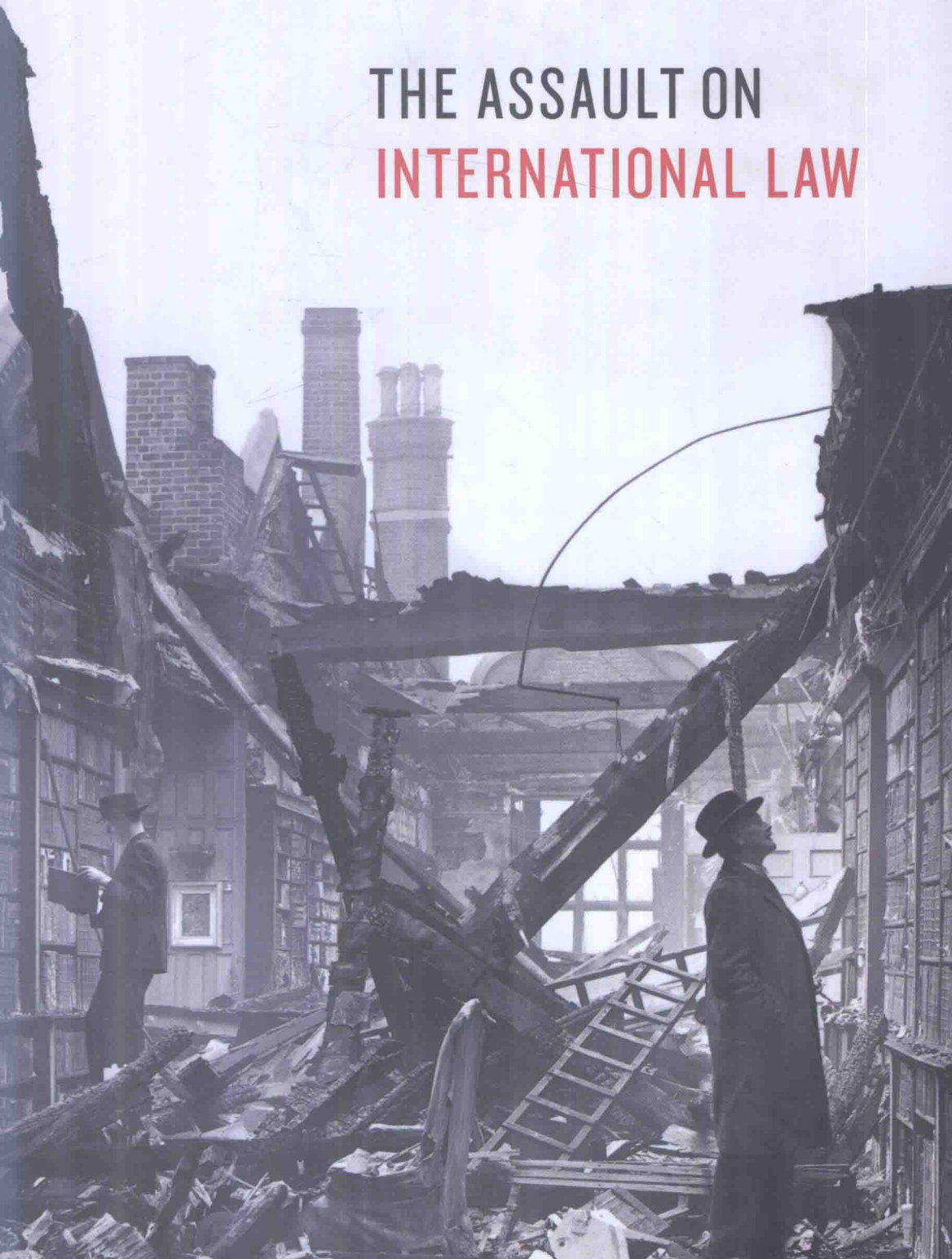


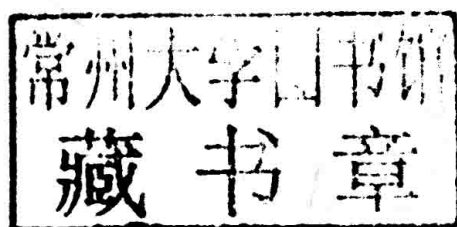
Jens David Ohlin

THE ASSAULT ON INTERNATIONAL LAW



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THE ASSAULT ON INTERNATIONAL LAW

For Nancy, Christopher, and Clara

PREFACE

Like many writing projects, this book quickly fell behind schedule. Although I had long since mapped out the core of its argument, in May 2013, I was hopelessly behind schedule, delayed by other writing commitments and distracted by the quotidian aspects of professional life.

