

# Justifying Official Disobedience

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## Abstract

Do government officials, who have taken an affirmative oath to uphold the constitution, have any legitimate claim to disobey the law? We argue that they do. Indeed, the nature of law itself requires officials to have some mechanism to enforce the secondary rules or if one prefers, the associative obligations, upon which their authority is based. When institutional structures and official behavior makes it impossible for officials to subordinate government activity to the rule of law, then other officials may be excused from legal constraints for the limited purpose of ensuring accountability. We use arguments from legal, constitutional and political theory to illustrate this narrow excuse.

## Keywords

official disobedience, civil disobedience, rule of law, concept of law, accountability, legitimacy, secondary rules, law as integrity, legal positivism

## I. Illegality and Disobedience

After the attack on the Twin Towers Vice President Richard Cheney advised the nation that the US Government would have to operate on the “dark side,” in order to capture the culprits and hold them accountable. Revelations since then suggest that this term included activities that are widely considered illegal under American and International law including torture, extra judicial executions and the warrantless wiretapping of American

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citizens. Even after admitting that the United States engaged in torture,<sup>1</sup> President Obama resisted calls to prosecute those responsible, arguing that the nation needed to “look forward.” Conversely, President Obama prosecuted more whistleblowers under the Espionage Act than did all other Presidents combined.<sup>2</sup>

All of the actions mentioned above were justified according to some higher moral purpose. The justification of willful disobedience to lawful authority has a long provenance in the Western Legal Tradition. Article 61 of the *Magna Carta* gave the Barons the authority to use force against the King if he exceeded his lawful authority.<sup>3</sup> Locke reiterated the limits of lawful authority and this principle was reaffirmed in the 19th century by Henry David Thoreau, and in the 20th century by Martin Luther King. That our own law aims to limit and control the power of the government was made plain from the start by Madison’s famous observation in *Federalist 51*.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>4</sup>

The claim of individuals to disobey when the government was not able to control itself gets more comprehensive support by legal theorists as diverse as Ronald Dworkin<sup>5</sup> and Joseph Raz.<sup>6</sup> Yet the disparate treatment of the actors by President Obama suggests that the meaning and limits of civil disobedience and the subordination of officials to the rule of law, are still unsettled.

This uncertainty is understandable. The very idea of there being lawful excuses to violate that which is lawfully required seems like a logical contradiction. Moreover, most justifications for civil disobedience presuppose private citizens resisting state power. Yet the actors who are the subject of this article are themselves part of the state apparatus. They are government officials or contractors acting as agents of the government. Does the

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1. See Press Conference by the President, The White House (Aug. 1, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president> (“With respect to the larger point of the RDI report itself, even before I came into office I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks.”) [*hereinafter* Press Conference by the President (Aug. 1, 2014)]. See generally, Jane Mayer, *The Dark Side* (New York: Doubleday, 2008).
  2. See “The Lead With Jake Tapper” (January 2, 2014) <http://www.cnn.com/TRANSCRIPTS/1401/02/cg.01.html>.
  3. <http://avalon.law.yale.edu/medieval/magframe.asp>.
  4. James Madison, The Federalist No. 51 in *The Federalist: With Letters of “Brutus,”* (Terence Ball, ed.) (Cambridge: Cambridge University Press, 2003), p. 252.
  5. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), p. 249.
  6. Joseph Raz, *The Authority of Law: Essays On Law and Morality* (Oxford: Oxford University Press, 2009), p. 260 (Raz goes so far as to say that there is no general obligation to obey the law although one may choose to do so if one has respect for it).

concept of civil disobedience even apply to them? One problem with extending the idea of civil disobedience to government officials is that it appears to obviate the idea of accountability under the rule of law.

This tension between the accountability of government officials for unlawful behavior and the principle of excusing unlawful behavior designed to keep government accountable to the rule of law is the focus of this article. We argue that under limited circumstances government actor civil disobedience can be justified because it promotes accountability, and indeed, is sometimes the proximate event that makes it possible. We examine official disobedience through the lens of accountability. In those circumstances where disobedience is designed narrowly to advance the enforcement of the law or political accountability of officials, punishment should be mitigated or excused. This is a narrow exclusion that would not include violations of law that are thought sound or even urgent policy for the “good of the country” such as the commission of war crimes, or the subversion of constitutional structures of government.<sup>7</sup> Presidents are able to justify their own or their subordinates’ departures from law as they see fit. But our constitutional structure requires that they do defend such actions and we argue that the mechanism for doing so is currently broken. Officials break the law and then punish subordinates for attempting to hold them accountable. Requiring an official to go to jail in order to enforce the rule of law cannot logically be part of the concept of law, nor of our constitutional application of the rule of law.

Most justifications of willful departures from the law depend upon a political theory of civil disobedience. Such a theory needs to be independent of any single ideology. Otherwise, it would not be a general theory of disobedience but merely about the rights and obligations one had given a particular political context. While the political theory of American Constitutionalism may be controversial, the fact that all authority is subordinate to the rule of law is not. Our model of disobedience transcends any theory of justice by grounding it in legal theory. We show that the concept of law itself requires some space for disobedience. Importantly, this holds true whether one thinks of law as a union of primary and secondary rules or the principled interpretation of past state actions that justify our obligations to it. Part II will lay the foundation for this position.

We argue that there are multiple foundations for justifiable disobedience that depend on the circumstances of the political and legal institutions on the one hand, and the particular situation of each disobedient person. So context is important for determining if or when those reasons are compelling. Whether disobedience is valued for the protection of democratic institutions, legal accountability or individual conscience depends upon the overall structure of justice in a society. The basic element of American Constitutionalism is that every act of state is subordinate to the rule of law. No official act of state is valid except under color of law. So Part III will apply Hannah Arendt’s ideas about the breakdown of accountability in a Republic to contemporary arguments in American Constitutionalism. Through this discussion we hope to show why the

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7. The justification of torture by Vice President Cheney would be an instance of the former while the Iran Contra Affair is an example of the latter. See Theodore Draper, *A Very Thin Line: The Iran Contra Affairs* (New York: Wang, 1991).

current evolution of American public institutions justify certain types of disobedience in order to achieve the accountability that was envisioned in our constitutional structure.

Part IV will show how officials have essentially made it illegal to report violations of the secondary rules that constitute the rule of law over national security policy. The practice of national security policy has developed to the point where responsible officials publicly repudiate legal accountability.<sup>8</sup> While some officials freely violate the law, those who report these violations experience the full weight of legal accountability. This disparity creates uncertainty about which secondary rules apply. By eliminating any legal mechanism to enforce some secondary rules it raises the question of whether those original rules really exist.

To show this we will examine three contemporary cases where the government made two different decisions about prosecuting willful violations of law. The first example concerns I. Lewis “Scooter” Libby, a vice presidential assistant who was convicted by a special prosecutor of exposing the identity of a non-official cover (NOC) CIA (Central Intelligence Agency) agent who was in charge of monitoring nuclear weapons buildup in Iraq and Iran. His sentence was immediately commuted by President Bush. The second case involves the decision of Jose Rodriguez, an official in the CIA directorate of operations, to destroy video tapes recording the torture of prisoners by CIA officers and contractors. Before being destroyed, those tapes were requested under subpoena by congressional committees, lawfully constituted investigative commissions, and parties to lawsuits against the government. The final case involves Edward Snowden, a former government official who was acting as a contractor for the National Security Agency (NSA) when he released classified information to journalists. Snowden’s stated aim was to expose illegal activity that the government had previously denied engaging in. In the case of Rodriguez, no prosecution or disciplinary action was taken while in the latter case Snowden was indicted under the Espionage Act of 1917 among other violations. The Espionage indictment is noteworthy because it permits the defendant no opportunity to present any justifications to the jury, including the fact that he might be disclosing illegal government behavior.

