

Roger Williams University

DOCS@RWU

---

Law Faculty Scholarship

Law Faculty Scholarship

---

2008

## True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers

Peter Margulies

*Roger Williams University School of Law*

Follow this and additional works at: [https://docs.rwu.edu/law\\_fac\\_fs](https://docs.rwu.edu/law_fac_fs)



Part of the [International Law Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), [National Security Law Commons](#), [President/Executive Department Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Peter Margulies, True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers, 68 Md. L. Rev. 1, 88 (2008)

This Article is brought to you for free and open access by the Law Faculty Scholarship at DOCS@RWU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DOCS@RWU. For more information, please contact [mwu@rwu.edu](mailto:mwu@rwu.edu).

# HEINONLINE

Citation: 68 Md. L. Rev. 1 2008-2009

Provided by:

Roger Williams University School of Law Library



Content downloaded/printed from [HeinOnline](#)

Fri Nov 18 08:52:53 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

# MARYLAND LAW REVIEW

---

VOLUME 68

2008

NUMBER 1

© Copyright Maryland Law Review 2008

---

## Articles

### TRUE BELIEVERS AT LAW: NATIONAL SECURITY AGENDAS, THE REGULATION OF LAWYERS, AND THE SEPARATION OF POWERS

PETER MARGULIES\*

#### ABSTRACT

*Ideological agendas distort the deliberation required for sound legal advice about national security. Elite government lawyers after September 11 advanced a theory at the expense of context, labeling legal constraints as “lawfare” against American interests. The lawfare critics failed to recognize that legal constraints can empower decisionmakers by reinforcing reputational and other long-term values. They also failed their history test, ignoring the lessons of presidents from Jefferson to Kennedy who rejected a rigid adherence to ideology in the national security realm. By discounting context, the construction of the lawfare paradigm produced dire results, including the torture memos drafted by the Justice Department’s Office of Legal Counsel (“OLC”) and the destruction of CIA interrogation tapes.*

*Unfortunately, this elevation of ideology over context has failed to yield adequate remedies. Tort litigation, exemplified by Jose Padilla’s recent lawsuit against former OLC attorney John Yoo, risks*

---

Copyright © 2008 by Peter Margulies.

\* Professor of Law, Roger Williams University School of Law B.A. Colgate, 1978, J.D. Columbia Law School, 1981; send comments to [pmargulies@rwu.edu](mailto:pmargulies@rwu.edu). I thank our superb reference librarian, Emilie Benoit, for her expert assistance, and Kathleen Clark, Lawton Cummings, Hal Gerber, Bob Gordon, David Pozen, Dan Richman, Ellen Saideman, Mark Shulman, Bill Simon, and participants at a workshop at St. John’s University School of Law and a roundtable sponsored jointly by the American Association of Law Schools Professional Responsibility section and Fordham Law School for comments on previous drafts.

*personalizing the problem and neglecting systemic issues. The informal norms approach suggested by a number of OLC alumni, while offering a number of excellent proposals such as citing and distinguishing adverse authority, has not attracted stakeholders across the political spectrum. A structural reform approach that replaces OLC with an adjudicative entity may produce an inquisitorial tribunal that lacks sharp adversarial inputs and loses influence to more pliable players such as White House counsel.*

*To transcend these difficulties, lawyers should turn to a model of dialogic equipoise relying on two values: transparency and tailoring. Dialogic equipoise allows the President to take action that is consistent with the most accurate reading of sources of authority. Action, however, must be both interstitial—with a clear exit strategy—and publicly disclosed. To implement the dialogic equipoise model, this Article recommends an integrated approach, including a safe harbor for publicly disclosed legal opinions, consideration of institutional consequences, assertion of the least drastic rationale for executive power, and an ex ante role for Inspectors General and the OLC in document preservation. This blended regime can counter ideology's corrosive influence on legal deliberation about war, peace, and national security.*

Some clients love drama. Take the client who informs you that the fates of thousands of people hinge on your advice.<sup>1</sup> For the conscientious lawyer, a dilemma arises. In the ever-shifting context of national security decisions, inflexible adherence to the letter of the law can spell disaster.<sup>2</sup> Invidious or ill-advised responses to exigency, however, can undermine the integrity of legal institutions. A lawyer with an ideological agenda to promote may not see the complexity of the situation. Indeed, the ideologically driven lawyer may have helped construct the client's stark vision. Unfortunately, failing to see the dilemma does not make it go away.

---

1. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 71 (2007) (noting the displeasure of Vice President Cheney's Counsel, David Addington, who often spoke for the Vice President, at then Office of Legal Counsel attorney Jack Goldsmith's refusal to sign off on "an important counterterrorism initiative;" Addington told Goldsmith that "the blood of the hundred thousand people who die in the next attack will be on *your* hands").

2. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (recommending pragmatism and cautioning against "rigidity dictated by a doctrinaire textualism" in analyzing scope of executive power); cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 948–49 (2008) (arguing that presidents have varied in their interpretation of their own authority and have often elected to work with Congress, rather than rely on stark claims of executive power).

Commentators have long argued that the lawyer is best served by a balance or equipoise between solidarity with a client and commitment to the abiding values of the legal system. This equipoise allows lawyers to fulfill the role identified by students of the social scene from Tocqueville<sup>3</sup> to the present as mediators between private and public interests.<sup>4</sup> When lawyers become issue entrepreneurs, pushing a perspective on an issue that ignores or discounts opposing views, they threaten this ideal of equipoise. For government lawyers in national security matters, the stance of the issue entrepreneur is particularly perilous.<sup>5</sup> National security lawyers opine about inherently dangerous or intrusive measures, including coerced interrogation, surveillance, weapons sales, and military strikes. The temptations for any lawyer to go along with the perceived wishes of a senior official are substantial. When a lawyer is an issue entrepreneur predisposed to approve violent or intrusive means, the lawyer's ability to say "No" to the client is even more gravely compromised.<sup>6</sup> Moreover, the lawyer's issue entrepreneurship can create a tipping point that privileges short-term interests and legitimizes unduly risky behavior by the executive. These perils have emerged in a number of recent developments, in-

---

3. See ALEXIS DE TOCQUEVILLE, *On That Which Tempers the Tyranny of the Majority in the United States*, in *DEMOCRACY IN AMERICA* 301, 306 (Arthur Goldhammer trans., Library of Am. 2004) (stating that the "legal profession is the only aristocratic element that can mix readily with the natural elements of democracy" and that a republic could not survive today "unless the influence of lawyers on its affairs increases as the power of the people grows").

4. See Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 *RUTGERS L. REV.* 939, 982 (2006) [hereinafter Margulies, *Lawyers' Independence*] (explaining that the concept of equipoise requires lawyers to balance work in a manner that both serves the interests of private clients and safeguards the public's interest and democratic values).

5. On the ethics of executive branch lawyers, see generally Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559 (2007); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 *CARDOZO L. REV.* 375, 407-19 (1993); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 *ADMIN. L. REV.* 1303 (2000); Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 *CONN. PUB. INT'L L.J.* 23 (2006); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *MICH. L. REV.* 676 (2005); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 *U. COLO. L. REV.* 1 (2006); A. John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?*, 2 *J. NAT'L SEC. L. & POL'Y* 201 (2008); cf. Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 *L. & CONTEMP. PROBS.* 65, 65-67 (1998) (arguing that government lawyers lack authority to second-guess their clients' choices on grounds of morality or policy); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 *U. CHI. L. REV.* 1293, 1295-97 (1987) (same).

6. Issue entrepreneurs can also be unduly predisposed toward caution. See *infra* notes 72-73 and accompanying text (discussing appropriate balance between caution and taking risks).

cluding the torture memos drafted by the Justice Department's Office of Legal Counsel ("OLC")<sup>7</sup> and the Central Intelligence Agency ("CIA") tape destruction affair.

