the weekly Standard

IT'S THE ECONOMY, STUPID
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KANGAROO COURT

The International Criminal Court 'Outlaws' Aggression

BY JEREMY RABKIN

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Angela Marie (Bay) Buchanan
37th Treasurer of the United States of America
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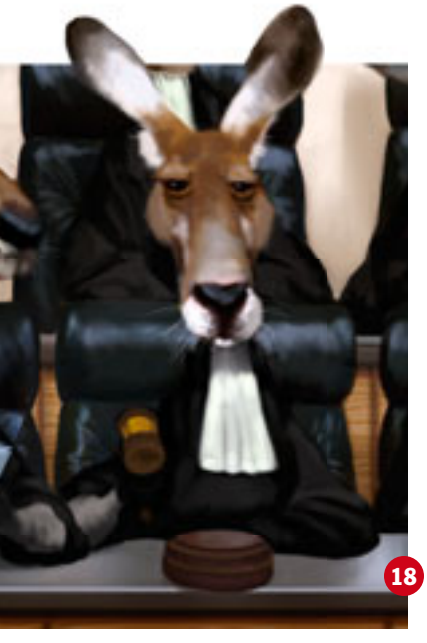

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COVER BY THOMAS FLUHARTY

Excuses, Excuses

When liberals get in trouble, it's never their fault. Two fresh examples: President Obama and the Senate. Obama's poll numbers have dipped at a record pace. He's now under water, his performance as president more disapproved than approved. But wait! Obama isn't to blame. Todd Purdum explains in *Vanity Fair* that Washington is "broken." The presidency is under too much pressure. "The modern presidency . . . has become a job of such gargantuan size, speed, and complexity as to be all but unrecognizable to most of the previous chief executives," Purdum writes.

And try as the White House might, it can't tamp down even a minor story by ignoring it. "The story will get blown up anyway," an Obama aide tells Purdum, "and you simply have to respond." And there's not enough time in the day for the president . . . Well, you've heard all this before. It's the too-big-for-one-person excuse first trotted out decades ago to minimize the stumbling and bumbling of Jimmy Carter. It didn't boost Carter's approval rating, nor is it likely to jack up Obama's. But come to think of it, that excuse has the ring of truth. The presidency was a job too big for Carter—and it may be for Obama as well.

Then there's the Senate, where Democrats have a whopping majority, 59-41. Guess what? It's broken too, plus "sclerotic, wasteful, unhappy." But not because Majority Leader Harry Reid or other Democrats have erred, according to George Packer in the *New Yorker*. Republicans, led by Minority Leader Mitch McConnell, are the source of the brokenness. "Under McConnell, Republicans have consistently consumed as much of the Senate's calendar as possible with legislative maneuvering," he writes. "The strategy is not to extend deliberation of the Senate's agenda but to prevent it."

But the Senate doesn't have an agenda. There's only a very liberal Democratic agenda. Packer laments it took 18 months for the Senate to pass health care and financial regulation measures and "nearly destroyed the body." He fails to mention a majority of Americans vigorously opposed the health care bill (nearly 60 percent favor repeal). Nor does he note, even in passing, that Democrats rejected meaningful compromise with Republicans on both health care and financial regulation. That's why Republicans filibustered both bills: to force Democrats to compromise.

The bipartisanship promised by Obama? It was a no-show. "One of the mysteries of the Senate is how Mitch McConnell has been able to keep his members in line," Packer writes. But that's no mystery at all. The reason is heavy-handed Democratic partisanship. He also writes, "Climate change joined immigration, job creation, food safety, pilot training, veterans' care, campaign finance, transportation security, labor law, mine safety, wildfire management, and scores of executive and judicial appointments on the list of matters that the world's greatest deliberative body is incapable of addressing."

How could this happen? Simple. The public is in revolt against Obama, Democrats, and liberal legislation. Since Packer is oblivious to this, he casts no blame on Obama or Democrats. Perish the thought. ♦

The placement of this ad in the *Washington Post* seems a bit dubious.

What's the Matter With Thomas Frank

The Scrapbook was perusing the *Wall Street Journal* the other morning and somewhere in the middle of the Opinion page noticed this sentence: "This is my last weekly column for the Wall Street Journal . . ." We were hooked.

Of course, a columnist can only write one essay with such an arresting opener, so that may well be the last thing The Scrapbook ever reads by its author, Thomas Frank. Recruited in 2008 as a successor to Al Hunt, Frank

was presumably hired to offer routine contrast to the *Journal*'s (generally) conservative editorial pages. It was, by any measure, a bold choice: Frank had gained some renown with the publication of *What's the Matter With Kansas* (2004), in which he lamented the fact that the working-class voters of his native state, by supporting Republican candidates, voted (in his view) against their own interests. It was a provocative thesis, supported with the apparatus of a doctorate from the University of Chicago, but tinctured (in The Scrapbook's opinion) with an ill-disguised contempt for the electors of Kansas, and a full-throated hostility to conservatism, as a guiding principle, and to conservatives as human beings. The title of his next book, *The Wrecking Crew: How Conservatives Rule* (2008), neatly summarized his thesis.

Conservatives are often accused of intolerance, but it has been The Scrapbook's experience, especially recently, that the left is the real province of incivility on the battleground of ideas. Unfortunately, Thomas Frank, in the pages of the *Journal*, soon became Exhibit A. Not content with a reflexive partisanship and pidgin Marxism, Frank challenged conservative ideas by consistently deriding them, without elaboration, and speaking scornfully—sometimes in surprisingly ugly terms—of people who identify themselves as conservatives. This is the sort of behavior that might be expected if Frank had been holding forth at a dinner party or preaching to the choir in the pages of, say, the *Nation*. Readers of the *Wall Street Journal*, who might be interested in hearing what the other side thinks, or would appreciate a trenchant critique of this or that doctrine, soon learned that there was nothing to be learned from reading Thomas Frank.

Indeed, The Scrapbook is reminded of this trend by the recent behavior of Paul Krugman, the Princeton economics professor and Nobel laureate who writes a column in the *New York Times*. Krugman decided last week to evaluate Republican representative Paul Ryan's comprehensive plan to overhaul federal spending and reduce taxes. And how did he do so? By ignoring the details of Ryan's proposal, misrepresenting his words and actions, and referring to the congressman as a "flimflam man," a "fraud," and a "dope." For this an innocent *Times* reader should pay two dollars? ♦

MICHAEL RAMIREZ

Sentences We Should've Avoided

"Then orders for [*Original Plumbing* No. 2], an unfinished issue vaguely themed around hair (body hair being a particular concern for people taking testosterone, as many transmen do), and including an interview with Margaret Cho, a supporter of the transgender community, began coming in at a pace that somehow crashed the magazine's PayPal account." ("Giving Voice to the Once-Silent," *New York Times*, August 12). ♦

Congress's Mad Libs

Democrats were in such a hurry to pass their latest giveaway to the public employees unions—$26 billion in "emergency aid" to the states—that they forgot to name the bill allocating the new stimulus funds. For a while, it seemed the legislation, passed by 247-161 in the House and 61-39 in the Senate, would be known as the "_____ Act of _____" (H.R. 1586).

Which got us thinking: Why stop there? Below, we've taken two paragraphs of the law and inserted blanks in place of certain nouns and verbs.

Your task, dear reader, is to follow the prompts after the blanks to create your own version of H.R. 1586.

If you'd like to share your effort with The Scrapbook, visit http://weeklystandard.com/blogs/congress-mad-libs, copy the text posted there, paste it into an email message, and send your entry to scrapbook@weeklystandard.com. Include your mailing address, and you will receive a free bumper sticker ("Don't Blame Me—I Read The Weekly Standard"). The Scrapbook's (PG-rated!) favorite will enjoy fame and a free, squeezable, stress-relieving ObamaHead. It's just like a round of Mad Libs—which, come to think of it, is a pretty good description of the 111th Congress. ♦

The "_____ Act of _____"
(H.R. 1586)

Begun and held at the City of _____ ***(PLACE)*** on Tuesday, the fifth day of January, two thousand and ten

AN ACT

To _____ ***(VERB)*** the _____ ***(ADJECTIVE)*** _____ ***(BODY PART)*** control system, improve the _____ ***(NOUN)***, reliability, and availability of _____ ***(NOUN)*** by air in the United States, provide for _____ ***(VERB ENDING IN -ING)*** of the air traffic _____ ***(ADJECTIVE)*** _____ ***(NOUN)***, reauthorize the _____ ***(BODY PART)***, and for other _____ ***(NOUN, PLURAL)***….

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Lucky Losers

More than any other sport, professional tennis is a caste system. The top players are invited to tournaments as "seeds." Players with lower rankings apply for wild cards or exemptions into the field. Further down the food chain are players who must participate in "qualifier" tournaments—the winners of which are also given entry into the main draw.

And then there are the untouchables. In most tournaments one or two players withdraw at the last minute owing to injury or exhaustion. Their vacant slots are then given to players who lost in the final rounds of the qualifying tournament. These players are called "lucky losers."

The older I get, the more taken I am with lucky losers and the sport's other also-rans.

Obscure tennis pros are still astonishing athletes. I watch them up-close every summer when the Association of Tennis Players World Tour comes to Washington. While most of the crowd goes to the stadium for the glamour matches, I like to wander the outer courts enjoying the lower-ranked guys. They have massive groundstrokes and booming serves, just like the big boys, and they're preternaturally fast and coordinated, too.

But their daily existence is closer to yours and mine. Roger Federer makes many million dollars a year, flies on a private plane, and divides his time between a house in Zurich and a high-rise in Dubai. The gentleman currently ranked #100 in the world—he's no slouch—might make $200,000 by the end of the 2010 season. Figure in taxes and expenses, and his take-home pay is probably closer to $80,000. (Tennis players are not unionized like baseball, football, or basketball players. Thus, they have no minimum salary requirements or pensions, like those jocks, and are paid as independent contractors. Also, unlike athletes in those other sports, tennis players pay for their own coaching, travel, and equipment.) Outside of the highest caste, most tennis players make a living somewhere between that of a good plumber and a mediocre lawyer. For the lucky loser, tennis isn't a winning lottery ticket. It's a job.

It's this work-a-day quality that makes the journeymen players so interesting. Last week I saw Marcos Baghdatis, a wonderful 25-year-old from Cyprus. Stocky and round-shouldered, he doesn't look like much. But he's surprisingly fast, and his forehand is a sledgehammer. It's a pleasure to watch him work.

DAVID GOTHARD

By any standard, Baghdatis has had a fine career. He's won four minor tournaments; in 2006 he made it to the finals of the Australian Open. He's been a top-50 player for the most part, though he was once ranked eighth in the world. He also has asymmetric fame: He might be the most recognizable man in his country, yet he could walk into a Starbucks anywhere else with total anonymity.

Baghdatis's frequent doubles partner is a Frenchman named Richard Gasquet. He was in Washington last week, too, and, as usual, his luck was rotten. His game is so fluid that he looks like a cyborg tennis machine from the future. As a junior, he was #1 in the world and marked for great things. The problem, as I see it, is that he doesn't like playing tennis.

To watch a Gasquet match is to witness tragedy. He glides around the court hitting brilliant shots and then, between each and every point, looks glumly down at his racket, as if he'd rather be in a Turkish prison. And whenever the sledding gets tough, Gasquet heads for the exit. Ranked 40th in the world, he dropped a tight first set early this month to a 28-year-old who's ranked 321st. Gasquet promptly retired from the match and hopped the first flight out of Washington. That's just his way.

My favorite lucky loser is Vince Spadea. For most of his career, Spadea bounced around the top-100, reaching a career-high ranking of #18. The most notable thing about him is that in 2000 he endured a 21-match losing streak.

Tennis isn't baseball, where long losing streaks are part of the natural course of events. To lose 21 straight means that you lost in the first round of 20 consecutive tournaments. Each tournament takes a week. Which means that even with a full playing schedule, Spadea—who is so good that there are not more than 100 people on the planet better at tennis than he is—went more than half a year without winning a single match.

Yet he kept going to work. Anyone who trades in even an amateur level of self-hatred will be mystified and awed by that accomplishment. Contextualizing failure is the most important skill we learn from sports. The lucky losers understand this better than anyone.

Jonathan V. Last

You deserve a factual look at . . .

The Deadly Threat of a Nuclear-Armed Iran

What can the world, what can the USA, what can Israel do about it?

Iran's president, Mahmoud Ahmadinejad, has declared publicly – not once, but repeatedly – that Israel must be "wiped off the map." That effort, the destruction of Israel, seems to be the main goal of Iranian policy. When Iranian missiles are paraded through the streets of Tehran, the destination "to Jerusalem" is clearly stenciled on them.

What are the facts?

A death wish for Israel. Ahmadinejad and the ayatollah who is the "supreme leader" have publicly mused that one or two nuclear bombs would obliterate Israel, but that, though it would cause devastating damage and millions of casualties, Iran would survive Israel's retaliatory attack. Iran is a huge country, with about 60 million inhabitants, so they are probably correct. And who can doubt that those religious fanatics would not hesitate to allow the destruction of much of their country and to sacrifice a third or even one-half of their population in order to eliminate the hated Jewish state. When our country was entangled with the Soviet Union in the bitter 40-year long "cold war," with both sides having sufficient nuclear weapons to destroy the opponent's country and its people, things were kept in place by MAD – Mutually Assured Destruction. However "evil" the leaders of the Soviet Union (the "Evil Empire") may have been, there was one great consolation and assurance: They were not crazy. But the Iranians and other Muslims are crazies, as we understand the concept. Because they take instructions directly from Allah, who tells them to kill the Jews and other infidels, whatever the cost.

> "An attack on the Iranian nuclear installations would fall under the heading of "anticipatory self-defense," recognized and sanctioned by international law and by common sense."

Israel has no problem with Iran. They share no borders and have no territorial dispute. In fact, they face common Arab enemies and should be natural allies, as they indeed were under the Shah. Iran's death wish for Israel is based entirely on religious fanaticism. In contrast even to the intractable North Koreans, the determination of the Iranians is immutable. It cannot be changed by persuasion, by diplomacy, by sanctions or by threats.

Once Iran is in possession of nuclear weapons, it will not only be a deadly danger to Israel, but to all of the Middle East and to virtually all of Europe. The flow of oil from the Middle East, the lifeblood of the industrialized world, would be totally under its control and so would be the economies of all nations of the world, very much including the United States.

What is to be done? In 1981, then prime minister of Israel Menachem Begin, being aware of Iraq's nuclear ambitions and looming realization of those ambitions, decided that its nuclear reactor at Osiraq had to be destroyed. The IAF (Israeli Air Force) accomplished that in a daring and unprecedented raid. Iraq's nuclear capability was eliminated in one stroke, never to rise up again. Israel had done the world an enormous service. Had it not been for Israel's decisive action, the Iraqi conquest of Kuwait and, without question, also of Saudi Arabia and its enormous oil fields, and, for that matter, of Iran, could not have been prevented. Saddam Hussein would have been the ruler of the world.

The solution to the deadly threat that Iran poses to the world is obvious. Of course, diplomacy and persuasion, threats and promises, sticks and carrots – every possible means short of military action – should be used until it becomes clear even to the most obdurate that nothing can deviate Iran from its chosen path of becoming a nuclear power and to dominate the Middle East.

There is reason to believe that the people of Iran, especially the young people, oppose the oppressive and theocratic regime of their country and are hostile to the mullahs who control everything. But the government has the tools of power firmly in its hands. It controls the instruments of coercion – it can kill people and it controls the oil money. While it would be most desirable and in the interest of the world to be able to foment an overthrow of the Iranian regime, that is an unrealistic and unattainable prospect.

Regrettably, there is only one solution to the terrible dilemma confronting the world, the unacceptable danger of a nuclear-armed Iran. The terror, the destruction and the 60 million dead of World War II could have been prevented at several times during the Nazi regime. But the Allied powers, under the leadership of Britain's prime minister Neville Chamberlain, opted for appeasement and for "peace in our time." We cannot afford to make that same mistake again. The world must give Iran an ultimatum: Desist immediately from the development of nuclear weapons; if you do not, we shall destroy the facilities that produce them. There still is a window of opportunity to do that. That window may close very soon. But who would do the job? The United States would be the obvious choice. But if the United States were in accord, Israel could do it, just as it did the job in 1981 in destroying Iraq's nuclear potential once and for all.

An attack on the Iranian nuclear installations would fall under the heading of "anticipatory self-defense," recognized and sanctioned by international law and by common sense. Nobody really knows for sure how far Iran is from reaching its goal — six months. six years? The experts disagree. But if Iran is not stopped now, it may well be too late not very long from now.

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the weekly Standard

Collapse

The left has collapsed.

Its political support has collapsed. Public opinion polls point to a historic repudiation of the president and the Democratic party this fall—something on the order of a 60-seat Republican gain in the House. The GOP has an outside shot at taking the Senate as well.

Its claim to intellectual integrity has collapsed. Paul Krugman—Ivy League professor, *New York Times* columnist, and Nobel laureate (the holy trinity of the liberal establishment)—has humiliated himself with a startlingly dishonest attack on Paul Ryan's budget proposal. Krugman, called out by Ryan, rebuked by honest analysts, and unwilling to concede his errors, has retreated into uncharacteristic abashed silence.

Its Leninist discipline has collapsed. Last week, White House press secretary Robert Gibbs complained about the craziness of the "professional left" in the punditocracy. "Those people ought to be drug tested," Gibbs explained. "They will be satisfied when we have Canadian health care and we've eliminated the Pentagon. That's not reality. . . . They wouldn't be satisfied if Dennis Kucinich was president." Members of the professional left hit back at Gibbs, dubbing the Obama White House the "amateur left."

Its democratic credibility has collapsed. In recent weeks, the left has the arbitrary rulings and sophistic arguments of federal judges who have overturned an immigration statute that mirrors federal law passed by the state legislature in Arizona, and a constitutional amendment, defining marriage as it has been defined for all of American history, enacted by the citizens of California. The left has also heaped praise on New York mayor Michael Bloomberg, as he, having bought his way to a narrow reelection, showered disdain and contempt on the majority of his fellow New Yorkers who object to a mosque next to Ground Zero.

And its good humor (such as it was) has collapsed. As *Politico*'s Ben Smith reported last week,

> the Agenda Project, a new, progressive group with roots in New York's fundraising scene and a goal of strengthening the progressive movement, has launched the "F*ck Tea" project, which is aimed, the group's founder Erica Payne wrote in an e-mail this morning, "to dismiss the Tea Party and promote the progressive cause."
>
> "We will be launching new products in the next several months to help people all over the country F*ck Tea," Payne told *Politico*.