Then, in June 2013, came a remarkable period of productivity. I took a brief vacation to Cape Cod with my wife Nancy and my daughter Clara. I awoke early each morning at 5:00 a.m., while my family slept; I fixed a pot of coffee and would start writing at a furious pace. In the space of seven inspired days, I wrote the crucial first stage of the book (chapter 4) that lays out the nuts and bolts of the philosophical argument upon which the entire project rests. Little did I know that during that week, amidst my bolt of creativity, something in my body was terribly amiss; I was in the process of getting very sick.

Back in Ithaca the following week, I put the finishing touches on chapter 4. I was pleased with the result, but I also felt exhausted. I couldn't climb a flight of stairs without becoming so short of breath that I wanted to collapse into bed. On Sunday morning, while fixing my daughter breakfast, I actually did collapse, losing consciousness and falling to the floor. Thankfully, my wife rushed me to the Emergency Room.

Upon my arrival at the ER entrance, the nurses slapped an EKG on my chest and read the results. A doctor appeared and told me that there was something seriously wrong with my heart. I was in

third-degree heart block, so the signals from the atria were getting lost before they could reach the ventricle and trigger a normal heartbeat. The doctors couldn't get my heart to beat faster than 29 beats per minute. "Why am I in heart block?" I asked my doctor. "I'm 39 years old and in perfect health."

"We have no idea," he said, "but you need a pacemaker and you need it now. We're prepping an OR and we're paging the implant team. If all of them call in, then we're a go for surgery in an hour." By lunchtime, I awoke from surgery with the latest pacemaker technology in my chest.

After a few days, they sent me home. I was wearing a sling because the doctors wanted my arm immobilized, and they didn't want me to move around too much. A pacemaker is implanted right above the heart with two wires that are jammed directly into the heart muscle. There isn't much to hold the wires into the heart, other than tiny surgical screws, and the doctors don't want the wires to get dislodged while scar tissue develops and solidifies the connection. So I sat on the couch and complied with their instructions to stay still.

With little to do, I wrote on my laptop. This began a period of immense productivity for the next two months. I proceeded quickly through the remaining chapters of the book, writing with speed, intensity, and inspiration. My writing provided a welcome distraction from my own health as well as from anxiety and fear about my condition. It was easier to think about the foundations of international law rather than the machine that was connected to my heart.

It was during this writing spasm that I received a call from one of my doctors, an infectious disease specialist who was consulting on my case. He told me that I had Lyme Disease. "The bad news is that you have Lyme Disease," he said. "The good news is that we can cure it with an antibiotic. And your heart abnormality was caused by the Lyme Disease. Once your Lyme is cured, we have every reason to believe that your heart will return to normal." Sure enough, over the next six weeks, my heart continued to improve. I slowly became less and less pacemaker-dependent. Eventually, I reached the point where my heart wasn't using the pacemaker at all. It was just sitting there.

At the beginning of October 2013, I finished the manuscript and sent it to my editor at Oxford, Dave McBride. The following morning, I drove to the hospital for a second surgery—this time to have the pacemaker removed. This ended the most productive summer of my scholarly career, though it is one that I'm not eager to repeat.

Ithaca, NY
October 2013

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I attended several conferences at the Center for Ethics and the Rule of Law (CERL) at University of Pennsylvania Law School, where Claire Finkelstein, Christopher Morris, Duncan MacIntosh, and David Gauthier deepened my understanding of rational choice theory. I also benefited from conversations on rational choice with my colleague Emily Sherwin, and from conversations on international legal theory with Lea Brilmayer.

Brad Wendel, Sid Tarrow, and Matt Evangelista read the entire manuscript and gave detailed reactions and suggestions that improved the book immensely. I am also grateful for the editorial stewardship of David McBride at Oxford University Press, Sarah Rosenthal, and my agent Jeff Gerecke.

