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1-1-2007

Introduction to The Imperial Presidency and the Consequences of 9/11

Mark R. Shulman
Pace University School of Law, mshulman@law.pace.edu

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Recommended Citation
Shulman, Mark R., "Introduction to The Imperial Presidency and the Consequences of 9/11" (2007). *Pace Law Faculty Publications.* Paper 334.
http://digitalcommons.pace.edu/lawfaculty/334

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Introduction

MARK R. SHULMAN AND JAMES R. SILKENAT

Over the past five years, members of the Association of the Bar of the City of New York have produced an impressive variety of hard-hitting reports, letters, and briefs addressing issues arising out of the so-called "global war on terror." For the most part, these publications have taken positions critical of the U.S. government's conduct and of the legal justifications offered by the Administration of President George W. Bush. These critiques are nonpartisan. Lawyers from many political orientations—members of both major parties—have drafted and signed them. Rather, the authors of these materials represent the independent voice of the nation's largest and most influential municipal bar.

Lawyers are frequently maligned as being amoral guns-for-hire, willing to take any position that pays. And with America's adversarial legal system, we are thankful to have lawyers willing to take unpopular cases. Without them, freedom of expression and freedom of choice would be far narrower. Without them, many more innocent people would be imprisoned or even executed. Someone must defend unpopular or marginalized people or rights are diminished for each of us. Many lawyers represent the unpopular at their standard billing rates. Many defend those who cannot pay on a *pro bono* basis. Even beyond that, lawyers frequently dedicate their time to protecting the legal system as the embodiment of our republic's values. What lawyer jokes invariably ignore is the tremendous amount of work lawyers do on principle.

Bar associations around the country (indeed around the world) perform critical roles in channeling the creative and honorable impulses of lawyers. The City Bar is one of the largest and oldest in the nation, established in 1870. For a century and a quarter, its members have worked to channel the efforts of a diverse group of individuals into improving the law and its implementation. For much of its history, however, the City Bar worked without much recognition outside the somewhat rarified circles of its membership. As with many venerable and important institutions, that low profile was raised considerably during the tumultuous events of the late 1960s and early 1970s when its President, the distinguished corporate lawyer Francis T. P. Plimpton, asked, "Are our unobtrusive, calmly analytical committee reports adequate for our stormy present?"[1] Plimpton was wondering if the stately organization was effective at promoting the role of law in ways that would help the United States address the day's raging debates.

Plimpton answered his own question with a charge. "I submit that our expert committees should continue their hard working expert ways, but that they should be infused and all our membership infused, with a new sense of urgent and deeply felt concern at the crisis that confronts our legal institutions and law itself, and a new determination, in the long and high tradition of this Association, to seek out and steadfastly fight for the changes that can and should be made to meet the just demands of today and tomorrow. Let us be militant activists, militant activists for the constructive reform of the law we were founded to promote."[2] And this new activism did infuse the City Bar with a spirit of reform and justice. A few short months later, that spirit was put to the test.

In the spring of 1970 President Richard M. Nixon ordered U.S. troops to move from Vietnam into Cambodia to attack Communist sanctuaries. "The invasion of Cambodia set up a galvanic shock in the New York legal community," wrote Mr. Plimpton in a City Bar report. "Does the President of the United States have the right to start a new war? There had been no consultation with Congress," he noted.[3] Standing up for the rule of law and, in particular, the separation of powers that protects this Republic from descending into autocracy, Plimpton told lawyers gathered in the Association's Great Hall that when "the President ordered American troops to invade Cambodia, he was acting on his own, in blithe and unilateral disregard of the Congress, which under the Constitution has the sole right to declare war."[4]

Plimpton decried this act as a threat to the Constitutional order. The "fact remains that the result of the President's action was a new war, war in another country, war by unilateral Presidential fiat, war without Congressional consultation, without Congressional authorization and without Congressional support."[5]

And with that conclusion, Plimpton (a Republican who embodied the legal establishment) led a "march on Washington," but not just any march on Washington. On May 20, 1970, some 1,200 lawyers from leading New York firms—many on chartered cars on the 6:30 train—invaded the nation's capital. Dividing into some 150 teams of six or seven people dressed in their corporate finest, the lawyers met with lawmakers and other high-ranking officials. Plimpton's first appointment, Senator Sam J. Ervin, Jr. (D–NC), stood him up. But after meeting with a full house of Washington lawyers, Plimpton called on the U.S. Solicitor General, his old friend Erwin Griswold. Griswold in turn arranged for Plimpton to discuss the legality of the war with U.S. Attorney General John M. Mitchell and then with Under Secretary of State Elliott Richardson.[6] With this sort of lobbying, the leading members of the preeminent bar were deploying their reputations, their time, and their wits in order to promote greater adherence to the spirit and the letter of the law.

Over the quarter of a century that followed, hundreds of lawyers have worked to live up to Francis Plimpton's spirit of reform and justice. When planes crashed into the Twin Towers of New York's World Trade Center on September 11, 2001, members of the Association sprang into action—not chasing ambulances as the cynic might suggest but running in advance of them to rescue the wounded and distraught. In the months that followed, the Association also served as a clearinghouse for assistance both to lawyers and to those who needed lawyers.