## II. Theories of Disobedience

Invoking a theory to justify disobedience implies a prior obligation to follow the law in the first place. Any presumption of obedience rests on some idea of justice that explains the grounds and force of law in a community. But different theories of justice generate obligations on different and occasionally inconsistent grounds. Some obligations may be duty based, some rights based while still others are grounded in the maximization of welfare. Trying to find a single justificatory principle across all theories of justice will be difficult because those rights or duties a person might have in one system can easily conflict with the maximization of general welfare required in another system of justice.

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8. Glenn Greenwald, “Obama’s Justice Department Grants Final Immunity To Bush’s CIA Torturers,” *The Guardian* (Friday, August 31, 2012). Available at: <https://www.theguardian.com/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer>.

A theory of disobedience aims to be much more than an index of where law ceases to exist or obligate. Its ambition is to justify departure from the law even when the law itself does not provide for it. To do this universally it must not depend on appeal to any specific substantive principle of justice. Instead, justifications for civil disobedience must depend on the *type* of objections one has to the law. What distinguishes civil disobedience from simple criminality is not an appeal to any specific moral principle but rather an appeal to some moral principle that attempts to make a theory of justice whole.

As Ronald Dworkin argued, we judge the legitimacy of disobedience not on the soundness of a disobedient person's convictions, but rather on the kind of convictions he or she holds.<sup>9</sup> Some sort of moral belief needs to be at the root of an objection in order to justify disobedience. Convictions of principle can arise in two different contexts. *Integrity based* disobedience can arise when the government forces an individual to choose between the law and his conscience. This might occur if an abolitionist was forced to return a runaway slave. *Justice based* disobedience occurs when someone believes the law promotes an injustice. The discriminatory Jim Crow laws impelled many civil rights protesters to violate segregation laws in the South. Conscience violating laws intrude most directly and provide the least opportunity for political redress so people asserting this right cannot be compelled to exhaust other remedies. Justice based disobedience enjoys a narrower range of legitimacy because it is not employed to protect personal integrity but to further a goal of dismantling an immoral program.<sup>10</sup> The least justifiable form of disobedience in this schema is that motivated by *objections of policy*. Here, the conviction is not the law's immorality but its imprudence for everyone, including the majority. Such disobedience cannot justify non-persuasive strategies because then the goal is simply to raise the cost to the majority of pursuing what it decides is in their common interest.

Whether there is a single theory of disobedience that can justify departures of law across all theories of justice is an interesting question that is beyond the scope of this article. We do not aim to generate a general theory of civil disobedience that will justify departures of law across all systems of justice. Rather, we seek to clarify a theory of disobedience that applies, at the very least, to those principles of justice incorporated into American Constitutionalism. In particular, we mean those set of principles of liberal democracy that vis-à-vis individuals, require the state to provide for freedom of conscience and to be neutral amongst different ideas of the Good while at the same time requiring officials to be politically accountable to the electorate and subordinate to the rule of law. These last two ideas of political and legal accountability contain the framework around which our theory of disobedience is built.

Regarding civil disobedience as a peculiar type of law breaking designed to preserve the principles of justice legitimating a legal system we not only distinguish it from ordinary criminality but also show why it includes government officials as well as the general public. The latter group can only violate primary rules. But the greatest threat to a

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9. Ronald Dworkin, "Civil Disobedience and Nuclear Protest," in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), p. 106.

10. Dworkin, "Civil Disobedience," p. 109.

legal system usually comes from the breakdown of secondary rules that tell officials the source and limit of their authority. It is these secondary rules of recognition, adjudication and change that distinguish the political foundations of a legal system. The difference between a democratic society under the rule of law and an arbitrary dictator is defined by the secondary rules that decide the contours of legitimate power. These types of laws, which define the fundamental structure of society only apply to officials and can only be broken by officials. So any theory of civil disobedience that ignores them excludes the most critical threats to a legal system's legitimacy and also the potentially greatest tool for rectifying those threats.

A cursory glance at national security law illustrates our position. Perhaps no other area of law co-exists so uneasily with the principles of legal and political accountability upon which American Constitutionalism is based. Accountability entails transparency while national security often requires secrecy. While attempts are made to juggle these divergent goals, American Constitutionalism requires that all official action be subordinated to the rule of law. This tension is exacerbated by the fact that most national security laws are secondary rules that only apply to officials. For example, while anyone can commit assault or murder, only an official of state acting under color of law can commit the crime of torture.<sup>11</sup> Yet officials who commit crimes naturally attempt to escape the consequences of their actions by declaring their behavior secret under the umbrella of national security.

This phenomenon illustrates why enforcing secondary rules is so difficult. The people to whom they apply are sometimes the same ones who are executing and adjudicating them. This creates a problem of both legal and political accountability. As Hart pointed out, one cannot have a legal system without secondary rules of recognition, change and adjudication. These rules are the institutional mechanism that spells out the political and constitutional contours of our structure of government. Whatever concept of justice is reflected in our constitution exists only because of the secondary rules that make it so. Yet when officials assert the existence of secret laws that expand their powers, invoke state secrets privileges to dismiss attempts of judicial accountability, or pass retroactive legislation removing rights from citizens,<sup>12</sup> the structure of government defined by those secondary rules are violated without any obvious mechanism for redress. If the rule of law requires that officials agree on those secondary rules that define the scope of their powers, then the fundamental disagreement represented by these actions mean that the most basic element required for the rule of law is absent.

In these circumstances civil disobedience might be the only way that violations are exposed and the system repaired. It may seem inconsistent to advocate official misconduct to remedy official misconduct but we hope to show that in those instances of

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11. 18 U.S. Code § 2340 (1) *and also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Part I Article 1. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

12. The relevant Bush torture memos can found at: <http://nsarchive.gwu.edu/torturingdemocracy/documents/theme.html>. The Obama administration "white paper" justifying its extra-judicial execution policy can be located at: [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

secondary rule violation that affect the structure of government, there might be no other mechanism to preserve accountability. There is no rule or principle that exempts the national security apparatus from the rule of law. The secrecy under which it operates, however, make its accountability to law difficult and obfuscates the secondary rules that define our system of justice.

This argument is not limited to legal positivism. Dworkin's idea of law as integrity leads to the same consequences. The associative obligations that bind us to each other are justified by the subordination of government behavior to the rule of law. Indeed, this would count as the most abstract principle at the root of all other associative obligations. The national security apparatus has challenged the existing mechanisms of accountability to the limits of integrity. While courts continue to affirm the supremacy of law over all official activities,<sup>13</sup> they cede control through acceptance of increasingly expansive assertions of state secrets privileges.<sup>14</sup> This begs the question whether our system is out of integrity with past justifications of state power or whether some new principles are emerging that change the foundation of our associative obligations. The next part will examine the story of our associative obligations to try to answer this question.

### III. Civil Disobedience and the Accountability Deficit in the American Republic

In many respects, our view of the justification for civil disobedience is consistent with the case that Arendt advanced to defend civil disobedience in the 1960s as a "remedy" for governmental abuse of power. Her argument emphasizes the importance of evaluating the merits of such incidents contextually, which includes weighing the effectiveness of institutional devices and legal measures employed to hold government officials accountable. More recent scholarship suggests that her diagnosis of the government's lack of accountability remains valid to this day. Modern liberal-democratic states presuppose in Arendt's view the principle of popular consent as a fundamental rationale for the legitimacy of rule and for the obligations of citizens to obey the law. This principle assumes that citizens are members of voluntary societies entered and sustained on the basis of their consent. It derives, she observes, from the unique human faculty for promise-making through which individuals create mutual obligations to order their future affairs among them. However, these promises are only binding, she contends, if the circumstances under which they were made do not radically change in unforeseeable ways. Mutual promises are only binding to the degree that all parties to them keep their own.<sup>15</sup>

The principle of consent, she observes, has been most fully developed in social contract theory. She contrasts two basic types of contract models: the vertical, as exemplified in Thomas Hobbes's version, and the horizontal, as exemplified in John Locke's version.

