligence institutions aid American efforts, the anti-Western public opinion of the Pakistani people leads the government to not officially endorse the UCAV program.

### Relevant Doctrines and Principles of Law

Following the devastation of the Second World War and the horrific crimes committed during that period, international law was clearly defined around the issues of war and peace in order to reflect humanism and rationality. Humanitarian law aims to elucidate the confines of war, so that the rule of law is not arbitrary during chaotic moments in international relations. There is a plethora of relevant international law agreements that must be understood in order to evaluate the lawfulness of the covert American operations in Pakistan.

The rule of law governing warfare is divided into two canons: *jus ad bellum* and *jus in bello*. *Jus ad bellum* describes the “justification for going to war;” what circumstances allow states to engage in war. War is theorized to be permissible when “having just cause, being a last resort, being declared by a proper authority, possessing right intention, having a reasonable chance of success, and the end being proportional to the means used.”<sup>10</sup> Indeed, war is justifiable in international law only under defined circumstances. The latter, *jus in bello*, details “what is justifiable in waging war;” the rules governing what practices are allowed



Predator drone firing missile.

Accordingly, no state may commit a crime against peace by violating another state’s borders. Use of force in another state without the official consent of the actor is recognized as a belligerent action. The vital exception to keeping the peace is the Article 51 provision granting each state the right to self-defense.<sup>13</sup> In this case, a state’s claim for retribution must first be taken to the UN Security Council for review. Then, with permission from the Security Council, a state may act in self-defense, but only with “proportionality.”<sup>14</sup> In fact, the International Court of Justice (ICJ) ruled in the 1986 *Nicaragua v. United States* case and the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion that it is even wrong to act in self-defense if the “use of force is not necessary to accomplish the purpose of defense and/or the purpose cannot be accomplished without disproportionate cost in civilian lives.”<sup>15</sup> The ICJ upheld this customary law again in the *Congo v. Uganda* case of 2005, issuing a decision that “Uganda could not use force under the self-defense doctrine in an action targeted against militants in Congo.”<sup>16</sup> The extent of force and type of weapons used is dependent on the type of permission granted—whether a declaration of war or a peacekeeping and law enforcement operation. These steps are necessary to “maintain or restore international peace and security.”<sup>17</sup>

In the *jus in bello* cannon, the International Covenant on Civil and Political Rights (ICCPR), a multilateral UN treaty, guarantees first generation political rights to individuals during both wartime and peacetime. Signed by the United States as well as a majority of states, the ICCPR upholds the right to life, due process, and a fair trial.<sup>18</sup> Article 10 of the Universal Declaration of Human Rights also guarantees the right of due process:

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*<sup>19</sup>

This means that an assassination of unarmed individuals, regardless of how terrible or how guilty, are illegal under international law because it deprives an individual these entitlements. The distinction between an extrajudicial assassination and a targeted killing relies on the categorization of an enemy combatant

## “The underlying problem with the drone program is its lack of accountability.”

and disallowed during war.<sup>11</sup> It yields humane practices during times of war.

The purpose of international legal agreements is to take this theory and put it to practice in its implementation. In the *jus ad bellum* area of humanitarian law, the first obvious source of law is derived from the United Nations, particularly its Charter. The UN Charter aims to limit states waging wars of aggression. The Charter was formed to keep the peace between nations. It provides each state the right to its own sovereignty. Article 2 (4) of the Charter states,

*All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.*<sup>12</sup>

as posing an immediate threat in a combat zone.<sup>20</sup> Moreover, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, commonly referred to as the Fourth Geneva Convention, “affords protections to civilians” in warring territories and outlaws the practice of total war.<sup>21</sup> This convention is founded on the principle of distinction, the requirement of “belligerents in war to distinguish between combatants and civilians.”<sup>22</sup> These broad rights are not to be suspended during times of international conflict.

### Literature Review

Before an analysis of the use of force in Pakistan, a proper literature review is necessary. Harold Koh, Legal Adviser of the Department of State, serves as one of the most influential legal experts providing justification for American drone operations in Pakistan. In 2010, Koh argued that the United States was “in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under

of lethal force...outside armed conflict.” In addition, Alston addresses the concern for the program’s lack of informational accountability: “States should make public the number of civilians collaterally killed in a targeted killing operation and the measures in place to prevent such casualties.” Alston’s report does not officially declare the UCAV program to be illicit under international law, but it does raise serious questions on the “main legal issues that have arisen.”<sup>25</sup>

Law professor Mary Ellen O’Connell at the University of Notre Dame is less restrained. O’Connell provides some of the most significant legal arguments in opposition to the drone program in Pakistan. O’Connell argues that “without a right to use military force on Pakistan’s territory, we not only violate that state’s rights under international law, we are violating the human rights of all victims, regardless of whether they are Taliban militants on a CIA hit list or bystanders.”<sup>26</sup> Her legal dissatisfaction is the foundation on which I will build my argument; that is, the distinction between armed conflict and law enforcement, the ideals of proportionality and self-defense, the identification and role of an enemy combatant, and the type of weaponry used.<sup>27</sup>

### An Analysis of Legal Justification

The legality of the United States’ reliance on UCAV warfare has little to do with the novelty of the technology. The fact that these aircrafts are controlled by men and women thousands of miles away from the use of force has little effect on the technology’s permissibility under international law. In terms of legality, UCAVs are similar to traditional manned aerial strikes. The technological innovation is essential in the tactical shift in how wars are fought while less impactful in terms of its lawfulness. Instead, the real variation lies in who is fighting. Accordingly, in evaluating the legality of the United States drone program in Pakistan, the deciding factors are unrelated to the absence of a human controlling the aircraft. On balance, four key conditions—law enforcement relative to armed conflict, proportionate response and self-defense, targeted killings compared to assassinations, and weapons usage—provide legal challenges to the UCAV program; each is due to the fundamental change in warfare.

First, the distinction between armed conflict and law enforcement highlights the foremost underlying challenge to drone legality. In armed conflict, combatants are allowed to use lethal force without warning. To be considered armed conflict under the law, there needs to be at least two organized armed groups fighting.<sup>28</sup> Consider that the United States legitimately assented to lethal force in reaction to the September 11 “acts of treacherous violence” in the 2001 Authorization for Use of Military Force.<sup>29</sup> Following this declaration, the United States was engaged as one of the organized parties in armed conflict, permitted to kill enemies during hostilities, at least until a stable government was formed. Law enforcement is distinct, however. For law enforcement, states must uphold other state’s sovereignty

“Hopefully, our world will utilize the opportunity of unmanned technology to bring justice in times of bloodshed.”

international law.”<sup>23</sup> His justification for military use hinged on three conditions: “imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.” UCAV military action in Pakistan accordingly accounts for all three variables as well as the principles of distinction and proportionality, says Koh.<sup>24</sup>

However, the controversy surrounding these UCAV weapons in Pakistan has galvanized discontent. Phillip Alston, former UN Special Rapporteur on Extrajudicial Executions and professor at New York University School of Law, is a leading voice on this issue. Alston argued in a 2010 report addressed to the UN General Assembly’s Human Rights Council that drones in general are a legal form of “targeted killings...justified both as a legitimate response to ‘terrorist’ threats and as a necessary response to the challenges of ‘asymmetric warfare.’” However, the report issued concerns on its permissibility due to the “problematic blurring and expansion of the boundaries” of inter-state force. Though terrorist practices are prohibited, the report notes that asymmetric warfare “does not affect the other side’s obligation to ensure that attacks” are lawful. The report objects to any “use



Harold Koh, legal advisor to the US Department of State.



Baitullah Mehsud, instrumental in plotting the assassination of Benazir Bhutto.

unless given consent.

Harold Koh and advocates of the United States UCAV program in FATA argue that permission to violate state sovereignty must be assumed if the state is unable or unwilling to control a threat within its own borders. It is argued that such is the case in Pakistan's territory.<sup>30</sup> The reality is, the United States is not in formal armed conflict with Pakistan, nor has Pakistan granted formal permission for law enforcement purposes. For proper entrance into the FATA region, the United States must receive consent from Pakistan, suggesting the help would suppress a Pakistani civil war and end an uprising against the *de jure* government. For instance, the permission given by the newly established Afghan government and security forces continues to allow the NATO allies to conduct law enforcement operations in Afghanistan. Sure, the Pakistani state may not be able to control the threat to the international community within its borders, as suggested by Koh. But Pakistan does have the ability to consent, which is something they have yet to do. Non-hostile territory, the official classification of Pakistan's northwest region, requires formal acknowledgment from the host country in order to enter sovereign airspace.

This primary legal challenge is due to the lack of state sovereignty that corresponds to the relevant actors. Who precisely is fighting essentially accounts for this illicit nature. The United States is waging a war against stateless, transnational adversaries. The laws that protect the right to state sovereignty fail to address non-state belligerents. The al-Qaeda terrorist network does not function like a state, yet the law treats stateless actors like states. This is a relevant theme in the next three legal objections to the UCAV campaign in FATA as well.

Second, the necessity of force to be both in self-defense and a proportionate response poses a legal problem for the United States. As mentioned previously, these two ideals, described at length in ICJ opinions and the UN charter, are necessary for a sense of rationality in war. But what does proportionality and self-defense mean in an insurgency war? John Brennan, Assistant to the President for Homeland Security and Counterterrorism, defended the drone program at the Harvard Law speech titled "Strengthening our Security by Adhering to our Values and Laws"

arguing that the action is considered self-defense when al-Qaeda is "planning, engaging in, or threatening an armed attack against U.S. interest if it amounts to an 'imminent' threat."<sup>31</sup> But this is based on a newfound definition of imminence and proportionality. Imminence was previously considered an inability to avoid action without harm done upon the actor. In today's asymmetrical battles in which one side relies on terrorist tactics, self-defense and proportionality is argued as necessary to thwart realities in the prevention stages, something that has yet to be defined as imminence under the law. The law does not see terrorist plotting as an imminent threat; instead, the law suggests these attacks are a preventative strike that breaks the peace defined by Article 51 of the UN Charter.<sup>32</sup> These strikes are carried out in self-defense, yet not according to international law.

Third, the recently blurred lines between a targeted killing and assassination are problematic. An assassination of an individual, depriving him or her of due process, is not legal under international law. But a targeting killing is legal if arrest of the individual is not feasible. Harold Koh argues that drones do not violate "the long-standing domestic ban on assassinations," because they are either in armed conflict or acting in self-defense.<sup>33</sup> Both the armed conflict status and self-defense are refutable, as previously delineated. The greater distinction lies in where the enemy is targeted—in geographic relevance to the combat zone. Targeted killings without warning are allowed only in a combat zone and only by lawful combatants. First, the CIA is not considered a lawful combatant. Members of the Armed Services would be considered combatants, if Pakistan expressed consent. Second, as previously discussed, the FATA region is not an official combat zone. Therefore, American strikes in FATA are not legal targeted killings.

The novel type of war can again account for this aspect of the violation of international law. Belligerents are difficult to identify in insurgency campaigns. The Jihadist movement is not only conducted against civilians, but its participants also hide among civilians. Identification of the enemy is less obvious than it was when states previously fought each other. Conflict prior to the rise in insurgency warfare had intelligible groups with uniformed troops. The shift has prompted a more difficult distinction between civilian and enemy, leading the United States operations against enemies to be considered illicit.

Fourth, the type of weapons used in UCAVs underscore the objections by many the legal community. Proponents of this new technology boast that drones minimize civilian casualties. If this is the case, the international community ought to celebrate this essential advancement in warfare. However, the type of weaponry of UCAVs is not correct for law enforcement, the technical classification if Pakistan even permitted the action. Combat drones have heavy firepower capacities, using hellfire missiles and bombs, which are only permitted in war zones. Lethal force is not allowed in law enforcement unless it is used

to immediately save a life. Consider the 2009 hijacking of the American cargo ship *Maersk Alabama* in which Navy SEALs successfully killed Somali pirates to save the life of American captain Richard Phillips.<sup>34</sup> In this law enforcement situation, the United States is unable—both logistically and legally—to drop missiles or bombs to save the life of the American. By nature, combat drones using missiles or bombs cannot carry out an operation for immediate threat to an individual. UCAV Hellfire missiles are legal in combat zones, a designation that has not been extended to Pakistan’s FATA region.

The underlying problem with the drone program is their lack of accountability. “The military’s version” of the drone program in Afghanistan and Iraq “is publicly acknowledged and operates in recognized war zones...[as] an extension of conventional warfare.”<sup>35</sup> The CIA’s version, however, “declines any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.”<sup>36</sup> While the type of weaponry may lead to more precise targeting, the international community is unable to assess the extent of civilian harm. This is the case due to the CIA’s jurisdiction of the program. Of course, there may be no reason to believe that Koh and the CIA are misleading in terms of the targeting of civilians; still, the international community is rightfully angered by the lack of data and transparency.

### Changes to Law and Practice

There is always the temptation to change the law to keep up with new progress, which is acceptable as long as the core traditions and benefits of the rule of law persist. It is vital not to fall into the fallacious pattern that technological innovation ought to change laws; the technology should not dictate change in principles or standards. Rather, change in humanitarian law should deal with the fundamental changes in how wars are fought and who fights them. It may be a slippery slope to alter laws to provide allowance of new techniques, but the legality of UCAVs depends less on the novel innovations and more on their usage. This is not to make an excuse for the transgression of the law. But law must reflect shifts in reality while upholding the principles of rationality and morality. A change in law must account for a change in war. Four foundational principles—state sovereignty, identification of the enemy, necessity of force, and extent of targeting—differ for America’s current war compared to wars historically fought

But how can the program fit within the bounds of international law? Three measures can mitigate the illegality of the American program: only use UCAVs when in armed combat, receive consent for drone usage from foreign countries like Pakistan, and shift the authority of the drones from the CIA to the Armed Services. First, by requiring the designation of armed conflict in order for their use, UCAVs cannot be considered tools for assassination and will be lawfully permitted to fire missiles and bombs. They will also be considered both proportionate

and in self-defense, if in armed conflict. Second, by requiring consent from Pakistan, state sovereignty will not be violated and terrorists will properly acquire the enemy combatant distinction. Third, by shifting the jurisdiction of the UCAV program from the Central Intelligence Agency to the Armed Forces, the program will have greater accountability regarding their use. The presently clandestine program run by the executive directors of the White House will be subject to congressional consent and a transparent military chain of command. These are standards that can be applied not only to drones in Pakistan but also in Afghanistan, Iraq, Yemen, and Somalia, bringing UCAVs within the confines of the law.

### Conclusion

By all indications, the United States drone program will continue on a course of growth. They are here to stay. CIA Director, Leon Panetta answered the dubiousness surrounding the drone program saying, “Very frankly, it’s the only game in town.”<sup>37</sup> Their popularity is growing, especially as domestic American support for foreign military influence deteriorates.

The argument presented may beg the question of whether, if kept at the status quo, the program ought to end in Pakistan. This is a difficult proposition: should the decision be made based on legal theory or practitioners of law? The triumphant realities of the drone program in targeting and dismantling leaders of terrorist organizations in FATA pose a challenging situation for the international legal community. Evil persists in this world, and warfare aimed to combat such evil is permissible and necessary. The United States, as a global superpower, ought to lead in that quest. That said, illegality must be limited if this program is to persist.

