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A TRANS ATLANTIC DIVIDE ON THE
BALANCE BETWEEN FUNDAMENTAL
RIGHTS AND SECURITY

Lorenzo Zucca*

Abstract: The lawyers of the Bush administration have taken criticism for
giving legal advice that some commentators have argued was unethical. In
prosecuting the war on terror, the reaction within the United States was
different than that of many European countries. In comparing the belief
systems underlying the different reactions, this Article argues that the
European response, which is due in part to their longer experience with
terrorism and a greater commitment to international law is the healthier
one. Ethical lawyers need to use good faith in giving their advice and be
prepared to justify their decisions or perhaps be criminally or civilly liable.

Introduction

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape till custom make it
Their perch, and not their terror.¹

Angelo’s words in Shakespeare’s Measure for Measure have much the
same meaning as those of Attorney General Michael Mukasey in his
2008 commencement address at Boston College Law School.² Measure
for Measure is known as a problem play, in which Shakespeare explores
themes of “justice and mercy, authority and the abuse of power.”³ An-
gelo, to make it clear from the outset, is the villain in this story. Much
like Attorney General Mukasey, he was made responsible by his coun-
try’s ruler for the strict enforcement of the laws while the ruler pre-

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¹ William Shakespeare, Measure for Measure act 2, sc. 1. For an analysis of the play
from a legal viewpoint, see Erika Rackley, Judging Isabella: Justice, Care and Relationships in
Measure for Measure, in Shakespeare and the Law 65, 65–79 (Paul Raffield & Gary Watt
eds., 2008).

² See generally Michael B. Mukasey, The Role of Lawyers in the Global War on Terrorism, 32

³ Rackley, supra note 1, at 66.
tended to be on a diplomatic trip. Angelo decided to be tough on crime and to apply the law without any sense of “measure.”

The question presented to this symposium concerns how ethical lawyers ought to weigh the competing imperatives of national security, civil liberties, and human rights. My answer is simple: ethical lawyers should seek to strike a balance between these competing interests in good faith. They should be prepared at any point to face judicial scrutiny and present evidence to justify their decisions. They must believe in the rule of law at any cost.

There is at the moment a clear transatlantic divide on this issue. The Bush administration put security first and suspended constitutional and criminal guarantees for terrorism suspects. Contrastingly, Europe just reiterated its commitment to the rule of law, even, if not especially, in times of crisis.4

The two positions reflect two worldviews. One believes in unilateralism and emergency powers, while the other embraces multilateralism and the enforcement of criminal law. The former may end up compromising human rights and civil liberties, while the latter preserves those same rights and liberties. My belief is that Europe has something to teach the United States. First, a proper understanding of the rule of law necessitates a greater respect for international law. Second, deviating from the established criminal justice system does not help in the fight against terrorism. Third, we cannot compromise on our commitment to the rule of law and human rights.

Attorney General Mukasey’s rhetoric demonstrates a poor understanding of the problems at hand. His speech, to European ears, rings as tragicomic as Angelo’s. The epilogue, however, need not be as tragic, for there is much we can learn from each other. President Obama faces important challenges that he cannot solve alone. As such, the three aforementioned lessons from Europe must be taken seriously. Once they are, we will be able to address the gross violations of human rights that have occurred.

I. The Rule of Law and International Law

The two competing worldviews can be differentiated by their perception of international law. Attorney General Mukasey’s conception of the rule of law ought to be called the rule of national law. Europe is much more inclined to take international law, and in particular inter-

national human rights law, very seriously. To be blunt, the rule of law must incorporate international law. From a European viewpoint, Attorney General Mukasey’s idea of the law is parochial and nationalistic. He proudly states that, “this nation’s well-proved commitment to the rule of law is what sets it apart from many other countries around the world and throughout history.”\(^5\) Under such a view, law begins and ends within the confines of the United States. There is no concern for international law, and security really means *national* security, as if terrorism was not a problem of global resonance.

