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When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy

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WHEN TO PUSH THE ENVELOPE: LEGAL ETHICS, THE RULE OF LAW, AND NATIONAL SECURITY STRATEGY

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Lawyers in national security matters face a perennial dilemma. On the one hand, an unyielding respect for the letter of the law does not mix well with national security strategy. Courts have long recognized that a doctrinaire absolutism about legal commands cannot accommodate the fluidity of foreign policy.[1] Moreover, a preoccupation with clean hands may prevent the politician from making difficult choices that ensure survival.[2] On the other hand, lawyers and other policymakers in the national security realm must also uphold core legal principles and preserve the integrity of legal institutions. Too often, lawyers in national security crises have skewed this calculus toward expediency, without paying sufficient attention to abiding values.[3]

This loss of equipoise is especially acute where, as in the case of Guantanamo, policies entail detention without trial. U.S. history has shown that regimes of mass detention undermine the legal system's values. A number of sorry episodes, most notably

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1. *See* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (recommending "scope and elasticity afforded by what seems to be reasonable" in construction of executive power, and cautioning against "rigidity dictated by a doctrinaire textualism"); *cf.* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 402-16 (2004) (outlining pragmatic approach to separation of powers questions in law and terrorism cases).

2. *See generally* Michael Walzer, *Political Action: The Problem of Dirty Hands*, *in* TORTURE: A COLLECTION 61-75 (Sanford Levinson ed., 2004) (describing the dilemma between governing innocently and making ethnical choices for the good of the nation).

3. *See* Jose Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 215-21 (2006). *See generally* Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005) (finding that the lawyers that drafted the Torture Memos failed to provide candid legal advice or inform their client about the risks of its actions); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SEC. L. & POL'Y 409 (2005) (arguing that the lawyers who drafted the Torture Memos failed to discharge their professional obligations).

the internment of Japanese-Americans in World War II,[4] demonstrate that detentions develop an institutional momentum that undermines accountability, fairness, and equality. This Article offers a framework for determining when pushing the envelope in national security crises is justifiable as a matter of law and legal ethics.

This Article argues for pushing the envelope when three conditions are met: (1) the executive engages in dialogue with other players, either before the fact or through timely *ex post* ratification; (2) pushing the envelope will generate a net positive aggregate of institutional consequences, viewed from an intermediate and long-term perspective; and (3) pushing the envelope harmonizes executive policy with evolving international or domestic norms. When these conditions are met, the lawyer for the executive should recommend the action, even if it appears inconsistent with the letter of existing law. While acting gives both the lawyer and her client "dirty hands," a failure to act may expose the United States to even greater risk. When the executive is unable or unwilling to meet all of these conditions, however, approving the proposed action places the lawyer in ethical peril.

Part I of this Article discusses the adverse effects of detention policies on legal ethics and the integrity of the justice system. Part II uses a broader lens to describe costs to the United States' credibility and reputation. Part III sets out the test for pushing the envelope, and discusses two examples from history: Lend-Lease and the Cuban Missile Crisis. The goal of this Article is to show that legal ethics in national security strategy must reject absolutes. A blind aggrandizement of executive power will pose ethical and policy problems. A risk-averse position that avoids pushing the envelope, however, can also pose dangers. Judgment, not a categorical approach, is necessary to discern the most prudent path.

I. *NATIONAL SECURITY, DETENTION, AND LAWYERS' ETHICS*

Detention of perceived national security threats outside the traditional confines of the criminal justice system strains the eth-

4. *See* Korematsu v. United States, 323 U.S. 214, 219 (1944).

ics of government lawyers. Detention may be necessary in exigent situations.[5] Nevertheless, the charged atmosphere of national security advice and litigation can cast legal ethics as a luxury that the attorney can ill afford. In this context, institutional and ideological factors can erode compliance with ethical norms.

Institutional factors include the familiar collective action problem of the "race to the bottom." While government lawyers do not bill by the hour, they do compete for power, prestige, and influence.[6] In the national security arena, government lawyers compete for influence on decision-makers by signaling their willingness to tolerate conduct that is close to the line of legality.[7] In the short term, a lawyer who tells a decision-maker what that senior official wants to hear receives even more attention. This attention generates more prestigious assignments. In addition, the lawyer gets to see her recommendations played out in actual government policy.[8]

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5. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (authorizing detention of suspected terrorist apprehended in "theatre of war," subject to procedural protections); *cf.* Margulies, *supra* note 1 (discussing appropriateness of narrowly tailored detention); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 155 (2004) (expressing doubt about authority of executive to detain individuals without express congressional approval).

6. Competition is often a beneficial phenomenon, sharpening the competence of the participants and producing goods that match consumer needs. Allocating power, prestige, and influence through other criteria, including status, race, or ethnicity, has obvious downsides. However, competition can also have a negative effect on public goods, including the overall integrity of the system. "Market failure" of this kind is a compelling rationale for regulation of competition, generally, and lawyers' ethics in particular. *Cf.* Lucian Arye Bebchuk & Christine Jolls, *Managerial Diversion and Shareholder Wealth*, 15 J.L. ECON. & ORG. 487, 489-90 (1999) (discussing importance of regulation to ensure transparency in executive compensation); George C. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102, 1116 (2004) (noting need to regulate self-interest of corporate managers).

7. Comparable problems led to the abdication of corporate lawyers' gate keeping role in the Enron debacle. *See* JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 205-06 (2006); Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006); Milton C. Regan, Jr., *Ethics in Corporate Representation: Teaching Enron*, 74 FORDHAM L. REV. 1139, 1146-47 (2005); William H. Simon, *The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 948-49 (2005).

8. Effective ties between attorney and client also play a role. Lawyers often turn to public service because they feel inspired by a particular public official. This was certainly true, for example, of lawyers who served Presidents Roosevelt, Kennedy, and Reagan. The approval of these charismatic figures may attain a special import for the lawyer, overwhelming ethical scruples. Moreover, lawyers want to be seen by clients whom

Ideological allegiances also play a major role in this process. For many lawyers in the current Administration, any tensions with legal ethics are at best hiccups that distract from the main mission: restoring the power of the Presidency.[9] This view has a compelling origin story: a narrative attributed to the Framers, in which the President wields virtually untrammeled power in foreign affairs. Supposed constraints on the President in domestic or international law are suspect. The problem is that this origin story of executive power badly distorts the Framers' words, actions, and intent. While the Framers recognized that in emergencies the President had certain institutional advantages, they also recognized the need for collaboration between the branches of Government.[10] In addition, they understood the importance of treaty obligations and other authority under international law.[11] Ideological champions of presidential power can, however, dismiss these critiques as the carps and cavils of the uninitiated.

Once the policy universe includes extraordinary detention regimes, institutional momentum takes over.[12] The lack of accountability becomes seductive. The new solution goes off in search of problems to solve.[13] As Twain said, "[g]ive someone a

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they admire, respect, and depend on for career advancement as "getting with the program."

Lawyers do not have to go this route. Indeed, finding equipoise between achieving the client's goals and upholding the integrity of the system is a central responsibility for the lawyer. However, the urgency of national security matters makes this balance very difficult to maintain. *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452-61 (2005); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80-85 (2005); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U.L. REV. 1167, 1171-74 (2005).

9. *See, e.g.*, John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1642 (2002).

10. *See generally* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (critiquing view that Vesting Clause of U.S. Constitution grants President unfettered power over foreign affairs).

11. *See generally* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (outlining a historical approach to international law and treaties based on the intent of the Framers of the Constitution).

12. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 29 (2007) (arguing that proliferation of anti-crime legislation since the 1960's reflected availability of sweeping government authority in this area, more than substantive priority of crime over other social problems such as poverty or environmental depredation).

13. Means for implementing a policy often influence identification and analysis of

hammer and they look for a nail."[14] In this environment, a spectrum of legal ethics problems emerge from lawyers' eagerness to justify the new approach. For example, lawyers risk counseling their policymaker clients to engage in illegal acts or target minorities. Lawyers also may display a lack of candor with courts. The Article addresses each issue in turn.