Further, ethical implications of this program must be considered. Like every advance in technological innovation, careful scrutinizing of potential consequences ought to occur, particularly when it comes to the life and death of humans. More study is needed to assess the psychological effects of distance killing without risk to the operator of these drones. In addition, society should try to understand the impact of a leader’s willingness to resort to military solutions when there maintains no risk to pilots.<sup>38</sup> Will a head of state be more likely to go to war if drones are the supreme method of war? And, the United States has every right to aim to minimize its own casualties, but it should consider its own domestic risk for when this technology inevitably becomes ubiquitous on the global stage. Ignoring international law sets a deleterious precedent, for future actors will possess UCAVs and should be expected to lawfully employ the weapon system.

I have found that the current state of the UCAV program in Pakistan poses legal transgressions due to the fact that the law of armed conflict fails to reflect realistic shifts in the nature of war. In combating adversaries, UCAVs have the potential to overhaul

the natural threat to civilian bystanders who are too often killed in war. Hopefully, state actors will utilize the opportunity of unmanned technology to bring justice in times of bloodshed.

#### NOTES

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# Letter of the Law: Scalia, Hamdi, Boumediene and Constitutional Jurisdiction Over Extended Detainment

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Major PHILOSOPHY, POLITICS AND ECONOMICS

Throughout U.S. Constitutional history, government has attempted to balance America's security needs with constitutional requirements to ensure liberty from detainment as guaranteed under Article I, Section 9 of the Constitution. The focus of this paper is to establish a constitutional doctrine for the detainment of prisoners in the United States, primarily through the cases of *Hamdi v. Rumsfeld* (2004) and *Boumediene v. Bush* (2008), which concern the writ of habeas corpus under President George Bush. For the purpose of simplicity, it will be assumed that the Geneva Conventions and other international accords do not bind the United States. Furthermore, it will also be assumed that the assertions of the government regarding the activities of the detainees Hamdi and Boumediene were in fact accurate - that they were enemy combatants fighting or plotting against the United States. This paper will also apply the doctrine on detainment to other Supreme Court Cases, and will briefly cross-reference opinions with some important constitutional scholars of the day. Furthermore, while *Rumsfeld v. Padilla* (2004), *Rasul v. Bush* (2004) and *Hamdan v. Rumsfeld* (2006) are important modern-day cases involving both American and foreign enemy combatants, the recent cases of Hamdi and Boumediene involve nearly identical scenarios and debates. The doctrine established here may be used to evaluate those cases as well as all of American constitutional history regarding detainment.

The overall opinion expressed here reflects that of Justice Antonin Scalia, who dissents in both *Hamdi* and *Boumediene*. Although it may be necessary to amend the exterior of Scalia's argument at certain points, his overall philosophy is generally commendable. Scalia's viewpoint is rooted in the idea that the text of the Constitution is the only law of the land, neither to be superseded by any other notions nor to be interpreted loosely. Scalia's dissent in *Hamdi* contends that for all people under the jurisdiction of the Constitution, detainment without full habeas corpus rights violates Article I, Section 9. The only exception

is that Congress may suspend the writ to habeas corpus "when in Cases of Rebellion or Invasion the Public Safety may require it" as per Article I, which discusses the powers of Congress. According to Scalia's opinion, these cases of public safety should be defined as when civilian Courts are not open as per *Ex Parte Milligan* (1862), which will be elaborated upon. Unlike Justice Scalia's opinion, it is held here that in the case of an exceptional emergency where Congress cannot convene to suspend the writ, the President may suspend the writ so long as he receives Congressional approval upon reconvention.

Further, as expressed in Scalia's dissent in *Boumediene*, this paper holds that foreigners who are not under the territorial jurisdiction of U.S. courts have neither the right nor the ability to obtain a writ of habeas corpus. As such, the President may detain foreign national enemy combatants indefinitely during military endeavors and try them under military tribunal, unless explicitly objected to by Congress. Differing here from Justice Scalia, this paper maintains that there should be some additional parameters limiting this executive power. Lastly, for focused analysis, the main criticisms that the majority of the Court would have against Scalia's opinion will be evaluated, largely overlooking the dissent of Justice Clarence Thomas.

In the case of *Hamdi vs. Rumsfeld*, Yaser Esar Hamdi, an American citizen, was detained by the Bush Administration for an extended period of time after being caught in Afghanistan aiding enemy Taliban forces. Hamdi was not given the ability to obtain a writ of habeas corpus and demanded that he deserved the ability to obtain one as a U.S. citizen under Article I, Section 9. Scalia agrees with Hamdi. The core of Scalia's opinion in *Hamdi* is twofold. The first is that when Congress granted the Authorization to Use Military Force in Afghanistan in 2001 (AUMF) to President Bush, it did not constitute a suspension of the writ of habeas corpus, a point that the majority does not contest. The second is that Hamdi is a citizen of the United States,

and every citizen, regardless of whereabouts or combatant status is under the jurisdiction of the United States Constitution unless declared otherwise by Congress, mandating the ability for him or her to obtain a writ.

Justice Sandra Day O'Connor, writing for the majority, similarly states that the "threshold question" in *Hamdi* involves Scalia's latter assertion and is, "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants,'" without suspension of the writ. She states: "All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States." O'Connor ultimately does not answer this pivotal question of whether the executive, in general, has the authority to detain without habeas, because she believes that the AUMF was a legislative grant to the President to act as he saw fit, which includes allowing the extended detainment of captured combatants. O'Connor and the majority, however, controversially state that they envision "a third option" for detainment of citizens, outside of suspension or non-suspension of the writ. This "third option," not found in the Constitution, consists of a Congressional order for the executive to detain individuals for an extended period of time but does not expressly suspend the writ. The majority insists that the defendants maintain the right for eventual appeal of detainment under this third option.

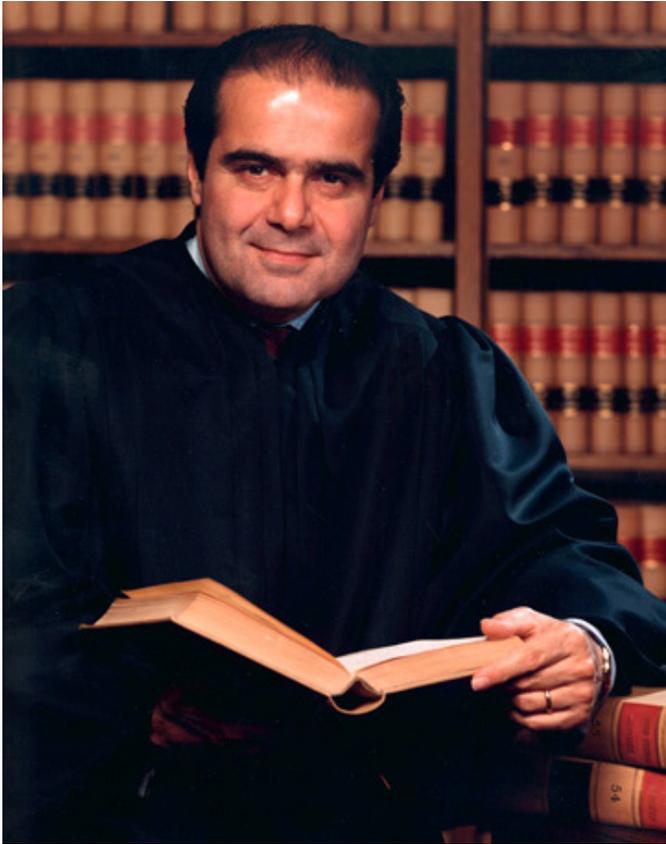
Scalia disagrees with this majority judgment, arguing that it seems to make a dangerous transition from the AUMF, to disregarding habeas corpus rights of citizens. He lambastes O'Connor for contending that extended detainment can be pursued without the suspension of this writ, accusing O'Connor of "transmogrifying the Great Writ—disposing of the present habeas petition". In complete agreement with Scalia, it is argued here that the majority's troubling assertion that "there is no bar to this Nation's holding one of its own as an enemy combatant" echo the words of a dictator rather than a Supreme Court Justice committed to preserving the Constitution. Scalia resoundingly responds that "the Founders inherited the understanding that a citizen's levying war against the Government was to be punished criminally" as treason and concluding that enemies who have full rights under the Constitution (e.g. citizens), regardless of combatant status, must be tried with due process and full habeas corpus in American courts. Scalia upholds the notion of unwavering habeas corpus for citizens with judicial precedence as well, noting that "the only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States was subjected to criminal process and convicted upon a guilty plea" [in the case of *U.S. v. Lindh* (2002)]. Scalia has cogency, the text of the Constitution and judicial precedent on his side in asserting the unequivocal rights of citizens to habeas corpus.

A major criticism of the Scalian view in *Hamdi* is that it envisions an executive branch unable to truly protect national

security. Reasonably, the majority of the Court may question the government's ability to act in cases of emergencies, such as those present during the Civil War, if the government may only detain citizens for very limited periods of time. The *Hamdi* majority may point to the case of *Ex Parte Merryman* (1862) to demonstrate that the extended detainment ordered by President Lincoln in Baltimore, Maryland during the Civil War is generally agreed to have been necessary to stabilize the United States during that frenetic period.

One can criticize Lincoln's actions here as Chief Justice Roger Taney did in the 1860's. However, a simple response to this reasonable concern of a potential lack of executive power would be to point out that there are cases when the writ may be suspended against a citizen, which would implicitly give the government enough flexibility to govern effectively in an emergency case like the Civil War. Scalia indeed accepts that in times of emergency when Courts are not functional or able to convene (as in *Merryman*) the legislature may suspend the writ to habeas corpus, making extended detainments legitimate. Scalia would maintain, however, that judicial precedent clearly only gives Congress the right to do so, that the executive may never invoke the Suspension Clause, and could cite *Ex Parte Bollman* (1807), the Habeas Corpus Act of 1867 and the 1971 Nondetention Act. It can quite easily be shown through judicial precedent that those who have the right to the writ may not have it taken away without any Congressional approval, as the O'Connor majority, despite their flexible creation of a "third option," surely accepts. Indeed Scalia tries to put doubts of executive ability in times of an emergency to rest and cites English justice William Blackstone, who ruled that "sometimes, when the state is in real danger, even this [i.e., executive detention] may be a necessary measure. But the happiness of our constitution is that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient." Historian Louis Fisher, despite holding widely different political views than Scalia, recognizes the need for Congress to have sole power over war-making abilities, including the suspension of the writ, and would have agreed with Scalia's opinion in *Hamdi*.<sup>1</sup>

Nevertheless, Scalia's position evokes persistent and understandable fears by the Court's majority. The case of *Merryman* in particular reasonably worries the Court and stymies Scalia's rebuttal, because in this case Congress was not *convened* and a state of emergency occurred. Indeed, if we fully accept Scalia's view, Lincoln may not have been able to effectively stop the insurrection in Maryland because of the inability to receive a suspension of the writ of habeas corpus from Congress. O'Connor, simply, would maintain that executive detainment without the writ could have taken place because of Congress's previous declaration of war and Lincoln's ability to use all means necessary to wage war. Scalia, however, cannot defend President Lincoln's actions. Recognizing the potential for harm in Scalia's view, it is



Antonin Scalia

recommended that a clause be added to Scalia's opinion: "In the event that the legislature cannot be convened, the executive may suspend the writ of habeas corpus, to be approved by Congress upon its reconvention."

This holds that President Lincoln's actions in Baltimore were legitimate and necessary because, under the logic of Blackstone and supported by Scalia, Congress is the only branch empowered to suspend habeas corpus, and it was unable to convene at the time. Lincoln temporarily assumed Congress' power and, by the time Congress reconvened, he had released the prisoners. It is held that in this extreme case where there is widespread recognition that the writ must be suspended but it is not able to be because of physical (not political) Congressional inability, the President may do so. This power of suspension is only granted to ensure that Congress's role does not go unfulfilled and with retroactive approval, because time is of the essence.

Indeed the decision in *Youngstown Sheet & Tube Co. v. Sawyer* (1952) established the important precedent of primacy of democratic authorization in legitimizing possible executive violations of citizen's rights, such as seizure of private property. Although the majority in that case condemned President Truman's actions, it did so because the President expressly disobeyed a Congressional order or had failed to ask for Congressional permission to deprive property rights when the option was available.

In contrast, the call for executive action in a case of a *Merryman*-like emergency does not legitimize President Truman's actions against the steel industry because it demands legislative authorization *post facto* and does not laud executive power, as the Court found Truman to have wrongfully done.

Chief Justice Taney in *Merryman* did declare Lincoln's actions unconstitutional and blasted Lincoln for this decision, asserting even that "Congress itself could not suspend these laws." It seems obvious that such a statement is not true under Article I of the Constitution. Furthermore, Taney argues that Lincoln overstepped the boundaries of the executive branch in doing so. However, it seems as if these actions were not superseding legislative powers, but rather assuming legislative powers in their absence and aiding in their expediency. Lincoln was helping ensure that Congress's role did not go unfilled, with the additional layer of protection of having to be approved upon Congress's reconvention.

Lincoln's actions in *Merryman* demonstrate the responsible, effective use of an executive to assert order while maintaining the highest level of citizens' rights during a state of true emergency. There is no line in the Constitution that dictates what to do in such a situation and no perfectly analogous case to compare to *Merryman*, so it is difficult to render judgment based on precedent. Perhaps the Federalist papers, which discuss the benefits of an expedient Executive Branch in military scenarios, best expresses this notion by stating, "The energy of the Executive is the bulwark of national security." This seems to be the case in this singular example of extreme emergency, where the future of the country's existence is threatened; the executive can take temporary action to assume a legislative role until Congress reconvenes.

While Scalia may differ with this variation of granting the executive branch legislative powers in the case that Congress is physically incapable of fulfilling its duties, since *Merryman* is such an extremely rare case this is a relatively minor argument in otherwise identical opinions, and generally unrelated to *Hamdi*. However, there is one related issue to *Hamdi* that remains—limitations on Congressional suspension of the writ. In the case of *Ex Parte Milligan* (1866), the Court properly decided that executive actions against citizens were not appropriate. Even though Congress had suspended the writ then, the Court concluded that trying an American citizen in military tribunal when courts were open violated the writ of habeas corpus because the courts could have asserted their jurisdiction (unlike in *Merryman*, where courts were inactive).

Even O'Connor agrees with the Court's decision in *Milligan*, albeit for different reasons. O'Connor asserts that it is only because Milligan was not a "prisoner of war" that he maintained the writ. O'Connor holds that if Milligan was a prisoner of war, Lincoln's actions would have been justified. She seems to ignore, however, the lack of mention in the Constitution about

the ability to deprive those under constitutional jurisdiction, including all citizens, of habeas corpus, regardless of “prisoner of war” status. While O’Connor and Scalia may both support the *Milligan* decision, the O’Connor majority opinion in *Hamdi*, on the other hand, presents a stark contrast between the two justices. In *Hamdi*, O’Connor permits the executive to detain a citizen for extended periods of time for national security reasons. Scalia works to give citizens the maximum ability to obtain a writ, even during a Congressional suspension.