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13. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

14. Henry Lanman, "Secret Guarding: The New Secrecy Doctrine so secret that you don't even know about it," *Slate*, May 22, 2006.

15. Hannah Arendt, "Civil Disobedience," in *Crises of the Republic* (New York: Harcourt Brace & Co., 1972), pp. 92–3.

In the former, liberty is exchanged for security whereby the contracting parties irrevocably transfer most of their rights and powers to a central, overawing power who rules over them as politically passive subjects. In the latter, contracting parties ally to form a political society in which they collectively retain their political power, which they then delegate to a government in the form of a revocable trust.<sup>16</sup> In modern liberal-democratic states, she argues, consent does not signify mere passive acquiescence, but active support and continuing participation in common affairs. Nevertheless, the Lockean idea of tacit consent remains a necessary supposition because in many practical ways our membership in a polity is involuntary. We did not choose the polity into which we are born, and most do not have a feasible means to leave. Under these circumstances, the supposition of consent is only meaningful when it is coupled with a legal right to dissent. To the degree that we choose not to exercise this right, it is reasonable to infer that we have consented. By the same token, when we express dissent against particular laws or policies, it follows that we consent to all those against we are not protesting. The fact that majorities in any polity may consent to how their government manages affairs does not diminish the right of minorities to dissent. The contract that binds society together remains a pact among distinct individual parties, and the authenticity of ascribing consent to each depends on each retaining the right to dissent.<sup>17</sup>

While recognizing that civil disobedience has become a global phenomenon, Arendt contends that that arose first in the United States as a legacy of the American colonial and revolutionary experiences. From these experiences, Americans learned the crucial political art of creating voluntary associations that presuppose the organizing principles of consent and dissent as guiding principles of action.<sup>18</sup> Through their master of this art, the founders successfully constructed a federal union of the original thirteen states, though at the expense of providing sufficient forums and channels for popular political participation.<sup>19</sup> Nevertheless, the American citizenry developed their own distinct forms of collective civic and political action through starting and joining a wide variety of voluntary associations to fight injustices and address unmet needs. In the American context, she argues, civil disobedience should be understood as another form of voluntary association, which not only enjoys rich precedent in the American political tradition but also is entirely consonant with the spirit of American law.<sup>20</sup> She sees voluntary associations generally and civil disobedience in particular as a distinctively “American remedy” for the failures of political and legal institutions.<sup>21</sup> Her view is consistent with James

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16. Arendt, “Civil Disobedience,” pp. 84–7.

17. Arendt, “Civil Disobedience,” pp. 87–8.

18. Arendt, “Civil Disobedience,” pp. 69, 83, 88, 94.

19. Hannah Arendt, *On Revolution* (New York: Penguin Books, 2006), pp. 159–70, 223–31, 245–7.

20. Arendt, “Civil Disobedience,” pp. 94–6.

21. Arendt, “Civil Disobedience,” p. 74. On the role this type of association has played in promoting legal change, see David Cole, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (New York: Basic Law, 2016). On the enduring American tradition of civil disobedience, see Lewis Perry, *Civil Disobedience: An American Tradition* (New Haven, CT: Yale University Press, 2013).

Madison's view that those who support republics regard the "people" as the most effective guardians of their own liberties.<sup>22</sup> Arendt points out that decades of workers had to fight bloody confrontations with their employers before they won the right to unionize and to strike. Likewise, the Supreme Court long construed the Fourteenth Amendment as consistent with the denial of racial equality. "Not the law," she argues, "but civil disobedience brought into the open the 'American dilemma' and, perhaps for the first time, forced upon the nation the recognition of the enormity of the crime, not just of slavery, but of chattel slavery . . . the responsibility for which the people have inherited, together with so many blessings, from their forefathers."<sup>23</sup> Among these examples, she might have also included among these examples the antebellum abolitionist movement and the women's suffrage movement.<sup>24</sup> Focusing on the anti-war movement, she observes, that "civil disobedience arises when a significant number of citizens have become convinced either that the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt."<sup>25</sup> In her view the executive branch's conduct of the undeclared war in Vietnam clearly met this threshold. She also pointed to its abuse of intelligence agencies for the purposes of domestic surveillance and the subversion of dissident groups.<sup>26</sup> The Supreme Court, she contended, had abdicated its responsibility to consider the

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22. James Madison, "Who are the Best Keepers of the People's Liberties?", *National Gazette*, December 22, 1792. In: James Madison, *The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed* Gaillard Hunt (ed.) (New York: G.P. Putnam's Sons, 1900), Vol. 6, pp. 120–23. Available at: <http://oll.libertyfund.org/titles/madison-the-writings-vol-6-1790-1802>. In the Virginia Resolution (December 21, 1798) protesting the Alien and Sedition Acts, Madison re-affirmed that the "right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right." Available at: [http://avalon.law.yale.edu/18th\\_century/virres.asp](http://avalon.law.yale.edu/18th_century/virres.asp). More concerned about the corrupting effects of oligarchic power than Madison, John Adams emphasized the chronic threat that elites posed to republican forms of government through their manipulation of elections and representative institutions as well as their disproportionate influence in the public square. See Luke Mayville, "Fear of the Few: John Adams and the Power Elite," *Polity* 47(1) (2015), 5–32. Rather than Adams or Madison, Arendt invoked the authority of Tocqueville to support her analysis of the key role that civic and political associations played in American society. For her discussion of Tocqueville, see Arendt, "Civil Disobedience," pp. 88, 89, 94–8, 101. For the pertinent sections in Tocqueville, see Alexis de Tocqueville, *Democracy in America*, (Arthur Goldhammer, tr.) (New York: Library of America, 2004), pp. 215–23, 595–9, 604–9, 709–10.

23. Arendt, "Civil Disobedience," p. 81.

24. See Perry, *Civil Disobedience*.

25. Arendt, "Civil Disobedience," p. 74.

26. For an overview of this pattern of surveillance and subversion, see Geoffrey R. Stone, "The Vietnam War: Spying on Americans," in *Security v. Liberty: Conflicts between Civil Liberties and National Security in American History* (Daniel Farber, ed.) (New York: Russell Sage Foundation, 2008), pp. 95–114.

legality of undeclared war and of conscription in service of that war by retreating behind the political question doctrine.<sup>27</sup>

In the years immediately following Arendt's analysis of the crises afflicting the American republic, Congress enacted a series of laws designed to curb executive unilateralism and the abuse of power, increase legislative oversight of the intelligence agencies, impose legal restrictions on domestic surveillance, and regulate the flow of private monies into political campaigns. In assessing the results of these reforms, numerous scholars have concluded that they have been largely ineffective, if not counter-productive.<sup>28</sup> Liberal legal scholars, such as Bruce Ackerman and Peter Shane, have argued that the continued growth of presidential power has undermined the constitutional framework of republican government and the rule of law.<sup>29</sup> From a different perspective, conservative legal scholars, such as Eric Posner and Adrian Vermeule, have reached a remarkably similar assessment, though they favor the expansion of executive power.<sup>30</sup> Other scholars examining the impact of disparities in wealth and power on policy-making have concluded that the American political system has developed a pronounced oligarchic character, which minimizes the influence of the overwhelming majority of American citizens on the conduct of their government.<sup>31</sup> In judging the phenomenon of

27. Arendt, "Civil Disobedience," pp. 99–101. On the case law dealing with the Vietnam War, see Louis Loeb, "The Courts and Vietnam," *American University Law Review* 18 (1969), 376–97.