A. *Assisting the Client's Illegal Acts*

Under the rules governing legal ethics, a lawyer may not knowingly counsel or assist the client in committing an illegal act.[15] The reason for this is simple: our legal system places a high value on lawyers, but regards accomplices more dimly. Unfortunately, national security strategy places attorneys in tension with this mandate.[16] National security strategy may clash with international law, as perceived national interests conflict with the international legal structure.[17] In addition, the executive branch may find it desirable to act inconsistently with the will of Congress. Unless the President has power under Article II of the Constitution to take the action, the lawyers' approval of the act will upset the orderly scheme of separation of powers, which describes the President's power as weakest when he acts in defiance of the legislature.[18]

The roots of the Bush Administration's disregard for law stem from an episode, Iran-Contra, where the Reagan Administration disregarded both a federal statute and international norms. Much of the Administration's view that it is not only per-

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the underlying problem. *See, e.g.*, JAMES G. MARCH & JOHAN P. OLESEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 13 (1989) (noting that a "solution [in public policy terms] . . . is an answer actively looking for a question").

14. *See* Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE: A COLLECTION, *supra* note 2, at 257, 271.

15. A lawyer may not "[c]ounsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003); *see* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1983).

16. *See generally* Alvarez, *supra* note 3 (arguing that lawyers feel the need to "torture the law" to insulate themselves from liability); Clark, *supra* note 3 (describing the Government's reliance on the inaccurate characterization of the Bybee Memorandum, written by the Office of Legal Counsel, for drafting interrogation policies); Margulies, *supra* note 7.

17. *Cf.* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004) (analyzing both complementarity and conflict between international law and national self-government).

18. *See* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-39 (1952) (Jackson, J., concurring).

mitted, but virtually required to disregard otherwise applicable law flows from the Minority Report issued by Republican members of the House Select Committee investigating the Reagan Administration's attempts to both provide weapons to the Iranians and undermine the Nicaraguan Government.[19] Doing the latter involved violating the Boland Amendment, a federal statute that barred aid to the Contra rebel group.[20] It also involved significant tension with international law norms that forbid the unjustified use of military force by one State against another through nongovernmental surrogates or the United States' own military forces.[21] By aiding the Contras, and then lying about it to Congress, the Reagan Administration turned its back on the *Youngstown* framework and cost itself credibility at home and abroad.

The present Administration's lawyers have engaged in even more problematic behavior with respect to Model Rule of Professional Conduct 1.2. Consider the problematic stance on international law adopted by John Yoo, Jay Bybee, and the other authors of the so-called "Torture Memos." Administration lawyers articulated a narrow definition of torture wholly at odds with the spirit and logic of international law,[22] thus giving United States personnel a virtual license to mistreat detainees.[23] In addition, this

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19. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 482-86, 505 (3d ed. 2002); *see also* Jane Mayer, *The Hidden Power: A Secret Architect of the War on Terror*, NEW YORKER, July 3, 2006, at 44, 49 (noting role of long-time Cheney aide David Addington in the Minority Report and policy in the Bush Administration); Jeffrey Rosen, *Power of One: Bush's Leviathan State*, NEW REPUBLIC, July 24, 2006, at 8-10 (discussing origins of Bush Administration view in Iran-Contra affair).

20. *See* DYCUS ET AL., *supra* note 19, at 491-93.

21. *See generally* Military and Paramilitary Activities (Nicar. v. United States), 1986 I.C.J. 14 (June 27). Ironically, more recent events, including the State manipulation of private death squads in the former Yugoslavia and the international community's revulsion at the involvement of the Taliban in supporting al-Qaeda, have arguably led to a broader test for determining a State's responsibility for the actions of private groups. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 137 (July 15, 1999); *cf.* Vincent-Joel Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615, 630-41 (2005) (arguing that broader standard is appropriate to encourage State diligence).

22. *See* United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, 112 Stat. 2681, 1465 U.N.T.S. 85 (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for purposes of punishment, intimidation, discrimination, or extracting a confession).

23. Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *in*

cramped definition was inconsistent with the purpose and meaning of the War Crimes Act, which relies on international standards.[24]

The Administration ran into further trouble with its national security wiretapping policy.[25] This policy violated specific provisions in the Foreign Intelligence Surveillance Act ("FISA"), which require the government to seek a warrant within three days of beginning surveillance and allow fifteen days of warrantless surveillance during a war.[26] By opining that the President could act inconsistently with FISA, the Administration's lawyers again ran afoul of the venerable *Youngstown* framework.

While gray areas are common in national security law, issues such as torture and warrantless wiretapping also feature some reasonably clear boundaries. In isolated, highly exigent situations, government conduct that crosses the line may be difficult to condemn categorically.[27] Lawyers who consistently advise conduct that straddles the boundary, however, blur the distinction between attorney and accomplice.[28]

MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 115, 145 (2004) [hereinafter Memo for Alberto Gonzales] (arguing that federal statute criminalizing practice of torture "must be construed as not applying to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority"). *But see* Sanford Levinson, *Contemplating Torture, in* TORTURE: A COLLECTION, *supra* note 2, at 23, 28-30 (criticizing analysis in torture memos); *cf.* Peter Margulies, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 313 (2006) (arguing for pragmatic focus on interaction of norms and institutions in torture debate).

24. *See* John Yoo & Robert J. Delahunty, U.S. Dep't of Justice, Office of Legal Counsel, *Application of Treaties and Laws to Al Qaeda and Taliban Detainees, in* DYCUS ET AL., *supra* note 19, at 47-48 (Supp. 2005-2006) (citing then-current 18 U.S.C. § 2441(c)(3)(2005)) (war crimes included violations of common Article 3 of the Geneva Convention, such as torture and cruel, inhuman, or degrading treatment). In the recently enacted Military Commissions Act, Congress diluted the provision dealing with Common Article 3 by specifying that only "grave breaches," not mere violations were prohibited. *See* 18 U.S.C. § 2441(d)(2007). Congress retained the prohibition on torture and cruel and inhuman treatment. *See id.*

25. *See generally* ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (striking down part of NSA wiretapping policy).

26. Foreign Intelligence Surveillance Act, Pub. L. No. 95-11, 92 Stat. 1753 (1978) (codified at 50 U.S.C. §§1801-1811).

27. *See* Margulies, *supra* note 23. *But see* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SEC. L. & POL'Y 285 (2005) (critiquing facile and frequent use of "ticking bomb" scenario to justify torture).

28. *See* Margulies, *supra* note 7; *cf.* Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003) (discussing ethical risks for criminal defense lawyers).

B. *Targeting Based on Race*

Another disturbing aspect of lawyering on matters of detention is reliance on stereotypes and profiling. Generalizations about citizens and immigrants have been a mainstay of national security policy since World War I.[29] In contrast, rules against "bias or prejudice" in the practice of law are of recent origin.[30] An unduly rigid application of ethical restrictions on bias might chill lawyering even where ethnicity, religion, or national origin was one criterion among many. A more robust interpretation of the ethical rules, however, would promote liberty, equality, and accountability. In addition, decreasing reliance on stereotypes in decisions about arrest, detention, and deportation would promote efficiency in law enforcement and national security policy.

The ethical strictures against lawyers' "words or conduct" that manifest bias echoes clear prohibitions in international law.[31] For example, the International Covenant on Civil and Political Rights ("ICCPR") bars discrimination on the basis of nationality, race, religion, and other factors, and imposes duties on States to implement this prohibition. While the United States has limited the legal force of the ICCPR, the overarching principle of non-discrimination commands wide respect. In an increasingly interdependent world, equality is a good for its own sake. Moreover, on the international stage, a commitment to the principle of equality also encourages reciprocity by countries and communities that might otherwise be suspicious of each

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29. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (June 2003) (critiquing criteria used to detain aliens after September 11); *cf.* Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1 (2001) (exploring common themes between Japanese-American internment and post-September 11 measures); Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449 (2005) (discussing the dangers of a monolithic paradigm in times of national emergency).

30. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt.3 (2003).

31. *See* International Covenant on Civil & Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171; Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOK. J. INT'L L. 495, 515-19 (2006); *cf.* Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT'L L. REV. 557, 570-73 (2006) (discussing legal options regarding state adherence to provisions of international agreements on hate speech and problems with prosecuting hate speech in international tribunals).

other's motives.[32] This element of reciprocity is important because politicians throughout the world often act against minority communities under the guise of national security.[33] Legal advice that limits resort to this gambit will promote a positive brand of reciprocity, as well as a more focused national security strategy that concentrates on genuine threats.

Unfortunately, government lawyers addressing national security policies that rely on stereotypes have failed to consider international law norms barring discrimination. For example, after September 11, the Administration engaged in a round-up of undocumented aliens from Middle Eastern and South Asian countries.[34] There is no evidence, however, that legal advice to the Bush Administration on measures such as the round-up considered international law norms or the impact of such actions on public opinion abroad. While the Administration has engaged in negotiations with certain countries regarding the detention of their nationals at Guantanamo, these negotiations have been ad hoc, without the bedrock of principle that would comply with the spirit of international norms and persuade international audiences of the United States' good faith. Administration lawyers have also defended measures such as the immigration round-up as justified exercises of executive authority.[35] While the content of the Administration lawyers' arguments has not affirmatively promoted stereotypes, one can argue that the deference to policies based on stereotypes, not particularized proof, nonetheless manifests bias.

Government lawyers dealing with national security issues have been similarly unconstrained by provisions of U.S. law that require particularized suspicion and equal treatment under the law. During the Civil War, military authorities used the suspension of habeas corpus to detain thousands of citizens, some ap-

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32. *Cf.* Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES L. 47, 72 (2004) (stressing importance of dialogue between transnational non-governmental organizations and United States on human rights issues).

33. *See* BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 81 (2001) (discussing persecution of immigrant dissidents).

34. *See* DAVID COLE, ENEMY ALIENS (2003). *See generally* Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing the marginalization of particular communities after September 11).

35. At least one court has agreed. *See, e.g.*, Turkmen v. Ashcroft, 2006 U.S. Dist. Lexis 39170 (E.D.N.Y. June 14, 2006).

propriately (particularly early in the conflict), but others on charges so nebulous that the detainees' jailers could not even recall them when asked.[36] During World War I, the Administration rounded up dissidents, many of them Jews, like the anarchist Emma Goldman,[37] and imprisoned or deported many. The Government's actions during World War II, however, present the most troubling case for both policy and lawyers' ethics.

The legal defense of the internment policy hinged on a stereotype of Japanese-Americans as insidious and inscrutable security risks.[38] Ironically, the narrative shaped by government lawyers acknowledged the discrimination that Japanese-Americans had frequently faced in the United States, but then leveraged that history of discrimination to paint Japanese-Americans as a resentful and cloistered minority eager to exact their revenge on U.S. interests. Based on the government lawyers' skillful advocacy, the Supreme Court accepted this argument in *Hirabayashi v. United States*.[39] Once accepted by the Court, these arguments formed part of the backdrop for the Court's decision in *Korematsu v. United States*[40] that upheld a statute that criminalized resistance to the forced evacuation of Japanese-Americans from their homes.

One aspect of a learned profession like the law is that practitioners should learn from their mistakes. Unfortunately, the present Administration has not taken that lesson to heart. As episodes like the post-9/11 round-up show, lawyers for the Bush Administration have seen fit not to learn from the mistakes of the past, but to repeat them.

C. *Lack of Candor With the Tribunal*

Another disturbing effect of detention policies has been the lack of candor thereby promoted among lawyers charged with defending the Government. Candor with the tribunal has been among the most important ethical dictates of the lawyer. Without candor the adversary system cannot function. For this rea-

36. *Cf.* MARK NEELY, THE FATE OF LIBERTY 52-65 (1991) (discussing examples of abusive confinement during the Civil War).

37. *See* PETER IRONS, JUSTICE AT WAR 15 (1983).

38. Lawyers honed this strategy despite their private doubts. *Id.*

39. 320 U.S. 81 (1943). For background on the case, see IRONS, *supra* note 36, at 249-50.

40. 323 U.S. 214 (1944).

son, ethical rules prohibit the lawyer from making false statements of law or fact to a tribunal, or "failing to correct" false statements previously made.[41] Unfortunately, episodes of detention—sometimes involving illustrious U.S. lawyers—have revealed a lack of compliance with this ethical norm.

Deception is a perpetual risk because governments often resort to detention when evidence is murky or nonexistent. Conceding this lack of evidence can produce embarrassment, shame, and legal liability. Locked in a race to the bottom, lawyers turn to exaggeration, fabrication, and concealment as winning strategies.

The most salient example of lack of candor occurred during the litigation in the Supreme Court concerning the Japanese-American internment during World War II. The litigation of the *Korematsu* case involved a number of celebrated lawyers, including the Secretary of War Henry Stimson, Assistant Secretary John McCloy and Assistant Attorney General Herbert Wechsler, a professor at Columbia who subsequently drafted the Model Penal Code, co-wrote a pioneering casebook on federal courts, and authored a profoundly influential article on "neutral principles" in constitutional law. An important feature of this litigation was the report prepared by General John DeWitt for the War Department setting out the basis for the government's policy ("Report" or "DeWitt Report"). DeWitt's Report was the fulcrum for the lawyers' lack of candor.

DeWitt made a number of damning claims in the Report, including the charged assertion that the government had documented Japanese-American radio transmissions from the West Coast to the forces of the Japanese Empire. DeWitt also asserted that threats of violence by whites prevented the voluntary movement of Japanese-Americans from the West Coast to less sensitive areas further east. The Report stated that the failure of a voluntary program of evacuation and resettlement justified the evacuation and internment policy.[42] Both of these claims were false. An investigation by the Federal Bureau of Investigation ("FBI")

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41. *See* MODEL RULES OF PROF'L CONDUCT, Rule 3.3 (2005). The Model Code of Professional Responsibility, an earlier codification of ethical rules first adopted in 1908 and still in force in a majority of states, has comparable rules. *See* MODEL CODE OF PROF'L RESPONSIBILITY, DR 7-102(A)(5) (2005) (prohibiting the lawyer from knowingly making a false statement of law or fact).

42. *See* IRONS, *supra* note 36, at 294-95; *cf.* Joseph Margulies, Evaluating Crisis Gov-

failed to find any documented instances of radio transmissions.[43] Indeed, the FBI concluded that these claims were fabrications.[44] In addition, the facts wholly failed to demonstrate that violence against Japanese-Americans would have doomed a voluntary program.[45]

Fidelity to ethical rules requiring candor with the tribunal would have required a clear distinction between the discredited claims in the DeWitt Report and the facts as stated in the government's brief. A straightforward disavowal of the Report would have been the action most appropriate for avoiding any misapprehension on the part of the Court. Several Justice Department lawyers wished to take this step. Wechsler, however, at McCloy's urging, decided that a less precise caveat was appropriate.[46]

Wechsler drafted a footnote that said the following: "We have specifically recited in this brief facts relating to the justification for the Evacuation, of which we ask the Court to take judicial notice, and we rely upon the . . . [DeWitt] Report only to the extent that it relates to such facts."[47] This cryptic footnote, however, failed to fulfill the Justice Department lawyers' duty under the ethical rules. First, the footnote failed to adequately identify those portions of the DeWitt Report that the lawyers knew to be false. This invited confusion on the part of the Court, particularly since the Court had already relied on the Report in the *Hirabayashi* case.[48] Second, on its own terms, the footnote was faulty. While the Justice Department asked the Court to take judicial notice of the report's accuracy on the matter of violence against Japanese-Americans, the facts did not provide the clarity and certainty that judicial notice demands.[49]

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ernment, 40 CRIM. L. BULL. 627, 638-39 (2004) (discussing problematic basis for U.S. imposition of martial law in Hawaii during World War II).