The unfortunate decisions in the cases of *Korematsu v. U.S.* (1944) and *Ex Parte Quirin* (1942) can also be traced back to the need to try citizens in courts when they are open. The decision to intern Japanese citizens, lamentable for the racism and fear in the majority opinion, also weakened the power of the Court because it discarded judicial constitutional jurisdiction and authority in the name national security. Additionally, Scalia notes that the decision in *Quirin* contained similarly egregious mistakes to *Korematsu* and led to the execution of a U.S. citizen under an executive military tribunal when the writ was not suspended. Constitutionally, the American citizen in this case, Herbert Hans Haupt, should have been tried in a Court with full habeas cor-

pus rights for treason and executed, with the arbitrary notion of “lawfulness” of the combatant having no bearing on the case. It is also unclear where in the Constitution the Supreme Court of the 1940s derived that there is a notion of “lawfulness” of accused actions that may have any bearing on a case, let alone constitute a reason to circumvent the judicial process. Indeed, that is the reason for the judicial process of citizens, to determine whether such citizens’ actions were lawful. The justices, in O’Connor-esque style do not even pretend to hearken to the Constitution for this claim of “lawfulness” but rather cite “the law of war,” an extra-Constitutional U.S. code of military regulation, as justifying these violations of the Constitution. Furthermore, according to Scalia in *Hamdi*, “The Government justifies imprisonment of Hamdi on principles of the law of war” but even law of war “cannot be applied to citizens when Courts are open” as established in *Milligan*. Confusingly, the unanimous decision in the case of *Quirin* may have been a byproduct of the fear and xenophobia present during World War II, focusing instead on Haupt’s German heritage rather than the citizenship of the single American involved. Nevertheless, this is precisely the kind of emotional governance which the Constitution ought to protect its citizens from and which reigned supreme in the World War II cases of *Korematsu* and *Quirin*. While the unconstitutional

process of detainment and trial towards Mr. Haupt in this case is lamentable, the verdict on the other five German national saboteurs denied habeas corpus in this case is slightly different and will be dealt with in the discussion of *Boumediene v. Bush*.

The case of *Boumediene v. Bush* involved a non-U.S.-citizen enemy combatant, Lakhdar Boumediene, captured in his home country of Bosnia by the Bush Administration, held at the Guantanamo Bay Naval Base in Cuba and linked to the September 11th attacks. While the Scalian viewpoint holds that a citizen of the United States clearly falls under constitutional jurisdiction, the jurisdiction of the Constitution over non-Americans is not clearly spelled out in the text. Bush justified his actions against Boumediene through the Military Commission Act of 2006, passed by Congress in the wake of other trials related to the detainment of foreign enemy combatants (see: Hamdan and Rasul) which states, “No Court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the U.S. who has been determined by the U.S. to have been properly detained as an enemy combatant.” As such, Scalia frames the case *Boumediene* such that “As a Court of law operating under

## “Indeed the constitution was created with the ideal to prevent government from terrorizing its own citizens.”

pus rights for treason and executed, with the arbitrary notion of “lawfulness” of the combatant having no bearing on the case. It is also unclear where in the Constitution the Supreme Court of the 1940s derived that there is a notion of “lawfulness” of accused actions that may have any bearing on a case, let alone constitute a reason to circumvent the judicial process. Indeed, that is the reason for the judicial process of citizens, to determine whether such citizens’ actions were lawful. The justices, in O’Connor-esque style do not even pretend to hearken to the Constitution for this claim of “lawfulness” but rather cite “the law of war,” an extra-Constitutional U.S. code of military regulation, as justifying these violations of the Constitution. Furthermore, according to Scalia in *Hamdi*, “The Government justifies imprisonment of Hamdi on principles of the law of war” but even law of war “cannot be applied to citizens when Courts are open” as established in *Milligan*. Confusingly, the unanimous decision in the case of *Quirin* may have been a byproduct of the fear and xenophobia present during World War II, focusing instead on Haupt’s German heritage rather than the citizenship of the single American involved. Nevertheless, this is precisely the kind of emotional governance which the Constitution ought to protect its citizens from and which reigned supreme in the World War II cases of *Korematsu* and *Quirin*. While the unconstitutional

a written Constitution, our role is to determine whether there is a conflict between that [Suspension] Clause and the Military Commissions Act.” The main question, as agreed upon by the majority led by Justice Anthony Kennedy as well, is not whether Bush’s actions were illegal under the MCA but rather whether the MCA itself is unconstitutional. Furthermore, Scalia insightfully realizes that “a conflict arises only if the Suspension Clause preserves the privilege of the writ for aliens held by the United States military as enemy combatants at the base in Guantanamo Bay, located within the sovereign territory of Cuba.” In answering this question, Scalia holds that people outside the territorial jurisdiction of the Court, which includes Guantanamo, are not subject to the judicial right to habeas corpus, making the MCA constitutional and Boumediene’s detainment justifiable under the laws of the United States.

Scalia is not alone in his opinion as there is substantial judicial precedence to support this legislative view of territorial jurisdiction. This view of a lack of jurisdiction being salient in habeas cases can be traced back to the case of *Ex Parte McCordle* (1868), where the Court claimed it lacked jurisdiction and therefore could not grant McCordle a writ. Although McCordle was a citizen, the Supreme Court concluded unanimously and established a precedent that the territorial jurisdiction of the Court

mattered immensely for habeas corpus. Critics of territorial jurisdiction may contend that *McCardle* was only so decided because he was a citizen and, according to the aforementioned approach, should not have had habeas revoked at all. Nevertheless, Congress had constitutionally suspended habeas corpus in Mississippi, with no courts open. Therefore, constitutionally, *McCardle* was on the same level as a Guantanamo prisoner in terms of habeas corpus.

This view is echoed nearly a century later in the landmark case of *Johnson v. Eisentrager* (1950). In fact, the core of support for the Scalian view on the doctrine of territorial jurisdiction is found in *Eisentrager*, the premier case on jurisdiction and habeas corpus for alien combatants. As Scalia notes, “*Eisentrager* thus held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.” Clearly, the majority in *Eisentrager*, led by Justice Jackson, asserted that “even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens.” The majority more importantly asserts that “we hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the U.S.” Even Justice Black in the dissent in *Eisentrager* specifically accepts, albeit in disagreement with the majority, that “the Court’s opinion inescapably denies Courts power to afford the least bit of protection for any alien who is subject to our occupation abroad.” The point made by Scalia, that jurisdiction of Courts matters and foreigners are not automatically granted rights to the writ, like citizens, seems indubitably accurate upon analyzing the majority opinion in *Eisentrager*.

Scalia seems to have located the precedent in *Eisentrager* for the MCA, passed by Congress, that clearly established the default constitutional view that aliens do not have a right to the writ. If the Court’s majority maintains *Boumediene*’s right to a writ of habeas corpus, it holds the burden of proof and must demonstrate that Guantanamo is in fact somehow within the territorial jurisdiction of the Constitution, even though the U.S. has no courts with direct jurisdiction over the base. However, the Court mostly circumvents this question, positing that “a diligent search of founding-era precedents and legal commentaries reveals no certain conclusions.” The majority does not settle the specific issue of Guantanamo’s jurisdiction, but rather employs reasoning that broadly dismisses the *Eisentrager* decision as a whole and contends that the *Eisentrager* precedent was dependent on certain situational circumstances, none of which apply in *Boumediene*. As Scalia demonstrates in his dissent though, each argument pursued by the Kennedy majority, from the notion that “practical considerations weighed heavily as well” in *Johnson v. Eisentrager*, to Kennedy’s assertion that “the justices

who decided *Eisentrager* would have understood sovereignty as a multifaceted concept” are littered with errors. It is beyond the scope of this paper to review the entire line of argumentation delivered in Kennedy’s majority opinion as well as Scalia’s rebuttal. All that is required by one who wishes to rebut the opinion of the Court is to repeat that pivotal line in the *Eisentrager* case, “We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy,” echoed in *McCardle* and consistent with the Constitution’s views on the rights of citizens and jurisdiction.

### **Ethical Implications**

Now that the constitutional arguments have been presented and legal qualms dismissed, practical and ethical concerns about the effects of such a policy of limited constitutional jurisdiction must be addressed as well. It is important here to reiterate the balance between security of the people and freedom of the people, which all sides in the debate strive for despite the alternating means of reaching that elusive goal. The first major concern is what measures prevent tyranny of the executive over the innocent if the President can yield power indefinitely in some situations without judicial review. As Hamilton says and Kennedy quotes in *Boumediene* “[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny”.

The first response to this legitimate concern of unchecked dictatorship is that United States citizens, under the doctrine of territorial jurisdiction, will never be subject to tyranny. Indeed the Constitution was created with the ideal to prevent government from terrorizing its own citizens. Accordingly, habeas corpus, being under control of the legislature cannot be revoked without a majority of democratically elected representatives approving such a measure, or retroactively approving it as is the case during a supreme emergency where the executive must take the helm as described in *Hamdi*.

Nevertheless, the core of concerns about liberty in *Boumediene* arises in dealing with non-citizens not under constitutional jurisdiction, and questions arise regarding the limitations of the executive from arbitrarily harassing these individuals. As a response to this persistent concern it is important to note a constitutional condition that curbs the executive from arbitrarily abusing his power that is often overlooked in the discussion of *Boumediene v. Bush*. This limitation is that Congress must approve the use of military force or declare war in order for the President to have any authority over foreign aliens. Indeed in the Civil War, World War II and the War on Terror, declarations of war as well as the AUMF were present. Without a mandate to use military force, the executive may not detain a foreign national, effectively preventing arbitrary detainment..

Still, those justifiably concerned with conditions of the detained may still worry about executive abuse of power in



Yaser Esam Hamdi is a former American citizen who was captured in Afghanistan in 2001.



Sandra Day O'Connor

military situations. It seems logical that the United States should take every conceivable measure to prevent unnecessary detainment for many reasons. The first reason is practical—it costs the United States money and creates animosity abroad, both pragmatic concerns which should be of interest to the branch in charge of executing foreign policy. Secondly, and the more important reason for limitation, is because of the need to conform to ideals laid forth in the Declaration of Independence. While it is not binding like the text of the Constitution, the Declaration does lay forth certain ideals including those of “life, liberty, and the pursuit of happiness” which should not be ignored without

“...this is precisely the kind of emotional governance which the constitution ought to protect its citizens from...”

reason. In order to conform to this great ideal, the U.S. should take every measure to quickly deal with those in U.S. custody.

Simultaneously, it is necessary at this point to differentiate between the right to a writ of habeas corpus and the universal ideals hinted at in the Declaration of Independence. Even liberal historian David Cole entertains the idea that “foreign nationals are entitled only to reduced rights of freedom” pointing to the right to vote and run for federal elective office.<sup>2</sup> The writ to habeas corpus, along with other Constitutional protections, remains a legal right granted to those within Constitutional jurisdiction; the Declaration, separate from the Articles of the Constitution, remains an ideal to be kept in mind by those acting for the government throughout their duties. The former is a “privilege” to those under jurisdiction as per Article I, the latter a non-binding, but guiding force for the executive.

Nevertheless, despite these provisions and motivations to prevent abuse from occurring through arbitrary detainment of foreign nationals, there is room for abuse. As Chief Justice William Rehnquist, despite his support of Bush Administration detainment policies, said: “It is all too easy to slide from one case of genuine military necessity, where the power sought to be exercised is at least debatable, to one where the threat is not critical and the power either dubious or nonexistent.”<sup>3</sup> This slight room for arbitrary detainment is recognized and necessitates a solution. As such, the proposal of an additional measure, to be passed by Congress should assert that the executive branch maintain control over national security measures but in order to ensure no unnecessary detainment occur, submit weekly briefings to a Congressional committee on all prisoners detained. This procedure would exist in order to ensure prisoners are not held arbitrarily and natural rights are not being violated. The courts should certainly have no say over this matter, with Congress being the only branch that may deal with the repeal of habeas corpus or authorization of war. It does seem logical that they, as the ones who declare war, should be the ones granted the minimal extra oversight to ensure prevention of arbitrary detainments in the course of war. Although this proposition is slightly removed from the letter of the law, it is intended to ensure that the letter of the law continues—that the balance of legislative oversight of individual’s treatment in war is upheld.

While most would be satisfied with this limited regulatory body over the executive, critics might question whether there is ever a case where indefinite detainment is ever necessary. Scalia says himself that “it is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met.” Justice O’Connor, writing for a plurality of the Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released due to her belief, pointing to *Quirin*, that the purpose of extended detainment or the suspension of the writ of habeas corpus is “to prevent captured individuals from returning to the

field of battle and taking up arms.” In the age of suicide bombers, a return to hostilities is certainly all the more threatening of a prospect, even after the formal cessation of hostilities. This is because there are cases where detainment may be necessary past the end of hostilities, and the near impossibility of formulating a clear doctrine that could take every national security scenario of the future into account would detract from the President’s constitutional mandate as commander-in-chief. The aforementioned proposition of requiring Congressional authorization and reporting to Congress should serve as enough of a check on the executive to protect those not fully protected under the Constitution.

Finally, critics might also claim that it was for these cases precisely that America was formed—to protect against foreign dictatorship. Such a notion, however, discards the reality of the time and fails to recognize that American colonists in the 1700s were under British judicial authority and should have been given all the full rights of British subjects. Indeed it was not the arbitrary detainment or “taxation” which was problematic to the colonists but rather the lack of “representation” that accompanied this process. The colonists, as subjects of Great Britain demanded due process in having their rights, such as habeas corpus, taken away. The philosophy expressed by Scalia lauds the rights of those under the jurisdiction of the government and allows the executive to thwart the attempts of those who wish to destroy a country which values its constituents so admirably.

Although not expressly dealt with, it is also important to mention the unacceptability of sweeping assertions by the Bush administration, Justice Clarence Thomas and constitutional scholars like John Yoo, who assert that the Constitution has a “flexible war-making system.”<sup>4</sup> The Constitution is inflexible. It lays forth what it holds to be true and does so quite bluntly. Any executive attempt to rationalize extended detainment represents as great a threat to the future of the United States as those wishing to deprive Hamdi of his rights as a citizen or grant these rights to people outside its jurisdiction.

#### NOTES

- 1 Fisher, Louis. *Presidential War Power*, (Kansas: University Press of Kansas, 1995), 7.
- 2 Cole, David. *Enemy Aliens*, (New York: The New Press, 2003), 88.
- 3 Rehnquist, William H. *All the Laws But One: Civil Liberties in Wartime*, (New York: Alfred A. Knopf, 2001), 224.
- 4 Yoo, John C. *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, (Chicago: University of Chicago Press, 2005), 143.