28. See, for example, Kathryn S. Olmstead, *Challenging Secret Government: The Post-Watergate Investigations of the CIA and FBI* (Chapel Hill, NC: University of North Carolina Press, 1996); Amy B. Zegart, *Flawed by Design: The Evolution of the CIA, JCS, and NSC* (Stanford, CA: Stanford University Press, 1999); Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (Oxford: Oxford University Press, 1997); Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor, MI: University of Michigan Press, 2005).

29. Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2013); Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago, IL: University of Chicago Press, 2009).

30. Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010).

31. Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics* 12(3) (2014), 564–81. Based on their 2015 Year in Elections Report, researchers in the Electoral Integrity Project of Harvard University's John F. Kennedy School of Government concluded that the United States ranks lowest on the integrity scale among liberal-democratic states around the globe. Pippa Norris, "U.S. Elections Ranked Worst among Western Democracies," *Washington Post* (March 29, 2016): [https://www.washingtonpost.com/posteverything/wp/2016/03/29/u-s-elections-ranked-worst-among-western-democracies-heres-why/?utm\\_term=.e3bcf6c52a01](https://www.washingtonpost.com/posteverything/wp/2016/03/29/u-s-elections-ranked-worst-among-western-democracies-heres-why/?utm_term=.e3bcf6c52a01). On how sophisticated new methods of gerrymandering have distorted the representativeness of American legislatures and contributed to political polarization, see David Daley, *Ratf\*\*ked: The True Story behind the Secret Plan to Steal American Democracy* (New York: Liveright Publishing Corporation, 2016). The Supreme Court has raised significant barriers to effective campaign finance regulations, starting with *Buckley v. Valeo*, 424 U.S. 1 (1976) and culminating in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

civil disobedience, Arendt's approach emphasizes the importance of not simply considering the specific acts themselves, but also this kind of broader context.

In tracing the growth of presidential power since the founding era, Stephen Skowronek emphasizes that it has always been driven by the aspiration to overcome constitutional and political constraints on the deployment of government power in the interest of advancing national policy goals. For example, around the turn of the last century, progressive reformers launched an intellectual assault on strict formalist interpretations of the Constitution combined with a drive to replace the party-centered basis of presidential power with new extra-constitutional institutional modes of governing, such as the expansion of the federal bureaucracy staffed by policy professionals, university programs to train this staff along with the creation of think tanks, and professional associations to improve policy expertise. For her part, Arendt was always skeptical of this progressive model because in her view bureaucratic rule alienates public support for any government and precludes any effective means to hold policy-makers accountable.<sup>32</sup>

By the early 1970s, Skowronek observes, liberals, such as Arthur Schlesinger<sup>33</sup> and Theodore Lowi,<sup>34</sup> turned from advocates of the old progressive model to its critics as they became increasingly concerned with its corrupting flaws.<sup>35</sup> However, the drive to expand presidential power did not end there. Rather it migrated to a new conservative movement, which included legal scholars such as Posner and Vermeule, behind the theory of the unitary executive. One striking feature of this movement, Skowronek observes, "is the indifference of these new insurgents to the challenge of inventing alternative machinery to surround presidential power and call it to account, machinery that might justify easing checks and balances with superior forms of external supervision, institutional coordination, and collective control."<sup>36</sup> The growth of presidential power over more than two centuries, he concludes, has so transformed the original constitutional order and political-institutional framework of the founders that little chance remains of turning back to revive older modes of checks and balances. The record of history also suggests not only that the drive will continue, but that it is likely to be successful.

The conservative legal scholar Jack Goldsmith has sought to challenge such pessimistic assessments of the executive's fading accountability. He contends that judicial and congressional action proved effective in correcting the excesses of George W. Bush's counter-terrorism policies after the press had exposed them. This corrective action demonstrates in his view that the checks and balances of the separation of powers framework remains robust as ever. By this argument, the fact that Obama, who had been a sharp

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32. See, for example, Arendt, "On Violence," in *Crises of the Republic* (New York: Harcourt Brace & Company, 1972), pp. 137–8, 140, 182–3.

33. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston, MA: Houghton Mifflin, 1973).

34. Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: Norton, 1969).

35. Stephen Skowronek, "The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive," *Harvard Law Review* 122 (2009), 2083–93.

36. Skowronek, "The Conservative Insurgency and Presidential Power," 2092.

critic of many of these policies, decided to as President to retain, if in modified forms, most of these policies not only the core of the Bush policies, but also shows how the influence of the other branches has helped to refine them. Of course, this continuity can be interpreted just as plausibly as evidence of the enduring power of the institutional networks of the national security state.<sup>37</sup>

For our purposes here the most salient aspect of his argument concerns his process-based concept of accountability, which he defines as meaning “to be subject to an account, which in turns means to disclose one’s activities, explain and answer for them, and subject oneself to the consequences of the institution to which one is accounting.”<sup>38</sup> This standard is considerably more flexible than the one Supreme Court Justice Brandeis proposed in *Olmstead v. United States* (1928), where he held:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.<sup>39</sup>

Emphasizing that accountability in no way mandates criminal liability, Goldsmith contends that all of the senior government officials involved in the Bush torture policies

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37. For this view of these institutional networks, see Michael J. Glennon, *National Security and Double Government* (Oxford: Oxford University Press, 2015); see also, Andrew J. Bacevich, *Washington Rules: American Path to Permanent War* (New York: Metropolitan Books, 2010); Stephen Holmes, “The Spider’s Web: How Government Lawbreakers Routinely Elude the Law,” in *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration* (Austin Sarat and Nasser Hussain, eds) (New York: New York University Press, 2010), pp. 121–52. The journalist Dana Priest and military expert William Arkin have also called attention to the importance of the burgeoning private industry of national security professionals in these networks, which creates a revolving door between government service (where key contacts and security clearances can be had) and a private sector with vastly more lucrative employment opportunities. Dana Priest and William M. Arkin, *Top Secret America: The Rise of the New American Security State* (New York: Little Brown and Company, 2011), pp. 176–201.

38. Jack Goldsmith, *Power and Constraint: The Accountable President after 9/11* (New York: W.W. Norton & Company, 2012), pp. 234–5.

39. *Olmstead v. United States*, 277 U.S. 438, 485 (1928). Available at: <https://supreme.justia.com/cases/federal/us/277/438/case.html>. In *Federalist No. 57* (February 19, 1788), James Madison similarly contended that the most formidable restraint of the government’s abuse of power is “the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.” In *The Federalist with Letters of “Brutus,”* p. 279.

were more than amply held accountable despite the fact that none were ever criminally prosecuted<sup>40</sup> as required under U.S. statute<sup>41</sup> and international law.<sup>42</sup>

In reaching this conclusion, Goldsmith considers the issues at stake entirely from the perspective of the elite legal and policy-making circles to which he belongs. Thus, for example, he refers to the “brutal recriminations that Jay Bybee, John Yoo, and other lawyers suffered” for their roles in orchestrating these policies, but never considers the costs to the victims of torture, many of whom were clearly innocent,<sup>43</sup> or to the interrogators who employed these techniques.<sup>44</sup> He displays no interest in exploring how different interrogation methods were actually used, how the American experience in using them compares with that of other countries, what the history of this use may show, what researchers into the physical and psychological effects of these methods have found, or any of the extensive literature on torture.<sup>45</sup> Nor does he consider why it was fair that low-level soldiers, such as Lynndie England, were criminally prosecuted, convicted and imprisoned for their roles as prison guards in Abu Graib, when no senior officers or elite policy planners ever were. Whereas Bybee was subsequently elevated to a judgeship on the Federal Appeals Court and Yoo returned as a tenured professor to a prestigious law school, England (as a convicted felon) has found it difficult to obtain any employment since her release from prison.