Is Erica Payne a loony nobody? No, she's a lefty somebody—a former Democratic National Committee official, a veteran of many progressive groups, and one of the founders of the Democracy Alliance, the group of big donors who have spent over $100 million to fund "progressive" organizations like the Center for American Progress.

Payne says she launched her effort to push back against "the rhetoric over results paradigm that is holding our country hostage." She wasn't being ironic. As the estimable Allahpundit commented, "Because, you see, if there's any movement that's about results over rhetoric, it's clearly the f*ck tea movement."

The "f*ck tea" movement—that's what the left has come to. They can't defend the results of Obama's policies or the validity of Krugman's arguments. They know it's hard to sustain an antidemocratic ethos in a democracy. They realize they've degenerated into pro-am levels of whining and squabbling. So they curse their opponents.

There's a familiar saying that, despite its religious origins, has usually been associated, presumably because of its odor of condescension and smarminess, with the modern left: Better to light a candle than curse the darkness.

Especially if you're not cursing darkness, but rather your fellow citizens. In a recent poll of likely voters, 54 percent strongly or somewhat supported the Tea Party movement, with 38 percent strongly or somewhat opposed. In another poll, of all adults, the movement did have a slightly negative image (30 percent positive, 34 negative)—but it was considerably better than the image of either the Democratic or Republican party.

So, those of us from the pro-Tea Party wing (dare I say the pro-American wing?) of the American public need not respond to the left in kind. We choose the high road. We choose—yes—to light a candle! We choose to ignore the

left's sad vulgarity. We choose cheerful doggerel. We say to Erica Payne and Robert Gibbs and Paul Krugman:

When you're feeling sad & blue
And have no clue what to do
Sit down and have a cup of tea
And a hug or two or maybe three.
Feel those troubles melt away
And start you on a better day.

—*William Kristol*

It's the Economy, Stupid

Barack Obama understands that it's bad economics to raise taxes in a recession. It's "the last thing you want to do," he said almost exactly one year ago.

In early August 2009, the president visited Elkhart, Indiana, to tout his $862 billion stimulus plan. Less than 20 percent of the stimulus had been spent and White House officials, infused with Keynesian confidence, were bullish about a strong recovery. NBC's Chuck Todd talked to Obama about the recovery and posed a question submitted by an Elkhart resident named Scott Ferguson. "Explain how raising taxes on anyone during a deep recession is going to help with the economy."

Obama was blunt: "Well—first of all, he's right. Normally you don't raise taxes in a recession, which is why we haven't and why we've instead cut taxes. So I guess what I'd say to Scott is—his economics are right. You don't raise taxes in a recession. We haven't raised taxes in a recession."

Todd interjected: "But you might for health care. You might for the high—for some of the wealthiest."

Obama responded:

> We have not proposed a tax hike for the wealthy that would take effect in the middle of a recession. Even the proposals that have come out of Congress—which by the way, were different from the proposals I put forward—still wouldn't kick in until after the recession was over. So he's absolutely right, the last thing you want to do is to raise taxes in the middle of a recession because that would just suck up—take more demand out of the economy and put businesses further in a hole.

Technically, a recession is two consecutive quarters of negative growth. The United States emerged from its latest recession in the third quarter of 2009, when GDP grew at 1.6 percent. The economy grew over the next three quarters—at 5.7 percent in the fourth quarter of 2009, at 3.7 percent in the first quarter of 2010, and at 2.4 percent in the second quarter.

But growth is slowing. In mid-July, the *Washington Post*'s Neil Irwin wrote that the "bottom is falling out of analysts' estimates of how fast the economy grew from April to June," as several forecasters projected that the original 2.4 percent estimate would be revised downward. Last week, first-time jobless claims rose unexpectedly, and the Department of Commerce reported a trade deficit of $49.9 billion—much higher than analysts had anticipated.

Last week, the Federal Reserve affirmed what had become increasingly obvious: Economic growth "has slowed in recent months." The Fed warned "the pace of economic recovery is likely to be more modest in the near term than had been anticipated." The economy grows at approximately 3 percent on population growth and productivity improvements alone, so levels of growth below that are effectively negative. Concerns about a double-dip recession, once voiced primarily by professional skeptics, are on the lips of pretty much everyone these days. And prominent economists have said that allowing all the Bush tax cuts to expire could cost the U.S. economy a further 1 to 3 percentage points next year.

All of which presents a difficult question for the White House: If it is bad economics to raise taxes in a recession, is it wise to do so in a stagnating economy?

The obvious answer is no. But inside the White House gates it's still the "Summer of Recovery." Treasury Secretary Timothy Geithner told NBC's David Gregory last month that he does not believe we're headed toward a double-dip recession. And while he acknowledged that the recovery could take a while, he was quite optimistic. "You are seeing recovery. You're seeing private investment expand again, job growth starting to come back." When he was asked specifically about raising taxes on top income earners, as is scheduled to happen on January 1, 2011, Geithner said, "The country can withstand that. The economy can withstand that. I think it's good policy."

It was an interesting word choice: "withstand" a tax hike? So the U.S. economy is strong enough to endure the additional constraints the Obama administration wants to place on it in pursuit of its redistributionist goals? This is the triumph of ideology over economics.

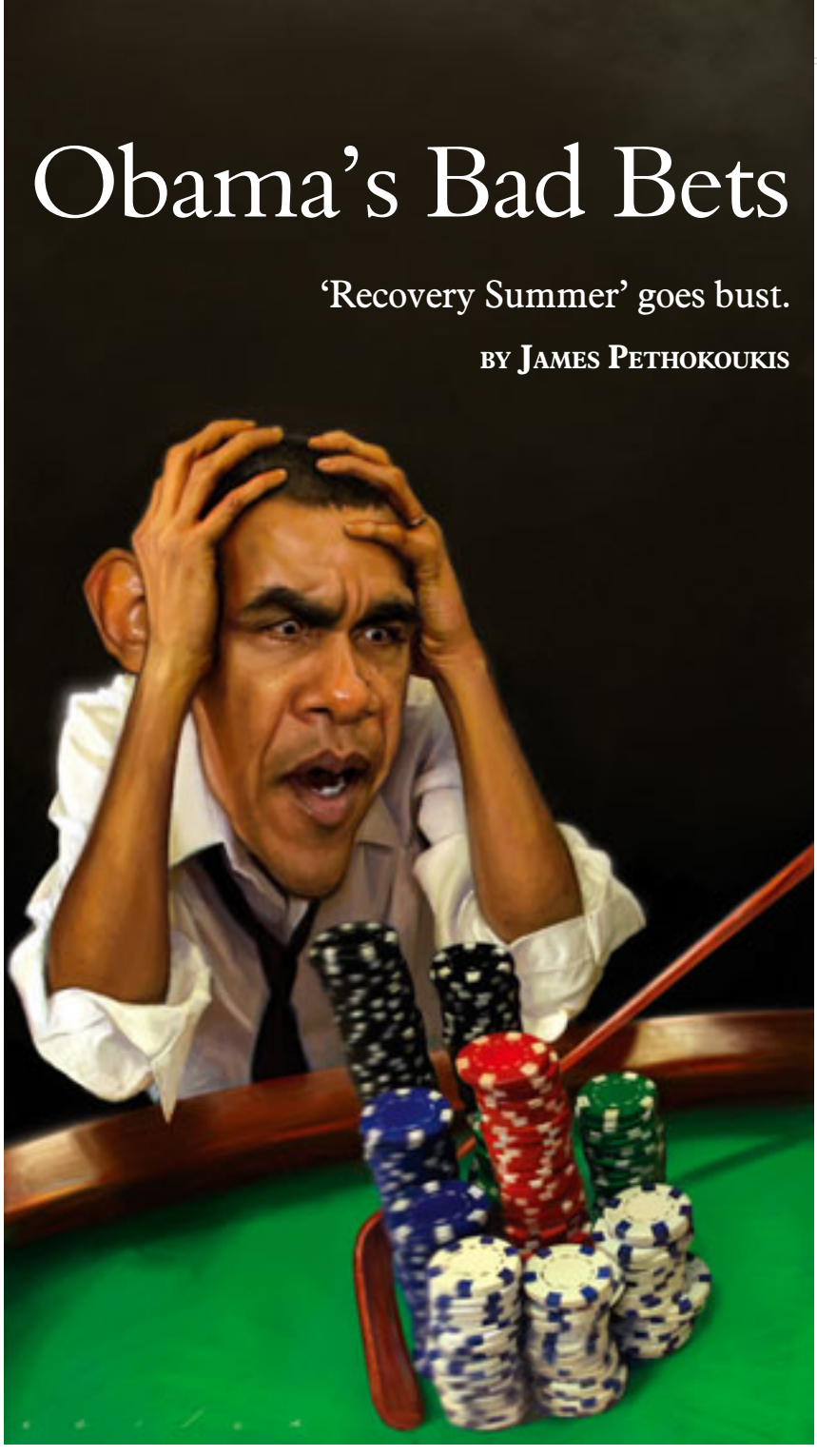
No one knows whether the economy will grow at an anemic pace or continue its slide into recession. But it's certainly the case that raising taxes in January—on anyone—makes a slide more likely. Does the Obama administration really want to take that risk?

—*Stephen F. Hayes*

Obama's Bad Bets

'Recovery Summer' goes bust.

BY JAMES PETHOKOUKIS



JASON SEILER

Declaring a "Recovery Summer" victory tour at the start of June must have looked like a pretty safe wager for the Obama administration. The economy seemed to have shifted firmly into gear during the spring. Lawrence Summers, director of the National Economic Council, told the *Financial Times* in early April that the economy was "moving toward escape velocity. You hear a lot less talk of 'W'-shaped recoveries and double-dips than you did six months ago."

A big reason for White House optimism was a stronger job market. The economy added an average of 320,000 net new jobs a month during March, April, and May, about half of them in the private sector. Granted, the unemployment rate still hovered close to 10 percent. But if the economy kept growing at a 3 percent annual clip or greater—creating lots and lots of new jobs in the process—unemployment would eventually fall, perhaps dramatically. As one White House insider remarked upon reviewing all the macro-indicators and then evaluating the economic team's performance, "It looks like we got things just about right."

Since then, however, the economy has fallen back to earth, and "Recovery Summer" looks more like a bad bet. Private sector job growth has fallen by two-thirds, and the unemployment rate is still at a sky-high 9.5 percent. And if the size of the U.S. workforce, as measured by the Labor Department, had stayed constant since April—instead of shrinking by a million—the unemployment rate would be 10.4 percent. Jobless claims are at their highest level since February. Worse yet, the expansion is decelerating. After growing by 5.7 percent in the final quarter of 2009 and 3.7 percent in the first quarter of 2010, GDP advanced by just 2.4 percent from April through June, according to the Commerce Department. And new data show the final second-quarter number may actually be closer to flat, with growth for the rest of the year just 1 to 2 percent at best.

The White House didn't count on a summer swoon. Then again, it has suffered bouts of premature and unfounded economic optimism before, a malady that has led it to make a number of losing bets and faulty assumptions—which, in turn, have created an even worse environment for growth and jobs. Among them:

■ *High unemployment is a psychological anomaly.* Republicans love to mock the now-infamous chart prepared by administration economists that showed the $862 billion stimulus would prevent unemployment from hitting even 8 percent. But the White House has continued to be overly hopeful about jobs. Here's why.

Obama advisers noticed that the Great Recession seemed to be violating an economic rule of thumb called Okun's Law (named after JFK adviser Arthur Okun), which describes the

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relationship between economic growth and unemployment. As bad as the recession was, unemployment shouldn't have risen to 10.1 percent, according to Okun. Maybe just 9 percent or so. The administration's explanation for the overshoot: Panicky businesses shed workers willy-nilly because they feared another Great Depression.

But now with the worst behind and the economy growing again, there should have been a "catch-up" phase during 2010 when job growth would far exceed GDP growth. (That, even though there's no historical precedent for such an Okun mean reversion.) Yet revised GDP numbers show that the statistical fit between unemployment and growth has actually been much tighter than Team Obama first calculated. Unemployment rose so much simply because the downturn was deeper than preliminary numbers showed. Without much stronger growth, unemployment will stay high.

■ *America has economic immunity.* The White House is no fan of the idea that the U.S. economy has entered a stagnant economic state, what Pimco bond guru Bill Gross has labeled the "New Normal." It describes a situation where debt overhang after a financial meltdown forces consumers and businesses to retrench for years. The result is a lengthy period of slow economic growth, high unemployment, and big budget deficits.

There's plenty of academic research to back Gross up. The economists Kenneth Rogoff of Harvard and Carmen Reinhart of the University of Maryland have found that the aftermath of bank crises in places like Scandinavia and Japan is usually marked by "deep and lasting effects on asset prices, output, and employment." Similarly, the Cleveland Federal Reserve Bank concluded that such banking events cause "negative long-term effects on the economy, such as slow growth, high interest rates, and lower living standards."

Sound familiar? Now even though all this seems to pretty accurately describe what America is currently going through, Team Obama has been continually dismissive of such scenarios. They argue the U.S economy is so big and unique—it possesses the world's reserve currency, for instance—that international comparisons are misleading at best, useless at worst. As the saying goes, it can't happen here.

■ *Ben Bernanke's got our backs.* During the 2000 presidential campaign, Senator John McCain joked that if former Federal Reserve chairman Alan Greenspan died, it would be wise to prop up his corpse and keep him on the job, like the title character in the movie *Weekend at Bernie's*. Few observers hold Fed chairmen or the central bank in such high esteem these days. But the White House apparently does. After passing a giant stimulus in 2009, the administration pivoted to "the agenda"—health care, financial reform, cap and trade. Jobs and the economy? Certainly the combination of higher government spending and oodles of monetary stimulus from Ben Bernanke & Co. would be enough to spur a return to growth.

The job market is also full of worrisome signs. The extended period of high unemployment may be turning from cyclical to structural, where there are not enough qualified and employable applicants for new job openings.

Yet the deluge of Fed money seems to be sitting on the sidelines. As economist David Gitlitz of High View Economics points out, interbank lending, a major funding source for consumer and business loans, has shrunk from nearly $500 billion to less than $175 billion since the fourth quarter of 2008. The Fed's low interest rate policy is great for bank profits—institutions are able to get a decent return by borrowing cheap and plowing the money into government debt—but that has done little to boost lending to job creators or the rest of the economy.

And Obama may now start to comprehend the frustration of predecessors such as George H.W. Bush and Richard Nixon when the Fed seemed to be unaccommodating to their economic and political concerns. Even though the recovery looks to be faltering, the Fed's recent policy meeting showed the central bank is taking only the tiniest of baby steps toward another round of "quantitative easing" by buying more Treasuries or other securities. Not that "QE2" would be a magic bullet for the economy. The White House is learning, as CNBC's Lawrence Kudlow puts it, "the Fed can print more money, but it can't print jobs."

To some degree, the tendency of the Obama White House to "slide down the slope of hope" is understandable. A New Normal scenario, for instance, looks like an economic recipe for a one-term presidency. Easier to dismiss it than seriously consider and perhaps accept it. And relying on both the Fed and its own onetime, trillion-dollar dose of fiscal steroids to restore prosperity—set it and forget it—freed the administration to spend its remaining political capital on passing its domestic policy wish list.

But the results of that policy positivism have been gloomy and seem unlikely to brighten. A recent analysis by the San Francisco Fed of forward-looking economic indicators finds that "the macroeconomic outlook is likely to deteriorate progressively starting sometime next summer, even if the data suggest that a renewed recession is unlikely over the next several months." The job market is also full of worrisome signs. The extended period of high unemployment may be turning from cyclical to structural, where there are not enough qualified and employable applicants for new job openings. If that happens, even higher economic growth may do little to lower unemployment.

Of course, the administration could dramatically change course and join with a more Republican Congress next year to both lower the long-term debt outlook and boost the economy by slashing taxes on capital and corporations (which mostly passes through to workers). But don't bet on it. ♦

Desperate Democrats

The only strategy they have left is personal attacks. BY FRED BARNES

The Democratic strategy in the 2010 election is simple: Change the subject. And given the subject on everyone's mind, who can blame them? That subject is the economy and related matters like spending, the deficit, debt, and President Obama. These are the last things Democrats want to talk about.

Instead they'd like to reduce each race for the House and Senate to the personal level. Their aim is to emphasize the individual flaws of Republican candidates. In the Democratic game plan, the economy and national issues are taboo.

This microstrategy is one of pure desperation. It's all that's left when macro-political trends are going against you. Indeed, Democrats start with two strikes against them. A midterm election is usually a referendum on the president's performance, and this year's is no exception. And the most important measure of the president's success or failure is the condition of the economy.

Given this, the campaign is on a track that's likely to produce a Republican landslide in November. So Democrats are eager to create a separate track, a parallel campaign aimed at minimizing their losses.

The strategy is clever in that it lures the media into playing along. Media types can't help themselves. Those covering the campaign need new things to report on each day. And Democrats are prepared to supply or otherwise draw attention to just those things, the smaller and more marginal the better.

We saw numerous instances of this last week. When *GQ* magazine reported that Rand Paul, the Republican Senate candidate in Kentucky, had "kidnapped" a female student while he was in college, the story was widely disseminated by the media. Later, the "victim" came forward to explain there was no kidnapping, only a college prank that she went along with willingly. Despite its short life, the story distracted attention from bigger issues.

Then there was the Colorado primary, the results of which were interpreted by *Politico* as "good news for President Obama and Democrats." This was a stretch, but it was a fresh angle on the campaign. The *New York Times* on its website said the president was "savoring one of the sweetest victories of the midterm election season." The White House did everything it could to encourage this line of thinking.

Obama had supported appointed senator Michael Bennet, who handily defeated his primary foe, former state house speaker Andrew Romanoff. (Romanoff had the backing of former President Clinton.) White House political chief David Axelrod said the Bennet victory showed that "2008 Obama voters" would "participate in an off-year election."

But that wasn't all. The Colorado results undermined predictions of a "wave" election in 2010, a tide sweeping Republicans into office across the nation, Axelrod told the *Hill*. Elections "will be decided on a race-by-race basis, depending on the candidates and campaigns, and not some wave." Get it? Axelrod was saying the small, personal stuff matters more than larger issues such as the economy.

For Democrats, Colorado brought another supposed benefit. "In an assessment that many independent analysts tend to agree with," John Harris of *Politico* wrote, "[Democrats] said the most favorable news for them may have come from the results on the Republican side." Harris was referring to the victory of local prosecutor Ken Buck over former lieutenant governor Jane Norton for the Republican Senate nomination.

Buck's problem? He was supported by Tea Party activists and had committed a gaffe, a "caught-on-tape remark that he ought to be elected because he didn't wear high heels." Yet Bennet's weaknesses appear to be greater than Buck's, a fact the media overlooked.