Issue entrepreneurship in post-September 11 legal advice arose because academic lawyers pushed the overarching idea that America was unfairly and dangerously bound by law. According to these lawyers, who included OLC attorneys John Yoo and Jack Goldsmith,<sup>8</sup> international law was often illegitimate because it did not require adequate consent or reflect national interests.<sup>9</sup> Yoo also had a distorted view of executive power.<sup>10</sup> Goldsmith has struggled to reconcile his critique of international law with an emerging prudential concern about the Bush Administration's unilateralism. In his starkly

7. See DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 176–80, 200–02 (2007) (critiquing Assistant Attorney General Jay S. Bybee and OLC lawyer Daniel Levin's memos addressing torture and abuse of Al Qaeda detainees); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 187–99 (2007) (providing a historical background on the role of OLC lawyers in drafting legal opinions and addressing the torture memos specifically); Stephen Gillers, *Legal Ethics: A Debate*, in *THE TORTURE DEBATE IN AMERICA* 236, 236–40 (Karen J. Greenberg ed., 2006) (arguing that the torture memos failed to adequately address the legal questions at issue); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80–85 (2005) [hereinafter Wendel, *Legal Ethics*] (critiquing the torture memos); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1224–32 (2005) [hereinafter Wendel, *Professionalism as Interpretation*] (same).

8. See GOLDSMITH, *supra* note 1, at 20–21 (noting that John Yoo and Jack Goldsmith were part of a group of conservative intellectuals skeptical about the increasing influence of international law on American law).

9. Goldsmith has also argued that customary international law is nothing but a stalking horse for national interest and is thus entitled to no independent respect. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005) (arguing that customary international law does not reflect "universal" interests, rather that it is a product of state self-interest); cf. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 275 (2007) (arguing that legal constraints on national security decisionmaking are usually counterproductive and institutionally flawed); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 106–08 (2006) [hereinafter YOO, *WAR BY OTHER MEANS*] (arguing that restrictions on wiretapping and data collection endanger national security).

The lawyers mentioned are often part, very loosely speaking, of a network of lawyers with conservative goals and values. See generally Patrick J. Bumatay, *Causes, Commitments, and Counsels: A Study of Political and Professional Obligations Among Bush Administration Lawyers*, 31 J. LEGAL PROF. 1, 22–36 (2007) (discussing the views of government lawyers' roles among Bush Administration attorneys); Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 L. & SOC. INQUIRY 883, 891–99 (2007) (providing statistical data about the structure of lawyer networks). Of course, there are substantial variations within the cohort of conservative lawyers, as they are among lawyers who consider themselves liberal or progressive. See Paik et al., *supra*, at 891–99 (discussing differences among social, pro-business, and libertarian conservatives).

10. See YOO, *WAR BY OTHER MEANS*, *supra* note 9, at 10–14 (arguing that the President has prerogative power that neither Congress nor the courts can restrain under the Constitution).

critical mode, Goldsmith argues that enemies of the United States exploit international law by conducting “lawfare” against American interests.<sup>11</sup>

The lawfare critics at the OLC failed to recognize that legal constraints can empower, as well as impede, decisionmakers. Reasonable constraints check the executive’s tendency in crises to discount reputational and other long-term values. Preserving reputation allows the United States to project “soft power,” which is often more effective than brute force. That ability to project soft power has suffered with the revelations about American personnel engaging in torture and coercion, often acting with at least partial authorization from the OLC.

This Article will discuss the construction of lawfare in the political economy of theory. Theorists and those who publicize their work have often extolled parsimony as a virtue—advancing one idea to explain as many complex events as possible.<sup>12</sup> In theory, parsimony is a good idea, paring away extraneous or irrelevant factors and—particularly in the physical sciences—allowing other members of an interpretive community to try to falsify the thesis. Think of gravity. In practice, however, particularly in the area of social sciences, parsimony poses risks. It can become reductive, missing the history and context that form the backdrop for human events.<sup>13</sup> In addition, parsimony can become a branding strategy for issue entrepreneurs seeking a vivid story to vanquish their opponents’ fuzzy equivocations. In the social sciences, issue entrepreneurs have reduced theories of self-interest to simplistic levels that would earn the ire of thinkers like Adam Smith, who regarded parsimony as theory’s distinctive vice.<sup>14</sup>

The critique of international law as lawfare advanced by Goldsmith, Yoo, and others is a model of parsimony. It attacks international law on two grounds—as being illegitimate and impairing the efficacy of American policy. Each argument founders, however, when context and history disturb parsimony’s domain. International law has featured prominently in American law since the Founding era, with Chief Justice John Marshall relying on the international law of

11. GOLDSMITH, *supra* note 1, at 58–59.

12. See ALBERT O. HIRSCHMAN, *Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse*, in RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 142, 142–43 (1986) (outlining skeptical view of parsimony’s virtues in the context of economic theory).

13. Cf. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 224–64 (1993) (discussing problems with parsimony and the neglect of prudential considerations on both the Right and Left in the legal academy).

14. See PIERRE FORCE, *SELF-INTEREST BEFORE ADAM SMITH: A GENEALOGY OF ECONOMIC SCIENCE* 10–11 (2003) (analyzing Adam Smith’s negative view of parsimony).

neutrality in *Murray v. Schooner Charming Betsy*.<sup>15</sup> American presidents have typically regarded the body of international law as a useful constraint, not a hindrance. From Lincoln to Roosevelt to Kennedy, presidents have considered international law in making national security decisions, without any noticeable deficit in their decisiveness.<sup>16</sup> Unfortunately, the lawfare critics' parsimonious perspective has obscured this productive role.

The parsimonious turn has also affected the lawfare critics' work product, with dire consequences for United States interests.<sup>17</sup> John Yoo wrote a memo that narrowed the definition of torture by ignoring the lawyerly virtues of tailoring and fit.<sup>18</sup> While Jack Goldsmith showed great courage in withdrawing Yoo's memo, Goldsmith today faults the Administration on form, not substance. He acknowledges that the Bush Administration's unilateral predilections have often proved unwise, but asserts that the interrogations authorized by Yoo, including those that used waterboarding, were legal.<sup>19</sup> For Goldsmith, the chief problem with the Administration's stance is that it precluded early cooperation with Congress on measures that would have been even more draconian than the Military Commissions Act ("MCA"). Given that the MCA appears to permit evidence obtained through coercion, as long as that evidence is "reliable," Goldsmith's vision of procedural safeguards seems minimalist at best.<sup>20</sup> Moreover, Goldsmith authored a draft opinion on removing undocumented aliens from Iraq that is more open about opposing authority, but fails to consider how removing and interrogating people in this group leads straight into the murky world of disappearances, "black sites," and secret prisons.

---

15. 6 U.S. (2 Cranch) 64 (1804). Marshall stated that an act of Congress can never be construed to violate "neutral rights" or to affect "neutral commerce" under international law. *Id.* at 118.

16. See *infra* notes 132–146 and accompanying text.

17. Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 469–71 (2005) (stating that despite the torture memo's "glaring legal inaccuracies" and flawed legal analysis, it became the basis for the Defense Department's interrogation policy); 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, 451–52 (2005) (arguing that the attorneys that prepared the OLC torture memos failed to carry out their professional obligations).

18. Yoo also opined that the President was not bound to any law Congress passed on this issue. See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1229–35 (2006) (critiquing Yoo's view).

19. GOLDSMITH, *supra* note 1, at 143–51, 164–65.

20. See 10 U.S.C. § 948r(d) (2006) (providing that statements obtained under circumstances "in which the degree of coercion is disputed" may be admitted if a military judge finds that the statement is "reliable").



The damage caused by issue entrepreneurs extends not just to compliance with international law, but to compliance with the Constitution. Examples of the latter include the MCA's evisceration of habeas corpus and the warrantless surveillance wrought by the Administration's Terrorist Surveillance Program. Some of these developments would surely have occurred without the issue entrepreneurship of the lawfare critics.<sup>21</sup> The lawfare critics, however, legitimized policy and, at least in Yoo's case, provided what even Goldsmith now acknowledges as the virtual equivalent of a "get out of jail free" card.<sup>22</sup> Moreover, as the ongoing investigation into the CIA's destruction of interrogation tapes reveals, the transitions between levels of coercive questioning increased the risk of satellite misconduct such as obstruction and perjury.