Based on her observations of transitional justice in postwar Germany, Arendt would likely not have been surprised that the American architects of the torture and incarceration policies escaped criminal prosecution while low-level agents carrying these policies out were less fortunate.<sup>46</sup> She also learned from this history that these agents often proved more abusive in their capacities as guards and interrogators than the architects had

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40. Goldsmith, *Power and Constraint*, pp. 236–7.

41. 18 U.S. Code § 2340; 18 U.S. Code § 2441.

42. Article 17 of the *Third Geneva Convention* (1949) proscribes torture against prisoners of war. Article 32 of the *Fourth Geneva Convention* (1949) proscribes torture against detained civilians. The United States became a party to both Conventions in 1955. Article 7 of the 1966 *International Covenant on Civil and Political Rights*, which the United States ratified in 1992, re-affirmed the prohibition against torture. This article is non-derogable, which means it is so fundamental that it may never be lawfully violated under any circumstances. In 1994 the United States has also ratified the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

43. One of the most famous examples concerns Maher Arar, a Canadian citizen who was apprehended by American authorities in 2002 while changing planes in New York and then secretly rendered to Syria where he was imprisoned and tortured for ten months. While the Canadian government has acknowledged that its suspicions of his ties to terrorism were groundless and paid Arar compensation for his ordeal. American courts have consistently dismissed his lawsuits. See <http://ccrjustice.org/home/what-we-do/our-cases/arar-v-ashcroft-et-al>.

44. On the trauma that the interrogators in the Iraq War experienced, see Joshua E.S. Philips, *None of Us Were Like This Before: American Soldiers and Torture* (New York: Verso, 2010).

45. By contrast, consider this recent exploration of the application of the Nuremberg Principles to the American torture program: *Physicians for Human Rights, Nuremberg Betrayed: Human Experimentation and the C.I.A. Torture Program* (June 2017).

46. Arendt, “Auschwitz on Trial,” in *Responsibility and Judgment* (Jerome Kohn, ed.) (New York: Schocken Books, 2003), p. 236.

intended.<sup>47</sup> While fully supporting the criminal prosecution of these low-level functionaries, she endorsed the view of the Jerusalem judges who tried Adolf Eichmann that “*the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hand.*”<sup>48</sup> For his part, Goldsmith displays no interest in seeking to explore the linkages between the policies adopted at the top and their actual implementation below or how creating a new clandestine incarceration and interrogation system may have created settings ripe for abuse. Unless the allocation of responsibility is considered against this much broader background, it is impossible to judge the appropriateness of different accountability mechanisms.

In identifying new mechanisms of accountability, Goldsmith underscores the importance of investigatory journalism and the NGOs, such as the American Civil Liberties Union, in ferreting out government secrets and bringing this information before the public. The overwhelming volume of classified records, he adds, makes leaks inevitable and prospect of such leaks raises a significant deterrent to governmental law-breaking.<sup>49</sup> However, his claim that such unauthorized disclosures and media investigations have been sufficient to keep the public adequately informed seems highly contestable. The records concerning torture are a case in point. Most of the evidence necessary to evaluate claims of torture’s effectiveness have never been released. The Executive Summary of the Senate Intelligence Committee’s *Study of the Central Intelligence Agency’s Detention and Interrogation Program* Senate Intelligence (2014) flatly rejects claims that torture yielded any useful information and shows that the CIA lied about effectiveness of its interrogations, but its conclusions have been challenged by the Committee’s *Minority Report* and by *Rebuttal: The CIA Responds to the Senate Intelligence Committee’s Study of Its Detention and Interrogation Program*.<sup>50</sup> The full *Study* has never been released and likely will not be for the foreseeable future. As a result, scholars and journalists have been unable to examine the underlying evidence supporting Executive Summary’s conclusions, much less the actual CIA records (which have been preserved<sup>51</sup>). Under these

47. Arendt, “Auschwitz on Trial,” pp. 246–7. Darius Rejali points out that this pattern is common. “In the case of the regulation of torture,” he observes, “there appear to be at least three different slippery slopes. First, torturers go beyond the specified suspects to torture individuals not normally tortured. Second, torturers go beyond the approved techniques to a broader range of brutalities. Third, torturers break away from the bureaucratic oversight, creating their own autonomous organizations.” The path down this slippery slope, he adds, is hastened in counter-insurgency operations. Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007), pp. 530, 532.

48. Arendt, *Eichmann in Jerusalem* (New York: Penguin Books, 2006), p. 247. [Italics Arendt’s].

49. Goldsmith, *Power and Constraint*, pp. 51–82.

50. Edited by Bill Harlow (Annapolis, MD: Naval Institute Press, 2015).

51. The CIA destroyed video-tapes of the harshest interrogations in 2005. Mark Mazzetti, “U.S. Says C.I.A. Destroyed 92 Tapes of Interrogation,” *New York Times* (March 2, 2009). Available at: [http://www.nytimes.com/2009/03/03/washington/03web-intel.html?\\_r=0](http://www.nytimes.com/2009/03/03/washington/03web-intel.html?_r=0). Jose Rodriguez, then the CIA’s top operations officer, ordered their destruction, but he was never prosecuted. The CIA’s watchdog, the Inspector General, now claims to have lost the agency’s copy of the Senate Intelligence Committee’s *Study*. See: <http://thehill.com/policy/national-security/280002-cia-watchdog-accidentally-destroyed-only-copy-of-torture-report>.

circumstances, how is the public supposed to sort out the conflicting claims over the efficacy and harshness of the torture methods that the CIA used? There is a long history of governments who have employed torture denying researchers' access to their records.<sup>52</sup> Those who have been complicit in the administration of torture have considerable personal stakes of accountability in avoiding this kind of scrutiny if they fear these records will not bear out their claims. However, given that much of the public continues to believe that torture is effective, there are significant potential public policy ramifications if these issues are left unsettled. In making his case for the new modes of accountability, Goldsmith develops a compelling argument for indispensability of unauthorized disclosures as a political remedy. This argument appears to rest on the assumption that senior executive branch officials cannot be relied upon to adhere to the law or to tell the public the truth unless they fear that their clandestine conduct will be exposed.

The question remains what standard of accountability should be applied to those who make unauthorized disclosures. Goldsmith points out that high-ranking government officials have proven willing to share considerable classified information with selective journalists when it serves their own personal and policy agendas. "Such open defiance and manipulation of the secrecy system at the top," he laments, "indicates a lack of seriousness about secrecy that inevitably corrodes the respect that lower-level officials give it in their discussions with journalists."<sup>53</sup> High officials leak because the danger of accountability is slim. However, when lower-ranking officials take it upon themselves to expose higher-level misconduct, accountability is swift, albeit at the cost of democratic or political accountability for the system at large.

#### IV. Official Misconduct versus Civil Disobedience

In order to understand the distinction between official misconduct and civil disobedience by officials it will be helpful to examine some examples in context. The integrity of the American constitutional structure rests on legal supremacy over political actors and the equal application of the law. Government officials cannot violate these norms without endangering their own political prospects. Hence, they pay tribute to this virtue by insisting upon the equal application of the law to all. Yet the disparate treatment of different official leakers illustrates why some types of disobedience are merely misconduct, appropriately punished, while other types are motivated to protect legal integrity and political accountability.

President George W. Bush had an excellent opportunity to demonstrate the equal application of the laws in the case of I. Lewis ("Scooter") Libby. Vice President Cheney's former chief of staff was convicted of four felony counts of lying to the FBI and a grand jury about the exposure of Valerie Plame's identity. Ms. Plame was a clandestine CIA officer who operated under non-official cover ("NOC"). These NOC officers are amongst the most secretive operatives of the CIA because they operate in foreign countries without benefit of diplomatic immunity or even the pretense of United States government

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52. Rejali, *Torture and Democracy*, pp. 521–2.