The Republican primary attracted 68,573 more voters than the Democratic primary, and Bennet got fewer votes than Jane Norton, the Republican runner-up. The first postelection poll, conducted by Scott Rasmussen, gave Buck a 46 percent to 41 percent lead over Bennet. And Bennet is anxious about the possibility of an Obama campaign appearance. "We'll have to see," he told ABC. "We'll obviously do what's right for the campaign." This is a signal to Obama to stay away. And it came from a candidate who's not brimming with confidence.

The Buck victory touched off a whole series of stories about the "offbeat" Republican candidates, as *Politico* called them. The list includes Senate candidate Linda McMahon in Connecticut, Rand Paul, and Colorado gubernatorial nominee Dan Maes. *Politico* referred to them as "a former professional wrestling executive, a libertarian ophthalmologist, and a man who thinks bicycle use could empower the United Nations."

For sure, these are candidates with peculiarities, and it's the idiosyncrasies and quirks and tendency to say unusual things that Democrats and the press are concentrating on. But there's no reason to believe the Republicans who lost to these alleged oddballs would fare better against Democrats in the fall.

While Democrats and the media are codependents here, a few journalists deserve credit for exposing the strategy. "Obama and his party are seizing on gaffe after GOP gaffe, intent on making the election anything but a referendum on the majority," *Politico*'s Jonathan Martin wrote. Democrats are "moving faster and more aggressively than in previous election years to dig up unflattering details about Repub-

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lican challengers," Philip Rucker reported in the *Washington Post*.

Will the strategy work? With a powerful anti-Obama, anti-Democrat, anti-liberal storm brewing, it won't help much. Democrats are pursuing it for lack of an alternative. In 2010, it's a strategy for losers. ♦

Judge to Voters: Drop Dead

The irrationality of Vaughn Walker.

BY ROBERT F. NAGEL

At the heart of modern America's heavy reliance on constitutional law to settle issues that more properly would be decided in the political process is something called "the rationality test." The legions of lawyers and judges who purport to understand and enforce our Constitution actually know little about that document. What they usually apply when addressing society's divisive issues is a free-floating demand that government policies be rationally related to some legitimate purpose.

This demand sounds innocuous enough. Who, after all, is in favor of irrational laws? But in actual operation, it is the judiciary's use of the rationality test that is intellectually empty. Indeed, as demonstrated by Judge Vaughn Walker's August 4 opinion invalidating California's ban on homosexual marriage, judicial application of the rationality test can be a parody of intelligent analysis.

Step back and consider the scene. Judge Walker held a trial to determine whether millions of people living in widely varying circumstances across many centuries had any legitimate reason *at all* for defining marriage as a union between a man and a woman. To make this assessment, the judge needed from those challenging the law only eight lay witnesses and nine expert witnesses. He needed 16 days of trial time. And, of course, he had to apply his own formidable mind to the problem. After bringing the judgment of history before this tribunal, Judge Walker concluded that there was no evidence justifying the traditional definition of marriage. Indeed, the issue did not even present "a debatable question."

Now, the good judge took pains to present himself as a workmanlike lawyer rather than a recklessly arrogant philosopher king. His opinion is designed so that it appears merely to apply legal propositions laid down by the Supreme Court and to evaluate factual evidence meticulously. Courts routinely do these tasks, so this decision, we are to believe, is all in a day's work.

If Walker's application of the rationality test was so straightforward, you might well ask, how could he conclude with such certitude that all those people—the many millions who have thought traditional marriage to be a bedrock of society—have been entirely wrong? And you might also wonder how he could assert, despite the fierce debate Americans have been having about gay marriage, that there is actually nothing to discuss.

Here is how it works: Where there are undeniably reasons (debatable reasons, to be sure) behind the traditional definition of marriage, Judge Walker simply announces that those reasons are illegitimate and therefore don't count. And where the reasons are undeniably legitimate, Judge Walker dismisses them on the basis of sweeping factual claims that he cannot possibly support.

Consider the argument that homosexual conduct is immoral or, at least, less desirable than heterosexual conduct. Needless to say, many highly thoughtful people throughout history have held such views and have given reasons to support them. To the extent that these reasons are religious, Judge Walker rejects them on the ground that it is impermissible to base public policy on religious ideas.

This radical idea has some vague resonance with certain understandings of the Establishment Clause, but it is in fact not the law. It is simply a baseless edict that, if taken seriously, would silence some of the most important arguments that have been made in favor of policies on, for example, civil rights and the death penalty. Not to mention freeing the slaves.

Of course, not all moral arguments against homosexuality are religiously based. Judge Walker discards all the secular moral arguments on the basis of a puzzling assertion, repeatedly made in the opinion, that moral disapproval is "not enough" to justify a public policy. The closest the judge comes to giving a reason for this dismissal of the importance of moral judgment is his occasional use of the adjective "private" to modify "moral views," as if there were certain moral positions on the institution of marriage that are inherently private and therefore can't be used to satisfy the demand for rational justification.

The simple fact is that, despite the patina of legal authority alluded to in Walker's opinion, religious and moral reasons are not illegitimate bases for public policy. And the traditional definition of marriage is rationally related to those reasons.

When Judge Walker cannot dispense with a justification because it is supposedly illegitimate, he dismisses it on the basis of factual assertions that are highly controversial at best. Take the argument that the California law was justified as an attempt to proceed with caution on a risky change in social norms. Walker responds that

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"proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society." See, no need to be cautious because the judge already knows what all the effects of homosexual marriage will be.

California voters, it goes without saying, did not conclude that homosexual marriage would involve risk on the basis of the meager evidence produced in Judge Walker's courtroom. They proceeded on the basis of historical understandings and their own experience—neither of which was Judge Walker in any position to evaluate.

In at least one place, however, Judge Walker's opinion actually seems to insist that there can be no risk in allowing same-sex marriage because that innovation would not change the historical understanding of marriage. He says same-sex marriage would be "an evolution in the understanding of gender rather than a change in marriage." The exclusion of homosexuals from marriage is, the judge explains, "an artifact of a time when the genders were seen as having distinct roles in society and in marriage." That time, he opines confidently, "has passed." Left unexplained is how a trial judge can know that the genders are no longer seen as having distinct roles in society and marriage. Isn't disagreement about that issue one cause of the current battle over gay marriage?

Despite all its cerebral and legalistic trappings, Judge Walker's opinion is not an exercise in some detached and impartial form of rationality. Like the law it invalidated, his opinion is a reflection of aspirations, fears, guesses, and moral judgments. In political debate, people generally make no pretense about the controversial and uncertain nature of their arguments. Most jurists, in contrast, believe that judicial application of the "rationality test" is different from political argumentation. It is thought to be a high intellectual exercise that constrains the worst excesses of political decision making. What is at least as frightening as the unruly world of politics is the supercilious and resolutely self-satisfied world occupied by judges like Vaughn Walker. ♦

The War on Terror (cont.)

The Obama administration extends Bush-era surveillance policies. BY GARY SCHMITT

In an effort to clarify ambiguous language in the Electronic Communications Privacy Act, the Obama administration is asking Congress to pass a measure that would allow the FBI to gain access to an individual's web browsing history and email traffic record (not the messages themselves, but the list of addresses they were sent to and received from). The proposal would give the Bureau the authority to demand the information from Internet service providers by means of a "National Security Letter" (NSL), requiring no court approval but just the signature of a senior FBI official stating that the request is related to a terrorist or intelligence investigation.

Civil libertarians are up in arms: some calling it a "stunning and brazen request" and the *New York Times* suggesting the administration is "breaking a promise on surveillance." And given the FBI's documented history of abusing its authority to issue NSLs in the past, their concerns are not without some basis.

But the complaint in this instance is really tied to a larger criticism by the president's would-be supporters that he hasn't done more to roll back the previous administration's counterterrorism policies. As a presidential candidate, Barack Obama was not shy about criticizing the Bush White House's response to 9/11, calling it "dangerously flawed" and "undermin[ing] the very values that we are fighting to defend."

There have been changes from the Bush years, of course. Among President Obama's first acts were to put an end to the CIA's enhanced interrogation program and to announce his intention to close Guantánamo. In addition, the decision to try Khalid Sheikh Mohammed, the mastermind behind the attacks on 9/11, in a federal court rather than before a military tribunal was a break from what the Bush team had planned.

On the whole, however, there have been fewer changes than many (especially those on the professional left) expected. For instance, the Obama administration has not abandoned the option of indefinite detentions for captured terrorists; it has modified, but not eliminated, the use of military tribunals. It continues to prosecute the war in Afghanistan, increasing both the number of American soldiers there and the number of targeted killings in neighboring Pakistan. And, on the home front, the administration has made no effort to overhaul the laws, guidelines, or institutional reforms put in place after 9/11 by Obama's predecessor.

Although the Obama administration has abandoned the phrase "war on terror," it knows from the bevy of arrests and failed attacks (as well as the successful Fort Hood assault) during its first two years in office that the United States is still at war with al Qaeda and its allies, and that preemption, both abroad and at home, is the key to keeping Americans safe from future 9/11-like attacks. As one senior administration official put it in arguing for the new statutory language

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for gathering email traffic, the NSL "allows us to intercede in plots earlier than we would if our hands were tied and we were unable to get this data in a way that was quick and efficient."

Those criticizing Obama for staying the course set by the previous administration would do well to recognize that this approach is fully consonant with the practices of virtually all our key democratic allies. Equally important, it has largely succeeded.

Take two recent news stories from France. In late July, French forces were involved in a raid on the border of Mali and Mauritania that killed a half dozen al Qaeda terrorists. Although intended to free a French hostage, the raid was consistent with the government's 2005 white paper on terrorism which stated that France would not hesitate to use military force to preempt terrorist activity.

Also at the end of July, France's highest court stripped French police of their power to hold criminal suspects for up to 48 hours without bringing charges or advising them of their right to a lawyer. The court, though, stated that its ruling did not apply to suspects possibly involved in exceptional crimes, such as terrorism. In those instances, an individual can still be held without access to a lawyer for up to three days. And, even when charged, a suspect can be held in pre-trial detention for up to four years. Similarly, in Britain, a terrorism suspect may be detained without charges for up to 28 days.

The fact is, whether one is looking at police surveillance powers, laws defining terrorist activities, prohibitions on speech, cooperation between police and intelligence, or—as in this instance—access to Internet use, the norm in Europe is no less forward-leaning in the fight against terrorism than here in this country—and is often more so. Although there are differences in specific counterterrorism practices due to the differences in history, constitutions, and threat levels, democratic governments across the board are nevertheless working aggressively to head off the kind of devastating attacks that occurred in the United States in 2001, in Spain in 2004, and in London in 2005.

To accomplish this, there has been an adjustment in the balance struck between the government providing security and the day-to-day exercise of civil liberties. It is wrong, however, to suggest that this adjustment has resulted in some dramatic alteration to the freedoms we associate with decent democratic rule. Compared with earlier points in history when a serious threat to national security arose, the policies adopted both here and in Europe have been far less onerous.

In short, Barack Obama has nothing to be embarrassed about when it comes to keeping in place much of his predecessor's counterterrorism policies. Rather than burying that fact, the Obama White House should accept it and point to its successes, while also noting those same policies are well within the "democratic mainstream" of our closest allies. ♦

Voting Rights... for Some

The Justice Department harasses Cuyahoga County.

BY JENNIFER RUBIN

The mainstream media have recently discovered the misdeeds of the voting section of the Obama Justice Department. But the dismissal of an egregious case of voter intimidation against the New Black Panther party (over the objections of the veteran trial team) by Obama political appointees and the refusal to enforce Section 2 of the Voting Rights Act (requiring voting rolls be reviewed and updated to prevent voter fraud) is just the tip of the iceberg.

A case in point is Cuyahoga County, Ohio. After a series of seemingly innocuous visits by Justice Department attorneys, the director of the county elections board was contacted by the voting section this summer. He was informed that department attorneys wished to meet with him and "no more and no less than two" of the four members of the bipartisan elections board. Five Justice Department attorneys arrived for the July 29 meeting.

Rob Frost, a Republican board member present at the meeting, told me:

> According to stats the Department of Justice attorneys cited in the meeting, Cuyahoga County has 34,000 Puerto Ricans, 12,000 of whom are of voting age and were educated in Puerto Rican schools. They further cited a number of 6,334 with limited English proficiency, but on my questioning admitted that they do not know how many of the 6,334 are among the 12,000 who are of voting age and were educated in Puerto Rican schools. That is, the numbers of people in Cuyahoga County to whom the law applies is something less than 6,334, or something in the neighborhood of .5-.6 percent of our approximately 1 million registered voters.

The county was being asked to print ballots in Spanish for all voters. With additional requirements for translators, community outreach, additional staffing, and printing, the demand potentially would double the county's election costs. The Justice attorneys said they were authorized to sue the county unless officials immediately entered into a consent decree that would cover not just federal elections but also local ones, specifically a September primary for local races.

The board members were surprised by the demand and wondered whether there was not some threshold number of voters required to trigger an enforcement action. Frost recalls, "They fudged that issue and gave a roundabout answer. They admitted they couldn't bring a de minimis case." The only written document they presented was a copy of Section 4e of the Voting Rights Act which concerns voters "educated in American-flag schools" in Puerto Rico and prohibits "conditioning the right to vote of such persons on ability to read, write, understand or interpret" English. When queried as to why they could not receive documentation of the department's concerns in writing the county officials were told that the department "didn't want to create a public record."

A Democratic board member said she was taken aback by the Justice attorneys' aggressiveness and the unreasonable timing of the demand (i.e., immediate action). She said she didn't want anyone to be disenfranchised, but thought the attorneys' behavior was simply unreasonable. Frost said that the Justice Department is taking "a meat cleaver when a sharp scalpel is needed."

The Justice Department attorneys left with an ultimatum: Sign the decree or be embarrassed and burdened by a lawsuit. But the Cuyahoga officials have refused to be strong-armed. The election board met again with the Justice attorneys on August 11 in executive session to discuss potential litigation. A majority, it appears, were not willing to capitulate to the Obama team's demands. No agreement was reached, and another meeting is scheduled for August 23.

One of the Justice lawyers who met with the board was Katherine Culliton-Gonzalez. While working in the voting section, she authored a law review article and spoke at a seminar advocating expansion of voting rights for Puerto Ricans, a task normally associated with advocacy rather than those tasked with enforcing existing law. Culliton-Gonzalez took part in partisan political activities on behalf of a candidate in Prince William County, Virginia, who opposed the enforcement of anti-illegal immigrant ordinances. She also attempted to bypass the normal hiring processes in order to recruit members of the Young Democrats to the Justice Department. These were all the subject of a citizen complaint alleging that she had violated her ethical and statutory obligations to avoid partisan activity while in government service and that she had called into doubt her ability to act impartially.

Deputy voting rights section chief Rebecca Wertz was also at the meetings. She has recently been in the news for encouraging local authorities to apply for waivers to opt out of legislation requiring the provision of ballots to military personnel. Wertz falsely asserted that there was great discretion in application of provisions that in fact are crystal clear. Senator John Cornyn was so enraged by this conduct he has demanded an oversight hearing.

Jennifer Rubin is Commentary *magazine's contributing editor..*

Wertz, Culliton-Gonzalez, and their colleagues have as little legal precedent as they do evidence to help them badger Cuyahoga officials into submission.

J. Christian Adams, the New Black Panther party trial attorney who resigned in protest in June, says that there are steep evidentiary burdens on the department in 4e cases, and local officials "would be nuts to concede anything to them." Using targeted ballots to discrete precincts or providing Spanish ballots only upon request are, Adams explains, among the "many ways to make a marginal change that is less expensive than what DoJ wants, but defendants rarely know about all of the discrete lines of attack." He adds, "There is a reason they don't want to put anything in writing."

The Justice Department is playing a game of legal chicken with local officials. As Adams explains, "The Department of Justice has never really had to litigate 4e issues fully and therefore no court has ever offered clarity about liability or remedial obligations. While there are some older cases that skirt around the edges, much has changed in the Puerto Rican community since those decisions were made decades ago." The Justice Department ideologues are betting local officials will sign on the dotted line to avoid the cost and controversy of a suit labeling them as civil rights violators.

In the last 18 months, we have seen how much power and discretion federal voting rights attorneys have. The Obama administration seems bent on disregarding any voting rights provisions it does not like (or simply refusing to enforce them against minority defendants) while stretching other provisions beyond all recognition. Absent sufficient congressional oversight and media scrutiny to temper such abuses, local officials will have to decide whether to knuckle under or stand their ground. If Cuyahoga officials stand up to the Obama onslaught, they may encourage other jurisdictions to do the same. ♦

Aussies Vote

And why Americans should care.

BY ROSS TERRILL

As President Obama's support wanes, midterm elections loom, and economic troubles persist, he barely heeds East Asia and the Pacific. Flourishing Australia is neglected because it causes Washington few problems. Twice this year Obama canceled a visit to Australia.

But this nation of 22 million—which has its own election August 21—copes with a junior-partner role out of long experience and for good reason. The United States, despite being 8,000 miles away, is of the first importance to Aussies. They fought alongside the United States in all its major wars, from World War I, World War II, Korea, and Vietnam to Iraq and Afghanistan.

Australia changed prime ministers in June when Julia Gillard overthrew Kevin Rudd in an internal Labour party struggle. Rudd had become Labour leader in 2006 not because the party liked him but because he was their best chance to win. In 2007 he did beat John Howard, handsomely, ending an 11-year conservative reign. But Rudd was aloof from his own Labour party; its backroom figures, fearing defeat in the 2010 vote, knifed him and chose Gillard, a leftist trying to edge to the center. As happens under a Westminster-style parliamentary system, she became prime minister on the spot.

Gillard faces a thoughtful conservative, Tony Abbott of the Liberal-National party, in a close tussle, and the result is important to U.S. interests. Gillard would support Obama's worst foreign policy instincts, while Abbott would resist them.

Howard resolved the warring currents of history (Western) and geography (Asian) that define Australia. The eight-year Bush-Howard axis was a golden age for relations between the United States and Australia; yet Howard also brought Japan, China, and Indonesia closer to Australia than ever before. So much for the Australian intellectual left's cry that "we must choose between America and Asia" (they would choose Asia).

The Canberra-Washington connection has always been strong under the Liberal-Nationals. But Labour, especially since the Vietnam war, dislikes foreign entanglements and calls for "exit" from a war before victory is in sight.

In 1972, Henry Kissinger, as I entered his White House office for a chat about China, angrily waved a cable from Gough Whitlam, just elected Labour prime minister of Australia, protesting President Nixon's "Christmas bombing" of Hanoi. "It's unforgivable for this Australian government to put us on the same moral footing as North Vietnam!" said Kissinger. "You can't apply ANZUS [a tripartite security pact also including New Zealand] on some points and not on others." I crept out to phone Whitlam. It was a low point in relations between Washington and Canberra.

