

WHEN NOT TO NEGOTIATE: A NEGOTIATION IMPERIALIST REFLECTS ON APPROPRIATE LIMITS

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INTRODUCTION

I have spent the last fifteen years of my academic career studying negotiation. Like other negotiation imperialists, I have taught that negotiations are omnipresent. Within the family, spouses negotiate with each other and with their children. In the workplace, employers negotiate collective bargaining agreements with union representatives and nearly all managers and supervisors at times negotiate with their subordinates. In the business world, executives negotiate joint ventures, acquisitions and mergers; and goods and services are regularly exchanged by negotiation. In the political arena, legislators negotiate over the terms of proposed legislation; and in the legal arena, lawsuits are resolved regularly by negotiation rather than adjudication. In the realm of international relations, diplomats and political figures regularly resolve conflicts through negotiation.

In my research, I have studied barriers to the negotiated resolution of conflict and how to overcome them. From a variety of disciplinary perspectives, I have explored why negotiations often fail under circumstances when parties in conflict can make themselves better off through a negotiated agreement.¹ My most recent book, written with the University of Colorado's very own Scott Peppet, suggests how problem solv-

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1. See generally, e.g., Robert H. Mnookin, *Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 2345 (1993); see also generally BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky & Robert Wilson eds., 1995).

ing approaches to managing the tensions inherent in negotiations can allow lawyers to create value for their clients.² My colleagues at Harvard's Program on Negotiation regularly recommend the books *Getting to Yes*³ and *Getting Past No*⁴ and some negotiation imperialists purport to teach that you can negotiate anything.⁵

In this lecture I would like to share my thinking on some interrelated questions that came to my mind in light of the September 11, 2001 terrorist attacks on the U.S.: What are the limits of negotiation? How should one decide whether it makes sense to explore the possibility of resolving conflict through negotiation? And when should one refuse to negotiate? There is surprisingly little scholarship addressing these questions.

This paper begins by delimiting the boundaries of the discussion, by defining what I mean by "negotiation" and by a "refusal to negotiate." Next, the paper suggests a framework that someone facing a conflict might use to decide whether engaging in negotiation makes sense. This framework exposes the relevant considerations—both benefits and costs—that a party might appropriately take into account in deciding whether to refuse to negotiate. Next, the framework is used to analyze and evaluate two contemporary examples where the Bush Administration has refused to negotiate. The first relates to President Bush's decision not to negotiate with the Taliban after September 11, 2001. The second is the Administration's current stance of refusing to engage in bilateral negotiations with North Korea with respect to its nuclear weapons program. I use these examples both to illustrate the framework and to explain why I have concluded that the President's decision regarding the Taliban was appropriate but that his refusal to negotiate with the North Korean government is not. In the conclusion, I suggest that while a presumption in favor of negotiation may be appropriate, that presumption should be rebuttable. Although parties may commonly—and unwisely—have a tendency to exaggerate the costs and underestimate the

2. See generally ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

3. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

4. WILLIAM L. URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (1993).

5. See generally HERB COHEN, *YOU CAN NEGOTIATE ANYTHING* (1982).

benefits of negotiating, nevertheless my basic point is that sometimes it is entirely appropriate and rational to refuse to negotiate.

I. THE SCOPE OF THIS INQUIRY

A. *Defining Negotiation*

The term "negotiation" is hardly self-defining. The U.S., for example, has a stated policy of not negotiating with terrorist groups that have kidnapped American citizens. But in a number of instances, this policy is not seen as inconsistent with "dialogue" or "talks" or "contacts" with the hostage-holders. In the words of L. Paul Bremer, former Chief of the State Department's counter-terrorism program: "We will always talk to anybody about the welfare of American hostages, but we will not negotiate because that implies making concessions."⁶ In contrast, Spain's former interior minister suggested that "dialogue" of any sort with Basque rebels would be inconsistent with Spain's no-negotiation policy.⁷ Indeed, by manipulating the meaning of "negotiation" these examples suggest parties will often seek to loosen or tighten self-imposed limits.

Negotiation scholars have defined "negotiation" in a variety of ways.⁸ When the definition is very broad, it may include

6. Robert Pear, *White House Reaffirms Anti-Terrorist Policy While Taking Steps to Work Around It*, N.Y. TIMES, Aug. 4, 1989, at A6.

7. Emma Daly, *Moderate Basques Promise to Focus on Peace Talks*, N.Y. TIMES, May 15, 2001, at A10.

8. *The Oxford English Dictionary* defines "negotiate" as follows: "To hold communication or conference (*with* another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some settlement or compromise." THE OXFORD ENGLISH DICTIONARY 303 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). According to *The Oxford Dictionary of English Etymology*, "negotiate" derives from the Latin term meaning "to carry on business." THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 606 (C.T. Onions ed., 1966).

Several prominent negotiation scholars have also defined negotiation. Following are some examples:

"[Negotiation] is a situation in which two or more parties recognize that differences of interest and values exist among them and in which they want (or in which one or more are compelled) to seek a compromise agreement through negotiation." HOWARD RAIFFA, *ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING* 7 (1982).

"Basically *negotiation* is a method of conflict settlement. It involves at least two parties but may, in the multilateral case, engage several hundred actors . . . Typically the purpose of negotiation is to find a formula for the distribution of a contested value or set of values between the negotiating parties. Thus negotiation

nearly any type of interaction in which a party in a conflict is trying to influence someone else, even if there is no direct communication. Through moves away from the negotiation table, a disputant is often trying to shape the other side's perception of possible outcomes; thus, negotiation can be defined in a way that is so broad that *any* move by a disputant can be seen as part of a negotiation. Note that if tacit communication is included within the definition's scope, then tactical actions in a war or procedural moves in a lawsuit can be seen as part of a negotiation process.

On the other hand, it can be defined so narrowly as to exclude dialogue about a problem when one party takes a firm position and is unwilling to compromise.⁹

For purposes of this paper, I define negotiation as a *joint decision making process* involving *interactive communication* in which parties that *lack identical interests attempt to reach agreement*. This definition requires active communication, as well as a mixed-motive game, in which not all interests are aligned.

is a joint decision-making process through which negotiating parties accommodate their conflicting interests into a mutually acceptable settlement." GUY O. FAURE & GUNNAR SJOSTEDT, *Culture and Negotiation: An Introduction*, in CULTURE AND NEGOTIATION 7 (Guy O. Faure & Jeffrey Z. Rubin eds., 1993).

"Negotiation is a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed." FISHER & URY, *supra* note 3, at xi.

"More precisely, we characterize negotiation as a process of potentially opportunistic interaction by which two or more parties, with some apparent conflict, seek to do better through jointly decided action than they could otherwise." DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 11 (1986) (emphasis omitted).

"Negotiation is an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they could be if they were to act alone." RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 1 (2002).

9. For example, when trying to explain how the White House policy on negotiations with Iran to free the American hostages kidnapped in Lebanon in 1985, State Department spokesman Bernard Kalb restated the long-declared U.S. policy of not negotiating with terrorists, but added an interesting twist: "The United States does not get involved in negotiations, but is ready, of course, to talk about the release of the hostages We remain in touch with a number of parties in the region on this whole issue." When asked about the difference between negotiating and talking, Kalb replied: "[W]ith negotiations there may be somehow an implication of concession or a deal That is out." Kathy Sawyer, *Captives' Letters Allay Families' Fears*, WASH. POST, Nov. 9, 1985, at A20.