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# Politics, Big Government, and Debt in the United States

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Major POLITICAL SCIENCE

America's \$70 trillion "big government" is neither good nor evil; it is simply something that must be managed.<sup>1</sup> "Big debt," on the other hand, is nearly universally reviled. Sooner or later, many economists predict, the U.S. will rack up a public debt that will "have significant negative effects on the economy."<sup>2</sup> Indeed, a fierce debate now exists regarding the United States' fiscal maneuverability and the point at which its public debt burden will become harmful or unsustainable. Big government can be managed. Is it possible to manage an escalating debt burden? And how do America's politics and governing institutions affect its debt sustainability?

There is significant clash in the economic literature on the subject. Some economists believe that the United States is bound by a finite and measurable debt intolerance threshold of between 90 and 160 percent of GDP that, once breached, will lead to economic stagnation and a potential fiscal crisis.<sup>3</sup> Many others, however, solidly refute this claim, citing the Federal Reserve's ability to expand the money supply, the United States' central role within an interconnected global economy, and the historically high debt carrying capability of strong economies in order to argue that the U.S. can borrow indefinitely even with a large public debt.<sup>4</sup> There is even less controversy around the idea that, during a recession, deficit spending is necessary and austerity is downright disastrous. Most agree, however, that there is a point at which the U.S. debt burden could become unsustainable, even if they disagree over the identity or even the existence of a specific number.

My goal is not to find this threshold. Instead, I address the effects of politics and institutions on the economics of government debt. In this paper I examine the role of politics in the sustainability of the U.S. public debt burden, as well as the relationship between American deficits and big government.

## The Politics of Debt

In this section, I discuss how politics affects government debt carrying capacities. Government indebtedness, bond markets, and other economic phenomena do not exist in a vacuum: they are subject to the decisions of (hopefully) wise policymakers and are not immune to the ugly political realities that sometimes underlie policymaking in a ripened democracy. In a perfect world, governments (including that of the United States) could carry more debt than is currently possible, but the stability and perceived adeptness of their governing institutions impede their ability to instill confidence in markets and solve problems quickly and efficiently when the situation demands it. More specifically, this means that although under ideal circumstances the United States might be able to issue bonds or print money as necessary to rejuvenate its economy, it will most likely be limited in its capacity to borrow due to political malaise.<sup>5</sup> It is therefore likely that the United States is subject to a debt intolerance threshold, even if it is virtually impossible to pinpoint.

Ideally, partisan squabbles should not affect economic policy, yet politics and policy are inextricably linked. Dysfunctional politics can produce deleterious economic effects, as Thomas Ferguson and Robert Johnson explain:

*In theory... a country could get into trouble at almost any level of debt to GDP... Debt crises are not purely economic events; virtually all crucially involve political factors [emphasis added]... our guess is that if a [precise debt-to-GDP threshold] is ever discovered to hold for debt crises, it will refer to the way short-run political and economic factors combine to trump long-run economic considerations: When none dare call it reason and political stalemate develops, rising debts or slow growth can trigger crises at even comparatively low levels of debt to GDP, as Spain is now discovering. Conversely, as long*

*as the political system continues grinding away—either because, like Great Britain for most of its history, it is dominated by financial interests in coalition with other business groups or because it balances social groups successfully through institutionalized compromises—even very high rates of debt to GDP will be shrugged off.”<sup>6</sup>*

Ferguson and Johnson make an important point. Debt crises are as much political events as they are economic events. Indeed, political stability tends to be a solid predictor of fiscal performance over time.<sup>7</sup> In any country, smart policymakers could mold their economies and societies in ways that could preclude the possibility of fiscal turmoil, if only they could ignore the often-impossible demands of their constituencies. But citizens of any nation will inevitably want high spending and low taxes, and policymakers are politicians first. Therefore, nations will inevitably attempt to spend beyond even their means, leading to policies like unsustainable health and retirement benefits in the U.S. or the near election of a radical left-wing party in the face of skeptical bond markets in Greece that could have led to a ruinous Eurozone exit.

Beyond misguided policies is the issue of economic uncertainty. Highly polarized party systems often show decreased levels of bipartisanship and compromise, and policymakers can be tempted to postpone important decisions until the last possible moment.<sup>8</sup> Political brinksmanship over economic policy can create pervasive uncertainty, which may lead firms and households



Milton Friedman

## “Debt crises are as much political events as they are economic events.”

to postpone crucial economic decisions, consequently stalling or slowing a nation’s economy. Although the direction of causality remains unclear, a rise in economic uncertainty correlates strongly with a contraction of national GDP and a reduction in employment.<sup>9</sup> Policy gridlock and political gamesmanship can produce tangible negative economic effects: a significant event could trigger a recession, a financial crisis, or even a massive flight of investors.

### American Politics

It is now common knowledge that the U.S. Congress is ideologically polarized, gridlocked, and widely dysfunctional. The evidence is clear: the 112th Congress is the most ideologically polarized American legislative session since post-Civil War Reconstruction.<sup>10</sup> Since the Republican realignment of the South, polarization has steadily increased, leading to ignorance of Congress’s regular order, abuse of parliamentary procedure,

a culture of corruption, and a large-scale eschewing of compromise in favor of pseudo-tribal partisanship.<sup>11</sup> In today’s divided government, gridlock rules. For all intents and purposes, Congress is “broken,” beset with diametrically opposed, parliamentary-style parties within a system designed for deliberation and compromise, and an extremist Republican party that scorns compromise and aims to return the American economy to its pre-New Deal, laissez-faire condition.<sup>12</sup> This is worrisome because rising political polarization increases debt accumulation.<sup>13</sup>

No one event can fully illustrate what ails the American government, but the political crisis that led to the genesis of the Budget Control Act of 2011 comes close. Faced with the seemingly obvious choice between raising the debt ceiling to facilitate further government borrowing and defaulting on billions of dollars worth of promised government outlays, the Republican Party chose the latter, using its clout in the House of Representatives to produce the threat of an unnecessary government default and to hold the U.S. economy hostage in order to reduce the size of its government. The political brinksmanship of the debt ceiling crisis “disrupted financial markets,” rocked the public’s already tenuous confidence in the U.S. Congress, and inspired Standard & Poor’s to downgrade the U.S. credit rating for the first time ever.<sup>14</sup> By some rough estimates, the debt ceiling fight alone may have reduced annual GDP growth by as much as one percent and added as many as one million people



American economist, Hyman Minsky

to the ranks of the unemployed through the spillover effects of extreme economic uncertainty.<sup>15</sup>

In addition to moderate but immediate spending cuts, the eleventh-hour deal that followed led to the creation of an ill-fated deficit “supercommittee” that ultimately failed to reach a deal. This led the U.S. economy on a crash course toward a “fiscal cliff” of up to \$720 billion in deficit reduction through immediate cuts to defense, Medicare, and other federal program via the Budget Control Act’s “sequester” mechanism alongside the expiration of the Bush tax cuts and the Obama payroll tax reduction. Should lawmakers fail to come to a bipartisan solution, the result would be a recession for the first half of 2013.<sup>16</sup> Even if Congress does eventually cancel its economic suicide run, pervasive uncertainty will lead many businesses and households to postpone important financial and economic decisions, creating an economic slowdown in the months leading up to the deadline at the end of 2012 that some estimate will hinder growth by 0.5% or more in the second half of the year.<sup>17</sup>

Poisonous American politics may continue to disrupt the already-fragile U.S. economy in the near and foreseeable future. Citing a “recent decline in the effectiveness, stability, and predictability of [American] policymaking and political institutions” as well as “uncertainties about the government’s ability and willingness to sustain public finances,” S&P has adopted a negative outlook for its U.S. sovereign credit rating, signaling that markets

may not be willing to put up with such rampant economic uncertainty for much longer without consequence.<sup>18</sup> Meanwhile, ideological polarization in the U.S. Congress continues to escalate. There is a real possibility that America’s dysfunctional politics may damage its future economic prospects, a concerning predicament considering the fragile state of the American economy’s recovery from the Great Recession.

The long-term outlook for U.S. indebtedness is worrisome. Short-term, rehabilitative deficit spending aside, longer-term, more substantial spending commitments to health care, old age insurance, and defense will create structural deficits that will not bode well for an aging population with an anti-tax penchant.<sup>19</sup> Nor will the continued existence of too-big-to-fail financial institutions that may someday tumble back to failure’s doorstep. Although the United States does have a far higher borrowing capacity than most other nations, it cannot sustain its current commitments indefinitely without crowding out enormous chunks of its budget with interest payments for its massive debts. A distinct lack of bipartisanship and compromise in American politics, however, could lock in an unsustainable status quo. It does not help that the sectors most in need of reform tend to be represented by powerful, entrenched concentrated interests with influential lobbyists and clout at the polls. But at some point, the U.S. will need to convince investors that it is blazing a sustainable and affordable trail for the future; otherwise, they may find government debt from more stable polities to be a safer bet.

Perhaps, were its political system willing and able to facilitate it, the United States could continue borrowing until its economy reached near full employment without worrying about the consequences of an escalating debt burden beyond the inevitable budget crowd-out effect.<sup>20</sup> Freed of its politics, the U.S. might not face debt intolerance at all. Yet volatile and sometimes outright self-destructive politics justify investors’ fears that their “risk-free” U.S. debt securities might not be as safe as they once thought, and the transformation and polarization of the American party system threatens to give credence to this view. No empirical study or theoretical model can predict just how much political provocation it will take before the markets demand higher interest rates, but if current political trends continue, then the U.S. will find that its borrowing is restricted by a very real, if mysterious and unpredictable, debt intolerance threshold.

### **Big Debt and Big Government**

The United States may be able to sustain a relatively high public debt-to-GDP ratio if it can retain the political tools necessary to restrain deficit spending or raise taxes if necessary. The post-World War II era, however, has witnessed the growth of an American Leviathan—“big government”—that has amassed such a great size that it perpetuates its own existence through sheer inertia. This begs the following question: does “big government”

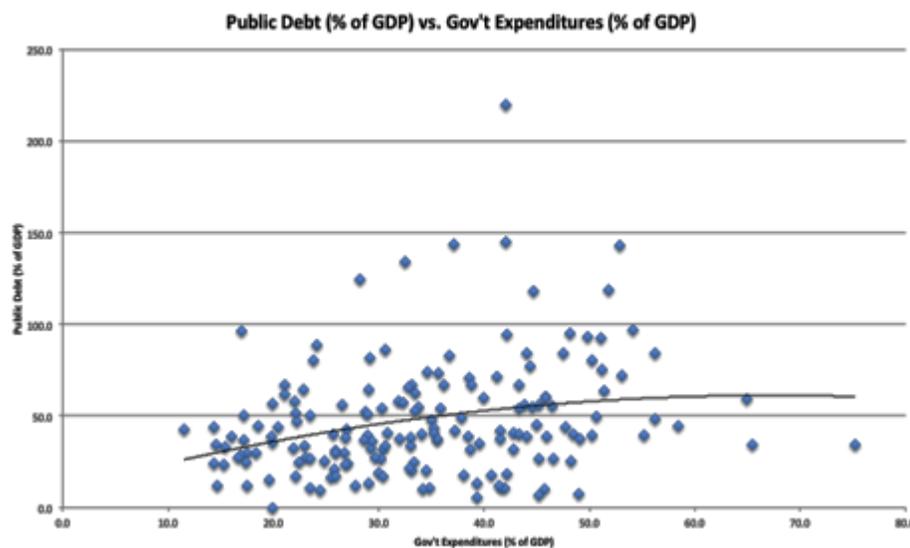
Figure 1

Country	Government Spending as a Percentage of GDP <sup>1</sup>	Gross Public Debt as a Percentage of GDP <sup>2</sup>
Japan	37.1	229.8
United States	38.9	102.9
Singapore	17.0	100.8
Canada	39.7	85.0
United Kingdom	47.3	82.5
Poland	43.3	55.4
Denmark	51.8	46.4
Sweden	52.5	37.4
Australia	34.3	22.9

<sup>1</sup> Source: The Heritage Foundation & The Wall Street Journal, 2011 Index of Economic Freedom

<sup>2</sup> Source: International Monetary Fund World Economic Outlook Database, April 2012

Figure 2



Source: The Heritage Foundation & The Wall Street Journal, 2012 Index of Economic Freedom.

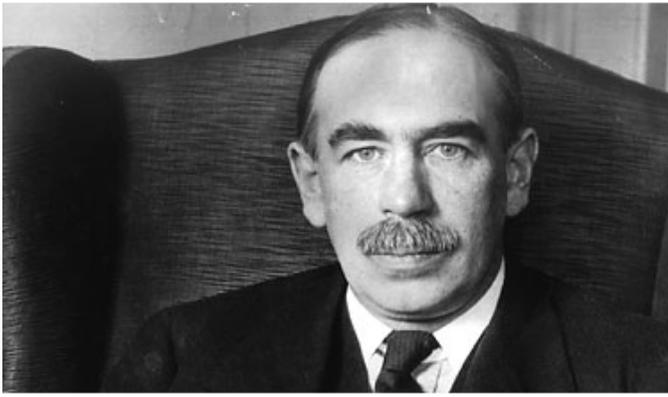
create and sustain “big debt”?

Before focusing in on the American case, I begin with a more general examination of the hypothesized link between larger governments and both large debt burdens and higher difficulty with reducing those debts. This idea is strongly associated with the ideas of American economist Hyman Minsky, to whom I now turn for an explanation.

Minsky and many of his contemporaries believed that big government sectors lead to high debt-to-GDP ratios as a consequence of capitalism’s natural instability. In his view, the success of big government institutions “encourages private investors to engage in excessive risk-taking,” causing “frequent financial crises [which force] the government to run large deficits during recessions.”<sup>21</sup> The boom and bust cycle is a natural product of our capitalist system, in which major financial actors “know that both the Treasury and the Central Bank will intervene to prevent a ‘free fall’ of the financial system.”<sup>22</sup> Due to the political obstacles of running surpluses and because interest rates rise after an economic recovery, surpluses do not offset those deficits during economic expansions, and the debt-to-GDP ratio rises.<sup>23</sup>

Of course, the cycle cannot continue indefinitely: after a certain point, the cost of servicing government debt crowds out the budget to the point where the government either cannot effectively intervene during a crisis or interest rates on government bonds become prohibitively high. This is what some call the “Minsky paradox”—that unstable capitalist economies require big government institutions to achieve economic stability and prevent depressions, but those institutions ultimately destroy themselves through excessive debt accumulation from the repeated mistakes of an unstable financial system.<sup>24</sup>

Alberto Alesina, Filipe Campante, and Guido Tabellini explain the critical observation that lies at the heart of Minsky’s logic: that big capitalist governments often fail to achieve the budget surpluses necessary for successful countercyclical fiscal policy.<sup>25</sup> The authors show that rational voters in a democracy often promote “procyclical and myopic fiscal policy” because they do not trust corrupt or inept governments with resources; thus, when a positive income shock hits the economy, voters “demand immediate benefits in the form of tax cuts or increases in productive government spending or transfers. They fear that



British economist, John Maynard Keynes.

otherwise the available extra resources would be ‘wasted.’”