Another low came when Mark Latham, a Labour leader prior to Rudd, called President Bush "incompetent and dangerous" and declared, "The alliance with the United States is just another form of neocolonialism."

Bob Hawke, a highly successful Labour prime minister (1983-91), had checked some of Labour's anti-Americanism, declining to follow New Zealand's wish for a South Pacific Nuclear-Free Zone and thus saving ANZUS. Still, Hawke missed Reagan's historical importance; he told me feebly in 1987,

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"The United States hasn't had a decent president since Truman." Hawke's defense minister, Kim Beazley, also pro-American and now Australian ambassador in Washington, said in an email to me this week, "Australia is a solid, capable ally of the United States prepared to project itself forward in the East Asian region. Because the views we develop independently are rarely difficult for the United States, they are valuable to the United States."

Since Howard's long tenure as prime minister (1996-2007), the conservatives have had three leaders, and since their loss to Howard in 1996, Labour has changed leaders six times. So Abbott (52) and Gillard (48) are both new to party leadership. Gillard comes out of a Labour world in Melbourne rife with social engineering ideas and bitter factionalism. A pillar of EMILY's List, with no husband or children, she takes Aneurin Bevan, the British Labour firebrand, born like Gillard in Wales, as her political hero.

Abbott is Howard's spiritual heir, short on charisma but strong on character and not given to political fashion. A star boxer at college, he studied for the Catholic priesthood and later became a journalist. More cerebral than Howard, he has written three books, including a memoir, *Battlelines*, and an intelligent defense of Australia's constitutional monarchy, *The Minimal Monarchy*.

I lunched with Rudd on his first visit to the United States as prime minister in 2008 and have never heard an Australian prime minister as good on China. His weak point was a party-mandated determination to rely on the United Nations, moral example, and transnational institutions, as Howard seldom did.

Such policies reinforce Obama's worst instincts. North Korea is not shamed by the American president's promotion of disarmament into taking its own disarmament steps. Nicolas Sarkozy rebuked Obama to his face in New York: "President Obama dreams of a world without weapons . . . but right in front of us two countries [Iran and North Korea] are doing the exact opposite. We live in the real world, not the virtual world." Abbott inhabits the real world. Gillard has a background in the virtual world.

Rudd's supranational thrusts came to little—climate change, fresh regional groupings, a fruitless International Commission on Nuclear Nonproliferation and Disarmament. With Rudd's international experience absent, a Labour government under Gillard would resort to the party's crown jewels of "idealism," transnational fiddling, and faith in international covenants. Obama would encounter no correcting wind from Down Under.

Labour, like some Obama folk, sees national sovereignty as outmoded, taking a lead from European social democracy. But as the EU sails hopefully into transnationalism, East Asia is different. Beijing has an old-fashioned view of power that uses international institutions only to ward off difficulties for China. ASEAN is equally strict about "noninterference" in any nation's internal affairs. Abbott knows this and would try to convince Obama that East Asia is not Europe.

Julia Gillard and Tony Abbott

Australia's voice should count in Washington. The Aussies have one of the largest economies in East Asia: After the giants, Japan and China, Australia is neck and neck with South Korea and Indonesia. Solid institutions on the home front help when international economic crises hit. Australia is unique as a Western-derived nation that knows East Asia well.

Encouragingly, Abbott calls the United States "an immense force for good in the wider world." In 2003, I helped arrange for Abbott, then a minister in Howard's government, to speak to the academic association of specialists on Australian studies in North America. He shocked the meeting in Philadelphia by defending the Iraq war. The professors shifted their feet, and some walked out. Abbott's position is unchanged. "The emergence of a pluralist and relatively liberal Iraq," he told the Lowy Institute in Sydney in April, "would be a truly historic breakthrough with beneficial consequences right around the world."

Many Australians ask whether China, a major economic partner for Australia, is merely "catching up" or seeking to replace the United States in Asia. Some see Beijing joining the "international community." Others see China urging an East Asia community without the United States, embracing any country in Asia, Africa, or Latin America that has poor relations with Washington, and gaining missile and submarine capacity to deny the U.S. military access to the Asian seas. Gillard, bright as she is, shows no sign of grasping this latter pattern.

If the United States doesn't lead in the Asia-Pacific region, who does? Here Abbott is staunch, Gillard less so. Abbott says, "America's habitual critics should more often consider to which other country or body they would rather entrust a solution to the world's troubles." Abbott is no more experienced in foreign policy than Gillard, but he is hard-headed, and he talks interests, not wishful thinking. His idea of an association of democracies—not only Western countries, but India, Japan, and others—would make an excellent project to press on Obama.

Given current U.S. confusions, not only Australia but America would benefit from a prime minister who puts alliances first, understands that balance of power still operates in Asia, declines to mystify Asia, and believes deterrence keeps the peace.

Still, Abbott is capable of indiscretion. The left jumped on him in 2008 when he commented about Obama: "He sounds terrific, but I don't know what's really there." If Abbott wins on Saturday, that statement may make the rounds in Washington. ♦

NEWSCOM

Aggression Outlawed!

Magical thinking at the International Criminal Court

By Jeremy Rabkin

Last November, as a new round of bombings in Baghdad raised doubts about Iraqi security measures, the *New York Times* reported that hundreds of Iraqi checkpoints were relying on a "small hand-held wand, with a telescopic antenna on a swivel" to check for explosives. A retired lieutenant colonel in the U.S. Air Force was quoted as saying the device was "nothing more than an explosives divining rod" which works "on the same principle as a Ouija board." The head of the Iraqi Interior Ministry's Directorate for Combating Explosives insisted that whether it was "magic or scientific," the device was preferable to relying on bomb-sniffing dogs at all the 400 checkpoints in Baghdad: With all those dogs, "the city would be a zoo."

It is tempting to dismiss this story as a comical illustration of Third World thinking, the special penchant of less developed countries to invest technical gadgets with magical properties. But it's not so funny when you think of the consequences. As that American lieutenant colonel pointed out, when European swindlers peddled this device as something that would "save your son or daughter on a patrol, [they] crossed an insupportable line into moral depravity." And we still don't know what obscure motivations may have moved the Iraqi Interior Ministry, which answers to Shia clerics, to embrace techniques so different from those of the Iraqi Army and its American trainers.

But meanwhile, Europeans have shown their own penchant for magical gadgets. The International Criminal Court is a prime example. It has been operating for eight years without securing a single conviction. In 2009, the court approved charges against Sudanese president Omar Hassan al-Bashir for complicity in mass murder in Darfur—which not only did not result in Bashir's arrest, but also did not prevent him from being welcomed at a series of international conferences (in Africa, Turkey, and Denmark) and winning reelection this spring to a new five-year term (he has held power since a coup in 1989). But at a conference in Kampala, Uganda, earlier this summer, the parties to the ICC treaty agreed to extend the court's existing jurisdiction—over "genocide," "war crimes," and "crimes against humanity"—to the new crime of "aggression." With delegates from over 100 countries attending, the conference decided that an institution that is so far making no discernible difference has proven that it can safely be trusted with new responsibilities—at least on paper.

The United States was not an official participant in the Kampala conference, because it has never ratified the treaty establishing the ICC. But the State Department had, on several occasions in the past few years, affirmed its desire to "cooperate" with the ICC. So Harold Koh, legal adviser to the State Department, and Stephen Rapp, the U.S. ambassador-at-large for war crimes issues, attended as observers. Weeks before the conference, Koh and his team traveled to a string of European capitals, trying to persuade our NATO allies (all of whom except Turkey are signatories to the treaty) not to expand the ICC's jurisdiction to the new and quite undefined crime of "aggression." At the opening of the Kampala conference, Koh was allowed to make a direct appeal to the assembled delegates. He warned them, emphatically, that adding this new jurisdiction might undermine peace and stability and respect for human rights in the world, while entangling the ICC in disputes that would also threaten its own standing. With the support of the Europeans, the Kampala conference went ahead and added "aggression" to the court's jurisdiction anyway.

Nonetheless, American officials expressed satisfaction with the result. Koh explained at a State Department news briefing on June 15 that "the outcome protected our vital interests." The new jurisdiction cannot go into effect until formally blessed by a new conference in 2017. There were procedural safeguards in the Kampala amendments which "ensure total protection for our Armed Forces and other U.S. nationals going forward." And beyond all that, since "we do not commit aggression," Koh explained, "the chances

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are extremely remote that a prosecution on this crime will, at some point in the distant future, affect us negatively."

Of course, previous American administrations had said the same about "war crimes" and "crimes against humanity"—that Americans don't commit such crimes—but were still unwilling to embrace the ICC. President Clinton declined to sign the treaty establishing the International Criminal Court for nearly two years. When he finally signed, in December 2000, he said he still thought the new institution needed more safeguards before he could support ratification by the Senate. After 9/11, the Bush administration became more worried about ICC second-guessing of American war measures. So the Bush administration notified the United Nations that it was no longer contemplating ratification of the ICC treaty—in effect, rescinding Clinton's signing. In 2002, Congress enacted the American Service Members' Protection Act, authorizing the president to use all means, up to and including armed force, to prevent any American from being extradited to the ICC. Among those who voted for this measure was the junior senator from New York, Hillary Clinton.

ED OUDENAARDEN / AFP / GETTY IMAGES

The ICC hears its first war crimes case, from the Democratic Republic of the Congo, March 20, 2006

The Obama administration, however, soon changed course. In its first weeks in office, it announced that it was "reviewing" the U.S. stance toward the ICC. In August 2009, on a visit to Kenya, Hillary Clinton, now secretary of state, said it was "a great regret" that the United States had not joined the ICC. "But we have supported the court," she assured university students in Nairobi, "and [we] continue to do so." The result at Kampala does not seem to have generated any second thoughts.

Harold Koh claimed, in his post-Kampala press briefing, that the negotiations had "reset the default on the U.S. relationship with the court from hostility to positive engagement," and the outcome "demonstrates again [that] principled engagement can protect and advance our interests . . . and make for a better court, better protection for our interests, and a better relationship going forward between the United States and the ICC."

In principle, the court's new jurisdiction over aggression rewrites the U.N. Charter and implies the most fundamental change in the structure of international affairs since 1945. But it's complicated and won't go into effect for at least seven years, so, as the State Department sees it, there's no need to disrupt an emerging consensus now. As far as anyone could tell from the news reporting, nothing at all had happened in Kampala—just one more talk-fest on the international conference circuit, not worth trying to analyze. The American media yawned and moved on.

Undoubtedly the Foggy Bottom version of magical thinking helps to explain this reaction: If we don't make a ruckus over an international consensus, our diplomacy has achieved "constructive engagement"—even if the emerging consensus is hostile or dangerous to American interests. Perhaps the media simply followed the administration's cues. Or perhaps they were lulled by their own magical thinking: Like health care reform and deficits and debt burdens, the expanded jurisdiction of the ICC is not important, so long as its consequences can be put off until Obama's second term or somewhat later.

But it is important now. Two current examples make the point: The United States is relying on missile strikes in Pakistan to disrupt the Taliban networks attacking Afghanistan from cross-border sanctuaries. At Kampala, the United States essentially went along with a definition of "aggression" under which such strikes are criminal acts. Meanwhile, the Obama administration still claims, at least officially, that military action might be in order to prevent Iran from obtaining nuclear weapons. Under the Kampala definition, a preemptive attack would also be a crime.

WHEN IS IT LAWFUL TO USE FORCE?

The Kampala conference did not invent the idea that aggressors should be subject to international prosecution. The German and Japanese war leaders were prosecuted for this crime at the Nuremberg and Tokyo tribunals in 1945 and 1946. So, when delegates convened in Rome in 1998 to negotiate the treaty establishing a permanent international criminal court, they readily agreed that, like those postwar tribunals, it should have jurisdiction over the crime of aggression. But the delegates could not agree on its definition. Instead, they bracketed the reference to aggression in the text, agreeing that this jurisdiction would not be activated until a later conference could settle the definition of the crime.

You can see the problem if you think about the Nuremberg precedent. Prosecuting Nazi leaders for "conspiracy to commit aggression" was the most controversial aspect of the Nuremberg proceedings, not only because it had no precedent in international law but also because "aggression" was so hard to define in generally applicable terms. Almost all governments, in almost all wars, claim to be using force in self-defense—as, in fact, Germany claimed to be doing when it invaded Poland in 1939 (in response, it said, to a Polish attack on a German broadcasting station near the border with Poland).

It was easy to dismiss all such claims by Germany as blatant pretexts, given Hitler's open call for European conquest in his prewar writings. But would it have been "aggression" for Britain and France to have deployed military force to resist Germany's remilitarization of the Rhineland in 1936 or its annexation of Austria in 1938—actions that were in violation of the Treaty of Versailles but were implemented without violence? Once war was declared, was it lawful for Britain to invade neutral Norway in 1940, as it did, to preempt a threatened German invasion there? Was it lawful in 1942 for the United States to seize control of Morocco and Algeria, colonial possessions of neutral France, which had not attacked the United States? All these awkward questions—and much more awkward ones posed by Stalin's invasion of eastern Poland and Finland in 1939 and the Baltic states the following year—were evaded at Nuremberg by an agreement to limit the tribunal's jurisdiction to "Axis" war crimes.

If one looked only a bit further back, though, the issue might seem even more clouded. Woodrow Wilson had urged American entry into war in 1917 not because Germany was directly attacking the United States but because it was using submarines against neutral shipping to enforce its attempted blockade of Britain. Essentially the same principle—freedom of the seas—had been invoked by President Madison in urging war with Britain in 1812. The young Abraham Lincoln was among those who doubted that the United States was justified in invading Mexico in 1846 over what was essentially a boundary dispute. That war ended not with mere clarification of the Texas border but with vast territorial acquisitions, extracted by the United States from Mexico in the ultimate peace treaty.

The world wars of the twentieth century also ended with vast territorial adjustments at the expense of the defeated states. Was it right to continue these wars until these results could be achieved, rather than accept a compromise peace with aggressors? Quite a few serious people questioned Allied war policies at the time, and more questions were raised in reaction to subsequent events. When resort to war is proper—and when war can rightly be continued—has been the central question in international politics for many centuries.

A power that could say definitively which side was in the wrong (or apportion blame between the contending sides) would be the ultimate arbiter of international justice. The U.N. Charter might seem to confer that authority on the Security Council, specifying that the council has "primary responsibility for the maintenance of international peace and security" (Article 24) and authorizing it for this purpose to "determine the existence of any threat to the peace, breach of the peace or act of aggression" (Article 39). The charter contemplates that the Security Council may impose various economic sanctions and ultimately "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security" (Article 41, 42)—without limiting these powers to repelling actual, full-scale invasions. The charter thus seems to endorse the traditional view that recourse to force may be justified in international affairs, even in response to less immediate threats than a full-scale invasion.

But this role for the Security Council was hedged by the provision requiring council resolutions to be accepted by each one of its five permanent members (the United States, the United Kingdom, France, Russia, and China—the great powers, as they were supposed to be in 1945). In most conflicts since 1945, this great-power veto has left the council incapable of decisive action. The charter does recognize an alternative: "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" (Article 51). Many commentators interpret that language to mean that force can be lawfully deployed only when authorized by the Security Council or in response to actual invasion.

This view supposes that resort to force may be appropriate in many circumstances with council approval—but, barring full-scale invasion, not necessary at all if the council

does not agree. The actual practice of states since 1945 suggests that most governments find this strategic constraint too dangerous to accept. The United States has certainly followed a different understanding. Whatever justifications might be offered for President Kennedy's blockade of Cuba in the 1962 missile crisis, President Reagan's interventions in Central America and Grenada in the 1980s, or President Clinton's bombing of Serbia in 1999 (or, of course, President Bush's invasion of Iraq in 2003), none of these actions could be described as intended to repel an "armed attack" against the United States that was already underway.

In wartime planning discussions, officials in the Roosevelt administration weighed the idea that a postwar peace organization should require states to submit all their disputes to arbitration in a new international court or stand accused of aggression if they resorted to force without the court's endorsement of their claims. They rejected the idea as impractical. The alternative ultimately adopted in the U.N. Charter—giving the Security Council "primary responsibility" for resolving "threats to the peace"—rested on the assumption that no peace could be reliably enforced without the cooperation of the great powers, and getting their agreement would not always be helped by an overly precise allocation of past rights and wrongs in a particular dispute.

The ICC project supposes that, where the great powers cannot agree at the Security Council, a group of isolated judges can, all by themselves, determine the rights and wrongs of international conflicts with the confidence of a domestic court judging ordinary crimes.

To now give the International Criminal Court jurisdiction to punish "aggression" might seem a return to the sort of legalism rejected in 1945. But, in fact, it carries the reliance on legalism still further. The U.N. Charter did create an International Court of Justice (often called the "world court") but empowered it only to issue rather general findings on matters in dispute between actual states, leaving ultimate remedies to be negotiated between the states involved. The International Criminal Court created by the Rome treaty, operating since July 1, 2002, and based, like the ICJ, in the Hague, is supposed to decide which specific officials should be punished, and with what degree of severity, for their own decisions.

The whole project supposes that, where the great powers cannot agree in negotiations at the Security Council, a group of isolated judges can, all by themselves, determine the rights and wrongs of particular international conflicts with the same confidence as a domestic criminal court judging ordinary personal crimes. But domestic prosecutors have a well-developed body of criminal law to apply—not to mention police forces to assure that controversial verdicts do not threaten the peace. There has never been a standing body of criminal law for the uniquely international crime of "aggression." The amendments to the ICC statute agreed at Kampala this summer are supposed to fill that void, but they actually make the challenge for the ICC more dizzying.

To start with, the Kampala amendments spell out the scope of this new crime, in pedantic detail, extending the term "aggression" to cover not only invasion by fully equipped armies, but airstrikes, naval blockades, surgical commando raids, even the temporary occupation of a limited area during an evacuation of foreign nationals. So charges of "aggression" could be filed against officials who approved a limited reprisal raid or demonstration attack—of the sort that, for example, President Clinton regularly made against Iraq in the 1990s to punish Saddam's defaulting on obligations to cooperate with weapons inspections.

Even more remarkably, the definition does not specify any valid justifications for the use of force but simply repeats that force must always be consistent with the limitations imposed by the U.N. Charter. If the court interprets the charter as most academics do—to prohibit all use of force except to repel an actual "armed attack"—then Israel's airstrikes on nuclear production facilities in Iraq in 1981 and in Syria in 2007 were acts of "aggression," as are current U.S. missile strikes on terror bases in Pakistan. The Kampala amendments make no provision for humanitarian intervention, either. Even a very limited incursion of armed troops in a rescue operation—like the Israeli commando raid at Uganda's Entebbe airport in 1976 to rescue passengers held hostage there—could therefore be charged as an act of criminal "aggression."