B. Defining the Scope of "Refusals to Negotiate"

Once one looks at the negotiation process through the prism of asking about its limits, it soon becomes apparent that a party is making decisions throughout the process that can be seen as refusals to negotiate. The focus of this paper is on the decision whether or not to enter into a negotiation in the first place. But even when negotiations begin, there are further decisions that involve refusals to negotiate. For example, if a party decides to negotiate, there are often decisions about the *scope* of the negotiation: What issues are going to be "on the table" for discussion, and what issues are not? Often a party to a negotiation will refuse to talk about certain issues. For example, in negotiating about terms of employment, an orthodox Jew may make clear that her unwillingness to work on the Sabbath is "non-negotiable."

A second instance of a refusal to negotiate involves a negotiator's decision about when to end a negotiation if no satisfactory agreement is reached. A decision to negotiate no further, whether implemented by abiding by a deadline, by holding firm on a final, take-it-or-leave-it offer, or by simply walking away from the table all involve setting limits on the process.

All of this suggests, of course, that refusals to negotiate can often simply be a tactic that is used as part of the negotiation process. A negotiator might proclaim a refusal to negotiate, or threaten to end negotiation, simply as a "hard-bargaining" tactic.¹⁰ In such a case, the proclaimed refusal to negotiate is intended only to extract additional concessions from the rival in exchange for agreeing to negotiate. When the decision not to negotiate is strategic, on the other hand, it should not be seen as a negotiation tactic; rather, it is a preference for an alternative course of action: either abstaining from any interaction ("walking away") or resorting to coercive measures (the court or the sword).

In the present discussion, I narrow my interest to the strategic decision of not entering into the negotiation. The implicit assumption of many negotiation imperialists—that everything is or should be negotiable—certainly doesn't describe the world. In the family, at the workplace, and in the market, many mat-

10. See FISHER & URY, *supra* note 3, at 144 (describing the refusal to negotiate as a "possible negotiating ploy").

ters are said to be "non-negotiable." A department store won't haggle over the price of its ties and a restaurant won't negotiate the price of an entrée. A political leader may refuse to negotiate with a terrorist kidnapper. Sometimes the refusal to negotiate may be unwise. But sometimes *it is better not to negotiate*. What considerations are and should be taken into account in deciding whether to negotiate at all? In various contexts, where a party refuses to negotiate, what reasons are typically used to justify that decision? How should a party think about and decide whether to enter into or begin a negotiation at all?

II. A FRAMEWORK FOR DECISION MAKING

While negotiation involves *joint decision making*, the decision whether to enter into negotiation or instead pursue some other alternative can be framed in terms of decision analysis, in which a decision maker *independently* assesses the expected costs and benefits of negotiation and its alternatives. We negotiation imperialists are prone to underline the potential benefits of negotiation. But we often don't spell out the potential costs.

At the outset I wish to acknowledge that performing the cost-benefit analysis of entering into a negotiation is a challenging task for three reasons: (1) the consequences of potential negotiation outcomes are inevitably marked by uncertainty; (2) negotiation occurs in a context of strategic interaction, and (3) negotiation may implicate difficult value choices. There is always some uncertainty surrounding the estimation of short- and long-term costs and benefits of negotiation, as well as the potential costs and benefits of the disputant's Best Alternative To a Negotiated Agreement, or BATNA.¹¹ Moreover, while the each party's decision whether to negotiate can be seen as a unilateral decision, the consequences of that decision are not independent of the other party's strategies. Both negotiation and its alternatives—whether litigation or war—occur in the context of strategic interaction. The probability of any particular outcome depends on the counterpart's actions (and reactions)

11. First used by Fisher and Ury, the term BATNA, or Best Alternative to a Negotiated Agreement, has become a term of art in negotiation scholarship. See FISHER & URY, *supra* note 3, at 104.

no less than on one's own.¹² Finally, as will be discussed below, difficult value judgments are often implicated by the decision whether to enter into negotiations or not. Assessing benefits and costs—which involves the use of a utilitarian or consequentialist framework—may be especially difficult when issues of morality must be weighed. All of these are problems with which decision analysts are familiar.¹³

My framework poses six questions that should be addressed, four of which draw from negotiation analysis. Negotiation imperialists—myself included—suggest that in preparing for a negotiation a party should identify its own interests and those of the other parties; think about each side's BATNA; try to imagine options that might better serve the negotiators' interests than their BATNAs; and ensure that commitments made in any negotiated deal have a reasonable prospect of actually being implemented. These same considerations are equally valid in informing an individual's decision whether one should enter into a negotiation. In addition, one must also consider the expected costs—both direct and indirect—of engaging in the negotiation process, as well as issues of legitimacy and morality.

A. *Interests*

What are my interests? What are my counterpart's interests? The analysis begins by identifying one's own interests: long- and short-term, intangible and tangible, indirect and direct.¹⁴ One should then proceed to consider, given the available information, the interests of the other parties. Negotiation theory teaches, among other things, that it is necessary to probe beneath stated demands and positions and ask, what is important to the other side? What do they value? It is in light of these interests that an analyst can assess the benefits and costs of alternative courses of action.

12. Parties typically have access to different information. Predicting another party's reactions is especially difficult in the context of informational asymmetries. See, e.g., Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 87–91.

13. See generally JOHN S. HAMMOND, RALPH L. KEENEY & HOWARD RAIFFA, *SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS* (1999).

14. FISHER & URY, *supra* note 3, at 41–57 (defining and analyzing negotiation “interests”).

B. BATNAs

*What is my best alternative to negotiation?*¹⁵ *What is my counterpart's?* The second set of questions concerns alternatives to negotiation, or BATNAs. In deciding whether to negotiate, it makes sense to consider one's legitimate alternatives to negotiation. Indeed, each party to a conflict must assess its possible alternatives and how those alternatives serve its interests.

One alternative might be to do nothing, or ignore the conflict. Another alternative might be to engage in self-help or unilateral action. In many contexts, the existence of an institutional structure or hierarchy may make negotiation unnecessary because one party can impose its will very effectively by fiat or command. In an army (and some organizations) a superior can order a subordinate to undertake some task and reasonably expect his command to be followed. Parents are often advised not to negotiate bedtime with their young children. And a teacher in school would most often impose on the students the date and time of the final exam. In some contexts, a party can initiate an institutional process that can coercively impose an outcome. For example, when a party has a legal claim, an alternative might be to bring a lawsuit, which if successful, will require the other party to do certain things. Where effective self-help is readily available, it may also serve as an alternative to negotiation. This is understood by every bigger child who snatches a toy from a smaller one. At the same time, it also suggests the need to consider the legitimacy of a self-help alternative, especially when it involves the use of force.