The Attorney General’s statement to the class of 2008, that “you, as lawyers, must do law,” is reminiscent of Angelo’s “scarecrow” line. It speaks to the strict letter of the law, and stresses the responsibility of each lawyer to define the scope of what is legally permissible.\(^6\) Unfortunately, U.S. law, as Attorney General Mukasey acknowledges, is deeply indeterminate when it comes to issues of national security. The limits of the executive are not clearly defined by the constitution or by legal precedent. Legislation does not provide clear answers to novel questions, and judicial decisions do not abound in this area.

Within this context, the Attorney General’s command, that lawyers “must do law,” rings hollow because doing law is different from engaging in matters of policy. “Doing law” according to Attorney General Mukasey means to closely read the language of the constitution or other legislative acts. If those very acts are indeterminate, however, you can read as much as you wish without finding an answer. You will have to appeal to something else. What then? It is not policy, it is not the text, and, based on recent Executive actions, it cannot possibly be principle.

Doing law in these cases must boil down to unfettered discretion or sheer deference to power. Attorney General Mukasey’s understanding of the rule of law is comic when applied to things like the Geneva Conventions.\(^7\) The Attorney General’s principal client is the President, and his advice and that of his predecessors to that client with respect to the Geneva Conventions was to trash the law.\(^8\)

\(^5\) Mukasey, *supra* note 2, at 181.

\(^6\) *Id.* (“A lawyer’s principal duty is to advise his client as to what the best reading of the law is—to define the space in which the client may act consistent with the law.”).


\(^8\) See generally *David Cole*, *Justice at War: The Men and Ideas That Shaped America’s War on Terrorism* (2008) (noting Attorney General Ashcroft’s position that foreign nationals are not protected by international human rights treaties and that the Geneva Conventions are “quaint” as applied to the current conflict).
The U.S. Supreme Court’s decision in *Hamdan v. Rumsfeld* expresses a deep disagreement with the Bush administration’s understanding of the rule of law. As David Cole points out, “the *Hamdan* case stands for the proposition that the rule of law—including international law—is not subservient to the will of the executive, even during wartime.” In contrast, most Europeans do not question whether international law is part of the rule of law, as there are major sanctions for its violation. If a government used torture to gather information, an individual would have a claim under Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhuman and degrading treatment. If a national court ruled in favor of a government regulation allowing torture, the individual would have the ability to challenge the domestic decision before the European Court of Human Rights. This court has, for example, already ruled that certain U.K. interrogation practices in Northern Ireland were unlawful.

Some countries have made their commitment to human rights even more explicit by incorporating the ECHR into their domestic system. The ECHR, however, is not the only standard of human rights in Europe. The European Union, through its Court of Justice (ECJ), has developed a substantive body of human rights law since the late 1960s. It did so to complement the creation of a supranational space, the European Community. Its first fundamental rights cases were decided in response to the demand of the German Constitutional Court, which was not prepared to recognize the legitimacy of the ECJ’s decisions so long as they did not display a genuine commitment to human rights (“Solange principle”). Today, the ECJ’s commitment to human rights in an age of terrorism is exemplary.

A commitment to the rule of law, including international law, sends an important message to the whole world about the values for which a society is prepared to stand. While it is necessary, however, it is

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not sufficient. The Bush administration attempted to carve out locations where the rule of law would not apply; Guantanamo Bay is the most glaring example. In *Boumediene v. Bush*, the U.S. Supreme Court made clear that such internal limitations were not justified. Guantanamo Bay is part of the United States for constitutional purposes. Needless to say, this interpretation of the law belongs to the more outward-looking, European, worldview. It is no coincidence that Justice Kennedy, someone who has spent many years researching at the European Court of Human Rights joined the majority opinion.

In conclusion, Attorney General Mukasey’s admonition, “you must do law,” can only make sense if the concept of law to which one subscribes is underlined by a robust and extensive conception of the rule of law that knows no internal or external limitations.

II. THE RULE OF LAW AND THE CRIMINAL MODEL

The years following September 11 can be characterized with varying degrees of fear and hysteria in the United States. In contrast, after a number of terrorist attacks in London and Madrid, life resumed as usual with only a few minor changes in the legal system. These opposite reactions correspond to the different models on how to deal with the threat of terrorism. The United States opted for the emergency model, while Europe stuck to its criminal model of investigation.