American economist James M. Buchanan provides an alternate explanation: many citizens suffer from a “fiscal illusion” and do not see the full effects of government borrowing. Citizens weigh the clear and immediate benefits of government spending against the amorphous and hazy costs of higher deficits, and tend to choose the former. Thus, they seek increased spending or tax cuts, and are “accommodated by politicians seeking reelection and bureaucrats seeking to maximize the size of their agency’s budget.”<sup>26</sup> Deficits are particularly attractive, because, “borrowing... yield[s] immediate political payoffs without [incurring] any immediate political cost.”<sup>27</sup> Unfortunately, it also creates a “permanent disconnect between spending and revenue.”<sup>28</sup> Again, the problem is political: having already adopted Keynesian policies of economic interventionism, big capitalist governments tend to sustain their deficits to please special interests and institutional actors. Buchanan’s arguments are difficult to evaluate based on empirical evidence; one study that attempts to quantify fiscal illusion, however, estimates that the U.S. is near the bottom of an international “Fiscal Illusion index.”<sup>29</sup>

Finally, some economic models have confirmed the link between big government and big debt. For example, in 1989, Alex Cukierman and Allan Meltzer concluded that, “deficit financing is more likely when government expenditures increase, and surpluses are more likely when expenditures decline.”<sup>30</sup> The empirical evidence is somewhat fuzzier: although there exist a considerable number of nations with relatively large ratios of government spending to GDP that struggle with high public debt like the United States, the United Kingdom and Japan, many nations that have relatively large public sectors have very manageable debt burdens (Fig. 1). Singapore demonstrates this fact aptly: although its government spending is among the lowest in the world, its gross debt now exceeds 100% of GDP. There does appear to be a weak correlation between the two variables (Fig. 2), but it is far from conclusive. Whether “bigger governments” have a measurable tendency to run larger and more structural deficits than “smaller” ones is a question beyond the scope of

this paper. However, it is clear that it is far more difficult to cut existing government spending than it is to enact new spending programs in the United States, the land of institutional inertia and the home of the tax-averse. Deficits, therefore, tend to reinforce themselves. So goes the famous Milton Friedman adage: “governments spend whatever they take in and then whatever they can get away with.”

### American Big Government

Certainly, many pundits scream that “big government” strangles the American economy and creates unsustainable borrowing practices, increasing deficits while decreasing the political will needed to bring the debt problem under control. The “deathly hand of Big Government [sic]” is blamed for just about everything, especially the national debt.<sup>31</sup> Libertarians, fiscal conservatives, and classical economists all observe and condemn Friedman’s “iron triangle” of politicians, bureaucrats, and special interests, which tightly grip government and prolong its slow-motion debt disaster; for them, the only way to solve the debt issue is to reduce the size of government.<sup>32</sup>

Conversely, other commentators parry with the claim that a smaller government that embraced laissez-faire economic policies led to disastrous economic consequences throughout U.S. history, particularly in the 19th century, when multiple severe downturns led to widespread hardship and social unrest.<sup>33</sup> To them, the big government safety net and web of regulations saves the people from themselves, moderating economic strife and preventing labor revolts at an acceptable cost to society. Rather than a self-defeating machine of economic stagnation, big government is instead necessary “to build a viable and robust version of capitalism.”<sup>34</sup>

Before evaluating the effects of American big government, however, it is necessary to show that the U.S. government is, in fact, “big”. And it most certainly is. The Congressional Budget Office predicts that combined U.S. government spending (federal, state, and local) will average approximately \$7 trillion each year for the next decade; federal deficits will fall somewhere between \$600 billion and \$1 trillion annually.<sup>35</sup> Today, the government spends more on each individual citizen than France, Germany, or the U.K, and “as a percentage of GDP, our government is larger than the governments of Canada or Japan.”<sup>36</sup>

Indeed, despite this, the boldest deficit-reduction proposals like the Ryan or Simpson-Bowles plans propose to cut no more than \$4 trillion from a \$6-10 trillion deficit over the next decade. Professor John J. DiIulio, Jr., a political scientist at the University of Pennsylvania, aptly summarizes this phenomenon—the self-reinforcing nature of American big government:

*The unpleasant truth is that our government is much bigger than even our fiscal hawks generally acknowledge, and reducing its size will be much harder than any politician is willing to admit... Big government is here, and it*

*isn't going away [emphasis added]... we fully embrace a complex government financed through deficits, and administered through maze-like networks of federal grants and contracts, sub-national civil servants, for-profit contractors, and non-profit grantees. The result is a democratic polity in which most people claim to resent the growth of government, all the while expecting, wanting, and voting for government to help protect and take care of their children, their parents, and themselves.*<sup>37</sup>

Furthermore, Americans are particularly prone to “fiscal illusions” because the “submerged state” hides parts of the budget and makes them exceedingly difficult to trim.<sup>38</sup> Budgetary projections do not include an estimated \$0.7-1.1 trillion of “tax expenditures that finance a dense web of government interests from the nonprofit industry to an employer-based health care financing scheme to defense contracts.”<sup>39</sup> These resist change for several reasons: first, because they are “mostly hidden from public view” and understated; second, because “voters may not fully perceive the cost of tax expenditures” since they are absent from budgetary projections; and third, because “tax expenditures have a privileged status in the budget process” as a result of their immunity to cut- or pay-as-you-go rules.<sup>40</sup> The result: “a government that is larger and less efficient than would prevail if citizens had full information.”<sup>41</sup>

What does this all mean? First, that American government is indeed quite “big”. Second, that it is exceedingly difficult to either reduce the size of American government or to raise taxes, both due to the natural preferences of a democratic society and the uniquely inertial nature of American political institutions. Third, that since reducing the growing American national debt requires making deep and unpopular cuts to the welfare system and a dense network of government contractors and grantees, it is difficult and unlikely that Americans will be able to summon the political will to reduce the size of government, and therefore of government debts, assuming *ceteris paribus*.

Restraining the growth of the United States national debt will require addressing and reducing the major drivers of government spending: tax expenditures and subsidies, large state prison populations, welfare, and what Thomas Ferguson and Robert Johnson call the three “big whales” of health care, defense, and “too big to fail” financial institutions.<sup>42</sup> A robust recovery can help to finance these high-impact budget items, but if Americans want to cut the deficit, they will need to sacrifice some of the government benefits that they have come to expect and depend upon.

The United States has a strong economic foundation that enables it to shoulder a much heavier debt burden than the average nation, but the expectations of the market are fickle and seldom rooted in fact. As the Chinese and European economies grow stronger and (perhaps) safer in the decades to come, there may come a time when investors reconsider the long-held

characterization of the U.S. Treasury bond as the world’s sole “risk-free asset”. When that day arrives, a moderate debt burden will serve the interests of the American people well, for a debt-laden American economy may not appear to be a safe bet for the cautious investor.

### **Conclusion: The Ideal Size of Government**

In this paper I have argued that America’s volatile politics restrain and reduce its capacity to sustain its growing national debt, and that the institutions of big government capitalism entrench large U.S. deficits and resist change.

All of the preceding discussion leads to a question that is as rooted as much in philosophy and belief as it is in testable economic fact: what is the “best” size of government to maintain a robust economy and avoid unsustainable borrowing practices? After all, economics is a social science, and its predictions largely derive from modeled guesses about unpredictable and often irrational human behavior. We do know, however, that big government and its allies engender large and potentially harmful public debts, but that big government helps to save capitalism from itself.

Again, Hyman Minsky may provide some perspective. Although the American economist criticized big government capitalism for its seemingly inevitable production of unsustainable debts, like Keynes he still suggested that it was necessary to alleviate the financial instability inherent in a capitalism system, and was therefore “more stable than small government capitalism.”<sup>43</sup> With great power, however, comes great responsibility. Although Minsky emphasized that big government could and should intervene to moderate economic downturns, its policymakers would also need to scale back the risky behavior that helped create asset bubbles in the first place through regulation and reform. It would be their responsibility to engineer budget surpluses and higher interest rates to “cool the economy” when it ran at full capacity.<sup>44</sup>

It is fair to say that most Americans agree that government should help to stabilize an economy in free fall. But as J.S. Mill first observed, whether the United States government’s involvement in the economy should go beyond mere stabilization is a matter of societal preference: today’s “big government” may be bigger than it needs to be, but such is the apparent will of American society.<sup>45</sup> To Minsky, the perfectly sized government was just large enough to perform that single function; to F.A. Hayek and Milton Friedman, it was smaller still.<sup>46</sup> Others, however, prefer that the government extend a hand to the poor, elderly, and infirmed; maintain a superior military edge; and subsidize industries that benefit society. Indeed, in a way, the welfare state is one solution to the capitalism’s Marxist problem: its “inevitable” demise.<sup>47</sup>

From the lens of debt sustainability, the size of American government does correlate with its fiscal viability. For the welfare state to remain a practical reality, Americans must be willing to pay for it or give up some of its many benefits. The United States must convince the markets that it will keep its promises: either tax rates must rise, or spending must fall.

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# A Tale of Two Regimes: Combining Contemporary Chicago Public School Reform Efforts Through Regime Theory

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Major POLITICAL SCIENCE

Last fall, the Chicago Teachers' Union (CTU) strike against the educational reform proposals of Mayor Rahm Emanuel made national headlines. The standoff was only the latest phase of over three decades of contemporary efforts to reform the Chicago Public Schools (CPS), which has become a poster child for the failures of urban education. Applauding the settlement later reached between the administration and CTU at a news conference, Mr. Emanuel affirmed, "It means a new day and a new direction for Chicago Public Schools."<sup>1</sup> Yet it is unclear how much of a change this new platform will bring to local students and their families. In the struggle to overcome legacies of racial and class inequities stemming from the pre-segregation era, CPS has yet to break away from its long-standing record of high dropout rates and low test scores among its mostly low-income, African-American, and Latino student population.

The current scholarly literature on CPS is highly fragmented. Of the limited pool of studies that address Chicago education reform, most run statistical tests on the outcomes of individual policies such as provisions of No Child Left Behind (NCLB) or the introduction of a group of magnet schools within a certain time period. A few others have interpreted reform through the lens of sweeping theoretical approaches, drawing broader conclusions regarding the historical trends underpinning reform efforts. Some studies focus on the efficacy of the reforms, while others target the policymaking process. And despite strong interest in the national significance of Chicago school reform as a case study for urban and minority education, little has been written on the unique context of the city of Chicago itself or its implications for CPS reform. This paper unifies existing knowledge under a focused study of contemporary CPS reform which anchors quantitative assessments of successful policies in a

qualitative explanation of the political, economic, and social dynamics of the reform process.

Regime theory, which expands on the concept of civic capacity, offers an ideal guiding framework for CPS reform. Applied to Chicago's historical experience, it demonstrates the importance of broad-based coalition building among the business, community-based, educational, and government sectors. The contribution of all actors is essential to achieving the two elements of an effective CPS reform agenda: active community engagement paired with central professional and financial resources. Though the reform process has been hampered by racial and class tensions, regime theory shows that political and economic

**"It means a new day and a new direction for Chicago Public Schools."**

interests, not social ones, are the deciding factors in the design and execution of reforms.

To set the scene, I begin with a background discussion of social and political developments behind CPS in the second half of the twentieth century. Next, I explain why regime theory is a valuable lens through which to assess CPS reform, comparing it to other analytical approaches. Part Two applies regime theory to each of the three waves of contemporary CPS reform to identify key actors, resources, and interests in the policymaking process. Last, I examine specific policies and reform projects which have been successful in the past and relate them to these

key actors. I close with recommendations for CPS reform that fosters quality schooling and equitable outcomes for students regardless of class, income, or ethnic background.

### **Background: the legacy of economic and political isolation**

By many standards, CPS is a severely underperforming school system. As of 2006, only eight percent of CPS students who began high school went on to earn a baccalaureate degree by their mid-20s, and only about three percent of male African-American and Latino students did.<sup>2</sup> In 2011, only 17 percent of students performed at “proficient” levels on the national Assessment of Educational Progress tests, while 40 percent did not even reach “basic” levels.<sup>3</sup> Given that a considerable majority of its students come from both low-income families and minority groups (about 40 percent of its students are black, and 40 percent are Latino), these failures highlight the severe inequity of Chicago schools. Indeed, much of CPS’ current difficulties result from decades of the political and economic marginalization of the communities it served throughout and following segregation. Thus far, contemporary reform efforts have failed to overcome the effects of this legacy.

Throughout the second half of the 20th century, black and

youth as an opportunity to maximize his political fortunes rather than as a genuine social concern. He oversaw a clear patronage system as a Democratic machine boss, strategically distributing real estate and contracts to reward supporters in the political and business community, and as racial politics became a major focus of his term in office, he carried out education policies much in the same fashion.<sup>6</sup> When black voter populations on the South and West Sides were decisive to his electoral win, more schools were indeed built in those communities in the 1950s and 1960s than in other areas with large minority communities.<sup>7</sup> His claims to administrative efficiency in education earned him considerable middle-class and black support.<sup>8</sup> Yet his tacit support for segregated schooling also allowed him to sustain the white vote. Thus, the schools on the South and West Sides were erected in densely populated ghettos instead of in border areas accessible to all populations, so as to contain low-income blacks in those regions.<sup>9</sup>

The lasting impact of the economic and political isolation of Chicago’s minority population, in schooling and otherwise, has been well documented. The cumulative harms of poverty have been sustained across generations and entire communities, in accordance with the rule of thumb that the greatest predictor

## “CPS has yet to break away from its long-standing record of high dropout rates and low test scores among its mostly low-income, African-American, and Latino student population.”

Latino Chicagoans have not only been disproportionately poorer than the rest of the population, but have also been concentrated in socioeconomically segregated and homogenous communities. Even as early as the 1960s, households in the historic Black Belt region were more frequently below the poverty line than others in neighboring areas.<sup>4</sup> Up until the 1980s, residential and employment race discrimination was compounded by white flight and redlining, while the withdrawal of commercial institutions led a decline in property values and fewer community resources for inner-city neighborhoods. The same sociocultural divisions extended to education, with schools in black communities at the time receiving noticeably less resources per student compared to those in white communities.<sup>5</sup> And when effective schooling desegregation efforts finally took place in the 1980s, few white students remained in CPS to begin with, while little attention was devoted to actually improving the educational experience of low-income students.

The administration of Mayor Richard J. Daley sustained minority segregation and marginalization in schooling throughout this time. Daley treated the lack of quality schooling for black

of offspring wealth is the parents’ net worth.<sup>10</sup> Black Belt communities have since become even more disproportionately poor, with over half of families—in some areas up to 85 percent—below the poverty line.<sup>11</sup> This tradition of race-based economic and political divisions posed a formidable challenge for later efforts to revive CPS.

### **Framing the Discussion: introducing urban regime theory**

Previous scholars have observed that urban schools are contested territory for control, involving a wide range of interests beyond simply the improvement of student education.<sup>12</sup> The design of reform legislation often mobilizes major private and public actors in addition to government officials, as many vital educational operations take place beyond the scope of central city authority. Conversely, a recent study on Chicago’s mayors throughout the 20th century concluded that the educational positions taken on by all mayors were as much about marshaling votes and corporate endorsement as they were about improving schools.<sup>13</sup> As such, schools and reform proposals cannot be considered in isolation, but rather, they call for a wider theoretical

CHICAGO  
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approach. Schools and reform proposals must be viewed within the larger network of social, economic, and political relationships in which they function.