C. Potential Negotiated Outcomes

Are there potential negotiated outcomes that can satisfy my interests and those of the other party better than our respective BATNAs? The third question requires an assessment of possible negotiated agreements. If a party has an alternative that is clearly superior to any possible negotiated agreement, why ne-

15. In the present context, BATNA is not only the Best Alternative to a Negotiated Agreement, but also the Best Alternative to Negotiation at All.

gotiate?¹⁶ Because negotiations are not devoid of costs, negotiating only makes sense if there are reasonable prospects for a negotiated agreement, superior to each party's BATNA. Even if there are potential negotiated agreements that better serve the interests of each party, this is not the end of the analysis for three more questions must be addressed.

D. Reliable Counterpart

Is there a reliable negotiation partner? Is there a negotiation counterpart with whom I can negotiate a sufficiently enforceable deal? Even when one can imagine a negotiated deal that better serves each party than its best alternative, it may nonetheless make no sense to initiate negotiations if one believes the other party would never uphold its end of the bargain and there is no effective mechanism for enforcing the negotiated deal. In some instances, it may simply be a matter of trust. In other contexts, there may be no representative who has the capacity to bind a set of stakeholders.

Consider the plight of a real estate developer who owns a large parcel of land in a residential neighborhood that she wishes to use to build a small shopping center. Various neighbors object and threaten to bring suit (and thus delay the development for a matter of years) if the city's zoning commission grants a variance. The developer may be willing to negotiate a deal that might benefit all concerned, but there may be no organization or representative that has the power to bind all the neighbors. If there is no reliable counterpart, entering into a negotiation would be a futile—and potentially costly—exercise.

E. Costs

What are the expected costs, direct and indirect, of negotiation? A rational decision obviously requires a consideration of costs. There are costs associated with the process of negotiation, regardless of whether a deal is made.

16. There may be cases in which a decision maker would find it beneficial to negotiate, even if conscious of the low probability of a better negotiated outcome, in order to appease constituencies or to prove that all "peaceful" methods have been exhausted prior to using a coercive means. In other words, the legitimacy of coercive means may be enhanced by at least attempting negotiation.

1. Direct Transaction Costs

Whether one is making a deal or resolving a conflict, the process of negotiation imposes *transaction costs* on the parties, who must invest time, money, manpower, and other resources.¹⁷ Negotiation can absorb the attention and energy of persons whose time is valuable. It can cost money because a party may need to hire professionals or experts to assist. The amount of costs depends, naturally, on the type of negotiation involved, its prospective duration, the necessary logistics for the process, etc. Entering into a used-car dealership does not entail the same transaction costs as negotiating an arms-control agreement with a rival country.

In some instances, transaction costs may make negotiation an economically inefficient process. In general, this would be true for any business that performs a large volume of transactions with a large number of parties, such as restaurants, large stores, theatres, museums, etc. For example, Macy's in Herald Square, New York, receives "about 30,000 visitors a day."¹⁸ If, on average, one of three visitors purchases one item,¹⁹ then there are about 10,000 transactions a day at the store. Now, imagine the store willing to negotiate the price of each purchase. The transaction costs involving the hiring and training of additional employees, the devising of complicated employment compensation schemes with incentives for "good negotiators," coupled with concerns regarding possible damages to reputation, would probably outweigh any potential benefit.

Beyond the immediate transaction costs, direct costs also involve the *disclosure of information*, which may be exploited by the counterpart in future actions, regardless of whether an agreement is achieved in that instance. Exposing intelligence-gathering capabilities, a company's vulnerabilities, or even personal desires may prove detrimental in future interactions with the same party.

17. MNOOKIN, PEPPE & TULUMELLO, *supra* note 2, at 104-05.

18. Constance C.R. White, *Patterns: Making Macy's Easier*, N.Y. TIMES, Oct. 29, 1996, at B19.

19. In this hypothetical, there are fewer actual buyers, but some buyers purchase more than one item.

2. Indirect or Spillover Costs

Apart from the direct transaction costs, there may be a variety of indirect or spillover costs. Entering into a negotiation may affect a party's *reputation*: People's instincts may tell them that if someone is willing to settle, there must be something to the claims against them. The mere willingness on the part of a defendant to negotiate a plea bargain with the district attorney might be perceived as an admission of guilt. Reputation costs increase where a negotiating party has previously stated a policy of not negotiating in similar instances, as where a company has declared in the past that it would refuse to negotiate frivolous lawsuits and see them through in court, but is willing to negotiate with a current plaintiff.

Reputation is somewhat related to another type of spillover costs. A demonstrated willingness to negotiate here may serve as an adverse *precedent*, creating an incentive for other potential claimants later. Even if negotiating a resolution of this single dispute may make sense in light of the immediate cost savings, the precedent of a negotiated settlement here may bring a flood of similar claims later. An employer may refuse to negotiate with unlawfully striking workers if the employer believes that negotiation may only encourage future employees to go on strike. For example, in 1981 when 11,400 air traffic controllers went on strike for higher wages and better working conditions, President Ronald Reagan and the Federal Aviation Administration (FAA) refused to negotiate, fired the striking controllers, hired replacements, and barred the strikers from ever being re-employed by the FAA.²⁰

In a similar vein, numerous countries around the globe, such as the U.S., Britain, France, Italy, Germany, Israel, the Philippines, Guatemala, Peru, and Russia have a declared policy of refusing to negotiate with terrorists. This refusal, as I shall show later, is no doubt driven by additional considerations, but it is also intended to avoid providing incentives for further extortions by future terrorists.

Beyond the costs associated with the parties "at the table," there are also spillover costs "behind the table" relating to one's *constituencies* or *coalitions*.²¹ The decision to enter into nego-

20. See *Postal Service Said to Beckon to Ex-Air Controllers*, N.Y. TIMES, Aug. 20, 1982, at A17.

21. MNOOKIN, PEPPE, & TULUMELLO, *supra* note 2, at 303-06.

tiations may have an adverse effect on those whom you will need to rally to your cause in the event negotiations fail. Apart from your own constituents, there can also be effects on coalitions—those whom you may need as allies if negotiations fail.

A dramatic example with respect to constituents relates to Winston Churchill's refusal to accept an invitation to begin negotiations directly with Mussolini—and indirectly with Hitler—in May of 1940. Churchill had just become Prime Minister, France had very nearly been overrun, and tens of thousands of British troops appeared to be trapped around Dunkirk. The Battle of Britain had just begun, and German bombers had launched their attack. While Churchill's refusal to negotiate reflected a number of considerations, one of which was his skepticism that Hitler would abide by any deal that might be at all acceptable to his government, a primary reason for Churchill's refusal related to his concern that the act of negotiating with the Axis would have a devastating impact on the morale of his constituents and their ability to make the sacrifices necessary if negotiations failed.²²

A decision by one member to negotiate separately may have a devastating effect on the viability of a previously effective coalition. Liggett's decision to negotiate with a plaintiff in a tobacco suit generated a flood of lawsuits and settlements across the country because of its devastating impact on the previously effective coalition among all the major tobacco companies, which for years had insisted on litigating to the end all tort claims.²³

C. *Legitimacy and Morality*

What considerations of legitimacy and morality should be taken into account? In considering the benefits and costs of the decision whether to negotiate, there is no avoiding questions of legitimacy and morality. One aspect was mentioned earlier: when thinking about alternatives to negotiation, one must consider the legitimacy of those alternatives. A bigger child may have the power to grab the toy of a younger and smaller sibling, but most parents would prefer that the child not exercise that alternative but instead ask to use the toy. A self-help al-

22. See generally JOHN LUKACS, *FIVE DAYS IN LONDON: MAY 1940* (1999).

23. MNOOKIN, PEPPET, & TULUMELLO, *supra* note 2, at 305–06.

ternative to negotiation may not be considered legitimate, at least without some institutional approval. Few doubted the capacity of the U.S. to bring about a regime change in Iraq, but many have questioned the legitimacy of the American resort to force in the absence of U.N. Security Council authorization.

