

Prof. Anthony D'Amato, **Bolton in sheep's clothing**, Nov. 20, 2006  
Jurist Hotline <http://jurist.law.pitt.edu/hotline/2006/11/bolton-in-sheeps-clothing.php>

[Anthony D'Amato](#) [Northwestern University School of Law]: "Homeland Security Secretary Michael Chertoff is US UN Ambassador John Bolton dressed up in sheep's clothing and wearing velvet gloves. He is no friend of internationalization, international law, or human rights.

His main point in a [speech](#) to the Federalist Society Friday is that its members - and he himself - believe in "judicial modesty." But by "judicial modesty" he means judges deferring to the political branches. Thus, when you look at it closely, judicial modesty is failing to do one's job as a judge. It is turning over jurisdiction to people other than judges.

Now, I'm in favor of judicial modesty when it comes to policy-making. The Supreme Court, in my view, has no business making national policy. Their business is to decide cases. But in deciding cases, they should not whittle away someone's rights because Congress or the President wants to whittle them away.

Judicial modesty, I believe, has no place at all in interfering with the judicial process. Courts should strike down Congressional statutes, such as the Military Commission Act, when they violate the Constitution. This is not a matter of policy. It's a matter of a fair reading of the habeas corpus and due process clauses of the Constitution.

Any "modesty" along these lines means that Congress and the President should get away with disregarding Due Process and Habeas Corpus. And this is precisely the kind of "modesty" that Michael Chertoff is peddling. I would like to see him and John Bolton form a law firm and set up shop in Saudi Arabia where their first clients will be the Wahabbies. They'd find a nice home there.

No international lawyer should accept the distorted view Chertoff gives of the ICJ's advisory opinion on the Construction of a Wall in Occupied Palestine. He purposely does not even try to understand the title of the case. The ICJ had no problem with Israel's construction of such a wall on Israeli territory. It was only the attempt, by Israel, to construct the wall on someone else's territory that gave rise to the court's scrutiny of Israel's justifications. Those justifications were all political, even though they were largely meritorious. But political justifications, as we saw in the Teheran case, cut no weight in the ICJ against legal justifications.

Nor should any international lawyer swallow Mr. Chertoff's reasoning, if it can be so-called, on the Nicaragua case. Mining the Nicaraguan harbors was a direct violation of a treaty of Friendship, Commerce, and Navigation that the US has with Nicaragua. (I pointed this out at the time in a letter to the *NY Times*.) There were no other "relevant parties" to that treaty, as Mr. Chertoff quite erroneously suggests.

Finally, in the *Breard Case*, Mr. Chertoff has the gall to applaud the Supreme Court's

decision that Mr. Beard was time-barred from raising a treaty-based defense that could have saved him from the electric chair. He fashions this as a case between a US court and the ICJ decision in the same case. But aside from the ICJ decision, the Supreme Court -- as it had previously done in *Alvarez-Machain* -- distorted the ordinary meaning of a treaty in order to justify Executive actions. Mr. Chertoff, it seems, is using the Supreme Court's penchant for ignoring the Supremacy Clause of the Constitution as a reason for ignoring international law.

As you read his speech, listen carefully to the voice coming from under the lamb's fleece. That voice is trying to fleece YOU."