Existing analyses of Chicago education policy often describe reform efforts in terms of civic capacity, or the ability of local leaders to build effective alliances among civic and government sectors to devise a collective policy solution.<sup>14</sup> Civic capacity emphasizes a threshold commitment of a diverse group of communal actors to solving a public issue and to sustaining a common reform agenda, even against competition from other groups. Factors such as leaders' political skills, government resources, and traditions of interaction may contribute to this commitment.

Civic capacity has been applied in a variety of ways to CPS reform, most often in terms of the empowerment of local communities to influence their schools. Generally, Rufus Browning, Dale Marshall, and David Tabb argue that local minority group mobilization can lead to their incorporation in city governance, while Jeffrey Berry, Kent Portney, and Ken Thomson call for consistent citizen participation to enliven urban democracy. Some studies have faulted past reform efforts for attempting to construct overly broad and disparate coalitions.<sup>15</sup> Others question how sociopolitical developments, such as greater minority office-holding, have altered the means of achieving civic capacity.<sup>16</sup> Nonetheless, the relative abstractness of civic capacity cannot answer questions such as which sectors are relevant, how effective alliances can be maintained, and which factors—economic interests, social traditions, or political resources—are deciding ones. As a result, civic capacity is typically more useful as a term than as an analytical framework.

As a refinement on the concept of civic capacity, regime theory provides a more precise and holistic framework for understanding the political and economic dynamics of historical CPS

reform. Regime theory not only emphasizes the involvement of groups beyond the formal political structure, but also examines the political and economic resources and interests leveraged by the parties involved. A recent study on regime politics in London defines an urban regime to be distinguished by: "1) a distinctive policy agenda, which is 2) relatively long-lived, and 3) sustained by coalitions of interests or personnel not formally or fully specified in institutional structures...and often 4) crossing sectoral or institutional boundaries."<sup>17</sup> To create and maintain cooperation, urban regimes distribute incentives such as jobs or selectively located public facilities.<sup>18</sup> Thus, regime theory helps explain how vastly different groups can work together and how select groups can dominate the reform process. Few studies have applied regime theory to contemporary CPS reform. I now turn to this task.

### **The Reform Process: two regimes, opposing paths**

Two city administrations that followed Daley's tenure constructed vastly different regimes in their attempts to reform CPS. While Mayor Harold Washington dramatically decentralized school control to local communities, Mayor Richard M. Daley's granted corporations a role in the funding and design of new schools. Based on the constituencies each mayor served, I will refer to them as the localized regime and centralized corporate regime, respectively. While each regime had its advantages, each regime's ignorance of the interests and resources of excluded constituencies led to inadequate, one-sided agendas. I observe that meaningful educational improvement in Chicago requires the active involvement of all four major actors in the reform process: the low-income minority communities, the corporate sector, the CTU, and the central city government.

### **Washington's Localized Regime**

By the 1980s, the city had reached a general consensus that the

CPS was failing to meet the academic needs of an increasingly low-income black and Latino student population. Latino and black advocacy groups protested the high dropout rates and low test scores of their schools; the white community had become concerned about dwindling numbers of quality teachers and middle-class families; and the corporate elite was determined to regain control of widening budget deficits. Spurred by urgent calls for action, Mayor Harold Washington, Chicago's first black mayor, pushed through the first wave of contemporary CPS re-

“Despite national and local media praise, there was no clear evidence that the new reforms had produced rising student performance.”

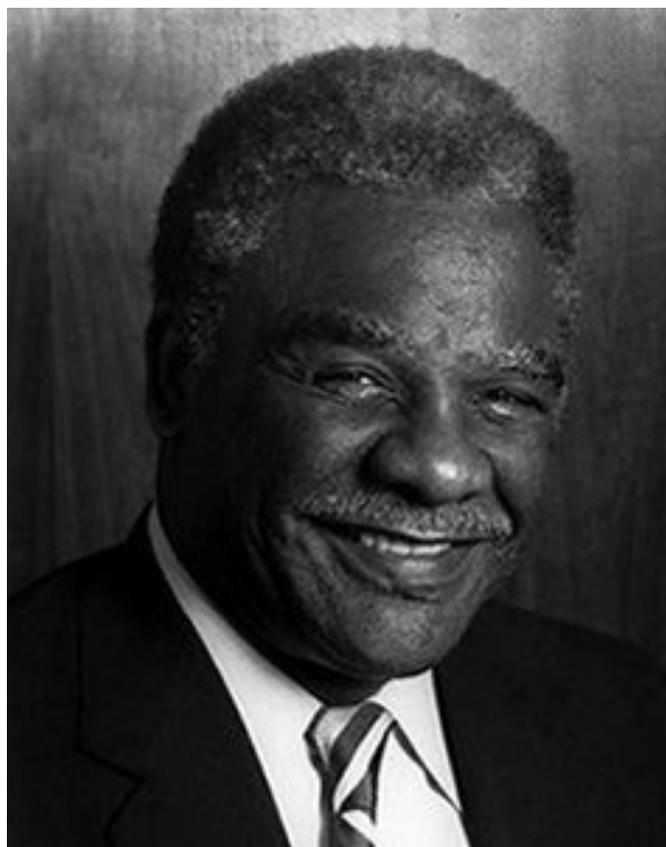
form with a coalition composed mostly of the black and Latino communities, with the additional support of the business community. Because the reform process was dominated by local minority communities, the Chicago School Reform Act of 1988 that emerged from their efforts granted the minority communities an unprecedented degree of control and budget power over schools. However, the lack of support from central government officials and business led to this regime's dismantling within a few years.

Washington won the election for Chicago mayor in 1983 with the strong support of blacks and Latinos, defeating a Republican opponent who had been the preferred candidate of majority-white neighborhoods.<sup>19</sup> Throughout his term, Washington remained dedicated to his core constituency of minority and low-income populations. He promoted a redistributive plan of economic development that sought to promote balanced growth in both the wealthier downtown areas and the working-class neighborhoods.<sup>20</sup> To promote local community development, he introduced a distinctively open governance style which invited community participation.<sup>21</sup>

Similarly, in CPS reform, Washington made sure to include representatives from minority and low-income communities from the beginning. After hosting an initial “mass brainstorming session” attended by approximately 1,000 people from across the city, Washington hosted a more exclusive, but still remarkably diverse, fifty-member Education Summit” in 1986.<sup>22</sup> The presence of parents and community members sitting alongside executives and officials signaled a profound change in the



Chicago Mayor, Rahm Emanuel



Harold Washington



Former Chicago Mayor Richard Daley

reform process, which was traditionally dominated by business and political elite. Washington gained the CTU's participation by inviting them to the summit in exchange for their agreement to end an ongoing strike. Throughout summit negotiations, white, well-organized Latino community groups, and some black leaders demanded greater input in their own schools. They called for a fundamental change in the governance structures, with the creation of elected Local School Councils (LSCs) to govern all 550 schools and of a School Board Nominating Commission (SBNC) to screen citywide Board of Education candidates.<sup>23</sup>

The Chicago School Reform Act of 1988 that emerged two years later vastly decentralized school control and financing. The reduction of district-level bureaucracy transferred staffing and budgetary powers from the Board's central office to principals, parents, and community groups. LSCs became the primary groups of education policymakers, with expansive powers to make decisions for individual schools. Before, the mayor could choose Board members at his own discretion; now, he could pick only from a list of SBNC nominees. Previously, school board members had only represented the city's sociopolitical elite; now, SBNC introduced representatives of minority and low-income communities as well.<sup>24</sup> And whereas previous lawmakers emphasized the equal allocation of state funds, the 1988 Act redistributed state aid in proportion to the poverty level of each school in recognition of the needs of the poor.<sup>25</sup>

Yet not everyone was pleased with the new arrangements, and they soon crumbled under the weight of cross-sector disagreements. Business relations with CPS administrators had soured since the breakdown of earlier negotiations for a business-public school compact.<sup>26</sup> Because Washington did not engage in patronage-based machine politics, and because he was primarily seen as protecting the interests of low-income citizens, business elites were also far less interested in working with him than they had been with Daley, and they sought the support of Republican legislators.<sup>27</sup> Upon Washington's unexpected death in 1987, a business-led coalition at the summit managed to gain an advantage in negotiations to preserve ultimate budgetary power in the School Finance Authority rather than decentralizing it.<sup>28</sup> Because corporate-backed Republicans later vetoed implementation funding, the only financial and technical resources for the new initiative came from private foundations.<sup>29</sup> Central administrators, too, felt that LSC members were unqualified to execute the broad powers they had been assigned and later accused LSCs of corruption and incompetence.<sup>30</sup> As the reform legislation also threatened their authority and social status, the central administrators were reluctant to support decentralization.

Thus, Washington's localized regime yielded mixed outcomes and proved unsustainable. Although some schools performed better, most did not see significant improvements. Families did report high satisfaction with the responsiveness and opportunities for representation in the new system, and many parents were inspired to volunteer at school and run in LSC elections.<sup>31</sup> However, to this day, no clear relationship can be established between the model of "democratic localism" school governance and improved educational outcomes.<sup>32</sup> The system began buckling under the weight of financial strains, and the budget deficit quickly ballooned to \$150 billion only five years after the Act.<sup>33</sup> Meanwhile, the corporate sector refused to shore up a program in which they had little faith or ownership. The absence of a strong central institutional structure that could support schools across the city also obstructed implementation, as the board's central office had been considerably weakened by the legislation.<sup>34</sup> In fact, the lack of an accountability mechanism introduced by the de-legitimization of the central office became a key criticism of the new system among the city's social and political elite.

### **Daley's Centralized Corporate Regime**

These complaints of mounting financial woes and lack of accountability became the cornerstones of public support for the second phase of reform, orchestrated by Mayor Richard M. Daley. The son of former Mayor Richard J. Daley, he revived his father's practice of patronage-based machine politics to augment his own political power and strengthen corporate relations by using CPS reform as a bargaining chip. Thus, the second



A public school classroom in Chicago.

Chicago School Reform Act forcefully rejected decentralization in its reassertion of central, and particularly mayoral, power, giving considerable autonomy and influence to corporations in establishing new charter schools throughout Chicago.

Near the end of Washington's term, two new reform coalitions began emerging. First, progressive education activists began partnering with top foundation leaders in the hopes of winning the Chicago Annenberg Challenge grant as a means of funding continued efforts within decentralization.<sup>35</sup> Though it succeeded in winning and distributing the grant money among schools, the nascent coalition crumbled due to the opposition of the CTU and its general failure to build a cross-sector, citywide coalition. Its fatal error, however, was its total lack of engagement with the city's political leadership and its ignorance of Daley's outright disapproval of the democratic localism approach.<sup>36</sup> The agenda proposed by the rival reform coalition, formed by business groups such as the Commercial Club of Chicago and the Illinois Business Education Council (IBEC), was motivated by CPS' steadily increasing financial difficulties and an interest in local schools as a labor source for the drive to transform Chicago into a "global city."<sup>37</sup> IBEC saw Daley as its gateway to long-term implementation of its reform ideas: not only had the mayor had cultivated a reputation as the "business candidate" since 1983, but corporations were his major campaign contributors.<sup>38</sup>

Sure enough, the pro-business coalition proved much more appealing to Daley. Upon being elected in 1989, Daley made his opposition to decentralization clear.<sup>39</sup> Grassroots empowerment diminished his authority, and his economic plans of downtown development, catering to middle-class populations, gave short shrift to the needs of low-income minorities. IBEC's proposed legislation regarding market-based schooling presented an opportunity to kill several political birds with one stone: restore central city control over CPS, gain powerful corporate supporters, and further Daley's economic goals. Along the way, Daley acquired the support of the CTU leadership in exchange for a multiyear contract offering generous salary raises.

The legislation that emerged in 1995 dramatically recentralized administrative power with the mayor under a radically new corporatized institutional structure. Daley was assigned the power to appoint a new five-member Board of Trustees and Management Team in lieu of the former Board of Education and superintendent. Not only did the Act remove the historic requirement of city council confirmation of board members, but it also granted the Board an unprecedented level of financial flexibility. The composition of the new board, too, reflected the business community and the city's political elite, reversing the previous trend toward diversity. Daley was also careful to select new school leaders who were personally loyal to him, including

his former budget director and former chief of staff. Though LSCs were formally retained, their de facto authority and finances were severely curtailed.<sup>40</sup>

CPS programs, funding, and standards of assessment were unified under this centralized infrastructure. High stakes testing, a defining feature of the 1995 reforms, introduced citywide standards and proficiency testing as a requirement for promotion to the next grade. Students facing greater retention risks were provided additional resources, such as smaller classes or supplemental instructional programs. Schools where fewer than 15 percent of students scored at or above national norms were put on an “academic probation” program, in which schools were reconstituted and teachers dismissed or reassigned.<sup>41</sup> Overall, the new infrastructure produced a highly regulated system centered at high levels of city government. The central administration also provided key resources, such as technical evaluation of teaching skills, mandated curricula, and scripted instruction for low-scoring schools.<sup>42</sup> The central administration invested substantially in initiatives that aimed to improve the quality of schooling, including programs that recruited, prepared, and mentored new school principals and facilitated professional education development.<sup>43</sup>

The second defining outcome of the centralized corporate regime was the establishment of privately run magnet and charter schools under CPS. A host of special programs and schools, such as expanded International Baccalaureate programs, College Prep Regional Magnet High Schools, and Math, Science, Technology Academies (MSTAs), were built in gentrified areas, and allocated almost half of all of CPS construction and renovation funds until the end of the decade.<sup>44</sup> Thus, the 1995 Act introduced corporate management of Chicago schools while furthering Daley’s development plans, which focused on middle-class interests. In fact, Kenneth Saltman argues that the start of privately managed schools through education management organizations and charter management organizations created “short-term profit possibilities for rich investors.”<sup>45</sup> Collectively, these developments exacerbated racial and class stratification.

At the turn of the century, the Daley administration drew on the centralized corporate regime to launch a second reform initiative called Renaissance 2010 (Ren 10). Throughout the following decade, CPS CEO Arne Duncan emphasized the transformation of high schools through the establishment of new charter and contract schools and the closure of poorly performing ones. Over 10 years, 155 new schools were erected, and 82 were closed.<sup>46</sup> Ren 10 also continued producing a variety of new institutional programs to improve professional development and continued to rely on student test scores for school and teacher assessment.

Such initiatives built on the resources and oversight of the central administration. The improvement of citywide data collection, for example, allowed CPS to begin providing

regular reports on students’ progress to individual high schools. Meanwhile, the central administration disseminated information about various strategies to promote coherent curricula and to raise awareness of the importance of literacy and math among families. It created and reorganized central offices around curricular areas to offer focused guidance for schools, even hiring math and literacy coaches.<sup>47</sup>

Though the new charter schools were promoted as solutions to certain problems of low-income communities, such as overcrowding and parents’ need for greater educational choice, Ren 10 extended the same inequitable logic of development of the previous decade. This served Daley’s interest, as he provided for his middle-class constituency and businesses’ interests.