43. *See id.* at 291.

44. *See id.*

45. *See id.* at 294-95, 299-300.

46. *See* Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 886-90 (1993).

47. *See* IRONS, *supra* note 36, at 290-91.

48. *See id.* at 291 (including the assertion in *Hirabayashi* that the "opportunity for espionage and sabotage" justified the evacuation); *cf.* Korematsu v. United States, 584 F.Supp. 1406, 1417-19 (N.D. Calif. 1984) (granting writ of *coram nobis* vacating Korematsu's conviction, based on government's reliance on a misleading factual record).

49. *See id.* 299-300.

Ultimately, the Court in *Korematsu* relied on the DeWitt Report as a basis for upholding the statute criminalizing failure to report to a government facility.[50] In *Ex Parte Endo*,[51] issued on the same day, the Court granted the secret wish of the Justice Department's lawyers and held that the executive lacked statutory authority to detain a concededly loyal Japanese-American.[52] While this decision effectively ended the internment program,[53] the *Korematsu* holding has retained its impact in U.S. history and culture. No case better demonstrates the pressures that undermine lawyers' fidelity to ethical rules in national security matters, and the ill effects yielded by government lawyers' failure to internalize ethical norms.

Lawyers in the Bush Administration have also acted in a fashion that suggests a lack of candor on issues of detention. Consider the case of Brandon Mayfield, a Portland lawyer whom the FBI arrested in May 2004 as a material witness in the investigation of the Madrid train bombing.[54] The FBI had examined a third-hand version of a fingerprint found at the scene, and matched that print with Mayfield.[55] Prosecutors submitted an affidavit asserting that Spanish authorities agreed with the fingerprint analysis of the FBI.[56] Based on the affidavit, a judge approved a covert search of Mayfield's residence and Mayfield's detention for seventeen days as a material witness. Federal authorities released Mayfield after they conceded that the fingerprints did not match.[57] In fact, FBI agents knew from the start that Spanish authorities disagreed with the FBI's fingerprint analysis.[58] If the prosecutor knew or came to know about this

50. Korematsu v. United States, 323 U.S. 214, 219 n.2, 223-24 (1944).

51. 323 U.S. 283, 294 (1944); *cf.* Patrick O. Gudridge, *Remember* Endo?, 116 HARV. L. REV. 1933 (2003) (discussing significance of case).

52. *See* Jane B. Baron & Julie Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 160 (1997) (noting Wechsler's recollection that, in *Endo*, the Justice Department lawyers "lost and were delighted to lose").

53. *See* Gudridge, *supra* note 50, at 1933.

54. *See* Sarah Kershaw & Eric Lichtblau, *Spain Had Doubts Before U.S. Held Lawyer in Blast*, N.Y. TIMES, May 26, 2004, at A1.

55. *Id.*; *cf.* Darryl K. Brown, *Rationalizing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 823-24 (2004) (noting surprisingly weak reliability of fingerprint evidence).

56. *See* OFFICE OF THE INSPECTOR GEN. ("OIG"), U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE (March 2006), *available at* http://www.usdoj.gov/oig/special/s0601/final.pdf [hereinafter OIG REP.].

57. *See* Kershaw & Lichtblau, *supra* note 53.

58. The FBI's focus on Mayfield, who was entirely unconnected to the Madrid at-

disagreement, making a contrary assertion in the affidavit or failing to alert the judge upon discovering the discrepancy between the facts and the pleadings submitted would be a violation of the duty of candor.[59] The government recently settled a subsequent civil suit by Mayfield, agreeing to pay him US$2 million.[60]

Government lawyers have also discounted the need for candor in the extensive litigation surrounding Jose Padilla, a U.S. citizen whom the government detained for three and a half years as an alleged enemy combatant. In *Padilla v. Hanft*,[61] Judge J. Michael Luttig of the U.S. Court of Appeals for the Fourth Circuit, an ideological soul-mate of the Administration, told the sad story of government lawyers' slippery strategy in arguing for the legality of Padilla's detention. Those lawyers almost certainly knew that if the Fourth Circuit agreed, the government would moot the dispute by charging Padilla with criminal violations, rather than face Supreme Court review.

Judge Luttig responded with a blistering opinion that called the government's good faith into question. After observing that the government was "steadfastly maintaining that [Padilla's detention] . . . was imperative in the interest of national security,"[62] Luttig noted the peculiar coincidence that the governments' fil-

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tacks, may have stemmed from evidence relating to Mayfield's religion and professional associations: Mayfield was a practicing Muslim, had called the head of a local Islamic organization, and had represented a terrorism defendant in a completely unrelated family law case. *But see* OIG REP., *supra* note 55, at 267, 270 (claiming that Mayfield's religious affiliations and legal experience had no impact on law enforcement decisions).

59. While the OIG cleared Department of Justice ("DoJ") attorneys of any wrongdoing, see OIG REP., *supra* note 55, the Report does not explain how an alert prosecutor could have failed to ask Federal Bureau of Investigation ("FBI"). *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003) (discussing complex relationship between agents and prosecutors). *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.1 (2005) ("a prosecutor has the responsibility of a minister of justice and not simply that of an advocate"); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 439-41 (2002) (advocating for uniform regulation of federal prosecutors through Congressional action). If Mayfield *had* turned out to be factually guilty, the misrepresentations in the affidavit could have been considered both material and entered into in bad faith, thus requiring exclusion of evidence obtained through a search authorized in reliance on the affidavit. *See, e.g.*, Franks v. Delaware, 438 U.S. 154, 164-72 (1978) (discussing requirements for accuracy in affidavits supporting warrant applications).

60. *See* Eric Lichtblau, *U.S. Will Pay $2 Million to Lawyer Wrongly Jailed*, N.Y. TIMES, Nov. 30, 2006, at A18.

61. 432 F.3d 582 (4th Cir. 2005), *overruled on other grounds*, 126 S. Ct. 978 (2006).

62. *Id.* at 584.

ing of criminal charges occurred just two days before the Administration's brief in support of Padilla's continued detention was due in the Supreme Court.[63] Luttig inferred from these facts that the government had filed the indictment to avoid Supreme Court review of Padilla's detention.[64] When conducting litigation with these stakes, so "imbued with significant public interest,"[65] the Court continued, the government should not engage in forum shopping.[66]

The Administration's tactics, the court observed, had serious institutional consequences for the Administration's credibility in the war on terror—consequences that the government, as well as its legal advisors, had underestimated in their hurried search for an expedient solution to their litigation dilemma.[67] The Court deplored the government's switching of stories regarding the basis for Padilla's detention and subsequent indictment, from a lurid plan to obtain a "dirty bomb" that would spew radiation to a more mundane effort to aid Muslim fighters in Bosnia and Chechnya.[68] The Court added the chilling view that the government had, through its dance of expedience, both damaged its own claims to detention in truly exigent circumstances and "left . . . the impression that Padilla may have been held for . . . years . . . by mistake."[69]

The ramping up of plans to try high-level terrorism suspects before military commissions will only exacerbate issues of candor with the tribunal. The Military Commissions Act ("MCA") requires that tribunals categorically exclude evidence based on torture.[70] It also mandates the exclusion of evidence obtained by

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63. *See id.*

64. *See id.* at 585.

65. *Id.*

66. *See id.*

67. *See* 432 F.3d at 587.

68. *See id.* at 584.

69. *Id.* at 587. National security cases where the government has brought criminal charges display problems similar to the lack of candor described in the text, including the withholding of exculpatory evidence. *See generally* Koubriti v. United States, 336 F. Supp. 2d 676 (E.D. Mich. 2004) (granting Government's motion to vacate convictions on grounds because the prosecutor failed to disclose views of government experts); United States v. Wilson, 289 F. Supp. 2d 801 (S.D. Tex. 2003) (finding that court found that prosecutors may have willfully deceived the court by stating that defendant lacked government authorization for many of his activities).