53. Goldsmith, *Power and Constraint*, p. 77.

affiliation. At the time she was outed, Ms. Plame was the chief of operations of the Joint Task Force on Iraq – part of the Counterproliferation Division of the agency's clandestine Directorate of Operations. Her job in the lead up to the Iraq war was to find evidence that Iraq possessed a nuclear weapons capacity. She also worked on non proliferation issues in Iran and other Middle Eastern countries. The office was under tremendous pressure because although the Bush Administration was publicly insisting that Iraq possessed nuclear weapons, her office was not able to find evidence to support that claim. To make matters worse, Ms. Plame's husband, a retired diplomat, publicly discredited one of two pieces of evidence the Administration was using to support their claim.

The Bush administration first denied that Ms. Plame was a clandestine officer but the CIA soon confirmed her secret status. Without ever admitting guilt, Vice President Cheney and his chief of staff justified her exposure as necessary to discredit a separate report her husband, Ambassador Joseph Wilson had submitted to the CIA disproving rumors of yellow cake uranium sales from Niger to Iraq. These sales were one of two pillars the Bush Administration used to justify the Invasion of Iraq and Ambassador Wilson's report threatened to upend their campaign to gather support for a war. Vice President Cheney evidently thought he could undermine Wilson by suggesting that his mission to Niger, sponsored by the CIA, was merely a pleasure junket procured by nepotism through his wife's connections. The seriousness of this exposure, and President Bush's promise to discover and punish the perpetrator made an investigation necessary although the apparent lack of enthusiasm in doing so triggered the appointment of a special prosecutor, Patrick Fitzgerald. The prosecutor identified Cheney, Libby, Deputy Secretary of State Richard Armitage and Presidential advisor Karl Rove as responsible for leaking Ms. Plame's identity but ultimately only prosecuted Libby for lying about his and other people's role in the affair. He made clear in court statements and his sentencing memorandum that the limited charges were precisely because Libby's perjury and obstruction made further prosecutions untenable.<sup>54</sup> One of the things left unclear by Libby's perjury was not merely the involvement of Vice President Cheney in the disclosure but of President Bush himself.

Libby was sentenced to 30 months in prison but never served a day in jail because President Bush commuted Libby's punishment on the grounds that he had suffered enough already.<sup>55</sup> In doing so, Bush ignored the regular channels of review through the Pardon Attorney's Office and did not consult with the Justice Department.<sup>56</sup> Bush's act of clemency showed a level of concern for his close colleagues that he could not muster for others in the federal bureaucracy. When Chelsea Manning released documents that were classified at the much lower level of "secret" and "noform" (not for release to foreigners) she was prosecuted for espionage and aiding the enemy, capital crimes. Another difference between these two leaks is that Libby's was motivated to assist the Bush

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54. *Federal Sentencing Reporter* 20(1), 44–8.

55. "Statement by the President on Executive Clemency for Lewis Libby" (July 2, 2007). Available at: <https://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070702-3.html>.

56. Jeffrey Crouch, *The Presidential Pardon Power* (Lawrence, KS: University of Kansas Press, 2009), pp. 123, 143.

Administration's invasion of Iraq while Manning was hoping to show that the Iraq war was being prosecuted illegally.<sup>57</sup>

The willful release of a CIA clandestine officer is a crime, as is obstructing justice and perjury. The question is whether this behavior ought to be protected civil disobedience that was taken for some higher purpose. While it is true that the lawbreakers in the Plame case thought that they were pursuing a higher national security policy, their actions do not merit protection as acts of civil disobedience. Examined through the mirror of accountability, we can see that the Administration was actually attempting to suppress facts that directly affected its ability to secure a democratic mandate to go to war. Waging war is perhaps the most awesome action a state can undertake. Whatever the President's constitutional powers, the enormity of this action caused him to believe that he needed a congressional mandate, and by extension, a national mandate to undertake this action. We now know that as an empirical matter, Ambassador Wilson's report was accurate and Valerie Plame's failure to find any evidence of the administration's claim was because no evidence, and no weapons, existed. The actors illegally leaked information to obfuscate these facts and they succeeded by spreading willful untruths. Rather than supporting the principle of democratic accountability, these leaks were designed to override it through a coordinated misinformation campaign through the press. By extension the perjury and obstruction charges also fail as acts of disobedience because they defeated the democratic accountability that the President ostensibly sought for the war. Moreover, these crimes also prevented legal accountability because it made it impossible for citizens to know whether their elected officials had attempted to suborn their democratic mandate through lies.

Civil disobedience is disruptive and rarely justified. Creating a misinformation campaign to secure a political mandate under false pretenses and then lying about it does not meet the standard we present. These actions were intended to evade accountability not secure it.

Destroying evidence of participation in war crimes also fails to further the purpose of political or legal accountability for one's actions as a government official. Yet one highly placed government official, Jose Rodriguez, the CIA Director of Clandestine Operations did just that despite the fact that those tapes had been requested by congressional committees investigating torture in CIA prisons,<sup>58</sup> a federal judge presiding over the prosecution of one potential torture victim,<sup>59</sup> and the official 9/11 Commission investigating the attacks and our response.<sup>60</sup> All of these authorities had subpoena power.

The process of interrogation of Abu Zubaydah was unusual from the start. Although the CIA captured Zubaydah, the FBI (Federal Bureau of Investigation) is legally

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57. Alex O'Brien (August 18, 2013), "The Ethical Consistency of Bradley Manning's Apology," *The Guardian*, July 22, 2014.

58. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Anchor Press, 2008), p. 292.

59. Dan Eggen and Joby Warrick (December 7, 2007). "CIA Destroyed Videos Showing Interrogations: Harsh Techniques Seen in 2002 Tapes," *Washington Post*, October 13, 2011.

60. Greg Miller (December 7, 2007), "CIA destroyed secret tapes of interrogations," *Los Angeles Times*, October 13, 2011.

responsible for taking custody of and interrogating prisoners who have committed crimes and for counterespionage. While the FBI interrogators insisted Zubaydah was fully cooperative, the CIA requested authority to take over the interrogation and use different techniques. President Bush gave the CIA permission to assume custody of the prisoner and use “enhanced” techniques. The CIA had ample warning that its behavior might be illegal. The two CIA officers who captured Zubaydah viewed the “enhanced” techniques as illegal and refused to participate.<sup>61</sup> When the CIA found contractors willing to torture the prisoners, the FBI agents who were present at the scene called their headquarters to report the incidence of a crime and asked permission to arrest the interrogators. The FBI director instead withdrew his agents from the scene.

Director Mueller’s decision to withdraw the agents highlights the problem of accountability. Even if he agreed with his agents’ interpretation of the law, the Justice Department’s office of legal counsel took the position that the measures were legal. That office has the final authority to interpret the law for all executive branch agencies of the federal government. So if the Director had ordered the arrest of the torturers, the Justice Department could have stopped the prosecution and secrecy laws would have prevented any debate over the substance of the claim. Hence, the person breaking the law, the President, could use the state apparatus to shut down his own accountability.

These events took place in Thailand in 2002. Knowledge of these events and the existence of the videos became known first to Congressional Committees and then to the general public over the next three years. Exactly why Rodriguez destroyed the tapes that were under subpoena is not clear. He justified the destruction of evidence in order to shield his operatives from prosecution for following orders.<sup>62</sup> He thought that prosecution for obstruction of justice would be less damaging than prosecution for torture. Whether Rodriguez acted to protect his subordinates is unclear. In later congressional hearings he requested immunity from prosecution in exchange for testimony that the White House ordered the destruction and that President Bush had personally seen at least one of the videos showing waterboarding.<sup>63</sup> If true, the tapes may have been destroyed to protect the President from prosecution for torture. While President Bush had openly admitted to approving the techniques used in “enhanced interrogation,” he insisted that they did not amount to torture. He later commissioned several legal memos from the office of legal counsel confirming this view. Those legal opinions were of such dubious quality that a successor deputy attorney general would rescind them. With the exception of a very few well placed lawyers inside the Bush Administration most national security lawyers inside and outside the government regarded the enhanced techniques as torture. The fear was that any normal person who saw the videos would immediately agree that the techniques were torture and no amount of legal argument would protect the President against prosecution.