But for all the sweep of the new jurisdiction, it contains a very notable omission. By its terms, only those who "direct the political or military action of a state" can be guilty of "aggression"—that is, the definition does not apply to leaders of terrorist organizations like al Qaeda or the Taliban or Hezbollah. The Kampala amendments do specify that "aggression" encompasses the sending of "armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State"—but only when the "sending" is "by or on behalf of a State." If Syria hosts terrorist groups plotting aggression against Iraq or Israel, then, its leaders can escape liability by insisting

that these groups were not directed "by or on behalf" of the Syrian government in their actual attacks.

Thus, the Kampala amendments immunize governments that harbor and cooperate with terrorist networks, so long as they don't exercise overly direct control of their operations—while officials in countries attacked by terrorists risk being charged with "aggression" for retaliating against terror bases in other countries. This asymmetry cannot be attributed to inadvertent drafting error. The Kampala amendments were, as the official text acknowledges, adopted "in accordance with" a U.N. General Assembly resolution of 1974. Indeed, they track precisely the language of that resolution.

The U.N. General Assembly took every opportunity in the 1970s to express support for the "just struggles" of guerrilla forces attacking South Africa and the Portuguese colonies in Angola and Mozambique—and for the Palestinian terror networks attacking Israel. So the 1974 resolution ends with the stipulation that nothing in its definition of "aggression . . . could in any way prejudice the right [of] . . . peoples under colonial and racist regimes or other forms of alien domination . . . to struggle ['for self-determination, freedom and independence'] and to seek and receive support." Having licensed "struggle" against "racist regimes," the General Assembly underscored the point the following year by adopting a resolution that defined "Zionism" as "a form of racism." A few years later, it endorsed a Law of the Sea Treaty that defined "piracy" in a way that excluded ideologically based terror groups from the sorts of force authorized against mere "pirates" attacking shipping for "private ends."

It's easy to see why governments sympathetic to terrorism would today welcome a definition of "aggression" that works so well for them. Why does this meet with the approval of the Obama administration?

SAFEGUARDS THAT WON'T SAVE

The Obama administration has tried to downplay the outcome of the Kampala conference, and even advocates for the ICC insist the new provisions won't make much difference in practice. It won't go into effect for seven years, after all, and it is hedged with safeguards.

On substance, the advocates note that the definition implicitly excludes marginal or ambiguous cases by limiting "aggression" to an act which "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." But these terms have no clear meaning, as the U.S. representative, Ambassador-at-large Rapp, warned at the outset of the Kampala conference. The definition specifically incorporates many actions that, in terms of "gravity" and "scale," might seem rather minor compared with full-scale invasion. If it were clear what sorts of acts were "manifest" violations of the U.N. Charter, the conference could have offered a list of extenuating circumstances to distinguish allowable (or ambiguous) measures from "manifest" violations. The failure to offer any such clarification indicates that there is no agreement on what circumstances might distinguish limited interventions or defensible measures from "manifest" aggression.

What the conference did instead was offer amendments to the regulations defining procedural standards for the court (so-called "Elements of Crimes"). These amendments specify that the "term 'manifest' is an objective qualification"—that is, not a matter of subjective intent on the part of the alleged perpetrator. Another amendment specifies that the ICC prosecutor need not "prove that the perpetrator made a legal evaluation as to the 'manifest' nature of the violation of the [U.N.] Charter." In other words, good faith reliance on a seemingly plausible legal theory is no defense to the charge of "aggression": That crime will be defined as the judges at the ICC deem appropriate—by whatever criteria they prefer.

The assumption on the part of ICC advocates in Europe is that the court will exercise prudent discretion before wading into controversial disputes. But why suppose that? Western countries decided not to fight over the 1974 U.N. General Assembly resolution, so it was adopted by consensus. Such resolutions were not binding—what did it matter? A decade later, the International Court of Justice decided to accept Nicaragua's suit against the United States for various acts aimed at resisting Nicaragua's support for guerrilla forces in Guatemala and El Salvador. The United States protested, among other things, that the ICJ was usurping authority reserved to the Security Council and ignoring the U.S. reservation against submitting disputes to the world court on claims grounded in multilateral treaties. The ICJ brushed past all these objections, holding that provisions of the U.N. Charter and the Geneva Conventions were now customary law—and that the 1974 General Assembly resolution had also established a customary law principle that states may not invoke the right of "self-defense" against nonstate actors based in foreign countries.

The Reagan administration was so provoked that it withdrew the long-standing American consent to have claims against the United States presented to the International Court of Justice. But the ICJ was not much chastened. In 2003, when the General Assembly asked it to rule on the "wall in Palestine" (that is, the barrier Israel had constructed to thwart attacks by suicide bombers), not only the United States but also the European Union, Russia, India, and a half dozen other states urged the ICJ not to intervene in the midst of ongoing peace negotiations between Israel

and its neighbors. The court ignored these pleas to deliver the rebuke that the majority in the General Assembly was so eager to have on record. In condemning Israel's "wall" against suicide bombers, the court again invoked the 1974 U.N. resolution to support its claim that the right of "self-defense" does not extend to attacks by nonstate actors.

Why is it, exactly, that we think the International Criminal Court will be more restrained than its companion institution in the Hague, the International Court of Justice? The judges of the ICC are elected by member states of the ICC—a gathering in which Third World countries are now also the majority. Why won't the ICC have the same incentives to play to the gallery of the "nonaligned," the unserious, and the malevolent? Not to worry! The fine points of legal reasoning won't matter, say defenders, because the Kampala amendments allow parties to the ICC treaty to opt out of the court's new jurisdiction, and even if the United States should some day join the ICC, it simply won't consent to the court's jurisdiction over aggression (nor would Israel or other states which fear they will need to use force in self-defense). But will our NATO allies, all but Turkey already full participants in the ICC's other activities, decide to opt out of the court's jurisdiction over aggression?

The visitors' gallery on a rare day when the ICC was open to the public, September 20, 2009

KOEN VAN WEEL / AFP / GETTY IMAGES

At Kampala, despite American pleas, European states were unwilling to resist calls for expanding ICC jurisdiction in principle. Will they have recovered enough confidence by 2017 to say, "We have supported the principle—but we never meant to let it apply to us"? Most EU states don't have the military capacity to mount any sort of military operations outside their own borders, anyway, so they may find it quite tempting to claim that no one should act without Security Council endorsement. Given Europe's commitment to a "common foreign and security policy," will Britain and France really have the backbone to resist a common EU move to embrace the aggression amendments? Is public opinion in these countries really so committed to retaining legal immunity for the participants in another war like that in Iraq?

Meanwhile, reliance on the opt-out misses the larger picture. At the same time that the Kampala amendments authorized states to exempt themselves from the ICC's new jurisdiction, they also authorized the Security Council to impose this new jurisdiction on any state, including states that have not agreed to previous areas of ICC jurisdiction. So the next time there is an uproar over something like the attack on the Gaza flotilla, the Security Council can instruct the ICC to investigate. The council won't even have to say the disputed action did, in its considered view, constitute "aggression." It can (under the terms of the Kampala amendments) simply recognize that there is controversy about whether force was justifiable and hand off the matter to the supposedly nonpolitical legal processes of the ICC—as we in America hand off controversial disputes to independent prosecutors.

Is it certain that a future U.S. administration would not find this a convenient way to deal with an international controversy with which it did not want to become too involved? As it is, the Obama administration gave ambiguous signals on whether it would support a new U.N. "investigation" of the Gaza flotilla incident. And what about American actions that provoke condemnations at the U.N.? Would an American president really find it so easy to veto a Security Council resolution referring the matter to the ICC? After all, the ICC prosecutor would, at the outset, only be "investigating" all the disputed circumstances, and other permanent members of the council (at least France and Britain) might already have agreed to subject themselves to such "investigations." To hold the line on American immunity, the president would have to say, "Yes, we've been saying since the days of Secretary Clinton that 'we support the ICC,' but we didn't mean we would put our own people at risk. We only 'support' investigations of others."

But still, says the State Department, the consequences of the Kampala conference will be contained. Along with changes to the ICC statute, the conference endorsed a set of "understandings" of what they mean, including a stipulation that the new definition of aggression is not evidence of customary law. So, say our officials, the effect of the Kam-

pala amendments will be limited. But the United States insisted in 1945 that the Statute of the International Court of Justice have a similar provision, holding that its decisions would be binding only on parties to the immediate case and the ICJ's rulings would not be a source of law justifying future decisions. The United States also took care to have the U.N. Charter stipulate that only decisions of the Security Council—where Washington retained a veto on substantive resolutions—would be "binding," while resolutions of the General Assembly would simply be "recommendations." The actual practice of the International Court of Justice shows how futile such lawyerly stipulations are when determined judges set out to impress the world with the majesty of international law.

Harold Koh warned at the outset of the Kampala conference that "as yet no authoritative definition of aggression exists under customary international law." Adopting an ambiguous or open-ended definition at the conference might encourage "unjustified domestic prosecutions," as countries assert "universal jurisdiction" (by which any state may choose to exercise criminal jurisdiction, even if the crime had no connection with its own territory or its own nationals) to punish the poorly defined crime of aggression by officials of other states. Under the circumstances, he warned, such prosecutions would be "highly unlikely to promote peace and stability."

And now? Language in the Kampala "understandings" stipulating that the new definition does not, in itself, establish customary law does not establish much at all. Even if the new language in the ICC statute is not "evidence of customary law," its ratification by any sizable number of states could readily be taken as evidence of state practice. If the world agrees—more or less—that perpetrators of aggression should be punished, why shouldn't the nations most committed to international law take it upon themselves to pursue prosecutions in their own courts against aggressors who have opted out of the ICC's jurisdiction? The preamble to the ICC statute asserts that "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes."

That admonition seems to have encouraged European states to attempt to prosecute former Chilean president Augusto Pinochet in the late 1990s—and attempt prosecutions of American and Israeli officials in the years since—on the theory that the worst international crimes fall under "universal jurisdiction." Nothing in the Kampala amendments disavows the exercise of such jurisdiction for the crime of aggression.

The least one can say is that the outcome in Kampala will reinforce trends in international law that would constrain future U.S. foreign and security policy. Does that really not matter?

WHY INTERNATIONAL LAW MATTERS

It is telling that defenders of the Kampala amendments stress the procedural safeguards which, they say, will protect Americans from prosecution. It is as if the court's authority were already an established fact and the challenge now is to have our defense lawyers find the most promising loopholes. But that is conceding the main point at issue. The court has no power to make arrests or compel governments to hand over documents and witnesses. It depends on the cooperation of governments, yet it has no power to punish governments that fail to cooperate. In practice, the court's effectiveness must depend on its moral authority.

That is so, not only when it comes to cajoling cooperation from governments in particular proceedings, but also in larger terms. Even defenders of the court acknowledge that it is only a supplement to enforcement by governments, that it will never have the capacity to mount more than a few trials each year—across the whole range of its enforcement responsibilities. And when it comes down to it, the United States asks hundreds of thousands of soldiers, sailors, flight crews, and intelligence agents to risk life and limb to defend our country. We can certainly tell high officials that they must accept, as part of the burden of office, the very slight risk that they may be threatened with some sort of legal proceeding before international jurists in the Hague. The issue is not the safety of American officials but their confidence and effectiveness in a world that looks to more or less anonymous officials in the Hague for moral guidance. The ICC is all about relocating moral authority in the world.

The idea that Islamist terror networks would be deterred by the International Criminal Court was always absurd, as was the idea of the ICC deterring states which harbor or cooperate with terrorists. So it was, apart from other considerations, almost logical for the Kampala conference to exempt nonstate "armed bands" and the states that host them from the court's new jurisdiction. But even when the jurisdiction might apply, as with a direct attack by one state on its neighbor, the ICC won't affect a tyrant's calculations. North Korea and other rogue states have not consented to the ICC's jurisdiction.

Where the threat of ICC prosecution will matter is in democratic countries or countries that depend on assistance from democratic countries. As our experience in the past decade shows, people in democracies have come to regard military action of almost any kind as inherently questionable. Almost any use of force can be challenged as disproportionate or premature or counterproductive. Legitimate experts are always available to reinforce such arguments, and opportunistic politicians are usually quite ready to provide them a platform, especially if military action drags on or encounters difficulties. Almost every major Ameri-

can action since World War II has been dogged by skeptical challenges, often enhanced by conspiracy theories about the "true" motivation for the intervention.

But in the past, American administrations did not seriously contend with the claim that resort to force would be "contrary to established international law." With all the rage and rancor provoked by the Vietnam war in its last years, no one wasted much time arguing about legal issues. These were understood by almost everyone as inherently disputable and so not really to be settled by citations of legal authority.

The advent of the International Criminal Court ratifies a new expectation that military policy can, indeed, be settled by lawyers. So whether the ICC actually does try to prosecute an American is almost beside the point. The rage of legal scholars against John Yoo and others in the Bush Justice Department reflected a remarkable degree of acceptance for a new assumption: Even in the midst of war, questions about detention and interrogation policy have clear and determinate answers, quite apart from what commanders on foreign battlefields may think necessary. It did not seem to matter that there were hardly any American judicial precedents to guide the Bush Justice Department. It did not even matter that most foreign precedents were not clearly at odds with the policies finally adopted. The "law" was something to be settled by the consensus of law professors at prestigious universities.

Consider the Obama administration's continuing promise to close the Guantánamo detention center. Since the Supreme Court rulings in Bush's second term extended habeas corpus to Guantánamo detainees, there is no legal distinction whatever between holding the remaining detainees in Cuba and transferring them to maximum security prisons in Illinois or Colorado. Still, the idea has taken root that Guantánamo is an affront to "international law," so it is too late now to offer even legal arguments in response. And that has happened without an authoritative pronouncement from any international tribunal, but merely in response to expressions of opinion by the International Red Cross, the European Parliament, and various other bystanders, denouncing Guantánamo as a "law-free zone."

We may, in fact, get the worst of both worlds by expanding the ICC's jurisdiction in principle while limiting its reach in practice. A string of controversial decisions that were openly scorned by much of the world would dent the court's authority. But even standing on the sidelines, the ICC encourages the idea that there really is a definite legal standard for aggression—as for all the minutest tactical operations within war—without endangering this inspiring thought by associating it with controversial conclusions in particular cases.

The interest of the United States is in ensuring that it retains the sovereign right to make its own decisions. And as our military capacity gives us a wider range of potential options to choose from—and a much wider range of allies and partners who depend on our choices—we have special incentives to make sure that no international institution supplants our authority. But that is precisely what the ICC symbolizes. The world has grown impatient with political deliberations in the U.N. Security Council, where the great-power veto forces interminable negotiations. What the ICC promises—or holds out as an ideal—is an alluring middle way between leaving ultimate decisions to sovereign states and establishing a world government to enforce the will of the global majority (or some well-placed global oligarchy?). Instead, we can just have rules, adumbrated and applied by legal experts in the Hague.

This is, in truth, as childish as the Iraqi reliance on those explosive-detection wands to avoid the unpleasantness of bomb-sniffing dogs. Much of the world wants to believe that a court can settle the question of "aggression" by legal logic. Then it won't be necessary to take sides or even take serious steps to deal with actual threats.

What happened this summer was that the Obama administration decided it was easier not to disrupt this pleasant fantasy than to meet its responsibility to protect those who carry out the national security policies of the United States. Instead, the United States showed the world that it has rejoined the "international consensus" so rudely disrupted by the Bush administration. It will be years before we have to say we don't actually share the premises of this latest dream of "peace through law." And by then—we'll have balanced the budget and gotten our debt under control, so we'll be better able to confront this external challenge.

The problem is that, in the absence of a world legislature, advocates of international law tend to treat silence as consent (and they treat incoherent mumbling as equivalent to silence). That is how "consensus" leading to new "customary international law" gets established. A new "consensus" gained a lot of momentum at Kampala without any serious opposition from the United States. The world took another large step toward isolating and stigmatizing the American understanding of the "inherent right of self-defense."

It will be important, in the next few years, to put the world on notice that we don't, in fact, mean to go along with the subsequent stages of the project that the ICC represents. But we can't now rely on the Obama administration to stand up for our sovereign rights. Time for others—especially in Congress—to start doing so before it's too late to say, "We didn't really mean it." ♦

A Fortune Underfoot

Can Bolivia develop its mineral wealth—and undermine Hugo Chávez?

By Vanessa Neumann

The stark white landscape of the Salar de Uyuni in the Potosí department of Bolivia is punctuated only by pink flamingos and salt pyramids being slowly shoveled and loaded onto llamas by the Quechuá Indians. It is an unlikely place to be at the forefront of the future of the world's energy supply. Yet this remote salt flat high in the Andes is at the heart of a global battle which captures nearly every modern ideological struggle: north vs. south, east vs. west, socialism vs. capitalism, native vs. foreigner, rich vs. poor. What lies beneath the surface here could turn Bolivia (one of South America's poorest countries) into the Saudi Arabia of the 21st century. In 2009, the U.S. Geological Survey confirmed that Bolivia is sitting on half the world's lithium, and it is concentrated in the Salar de Uyuni.

Lithium is the oil of green technology. Rechargeable lithium-ion batteries are vastly superior to nickel-based batteries. Lighter than nickel, lithium can hold a much greater charge and for longer. It also has a much lower self-discharge rate—5 percent a month compared to 10-30 percent for nickel batteries. Rechargeable lithium-ion batteries are already powering everything from cameras, cell phones, and laptops to cars, and former Bolivian president Jorge "Tuto" Quiroga told me that the applications are limited only by the imagination. "Right now it's cars; someday it'll be motorcycles; someday it could be boats, and one day small planes. I am sure that well before 2045, in Denmark, Norway, or someplace in California, houses or apartments will be able to have lithium batteries outside and that from midnight until two in the morning the electronic system will charge the battery so the house can function all day without drawing on the grid." That day may be closer than he realizes: Earlier this year, a small plane flew for 24 straight hours powered only by solar panels and rechargeable lithium-ion batteries.

The Salar de Uyuni is the latest and greatest discovery in the "Lithium Triangle": 16,000 square miles straddling northern Argentina, Chile, and southern Bolivia, where an estimated 75-90 percent of the world's lithium deposits are located. So far, Chile's Salar de Atacama has been the largest source and the best exploited—particularly by the Chinese, who imported 4,300 tons of it in 2008.

The importance of the Salar de Uyuni is not lost on Bolivia's socialist firebrand president, Evo Morales, who said before a meeting in February 2009 with French billionaire industrialist and Sarkozy chum Vincent Bolloré: "Lithium is the hope not just for Bolivia but for all inhabitants of the planet." Though Bolivia has yet to produce or export one pound of the stuff, delegations of Canadians, French, Chinese, South Koreans, Brazilians, Russians, and Japanese have been clogging La Paz's international airport as they come to court Morales. Reducing dependency on Middle East oil will mean increasing dependency on imported lithium from South America, with all its political complexities.