The mere process of negotiation with a counterpart is perceived as conferring some *recognition* and *legitimacy* on them. Providing a counterpart with "a place at the table" acknowledges their existence, actions, (and to some degree) the validity of their interests. To avoid validation of interests or claims, countries have often refused to negotiate with rebels or insurgent groups, denying them any recognition or legitimacy. Thus, for decades, Israel refused to negotiate with the Palestinian Liberation Organization, Britain denied any status from the Irish Revolutionary Army, the Spanish would not negotiate with the Basque separatist rebels, Peru would not engage in a dialogue with the Tupac Amaru, and Russia announced an absolute policy of not negotiating with the Chechen rebels. In addition, the interest of denying recognition and legitimacy has also largely determined the relationships between Israel and some Arab countries and between China and Taiwan.

The policy of refusing to negotiate with terrorists derives not only from the fear of conferring legitimacy or recognition, but also from aversion to *rewarding past bad behavior*. When previous interactions have failed to satisfy the claims of a party, satisfying its claims under the pressure of violence implies that violence was indeed worthwhile. This consideration, of course, is problematic. Although most of the national liberation movements around the world have employed violence in their struggle to gain independence or self-determination (among very few Gandhi-like exceptions), once violence is employed it usually entrenches political rivals, at least in the short term following violence.

Perhaps the most renowned example of a refusal to negotiate for moral considerations is Sir Winston Churchill's refusal to negotiate directly or indirectly with Adolph Hitler in May of 1940. For Churchill, the refusal derived not only from the questionable effectiveness of such negotiations, given the dismal history of Hitler's negotiations with Chamberlain, or the potential effects of failed negotiations on his fellow citizens, but also from a strong moral aversion to "*doing business with the devil*." Churchill truly believed that Britain had a deep moral obligation, on behalf of itself as well as the rest of the world, to

fight Nazi Germany. In relation to British advocates of appeasement, he said: "An appeaser is one who feeds a crocodile—hoping it will eat him last."²⁴

The dealing-with-the-devil consideration often fuels debates over plea-bargains made between prosecutors and suspected criminals, in which sentences are mitigated in exchange for confessions and trial-avoidance.

III. DECISIONS NOT TO NEGOTIATE: TWO TEST CASES

I now turn to test the application of this framework to two decisions made by the current U.S. Administration. The first involves President Bush's refusal to negotiate with the Taliban, Afghanistan's ruling party, before initiating the war in Afghanistan, and the second relates to the Administration's refusal to engage in bilateral negotiations with North Korea over its nuclear weapons program. This analysis makes no claim about comprehensively taking into account the full range of considerations that may have influenced American policy because it necessarily relies only on facts publicly known at this time. Instead I seek to illustrate how a decision maker might weigh the costs and benefits of a decision whether to negotiate.

A. *Afghanistan: Negotiating in the Face of Terrorism*

Let us roll the clock back to the immediate aftermath of September 11, 2001. Nine days after *al Qaeda's* terrorist attacks on the U.S., President Bush issued an ultimatum: He demanded that the Taliban (1) turn over Osama bin Laden and the leaders of his *al Qaeda* terrorist network, and (2) shut down the terrorist training camps in Afghanistan. Through the press, the Taliban initially denied that bin Laden and *al Qaeda* were in any way involved in the attacks of September 11, and disputed claims of western intelligence agencies linking the perpetrators of the attacks to bin Laden.

The Taliban asked the U.S. to provide proof and to allow the Taliban to judge its adequacy. The regime stated it might be willing to try bin Laden before an Islamic court in Afghanistan or elsewhere. On September 19th, in addressing a council

24. Tom Kuntz, *Aftermath*, N.Y. TIMES, Sept. 23, 2001, Week in Review, at 3.

of clerics, Taliban leader Mullah Mohammed Omar reiterated this offer: "If the American government has some problems with the Islamic Emirate of Afghanistan, *they should be solved through negotiations.*"²⁵

President Bush refused to negotiate, and after receiving both Congressional and U.N. authorization, launched the war in Afghanistan. In the meantime, in the face of the American military threat, Omar held fast to his refusal to turn over bin Laden, citing Islamic law.²⁶

Was President Bush right when he refused to negotiate with respect to the terms of the ultimatum he had issued to the Taliban? Should the U.S., directly or indirectly, have entered into negotiations with the Taliban about whether bin Laden would be turned over to the U.S.? About the evidentiary basis necessary to prove that bin Laden and *al Qaeda* were implicated in the September 11th attacks? About where bin Laden should be tried? About whether the terrorist camps should be shut down? I think not.

Many no doubt believe that the swift military victory compellingly demonstrates the wisdom of President Bush's choice to make non-negotiable demands and to use force when the demands were not met. There is no denying that the military operation removed the Taliban from power and eliminated the large terrorist training camps operated by *al Qaeda*, while suffering few casualties. Critics, on the other hand, may question our refusal to negotiate, pointing to our failure to capture bin Laden and many of his compatriots. But such conclusions of both supporters and critics alike incorporate the benefit of hindsight and involve an *ex post* analysis. I would like to focus on the president's strategy *ex ante* rather than *ex post*. By employing the framework offered above, based on the information available to President Bush at the time he refused to negotiate, I explain why the decision not to negotiate was justified.

25. Mohammed Omar, Address to Ulema at Kabul (Sept. 19, 2001) (transcript on file with author) (emphasis added).

26. For more information about the events leading up to the U.S. war in Afghanistan, see generally DILIP HIRO, WAR WITHOUT END: THE RISE OF ISLAMIST TERRORISM AND THE GLOBAL RESPONSE (2002).

1. Interests

The paramount U.S. interest in this context was to protect American lives both within the U.S. and abroad, as well as to prevent and deter future terrorist attacks. The U.S. had additional interests, stemming from its geopolitical role, in building and sustaining an international coalition in the war on terrorism, and in promoting democracy, tolerance, and human rights. Given these interests, the immediate goals vis-à-vis Afghanistan included the following:

1. to incapacitate bin Laden and to eradicate *al Qaeda*;
2. to ensure that Afghanistan no longer harbored or supported international terrorist groups; and
3. to remove the Taliban regime from power and promote the establishment of a broad-based government that is more tolerant of ethnic diversity and more observant of human rights.

The Taliban's paramount interests were in surviving and remaining in power, and in so doing, in sustaining the fundamentalist Islamic character of Afghan society. It had no intention of adopting more liberal, tolerant, or secular policies. Because of its interest in maintaining its role as a fundamentalist enclave in the Islamic world, it could not be seen as abandoning bin Laden and *al Qaeda* to the infidels. The Taliban may also have had an interest in playing for time—hoping that in the meantime more external voices might express opposition to war.