Attorney General Mukasey’s rhetoric is more direct and disturbing in the second part of his speech. On eight occasions he scorns those lawyers who are risk-averse and exceedingly timid, praising instead, “aggressive lawyers who give sound, accurate legal advice.” Attorney General Mukasey describes the bravery of many people he personally witnessed at Ground Zero. An appeal to emotions, however, in order to create aggressive lawyers, risks playing down the faculty of reason. That reason is most essential when attempting to provide accurate legal advice.

Attorney General Mukasey’s words are akin to Angelo’s line, “we should not set up [the law] to fear the birds of prey.” In raising their voices against timid and moderate people, both men aim to raise the

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17 See id.
18 Mukasey, *supra* note 2, at 181.
20 See id.
21 Mukasey, *supra* note 2, at 182.
level of fear by suggesting that the community will perish if it does not respond aggressively. Once fear is instilled, the response to any threat is amplified. The strategies put forward are the result of collective hysteria rather than calm deliberation.

Both sides of the political spectrum have been caught up in this hysteria. To borrow Conor Gearty’s words, “[it is] depressing . . . how compliant to power liberal intellectuals can be even when they think they are being brave and radical.”22 What is really depressing is to observe brilliant constitutional lawyers arguing in support of side-stepping the constitution. Their fear is so great that it outweighs the document that symbolizes the United States itself.

Europeans have reacted very differently to these recent terrorist threats, largely as a result of their long history with terrorism. Terrorist attacks in Italy, the United Kingdom, Spain, and France have been fairly regular since World War II. The United Kingdom, for example, was confronted by terrorists in Northern Ireland; Italy was plagued by right- and left-wing extremists in the 1970s; and Spain suffered numerous terrorist attacks by Basque separatists. This long history has helped shape European counter-terrorism policies in recent years.

Another important difference is that terrorism in Europe is largely a threat from within. In the United States, it is perceived as an external threat. David Cole suggests that a threat from within is like a cancer, the remedy for which is to cure the illness and preserve the host.23 This is not the case for an external threat, for which the correct response is to obliterate both the disease and the host that nurtured it.

A particularly interesting comparison is the United Kingdom’s response to al Qaeda following its experience with the Irish Republican Army. Decades of conflict, which brought condemnation by the European Court of Human Rights, taught the United Kingdom that terrorism should be addressed within the established criminal justice system. In other words, the rules of the game cannot be changed. It is only through meticulous gathering of information and accurate criminal investigation that terrorism can be fought. This strategy proved itself when British police caught and brought to trial the people responsible for the London bombings of July 7, 2005. Like the United Kingdom, other European states relied on their existing criminal justice systems in the wake of terrorist attacks.

23 See Cole, supra note 19, at 71.
The fear created during the Bush administration has hindered such a response in the United States. The only way forward is to trust the institutions already in place. This includes criminal prosecution and all of the guarantees it provides for defendants. This may indeed create burdens for the government. Those burdens, however, exist for a reason, and great nations should be able to overcome them and not sidestep them by altering the laws. If the United States is able to do so, it will send a crucial message to the world: that in order to be a leader, one has to embrace the most difficult challenges.

III. Self-Defeating Rule of Law and the Fundamental Right to a Fair Trial

The Bush administration weakened and limited the rule of law by disregarding international treaties and advocating emergency powers. Having addressed the transatlantic divide regarding international law and the use of different legal models against terrorism, we can finally weigh competing imperatives of national security, human rights, and civil liberties. In order to do so, one must first distinguish between civil liberties and human rights, and then analyze each with respect to national security. The right balance is a matter of different variables; however, there is one human right that cannot possibly be lost in the balance: the right to a fair trial.

A. Human Rights and Civil Liberties

It is fairly common to distinguish between human rights and civil liberties. The latter guarantees that when the state regulates public or private life, it will respect individual freedoms. On this point the United States and Europe have divergent positions. Europe, for example, is far more restrictive of speech than the United States, especially when it expresses religious or racial hatred. The reasons for this divergence are a matter of history and local preference. European history shows that racial and religious hatred can become contagious and extremely dangerous, whereas the United States believes that free speech is the essential ingredient of democracy.