70. *See* Military Commissions Act ("MCA"), Pub. L. No. 109-481, 10 U.S.C. § 948r(b)(2006). Congress enacted the MCA after the Supreme Court struck down the

methods other than torture if that evidence is not reliable.[71] Prosecuting attorneys in these cases will face enormous pressure to conceal, minimize, or misrepresent the methods used.[72] In high-profile criminal cases, such pressure is often present.[73] In the terrorism prosecutions, where the stakes include the release of individuals who appear by any calculation to be dangerous to the United States, the pressure will be very difficult to withstand.

II. *AGENCY COSTS OF DETENTION GONE AWRY: DAMAGE TO REPUTATION, CREDIBILITY, AND LEGITIMACY*

In addition to the adverse effects on lawyers' ethics and the integrity of the legal system, a misconceived detention regime can generate an array of agency costs. As defined here, agency costs are costs borne by an entity, including a country such as the United States, by the decisions of the entity's leaders. The regime of detention established after September 11 has injured U.S. interests by impairing the perceived legitimacy of U.S. actions on a global scale and weakening the system of international governance in which the United States has a principal stake.

A. *Legitimacy*

Commentators have long argued that one of the greatest attributes of the United States is its "soft power"—its ability to persuade and influence other countries through cultural, social, and political strength, without the use of force.[74] This soft

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President's order establishing military commissions. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); *cf.* Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, CATO SUP. CT. REV. 51 (2005-2006) (analyzing *Hamdan*).

71. *See* 10 U.S.C. § 948r(c).

72. *See* Peter Margulies, *The Military Commissions Act, Coerced Confessions, and the Role of the Courts*, 26 CRIM. JUST. ETHICS (forthcoming 2007), *available at* http://ssrn.com/sol3/papers.cfm?abstract_id=954415 (arguing that courts should use statutory interpretation, supervisory authority, and construction of fundamental constitutional rights to address issues of coercion).

73. *See, e.g.*, New York v. Wise, 752 N.Y.S.2d 837, 845-46 (Sup. Ct. N.Y. Co. 2002) (granting prosecution motion to vacate convictions in New York's infamous Central Park Jogger case, based on government's disregard of pervasive and material inconsistencies in the alleged "confessions" of the defendants, and discovery of new DNA evidence indicating that another individual had committed the crime in question).

74. *See* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 35 (2002) (arguing that a preemptive approach by the United States will result in the loss of "important opportunities for cooperation in the solution of global problems such as terrorism").

power hinges on perceptions that the United States acts fairly in international relations.[75] The observance of human rights and international humanitarian norms is a central element in such perceptions of fairness. When the United States signals that it takes such human rights norms seriously, the world responds, as it did during the founding of the United Nations. Pressure on the human rights front also contributed to the collapse of Communist regimes in Russia and Eastern Europe. By the same token, U.S. defection from international law norms can discredit those who seek adherence to such norms around the world, and bolster regimes that seek to oppress their own people. Ironically, a regime that disregards such norms may eventually trigger a revolution, as the case of Iran demonstrates.[76] Such drastic shifts do not serve the interests of the United States.

A studied disregard of international law also foregoes valuable opportunities to collaborate with other countries and international organizations on improvements in the international law system. International law may well be unduly idealistic in some respects, without sufficient regard for the prerogatives of individual States and the need for flexibility in the conduct of foreign affairs. If this is true, the soundest strategy is to work to reform international law by making international agreements and tribunals more sensitive to such concerns.[77] Unilateral repeal, modification, or disregard of international law short-circuits this process, impeding dialogue and legal innovation within international law. A lawyer giving advice needs to consider these opportunity costs.

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75. *See generally* Harold Honju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) (exploring the idea of "American exceptionalism," or the idea that the United States is qualitatively superior to other developed nations due to its unique origins, national credo, historical evolution, and distinctive political and religious institutions).

76. *See* STEPHEN KINZER, OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 196 (2006) (observing that attempts by the United States to dislodge democratically elected regimes in Iran and elsewhere exacerbated anti-U.S. sentiment).

77. *See* Jane E. Stromseth, *New Paradigm of the* Jus Ad Bello*?*, 38 GEO. WASH. INT'L L. REV. 561, 571-72 (2006) (discussing challenges to the current paradigm on the use of force in international law, while suggesting that appropriate changes are possible within international law framework); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 421-26 (2006) (arguing that definitions of the permissible use of force can be adopted to address the threat of terrorism).

B. *The Challenge of Finding an Exit Strategy*

The detention of suspected terrorists at Guantanamo also lacks a clear exit strategy.[78] Without a clear exit path, the Government loses control over the behavior of detainees. In addition, the lack of an exit path makes it more likely that the experience of detention will radicalize detainees, making them more likely to engage in violence if they ever are released.

Controlling any detained population is difficult with both sticks and carrots. In prison, inmates have a clear exit—they leave when their term is up. Often, they can get time off for good behavior, or at least avoid serving additional time by refraining from criminal conduct while in prison. In other facilities without fixed terms of confinement, such as psychiatric facilities, expert diagnoses hasten release. At Guantanamo, however, these incentives do not operate, since the government appears to wish to hold many of the detainees indefinitely. Accordingly, interrogators have far fewer incentives to provide to detainees for obtaining worthwhile information or ensuring good behavior.[79] The experience of being held indefinitely may also be a self-fulfilling prophecy. This experience can instill militancy where none had been present, producing an implacable foe of the United States. If radicalized individuals are eventually released, preventing violence in the future may be difficult.

Finally, the peculiar status of Guantanamo as a facility for foreign nationals also triggers international law obligations accepted by the United States that impede an exit strategy. Even if the United States wished to release the great bulk of the detainees at Guantanamo, the Convention Against Torture ("CAT")[80] would create obstacles. Under CAT, the United States cannot release detainees to a country where they are likely to be tortured. Unfortunately, the government's labeling of the detainees as terrorists increases the likelihood of bad treatment if they are returned to their country of origin. Many States practice tor-

78. *See* Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 44-53 (2004).

79. See Tim Golden, *The Battle for Guantanamo*, N.Y. TIMES MAGAZINE, Sept. 17, 2006, at 65-66.

80. *See* CAT, Dec. 10, 1984, 112 Stat. 2681, 1465 U.N.T.S. 85; *cf.* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1145-64 (4th ed. 2005) (analyzing non-*refoulement* obligation under CAT); Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 670-85 (2006).

ture, and the fact that a State has signed and ratified CAT is no guarantee of a commitment to avoid this practice (as U.S. citizens have discovered in the wake of revelations about Guantanamo and Abu Ghraib). Without assurances, release of detainees to their countries of origin violates international law. The result is that Guantanamo is Humpty Dumpty in reverse. When Humpty Dumpty shattered into pieces, it was impossible to put him back together. Here, in contrast, since Guantanamo has been established, it will be difficult to take it apart. A broader commitment to understanding and working within international law would have prompted greater caution in setting up Guantanamo. Since Administration policymakers and their attorneys disparaged international law, however, they were ill-situated to provide this valuable advice.

C. *Torture and Institutional Momentum*

Finally, authorizing conduct in tension with international law triggered institutional drift toward coercive interrogation as the norm, rather than the exception. Here, too, the government's policymakers and counselors were less than prescient. It is true that then White House Counsel Alberto Gonzales noted that permitting "alternative methods" of interrogation could adversely affect "military culture."[81] Gonzales's response to this concern—that the military would not back-slide from commitments to the Geneva Conventions because President Bush had "directed" them to adhere to those principles[82]—fails to recognize the mixed messages about international law conveyed by the Bush Administration. The signals sent by Gonzales himself, that the Geneva Conventions were "quaint" and "obsolete"[83] helped pave the way for the abuses at Abu Ghraib and Guantanamo. As the race to the bottom dynamic predicts, people resort to coercion when norms are ambiguous and coercive methods are expedient.[84] Coercion moves from the exception to de-

81. *See* Alberto Gonzales, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, *in* DYCUS ET AL., *supra* note 19, at 52, 54 (Supp. 2005-2006) ("a determination that . . . [the Geneva Convention] does not apply to al-Qaeda and the Taliban could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct").