2. BATNAs

The obvious American alternative was the use of force. By invading Afghanistan, the U.S. could probably achieve at least two of its immediate goals: ousting the Taliban regime and dismantling the terrorist camps. As for capturing or killing bin Laden, there was no guarantee that an invasion would achieve that, but it seems that at the time the Administration believed that the probability of success was high.

In terms of power, the U.S. enjoyed a clear military superiority, although a war was not without its risks: Taliban and *al Qaeda* forces were battle-tested from decades of fending off internal and external threats, and they enjoyed the advantage of familiarity with Afghanistan's vast, rugged terrain. Many of the same fighters had used guerilla tactics to force a Soviet

withdrawal from Afghanistan more than a decade earlier. Highly sensitive ethnic tensions had to be managed, and post-conflict reconstruction was expected to be a long and difficult task.

The American use of force was perceived, not only in the U.S. but also worldwide, as a legitimate and morally justified response to the *casus belli* of the September 11th attack. The Taliban had every reason to understand that the U.S. would make good on its threat to use force if the Taliban refused to turn over bin Laden and shut down the training camps. The Taliban's maneuvering in response to the U.S. ultimatum had only reinforced the legitimacy of the American position.

3. Potential Outcomes and Reliable Counterpart

On the benefit side, one would need to make some predictions: What outcomes to a negotiation would seem possible, considering the interests of the parties? If a favorable deal could be struck, how likely was it that the Taliban would uphold its end of the bargain? On the facts that were known before hostilities began, the Administration could have reasonably concluded that it was extremely unlikely that any deal struck with the Taliban could serve vital American interests as well as the U.S. BATNA.

Our previous negotiations with the Taliban over nearly identical issues had been singularly unproductive. After the 1998 embassy bombings in Kenya and Tanzania, the U.S. government had been both negotiating with and putting pressure on the Taliban with respect to bin Laden and the terrorist camps, all to no avail. President Clinton and the U.N. had imposed economic sanctions, and the U.S. and all but three nations in the world (Saudi Arabia, the United Arab Emirates, and Pakistan) had withheld diplomatic recognition. After September 11, the Taliban had remained steadfast in its refusal to turn over bin Laden. It was doubtful whether the Taliban had the capacity, let alone the will, to shut down the terrorist training camps and turn over bin Laden. Bin Laden's power and influence over the Taliban regime (including family ties between bin Laden and Omar) led some to believe that bin Laden, not Omar, was the real ruler of Afghanistan.

Even if the Taliban might have eventually agreed to turn bin Laden over to some other Islamic country for a trial, it was highly unlikely that the Taliban could or would shut down the

training camps. Moreover, in light of America's vital interest in deterring other countries from harboring terrorists in the future, any negotiated outcome that failed to hold the Taliban accountable for its past actions and inactions would have been inadequate.

4. Costs

The immediate direct costs of negotiating with the Taliban might not have been great—particularly when compared to the direct costs of war—but the spillover, or indirect, costs of negotiating would have been very high. Negotiating with the Taliban would have been seen as inconsistent with our previous warning that the U.S. would hold the Taliban responsible for any *al Qaeda* related terrorist acts. Moreover, such negotiations would have damaged America's future credibility in its broader policy of not distinguishing between terrorists and the countries that support or harbor them. If the U.S. had shown a willingness to negotiate with countries that harbor terrorists under these circumstances, it would have set a dangerous precedent. "Behind the table," the Bush Administration also had to be concerned about the impact of negotiations on its domestic constituents. The American public was shocked and outraged by the September 11 attacks, and negotiating with the Taliban over what Islamic court might try bin Laden would have seemed an insufficient response to the attacks and an inadequate deterrent of future terrorism. A prolonged and frustrating process of negotiation would have weakened political support for Bush at home and once the initial shock had passed, would have probably reduced his ability to assemble and lead an international coalition to fight terrorism.

5. Legitimacy and Morality

Turning to considerations of legitimacy and morality, there was little question under domestic and international law that the American use of force was legitimate. Congress explicitly authorized military action, and the U.N. Security Council added its own authorization. The September 11th attack was seen as an act of war against the U.S.—a *casus belli* justifying the use of force by the U.S. under Article 51 of the U.N. Charter. Indeed, bin Laden and *al Qaeda* had declared war on the U.S. long before September 11. On February 28, 1998, an Arab

newspaper in London published a *Fatwa* signed and sent to them by bin Laden. It called for a *jihad*—against the Jews and the Crusaders—and makes for chilling reading. The *Fatwa* says:

To kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country, where this is possible, until the Aqsa Mosque [in Jerusalem] and the Haram Mosque [in Mecca] are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam.²⁷

The members of the Taliban were not innocent bystanders. They had been given advance warning by the U.S. government: according to a State Department official who had testified before Congress in the summer of 2000, the U.S. had let the Taliban “know, in no uncertain terms, that we will hold [the Taliban] responsible for any terrorist acts undertaken by bin Laden.”²⁸ There could be little doubt that the Taliban harbored thousands of Islamic terrorists from around the world and allowed its territory to serve as a training ground for armed secret agents capable of terrorist acts in the U.S. and elsewhere.

Under these circumstances, there would be moral costs associated with negotiating with the Taliban. Negotiating a deal that would save the Taliban regime would be tantamount to rewarding it for its flagrant defiance of the U.S. and the international community regarding its responsibility for *al Qaeda*’s operations in Afghanistan. Moreover, it would have required the U.S. to negotiate with an intolerant and repressive regime that the U.S. had been unwilling officially to recognize heretofore and which the U.S. had already declared it would hold directly responsible for any future *al Qaeda* attack. Finally, although negotiation with the Taliban did take place after the 1998 bombing of the U.S. embassies, the nature, magnitude, and horror of the September 11th attacks brought many to feel that there would be something repulsive in negotiating the fate of the chief perpetrator of the attacks with the regime that was complicit.

27. Quoted in Hendrik Hertzberg & David Remnick, *The Trap*, NEW YORKER, Oct. 1, 2001, at 37.

28. *The Taliban: Engagement or Confrontation: Hearing before the Subcomm. on Near Eastern and South Asian Affairs*, 106th Cong. (2000) (statement of Karl F. Inderfurth, Assistant Secretary of State for South Asian Affairs).

To conclude, analyzed through the framework offered here, and specifically, by weighing the interests, the probability of a good negotiated outcome, the available BATNAs, and the costs associated with negotiating, I believe President Bush's decision not to negotiate with the Taliban, and instead, to use force to achieve U.S. goals, was correct. To negotiate with the Taliban would have imposed substantial costs:

1. in deterring future terrorists and those who might harbor them;
2. in maintaining credibility and self-respect;
3. in legitimizing a regime that the U.S. had not previously recognized;
4. in building and sustaining a broad international coalition and maintaining domestic political support; and
5. in allowing heinous acts to be the occasion for dialogue with a party that the U.S. believes is at least partially responsible for such acts.