Human rights are not about how the state can regulate certain human activities; they are about how people should be treated. Generally, we say that humans should be treated with dignity. Although many disagree on a definition of dignity, it is not difficult to identify violations. Without providing a comprehensive list of human rights, one can intuitively say that they are important and therefore weigh heavily in the balance with national security and civil liberties.
Thus, while both civil liberties and human rights are very important, only human rights are universal and absolute, while civil liberties are relative and can be regulated. The way a state protects or curtails human rights and civil liberties sends a powerful message to other countries about the values for which it stands. It is in this context that it is possible to weigh national security vis-à-vis human rights and civil liberties.

B. National Security vs. Human Rights and Civil Liberties

Attorney General Mukasey states that issues of national security are critically important, explaining, “Lives, economic prosperity—our way of life—may hang in the balance.”24 While this may be so, information about threats to national security is often kept secret, making it difficult for the ethical lawyer to accurately weigh the competing imperatives of national security and civil liberties.

There are two principles that an ethical lawyer must follow in balancing the competing imperatives. First, the good faith requirement is the *conditio sine qua non* of any legal advice. Without it, the advice of a lawyer is at best unprofessional, and at worst criminal. When acting in good faith, lawyers can recommend actions that at first may seem objectionable from a legal and moral viewpoint. For example, some lawyers would—in good faith—prioritize national security in a way that restricts civil liberties.

The second principle is that the rule of law cannot be ignored, even in good faith. In other words, one cannot deny the most fundamental requirement of any legal system: the right to a fair trial.25 This does not mean that courts will automatically conclude that human rights should be prioritized over national security. It simply means that such a decision, made by the government, must be examined by a court of justice. When this is the case, the government and the lawyers who advised the government will have to produce the evidence that led them to reach that decision. It may well be that the decision is fully justified, in which case the individual petitioner will have to accept that in certain circumstances national security does trump human rights and civil liberties. In many other circumstances, however, it will be hard to justify such a decision, and it may well be that legal advice was given in bad faith.

24 Mukasey, supra note 2, at 181.

25 See generally Kadi, 2008 ECJ EUR-Lex LEXIS 1954 (holding in part that the ECJ will itself review decisions for violations of human rights).
The idea is that the balance between national security and civil liberties is the prerogative of the government, which must have some leeway as only it has the benefit of intelligence. If we are serious about civil liberties, we have to accept that they might be limited on grounds of national security. What we cannot accept is when the government limits those liberties on the basis of information that can never be scrutinized in a courtroom. Even if the government has a reason to limit civil liberties, it cannot possibly disregard the right to a fair trial, according to which the government has to present evidence to justify such restrictions. If it cannot provide such evidence, it has acted beyond its powers and should be held responsible for its unlawful restriction of human rights.26

CONCLUSION

Attorney General Mukasey acknowledges that criminal responsibility is a specter looming over the Bush administration, stating, “one even hears suggestions—suggestions that are made in a manner that is almost breathtakingly casual—that some of these lawyers should be subject to civil or criminal liability for the advice they gave.”27 Since President Bush has left office, the question of civil or criminal liability remains a very important one. It is deeply ironic that Attorney General Mukasey condemns those who want law to take its normal course. He implored good lawyers to be aggressive. Accordingly, if they believe that major breaches of the law were carried out, then they should argue for serious punishment.

Legal advice is unprofessional when it justifies the violation of legitimate individual interests protected by legal rights. In such cases, the government should redress the situation and pay damages. Furthermore, legal advice is criminal when legitimate individual interests protected by human rights are unjustifiably violated. In these cases, lawyers and officials who justified those practices should be found criminally responsible.

Let me return to Angelo, who applied the law as strictly as possible in order to combat sexual decadence in his city, only to fall himself into sexual temptation. Can we reasonably argue that his enforcement of the law was done in good faith? I believe that his behavior shows that it was not, and as such, he should be held responsible for the evils im-

27 Mukasey, supra note 2, at 183.
posed on other people. *Mutatis mutandis*, is it possible to justify an administration that breaches the law while pretending to uphold it? The answer is no. As lawyers you must do law, indeed. And you must be aware that if you breach the law and human rights you might be civilly and criminally responsible.