This Article will argue that the issue entrepreneurship of lawfare critics should give way to a model of dialogic equipoise. The dialogic equipoise model stresses two core values: transparency and tailoring. On this view, the attorney serves the executive branch best by keeping in mind the structural scheme of the Constitution<sup>23</sup> and limiting the executive's claims to inherent authority. The model recognizes, however, that a "workable government"<sup>24</sup> is fluid, not static. The attorney may advise the executive to act against the most accurate reading of a statute or constitutional provision, but should approve only interstitial actions with clear exit strategies. Moreover, such interstitial measures should be subject to dialog with other stakeholders. Lincoln's initial suspension of habeas corpus in the spring of 1861 to protect Union transportation and communications lines from insurrection in Maryland, President Roosevelt's destroyer deal with Britain during World War II, and President Kennedy's response to the Cuban Missile Crisis meet this test.

To enforce a model of dialogic equipoise, this Article will suggest a comprehensive regime that blends criminal and tort law, informal norms developed by former OLC officials, and structural reforms.

---

21. See generally DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 264 (2007) (noting that "temptation to adopt harshly coercive preventive measures in response to terrorist attacks" is not exclusive to one particular presidential administration or to any particular party).

22. See GOLDSMITH, *supra* note 1, at 149–50 (stating that the OLC's conclusions about presidential power "could be interpreted as if they were designed to confer immunity for bad acts").

23. For another approach exploring this theme, see Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1169 (2006).

24. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Each of these approaches is inadequate in isolation. Tort remedies, for example, exemplified by Jose Padilla's recent lawsuit against John Yoo, risk personalizing the problem and neglecting the systemic issues that any new administration will face in a world that still presents dangers. By playing "gotcha," both criminal and tort law approaches also risk alienating politicians and lawyers linked to the present Administration and its supporters in Congress, leading to a reprise of the volatile mixture of law and politics that plagued implementation of the Independent Counsel statute in the 1980s and 1990s.<sup>25</sup> The informal norms approach, while offering a number of excellent proposals for best practices by OLC attorneys like citing and distinguishing contrary authority, similarly lacks stakeholders affiliated with the Bush Administration and also appears to unduly limit the President's own lawmaking power under the Constitution. A structural reform approach that replaces the OLC with an adjudicatory entity raises questions about the tribunal's legitimacy, the quality and sharpness of its adversarial inputs, and the role of politics in selecting the entity's personnel.

In contrast, a pragmatic or blended approach would take the best of each of these approaches. It would provide presumptive safe harbor protection from criminal and tort liability to attorney opinions that have been published, thus encouraging dialog. It would develop specialized ethics rules for national security attorneys that require practices consistent with the informal norms approach, including citation and distinguishing of adverse authority, consideration of the non-legal and institutional consequences of executive action, and adoption of the least expansive rationale for such action by the President. Finally, to deal with the problem of satellite misconduct, the blended approach suggests a greater role for Inspectors General in handling questions of document preservation, and seeking guidance from the OLC.

These proposals will not end issue entrepreneurship in national security matters. Nor will they end the perennial appeal of parsimony to scholars who find themselves in government positions. Seeking dialogic equipoise will, however, temper the excesses of issue entrepreneurship and promote the deliberative virtues that have distinguished the most effective national security advice.

This Article is presented in six Parts. Part I outlines the problem of parsimony and provides a brief history of issue entrepreneurship

---

25. Cf. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 590-92 (2005) (discussing Independent Counsel Kenneth Starr's investigation of Bill Clinton).

among government lawyers. Part II focuses on Goldsmith and Yoo's lawfare critique, highlighting the flaws in that critique. Part III examines the legal memos produced by Yoo, Goldsmith, and their successors, and the costs of those memos. Part IV analyzes options for regulating the advice of OLC attorneys, including the criminal, tort, informal norm, structural reform, and professional discipline options. Part V outlines the dialogic equipoise model as an alternative to issue entrepreneurship for elite government lawyers. Part VI provides a blended enforcement model for encouraging dialogic equipoise.

## I. ISSUE ENTREPRENEURS, CAUSE LAWYERING, AND GOVERNMENT LAWYERS

### A. *Parsimony in Theory*

Government is not just about ends and means, it is about ideas. Ideas distinguish contending groups, marking some as friends and others as enemies. Issue entrepreneurs assert their own identity through their ideas, seeking to establish the primacy of their analysis over perspectives from the past or competing perspectives from the present.<sup>26</sup> Scholars in law and economics, for example, have developed rational actor theories, either reductive or nuanced in nature, to explain human behavior and lay down a marker to measure other theories' effectiveness.<sup>27</sup>

For issue entrepreneurs, parsimony confers advantages. To be successful, issue entrepreneurs must attract attention and discredit old orthodoxies.<sup>28</sup> Parsimony aids this mobilization process.<sup>29</sup> A

26. See ERIC A. POSNER, LAW AND SOCIAL NORMS 29–33 (2000) (discussing the process that “norm entrepreneurs” use to establish social and political norms).

27. See FORCE, *supra* note 14, at 9–14 (discussing the use of the self-interest principle to explain human behavior and economics); see also Ralph G. Carter et al., *Setting a Course: Congressional Foreign Policy Entrepreneurs in Post-World War II U.S. Foreign Policy*, 5 INT'L STUD. PERSP. 278, 284–86 (2004) (discussing foreign policy issue entrepreneurs). Issue or policy entrepreneurs in this context are practitioners or scholars who wish to take the initiative in a particular area, often with a parsimonious narrative that explains and justifies through a simple set of criteria. Entrepreneurs in the political realm may focus on issues that distinguish them from the current occupant of the White House—for example, Senator Edward Kennedy's interest in human rights and refugee affairs—or that respond to a niche demand—such as Senator Chris Dodd's commitment to peace in Latin America, originating from his experience in the Peace Corps.

28. The suffragettes, for example, pressing their overarching idea of gender equality, “chained themselves to fences, went on hunger strikes, broke windows of government buildings, and refused to pay taxes as ways of protesting their exclusion from political participation.” Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 897 (1998). Similarly, the modern civil rights movement strove for equality by seeking to overturn established precedent and moving beyond the judicial arena, engaging in sit-ins and other forms of direct action. See generally MARTIN

good theory accords with the familiar rule of Occam's razor—it relies on as few moving parts as possible. Economists, for example, turn to the concept of rational self-interest, in various guises, to do both normative and descriptive work.<sup>30</sup> Prospective adherents remember facts and theories distinguished by salient features that are readily explained and tell a simple story.<sup>31</sup> The audience for the issue entrepreneur does not have to remember a long list of factors, or dig deep into the detail of each case. Such theories have a rhetorical advantage over theories that are thicker, taking in more facts about institutional structure and routine that complicate the narrative.<sup>32</sup>

In fights for interpretive dominance, therefore, parsimonious theories frequently drive out thicker theories, at least for a time. A discourse that enjoys these advantages soon approaches a tipping point. Those who have initiated the discourse expect loyalty, while acolytes strain to declare their allegiance to the theory and disparage the competition. The thrill of the new, or the urge to find renewed

LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 77 (1964) (writing about his nonviolent protest against segregation in Birmingham, Alabama). For a transformative vision of race and class that seeks to update and extend King's ideas, see john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 *LAW & INEQ.* 355, 355–60 (2007).

29. See Finnemore & Sikkink, *supra* note 28, at 897 (explaining that issue entrepreneurs must challenge existing social conditions to create new norms).