“Though the new charter schools were promoted as solutions to certain problems of low-income communities, such as overcrowding and parents’ need for greater educational choice, Ren 10 extended the same inequitable logic of development of the previous decade.”

Since entering office, Daley had overseen a boom in expensive housing and development, backed by corporate support, which aimed to attract highly paid professionals and grow a globalized municipal economy. This targeted investment has increased racial inequality: as of 2002, the Chicago metropolitan area features the greatest economic disparity between whites and blacks in the entire city.<sup>48</sup> Twenty-first century CPS reform only provided another platform for these development plans, selectively granting charters to politically connected school administrators and private firms in exchange for private investment.<sup>49</sup> These highly publicized charter and magnet schools were in turn meant to attract professionals and middle-class families to the city, while existing schools would be closed to make way for new

schools catering to increasingly gentrified and white communities.<sup>50</sup> William Ayers and Michael Klonsky point out:

*Despite the growth of charters and relative success of some, most students still stuck in dilapidated, large, overcrowded, poorly staffed buildings and will continue to be as Ren 10 charters cherry-pick the best facilities and as the city runs out of new school construction dollars.*

The privatization of CPS therefore worsened the inequity between the experience of white middle-class students and that of poor black and Latino students. While a limited upper tier of public schooling constructed a superficial public image of improving school quality, many CPS schools continued to languish on the political sidelines.

The centralized corporate regime sustained itself throughout most of the decade. The economic goals of the small coalition of business and political leaders overlapped, while the consent of a third actor, CTU, was quickly acquired in a direct, relatively inconsequential quid pro quo. Both core parties were well-resourced, and the limited nature of the coalition meant they could deploy those resources quickly without compromise. Pauline Lipman argues that the political regime used its visibility and prominence to shape the public conversation on education reform and to muffle critics.<sup>52</sup> Excluded and dissatisfied parties could not do much to alter Daley's agenda. Though the law received little support from Democrats, it passed by virtue of a Republican legislative majority. Minority and low-income communities were certainly frustrated at the revocation of their input under decentralization, accusing the new school board of being unresponsive despite its claims of accountability and accusing Daley of rewarding his middle class constituents at the expense of poorer neighborhoods.<sup>53</sup> Nonetheless, minorities' lack of access to either the mayor or central city politics prevented their grievances from gaining much traction.

In terms of actual impact on CPS, the centralized corporate regime had some advantages. For one thing, it successfully balanced the budget, achieving what the localized regime never could. Early on, it yielded a measure of promising results, with greater percentages of students meeting test score requirements through 1999. However, scores dipped in 2000, preluding growing public controversy over the value of using a single test score for grade promotion across all schools. Despite national and local media praise, there was no clear evidence that the new reforms had produced rising student performance.<sup>54</sup> Most importantly, the new regime not only overlooked the needs of low-income and minority students, but its targeted establishment of charter schools also aggrandized racial and class inequity.

## Discussion

Washington's localized regime and Daley's centralized corporate regime were diametric opposites in the interests, resources,

and actors that each gathered. The core of the first was well-organized Latino and black community groups, which used their influence to design a strong leadership role for themselves in CPS. As a result, the localized regime was frequently successful in mobilizing local families, parents, and school administrators in cultivating supportive and productive learning and professional environments through LSCs.<sup>55</sup> Without having sufficiently engaged the central city government or business sector, however, the regime suffered from a lack of financial accountability and central structure, finally falling apart to heavy public criticism and a stunning reversal of its agenda in the centralized corporate regime.

The centralized corporate regime, on the other hand, was dominated by central city government and business at the expense of black and Latino communities. As before, the CTU gave its consent but did not play a vital role in the design or execution of the agenda. Daley brought the financial might of the corporate sector and the bargaining clout of his patronage politics to bear on passing the 1995 Act. Because it was premised on a small, concentrated alliance with a shared vision of economic development, the new regime was able to swiftly execute dramatic institutional changes without the hassle of compromising to accommodate socially, politically, and economically weaker groups. For the same reason, it was able to sustain itself for over a decade. Today, the lasting impacts of the new CPS system have been the resurgence of strong central direction, and of increasingly inequitable educational opportunity due to the redistribution of attention and funding from low-income and minority areas to gentrified, middle-class ones.

This theoretical urban-regime-based interpretation of Chicago education reform has three-part significance. First, it illustrates that the reform process is not directed by racial or cultural considerations, but rather by political and economic concerns. Previous studies on urban educational change often cite the powerful influence of race relations and social histories. A comparative study of Atlanta, St. Louis, Baltimore, and El Paso, for instance, concluded that race and class cleavages may create serious obstacles to civic cooperation.<sup>56</sup> Yet in both Chicago regimes, strategic interests carried the day. Race identities were certainly relevant, and were certainly impacted by the outcomes of CPS reform. Race did not, however, determine which groups could sit at the negotiating table or which groups were able to cooperate. The predominantly black CTU endorsed an agenda designed primarily by white political and business elite in exchange for salary raises. The newly instituted black leadership at the time of the 1988 Act had initially taken decentralization as an affront to their authority from the Latino and white communities, but that did not stop the wider black community from celebrating the new political voice it had won.<sup>57</sup> The true divide in the regime was that between the city leadership and individual low-income communities rather than one along race lines.

Divisions of class, too, resulted from different economic interests and political constituencies, not racial associations. Thus, though Daley's policies were indifferent to widening racial inequity, they were designed based on middle-class interests that cut across race.<sup>58</sup>

Second, the mixed results of both regime agendas demonstrates that any policy agenda is inevitably the culmination of a bargaining process among a variety of self-interested groups that may be only partially concerned with or even opposed to improving educational quality. The failure of past reforms therefore cannot be attributed to a lack of public outcry or political "will." Each new reform initiative was stimulated by vigorous public criticism of previous efforts, but the participants in the reform processes pursued their own particular interests, because their visions for reform came from different perspectives. Though democratic localism did not necessarily improve schooling, for instance, it was enthusiastically advocated by local communities as a means of gaining greater governing authority and political participation. CPS reform, therefore, is not a challenge of inspiring "genuine concern" or "commitment to ideals" as suggested by Clarence Stone's proposed "performance regime" for urban education.<sup>59</sup> Yet the political process of negotiating reform has up to now been dominated by the weighing of diverse material or at least strategic interests, and the beliefs each actor holds toward reform have themselves been differentiated and shaped by their economic and political interests. Even the charismatic Washington was not able to convince businesses to abandon their profit calculations, and teachers and school administrators were more interested in the prospect of a salary increase under the Daley administration than in a reform package that would truly help their students.

Finally, regime theory reveals the importance of the position and political preferences of the mayor, who possessed the unique power to shape the composition of interests and rewards in the reform process. The Chicago Annenberg Challenge coalition never had a chance to introduce citywide reform without Daley's support, as it would have had little chance of being legitimized and institutionally entrenched through legislation. The political goals of Washington and Daley, the constituencies they served, and their larger aspirations for municipal government determined the nature of each education reform agenda from the outset. They were the linchpins of their coalition: each held the authority to introduce or remove various actors from the reform process, and could throw considerable weight behind one position or another during negotiations. Finally, and particularly in Daley's case, the mayor could also leverage extensive administrative resources and political benefits on behalf of city government.

By the end of the 2000s, three waves of reform and two mayoral administrations still had not produced any clearly effective policy direction for improving the quality and equity

of Chicago's public schools. Elementary school reading scores have remained fairly flat over past two decades, while the racial achievement gap has worsened, with black students most left behind.<sup>60</sup> And despite some admitted signs of progress—higher high school scores and graduation rates, for instance—the vast majority of CPS students remain at academic achievement levels far below that needed to graduate ready for college.<sup>61</sup> To make sense of this mixed record, we turn to more rigorous outcomes-based analyses of the policy approaches that have resulted from the localized and centralized corporate regimes.

### **Reform Policies: combining contemporary reform agendas**

Studies of Chicago's education policy generally fall under two categories of reform which are based loosely on the approaches of the Washington and Daley regimes. The first emphasizes community-level engagement, which involves parents, teachers, and administrators in cultivating a productive learning environment within each individual school. The second emphasizes the extension of technical and financial support from business and central city government. While it is difficult to precisely determine the ideal balance between the two types of reform, existing evidence nonetheless demonstrates that some combination of the two is necessary.

A recent report by the Consortium on Chicago School Research (CCSR) sums up this holistic approach by identifying five traits that distinguished schools that benefited most from decentralization. The report cited school leadership particularly an active and engaging principal as the foundation. Close relations among parents, the school, and the wider community were also found to have a direct positive effect on student motivation and participation, and the third trait, a student-centered learning environment, distinguished schools that fostered safe, supportive, and orderly school environments.<sup>62</sup> However, these qualitative accomplishments are also balanced with the two remaining traits on technical and institutional advancements: professional capacity and development, referring to the quality of human resources in each school; and instructional guidance, referring to the presence of an organized curriculum and learning opportunities for educators.<sup>63</sup>

Daley's high-stakes testing reforms have failed in their neglect of the needs of unstable, socioeconomically isolated areas. Generally speaking, these may be construed as the first three traits mentioned in the CCSR report. First, disadvantaged schools must cultivate more effective school-level leadership. A recent study on school conversions in Chicago observed: "The role that principals play (or do not play) is often the key... [they] mobilize teacher communities to collectively and coherently improve classroom practice, and they can help teachers to focus and coordinate their improvement efforts."<sup>64</sup> Not only could principals revitalize the quality and improvement of teaching, but they also "appear to prompt a pathway to personalized

support and improved attendance and, perhaps, graduation...a more supportive context.”<sup>65</sup> Although urban teachers are generally less professionally qualified than their suburban counterparts, many conventional measures of teaching skill, such as professional certification or educational background, have been shown to have little effect on student outcomes. Schools showing the largest improvements have in fact been those where a supportive professional infrastructure allows teachers to regularly collaborate and exchange ideas on improving instruction;

improved, and assessments of the program concluded that there was at best “spotty evidence that they may promote improved attendance and lower dropout rates.”<sup>69</sup> Overall, offering students more choices to attend schools with higher-quality teachers, greater funding, and more advanced and enrichment programs yielded unimpressive results for low-income and minority students. Not only was reassignment less likely to benefit students with low test scores, who had supposedly needed it most, but many were even better off remaining in their original schools.

## “As a refinement on the concept of civic capacity, regime theory provides a more precise and holistic framework for understanding the political and economic dynamics of historical CPS reform.”

where school leadership is inclusive and focused; where teachers feel they have influence over their own work environment; and where teachers and school administrators trust the principal as their leader.<sup>66</sup>

The second and third traits go hand-in-hand: schools must build a strong network between parents, administrators, and the wider community to promote a healthy and motivational learning environment for students. Studies demonstrate that in economically and residentially stable neighborhoods, parents and educators can establish trusting, familiar relationships in working together on behalf of students.<sup>67</sup> Urban poverty-stricken areas, on the other hand, have no social networks or long-standing infrastructure through which to build a healthy and motivational learning environment for students, or to protect them from harmful environmental influences in the neighborhood. In addition to strict instruction, therefore, schools must partner with the wider community to also address the non-academic needs of low-income and minority students.<sup>68</sup> Yet by giving preference to new, standardized, company-run charter schools over mission-driven schools run by local teachers for decades, the 1995 reforms directly undermined the grassroots, community-based development that is so essential to improving Chicago’s public schools.

The contrasting experiences of two of the Daley administration’s academic programs demonstrate the value of community engagement as opposed to innovative or well-financed quick fixes. The first, the Chicago High School Redesign Initiative, funded the establishment of 23 newer, smaller schools with high-quality teachers from 2002 through 2005 across the city. Though the first cohort of students showed some signs of decreased dropout rates and increased graduation rates, the second did not. Neither instruction nor student achievement

Moreover, after adjusting for race, gender, and prior achievement, the graduation benefit for students shrank significantly.<sup>70</sup> A recent experiment found that students selected by lottery to attend a Chicago magnet high school were in fact no more likely than those not selected to benefit academically.<sup>71</sup>

The Comprehensive Community Schools established in the 1990s, by contrast, created new public schools which combined tested “best educational practices” with a wide range of services to prepared children “physically, emotionally, and socially” to learn. These included afterschool programs to teach chess, art, or music; enrichment programs; sports programs, counseling, and homework help, creating a truly enriching educational experience. These schools, although newly erected, aimed to exceed a purely instructional role to become active community centers. Families and community leaders were actively involved in their governance. The results were promising, with improvements reported as early as 2002. Importantly, the successes of the Comprehensive Community Schools stemmed neither from increased funding nor from fundamental methodological changes requiring central guidance, such as professional development programs, resource reallocation, or new instructional techniques.<sup>72</sup> Instead, the successes were driven by changes in community mobilization, including student effort, parental involvement, and curricular redesign on the local level.<sup>73</sup>

Nonetheless, promoting local engagement is not the same as reliance on local capacity—external resources, such as corporate financing and central oversight, are an essential supplement to community-based efforts. As Marion Orr argues the limited resources of many urban school systems prevent them from being able to carry out complex reform initiatives on their own.<sup>74</sup> Apart from the obvious need for financial support for the majority of CPS schools serving low-income communities the central

government provides essential institutional, professional, and administrative support for individual schools. The installation of departments to improve instructional and teaching quality or citywide professional networks, for instance, has been effectively implemented through central guidance.<sup>75</sup> Uniform standards and means of assessment have also provided useful measures of progress, opportunities for further research, and feedback for schools.

## Conclusion

The results of both the reform process and the reforms themselves over the past three decades demonstrate the need for a new reform process in Chicago schooling that combines the resources of the Daley regime with the community empowerment of the Washington regime. First of all, no successful reform coalition can afford to leave out any of the four key actors—low-income minority communities, the corporate sector, the CTU, and city government. If teachers, parents, and principals are to be expected to carry out meaningful and enriching school-level reforms, the CTU and community representatives must be given a voice in negotiations, and reforms must grant parents some input in their children’s education and teachers greater authority over their work environment. At the same time, the coalition should woo business representatives for their financial support. Finally, the city government is not only the author and primary executor of reform but also the backbone of the CPS system. Without its sanctioning role, a purely informal reform effort would dissolve.

Secondly, to produce such a combination of reform policies, the interests of these four actors must be considered in unison and reconciled. Localized and centralized corporate regimes swung too far in either extreme. If a quasi-federal system which balances city regulation and local involvement is to be erected, compromise between the CTU’s and local communities’ desire for autonomy and the city government’s desire to retain authority must be reached. Meanwhile, corporate interests in stabilizing expenses and funding, as well as in promoting overall economic growth, can be harnessed to provide additional accountability for individual schools.