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61. David Martin, CBS, December 10, 2007, *The Man Who Ordered CIA’s Tape Destruction*.

62. Mark Mazzetti and Scott Shane (December 31, 1969), “Jose Rodriguez, center of tapes inquiry, was protective of his CIA subordinates,” *The New York Times*.

63. Sarah Baxter (December 23, 2007), “CIA chief to drag White House into torture coverup storm,” *The Times*, London.

Torture is a crime of state. Part of the elements of the crime requires that it be a policy ordered by high-level officials. Soldiers who brutalize prisoners on their own are guilty of assault, battery and murder under the military code of justice. Low-level CIA contractors acting on their own do not commit the crime of torture. Only high-level officials can commit this crime by making such brutalization part of the policy of state. Whether the president had committed such a crime was the specific interest of the congressional committees, judges and government commissions who requested the tapes. While the President insisted that the actions he authorized were not torture that is a question for prosecutors and juries under the federal criminal code.<sup>64</sup> The videotapes were probative evidence for that question and their willful destruction to prevent consideration of it constitutes obstruction of justice.

While Bush's and later Obama's Attorneys General ordered an investigation undertaken by a Justice Department subordinate, no charges were ever filed for the destruction of the tapes. The investigation was hobbled by President Bush's refusal to order the CIA to give the Justice Department officials the appropriate security clearance. Not only did these high officials obstruct knowledge of their own criminal activities, they punished any lower official who reported them. John Kiriakou, the CIA officer who refused to participate in what he and FBI agents on the scene considered illegal torture, was prosecuted for reporting the names of the CIA operatives who did engage in criminal behavior. Kiriakou argued that he could not go to the CIA legal counsel or the Congressional intelligence committees because both organs had either participated or acquiesced in the crime.

Under our model it is Rodriguez, not Kiriakou who should have been prosecuted. Although both of these officials broke the law, Kiriakou did so in an effort to impose legal accountability on government officials who had committed crimes. Rodriguez on the other hand, broke the law precisely to prevent legal accountability of government officials who had committed a crime. Defenders of the Bush torture program argue that their actions were justified by necessity. Torture is a war crime under both international and domestic law. If torture was permitted as a matter of necessity then it would always be used during wars when a country was in peril. It is for that reason that international law explicitly precludes the defense of necessity as a justification for torture.<sup>65</sup> The trial judge prevented Kiriakou from introducing any necessity defense to the jury, even though he was attempting to protect the rule of law over official misconduct involving war crimes. This has created an incoherent situation in which enforcing the rule of law requires officials first to break the law and go to jail. If government officials do not know of a procedure to enforce the rules in force this implies the collapse of the basic secondary rules of recognition and adjudication that are prerequisites of the rule of law.

The final instance of official disobedience we will consider is that of Edward Snowden. While not an actual employee of the federal government at the time he decided to leak classified materials, he was a contractor for the government and possessed all the necessary security clearances to access the material he released.

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64. 18 U.S. Code Chapter 113C.

65. International Convention Against Torture, Part 1 Article 2 • 2.

Snowden was an employee of the CIA, the NSA and various private companies who serviced these two clandestine agencies. He began working at the CIA in 2006 and became concerned about the level of warrantless spying on American citizens that he observed. At the NSA he raised his concerns with people in his supervisory chain of command. According to him, these officials agreed that the project was troubling and possibly illegal but that he should not pursue the matter even within the chain of command for fear of retribution that might even result in prosecution. The highest ranking official told him that he could not recall any time that an illegal program was shut down because of complaints but that he could recall individuals who were criminally prosecuted for minor violations when they insisted on pushing charges of misconduct.<sup>66</sup> Snowden's problems intensified when he began working for contractors because he no longer qualified for whistleblower protection under the existing statutory framework.

Having failed to find any avenue within the government willing to consider the problem of possible illegal conduct he decided to go to the press. In early 2013 he gave material concerning the allegedly illegal programs to Glenn Greenwald of *The Guardian* and reporters at the *New York Times* and *Washington Post*. It is not known how many documents he downloaded or what he shared with journalists. Snowden claimed that he vetted all the material to protect sources and methods although the government disputes this. President Obama, and his Attorney General, who together prosecuted more whistleblowers for espionage than all their predecessors combined, indicted Snowden on a variety of charges including violation of the Espionage Act.

In the sharper vision of hindsight, former Attorney General Eric Holder has admitted that Snowden's whistleblowing had done the country a much needed public service by exposing illegal activity and sparking a needed national debate on the privacy rights of Americans. Yet evidently this service was not very great because none of the officials who created and implemented such illegal activities as the Prism Program were ever reprimanded, let alone prosecuted for their actions. Moreover, General Holder still believes that Snowden must come back and face prosecution for his actions. Why he believes the person who reported the illegal behavior of government officials must be punished but not those officials themselves has not ever been discussed, let alone explained.

Applying the law equally to everyone similarly situated requires the executive branch to apply Goldsmith's flexible standard to individuals like Edward Snowden. This would make criminal prosecutions rare and imprisonment even rarer. Like Libby, Snowden has already suffered serious harm to his professional reputation and to his finances for his acts. His employer, Booz-Allen, fired Snowden. Unlike Bybee and Yoo, it seems unlikely that any employer engaged in the work of his former profession will give his old job back, much less a promotion. Congressional committees could call him before them to give an accounting of his conduct.

In those cases that merit criminal prosecution in the executive branch's view, the accused should have the right to mount a necessity defense before a jury whereby the

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66. Andrea Peterson, "Snowden: I raised NSA concerns internally over 10 times before going rogue," *The Washington Post*, March 10, 2014.

defendants may plead that they broke the law in order to avoid a greater evil.<sup>67</sup> Such a defense would enable civil disobedients to explain in a public forum the nature of the alleged government misconduct that prompted their acts. Given this opportunity, defendants “will render a service to justice” in Arendt’s view by using the trial as a means to “transform the situation in such a way that the law can operate” and their law-breaking can “be validated.”<sup>68</sup> In making this point, she discusses the example of Sholom Schwartzbard, who killed Ukrainian nationalist leader Simon Petlura in Paris in 1926, because the latter had been implicated in a wave of pogroms against the Jews. Upon shooting Petlura, Schwartzbard immediately surrendered himself to local authorities. He used “his trial,” she observes, “to show the world through court procedure what crimes against his people had been committed and gone unpunished,” supported by “extensive documentation of the crimes.”<sup>69</sup> Through this defense, he won acquittal, but ran considerable risk of much less favorable outcome.<sup>70</sup>

As William Scheuerman has aptly contended, Snowden clearly fits the definition of a civil disobedient in making his act public, offering a clearly-developed, principled rationale for it, and doing so at considerable personal risk in service of the common good.<sup>71</sup> Arendt likely would have agreed. Rahul Sager has argued to the contrary, but never addresses the issue of fairness in applying a more stringent standard of accountability to low-level agents than to high level ones.<sup>72</sup> If the executive branch believes that a more stringent standard should be applied, let them start by applying the Brandeis

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67. On the necessity defense, see James L. Cavallaro, Jr., “The Demise of the Political Necessity Defense: Indirect Civil Disobedience and *United States v. Schoon*,” *California Law Review* 81(1) (1993), 351–85; William P. Quigley, “The Necessity Defense in Civil Disobedience Cases: Bring in the Jury,” *New England Law Review* 38(1) (2003), 3–72.