30. See HIRSCHMAN, *supra* note 12, at 159 (noting the concept of self-interest in the context of economic analysis); see also FORCE, *supra* note 14, at 9–10 (discussing debate between Hirschman and market theorists such as Gary Becker). Other scholars may take a different view of substance that is equally absolute in method, advancing a theory of law as integrity that holds law to be consistent with our best practices and values. For scholars who follow this view, fairness and equality are often touchstones. See generally Finnemore & Sikkink, *supra* note 28, at 895 (explaining the “life cycle” of norms and the role of norm entrepreneurs). For a lucid argument that the concept of norm entrepreneurs has become too fuzzy to possess any descriptive utility, see David E. Pozen, *We Are All Entrepreneurs Now*, 43 *WAKE FOREST L. REV.* 283, 309–10 (2008).

31. See Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 103, 117–19 (Thomas Gilovich et al. eds., 2002) (explaining that individuals make decisions based on information sources deriving from experiences that are easy to recall).

32. Cf. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43–51 (3d ed. 1996) (discussing transitions between paradigms in scientific explanation). Theories with fewer moving parts are also more readily falsifiable, encouraging further research. See generally KARL R. POPPER, *Three Views Concerning Human Knowledge*, in *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 129–32 (2d ed. Basic Books 1965) (1963) (discussing relationship between structure of theory and growth of scientific knowledge); cf. Paul K. MacDonald, *Useful Fiction or Miracle Maker: The Competing Epistemological Foundations of Rational Choice Theory*, 97 *AM. POL. SCI. REV.* 551, 553–56 (2003) (arguing that even in scientific explanation, parsimonious theories work better in engendering debate than they do in accounting for observed phenomena).

relevance in a return to origins, helps to constitute the discourse.<sup>33</sup> Issue entrepreneurs also fashion signals that cue their followers and establish the bona fides of a group member. In the group that critiqued government regulation and exalted the unfettered market in the 1980s, for example, Adam Smith neckties were a prominent signaling device.<sup>34</sup> Smith himself would have viewed such displays as puzzling, but they illustrate the power of parsimonious ideas.

Parsimonious ideas often have disproportionate power in times of contradiction and crisis.<sup>35</sup> In a crisis environment, another cognitive dynamic joins the salience heuristic: representativeness.<sup>36</sup> People see a grave crisis looming on the horizon, immersing them in uncertainty, and they seek a story, image, or theory that is equally stark. A thicker theory seems equivocal in a climate that rewards decisiveness.<sup>37</sup> Indeed, thick theories seem like dangerous distractions at best, and emblems of disloyalty at worst.

Frequently, the problems that theories purport to resolve are themselves framed to encourage parsimonious answers. Consider the problem of torture and the “ticking bomb scenario.” Faced with destruction of a city because a single terrorist refuses to disclose the location of the bomb, a parsimonious utilitarian theory would suggest that

33. The appeal of parsimony can be just as potent on the Left as the Right. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 75 (2006) (discussing the influence of Marxist philosopher Friedrich Engels’ reductive notion that morality was product of “contemporary economic conditions of society”).

34. See *Washington Talk: Briefing; Salute to Reaganism*, N.Y. TIMES, Jan. 14, 1988, at A28 (discussing a reception and buffet attended by Robert Bork, Alan Greenspan, and others; noting that some attendees wore the “emblem of hard-core Reaganomics—the necktie embroidered with a bust of Adam Smith”).

35. See Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 232, 256–59 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (discussing competition and contradiction among political ideologies and discourses).

36. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES*, *supra* note 31, at 49, 49–50, 65–81 (discussing the controversy over the representativeness heuristic).

37. See Ronald Rogowski, Review Article, *Rationalist Theories of Politics: A Midterm Report*, 30 *WORLD POL.* 296, 304 (1978) (noting that American academics beginning in the 1960s came to believe that “largely inductive and intuitive style that had characterized even behaviorist explanation became unacceptable; instead, serious practitioners demanded hypotheses that were both *deductively derived* from a few basic axioms and *falsifiable*”). This dynamic then drives the entire interpretive community framed by the discourse. Cf. BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 148 (1997) (elaborating on prominent legal scholar Stanley Fish’s notion of a legal interpretive community, consisting of “groups of people bound together by shared knowledge, language or terminology, and often a basic corpus of ideas, beliefs, and attitudes. One becomes a member of an interpretive community by undergoing indoctrination—by learning and internalizing the shared ‘meaning system’ of the interpretive community”).

the salvation of the many justifies the suffering of one individual who is culpable. Driven by the hypothetical's premises, society moves toward a tipping point where actions such as torture are acceptable or even required.<sup>38</sup> As discourse percolates through institutions, the new theory "expand[s] itself to the limit[s] of its logic."<sup>39</sup> Having the tool of torture available creates further institutional pressure for the tool's use.<sup>40</sup> It also provides an opening for new acolytes to demonstrate their toughness.<sup>41</sup>

As the theories generated by the ticking bomb scenario demonstrate, issue entrepreneurs do not only attract attention, they also confer legitimacy.<sup>42</sup> Interest-based theories that tied the apparent excesses of markets to Adam Smith's invisible hand may well have missed the richness of Smith's thought.<sup>43</sup> These theories also justified inequality in two senses. First, they intimated that inequality was inevitable, and extended that notion to the premise that attempts to reduce inequality would invariably produce perverse consequences.<sup>44</sup> Second, reductive interest-based theories embodied the appeal of both novelty and origin myth, casting justifications of government regulation as camouflage for rent-seeking bureaucrats<sup>45</sup> and interest-based theories as a return to the virtues of innovation and risk-taking.<sup>46</sup> Through each of these arguments, interest-based theories legitimized inequalities of wealth and power.

38. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1427 (2005) (criticizing the "ticking-bomb hypotheticals" used to justify torture).

39. See *Krulwitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

40. Cf. JAMES G. MARCH & JOHAN P. OLSEN, *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").

41. Cf. Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, in *TORTURE: A COLLECTION* 299, 304 (Sanford Levinson ed., 2004) (arguing that lawyers constructing legal arguments for torture do not wish to seem naïve in confronting the ticking bomb scenario).

42. See Finnemore & Sikkink, *supra* note 28, at 903 (noting the importance of legitimacy in establishing social norms). In international law, legal scholars have long served this purpose by laying claim to expertise in identifying and describing binding customary norms.

43. See FORCE, *supra* note 14, at 9–14 (discussing interest-based theories).

44. See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 27–42 (1991) (discussing rhetoric of perverse consequences in the context of welfare provisions that some conservatives argue interfere with market incentives).

45. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005) (critiquing William Niskanen's well-known ideas regarding bureaucratic behavior); Rogowski, *supra* note 37, at 311 (same).

46. Many rational actor theorists have developed richer theories. See, e.g., POSNER, *supra* note 26, at 29–32 (discussing the motivations of "norm entrepreneurs" and the use of symbolism and signals to accomplish self-interest goals).

Unfortunately, life is too unruly to be reduced to theory. Life's rough edges get in the way, fragmenting theories as people try to create things that work in the world.<sup>47</sup> For example, interest-based explanations—unless they are so heavily qualified that they are no longer parsimonious—fail to account for a wide swath of cooperative human behavior.<sup>48</sup> Ultimately, interest-based explanations, while they can serve to enlighten and provoke debate, also embody academia's privileging of parsimonious theories. As social scientist, Jon Elster observes, "[t]he assumption that all behavior is selfish is the most parsimonious we can make, and scientists always like to explain much with little. But . . . [s]ometimes the world is messy, and the most parsimonious explanation is wrong."<sup>49</sup> Indeed, Adam Smith, sometimes hailed as the father of interest-based theories, criticized parsimony as a vice that scholars "are apt to cultivate with a peculiar fondness, as the great means of displaying their ingenuity[ ]—the propensity to account for all appearances from as few principles as possible."<sup>50</sup> British philosopher David Hume assailed parsimonious explanations as neglecting the richness of the human condition, deriding as "fruitless"

---

47. British philosopher and political theorist Edmund Burke distrusted the theories that drove the French Revolution, believing that the certainty of the theorists translated into corpses draped over guillotines. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 7 (Frank M. Turner ed., Yale Univ. Press 2003) (1790) (criticizing the intellectual tendency to view ideas "stripped of every relation, in all the nakedness and solitude of metaphysical abstraction;" arguing that "[c]ircumstances . . . give . . . to every political principle its distinguishing colour and discriminating effect . . . [and] circumstances are what render every civil and political scheme beneficial or noxious to mankind"); cf. KRONMAN, *supra* note 13, at 25 (noting that Burke and American legal scholar Alexander Bickel "emphasized the importance of judgment in politics and insisted that the prudence which political life demands cannot be reduced to or replaced by an abstract science of government"); Carl T. Bogus, *Rescuing Burke*, 72 Mo. L. Rev. 387, 411 (2007) ("Burke believed that the wisdom of law came not from logic or abstract theory but from experience . . ."). Similarly, political theorist Hannah Arendt argued that the French revolutionaries sought a purity that does not exist in the world, while American revolutionaries improvised in response to necessity—they insisted on the interaction of theory and facts on the ground and never lost sight of either. HANNAH ARENDT, *ON REVOLUTION* 111–12, 173–74 (Penguin Books 2006) (1963). For Arendt, any theory that sought a comprehensive explanation of human conduct aimed to end history and failed to take into account the unpredictability of human affairs, the multiplicity of perspectives, and the inevitability of change.