For there is another group of people who understand the value of Bolivia's lithium: the Quechuá Indians on whose ancestral lands it is found. Francisco Quisbert, the 64-year-old leader of Fructas, a union-like group of salt gatherers and quinoa farmers on the edge of the Salar de Uyuni, has said: "We know that Bolivia can become the Saudi Arabia of lithium. We are poor, but we are not stupid peasants. The lithium may be Bolivia's, but it is also our property."

A Hugo Chávez protégé, Morales rode into office on a wave of nationalist sentiment by styling himself a defender of the native Indian against the foreign ravager. He kicked out Americans, has defended the farming of coca as a protected indigenous tradition, and likes to nationalize foreign-owned companies on May Day. A new constitution ratified in January 2009 was aimed at empowering Bolivia's indigenous peoples and granted

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A miner works the Salar de Uyuni, the world's largest salt flat

them vaguely worded ownership of all natural resources on their lands—a provision that is now throwing a wrench in the works of lithium-mining negotiations.

Despite the new constitution, Morales—who notably speaks neither of the indigenous languages, Aymara and Quechuá, but only the colonialist language, Spanish—is insistent that "the state must have control of 60 percent of the earnings" from lithium. But in late March, Morales was forced to repeal a decree that established a state resources company to handle the extraction of the Salar de Uyuni's lithium. The community of Potosí rejected the government decision to create a La Paz-based company, and Concipo (the civic committee of Potosí) threatened a region-wide strike if the department did not receive a more direct role in the business. Concipo wants a 50-50 joint venture between the department and the national government to develop the deposits—not exactly the split that Morales or his foreign suitors had in mind.

Morales treads a dangerous line between his moneyed foreigners and his poor indigenous supporters. But Bolivia cannot exploit its lithium without foreign investment and expertise, and its main competitors have the jump on it. Chile and Argentina (the other two legs of the Lithium Triangle) already account for more than half the world's 27,400 metric tons of annual lithium production. Since lithium comes mainly from high-altitude deserts, Australia and China are also major producers—though China's reserves are mainly in the western provinces of Qinghai and Tibet, where infrastructure is rudimentary at best. In the United States, Nevada's Western Lithium Corporation is developing deposits in King's Valley in hopes of being a major domestic supplier to the U.S. automotive industry. And now also Mexico, where the Cierro Prieto geothermal brines in Baja California are ramping up their production capacity to meet the rising demand for rechargeable lithium-ion batteries for the new electric cars being launched this summer.

Then of course there's Afghanistan and its much-touted $1 trillion in mineral reserves. According to the report released by the Pentagon and published by the *New York Times*, mining could finally bring peace and prosperity to Afghanistan. Besides copper, gold, and iron, Afghanistan's Ghazni province allegedly has lithium reserves to rival

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Bolivia's and make *it* "the Saudi Arabia of lithium," according to the leaked Pentagon memo.

But not everyone is convinced. William Lamarque, a cofounder of Balor Capital, an adviser on risk management to the mining industry, says: "This is Pentagon spin to garner support for the war effort in Afghanistan. There's no mining culture there." Not only does Afghanistan lack the physical and institutional infrastructure to sustain large-scale industrial mining, minerals tend to be found in predictable and proven tracts, and there is little evidence of this yet in Afghanistan. Lamarque is not convinced the deposits are really as large as the Pentagon claims. "They're based on aeromag surveys, airplane flyovers with equipment that records the magnetism of what lies beneath the surface. But to really know what's there," he says, "you have to go around drilling holes in the ground. It's a very old-fashioned process and geologists are like explorers: a guy roaming the landscape alone with his pick." Security in Afghanistan, moreover, is a concern. "You can't protect an armored patrol in Afghanistan, never mind a poor fellow with a pick."

Even if you could mine successfully there, getting the minerals out would be another obstacle. Afghanistan is a landlocked country. The most accessible deepwater ports are the Chinese-built port in Gwadar, Pakistan, and Chabahar, Iran. Both options likely to be unpalatable to Westerners, though not to the Chinese, whose state policy of political neutrality in their pursuit of natural resources makes it easier for them to do business in the region. "The only viable option, then, is to fly the minerals out. While that's cost-effective for gold, platinum, and palladium, it isn't for iron, coal, copper, or raw lithium: too much bulk, not enough value-added. Afghan mining could be important and profitable, but we're a generation away," says Lamarque. So he would rather mine in Bolivia? "Oh, God, yes! Bolivia, a thousand times Bolivia."

Hugo Chávez treats Evo Morales paternalistically and has spent hundreds of millions of dollars in buying up Bolivia's debts, effectively turning it into a Venezuelan dependency.

Bolivia's greatest hope for the rapid development of its lithium reserves lies with the automotive industry. Carmakers are switching their hybrids from nickel-based batteries to lithium-ion batteries, which are essential in fully electric cars, such as the new batch of Beijing taxis made by BYD, a Chinese company that is one of the world's leading manufacturers of rechargeable lithium-ion batteries and an emerging manufacturer of inexpensive electric cars. The average car battery consumes 30 times the lithium of a laptop computer battery, and Bolivia would be an attractive place to manufacture them. (The country stands to make $30-40 billion from the export of high value-added lithium-ion batteries, but only $5 billion if it merely exports the raw materials, says Quiroga.) While many foreign companies—including BYD—simply want to mine and export Bolivia's lithium, as has been done with the country's silver and copper, the Bolivians know money is pouring into the lithium-ion battery industry.

In 2008, Warren Buffett bought a 10-percent stake in BYD through his MidAmerican Holdings, and MidAmerican's chairman David Sokol thinks BYD's technology is "a potential game-changer if we're serious about reducing carbon-dioxide emissions." Based in Shenzen in southern China, BYD already employs over 12,000 engineers in producing rechargeable lithium-ion batteries. LG and Samsung are also getting into the business. The market for lithium is booming. Although tonnage prices have dropped from $5,000 per ton to $4,500 per ton as a result of shrinking demand during the recession, the demand from electric carmakers is expected to push prices back to $5,000 per ton and more in 2011.

The Bolivians hope that companies might manufacture lithium-ion batteries in the country, and eventually even electric cars. For the Morales administration, the most tempting offer so far has come from Bolloré. On April 29, 2010, Thierry Maraud, Bolloré's financial director, announced a proposed deal with the La Paz government. Clearly designed to curry favor with the Quechuá, it is entitled "A Franco-Bolivian Project for the Well-Living of Bolivians in Harmony with Pachamama." (Pachamama is the Andean Mother Earth.) The Bolloré proposal is for full industrialization of the Salar de Uyuni—mining not just lithium but potassium, borax, and a variety of other minerals as well—and would include the manufacture of both batteries and electric cars.

Yet while Bolloré's ethnically sensitive proposal is tempting to the various Bolivian parties, it is not the most efficient way for the country to join the world lithium market. While no one has disclosed the amount of additional investment required to take production from lithium carbonate to metallic lithium to new-generation batteries, it looks certain to take at least six to seven years to start producing cars. Quiroga, for one, thinks the Morales administration is wasting the country's time and would do much better to go straight to the Chinese or South Koreans and persuade a company like BYD or LG to establish a joint venture in Bolivia for the processing of lithium carbonate and the manufacture of rechargeable lithium-ion batter-

ies. Building electric cars in Bolivia could be a later step.

Quiroga has a very clear vision for his country. He was involved in the negotiations with Intel to build a microchip assembly plant in Bolivia in the late 1990s and knows that the dry Andean climate is perfectly suited to microtechnology production. He would like to see a variety of lithium-based battery production in Bolivia—for cars in Oruro, south of La Paz; for laptops and cell phones in Potosí and Sucre; and for buses and motorcycles in Bolívar and Cochabamba. "We know that batteries will continue climbing the production chain. Taiwan started making hard drives and now makes computers, but we have to start with lithium batteries." He says he was the first to publicly mention lithium battery production—in a public forum last September. The Morales government, which had previously been silent on the topic of lithium, then stepped in and insisted they must assemble cars as well. It's a position Quiroga finds "very defensive," though he does see electric car manufacturing in Bolivia's future. "I would like to make a free trade zone in eastern Bolivia, close to Brazil, where you can assemble cars with Brazilian bodies and Bolivian batteries and flood the Brazilian and Argentine markets with cars made in South America."

Evo Morales and Hugo Chávez

So far the Morales government's modus operandi has been to sign accords or memoranda of understanding with everyone who comes along. In April 2010, the Canadian mining consortium New World Resource was invited to join the advisory committee to shape the new law to exploit the Salar de Uyuni. South Korea has no fewer than 13 companies and state-run research institutes advising on the most suitable infrastructure for Bolivia's lithium industry. The Russians, as is their custom in Latin America, offered weapons in exchange for access. They hosted a Bolivian delegation in Moscow in late April to talk about securing Russia's participation in exploiting Bolivia's lithium—as well as its zinc, gold, and magnesium—in exchange for which Putin and Morales agreed on Bolivia's borrowing more than $100 million on credit for the purchase of Russian military equipment.

Yet little has been done on the ground to build up the necessary infrastructure in Potosí. "The truth is that Bolivia has been talking for years about a pilot desalination plant," laments Quiroga. "In four years of the Morales government, I think they have invested the grandiose sum of $300,000, not 1 percent of the new presidential plane that's just been bought."

Some political observers see a darker motivation for Morales's stalling on lithium: the Machiavellian hand of Hugo Chávez, whose entire political strategy is based on oil. "What worries me about Bolivia's current government," says Quiroga, "is that it works closely and absolutely with and completely follows all the dictates of Hugo Chávez. . . . A car that runs [on lithium batteries]—a Nissan Leaf, a GM Volt—is a car that is not burning oil." PDVSA, the Venezuelan state-owned oil company, is rumored to own up to 80 percent of all the drilling rights in Bolivia. Chávez treats Morales paternalistically and has spent hundreds of millions of dollars in buying up Bolivia's debts, effectively turning it into a Venezuelan dependency.

Regardless of whether you prefer simple incompetence or geopolitical conspiracy as an explanation for the Morales administration's sluggishness, the truth is that to exploit its vast lithium reserves Bolivia needs heavy infrastructure development. Although the Salar de Uyuni is accessible by roads and a train line, much more is needed if international companies are to invest in lithium production and battery manufacture. Nevertheless, sprucing these up and expanding the local airport so the product can either be flown out for just-in-time manufacturing or taken overland to Chile or Peru, is a mere trifle compared with what it would take to make Afghanistan a viable source for world manufacturers. Bolivia simply holds much more promise for investors in green energy.

Quiroga has a refreshingly passionate utopian vision for his beloved country. "What does Bolivia have? . . . We have three semi-clean fuels [gas, biofuel, geothermal] and the three clean technologies of the future [hydroelectric, solar, wind] and we have half the lithium. What a great opportunity to turn Bolivia into Latin America's green heart. It is my mission to turn Bolivia into the green heart, generating clean energy with rechargeable lithium batteries made here." Though how it would affect the lives of the Quechuá and their laden llamas remains unclear. ♦

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Richard III (Laurence Olivier) consults with the Duke of Buckingham (Ralph Richardson), 1956

EVERETT COLLECTION

No Mystery Here

Shakespeare wrote Shakespeare's plays

BY JOHN SIMON

How many books concerning William Shakespeare amuse as much as they inform? I know of only one, and it is this one. James Shapiro is a Columbia professor whose previous book, *A Year in the Life of William Shakespeare: 1599*, I once reviewed rather sternly. But this new one is another story: not only incisive and suspenseful, but also funny.

To be sure, much of the subject lends itself to humor. It concerns not only the other figures nominated as the true author of Shakespeare's plays and poems—chiefly by the now exploded Sir Francis Bacon, and Edward de Vere, the 17th Earl of Oxford, still in the running—but also the often weird nominators, ranging all the way from Australia and Estonia to the *New York Times*. Why such fuss? No other writer of comparable stature has had his identity similarly disputed, regardless of how long ago he lived. But not a few dignitaries and oddballs, established professionals and provocative amateurs, have declared Shakespeare incapable of writing the plays, narrative poems, and sonnets ascribed to him.

Contested Will
Who Wrote Shakespeare?
by James Shapiro
Simon & Schuster, 339 pp., $26

To all the arguments for diverse claimants, Shapiro has compelling ripostes. But being a fair and thorough scholar, however orthodox in his views, he first meticulously examines the rise and evolution of contrary theories. He is outstanding in assessing how the events and social conditions of a given period, or personal crises, influenced contrarian viewpoints.

No less fascinating than the arguments on behalf of various claimants are the lives of the nominators, as well as the sundry forgeries of documents by or about Shakespeare that some of them resorted to in order to bolster their claims. Comic fiction could do no better. There is something risible about the way some of the most influential contrarians "turned to the authorship question only after experiencing spiritual crises." This only increased "the tendency to confuse the biographical with the autobiographi-

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cal as writers projected onto a largely blank Shakespearean slate their own personalities and preoccupations."

Prominent among the claimant pushers was, for example, the not-untalented American writer Delia Bacon, a Baconian not on the basis of a suppositious kinship that she herself minimized but largely (as Shapiro shows) for being brutally dumped and ridiculed by a fiancé as well as dropped by her publisher, all of which contributed to her ending up in a mental hospital. Or take the case of William-Henry Ireland, a Briton who strove to impress his father, an unsuccessful hunter of Shakespeareana, by producing any number of documents, including whole or partial manuscripts of Shakespeare plays known and unknown, as well as an encouraging letter from Queen Elizabeth—all stuff he later confessed to be forgeries.

I find that the supposed bases for disputing the authorship of "the man from Stratford," as he was derisively referred to, are mainly six.

• First, that grammar-school education and limited means for travel could not have provided the requisite frame of reference. But as Shapiro points out, an Elizabethan grammar-school education was considerable: Of Latin alone pupils learned more than today's typical university classics major. Much could also be gleaned from books and conversations with fellow Londoners, who included diverse nationals and extensive travelers.

• Next, the relative paucity of references to the great Shakespeare in contemporary writings. For one thing, the age did not yet go in for extended biography, and there is little enough about other dramatists of the period. For another, deification, as Shapiro aptly calls it, came to Shakespeare much later, by way of David Garrick and his likes.

• Third, the assumption that Shakespeare's plays and poems must contain autobiographical elements, yet nowise jibe with known facts of his life. Such eminences as Mark Twain, Sigmund Freud, Henry James, and Helen Keller, among others, subscribed to this notion—which, in its extreme forms, had Sonnet 144 hinting that the poet was syphilitic, and Sonnet 37 that he walked with a limp. For this there were usually personal reasons, such as Twain's acknowledging that his own writings were largely autobiographical. As Shapiro tells us,

> You would think that the endless alternatives proposed by those reading his life out of the works—good husband or bad, crypto-Catholic or committed Protestant, gay or straight, misogynist or feminist, or, for that matter, that the works were really written by Bacon, Oxford, Marlowe, and so on—would cancel each other out and lead to the conclusion that the plays and poems are not transparently autobiographical.

But why doubt the power of a genius's imagination, or that a mere glover's son from Stratford could have been a genius? Let me cite the case of the humbly born Karl May (1842-1912), a popular German novelist who wrote 65 volumes' worth of dazzling adventure novels compellingly set in America's Far West, the Middle East, and elsewhere, without ever leaving Germany.

• Fourth, an English aristocrat who had all that court knowledge wouldn't demean himself by picking an actor as his surrogate. Yet most of the proposed claimants were high-level noblemen, with Oxford, who, under his own name, wrote some tolerable verse and prose, by far the likeliest. But what about his dying in 1604, after which date most of Shakespeare's greatest plays were written? The Oxfordians argued that he wrote these plays earlier, to be parceled out after his death. Then what of the manifest allusions to post-1604 events? Was Edward de Vere also a prophet?

• Fifth, why would a great playwright retire relatively early to Stratford, stop writing, and become a grain merchant and moneylender? We now know that he still collaborated with other playwrights and, as for being a grain merchant, Shapiro asks, "What man or woman from the middling classes in Stratford wasn't?"

• Sixth, poor spelling. Shakespeare even spelled his own name in different ways. But spelling was idiosyncratic at the time; so the Earl of Oxford, for example, spelled "halfpenny" 11 different ways. And because in italic font a "k" followed by a long "s" would cause a collision that would make the font snap, the easiest solution was to insert an "e" or a hyphen or both, turning Shakspeare into Shakespeare or Shake-speare.

William Shakespeare's grave, Stratford

But the comedy of it! In 1946 Percy Allen proposed to solve the authorship mystery "by psychic means." With the mediation of the renowned clairvoyant Hester Dowden, daughter of the Shakespeare biographer Edward Dowden, Allen, president of the Shakespeare Fellowship, had hilarious conversations with Bacon, Oxford, and Shakespeare himself, although receiving different answers from those obtained by earlier seekers through other psychics. No less laughable were the mock trials of Shakespeare conducted by three Supreme Court justices in America and judicial eminences in Britain. In both

DEAN CONGER / CORBIS

countries, Shakespeare won the verdict, but the mere evoking of possible conspiracies, and conceding Oxford to be the least unlikely of other contenders, helped the Oxfordians' cause. These were the times of conspiracy theories concerning the Kennedy assassination and other tragic events, and of 80 percent of Americans believing "the government is hiding knowledge of the existence of extraterrestrial life forms."

Much earlier, already, the skepticism of the Oxfordians was boosted by the existence of a single authorial Homer having been disproved, and by David Friedrich Strauss's influential *Life of Jesus* (1835), which powerfully disputed the divinity of Christ. Then why not dispute Shakespeare's authorship for all its supposed sanctity? This was the sort of thing that encouraged the founder of Oxfordism, John Thomas Looney. Mocked for his name, even if he pronounced it to rhyme with "pony" (a jest Shapiro avoids), the author writes with fine irony of Looney: "His logic is unassailable—but only if you believe that great authors don't write for money and that the [Shakespeare] plays are transparently autobiographical."

Yet despite knockout blows by Shapiro and a slew of distinguished scholars, Oxfordism lingers with proponents such as Joseph Sobran, Lewis Lapham, and Justice Antonin Scalia. Most egregiously, in recent years, William Niederkorn, in the pages of the *New York Times*, propagandized for Oxford, stooping to such allegations as that the Supreme Court justices had changed their opinions, and now all found for Oxford, and that Oxfordism was being "taught in more universities and colleges than we can begin to imagine."

The last section of *Contested Will* provides mighty proofs for Shakespeare's authorship. One such is that a nobleman such as the Earl of Oxford, alleged by some to have also been Queen Elizabeth's lover, had additional reasons for concealing his authorship. If so, anything about such a scandal-prone figure would have been ferreted out and maliciously publicized.