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CONTENTS

Preface ix

Acknowledgments xiii

Introduction: Dramatis Personae 1

1 Gaming the Federal Courts 15

2 Presidents and Leviathans 49

3 The Attack: Misunderstanding
Rationality 89

4 Solving the Prisoner's Dilemma of
International Law 119

5 War as Cooperation 154

6 Reengaging International Institutions 189

Conclusion 227

Notes 231

Index 285

Introduction

DRAMATIS PERSONAE

When the hijacked airplanes hit the World Trade Towers on 9/11, John Yoo was working in his Justice Department office in Washington, DC. At the time, he was assigned to one of the most crucial legal departments in the federal government, the Office of Legal Counsel (OLC). Although he was an important lawyer in the administration of President Bush, Yoo himself was not well known outside of a close circle of Washington bureaucrats and policy wonks. He wasn't famous. But all of that would change very quickly.

Yoo had taken a leave of absence from Berkeley Law School to work for the Bush administration. His academic work had focused on constitutional law and foreign affairs, and he had earned a reputation for being a strong supporter of presidential war powers. According to Yoo, the president of the United States has virtually unlimited power as the constitutionally appointed commander in chief of the armed forces. Although Congress can play some role in times of war, Yoo had insisted in a series of law review articles that this role was secondary at best.¹ In times of crisis, presidential power always trumps congressional deliberation.

Before 9/11, Yoo's views were mostly of academic interest. His writings had attracted some skepticism among his law school colleagues, but prior to 9/11, his views were hardly part of the wider political discourse. All of that changed dramatically after the planes hit.

1. The Office of Legal Counsel

Within days, the White House was asking the OLC to answer a whole set of crucial legal questions: Could the president order the bombing of al-Qaeda training camps in Afghanistan? What type of congressional authorization was required before the president could use military force? Could the president use preemptive force to stop future terrorist attacks? Could the United States attack not just terrorist organizations but also the foreign states that harbored them? After the OLC answered yes to each of these questions, and President Bush ordered military attacks against al-Qaeda and the Taliban, a second round of no-less important questions were raised about the conduct of the war. Could terrorists be detained by the military, and did the Geneva Conventions apply to them? Could interrogators torture detainees to extract life-saving information about future terrorist attacks?

It was this last question that made Yoo famous. Yoo quickly researched the issue and concluded that it was both legally and morally permissible for interrogators to use coercive interrogation measures—and even outright torture—to induce a detainee to spill information that might save American lives. He drafted a memo that was sent to his superior who was then running the OLC, Jay Bybee, who signed the memo and delivered it to White House Counsel Alberto Gonzalez.² The memo was long and extensive and filled with scholarly looking footnotes, but the analysis was troubling and controversial. First, Yoo concluded that although the federal anti-torture statute did not define “severe pain,” a definition might be gleaned from a Medicare provision that allowed emergency medical services for cases of severe pain “capable of producing organ failure or death.” So, according to Yoo, interrogators could inflict as much pain as they wanted on a detainee, so long as it did not cause organ failure or death, and it would not be classified as torture under federal law.³

Yoo also argued in another memo that the Geneva Conventions, which prohibit torture during wartime, did not apply to al-Qaeda or Taliban fighters, so long as the president determined that neither group respected the laws of war. This determination was plausible

for al-Qaeda but was much more suspect with regard to the Taliban, and in any event, it was unclear why the president could unilaterally make this decision by fiat. Yoo also argued that the United States was not required to follow the Geneva Conventions because Afghanistan was a “failed state”—a legal nonentity under international law.⁴ According to Yoo’s argument, the Geneva Conventions embody reciprocal promises between nation-states. Since Afghanistan did not exist anymore, the Conventions were no longer in force between the United States and Afghanistan. With it went the legal protections afforded by the Conventions. Or so claimed John Yoo.