68. Arendt, *Eichmann*, p. 265.

69. *Ibid.*

70. Arendt’s endorsement here of a criminal trial for civil disobedients does not mean that she regards it as a requirement in order to legitimate such acts. First, she explicitly rejects the notion that a willingness of the agent to pay the legal penalty in any way enhances the validity of a disobedient act. Arendt, “Civil Disobedience,” pp. 66–7.

71. William E. Scheuerman, “Whistleblowing as civil disobedience: The Case of Edward Snowden,” *Philosophy and Social Criticism* 40(7) (2014), 609–28. Former U.S. Attorney General Eric Holder now agrees that Snowden “performed a public service by raising the debate that we are engaged in” through his unauthorized disclosures. Johan Engel Bromwich, “Snowden Leaks Illegal but Were a ‘Public Service,’ Eric Holder says,” *New York Times* (May 31, 2016). Available at: [http://www.nytimes.com/2016/06/01/us/holder-says-snowden-performed-a-public-service.html?\\_r=0](http://www.nytimes.com/2016/06/01/us/holder-says-snowden-performed-a-public-service.html?_r=0). It is worth recalling that prior to Snowden’s disclosures, National Intelligence Director James R. Clapper on March 12, 2013 assured the Senate Select Committee on Intelligence that the NSA was not conducting domestic surveillance despite the fact he knew this representation was factually incorrect. Clapper paid no discernible penalty when the Snowden disclosures exposed the inaccuracy of this representation. Ryan Lizza, “State of Deception,” *New Yorker* (December 16, 2013). Available at: <http://www.newyorker.com/magazine/2013/12/16/state-of-deception>.

72. Rahul Sager, “Against Moral Absolutism: Surveillance and Disclosure after Snowden,” *Ethics and International Affairs* 29(2) (2014), 609–28.

standard to themselves, such as they might have done with respect to torture. Those critical of Snowden's successful flight to avoid arrest have compared his case to that of Daniel Ellsberg, who proved willing to face a criminal trial. However, Ellsberg disagrees, pointing out that the treatment Snowden could reasonably expect is much harsher than what he had faced.<sup>73</sup> Unlike Scooter Libby and Jose Rodriguez whose misconduct was undertaken only to cover up their own illegal behavior, former officials like John Kiriakou and Edward Snowden were attempting to support the rule of law by reporting official malfeasance. The former were attempting to avoid legal and political accountability while the latter were attempting to secure it. For these reasons we regard the former as mere misconduct that should be punished while the latter as justified disobedience that should be excused.

## V. Conclusion

Apart from the inequity of punishing only minor officials, this type of selective prosecution obviates legal and political accountability. This avoidance threatens the foundations of American Constitutionalism, which purports to be rooted in the rule of law. Legal systems, however, require that officials understand and accept clear rules of recognition, change and adjudication. The practice of our national security services illustrates that few of these secondary rules are universally accepted or followed. The ambivalence of the political and legal branches to impose accountability over the national security apparatus has been a perennial problem at least since the National Security Act of 1947 created the CIA. Yet the erosion of accountability has accelerated with the policies undertaken during the "War on Terror," where for the first time in American history, the government engaged in torture as a matter of official policy at the highest levels of government.<sup>74</sup>

By acquiescing to criminal behavior under American and international law, the two political branches of government, in their own ways, undermined the accountability that was at the root of their institutional function. The extent to which accountability had eroded became clearer when President Obama took office. He resisted prosecution of those senior officials complicit in the torture of prisoners, and to the surprise of many federal judges, did not withdraw Bush Administration claims of state secrecy that had surpassed the boundaries of prior executive practice.<sup>75</sup> President Obama not only blocked access to civil remedies for victims of torture but also charged officials who leaked information about illegal activity to journalists with espionage more times than all his predecessors combined.<sup>76</sup>

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73. Daniel Ellsberg, "NSA Leaker Snowden Made the Right Call," *Washington Post* (July 7, 2013). Available at: [https://www.washingtonpost.com/opinions/daniel-ellsberg-nsa-leaker-snowden-made-the-right-call/2013/07/07/0b46d96c-e5b7-11e2-ae33-339619eab080\\_story.html](https://www.washingtonpost.com/opinions/daniel-ellsberg-nsa-leaker-snowden-made-the-right-call/2013/07/07/0b46d96c-e5b7-11e2-ae33-339619eab080_story.html).

74. Ewen MacAskill, "Torture Techniques Endorsed by the Bush Administration," *The Guardian*, April 17, 2009.

75. John Schwartz, "Obama Backs Off a Reversal On Secrets," *The New York Times*, February 9, 2009.

76. David Pozen, "The Leaky Leviathan: Why The Government Condemns And Condone Unlawful Disclosures Of Information," *Harvard Law Review* 127 (2013), 512, 536.

This broad institutional and bipartisan retreat from accountability affects the constitutional basis of government in two important ways. It subverts legal accountability by undermining the rule of law itself. The concept of law requires officials to know and adhere to either secondary rules or principles of integrity. Regardless of one's legal philosophy, the subversion of these rules and principles of accountability call into question whether the institutions of state are law governed. If all institutional avenues for legal accountability are foreclosed by the lawfully constituted authorities, then the only way in which officials can seek observance of the law is by publicizing the violations. This requires government officials to violate the law in order to preserve the rule of law. It cannot logically be part of any law governed system to require officials to commit a crime in order to secure the rule of law.

Political accountability is also stymied when officials close off avenues of information about the legality of their own or other's official behavior. This puts those officials who are aware of illegal behavior in the untenable position of breaking the law in order to secure the polity's democratic claim to govern. This conundrum is certainly relevant in light of the US intelligence community's determination that the Russian Federation interfered in the 2016 Presidential elections. While the FBI was conducting an investigation into this interference, President Trump, who denied the existence of any Russian interference, let alone his complicity in it, fired the Director of the FBI. In order to confirm the existence and gravity of the Russian interference Reality Leigh Winner, a government contractor, released information about Russian hacking of 122 local election officials in 31 different states to *The Intercept*, an online journal. Once identified, she was charged under the Espionage Act of 1917. Notably, the Espionage Act requires scientist that the accused had the intent either to harm the United States or to help a foreign nation at the expense of the United States. Winner's avowed intent was to notify the American electorate of attempts by a foreign power to subvert the foundations of American Constitutionalism. Given that this is what every government official swears to uphold as a precondition to taking office, it is hard to interpret her intent as one to harm the US or to help the Russian Federation. Yet her attempts to prevent officials from possibly covering up their own complicity in undermining the rule of law have been met with criminal prosecution.

Arendt's theory of civil disobedience is highly relevant to the disparate treatment of officials who leak information about illegality and corruption. Her characterization of civil disobedience as an emergency remedy for systematic failures of government institutions suggests that in assessing whether the remedy is justifiable we have also to consider the nature of the perceived emergency that has given rise to it. This view emphasizes the importance of context and careful scrutiny of the disobedient officials' rationales for their conduct. It often reveals that prosecuting disobedience actually obscures the failure of government institutions to uphold the rule of law. One of the primary justifications for punishing disobedient officials is to preserve law's authority and integrity. Yet our examination suggests that such prosecutions are treating the symptoms rather than the causes of this loss. Any mandate to preserve the rule of law requires attending more to those causes than their symptoms. In Arendt's view, the absence of effective means of legal and political accountability is corrosive to the foundations of any republican form of government because it leads people to begin

withdrawing their support for their governing institutions. In articulating his standard of accountability for government officials, Brandeis was making a similar point regarding how applying a lesser standard to them erodes respect for the law generally. Given the policies during the War on Terror, where we are expected to accept widespread government secrecy, it becomes all the more important that government officials are held to the highest accountability standards in exchange for the trust they ask us to give them.