82. *See id.* at 55-56.

83. *Id.* at 53.

84. *See* Margulies, *supra* note 23, at 313; Louis M. Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 893 (2005).

fault rule. This process crowds out alternatives, such as building rapport between captor and captive, that seasoned professionals view as more effective.[85]

D. *Summary*

In sum, the institutional consequences of the President's decisions on detention and interrogation boxed the Bush Administration into largely unproductive policies. While the then White House Counsel Gonzales wrote that declining to apply the Geneva Conventions "[p]reserves flexibility" and "holds open options,"[86] the opposite is true. Coercive interrogation and arbitrary detentions at Guantanamo in fact imposed significant opportunity costs on the United States, hampering a transition to more productive and legally defensible methods.

III. *PUSHING THE ENVELOPE JUSTIFIED*

While the dangers of proceeding with a detention regime are plain, cautionary tales have a downside. Sometimes pushing the envelope is a necessary course for lawyers advising the President on national security strategy. In such cases, lawyers may appropriately advise the President to violate existing law in a fashion that is consistent with the rules of legal ethics. Such advice, however, must meet three conditions. First, the lawyers and decision-makers must display what I call a "dialogic disposition," entailing an open exchange of views before the fact or within a reasonable time with international bodies, Congress, or the courts. Second, the lawyers must consider the intermediate and long-term institutional consequences of their advice. Third, the advice must harmonize government policies with evolving norms of international or domestic law. This section discusses these criteria, and offers as examples two national security decisions with significant ramifications for international law: Roosevelt's Lend-Lease program and the Kennedy Administration's successful effort to defuse the Cuban Missile Crisis.

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85. Moreover, the MCA accelerates the institutionalization of coercive interrogation. The MCA permits the introduction into evidence in military commissions of evidence obtained by coercion before December 30, 2005, as long as that evidence is "reliable." *See* Military Commissions Act, 10 U.S.C. § 948r (2006). Unless courts interpret the MCA to exclude such evidence, further damage will result to the United States' credibility. *See* Margulies, *supra* note 71.

86. *See* Gonzales, *supra* note 80, at 53.

A. *Dialogic Disposition*

A dialogic disposition is the first element of decisions for pushing the national security envelope. It is important for three reasons. First, dialogue is crucial for a civic humanist view that values participation for its own sake. Dialogue between lawyers, policymakers, and other relevant institutions or audiences, including Congress and international organizations, allows a multiplicity of players to offer their views as active contributors to debate. Second, it assures that a decision will be more accurate and well-founded, with a given approach exposed to light from a range of possible perspectives that counteract biases and individual agendas. Third, a decision made through dialogue is more likely to be a tailored use of power, since policymakers appreciate that tailored decisions are easier to justify.

A dialogic disposition can entail ratification after the fact.[87] A commitment to seek such ratification, however, should be part of the original decision. Moreover, an effort to secure ratification should follow the original decision in a reasonable period of time, typically six months or less. Attempts at ratification that are forced on a decision-maker and post-date the decision by a substantially longer period cannot really count as dialogue.[88]

Timely post-hoc ratification is also appropriate from a legal ethics perspective. The ethics rules permit advocates to seek good-faith modifications of existing law.[89] Since legal advisors contemplate that external audiences and institutions will have to ratify a policy, they have incorporated the transparency that the

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87. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?* YALE L.J. 1011, 1108 (2003) (discussing Jefferson's view).

88. For this reason, the Bush Administration's belated efforts to secure approval for its policies on detention, coercive interrogation, and national security surveillance through the Military Commissions Act of 2006 do not meet the dialogic disposition criterion. These late entries responded to court decisions and media disclosures. The Bush Administration also clarified its views on torture in response to public pressure. *See* Memorandum from Daniel Levin, Assistant Attorney General to James B. Comey, Deputy Attorney General (Dec. 30, 2004), http://www.usdoj.gov/olc/18usc23402340a2.htm (last visited Apr. 25, 2007) (discussing legal standards applicable under 18 U.S.C. §§ 2340-2340A). The Levin Memorandum categorically rejects the use of torture. *See id.* at 1 (declaring that "Torture is abhorrent to both American law and values and international norms"). However, this categorical rejection seems inconsistent with the Levin Memorandum's claim that its conclusions regarding treatment of detainees are identical with the conclusions drawn by the earlier memos, despite the narrower definition of torture those memos advance. *Id.* at n.8.

89. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2, 8.4 (1983).

ethics rules demand. While pushing the envelope may still create tension with the ethics rules, this tension is ultimately productive, leading to changes in the law that the rules recognize as both inevitable and desirable.

B. *Consideration of Institutional Consequences*

Legal advisers should also consider the institutional consequences of particular decisions. At their best, lawyers grasp not only legal doctrine but how institutions work. The rules of legal ethics encourage lawyers to offer advice on non-legal consequences.[90] Prudent legal advice should point out not only the benefits if a proposed action is successful, but also the risk of error in estimating the likelihood of success. Particularly when success hinges on the convergence of variables, the risk of error may be high. Lawyers with blind spots engendered by ideology, aspirations for career advancement, or intoxication with making an impact, may systematically overestimate the probability of success.

In the case of a proposal involving detention of national security risks outside normal channels, history provides a clear account of the risks. As we have seen, these consequences can include the erosion of the legal system's integrity, lawyers' ethics, and the ideal of equality. Such programs, as tempting as they may seem when first proposed, have substantial opportunity costs. When they involve violations of international law, they undermine the United States' credibility, and make forging international consensus more difficult. In addition, a decision to approve detention that challenges international law norms can also be difficult to reverse. Lawyers advising decision-makers must assess the difficulty of exiting from a policy, once it becomes counterproductive.

At the same time, lawyers must assess the consequences of failing to take action. When national security crises such as the destruction of railways and bridges in Maryland linking Washington, D.C. to the North emerged at the start of the Civil War, adherence to the letter of the law would have risked the entire structure of democracy and self-government. President Abraham Lincoln argued persuasively that here the long-term view argued for some temporary curtailing of habeas corpus, asking

90. *See id.* R. 2.1; Katyal, *supra* note 69, at 120-21.

in his message to Congress, "are all the laws but one [habeas] to go unexecuted, and the government itself go to pieces, lest that one be violated?"[91] One can view Lincoln's suspension of habeas corpus at this place and time as a narrowly tailored response to an existential threat, in which the institutional costs of inaction outweighed the costs of decisive measures to contain the Maryland insurrection.[92]

Moreover, Lincoln was discerning in the timing of the suspension, holding it in abeyance until after the Maryland legislature considered a secession vote. While others, including General Winfield Scott had urged the arrest of secessionist Maryland legislators, Lincoln thought better of this strategy. First, Lincoln noted that the legislators had a "clearly legal right to assemble."[93] Lincoln also noted that the remedy of suspension would only complicate the challenging political situation, observing that, "we can not permanently prevent their action. If we arrest them, we can not long hold them as prisoners; and when liberated, they will immediately re-assemble, and take their action."[94] Through clear-headed insight into institutional consequences, Lincoln appreciated that suspension of habeas corpus, whatever its virtues in dealing with the precarious military situation in the early days of the Civil War, would never be a solution to the political challenges faced by his Administration.[95]

Unfortunately, this insight did not prevent Lincoln's Administration, with his tacit or active consent, from using suspension of habeas corpus as an expedient through the rest of the conflict.[96] Through the rest of the war, Lincoln's administrators and generals used habeas corpus readily to arrest and detain approximately 13,000 people,[97] often without any official indication that these individuals were disloyal or plotting violence.[98]

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91. *See* NEELY, *supra* note 35, at 12.

92. *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 16-17 (2003); Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now—The Southern Rebellion and September 11*, 60 N.Y.U. ANN. SURV. AM. L. 463, 466 (2004).