48. See Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 137–38 (2000) (setting up a discussion of the gap between self-interested individuals and cooperative human behavior).

49. JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 54 (1989).

50. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 474 (Liberty Classics 1976) (1759).

interest-based theories proceeding from "that love of simplicity which has been the source of much false reasoning in philosophy."<sup>51</sup>

One central error is that entrepreneurs promoting parsimonious theories in law or social science often neglect the role of time. Reductive interest-based theories, for example, often admit only grudgingly that human beings cling to a short-term perspective. This narrowing of perspective camouflages long-term benefits and costs.<sup>52</sup> For institutions that function over time, temporal discontinuity can be disastrous. Constitutionalism is useful because it commits the polity to taking a long-term perspective, even when measures that injure equality or fairness promise short-term gain.<sup>53</sup> Interest-based theories, however, often marginalize constitutional safeguards like judicial review, arguing that deference to the political branches will typically lead to sound outcomes.<sup>54</sup> Interest-based theories also have a difficult time dealing with agency costs, caused by agents whose own agendas cause them to neglect the interests of the organizations or institutions they represent. Here, too, short-term gains tempt agents to make decisions with long-term costs. When economists study agency costs, they often

---

51. DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 116 (Liberal Arts Press 1957) (1777). The tradeoffs between over- and under-theorizing data have continued to consume scholars. See, e.g., Robert C. North & Matthew Willard, Review Essay, *The Convergence Effect: Challenge to Parsimony*, 37 INT'L ORG. 339, 340 (1983) ("[W]hereas a lack of parsimony often yields amorphous theory, an excess of parsimony may produce tautology, explain the obvious, or, in the case of some approaches to international politics, reduce complex human interactions to rigid, almost mechanical abstractions."); Rogowski, *supra* note 37, at 303-07 (rooting ascendancy of rationalist models in trends within the political academy, including new-found preference for models that were parsimonious and falsifiable); Lisa Wedeen, *Conceptualizing Culture: Possibilities for Political Science*, 96 AM. POL. SCI. REV. 713, 719 (2002) (arguing that political scientists would enrich their research by relaxing their preference for "conceptual parsimony over the complicated, messy narratives of anthropological inquiry," such as the work of anthropologist Clifford Geertz).

52. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13, 46 (Cass R. Sunstein ed., 2000) (discussing individuals' tendency to heavily discount future costs); cf. David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. ECON. 443, 444-45 (1997) (analyzing how individuals use "commitment mechanisms" such as insurance policies or savings plans to remedy the tendency to discount unduly the future); Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 105-07 (1999) (analyzing "present-biased preferences").

53. Indeed, the careful design of constitutional structures can also assure that markets play an appropriate role, encouraging efficiency and serving as a counterweight to politicians who seek rents for special interests or a monopoly on power. See, e.g., John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 542-46 (2000) (arguing that the World Trade Organization can serve a constitutional purpose by checking protectionist forces and opening markets to more efficient products, including products from the Third World).

54. For a contrasting view, see POSNER & VERMEULE, *supra* note 9, at 4-6 (arguing that objective analysis must also consider that courts might unduly discount the importance of acting quickly in emergencies).



come up with interest-based remedies such as stock options to align the interests of salaried managers more thoroughly with the interests of the corporation.<sup>55</sup> Interest-based theories do less well, however, in dealing with the volatility that risk-prone managers inject into markets. In sum, parsimony has costs, as well as virtues, which theorists tend to finesse.

### B. Cause Lawyers in Practice

Parsimony has shaped the strategies of some of America's greatest lawyers. Consider Justice Brandeis's work on behalf of maximum hours legislation. For Brandeis the public interest lawyer, justifying government regulation on a market failure theory was a central quest. Brandeis believed that untrammelled markets undermined human relationships, but that government regulation would help in restoring the balance. The problem, however, was that persuading hostile courts to uphold such regulation was a tall order. To increase the chances, Brandeis filed the famous amicus brief in *Muller v. Oregon*.<sup>56</sup> His brief sought to leverage images of women's frailty and child-rearing role.<sup>57</sup> This imagery led to a victory in *Muller v. Oregon*, but also exploited stereotypes that have shaped American social practices for decades afterward.

Similarly, commentators have critiqued public interest lawyers as pursuing a single idea, thereby risking arrogance and disregarding the needs of their clients. Derrick Bell has argued that the NAACP lawyers did not pay attention to the needs and wishes of their clients, who may have wished to secure more resources for their own communities, rather than secure a formal legal equality that too often cloaked continued resource disparities.<sup>58</sup> In the area of structural reform of government institutions, I and others have argued that public interest lawyers seeking to improve conditions at state psychiatric hospitals and prisons failed to pay sufficient attention to the consequences of court-ordered reform. In particular, advocates did not reckon ade-

---

55. Cf. Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 919–21 (discussing incentives for plaintiffs' securities lawyers, who supposedly act as agents for aggrieved shareholders).

56. 208 U.S. 412 (1908).

57. *Id.* at 421–23; see also Peter Margulies, *Public Interest Lawyering and the Pragmatist Dilemma*, in *RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE* 220, 226–27 (Alfonso Morales ed., 2003) (explaining Brandeis's brief in *Muller v. Oregon* and its conclusion that long work hours harmed women physiologically).

58. Cf. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 7–9 (2004) (arguing that desegregation litigation failed to bring quality education to African-American communities).

quately with the exit strategy available to states of dumping patients on the streets.<sup>59</sup> While institutional reform enhanced treatment, increasing costs led to homelessness and to “transinstitutionalization,” in which people who earlier were served in psychiatric facilities instead ended up in prisons and jails.<sup>60</sup>

When lawyers pursue parsimony and ignore context,<sup>61</sup> they can also harm third parties or the public. Entrepreneurship can blind a lawyer to wrongdoing that a client is committing, and pave the way for the lawyer becoming an accomplice instead of an advocate and an advisor—something I have argued happened with the radical defense lawyer Lynne Stewart,<sup>62</sup> and may have happened with John Yoo, as well, in his drafting of the torture memos.<sup>63</sup> Here, indulgence in entrepreneurship injures the lawyer’s role as gatekeeper.<sup>64</sup>

---

59. Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 514–15 (1999); cf. Keri K. Gould & Michael L. Perlin, “Johnny’s in the Basement/Mixing Up His Medicine”: *Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339, 346–48 (2000) (arguing that institutional reform often obtained meaningful benefits for patients and that cases helped give people with mental disabilities a voice); Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT’L L. & COM. 333, 335–37 (2007) (describing appalling conditions in facilities for people with mental disabilities worldwide and calling for effective reform).

60. For a vision of a more pragmatic public interest law, see William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 170–81 (2004) (arguing for more flexible approaches to defining community interests) and compare Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models of Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 325–30 (2007) (analyzing more collaborative models of advocacy).

61. For an argument that legal education breeds these vices, see Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 116–20 (2006).

62. Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 174 (2003) [hereinafter Margulies, *The Virtues and Vices of Solidarity*]. To ensure government accountability that is necessary in a constitutional republic, defense lawyers should mount a vigorous defense of their client, even when the client’s acquittal could pose dangers to the state. See generally Lonnie T. Brown, Jr., *Representing Saddam Hussein: The Importance of Being Ramsey Clark*, 42 GA. L. REV. 47 (2007) (discussing career of former Attorney General Ramsey Clark); Michael E. Tigar, *Voices Heard in Jury Argument: Litigation and the Law School Curriculum*, 9 REV. LITIG. 177, 179–82 (1990) (discussing the function of a criminal defense attorney in conveying his client’s humanity).

63. See Harris, *supra* note 17, at 452 (stating that personal views of OLC lawyers and pressure from the client “hindered OLC lawyers from fulfilling their professional responsibilities”); Margulies, *Lawyers’ Independence*, *supra* note 4, at 976–78 (explaining that Yoo was more concerned with “cementing his professional identity as a champion of executive power” than giving an accurate legal opinion).

64. For insight on how these issues also figure into the development of new forms for rendering professional services, see Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur? A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France,*

When the lawyer represents an organization, including the government or a corporation,<sup>65</sup> untempered entrepreneurship can also injure the interests of the entity itself.<sup>66</sup> The lawyers for Enron, for example, bought into the rhetoric of managers who maintained that old metrics of value such as price-earnings ratios were obsolete—mere accounting conventions that stifled innovation.<sup>67</sup> The result was a disaster for shareholders and third parties who suffered through the bursting of the Enron bubble.<sup>68</sup> As we will see, the United States suffered severe losses in credibility because of the issue entrepreneurship practiced by the Bush Administration's lawyers.<sup>69</sup> Better lawyers would have recognized that over time, the interests of a large organi-

---

*Germany, and the United Kingdom After the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589, 589–92 (2002) and George C. Nnona, *Situating Multidisciplinary Practice Within Social History: A Systemic Analysis of Inter-Professional Competition*, 80 ST. JOHN'S L. REV. 849, 850–53 (2006).

65. See Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829, 834–38 (2001) (arguing that as practical matter corporate lawyers often have little discretion in handling particular matters because of economic ties to significant clients). But see W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 991 (2006) (arguing that systemic good achieved by access to legal representation should generally trump scruples about representing certain clients). See generally KRONMAN, *supra* note 13, at 128–34 (discussing the blend of sympathy and detachment a lawyer should bring to client representation); Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1351–55 (2006) (arguing that the pluralist conception of morality, rather than the unitary conception of a “good” client or lawyer, best suits the modern legal profession); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1320–25 (2006) (discussing the importance of counseling on morality, justice, and prudence).

66. See generally Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007) (discussing tensions in representation of resistance movements); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992) (same).

67. See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, in *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 371, 372–73 (Susan D. Carle ed., 2005) (noting Enron lawyers' claim that they relied on managers and accountants to handle accounting matters); Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 55, 68 (2006) (stating that subordinate employees and outside attorneys for Enron “may have neglected to disclose wrongdoing or discuss potential problems as doing so would have branded them as followers of old discourses and ancient metrics that Enron culture had supposedly transcended”); Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1147 (2005) (explaining that Enron's accounting methods placed more importance on creating a “meritocratic” system to promote competition among employees rather than adhere to conventional accounting rules).

68. For a different account of lawyers' problems that emphasizes the influence of formalistic routine rather than issue entrepreneurship, see JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY* 34 (2005).

69. See Margulies, *Lawyers' Independence*, *supra* note 4, at 977 (stating that the torture memos “created sizable negative externalities for United States antiterrorism efforts by in-

zation often align with those of the public because any large organization requires credibility and good will to flourish.<sup>70</sup> Privileging parsimony and short-term gains conceals this common ground.

### C. Issue Entrepreneurs and Attorney General Opinions

The history of Attorney General opinions entails two very rough groupings—those who argue that the government lawyer's advice should reflect the best view of the law, and those who argue that the lawyer's advice should reflect the wishes of the President.<sup>71</sup> Issue entrepreneurs can be found on both sides of this divide, although the recent trend in issue entrepreneurship has been toward the latter category. On either side, issue entrepreneurs can be harmful, not least because they articulate a stylized view of both the "best" view of the law

---

flaming populations and communities whose cooperation the United States desperately needs").

70. See W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. REV. 967, 972–73 (2003) (noting that values of reputation and credibility encourage responsibility among lawyers). Issue entrepreneurs do not adequately address the role of long-term values like reputation and credibility because such values are too fuzzy for parsimonious theories. Theorists wedded to parsimony will sometimes dismiss reputation as cutting in too many directions to be a useful concept. For example, Goldsmith and Posner argue that a country may wish to cultivate a reputation as being law-abiding, or a reputation as being tough. See GOLDSMITH & POSNER, *supra* note 9, at 202–03 (stating that states comply with international law out of self-interest, not because citizens and leaders think a state has an underlying moral obligation to obey international law). For them, this uncertainty of application makes the concept of reputation problematic. One could argue, however, that the wisest leader should strive to uphold both of these values, exhibiting both toughness and fidelity to law.

Even if parsimonious theorists concede that reputation can be important, see GOLDSMITH, *supra* note 1, at 158, they fail to recognize that times of crisis distort officials' assessment of reputational interests. In times of crisis, officials tend to discount the long-term good of a reputation for law-abiding conduct and overweigh the virtue of appearing tough. Cf. Laibson, *supra* note 52, at 443–46 (discussing excessive discounting of long-term costs and benefits). The ticking time-bomb scenario virtually forces this discounting, asking the captor to choose between short-term disaster and the more diffuse and amorphous benefits of reputation. See Luban, *supra* note 38, at 1444 (stating that the ticking-time bomb scenario forces citizens to accept the morality of torture based on the "certainty of anguish and the mere possibility of learning something vital and saving lives"). This discounting also emerges at the micro level, when theorists seek government jobs. When crisis looms, theorists who debunk constraint but also concede the value of reputation tend to emphasize the former in their job interviews. Their official interlocutors do not redress the imbalance. See GOLDSMITH, *supra* note 1, at 29 (discussing candidly his interviews with Bush Administration officials for the top OLC job).

71. See McGinnis, *supra* note 5, at 380–81 (outlining the two views concerning the Attorney General's role as a legal opinion writer). McGinnis offers a third view, centered on upholding the institutional interests of the executive. *Id.* Later in this piece, I offer an alternative view that seeks to fulfill this role, while also encompassing respect for the separation of powers and the need for cooperation among the three branches of government. See *infra* notes 304–306 and accompanying text.

and the President's interests that can do violence to stability and practicality in government.

The first issue entrepreneur in the Attorney General's office actually argued for a risk-averse course when a more aggressive posture was most consistent with national interests. Levi Lincoln, Jefferson's Attorney General, argued that Jefferson needed a constitutional amendment to authorize completion of the Louisiana Purchase.<sup>72</sup> Lincoln was an aggressive advocate—an issue entrepreneur, in the parlance of this Article—of a strict constructionist view adopted by the Jeffersonian Party (the ancestor of today's Democrats) that rejected the expansive view of implied governmental powers espoused by the Federalists. For the Jeffersonian Party, implied powers were dangerous, leading to government overreaching at home and abroad, with the Alien and Sedition Acts passed in the Adams Administration forming the clearest example. Rejecting implied powers and insisting on clear textual authority for actions by the federal government, was for Lincoln the best—indeed, the only—way to keep the federal government honest. Jefferson agreed with this position in principle. In practice, however, as he noted, there were times when the welfare of the nation depended on the President's swift action, even without express textual authority. Jefferson believed that the need to take advantage of the favorable terms offered for the Louisiana Purchase was one of those occasions. Jefferson also asked Congress's consent and publicized his decision immediately, inviting public dialog. While the Louisiana Purchase on one level continued the decimation of native populations that had already begun through European settlement, in other respects it was clearly advantageous for the young Republic. Failing to temper an unduly risk-averse opinion with a fuller sense of the national interest can be as much a failing as unconstrained risk-seeking.<sup>73</sup>

After America entered World War I, Attorney General Thomas W. Gregory assumed an entrepreneurial role in the suppressing of dissent.<sup>74</sup> Gregory campaigned actively for the arrest and deportation of dissidents. Shortly after the war, Attorney General A. Mitchell Palmer continued this trend with the Palmer Raids that first brought to prom-

---

72. McGinnis, *supra* note 5, at 414, 417.

73. Edmund Randolph, who served as George Washington's Attorney General, was a pragmatist, mediating between those two great norm entrepreneurs, Jefferson and Alexander Hamilton. Randolph sought to find the happy mean between the extremes posed by his great Cabinet colleagues. McGinnis, *supra* note 5, at 407 n.109.