After the infamous “torture memo,” more legal research followed. The OLC concluded that al-Qaeda and Taliban fighters could be held indefinitely as enemy combatants and did not deserve POW status.⁵ The OLC concluded that the president alone could order captured fighters prosecuted before military commissions and that they could be denied access to federal courts to contest the lawfulness of their detention.⁶ Targeted killings, or what critics call assassinations, were approved. The National Security Agency was given the green light to eavesdrop on wiretapped conversations between American citizens and foreigners—even without a warrant—despite the fact that Congress had explicitly passed a law limiting this wiretapping to foreigners.⁷

Much of this legal strategy was hammered out by an informal group of lawyers, nicknamed the “War Council,” who met in the White House. In addition to Yoo, the group included White House Counsel Alberto Gonzalez, who reported directly to Bush, as well as David Addington, the top lawyer for Vice President Dick Cheney, and Defense Department General Counsel William Haynes.⁸ The group had no formal status, and its membership was not appointed by President Bush. Its authority stemmed only from the fact that Bush relied heavily on the advice of Gonzalez and Cheney, who were trusted confidants, especially on war matters. Cheney relied on Addington for legal analysis, and Addington listened to Yoo. By most accounts, the legal foundation for the War on Terror was developed by the War Council.⁹ Attorney General Ashcroft was noticeably absent from this group, and he apparently resented Yoo’s influence in the War Council.¹⁰ After all, Yoo worked at the Justice

Department and was supposed to report to him, not to Gonzalez or Addington.

In 2003, the top position at the OLC opened up after Bybee was nominated for a federal judgeship, and the War Council wanted Yoo promoted to lead the office. But Ashcroft objected and torpedoed the idea, fearing that the OLC, which was ostensibly located in the Justice Department, would effectively now report to Gonzalez and Addington.¹¹ Ashcroft claimed that Yoo was incompetent, and without Ashcroft's support, Yoo's candidacy went nowhere.¹²

So who would lead the OLC? Yoo suggested that his old friend Jack Goldsmith would be perfect for the job.¹³ Goldsmith, a young law school professor at the University of Chicago, had been working as a top legal adviser to Haynes at the Pentagon. Goldsmith and Yoo were friends and traveled in similar circles. In the relatively liberal crowd of law school professors, conservative lawyers provide mutual support for their endeavors. They join the Federalist Society in law school, clerk for the same Supreme Court justices (Rehnquist, Scalia, Thomas), and read drafts of each other's articles. Goldsmith and Yoo were no exception.

Yoo left the Justice Department to return to academia just as Goldsmith was taking over the helm at the OLC in 2003. The controversy surrounding Yoo's work there was only just beginning, because most of the memos written by Yoo were still confidential or classified.

Goldsmith enjoys an encyclopedic knowledge of constitutional law and its relationship with international law; while plenty of liberals disagree with his scholarship, everyone agrees that he has an impressive command of the law. But when Goldsmith got to the OLC, he was horrified by what he saw. Now that he was on the inside, he suddenly had access to all of the OLC memos written by Yoo and his colleagues since 9/11, only some of which he had seen during his time at the Pentagon. Goldsmith read the entire stack of memos and found them riddled with errors, unsupported conclusions of law, exaggerations, and fallacious arguments.¹⁴ He called the arguments cursory, one-sided, and legally flawed.¹⁵

What he would do next would ruin his friendship with John Yoo. Goldsmith went to his boss, Attorney General John Ashcroft,

and told him that the Yoo torture memo needed to be withdrawn. Although it sounds like a minor bureaucratic change, in fact, it represented a massive rejection of John Yoo and his tenure in government service. And it was also unprecedented. Not only had the OLC never withdrawn such a significant memo during the same administration, but they had never even done it after a *change* in administrations, when a new political party inevitably brings a new cohort of lawyers with a different ideological perspective on crucial questions of international law.¹⁶ Even then, the culture at the OLC was to respect precedent and the prior work of the department on matters of great significance.

Goldsmith's withdrawal of the Yoo memo was also something that could not be done quietly. Ashcroft had to inform the White House and every department in the executive branch that they could no longer rely on the legal advice in the torture memo. That meant informing everyone in the Pentagon and the CIA and deployed forces overseas. It meant Ashcroft admitting that the Justice Department had gotten it wrong, something that does not happen often in government. All of this made John Yoo look politically inept at best, legally incompetent at worst. Yoo would later write in his memoirs that Goldsmith and the new OLC lawyers were "too worried about the public perceptions of its work" and that they had caved to political pressure.¹⁷ Addington was furious that Goldsmith was undoing countless hours of legal strategy decided by the War Council.¹⁸

The next task was to actually rewrite the flawed memos. The new "torture memo" refused to define "severe pain and suffering" and declined to make the ridiculous analogy to the Medicare provision dealing with emergency medical services. Goldsmith also made sure to withdraw John Yoo's unsupported statements that the president could violate both international law and congressional mandates because the Constitution designates him commander in chief of the armed forces.¹⁹ All of it was gone. What was left was a far more cautious, and subtle, work of legal analysis.