93. *See* NEELY, *supra* note 35, at 6.

94. *See id.* at 7.

95. *See id.* ("Suspending the write of habeas corpus was not originally a political measure, and it would never become primarily political.").

96. *See* Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 718 (2006).

97. *See* NEELY, *supra* note 35, at 23.

98. *See id.* at 20-21.

Indeed, the ready availability of arrest and detention, more than any conduct by those actually arrested and detained, accounted for its use. Lincoln seemed to exhibit little interest in stopping these adverse institutional consequences, even when they provided fodder for his opponents.[99]

C. *Harmonization With Evolving Norms*

Policymakers at certain crucial junctures in U.S. history have defied the letter of the law to promote equality, dignity, and nonaggression. A purposive style of interpretation drives these decisions, premised on the goals served by constitutional or international law. Examples include: the protection of human dignity in the Emancipation Proclamation,[100] safety from aggression, as in President Franklin D. Roosevelt's Lend-Lease program, or the use of tailored and limited force to prevent a wider conflict, as in the Kennedy Administration's approach to the Cuban Missile Crisis. While each of these measures could also claim a pragmatic justification, each represented a conscious break with the past. Moreover, despite the tension triggered with existing norms, each decision vindicates the rule of law.

The law must reckon with evolving norms because societies and circumstances change. Sometimes values integral to the founding of an entity become submerged under the weight of popular fears, sectarian interests, or bureaucratic in-fighting. In such situations, a return to first principles is essential. Both Lincoln and Frederick Douglass, for example, understood that the struggle against slavery was about reconciling the ideals of the Declaration of Independence with an evolving vision of the Constitution's."[101] The renewed founding embodied in this return

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99. *See id.* at 18 ("the impact of the [subsequent arrest of legislators] on later Maryland elections is difficult to determine, but they were more likely harmful than helpful to the Administration's cause by supplying an issue to the opposition").

100. *See* Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/ Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1142-43; *see also* Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 814-23 (2006) (defending Emancipation Proclamation as legitimate exercise of presidential authority in time of war).

101. *See* MILNER S. BALL, THE WORD AND THE LAW 146-49 (1993) (discussing Frederick Douglass' views); MARK NEELY, THE LAST BEST HOPE OF EARTH: ABRAHAM LINCOLN AND THE PROMISE OF AMERICA 154 (1995) (discussing the rhetorical strategies at play in

to first principles is not a rejection of the rule of law, but a necessary step in affirming the rule of law's continued relevance.

Both legal ethics and international law recognize the importance of change in the law. Model Rule of Professional Conduct Rule 1.2 permits lawyers to challenge existing law, not only directly through litigation, but also indirectly through legal advice to groups engaging in civil disobedience. International law, elaborates and augments core principles in the formation of customary international law. While fundamental norms, such as the prohibition on torture, are *jus cogens* and therefore inviolable, other values and applications flow from an accretional process that reflects actions by States and tribunals, as well as surveys of the landscape by learned students of the process. Moreover, although detecting emerging norms is not always easy, the Supreme Court has indicated that courts have the competence to ascertain emerging international norms.[102] If courts have this power, lawyers certainly have the aptitude to make similar calls.

D. *Lend-Lease*

As one example of a national security decision that meets the above criteria, consider the Lend-Lease program. In Lend-Lease, President Franklin D. Roosevelt agreed, prior to the United States' entry into World War II, to send U.S. destroyers to Britain in exchange for a commitment by the British to lease bases in the Caribbean to the United States. Roosevelt made the agreement with British Prime Minister Winston Churchill without prior consultation with Congress.[103] Despite the utility of the agreement in holding Nazi Germany at bay, Lend-Lease was inconsistent with both statutory and international law.

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the Gettysburg Address); Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1177-78 n.228 (1995).

102. *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (discussing process of adjudication under Alien Tort Statute, which allows plaintiffs to seek relief in United States courts for violations of the "law of nations").

103. *See* ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY 1932-45, at 246-47, 256-60 (1979) (discussing chronology of Lend-Lease agreement, including post-agreement approval and appropriations by Congress); *cf.* ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 93-103 (John Q. Barrett ed., 2003) (providing account by Roosevelt's Attorney General, later Supreme Court Justice). Technically, the agreement with Churchill that preceded congressional authorization is called the "destroyer deal." *Id.* at 81-82. The author uses the term "Lend-Lease" throughout for the reader's convenience.

Then Attorney General Robert Jackson's opinion supporting the Lend-Lease program does not resolve these inconsistencies. Federal statutes passed by an isolationist Congress barred the conveyance of material "essential" to U.S. defense. In addition, both international law and a federal statute (the Espionage Act) prohibited provision of material by the supposedly neutral United States to a belligerent. On the question of whether the destroyers were essential to United States defense, Jackson basically changed the subject, arguing that the leasing of British bases would be a net security plus. On the statutory and international obligations that neutral status imposed on the United States, Jackson argued that the United States could not send material to a belligerent that had been built expressly to assist that party but could send material built for another purpose.

Neither of Jackson's arguments stands up to scrutiny. On the question of whether material was "essential," while Jackson's argument about net benefits is resourceful, there was no evidence that Congress contemplated aggregating costs and benefits as Jackson outlined. There was, however, ample evidence that Congress wished to avoid moves that might yield foreign entanglements. On the implications for neutrality of sending material to belligerents, Jackson's distinction between material built for that purpose and material built for another purpose but subsequently converted into aid to a belligerent seems sophistic at best.[104]

Viewed in this stark light, Jackson's opinion appears to counsel the willful evasion, if not outright defiance, of both international and domestic law. Jackson clings tenuously to the vine of subjective intent, arguing in essence that his belief compensates for the lack of reasonable support for his position. Lack of support also permits an inference that the lawyer, particularly a well-placed government lawyer, with access to all advice, did not actually believe that the action was lawful. Jackson also remained silent while Roosevelt, not in an actual court but in the

104. *See* Aaron Xavier Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-41*, 3 BUFF. J. INT'L L. 413, 473-80 (1996-1997); *cf.* U.S. Attorney General, Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 486-88 (1940) (relying on *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936)). The reliance of Jackson on *Curtiss-Wright*, which also supplied the clincher for Yoo's arguments in the Torture Memos, suggests that Jackson was less than confident in his statutory arguments.

court of public opinion during an election year, was at best less than candid about the existence of an agreement with Churchill.

Three factors make this stance appropriate. First, Roosevelt insisted on a far-reaching debate within his administration on the legality of the program, actively encouraging skepticism about whether Lend-Lease would be consistent with Congress's commands. Roosevelt also sought congressional authorization within six months of the agreement (although after the election). After powerful public statements by Roosevelt, including his memorably simple comparison of Lend-Lease with the loan of a garden hose to a neighbor whose house was on fire, Congress gave its approval.

Second, Jackson's position is clearly consistent with evolving international norms. The law of neutrality, for example, seemed also painfully irrelevant to the crucible of World War II. It did nothing, for example, to prevent the wholesale slaughter that the Nazis were preparing for Jews and other groups. In this sense, the law of neutrality obstructed realization of ideals that are essential in a legitimate world order, including freedom from force and want.[105] Indeed, the announcement of the Atlantic Charter by Roosevelt and Churchill demonstrated that both men were committed to a new international regime prior to the U.S.'s entry into the war.[106] After the war, the formation of the United Nations renewed commitments to comprehensive norms such as the prohibition of aggression. Fulfilling this vision required resistance to the Axis Powers, with their dreams of global domination. Roosevelt and Jackson grasped that fact, even as they discounted the letter of the law.

Third, institutional consequences support Roosevelt and Jackson's view. Disclosure of the full scope of the Lend-Lease program during the 1940 election could have roiled the voters, and encouraged posturing by congressional leaders, as well as a possible filibuster by committed isolationists. In this charged environment, the initiative may have withered on the vine, with significant adverse effects on British confidence and the war effort. By controlling the timing, Roosevelt waited until the moment

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105. *See* DALLEK, *supra* note 102, at 8-9 (discussing formation of Roosevelt's views as Assistant Secretary of the Navy in Wilson Administration); *cf.* JACKSON, *supra* note 103, at 103 (describing law of neutrality as "obsolete.").