Because of the combined weight of these costs, the lack of Taliban credibility, and improbability of a negotiated outcome that would serve American interests, the U.S. refusal to negotiate with the Taliban was justified. However, taken individually these costs should not be considered determinative of the decision whether to negotiate. For example, there may be cases where the costs of negotiating with a regime that the U.S. has not previously recognized would be outweighed by substantial benefits.

B. Negotiating Arms Control with North Korea

My second example also involves the Bush Administration. While the story is still unfolding and its decision may yet be reversed, the U.S. government is refusing to engage in bilateral negotiations with the North Korean government over its violation of an earlier 1994 framework agreement to suspend its nuclear weapons program ("1994 Agreed Framework").²⁹ Using the factors discussed previously, I will explain why I believe this refusal to negotiate is mistaken.

29. For more information on the U.S. standoff with North Korea, see Joshua Muravchik, *Facing Up to North Korea*, AMERICAN JEWISH COMMITTEE COMMENTARY, Mar. 1, 2003, at 33; Romesh Ratnesar, *How Dangerous Is North Korea?*, TIME, Jan. 13, 2003, at 22.

The current crisis arises out of the recent breakdown of the 1994 Agreed Framework, an agreement negotiated during the Clinton Administration between the U.S. and North Korea, to which South Korea and Japan were also parties. It was the result of a crisis that arose when the North Koreans refused to cooperate with the UN's nuclear inspectors and gave every appearance of embarking on an ambitious program to develop nuclear weapons. The Clinton Administration was literally preparing for the possibility of war with North Korea, when former President Carter intervened as an informal mediator, and as a result, diplomatic negotiations at a governmental level became possible. A complex deal ensued.

For its part of the deal, North Korea agreed to freeze its nuclear program, cap an existing reactor, and stop construction on two new and much larger reactors. These reactors had no real capacity to provide electricity but could produce uranium that might be enriched to make nuclear weapons. The North Koreans also agreed to allow U.N. inspectors into their country to confirm that there would be no further work on these reactors or the uranium enrichment program. In exchange, the U.S., Japan, and the European Union agreed to mitigate North Korea's severe energy shortage by (1) supplying fuel; and (2) agreeing to finance, design, and build for civilian use two light water nuclear reactors that could generate electrical energy but would pose little risk in terms of weapons development. The U.S. also agreed that it would work toward normalizing relations with North Korea, lifting the severe economic restrictions then in place on doing business with North Korea, and reducing North Korea's political isolation.

In years following the 1994 Agreed Framework and for the remainder of the Clinton Administration, relations between the U.S. and North Korea were strained but there were no grave crises. Congress remained very hostile to North Korea, and President Clinton relaxed, but did not eliminate, economic sanctions that had previously been imposed. As promised, fuel was shipped to North Korea, but the program to build the reactors fell far behind schedule. Originally the reactors were supposed to be completed by about 2003; by the end of the Clinton Administration, it appeared that the earliest completion date would be 2009. While relations between North and South Korea began to defrost, the behavior of the North remained provocative. Although no promises about missile development were included in the 1994 Agreed Framework, the North Kore-

ans not only began a long-range missile program but shot a missile over Japan for good measure. The U.S. posture was described as "cautious engagement." In the last year of the Clinton Administration, to the profound disappointment of the North Koreans, President Clinton decided against a visit. However, Secretary of State Madeline Albright did visit and meet with North Korean dictator Kim Jong Il. Together, they endorsed a joint communiqué that called for further talks and progress toward normalization.

With the change in administration, American policy towards North Korea was in limbo for nearly eighteen months: The Bush foreign policy team refused to endorse the joint communiqué while it undertook its own policy review. Finally, on June 6, 2002, President Bush proposed broad-based discussions with the North Koreans. But before such discussions could occur, a crisis arose when the U.S. discovered through new intelligence reports, that North Korea had in fact been pursuing a secret nuclear weapons program in violation of the 1994 Agreed Framework.

On October 16, 2002, the U.S. confronted North Korea with evidence of its nuclear weapons program. Without unequivocally acknowledging the truth of the U.S. charge, North Korea claimed that it had the right to develop nuclear weapons and any other type of weapons it wanted because of its need to defend itself, notwithstanding the 1994 Agreed Framework or the two treaties it had signed relating to non-proliferation and a nuclear-free Korean peninsula.

In the weeks that followed, matters only got worse. Not surprisingly, the U.S. and its allies suspended fuel shipments under the 1994 Agreed Framework. North Korea expelled U.N. weapons inspectors and repudiated its participation in the Non-Proliferation Treaty. North Korea said that it would view additional U.N. sanctions resulting from the expulsion as an act of war. On February 24, the North Koreans test fired a short-range anti-ship missile, and shortly thereafter North Korean fighter planes intercepted a U.S. surveillance plane over international waters.³⁰

As this crisis unfolded, North Korea called for bilateral negotiations with the U.S., suggesting it would be willing to dis-

30. David S. Cloud & Jay Solomon, *On the Brink: How U.S., North Korea Turned Broken Deals into a Standoff*, WALL ST. J., Mar. 5, 2003, at A1.

cuss its nuclear policy in the context of a non-aggression treaty, in which America would promise not to attack North Korea. The U.S. refused to negotiate one-on-one with North Korea, insisting that discussions would only occur in a multilateral context that also included South Korea, China and Japan. Ari Fleischer, press secretary to President Bush, suggested that the U.S. was unwavering in its demand that North Korea dismantle its program first, before any talks could occur. "It's not a question of talking," he said. "It's a question of action."³¹ For the reasons that follow, I think the Administration's refusal to negotiate is unjustified.

1. Interests of the parties

- a. *U.S. Interests*

North Korea's nuclear program jeopardizes vital security interests of the U.S. According to a recent *New York Times* article, North Korea can soon be churning out enough nuclear materials to produce one nuclear bomb per month. By the end of 2003, they could have enough to test one bomb, hide three, and sell several others.³² While the risk that North Korea would use nuclear weapons to initiate a direct attack on the U.S. is probably not great, there is a substantial risk that North Korea could yield to the temptation to sell nuclear weapons (or enriched uranium) to terrorists or a rogue regime that might use it against the U.S. North Korea is extremely poor, and there are groups (and countries) with the resources and motivation to make generous offers to acquire nuclear weapons.

The U.S. also has a vital interest in ensuring the security of South Korea and Japan and stability in the region. As a nuclear power, North Korea might become more aggressive toward its neighbors, and North Korea's nuclear program could

31. Philip Shenon, *White House Rejects North Korean Offer for Talks*, N.Y. TIMES, Nov. 4, 2002, at A10. All of this was happening as the crisis with Iraq deepened and that war grew nearer. The Bush administration tried to play down the North Korean crisis, suggesting that diplomatic solutions should be possible. At the same time the U.S. indicated that no option—including the use of military force—was ruled out in North Korea if vital American interests were jeopardized, and that if necessary, the U.S. had the capacity to conduct two wars at the same time.