Goldsmith had ruffled so many powerful feathers in his quest to reverse the Yoo mess that he decided to quit and return to teaching law school.²⁰ He had lasted only nine months as head of OLC

and didn't even have time to finish the new memos. But he set the revision process in motion and, in so doing, stood up to the worst excesses of the Bush administration and its shadowy War Council. He set the law back on track.

This is the standard story of what happened from 2001 to 2004, a crucial time in our nation's history when the government was formulating its response to terrorism and its posture toward international law. The United States had been attacked and had fought back, but in so doing, the nation's commitment to the rule of law was severely compromised. However, principled men and women like Goldsmith pulled us back from our darkest impulses; they saved the law itself.

This story, like all good stories, has a hero and a villain and a narrative arc that ties them together. Jack Goldsmith, still reliably conservative, comes across as careful, smart, and courageous for reversing the excesses of the first years of the Bush administration. And his actions were heroic because he sacrificed his relationship with John Yoo and annoyed many in the Justice Department and the White House to do it.²¹ Addington practically shook his fists in rage when he learned that Goldsmith was unwilling to issue a ruling that would back up a key anti-terrorism initiative. "The blood of the hundred thousand people who die in the next attack will be on your hands," Addington reportedly yelled at Goldsmith.²²

After less than a year, with the important work of righting the ship accomplished, Goldsmith left government service for the ivory towers of academia. Instead of returning to the University of Chicago Law School, he was offered a chair at Harvard Law School, a far more liberal academic environment than Chicago. Although his hiring was controversial and garnered some opposition by Harvard faculty, his supporters defended him on the grounds that Goldsmith was one of the "good guys."²³ He had gone in to a seriously dysfunctional OLC and cleaned up a legal and ethical mess. He was on the right side.

While Goldsmith was settling into his new office in Cambridge, things were not going so well for Yoo, who was back at Berkeley and readjusting to academic life. But his work in Washington was still haunting him. Ashcroft had agreed to launch an ethics investigation

into the torture memos, which was led by a separate division of the Justice Department responsible for investigating the conduct of government lawyers. Liberal critics of the administration were clamoring for Yoo and Bybee to be disbarred, and protestors were lining up outside of Yoo's lectures at Berkeley calling him a war criminal for being complicit in torture. Yoo was furious that Ashcroft was now pretending that he hadn't been involved in every step of the process, and Yoo was also bitter that Goldsmith had sold him out. "By refusing to defend its own logic, and pretending to distance himself from it," according to Yoo, "the administration only succeeded in eroding public support for the war against al Qaeda."²⁴

So the story has all of the essential characters. One villain, one hero, and a critical moment that defines each of them. Yoo learns about the planes crashing into the Towers and instantly resolves to provide the president with the legal superstructure to fight the War on Terror. An idealistic Mr. Goldsmith goes to Washington and confronts the cynical reality that law is polluted by politics. But in the end, idealism wins. The rule of law had been threatened by a Justice Department that was all-too-willing to sacrifice our most cherished values in order to vanquish our enemy; at the last moment, principled individuals stood up for the Law. And, in the end, Goldsmith and others like him saved us from our heart of darkness.

It is a great story, one that has been told in Goldsmith's memoirs and repeated in hallways across the country from DC to California. The only problem is that the story is fundamentally wrong. Not wrong in the sense of being a lie, but wrong in the sense that it paints a completely distorted picture of how the United States drifted so far from international law, and its institutions, since 9/11.

The ballad of Goldsmith and Yoo—hero and villain—focuses our attention on an intramural dispute between two central characters and, in so doing, diverts our attention from the bigger picture. The real story here is not the dispute and the fallout between Goldsmith and Yoo that almost cost Yoo his career, certainly cost the two men their friendship, but allowed Goldsmith to escape DC with his honor and reputation intact. The Goldsmith-Yoo story avoids the larger backdrop that unites both Goldsmith and Yoo and their fellow travelers in a common cause—the devaluing of international