How to form and sustain such a broad coalition will depend on context, including the goals of the mayoral administration and the level of public support for dramatic reforms. Coordinating the separate political and economic agendas will be challenging. It is perhaps a positive sign that an agreement was reached between the current Mayor Rahm Emanuel’s administration and the CTU. Yet as many parents expressed at the time, the spirit of cooperation may have been permanently damaged, making for a brittle alliance.<sup>76</sup> But the new regime has been sustained thus far. If it can foster the type of local enthusiasm and mobilization seen under Washington, and marshal the political and financial might seen under Daley, then there

is hope for holistic and integrated CPS reform before the end of the current administration.

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# Interview with Professor O'Leary

Conducted By JONATHAN MESSING



Dr. Brendan O'Leary is the Lauder Professor of Political Science at the University of Pennsylvania. In addition to his work as a professor, Dr. O'Leary has done extensive political and constitutional advisory work. He has worked on the Northern Ireland peace process, and as an advisor for the European Union and the United Nations in the promotion of confederal and federal rebuilding of Somalia. He has consulted on power-sharing and coalition governments in Kwa-Zulu Natal, South Africa, and in Nepal. Between 2003 and 2009 he often served as a constitutional advisor to the Kurdistan Regional Government in Iraq, helping in the negotiations of the Transitional Administrative Law (2004); the Constitution of Iraq (2005); and the Constitution of the Kurdistan Region (2005-). In 2009-10 he was the Senior Advisor on Power-Sharing to the Standby Team of the Mediation Support Unit of the United Nations. Dr. O'Leary has also published twenty books, including *How to Get Out of Iraq, With Integrity* in 2009 and *Courts and Consociations* and *Power-Sharing in Deeply Divided Places* in 2013.

**Much of your academic and political work concerns power-sharing in places with deep and long-standing ethnic conflicts. What do you think the government of Syria will look like in ten years?**

No one knows the answer to that very good question. What I think we can say is that no stable and democratic Syria can be constructed without very important power-sharing safeguards. It's a country with three large minorities: it's got Kurds, it has Christians, and it has a complex array of non-Sunni Muslims, including Shiites, Alawites, and Druze, who for these purposes can be classified as irregular Muslims. So, combined, these groups constitute at least one-third of the country, and the current regime is built on the tyranny of one of them - the dominance of Alawites over all the rest...Any successful resolution of the conflict in Syria has to find a place for the Alawites, as well as those who supported them, and any successful democratic resolution in Syrian intergroup conflict will also require autonomy for the Kurds in northern Syria. It's a tall order. The most likely scenario we're facing is one of the Lebanization of Syria, not in the positive sense...but in the negative sense of something resembling Lebanon's civil war in the 1970s and 1980s, which involved protracted fights between militias and large-scale international intervention.

**What US actions do you see as being able to make a positive influence in the outcome, and do you think the United States will take those actions?**

In answer to the first question I would remind your readers that the US was successful in the Balkans under the leadership of ambassadors Holbrooke and Galbraith when it decided on a clear plan of what it wanted in terms of outcomes in Bosnia and Herzegovina and then used American diplomatic and military capabilities to bring its goals about. In Syria the US is currently profoundly affected by the manifest failure of some of its war objectives in both Afghanistan and Iraq, and the gradual realization that a lot of hype and unreliable statements have been made about the so-called successes of military surges...The consequence of these reflections is that we have a president and those who surround him who are deeply loath to commit US troops to any future intervention, and they would not in general be welcome in Syria in any case, particularly with the largest section of the population being Sunni Muslims. So, clearly, the US has to rule out, at least for now, any significant direct military intervention.

What the US can do is to help make the Syrian national opposition both more inclusive and more democratic - to say that

it would provide no arms and no support for the overall overthrow of the regime unless the opposition clearly indicates that it will do something to ensure the long-term security of the unorthodox Muslims. The current statements by the Muslim Brotherhood, which say, roughly speaking, “We’ll be nice to the Christians, and the Kurds are already Muslims, and they’re good Sunnis, but we won’t do anything in particular for the Alawites, the Druze, or the Shiites,” are basically recommendations for those groups to fight to the last person. So until we hear genuinely pluralistic statements coming out of the Muslim Brotherhood and their allies, I think we should be deeply loath to provide significant support.

It’s clear that any post-conflict Syria will require a constitutional remaking. It’s also clear that commitments made during the overthrow of the Assad regime are likely to be very important, and that’s why, for example, the Kurds refuse in the main to join the existing opposition (because none of them are promising the Kurds autonomy or language rights or significant transformations of Syria as an Arab nation-state). Instead the Syrian opposition insists endlessly on the territorial integrity of Syria, which is in fact code for making no autonomy concessions to the Kurds. So I think the US should be very clear about the fact that the Syrian national opposition has to make manifest commitments to Kurds, Christians, Shiites, Druze, and Alawites, as well as to secular people and those who have no religious commitments. And it’s got to use its leverage in the area wisely.

As it happens, I don’t think that US policy is going to determine outcomes in Syria. I think outcomes in Syria are going to be determined largely by what Turkey decides to do. Turkey’s current detente with the Kurdistan Regional Government in Iraq and its current wish to have some kind of settlement with its own Kurds may well have a productive, calming effect on northern Syria. If Turkey decides at any juncture to engage in a major military intervention in Syria, that would be decisive. So this is a case where I don’t think the US is going to be the major player. It should be careful, however, not to let the Saudis and Qataris determine outcomes.

Now, did I remember to answer your second question? Your second question was “did I think the US would do the right thing?” I think one of the things that was on the agenda, according to newspaper reports, was that General Petraeus and Hillary Clinton had some kind of grand plan for American orchestration of the opposition. I think that such a plan would be grandiose and not likely to succeed. Are there political partners on the ground to make it work? I think the US is probably largely—wisely—going to sit this one out. It can use its diplomatic and other resources in, I think, an as-profitable way by working with the Russians to try and reduce Russian support for the Assad regime, [and] working out some kind of possibilities for asylum

for the Assad family, which would not immediately involve them going to the Hague, but might involve them going to Tehran, for example. Those kind of productive, behind-the-scenes activities are well within the feasible set of American diplomacy.

### **Where do you see Egypt heading in the wake of Morsi’s abandonment of the new constitution? Will democracy in Egypt be preserved, and if so, what will be its nature?**

I am not an expert on Egypt. I know more about Syria than I do about Egypt, so I should be circumspect. I think the most obvious item on the future Egyptian agenda is bankruptcy, and rolling over Egypt’s debt is going to create very significant leverage for all those who are at the other end of Egypt’s debt: its creditors. So I think if Morsi tries to run a new Egyptian constitution, solely based on the Brotherhood’s agenda, it would be very difficult for him. I don’t expect right now that the outcome of constitutional transformations in Egypt will be simply a Brotherhood-based constitution, but it would be astonishing if they were not the major players. They are the best organized force, the force that was most capable of taking advantage of the collapse of the Mubarak regime, and Egyptian liberals have proved remarkably fissionary and lacking in cohesion, and unless they do cohere and unless they can effectively build a base in the countryside and build some kind of successful alliance with Copts, I think the Brotherhood will be the dominant player in a fairly illiberal Egyptian democracy.

### **Given your role in helping shape the constitution of Iraq, what do you view as the future of the Iraqi political system?**

Well I must emphasize that my role was a modest one as an advisor to the Kurdistan Regional Government. At the moment I am much more pessimistic about the stability of the constitutional arrangements that the Kurdistan government was decisive in bringing about. At the moment we can see that in Iraq, the three basic communities have three different foreign policies. So the Baghdad-led Shia government is pro the survival of the Assad regime, and by and large pro the Iranian government, despite receiving large amounts of American military support. Its foreign policy is completely the opposite of American preferences. The Kurds, by contrast, want to see the fall of the Assad regime and are interested in mobilizing to support the Kurdish community in Syria. And the Sunni Arabs are strongly in favor of the Muslim Brotherhood inside Syria and related Islamists—Sunni Islamist—forces in Syria. For that reason, I won’t be surprised if some of the blowback from the Syria conflict is to destabilize matters inside Iraq.

The Maliki premiership has been a catastrophe. He has not been able to keep any of the promises he made—significant promises that he made—to either the Kurds or the Sunni Arabs, and Iraq can only function as a power-sharing federation in which both the Kurds and Sunni Arabs are significantly represented and get

some of their core demands met. Maliki has consistently broken Iraq's constitutional provisions with regard to natural resources. He has failed to create anything like accountable defense or intelligence services. He doesn't respect cabinet government. And therefore I am very fearful that he and those close to him will do their very best to try and fix the next federal elections in Iraq, which are not too long away.

But I am optimistic for the Kurdistan Region. I am optimistic that its relations with Turkey are benign and likely to be productive in the long run, and I think the Kurdistan Region will be prosperous and successful and on a democratic path whether it remains inside the shell of Iraq or whether it becomes independent. I'm deeply pessimistic about future politics in Arab Iraq. Sunni-Shia relations remain extraordinarily antagonistic. The whole of Arab Iraq is in between Syria and Iran, and I think the long-run consequences look very grim for ordinary people and for the prospects of something like a stable democracy and human rights protection. One can imagine that a quick and decisive outcome to the conflict in Syria and free and fair elections that lead to the replacement of Maliki could jointly produce a benign outcome in Iraq. I fervently hope so, but I'm not expecting that outcome.

**In 2007 you co-edited a book titled "Terror, Insurgency and the State: Ending Protracted Conflicts." In light of the ongoing debate over their efficacy and their legality, what do you see as the future of drones in the United States' counter terror and counter insurgency efforts around the globe?**

I remember remarking to two of my colleagues—I think it was Professor Rogers Smith and Professor Anne Norton—after the first major example of drone usage that my immediate worry was what happens to the world when drones become privatized, because the technology is clearly not one that is going to remain solely in the hands of governments. It's a technology which any rich organization or person presumably has within their reach.

So it's a fearsome new capability but old principles still apply. Governments do not have the right to assassinate their own citizens without some due process. Governments do not have the right to assassinate their own citizens without due process unless those citizens are an imminent threat to other citizens or to peace and good order. So I'm not saying that drones should never be used. I am saying their use should be extraordinarily carefully regulated. This does not mean that I am a victim of the kind of paranoia displayed from one of the congressmen...Rand is part of his name...but I do think the regulation of any technology like that is very important. And I also think it's not just a question of U.S. citizens. (That's the way the debate is characteristically recorded in U.S. newspapers.) America does not have a general right to assassination, no more than any other state in the world, and it's not clear to me that the use of this technology, in the long run, is more productive than some of the alternatives.

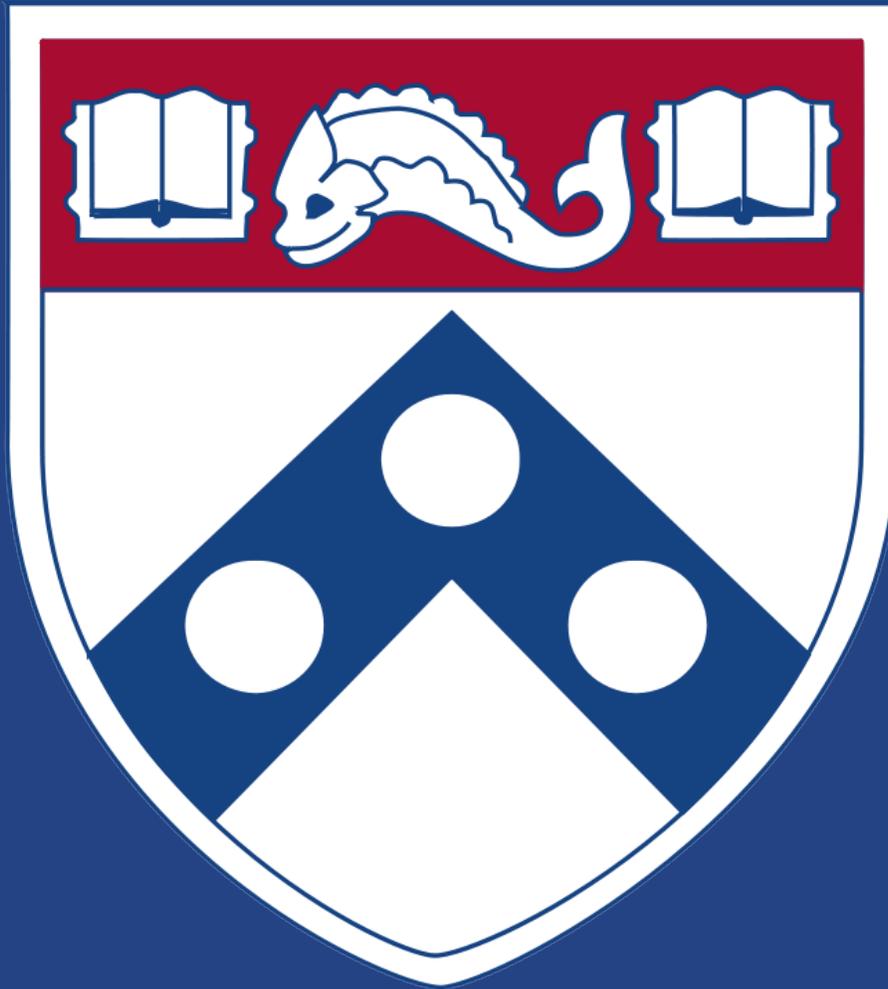
Osama bin Laden, if he had neatly offered himself up for arrest, might conceivably have been arrested—it's unlikely—but I'm very happy that he was killed in a fight rather than he and his family being destroyed in a drone explosion, in which case we would still be debating today whether it was really his DNA that was present or not. So if you are going to go for spectacular executions of the other side's generals, I think it is much better that you avoid drone strike technology.

I think it is an admirable feature of American institutions that eventually we are having a debate about regulating the use of executive power in this domain. Just because, in general, this is a President of whom I approve, doesn't mean that I think that I have to approve of all of the technical or legal innovations that have taken place under his presidency.

**Given your experience in both, how do you view the relationship between academia and policymaking?**

I think both benefit from the movement of people in both directions and both benefit from respect for the autonomy of each domain. Academics who go into policymaking thinking that they can immediately convert their ideas and agendas into policy are at best naïve. What you can do is hope to infuse arguments at the margin to have what I would call a "limestone effect," seeping a little bit of water through the limestone, which eventually might get down to the river of policymaking at the bottom. Anyone who expects to have a totally transformative effect is in for a big and sad surprise. As for the other way around, I think policymakers are understandably often impatient with pure research, which often has no immediate payoff. But I frequently point out that my friend Ken Binmore, who was—I assume that he is now retired—a professor of Economics at the London School of Economics & Political Science and at University College London and then I think also at Michigan, was a game theorist, very much a pure game theorist. Yet he invented a brilliant mechanism for getting people to reveal their true preferences at auctions, and the consequence of this piece of pure research has been to generate for the UK government absolutely enormous quantum of money from selling licenses to mobile phone companies. And all of that money is some enormous multiple of the entire UK social science budget since World War II. So pure research has policy payoffs that people can't anticipate. Therefore, it would be insane for the academy to become the prostitute of policymakers, or for policymakers to insist that all social science research be immediately relevant. But I think it's especially useful to have a significant number of people—it doesn't have to be a majority—but a significant number of people who move between these worlds. It enriches the lives of those who do it and hopefully brings some benefits in both directions.





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