32. David E. Sanger, *Next Question: How to Stop Nuclear Blackmail*, N.Y. TIMES, Mar. 9, 2002, Week in Review, at 1.

also set off a nuclear arms race within and around the Korean peninsula. The North Korean regime has a failing economy and is a repressive, totalitarian government with an abysmal human rights record. Encouraging reform would certainly be in our interest, and some would argue that it is in our interest to replace Kim's government with a more progressive, stable regime if chaos could be avoided.

b. North Korean Interests

The primary North Korean interest is the *survival of its regime*. North Korea has reason to be concerned about its security. Having been involuntarily added to President Bush's so-called "axis of evil,"³³ and very conscious that the Bush doctrine outlined a justification for preemptive strike if a country posed serious risk of providing weapons of mass destruction to terrorists, the North Korean government's fear for its own security is not without foundation. Finally, President Bush was quoted by Bob Woodward in his recent book, *Bush at War*, as saying: "I loathe Kim Jong Il. I've got a visceral reaction to this guy, because he is starving his people. And I have seen intelligence of these prison camps—they're huge—that he uses to break up families, and to torture people. I am appalled."³⁴ While President Bush also acknowledges that Kim has a massive army that could overrun our ally South Korea, and that there would be huge financial burdens on South Korea and China if the North Korean regime were to collapse, he suggested that in his mind it would be better if the people in the north could be liberated. Given all of this, Kim could quite rationally believe that, after Saddam, he is next on President Bush's hit list. Indeed, earlier this month, Mr. Bush suggested that if his options "don't work diplomatically, they'll have to work militarily." North Korea denounced the statement suggesting that after Baghdad, Pyongyang is next.³⁵

In addition to survival, North Korea has a substantial interest in *economic assistance from America and others*. North

33. In his 2002 State of the Union address, President Bush identified North Korea, along with Iraq and Iran, as part of an "axis of evil." David E. Sanger, *The State of the Union: Bush, Focusing on Terrorism, Says Secure U.S. Is Top Priority*, N.Y. TIMES, Jan. 30, 2002, at A1.

34. BOB WOODWARD, *BUSH AT WAR* 340 (2002).

35. Sanger, *supra* note 32.

Korea is in dire economic straits, as many of its citizens are literally starving. Kim's government is in desperate need of economic assistance. The regime also has an interest in *recognition and respect*. Kim himself is eager for Western recognition of his regime. This is not only a matter of security, but also of honor and pride.

2. BATNAs

a. U.S. Alternatives

By what alternative means—other than through bilateral negotiations—might the U.S. protect its vital interests that may be put in jeopardy by North Korea's nuclear program?

Military force: The U.S. has the option of using force to coerce North Korea to abandon its nuclear program. The use of force might be limited to targeting sites known to be connected to the nuclear weapons program (like Israel's targeting of the Iraqi Osirak nuclear reactor in 1981). Or, it may involve a broader operation to replace Kim's regime with a new one. Even a targeted attack on North Korea's nuclear facilities would create a substantial risk of a broader war that might cost tens of thousands—if not hundreds of thousands—of lives. North Korea has a 1.1 million man army (the fourth largest in the world), and has some 300 artillery pieces within striking distance of Seoul, the capital of South Korea with a population of over ten million people. Indeed, Kim Jong Il has warned that a military action on the Korean peninsula "will escalate into a nuclear war" with "frightful" consequences for "not only the Korean people in the North and South but the people in Asia and many countries around the world . . ."³⁶ The U.S. would ultimately prevail in a war with the North—its Army is badly equipped and its air force is largely dysfunctional—but American intelligence estimates that even without a nuclear exchange, an attack on Seoul could result in up to one million casualties.³⁷

In addition, unlike in Afghanistan, there would probably be little domestic, let alone international, support for pre-emptive and targeted American military action if many civilian

36. Keith Bradsher, *Threats and Responses: North Korea Says a U.S. Attack Could Lead to a Nuclear War*, N.Y. TIMES, Mar. 3, 2003, at A14.

37. Donald MacIntyre, *Kim's War Machine*, TIME, Feb. 24, 2003, at 14.

casualties or a wider war could result. North Korea has not attacked any neighboring country or any American target. It has repeatedly offered to take part in bilateral negotiations. The fact that it had expelled the International Atomic Energy Agency inspectors would probably not suffice to generate broad popular support for military action, especially at a time when diplomatic efforts have not been exhausted.

Economic and political pressure: Short of military action, are there other coercive economic or political means to pressure North Korea into abandoning its nuclear program? It is easy to identify possible alternatives of this sort. Presently the North receives some economic benefits from its neighbors, and the U.S. might persuade Japan, China, and South Korea to cut these off entirely. Korean residents of Japan send cash to North Korea and the Chinese provide fuel. South Koreans might be persuaded not to invest or trade with the North. The U.S. might inhibit North Korean trade, and deter nuclear sales by intercepting ships leaving North Korea. The U.S. might also persuade the Security Council to impose economic sanctions on North Korea for its expulsion of U.N. inspectors.

Each of these actions risk escalating the crisis, and triggering armed conflict. Kim had already threatened to interpret any imposition of U.N. sanctions as a *casus belli* against his country. The implicit threat to use his army to invade the South may or may not be a bluff. Moreover, the experience of imposing economic sanctions elsewhere is decidedly mixed: often they have had little impact on dictatorial national leaders but devastating effects on the local population. Given the reality that many in North Korea now are nearly starving, imposing additional economic sanctions seems a questionable strategy. Similar considerations should prevent the U.S. from requesting South Korea, China, and Japan to cease their currently limited economic assistance to North Korea. Most fundamentally, it is doubtful that a policy of attempting further isolation and additional sanctions will work to contain North Korea's nuclear program. Former Secretary of Defense William Perry, after calling North Korea "the most dangerous spot" in the world, said: "We can hardly isolate North Korea more than they are already isolated."³⁸

38. James Dao, *Threats and Responses: Criticism of Bush's Policy on Korea Sharpens*, N.Y. TIMES, Mar. 6, 2003, at A18.

Ignore North Korea: the U.S. might ignore North Korea and its nuclear program. Secretary of State Colin Powell recently said: "You can't eat plutonium."³⁹ While this option enables the U.S. to avoid the costs outlined below of entering into negotiations, it also provides no assurances against proliferation, both within the peninsula and outside it. The U.S. would then have virtually no way of ensuring that nuclear capabilities or components are not transferred to third parties.

b. North Korean Alternatives

In light of its interests, let us evaluate two polar North Korean alternatives: unilateral abandonment of its nuclear program and continuation of its program. In light of the poor U.S. alternatives, the continuation of North Korea's program would appear the more likely course of action. Given Kim's perception that President Bush has a strong preference for regime change in North Korea, having a nuclear program both offers the possibility of a bargaining chip in any future negotiation and carries some deterrent value. Assuming that Kim might, for a price, be prepared to trade his program for other benefits, he might well believe that unilaterally abandoning of the program would jeopardize his leverage in those future negotiations. What is not so clear, however, is why it would not serve the interests of North Korea to agree to participate in multilateral negotiations.

3. Potential Outcomes and Reliable Counterpart

Unlike the Taliban example, it is easy to imagine a negotiated deal that would better serve the interests of both North Korea and the U.S. than the alternatives. Korea might agree to eliminate or at least once again freeze its nuclear program in exchange for economic assistance, recognition, and a promise of non-aggression. One can't be certain that the North Koreans would agree to such a deal, but it is only through negotiations that the U.S. could ascertain its feasibility.