74. See Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 413–14 (noting aggressive tactics under President Wilson to suppress dissent).

inence one of the great issue empire builders in national security and law enforcement—J. Edgar Hoover.

In 1940, Franklin Roosevelt and Attorney General Robert Jackson aggressively wielded executive power to complete the destroyer deal that aided Britain and presaged the Lend-Lease Program.<sup>75</sup> Jackson approved the transaction, despite doubts about its legality. Jackson was candid in his opinion, however, acknowledging that one of his main arguments was hairsplitting.<sup>76</sup> Roosevelt and Jackson also solicited input from inside and outside the government. In this sense, they combined activism and prudence in a manner unknown to issue entrepreneurs.<sup>77</sup>

Ideological and issue entrepreneurs have occupied the OLC position in previous administrations. During the Johnson Administration, State Department lawyers issued aggressive opinions supporting presidential authority to intervene in Vietnam. Republican administrations have tended more to be issue entrepreneurs, although the products of the 2001–2003 OLC are striking for their aggressive ideological focus. William Rehnquist, as OLC chief, took a strong line on certain issues, arguing that Nixon had authority as Commander in Chief to invade Cambodia.<sup>78</sup> Rehnquist's argument on assuring the safety of American troops was colorable. Rehnquist's analysis, however, lacked sufficient consideration of the negative consequences that could arise if the President was wrong, including consequences for America's reputation and credibility.<sup>79</sup>

---

75. See ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 93–103 (John Q. Barrett ed., 2003) (explaining the destroyer exchange deal with Britain).

76. 39 Op. Att'y Gen. 484, 495 (1940).

77. In a more troubling episode during World War II, famed law professor Herbert Wechsler—author of the Model Penal Code—arguably misrepresented facts before the Supreme Court of the United States when he served as an Assistant Attorney General in charge of the Japanese internment litigation. See Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 *FORDHAM INT'L L.J.* 642, 652–54 (2007) [hereinafter Margulies, *When to Push the Envelope*] (discussing Wechsler's partial reliance, driven by pressure from the then Department of War, on a government report containing inaccurate charges about the loyalty of Japanese-Americans).

78. William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 *N.Y.U. L. REV.* 628, 638–39 (1970); see also STEPHEN DYCUS ET AL., *NATIONAL SECURITY LAW* 229 (4th ed. 2007) (providing an excerpt on Rehnquist's legal rationale for the introduction of U.S. troops into Cambodia).

79. Rehnquist also practiced constraint in his OLC role, most importantly by finding that the President lacked power to impound congressionally appropriated funds. See generally Moss, *supra* note 5 (explaining the role of executive branch lawyers as legal interpreters).

Later, during the heyday of Iran-Contra, the Reagan Administration asked for and received an opinion from OLC's head, Theodore Olson, who subsequently argued *Bush v. Gore*<sup>80</sup> on George W. Bush's behalf and became Bush's Solicitor General. Olson wrote an opinion on whether United States aid to the Contras violated the Neutrality Act.<sup>81</sup> Olson cited Robert Jackson's opinion approving the destroyer deal with Britain during World War II,<sup>82</sup> but wholly missed the substance and spirit—whatever good aiding the Contras accomplished, it would seem a stretch to compare it to aiding Churchill in the epochal global struggle against Hitler.

Olson also made a questionable analogy to a very early opinion by Attorney General William Bradford that argued American nationals who attacked a friendly government could only be prosecuted if their attack was initiated on U.S. soil.<sup>83</sup> Olson, however, alluded only in passing to the question of tort liability for wrongs committed by the Contras or their American sponsors, and the international backlash that such harms might create. Olson also narrowly interpreted the “within the United States” language in the Neutrality Act<sup>84</sup> to argue that U.S. nationals located in the United States who cause others to engage in hostilities against a foreign friendly state are immune from prosecution. This move would result in targeting foot-soldiers, while immunizing their suppliers and enablers—surely not the result that Congress intended. Olson ended the opinion with a reference to Robert Kennedy's post-hoc justification for the Bay of Pigs fiasco.<sup>85</sup> This reference seems curious at best—in the patterns of precedent that develop around executive decisions, success would seem to be a better guide than failure.

In another episode, Olson claimed executive privilege regarding decisions made by the head of the Environmental Protection Agency (“EPA”).<sup>86</sup> This claim was highly entrepreneurial in support of the President's power, particularly given the EPA's agency status. Such agencies are not part of the President's staff and are often statutorily protected from presidential influence. Claiming executive privilege

---

80. 531 U.S. 98 (2000) (per curiam).

81. 8 Op. Off. Legal Counsel 209 (1984).

82. 39 Op. Att'y Gen. 484, 488 (1940).

83. 8 Op. Off. Legal Counsel 209, 213–14 (1984).

84. 18 U.S.C. §§ 959, 963–67 (2000).

85. 8 Op. Off. Legal Counsel 209, 218 (1984).

86. See CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST-HAND ACCOUNT 135 (1991) (explaining that Olson advised EPA Administrator Anne Burford to claim executive privilege in response to a congressional investigation into the enforcement of environmental regulations).

was an attempt to expand the President's power at Congress's expense, changing the separation of powers scheme.

This being said, Congress's action was extreme. Angry congressional Democrats pressured for a special prosecutor to investigate Olson, asserting that he had misled Congress about documents he had turned over in the EPA investigation.<sup>87</sup> No charges were ever filed in the case. In retrospect, the role of the Independent Counsel in investigating Olson stemmed from an equal and opposite issue entrepreneurial posture in Congress and contributed to partisan bitterness that continues to plague the federal government. The criminal referral did nothing to curb entrepreneurial tendencies at the OLC; if anything, Olson's successor Douglas Kmiec was far more eager to take up the cudgels on behalf of presidential power, in the Independent Counsel case as elsewhere. Moreover, the Olson experience may have radicalized Republicans, forming the lode of resentment mined by Dick Cheney, David Addington, and John Yoo during the Bush Administration.<sup>88</sup>

## II. NATIONAL SECURITY ISSUE ENTREPRENEURS DURING THE TERROR PRESIDENCY

### A. *The Construction of "Lawfare"*

The OLC during the Bush Administration has been even more of a haven for issue entrepreneurship. The ideological climate in the office embodies a simple, parsimonious story pushed by John Yoo and best captured by Jack Goldsmith, the Harvard professor who in an act of great courage and character withdrew Yoo's torture memo. Goldsmith's perspective, despite his courageous act, still overlaps with Yoo's. Goldsmith advances the idea of "lawfare." In the lawfare paradigm, Goldsmith and Yoo depict enemies of the United States as frustrating American interests not only through violence—"warfare"—but also through a web of international and domestic law, rules, and regulations limiting American officials' flexibility.<sup>89</sup>

---

87. See *Morrison v. Olson*, 487 U.S. 654, 666 (1988) (stating that majority members of the House Judiciary Committee published a report suggesting that Olson gave false testimony at a hearing addressing the EPA investigation).

88. A better approach by Congress might have been to push back through assertion of its own power, either threatening to withhold funds from the OLC pending full disclosure, or threatening to hold Olson in contempt. Arguably, the departure connoted by the initial claim of executive privilege justifies such strong measures.