106. *See id.* at 282-85.

was ripe politically. In the process, Roosevelt and Jackson got some grime on their hands. Their maneuvering, however, avoided a greater ethical failure, the crime of doing nothing.[107]

E. *The Cuban Missile Crisis*

As another example that meets the criteria for pushing the envelope, consider the Cuban Missile Crisis faced by the Kennedy Administration. President Kennedy and his advisors, including his brother and Attorney General, Robert Kennedy, were caught between the U.S. military's pressure for an aggressive policy and the prohibition in international law of the unjustified use of force. The response formulated by Robert Kennedy, aided by a small phalanx of elite legal advisors, almost certainly violated the letter of international law, but it also avoided a larger conflict. Moreover, the purposive approach adopted by President Kennedy also reflected an effort to take law seriously that current national security strategists would do well to emulate.

As students of national security policy know, the crisis began when the Kennedy Administration learned in October, 1962 that Soviet nuclear missiles placed in Cuba were offensive in nature, designed for a first strike on U.S. cities. The military wished to attack Cuba to destroy the threat. There were, however, two significant problems with the attack option. First, it risked all-out nuclear war. Second, it would have violated international law.

The second problem arose because an attack would not meet the test of The Caroline, Daniel Webster's framing of a State's right to use force in self-defense,[108] or of Article 51 of the U.N. Charter,[109] which arguably codifies the customary international law principle articulated in Webster's letter. Under this test, a State can use force to prevent an imminent attack. Since it was not clear that the Cubans would use the missile imminently—or indeed at all—the United States could not meet this test.

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107. *See* Walzer, *supra* note 2, at 61-75.

108. Secretary of State Daniel Webster wrote that a nation may use force in SELF DEFENSE when there exists "[a] necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation." *See* Daniel Webster, Letter from Daniel Webster to Henry Fox (Apr. 24, 1841), *in* THE PAPERS OF Daniel Webster (Alfred S. Konefsky & Andrew J. King eds., 1982).

109. *See* U.N. Charter art. 51.

Tellingly, Administration lawyers considered not merely the abstract principle, but the institutional consequences that would have emanated from the use of force in this context. Robert Kennedy warned that other States and history itself would perceive the United States unfavorably if we emulated the aggression of the Axis Powers during World War II. He insisted that an attack would amount to "Pearl Harbor in reverse."[110]

To reconcile legal concerns with the need to take decisive action that would lead to removal of the Soviet missile, the lawyers articulated a "quarantine" argument justifying a limited naval blockade of Cuba.[111] The blockade also appeared inconsistent with international law barring the unjustified use of force.[112] While a limited blockade targeting Soviet vessels was a more proportionate response to the threat posed by the missiles than an all-out attack, the blockade nevertheless involved the application of military power against another sovereign State. Moreover, if the threat posed by the missiles was not imminent, than any use of force was unjustified under international law.[113]

The quarantine approach ultimately fares better under the test for pushing the envelope. First, a purposive approach to international law suggests that the quarantine approach harmonizes effectively with evolving norms. Article 2(4) of the U.N. Charter prohibits the use of force only "against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."[114] One can argue that this qualifying language permitted U.S. policymakers a small window for the limited blockade that President Kennedy imposed.[115] Moreover, the quarantine approach

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110. *See* ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 9 (1971) (recounting Kennedy's passing a note to his brother, the President, after listening to arguments for an air attack on Cuba, that said, "I now know how Tojo felt when he was planning Pearl Harbor"); Evan Thomas, *Bobby at the Brink*, NEWSWEEK, Aug. 14, 2000, at 49, 51.

111. *See* Richard N. Gardner, *Future Implications of the Iraq Conflict: Neither Bush nor the "Jurisprudes,"* 97 AM. J. INT'L L. 585, 587-88 (2003).

112. *See* U.N. Charter art. 2, ¶ 4.

113. *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 25-40 (1974).

114. *See* U.N. Charter art. 2, ¶ 4.

115. *See* Louis Henkin, *Comment*, *in* CHAYES, *supra* note 113, at 149, 152-53. Henkin's skepticism about a broader authorization for "anticipatory self-defense" under Article 51 lends credibility to his measured approval of the quarantine approach. *Id.* at 150.

represented a determined effort by the world's greatest power to limit force and promote a negotiated outcome. On the level of practice and symbolism, the self-restraint practiced by the United States nurtured values at the heart of international law.

Second, the United States showed a dialogic disposition throughout the crisis. The Administration focused intently on gaining assent from our allies in the region, through the Organization of American States ("OAS").[116] President Kennedy also submitted the problem to the United Nations, which knew of the quarantine but took no action. Kennedy consulted in this fashion, although matters were exigent, time was short, and the United States faced the single gravest crisis of the post-World War II period.[117] The ultimate resolution of the crisis, which also hinged on an unspoken bargain by the United States to remove missiles from Turkey that threatened Russia,[118] similarly demonstrates this commitment to dialogue.[119]

Finally, institutional consequences were manageable, at least compared with alternatives. A limited blockade authorized by the OAS provided legal and political cover for the Administration, and placed the Soviet Union on the defensive in the court of international public opinion. Limiting the use of force reduced—although it did not eliminate—the prospect of nuclear war. In contrast, doing nothing about the missiles would have eroded political support for the Administration, and generated momentum for a more extreme military response.[120] A straightforward swap of Soviet missiles in Cuba for U.S. missiles in Turkey would have allowed Russia to claim control of the interna-

116. *See* CHAYES, *supra* note 113, at 41-68.

117. *See id.* at 3 (quoting sources suggesting that President Kennedy believed the risk of nuclear war ranged from thirty-three to fifty percent).

118. *See id.* at 94-100.

119. The decision of the United States, with approval of the United Nations, to intervene militarily in Afghanistan after September 11 presents an even stronger case for legality. *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 4-7 (2004); *cf.* Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 16-35 (2002) (arguing intervention could be viewed under international law as legitimate use of self-defense against armed attack).

120. *See* CHAYES, *supra* note 113, at 31 (noting that legal advisor from the State Department "could not counsel passivity"); *cf.* GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 58 (1971) (discussing reasons for rejecting "do nothing" option).

tional strategic agenda in a fashion that could have prejudiced U.S. interests.[121] Particularly since the do-nothing, straightforward swap options commanded virtually no support among the significant players, pushing the envelope with the quarantine approach was the most appropriate response for legal advisors to the President.

CONCLUSION

National security lawyers face a challenging task. They regularly encounter situations where pushing the envelope of international or domestic law seems expedient, desirable, or even necessary. In some cases, particularly those involving the authorization of regimes of detention or interrogation, resisting this temptation is typically the best way to serve the client. History tells us, in the *Korematsu* litigation and in the Bush Administration's establishment of Guantanamo, that pushing the envelope in this area can have deeply problematic results. Discounting or disregarding international and domestic norms can erode the integrity of the legal system, lawyers' ethics, and the credibility of the United States around the world.

A national security lawyer, however, cannot rigidly oppose pushing the envelope. While such a course should never be entered into lightly, necessity may dictate taking this path. The lawyer's guideposts in this uncertain realm, where legal doctrine and statecraft meet, should be the importance of dialogue, institutional consequences, and harmonization with evolving norms. Decisions such as the Emancipation Proclamation, Lend-Lease, and the response to the Cuban Missile Crisis meet these criteria. The United States, and arguably the world, benefited from lawyers and policymakers who pushed the envelope in those exigent circumstances. More recent events, such as the U.S. military intervention in Afghanistan after September 11, are cut from the same cloth. Knowing when to push the envelope is the central responsibility of the national security lawyer; this Article has offered some modest ground rules for the effort.

121. *See* ALLISON, *supra* note 118, at 58-59.