The deeper problem relates to whether the North is a sufficiently reliable partner to make negotiation worthwhile. Within the Bush Administration, many would ask why we

39. Sanger, *supra* note 32.

should negotiate with a country that has shown it will not keep its word. Kim has violated previous agreements and is now using the fruits of these past violations to pressure the U.S. government for additional concessions.

4. Costs, Legitimacy, and Morality

For the U.S., the direct transaction costs of negotiating with Kim do not seem substantial, although the indirect costs do. One direct cost is the risk that in negotiations, the U.S. might inevitably expose information about American intelligence operations or capabilities, although this risk surely would be manageable. The indirect costs—i.e., the potential spillover effects of negotiating with North Korea—are much more troublesome, as are the moral issues relating to legitimacy and morality. These indirect costs include setting a bad precedent, rewarding North Korea's conduct, and "doing business with the devil."

President Bush is obviously concerned that any deal with North Korea would set a bad precedent by encouraging nuclear blackmail by other rogue nations. Negotiating with North Korea might encourage other nations hostile to the U.S. to secretly pursue nuclear programs so they could later be bought off by the U.S. In the words of *The New York Times*: "Successfully facing down North Korea would send a message that the world will not tolerate nuclear blackmail. Failing to do so will send a very different message to rogue states—that if you don't want to be treated like Iraq, get your bomb before facing off against Washington."⁴⁰

The Administration is reluctant to negotiate a new deal with North Korea because it does not want to reward North Korea's past misbehavior. In Secretary of State Powell's words, negotiating with North Korea would amount to "appeasing misbehavior."⁴¹ Administration officials have suggested that a new deal with the North Koreans would send a message that we are willing to pay twice for the same promise.

Negotiating with North Korea could also be perceived as "doing business with the devil." The Kim regime is without question a brutal, totalitarian regime with an appalling human

40. *Id.*

41. *U.S.: North Korea Must Reverse Course*, CHI. TRIB., Dec. 31, 2002, Red-eye Edition, at 4.

rights record that has oppressed and impoverished its people. Doing a deal with such a regime, quite apart from imposing domestic political costs given Congressional hostility to North Korea, might be seen by some as morally dubious. Indeed, the President's use of the rhetoric of "evil" in characterizing the regime does not leave a lot of room for dialogue and negotiation. As one presidential scholar asks in referring to the North Korean crisis: "How do you negotiate with evil?"⁴²

In the North Korean case, there is no denying that there are significant costs associated with negotiating with North Korea—whether in a bilateral or multilateral context. Notwithstanding these costs, I believe the U.S. should be willing to engage in bilateral negotiations with the North Koreans as well as multilateral negotiations. America has a vital security interest at stake—homeland security, not just the security of the South Korea and Japan. Because our unilateral alternatives are weak, our government should take the chance of seeing whether it is possible to negotiate another deal with the North. Indeed, our demand that North Korea "completely and verifiably" dismantle its program as a precondition to bilateral talks⁴³ makes little sense. How could one establish a system for verification except through talks? According to Robert Einhorn, a senior advisor at the Center for Strategic and International Studies: "In these circumstances, it would be wise to explore whether an acceptable negotiated solution is possible. To be acceptable, a negotiated arrangement would have to provide reasonable assurances that we could detect North Korean cheating"⁴⁴ North Korea is not a reliable negotiation partner, but experts believe that it would be possible verifiably to freeze all of its future nuclear activities.⁴⁵ Uncertainties would remain about the precise extent of North Korea's past activities and present holdings. But a freeze could at least eliminate the risk that North Korea would soon be in the position to produce

42. Susan Page, *"Axis of Evil" Often Repeated But Not by Bush*, USA TODAY, Jan. 27, 2003, at A9 (quoting Davis Houck, a professor at Florida State University).

43. Philip Shenon, *North Korea Now Open to Talks*, TORONTO STAR, Nov. 3, 2002, at A10 (quoting Undersecretary of State John Bolton).

44. Robert J. Einhorn, *Talk Therapy*, N.Y. TIMES, Feb. 12, 2003, at A37.

45. Jon B. Wolfsthal, *Getting Back to Go: Re-establishing a Freeze on North Korea's Plutonium Fuel Cycle*, at http://www.nautilus.org/fora/security/0236A_Wolfsthal.html.

more than fifty nuclear weapons per year.⁴⁶ If negotiations should fail, the U.S. still has the unattractive option of using military force in the future.

Because it makes sense—in terms of America's interests as well as the interests of the North Koreans—I predict that the present game of “chicken” over whether negotiations will be bilateral or multilateral will end and real negotiations will occur. One possibility is that the United States will enter into bilateral negotiations, perhaps secretly⁴⁷ if not publicly. Another possibility is that the North Koreans will “blink” and agree to multilateral negotiations.⁴⁸ What makes no sense, however, is for the United States to give up the possibility of negotiating at all by insisting that the negotiations be multilateral.

CONCLUSION

This lecture represents a preliminary intellectual foray into a question of substantial practical and academic importance: How should a rational individual go about deciding whether it makes sense to enter into a negotiation? Negotiation often takes place in the shadow of some more coercive alternative. This is as true for legal disputes, in which negotiation takes place in the shadow of the law,⁴⁹ as for international disputes, which at times are conducted in the shadow of military force. At times, people negotiate and fight simultaneously. After all, war, as Clausewitz argued, is merely the continuation of diplomacy by other means.

My basic preference in favor of negotiation remains. For any number of reasons, disputants may tend to exaggerate the potential costs of entering into negotiations and may underes-

46. Nancy E. Soderberg, *Escaping North Korea's Nuclear Trap*, N.Y. TIMES, Feb. 12, 2003, at A37.

47. On March 5, 2003, CNN reported that secret (and unproductive) bilateral talks between representatives of the United States and North Korea were held on February 20 and 21, 2003 at the North Korean embassy in Berlin. CNN, *U.S., N. Korea 'held secret talks'*, <http://www.cnn.com/2003/WORLD/asiapcf/east/03/05/nkorea.talks/> (Mar. 5, 2003).

48. While this article was “in press,” after the American military success in Iraq, there were press reports that the North Koreans changed their position and agreed to enter into multilateral negotiations to be hosted by China. See Karen DeYoung, *U.S., North Korea to Begin Talks: China Will Serve as Host of Effort to End Stalemate*, WASH. POST, Apr. 16, 2003, at A01.

49. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

timate the possible benefits in comparison with more coercive alternatives. Indeed, it would be useful to explore both theoretically and empirically this possibility, which if true, might go some distance in justifying the preference of negotiation imperialists. But even if true this would do no more than justify a presumption in favor of using negotiation to resolve conflict. This presumption must be rebuttable.

For too long, negotiation imperialists have implicitly assumed that negotiation always makes sense. This is, of course, nonsense. Such a conclusion would require that the expected net benefits of negotiation are always greater than the expected net benefits of any alternative form of dispute resolution. Negotiation is not without costs, and my primary purpose in writing this article is to suggest a framework for the analysis of not only the expected benefits but also the expected costs of entering into negotiation. Using that framework, I have explained why I have concluded that the Bush Administration's refusal to negotiate with the Taliban seems justifiable but the refusal to negotiate bilaterally with the North Koreans does not.