Equally as important, members of the Association have continued to devote countless hours to research and write the kind of "expert reports" that Plimpton spoke of two decades before. Such work has been done both by the City Bar on its own and in cooperation with the American Bar Association House of Delegates, particularly through the ABA Sections of Criminal Law, International Law, and Individual Rights and Responsibilities. The Association's Committee on Military Affairs issued the first of these reports within a few months after 9/11. This report decried the impact of President George W. Bush's Military Order of November 13, 2001, regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against

Terrorism." This report contained a timely and prescient analysis of an issue that continues to plague us years later. The Association's interest in ensuring that the Administration (the United States) not carve out areas beyond the law has subsequently resulted in several other significant publications by the Association, including two amicus briefs to the U.S. Supreme Court, letters to the General Counsel and the Inspector General of the Department of Defense, and three important committee reports. The most recent of these reports broke the story nationally about how the U.S. is engaged in "Torture by Proxy" by removing detainees to other jurisdictions in order to facilitate inhumane interrogations. International media picked up and ran with this information, but the practice may still continue, despite the remarkable work of the Association and a strongly worded letter from the President of the Association to Congress seeking to end U.S. involvement in these abhorrent practices.

By the summer of 2002, the Association's Committee on International Security Affairs found itself facing another of Plimpton's issues: whether the President has the authority to order the invasion of a sovereign state without an act of Congress? Just as the Association had concluded in 1970, the Committee argued persuasively that he has not.

More recently the Association has also been working to ensure that lawyers who have counseled the government poorly be held accountable for their advice. These efforts are reflected in the letter to the leaders of the Senate Judiciary Committee in connection with the nomination of the General Counsel of the Defense Department for a seat on a U.S. Court of Appeals.

The Association's vigilance on rule of law issues after 9/11 has drawn its members into some unpredictable areas. One traditional role for the Association is to comment on legislation proposed either by the U.S. Congress or by the state legislatures. One recent bill proposed using antiterrorism laws to deter (or punish) protestors against the inhumane treatment of animals in a slaughterhouse. This may sound far-fetched, but similar laws have actually been enacted in California and Oklahoma.

The important work of the Association continues on terrorism and rule of law issues, but after five years, it seems like an appropriate time to collect its contributions to this important work into one book. If the reports were an early draft of history, this work may be considered a second draft and useful resource for the history of the years following 9/11. Over the course of American history, wartime administrations have frequently overstepped the legal boundaries. During the Quasi War with France, President John Adams sponsored the notorious Alien and Sedition Acts. Facing all out Civil War, Abraham Lincoln suspended the writ of *habeas corpus*. Managing the United States' efforts during the catastrophic First World War, Woodrow Wilson jailed dissenters for speaking out, including one man who had received nearly a million votes in the 1912 Presidential election. In the panic of the Second World War, Franklin Roosevelt's Administration was responsible for the odious internment of tens of thousands of Americans of Japanese descent. And Vietnam era Presidents had their intelligence agencies collect information on U.S. citizens who were opposing the wars in Southeast Asia.

And yet, from each of these missteps, the nation's legal system rebounded after the war ended. By the time of the Presidential campaign of 1800, boisterous dissent had returned to American politics. Immediately after the Civil War, the Supreme Court ruled that Lincoln was wrong to suspend the most essential writ. President Warren G. Harding had ordered Eugene V. Debs released from prison early. The United States apologized to its *Issei* and *Nisei* brethren and offered reparations. And the intelligence community was ordered not to conduct surveillance of U.S. persons. Unlike previous wars, however, the struggle to defeat global terrorism is one that may not end soon or neatly. Therefore, our legal system cannot wait until the danger has completely passed before righting some of its wrongs. And these historical lessons seem oddly

relevant as dissent is squashed, ethnic minorities interned, and domestic surveillance once is again in the government's toolkit.

The pendulum may already have swung back. Two weeks after the Association's Committee on International Security Affairs released its war powers report, President Bush did an about-face and sought Congressional authorization to invade Iraq. In 2004 the Supreme Court found, with the Association's *amici* brief, that the detainees at Guantanamo Bay were not beyond the reach of the law. Two years later, the Court found the President's military tribunal to be unconstitutional. And New York will not use a "terrorism statute" to jail animal rights protestors for photographing poultry factories.

We hope that this book proves useful in explaining how the rule of law fosters the national interest in stability and security, while helping to maintain a sphere of individual liberty. We also hope that this book illustrates the constructive role that civilian lawyers can play in the political process, helping to explicate the law—its objectives and its implications. And in the end, we hope that this book will encourage young lawyers to follow in Francis Plimpton's footsteps, using their skills to serve their neighbors, their country, and their world, as well as their paying clients.

NOTES

1. Francis T.P. Plimpton, "Centennial Convocation of the Association of the Bar of the City of New York" (February 17, 1970) reprinted in Pauline Ames Plimpton ed., The Plimpton Papers: Law and Diplomacy (1985) 75 at 77

2. *Id.*

3. Report cited in Pauline Ames Plimpton ed., The Plimpton Papers: Law and Diplomacy (1985) 85.

4. "Meeting on Military Action in Southeast Asia at the House of the Association—May 19, 1970" quoted at length in Pauline Ames Plimpton ed., The Plimpton Papers: Law and Diplomacy (1985) 85 at 86.

5. *Id.* at 86–87.

6. *Id.* at 88–89. The fact that he was a registered Republican opposing the actions of a President from the same party gave ome considerable credibility to Plimpton. To many, Plimpton embodied the Establishment. Born to a wealthy publisher who had descended from very early English settlers in Massachusetts, Plimpton had been educated at Exeter, Amherst and Harvard Law School. Along with Eli Whitney Debevoise and William E. Stevenson, in 1933 he founded the firm that eventually became Debevoise & Plimpton LLP. Over the decades, he built and maintained an extensive network of leaders. His old friend Solicitor General Griswold had been Dean at Harvard Law School, and Under Secretary (later Attorney General) Richardson served with Plimpton on Harvard's governing Board of Overseers.