My one cavil with Shapiro's ingeniously structured and winningly written book is with the sporadically sloppy grammar and usage, unworthy of a professor of English. Thus we get "whomever he was," a misused "begs the question," "cannot help but," a child Oxford "conceived" (clearly misbegotten), and "different than," among others. I also wonder sometimes whether, despite Shapiro's cogent arguments against it, there isn't something to the question of a friend about why it has mattered so much who wrote the plays. I find in myself a smidgen of sympathy for the schoolboy who notoriously wrote, "Shakespeare's plays were written by William Shakespeare or another man of that name." ♦

B&A

Living Will

It's best to bestow when the going is good.

BY MARTIN MORSE WOOSTER

I regularly attend the lunches on philanthropic issues held by the Hudson Institute's Bradley Center. The lunches feature liberal and conservative speakers prepared to wage ideological war. But after the lunch, the would-be warriors discover that, while conservatives and liberals will always have strong disagreements on how foundations should spend their money, nearly everyone agrees on the organizational problems affecting nonprofits.

Immortality and the Law
The Rising Power of the American Dead
by Ray D. Madoff
Yale, 208 pp., $26

Speak to the heads of small or medium-size nonprofits and, be they liberal or conservative, they will tell you that the large foundations spend far too much money on dubious national social-engineering projects and not enough on smaller, local projects that could improve a neighborhood or community. The big foundations, they'd say, prefer older, established, and noncontroversial grantees to the young and struggling. And threaten nonprofits with increases in the excise tax foundations pay, or with an investigation by Sen. Charles Grassley (the bête noire of the philanthropic world), and you'll find such stalwart liberals as Paul Brest of the Hewlett Foundation or Rebecca Rimel of the Pew Charitable Trusts denouncing big government's heavy hand.

There is an increasing consensus that the perpetual and immortal foundation is no longer the best way to practice philanthropy. On the right, the classic example of a term-limited foundation is the John M. Olin Foundation, which spent itself out in 2005. As John Miller shows in his history, *A Gift of Freedom*, the Olin Foundation, by deciding to spend itself out, spent four times as much on grants as it would have if it had been a perpetual foundation with a large endowment and limited grant-making.

But the left is increasingly realizing that there's a great deal of satisfaction in putting your wealth to work while you're alive to see the results. A recent report from the term-limited Atlantic Philanthropies tells stories of all sorts of donors, such as software entrepreneur Tim Gill and Steelcase heir John Hunting, who decided to spend their fortunes during their lifetimes. Ray D. Madoff, a Boston College law professor, has joined this increasing trend by the left to side against perpetual foundations with her new book. *Immortality and the Law* is about all sorts of issues that affect estates, ranging from cryonics to copyright. But it is, at its heart, a

Martin Morse Wooster, senior fellow at the Capital Research Center, is the author of The Great Philanthropists and the Problem of 'Donor Intent.'

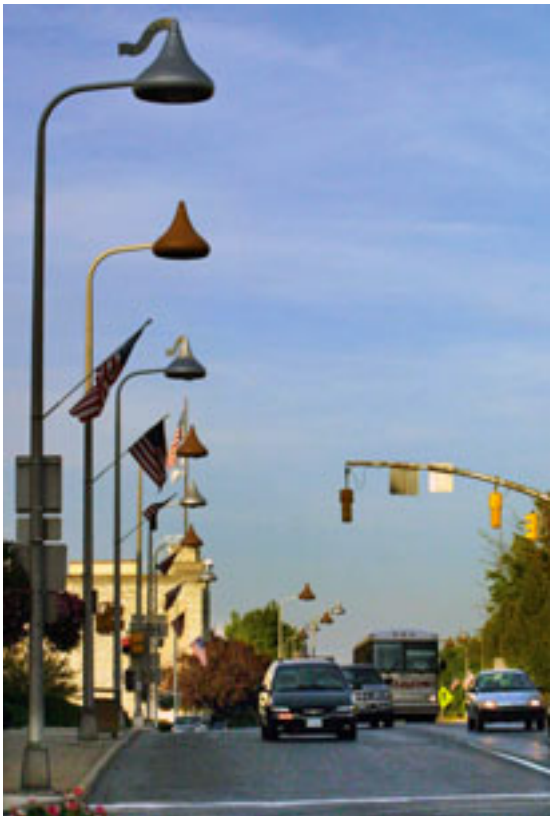
critique of the idea that donors should set up perpetual foundations.

Madoff is a writer who comes up with correct conclusions using wrongheaded premises and dubious analysis. She loves taxes so much, for example, that she actually calls the period from 1941 to 1977, when the federal estate tax was at a rate of 77 percent, "the golden age of the estate tax." Moreover, she distrusts the fundamental principle that people who create wealth should spend money on the causes they prefer: "Decisions about how charitable dollars are spent are made by the wealthy individual instead of through the political process," she writes. "In this way, reliance on private charity as opposed to public tax revenues further undermines the strength of the democratic form of government."

She very reluctantly decides that the charitable deduction is good only because the deduction allows donors to act as unpaid advisers to government bureaucrats. Adapting an idea by the legal scholar Saul Levmore, she contends that philanthropy is "an efficient way for the government to get information from the populace regarding which programs it ought to support." She offers no evidence that any government official has ever used philanthropic giving patterns as a guide to shaping public policy. When donors set up foundations, Madoff argues, donors try to shape the future with their ideas; the courts, she argues, usually act to ensure that the questionable or obsolete wishes of a donor can be preserved indefinitely. Her two major examples are the cases of the fortunes of Beryl Buck and Milton Hershey.

Beryl Buck, whose wealth came from privately held Belridge Oil, died in 1975, leaving her fortune to a trust designed (as her will stated) "in providing care for the needy in Marin County, California." The trust was given to the San Francisco Foundation to administer. Belridge Oil was sold to Shell in 1979, making Beryl Buck's share of the estate worth $253 million. In 1983 the San Francisco Foundation sued to alter the will so that Buck's fortune could be used in the Bay Area instead of in wealthy Marin County. In 1986, in a titanic legal battle dubbed "the Super Bowl of probate" by the local press, the San Francisco Foundation lost. Buck's wealth was used to create the Marin County Foundation.

But the judge in the case ruled that some of Buck's wealth had to be used to create three national organizations: the Buck Institute for Age Research, the Beryl Buck Institute for Education, and the Marin Institute. The judge who ordered the creation of these organizations declared that 20 percent of the trust be used to create 'major projects . . . of national significance and importance.' There is no evidence that Beryl Buck was interested in influencing public policy."



Chocolate Avenue, Hershey, Pennsylvania

TOM MIHALEK / AFP / GETTY IMAGES

Milton Hershey said that because he had no children, "I decided to make some of the orphan boys of the United States my heirs." In 1919 he left several thousand acres and a majority stake in the Hershey Company to the Milton Hershey School. But the dramatic growth of the Hershey Company has ensured that the school has more money than it needs to run the school, which has an endowment that rivals that of the wealthiest prep schools in the United States.

For Madoff, the Buck and Hershey cases show that courts "pay only minimal attention to current societal needs" when ruling on donor intent. But the Marin County Foundation has plenty of applicants for its grants. Courts could rightfully declare that Milton Hershey more than amply satisfied his wishes in creating his school, and that the Hershey wealth could be partially diverted to create smaller and less lavish Hershey schools in the inner cities.

The problem of donor intent comes about not because of "dead hand" control, but because of the abandonment of the principles of the foundations' founders. With the important exception of the Barnes Foundation, these cases involve liberals seizing control of foundations created by free-market conservatives, such as Henry Ford, J. Howard Pew, John D. MacArthur, and Andrew Carnegie. By creating foundations with a strict term limit of no more than 20 years after a donor's demise, today's wealth creators can ensure that their fortunes can be spent on causes they prefer, rather than having people they do not know spend the money in ways they would not like.

George Eastman was the greatest American philanthropist who never set up a foundation. By the time of his death in 1932, he had given away $125 million, and had hired only one assistant to help him. When asked by a journalist in 1923 why he didn't set up a foundation, Eastman said, "It is more fun to give money away than to will it. And that is why I give."

Ray D. Madoff is wrong in most of her analysis of philanthropy. But she is absolutely right in her fundamental point: It is better for donors to put their charitable dollars to work now than to create perpetual foundations that may or may not help our grandchildren and great-grandchildren. ♦

B&A

Sticks, Stones, Words

The academic study of literature is theoretical.

BY JAMES SEATON

The *Norton Anthology of Theory and Criticism* is the place to go to find out what sort of ideas and approaches are taken seriously in English departments—if not elsewhere. Because the *NATC* is the supreme canon-maker that establishes the framework of received opinion in its field, the appearance of a new edition, 2,758 pages long, is bound to reveal much about the current climate of opinion in English studies.

The Norton Anthology of Theory and Criticism
edited by Vincent B. Leitch, William E. Cain, et al.
Second Edition
Norton, 2,758 pp., $75

Despite its length, the new *NATC* is most revealing in its omissions, the most significant of which occurs in the title. The *NATC* claims to deal with "theory," not with "literary theory" and with "criticism," not merely "literary criticism." One cannot help but be impressed by the effrontery expressed by the deletion of the qualifying adjective. The strategic omission of "literary" intimates (without explicitly declaring) that English professors who use the *NATC* are equipped to provide guidance to all those who employ any sort of theory, presumably including their colleagues in the social sciences, and even in physics and chemistry. Such pretension has not been seen since the heyday of the Hegelian system, which claimed the intellectual authority to give the law to every particular science and discipline, from physics to history and everything in between. "Theory" with a capital "T" deserted philosophy with the demise of Hegelian idealism early in the 20th century, but it seems to have reappeared in the unlikely precincts of the English department.

In the preface the editors blandly assert that the grandiose claims of the Theory taught in English departments are not only compatible with "questioning" and "skepticism" but are somehow derived from just those attitudes. "Contemporary theory," they explain, "entails a mode of questioning and analysis . . . skepticism toward systems, institutions, and norms." It also involves "a readiness to take critical stands and to engage in resistance. . . . [It can be] more descriptively termed . . . cultural critique." The "Introduction to Theory and Criticism" explains that "critique calls for a critic at once suspicious and ethical, committed to a set of values different from, or directly opposed to, those expressed in the text."

Once again, the omissions are revealing. Theorists, one is told, "engage in resistance." Resistance to what? We are not told. The critic is skeptical toward "norms," and yet, since he or she is (we are assured) also "ethical," the critical theorist must endorse some norms. Which ones? No answer. At least we know the critic must have values "different from, or directly opposed to, those expressed in the text" he or she is studying. To be fair, this stance seems reasonable enough in studying some texts, such as *Mein Kampf*, but there are other texts, more likely to be encountered in literature courses, for which it seems less suitable. One wonders if it is absolutely necessary that the critic "engage in resistance" to the "set of values" of *Middlemarch* or *The Ambassadors* or *Beloved* in order to provide a theoretically sound interpretation. Perhaps it is Theory that should be "resisted."

The editors recognize that the sweeping claims they make on behalf of their favored approach will not be universally accepted. The first paragraph of the introduction acknowledges that some might not agree with this "turn away from literature and its central concerns." The *NATC* helpfully identifies these dissenters as "'antitheorists,' as they are called." Called by whom besides the editors themselves? No answer. Once having defined anybody who dissents from postmodernist theorizing as opposed to theory of any sort, it is easy for the editors to dispose of the opposition by pointing out that "there is no position free of theory, not even the one called 'common sense.'" True enough, and yet there is certainly a distinction to be made between those theories (like 19th-century idealism or the postmodernist theory of the editors) that reject common sense and those that attempt to clarify and refine it.

The first edition already skimped on criticism and ideas more than 50 years old, devoting almost half its 2,600-plus pages to movements after the New Criticism that flourished in the mid-20th century. This second edition, though more than a hundred pages longer, skews its selection even further, omitting many key texts found in the first edition, beginning with Plato's *Ion*, a short, witty dialogue that raises almost all the central questions about literature. Plotinus' *Enneads* is also gone, thus depriving readers of an acquaintance with the classic text of Neoplatonism, essential not only because of its own great influence but because an awareness of Plotinus' interpretation of Plato allows one to better understand Plato's own thought.

Other authors dropped from the new edition include Quintilian, Macrobius, Hugh of St. Victor, Geoffrey of Vinsauf, Giambattista Giraldi,

James Seaton, professor of English at Michigan State, is the editor of George Santayana's The Genteel Tradition in American Philosophy *and* Character and Opinion in the United States.

Ronsard, Edward Young, Thomas Love Peacock (whose satirical *Four Ages of Poetry* provoked Shelley to write his *Defence of Poetry*), Theophile Gautier, C.G. Jung, Kenneth Burke, Georges Poulet, and E.D. Hirsch (whose *Objective Interpretation* offered a rare union of good sense and hermeneutic sophistication). All these omissions allow the editors to devote almost 1,500 pages to developments after the New Criticism—including, especially, the rise of "Theory."

The additions to the new *NATC* include a category entitled "Antitheory," thus conveying the impression of an admirable willingness to provide space for voices opposing the anthology's own *raison d'être*. Yet only two of the nine critics classified as "antitheorists" defend anything close to what the editors themselves identify as the core of the "antitheory" position: "a return to studying literature for itself." Stanley Fish, listed as an "antitheorist," is probably one of the best-known American proponents (that is to say, theorists) of what he calls "anti-foundationalism." Gerald Graff is also listed as an "antitheorist." But in his own essay he is an advocate, objecting to "the established curriculum's poverty of theory" and arguing for a new curriculum in which "theory courses should be central, not peripheral." The title of Steven Knapp and Walter Benn Michael's essay, "Against Theory," suggests that its authors are taking on postmodernist Theory in all its ramifications; but the essay itself is much narrower, concerning itself only with "issues of belief and intention" and refraining from any call for "a return to studying literature for itself." bell hooks's [sic] essay is devoted to "exploring the radical potential of postmodernism as it relates to racial difference and racial domination."

C.D. Narasimhaiah and Barbara Christian are the only critics listed whose ideas bear any resemblance to the editors' description of "antitheory." Narasimhaiah, it should be noted, does not criticize or even discuss postmodernist Theory at all, focusing instead on the relevance for the critic of Indian literature of "a fair grounding in Indian Poetics" and "familiarity with literary masterpieces in Sanskrit and Prakrit." In her 1988 essay "The Race for Theory," Barbara Christian observed that "critics are no longer concerned with literature, but with other critics' texts" and objected strongly to contemporary theory's

> . . . linguistic jargon, its emphasis on quoting its prophets . . . its refusal even to mention specific works of creative writers, far less contemporary ones, its preoccupations with mechanical analyses of language, graphs, algebraic equations, its gross generalizations about culture.

Christian, no advocate of any "return to studying literature for itself," argued that the true political impact of the new, supposedly revolutionary, theorizing was far from liberating: "The literature of blacks, women of South America and Africa, etc., as overtly 'political' literature was being preempted by a new Western concept which proclaimed that reality does not exist, that everything is relative, and that every text is silent about something."

Perhaps the most inexplicable choice for the "Antitheory" classification is the most famous and influential theorist in Western history: Plato. No explanation is given, and the introduction to the Plato selections offers no clue, instead deepening the mystery by stating the undeniable: "A monumental figure in the history of Western philosophy, Plato looms nearly as large in the history of European literary theory." One is driven to the suspicion that it is because the implications of Plato as consummate theorist are so unwelcome to the contemporary apologists for Theory that they feel compelled to classify Plato, against the evidence of the *Dialogues* (including those excerpted here), as a batter for the other team.

The parallels are straightforward. The most influential contemporary theorists are contemptuous of common sense, desire radical cultural and political change, and are confident that theory rather than literature provides the key to understanding human life. Plato likewise distrusted the commonsense ideas of his society and worked for revolutionary cultural and political change. Literature, he came to feel, was dangerous because it reinforced and intensified all the prejudices and attitudes he opposed. Plato was confident that it was theory, not literature, that should guide human life.

There are, of course, some important differences between Plato's theories and contemporary Theory. Plato was the first and most influ-

Vanessa Redgrave, Madeleine Potter in 'The Bostonians' (1984)

ALMI PICTURES / COURTESY EVERETT COLLECTION

ential "logocentrist" and "essentialist," making him a target for the reckless deconstructive extremism of Nietzsche, Heidegger, and Derrida (*NATC* contributors all). Plato's Socrates insisted in the *Phaedo* that the "true philosopher" would be "entirely concerned with the soul and not with the body," while according to the "Issues and Topics" section of its "Alternative Table of Contents," the new *NATC* includes 11 readings focusing on "The Body" but no readings in which the soul or the inner self comes up as a topic or issue. Plato himself was a literary genius whose key dialogues and myths remain compelling literary works, while an article written with ordinary clarity is a rare achievement for contemporary theorists.

A closer parallel to the contemporary theorists in the *NATC* may be the feminist protagonist of Henry James's *The Bostonians*, Olive Chancellor, for whom "almost everything that was usual was iniquitous." For some of the new contributors it is the political and economic order that is especially "iniquitous." Lisa Lowe finds herself in a world where "the contradictions of the national and the international converge in an overdetermination of neocolonial capitalism, anti-immigrant racism, and patriarchal gender stratification." Michael Hardt and Antonio Negri call for rebellion against "today's real enemy" which, they explain, is no longer Western imperialism or even a putative American empire but simply "Empire." Other contributors find the usual attitudes about sex iniquitously stigmatizing: Lauren Berlant and Michael Warner are troubled by American "national heterosexuality," whose narrow judgmentalism sees to it that "promiscuity is so heavily stigmatized as nonintimate." Gayle Rubin, on the other hand, speaks up for "the community of men who love underaged youth," finding it unjust that "boy-lovers are so stigmatized." Judith Halberstam opposes "male dominance and heteronormativity."

At odds with the usual and normal, Henry James's Olive Chancellor "felt more at her ease in the presence of anything strange," and this seems to be the case with the new contributors as well: Their enthusiasms, if sometimes vague, are at least far from the conventional or usual. Lisa Lowe envisions "the formation of alternative social practices." Hardt and Negri look forward to a time when "the multitude" will arise and establish "constituent assemblies of the multitude, social factories for the production of truth." Berlant and Warner are enthralled by a display of "erotic vomiting," commenting that on such occasions "sex appears more sublime than narration itself." Objecting to male masculinity, Halberstam reserves her praise for "powerful and affirmative forms of female masculinity." Gayle Rubin hopes for a society in which "homosexuality, sadomasochism, prostitution, or boy-love" are no longer "taken to be mysterious and problematic in some way that more respectable sexualities are not."

René Wellek

The narrator of *The Bostonians* does not directly challenge Olive Chancellor's views, and he gives her credit for being personally "distinguished and discriminating." Granting that the contributors mentioned above possess similarly impressive personal qualities, and waiving any judgments about their ideas on politics or sexuality, one may still observe that literature plays little if any role in their arguments. That is understandable, since those who yearn for transformative change that will bring about a new world free from the attitudes, ideas, and institutions of the present must regard the most acclaimed literary works in much the same way Plato regarded Homer: as misleading and dangerous influences to be ignored or, if possible, suppressed.

In 2005, about midway between the publication of the first edition of the *NATC* and the second, Columbia University Press published *Theory's Empire*, an anthology in which 49 critics, including such well-known figures as René Wellek, Anthony Appiah, Denis Donoghue, and Frank Kermode, offered powerful critiques of every aspect of contemporary Theory. The anthology is no compilation of "antitheory," if that is taken to mean an attempt to avoid thinking about theoretical issues. If, however, an "antitheorist" is one who does not do battle with common sense but instead takes it as a starting point, then the contributors to *Theory's Empire* should be considered "antitheorists." The introduction explains that its scholars

> have to spell out and reinforce some rudimentary arguments concerning facts and beliefs, evidence and truth, knowledge and opinion that should by right be considered commonplaces but are more often unfamiliar to most of our students.

A reader depending on the second edition of the *NATC* to learn about contemporary theory, however, would never learn that an anthology with contributions from many distinguished critics challenging the hegemony of Theory had been published by a major university press. Though many recent essays are added to the second edition, none of the additions are by any of the contributors to *Theory's Empire*.

There are other weighty matters about which a reader who trusted this volume for a full presentation of con-

temporary theory and criticism would remain ignorant. Readers who turn to the section titled "Marxism" in the "Introduction to Theory and Criticism" would never learn that Marxism has been the ideology of some of the most murderous dictatorships in history, or that Marx's predictions about the future of capitalism and socialism have been discredited by the history of the last century. (Likewise, a reader of the "Psychoanalysis" section would never guess that the scientific standing of Freud's theory is today almost as low among psychiatrists as Marx's among economists.)

Such wholesale omissions tell their own story clearly enough. If, however, one wants to consider the debate over contemporary criticism and theory from a larger historical and intellectual perspective, there is no better resource than the work of René Wellek. Immensely learned in many languages, Wellek discusses, in his magisterial eight-volume *History of Modern Criticism 1750-1950*, the most disparate critical approaches with fairness and acumen throughout, always supporting his characterizations and judgments with generous quotations from the critic under consideration. Wellek and Austin Warren's *Theory of Literature* compared the leading ideas of English and American critics with the most significant developments in European thought about literature, shaping several generations of critics.

René Wellek died in 1995, but there is little doubt as to where he would stand in the current debates about Theory. The coauthor of *Theory of Literature* was anything but an "anti-theorist," and yet that is where he would have to be classified if, by some chance, he were ever considered for inclusion. If the editors of *The Norton Anthology of Theory and Criticism* were to allow René Wellek to appear in the inevitable third edition, they would certainly be introducing a perspective on Theory almost entirely omitted from the earlier versions of the *NATC*. Readings they might consider include his 1983 essay "Destroying Literary Studies," or the title essay of his *The Attack on Literature.* ♦

B&A

Castelli's Art

The connoisseur-dealer who commanded the market.

BY JAMES GARDNER

It is a testament to the art world's centrality in contemporary culture that even marginal figures like dealers are now treated to the sort of full-dress biographies that were once the privileged domain of generals, monarchs, and great writers. However one feels about this cultural shift, it seems quite clear that if any recent dealer deserves such treatment it is Leo Castelli, who presided over the international art world, and certainly over its New York chapter, for nigh on half-a-century. During that time, in some measure due to the exertions of Castelli himself, New York became the undisputed capital of the sort of contemporary art in which he exclusively trafficked.

Leo and His Circle
The Life of Leo Castelli
by Annie Cohen-Solal
Knopf, 576 pp., $35

The longevity of Castelli's tenure means that, unless a New York critic happens to be well advanced in years, he is unlikely to recall a time when this dealer was not the major player on the art scene, until his death, at age 91, in 1999. Even if one did not know the man, one certainly saw him everywhere: In the cutthroat arena in which he moved, he was remarkable for communicating to all and sundry an effortless pleasantness. He also stood out for being so remarkably well dressed, in an equally effortless and elegant way, that it is difficult even now to speak of him without invoking the word "dapper." But most of us never knew much about the man behind the smile and behind the astounding track record of his success in discovering the likes of Rauschenberg, Warhol, and a hundred other blue chip names. Now, thanks to this new biography, we are finally in a position to know the man.

Perhaps the most fundamental fact about him—and I write this with a sense of relief—is that there is little to disclose in the way of scandalous, Kitty Kelley details. Surely he had his affairs (many of them) and surely he hustled to build his business. But nothing in the nearly 600 pages of this work exceeds the normal and licit boundaries of conventional ambition or human frailty. And if there was much that the generality of his acquaintances did not know, that too lay within the normal ambits of human complexity. By all accounts, Castelli appears to have lived a relatively placid life over nine decades; and though this Jew from Trieste was forced to flee from fascism and come to America in the early 1940s, the details of his flight might be unique but the general narrative is one that he shares with millions of other men and women of his time.

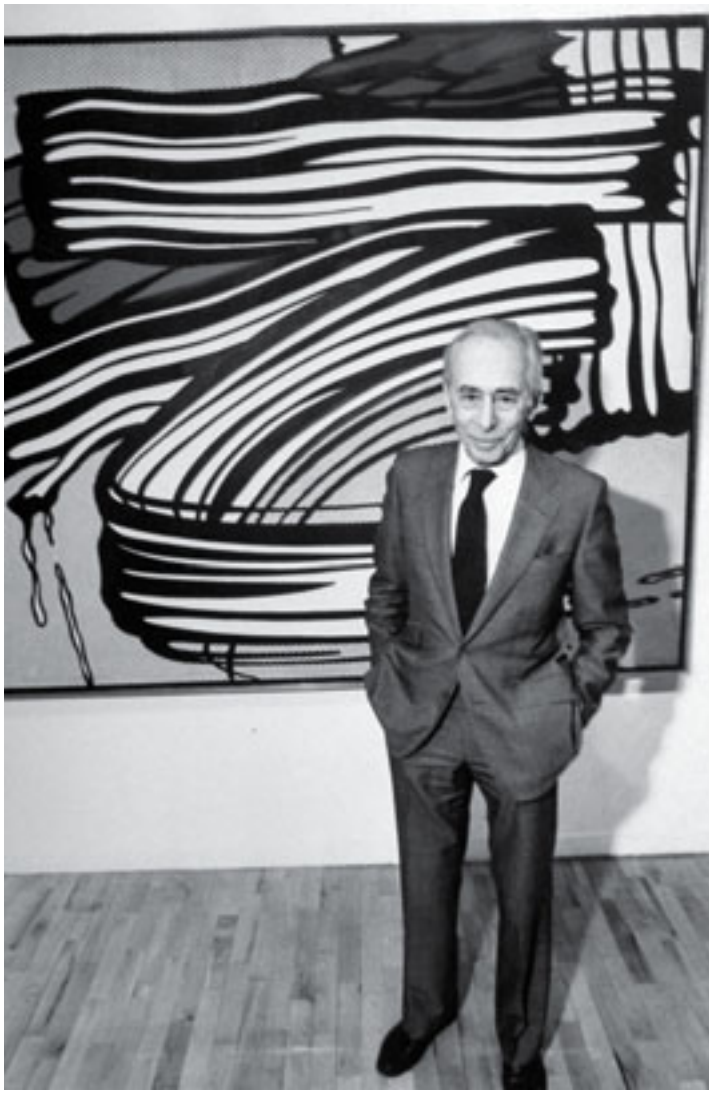
What most of his more casual acquaintances did not know, though it is now revealed by Annie Cohen-Solal, is that he was hardly born to take up the profession with which he is now so indissolubly associated. An indifferent student, he was, for at least the first 40 years of life, more interested in mountaineering and chasing women than in studying art. He was born into an affluent family in Trieste, where his father was the president of the main bank. But he exhibited no interest for that line of work, or for the law in which he earned a degree. He was not even especially interested in art, though he

James Gardner recently translated Vida's Christiad *(I Tatti Renaissance Library).*

did retain, throughout his life, an amateur's love of good European literature. In the course of his peregrinations, Castelli came to spend several years in Bucharest, where he met his first wife, Ileana Schapira, who, as Ileana Sonnabend, was destined to become, in her own right, a dealer almost as eminent as he was. But her father, who was extremely wealthy, is said to have despaired of his charmingly ineffectual son-in-law, whom he supported for decades and set up in the short-lived art gallery that Castelli opened in Paris in the 1930s.

Even in America, it would be nearly two decades before Castelli's career as an art dealer took off when he was 50. Any assessment of his ultimate success depends upon the criteria you choose to apply to him. In terms of his ability to spot winners, he is probably without peer in the postwar period. Only the much-earlier Ambroise Vollard, the discoverer of Cézanne and Picasso, comes anywhere close. Shortly after coming to America, Castelli managed to ingratiate himself with the leaders of the then-nascent movement known as Abstract Expressionism. And though he cannot claim to have discovered Pollock and De Kooning, he played no small role in the progress of their careers. But after 1960, when he had his own gallery, Castelli was instrumental in discovering some of the most celebrated (if not always the best) artists in America. Almost single-handedly he made the reputations of Robert Rauschenberg, Jasper Johns, and Andy Warhol, of Frank Stella, Bruce Nauman, and Julian Schnabel.

There are several ways of interpreting this exceedingly diverse roster. One could argue, for example, that Castelli was without formal principles, that he chose his artists less according to their merits than according to his unerring instinct for what the world, over the next 5 to 10 years, would come to find incandescently interesting and important. On the other hand, one could argue that art is a business like any other, and that Castelli's early grasp of these artists' monetary potential was the key to his success. At the same time, one is surprised to learn that, in later years, he ran into financial troubles and that his gallery, though outwardly stable, was no longer doing as well as it had once done.



Leo Castelli, 1987

MICHAEL ABRAMSON / TIME LIFE PICTURES / GETTY IMAGES

What is certain is that no one today has performed a role anywhere comparable to Castelli's, and it is unlikely that anyone will hereafter. When Castelli started soon after the end of the Second World War, it was still possible to see all the galleries in New York in a single afternoon just by strolling along West 57th Street. Today, with the exponential explosion of such venues throughout the city's five boroughs, it would take a solid week just to reach them. The competition is simply too great for one man to dominate the scene as Castelli did.

It should also be said that it is going on 40 years now since we have had any true revolutionaries worth talking about in the world of contemporary art. It is hard to imagine, at this moment, what someone of the stature of Pollock, or even of Rauschenberg or Warhol, would look like, or where that artist might be found.

In telling the story of Castelli's long and largely admirable life, Annie Cohen-Solal, formerly the cultural counselor at the French embassy in New York, has written a French biography. It is different from the American sort in that it is more impressionistic, more artificial and adulatory than what we tend to tolerate or produce: "Generous, loquacious, and attentive, he made sure . . . everyone's amour proper was flattered, working the room, deploying his personal and material charms as a peacock spreads its tail." But behind such breathless writing (which may have sounded better in the original French), Cohen-Solal, together with her phalanx of research assistants, has done the requisite work and, in the process, has laid bare aspects of Leo Castelli's life that few people knew before. ♦

B&A

Yesterday's Man

Whatever happened to George C. Scott?

BY JOHN PODHORETZ

The name George C. Scott has descended into the mists of obscurity, and in no time at all—he died a mere 11 years ago. Such a thing would have seemed impossible only two decades earlier, when George C. Scott was universally considered one of the great American actors and, by many, *the* greatest American actor. How does it happen that a reputation like Scott's can go into permanent eclipse? What did he have when he was at his best that no longer speaks to us?

The answer is simple: Scott's surpassing gift was his ability to convey authority of an old-fashioned sort: the intimidating, formidable, ramrod-straight authority that isn't afraid of, and doesn't back down in, a fight. He was, in other words, a man of a different time, unironic and unevolved, and we don't know men like him any longer, or if we do, we make fun of them for being retrogressive and reactionary.

Like all actors of distinction, who must learn to inhabit the bodies and souls of other people, Scott was (to use Isaac Rosenfeld's memorable words written in a different context) "as sensitive as a fresh burn," and that sensitivity was a torment to him even though he lived an amazing American success story.

The son of a coal miner, Scott joined the Marines and then went to the University of Missouri on the G.I. Bill. His military experience and his gratitude to the United States for the relative ease with which he rose through the social strata would always separate him from the bulk of his profession; he often inveighed against Hollywood's hostility to the Vietnam war. While he was studying journalism at Mizzou, he stumbled into the theater scene there and discovered, to his own surprise and the surprise of others, that he could do anything—classic melodrama, light comedy, bits, leads. Scott was a type that no longer exists: a middlebrow striver hungry for highbrow status. Throughout the high-water mark of his career, during the 1970s, he would leave film stardom behind and take months at a time to direct and star in revivals of very dated works by Eugene O'Neill and Noel Coward presented in relatively small New York theaters to spotty effect.

George C. Scott, circa 1975

Only two years after his first professional role off-Broadway playing Richard III, Scott hit the screen as an aggressive prosecutor in *Anatomy of a Murder* (1959) and a Mephistophelean gambler in *The Hustler* (1961), winning Oscar nominations for both. While watching a screening of an awful 1966 film called *The Bible*, in which a magisterial Scott played the patriarch Abraham, 20th Century Fox chieftan Darryl Zanuck turned to a producer on his lot and said, "There's your Patton." Four years later, Scott inhabited the role of the controversial World War II general and delivered one of the cinema's towering performances, for which he won an Oscar despite loudly refusing his nomination. The next year, he gave astounding force to the role of a suicidal Jewish doctor who works at a medical center that seems to specialize in killing patients in a brilliant black comedy called *The Hospital*.

Scott had everything, and he just let it all dribble away. He made only one decent movie after *The Hospital*—a wonderful and gentle Depression-era film parody called *Movie Movie* in 1978. *Movie Movie* was a flop, and so was everything else he touched. He played a scientist training talking dolphins to become CIA assassins in an all-time inadvertent comedy classic called *The Day of the Dolphin*; he played a humane German Zeppelin commander in a horrendous disaster flick called *The Hindenburg*. His most self-destructive act was to sink millions of his own into a cringe-inducing Social-Darwinist embarrassment called *The Savage Is Loose* about a shipwrecked family of three whose son decides to challenge his father for the sexual favors of the mother.

A riveting biography by David Sheward called *Rage and Glory* (2008), one of the best showbiz books of recent years, lays Scott bare: He was a violent alcoholic who literally drank himself to death when he refused to give up alcohol to prepare for an operation intended to sew up a hole in his heart. The drinking made him vicious—he beat up women as various as the formidable Colleen Dewhurst (twice his wife) and Ava Gardner (who tore out his heart as she had torn out Frank Sinatra's)—even though it was intended to dull the pain. In the end, the George C. Scott story is the same old, same old: The booze he thought he needed to get through life actually impaired it, worsened it, coarsened him, destroyed his judgment, and finally killed him. Such a death dated him as surely as his pre-feminist authority did. It will take a change in the culture for us to see a George C. Scott revival anytime soon. ♦

John Podhoretz, editor of Commentary, *is* THE WEEKLY STANDARD*'s movie critic.*

PAUL HARRIS / GETTY IMAGES

PARODY

"'The question for 2010 is: Whose side are you on?' Sen. Robert Menendez (D-N.J.) … said to reporters Thursday. He spoke after a closed meeting with Democratic senators, where palm cards itemizing contrasts between the parties were distributed for lawmakers to carry around during the recess. 'Democrats moving us forward, while Republicans take us back,' the card says."

—Los Angeles Times, *August 9, 2010*

…ournal …whores. And you know who you …

…PTEMBER 9, 2010 — *ONE DOLLAR CHEAP*

DEMOCRATS FIND PALM CARDS 'CUMBERSOME,' 'CONFUSING'

Boxer: 'Vote for me—I am the … Queen of Spades?'

By MONICA DAVEY

For the last month, Democratic senators seeking reelection have been following the orders of New Jersey senator Robert Menendez, chairman of the Democratic Senatorial Campaign Committee, to rely on palm cards conveying the Democratic message of progress. It now appears they may have developed an overdependence on the cards, having to pause, look down, and read what is in their hands, at every opportunity. On a few occasions, the card in their hands was not a message of progress but in fact a business contact or a ticket stub.

During a televised debate against Republican candidate Sharron Angle, Senate majority leader Harry Reid was asked why voters should reelect him. Replied Mr. Reid, "Because I … expire April 2011." Desperately trying to recover, the senator then reached into his pocket and added, "I mean because … Mr. Rooter can solve even your toughest clogs."

At a town hall gathering in Seattle, Senator Patty Murray told voters she and her fellow Democrats "are moving us forward." She then paused, looked down at her hand, and told voters to "get a stamp for every beef or veggie patty purchased. One fully stamped card is worth a single burger; two is worth a double burger." In Little Rock, Ark., Senator Blanche Lincoln read a similar message to constituents, except that she referred to "Strawnana" and "Banzai Blueberry" smoothies.

At a gala fundraiser in Manhattan, Senator Charles E. Schumer accidentally read aloud the phone number of a private investigator. Afterwards Mr. Schumer placed a call to Mr. Menendez, alerting him to the fact that his strategy "blows chunks." The New Jersey senator accepted the blame and asked his fellow Democrats to "lose the cards," but not before Maryland senator Barbara Mikulski let voters know that "for a good time, call

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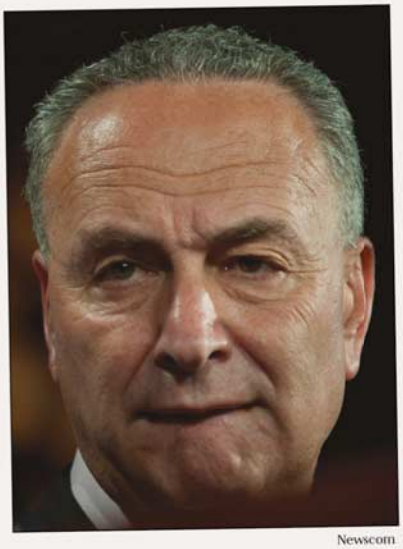

Newscom

Sen. Charles Schumer reacts to having accidentally read aloud a number for "Rocco," a private investigator.

'STEREOTYPE' COMMENTS EMBROIL NEVADA'S REID

'No one watches "Project Runway" who isn't gay'

the weekly Standard

AUGUST 23, 2010