89. Goldsmith identifies Air Force General Charles Dunlap as being responsible for the term "lawfare" gaining currency within the military. GOLDSMITH, *supra* note 1, at 58.



The lawfare idea weds the aesthetic virtues of parsimony with an entrepreneurial appeal to an eager market. The term “lawfare” leverages distrust of law among those who believe that bureaucratic constraints impede innovation and stifle democratic accountability.<sup>90</sup> On a rhetorical level, it contrasts the cumbersome technicalities of law with the no-nonsense approach required by incoming fire. A nation distracted by legal niceties, on this view, is ill-equipped to deal with the exigencies of national security and foreign affairs. More subtly, the logic of the lawfare paradigm suggests that making policy through consultation and collaboration is potentially perilous, with one sure-fire remedy: greater discretion residing with the President.<sup>91</sup>

Goldsmith and Yoo’s lawfare construct has both normative and descriptive dimensions.<sup>92</sup> Normatively, Goldsmith and Yoo argue that international law poses a challenge to democratic legitimacy. They also argue that international law norms pose a challenge to the efficacy of executive decisions. In contrast, they suggest, clear-eyed consideration of American interests would enhance both legitimacy and efficacy. As I will show in a subsequent section, they make some compelling arguments about particularly exigent situations where rigid adherence to the letter of the law is counter-productive.<sup>93</sup> Their analysis, however, like that of so many parsimonious theories, is frustratingly incomplete, aiming to stake a claim to a position and attract

---

90. See Levinson, *supra* note 45, at 926–34 (discussing this view).

91. Concern about illegitimate congressional meddling with executive policy in foreign affairs also spurred drafting of the founding document for today’s executive unilateralists—the “Minority Report” signed by Dick Cheney, with contributions from a young staff lawyer, David Addington, dissenting from the House Iran-Contra Committee Report. See H.R. REP. NO. 100-433, at 457 (1987); see also SCHWARZ & HUQ, *supra* note 7, at 158–60 (discussing the Minority Report). A similar argument that legal constraints impair the efficacy of responses to national security threats appears in POSNER & VERMEULE, *supra* note 9, at 275. While Posner and Vermeule make important points about the costs of unduly rigid legal constraints, their preference for broad conceptual arguments over sustained attention to empirical examples limits the force of their analysis. Actually, Goldsmith’s position is more complex than his lawfare construct suggests. He favors wide discretion for the President, but sees some role for Congress. Moreover, Goldsmith believes that the President, as a prudential matter, should often consult with others, although he fails to recognize that constraint can supplement prudence in a crisis. Compare GOLDSMITH, *supra* note 1, at 136 (arguing that the Supreme Court should have upheld the President’s unilateral establishment of military commissions), with *id.* at 197–98 (praising Franklin Roosevelt’s consultation with others regarding aid to Britain during World War II).

92. Criticism of Goldsmith’s earlier work has been plentiful. See, e.g., Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1270–75 (2006) (raising empirical and normative concerns about the assumptions made in GOLDSMITH & POSNER, *supra* note 9).

93. See, e.g., GOLDSMITH, *supra* note 1, at 80–81 (discussing Jefferson’s view that “a leader’s first duty was to protect the country, not follow the law”).

adherents, rather than to offer a nuanced descriptive or normative account. The lawfare critics unduly discount the complementary relationship between constraint and American power. They also fail to understand how constraint reinforces the teachings of prudence.<sup>94</sup>

### 1. *Lawfare and Legitimacy*

On the question of the democratic legitimacy of international law, Goldsmith with his sometime co-author Eric Posner asserts that international law has “no democratic pedigree or epistemic authority.”<sup>95</sup> One reason is that states do not always have the opportunity, present within a democracy, to specifically consent to provisions of international law, particularly customary international law, which develops through an accretional process based on state acknowledgment and practice, rather than express agreement.<sup>96</sup> Yoo takes this critique even further, asserting that treaties are not legitimate or binding unless they are not only ratified by the Senate, as the Constitution provides, but in *all* cases are also implemented by legislation passed by both houses of Congress and signed by the President.<sup>97</sup>

Goldsmith and Posner then warn of the danger that the agendas of nongovernmental organizations, such as Oxfam International, pose to democratic ideals.<sup>98</sup> According to Goldsmith and Posner, these groups press ideals of “cosmopolitan charity,”<sup>99</sup> which do not reflect the heterogeneous preferences of the American electorate. Goldsmith also warns in *The Terror Presidency* that the foreign activists in the “human rights industry”<sup>100</sup> may seek to use principles of universal jurisdiction to hold to account democratically elected American officials or their congressionally confirmed agents, such as former Secretary of

---

94. Goldsmith and Posner acknowledge that prudence is vital and that reputation is an important value. See GOLDSMITH & POSNER, *supra* note 9, at 202. They fail to adequately address, however, the argument that an emphasis on self-interest, untempered by constraint, can cause distortions in institutions and adversely affect national interests over time.

95. *Id.* at 199.

96. *Id.* at 189–91.

97. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1958–62 (1999) [hereinafter Yoo, *Globalism and the Constitution*].

98. GOLDSMITH & POSNER, *supra* note 9, at 211.

99. *Id.* But see Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1164–68 (2007) (arguing for polycentric conception of international law with a role for nongovernmental organizations).

100. GOLDSMITH, *supra* note 1, at 59. In fairness to Goldsmith, this stilted description, although not in quotes in the original text, may be an effort to convey the perspective of Donald Rumsfeld, whose point of view Goldsmith is depicting in the passage.

State Henry Kissinger.<sup>101</sup> Yoo argues that critics of the Bush Administration's interrogation policies invoked international law to impose their own policy preferences on the political branches.<sup>102</sup> In appealing to the courts, those making arguments based on international law compound this problem of legitimacy.<sup>103</sup> Yoo asserts that lawyers for the President must not surrender to these intrusions—if they do so, they undermine their role as legal advisers to the executive.<sup>104</sup>

## 2. *Lawfare and Executive Efficacy*

Similarly, Goldsmith and Yoo argue that international law reduces the efficacy of the political branches in dealing with foreign affairs and national security threats. Goldsmith argues that domestic statutes based on international law, such as the War Crimes Act, can tie the hands of a president seeking to deal with the pressing challenges of terrorism. Goldsmith warns that the “hornet’s nest” of such restrictions will prevent the executive from taking appropriate action.<sup>105</sup> In a widely quoted passage, Goldsmith ventures a revisionist view of the Bush Administration’s motivation that embodies this chilling effect, portraying the Bush Administration as “strangled by law.”<sup>106</sup> Indeed, says Goldsmith, since September 11, “this war [on terror] has been lawyered to death.”<sup>107</sup> For Goldsmith, the solution is simple: basing national foreign relations decisions not on international law, but on “the logic of state self-interest and state power.”<sup>108</sup>

Unfortunately, Goldsmith argues, lawfare today interferes with this attention to interests in a fashion that prior presidents have not had to face. He asserts, for example, that the law then in effect did not present Franklin D. Roosevelt with a “real threat to aggressive presidential action.”<sup>109</sup> According to Goldsmith, Roosevelt took “ex-

---

101. *Id.* at 55–58. Goldsmith does acknowledge the virtues of human rights law. *Id.* at 54–55.

102. YOO, *WAR BY OTHER MEANS*, *supra* note 9, at 180–81.

103. *Id.* at 180 (“[C]ritics sought to use litigation to move wartime policy in their preferred directions rather than working through our elected representatives.”).

104. *Id.* (characterizing critics of interrogation policies as arguing that lawyers “should have refused to answer the White House’s question, out of moral outrage”).

105. *See* GOLDSMITH, *supra* note 1, at 69 (stating that various restrictions on the President’s discretionary wartime powers limit his ability to fulfill his obligation of protecting the nation).

106. *Id.*

107. *Id.*; *cf.* POSNER & VERMEULE, *supra* note 9, at 44 (criticizing law professors for signing a letter in December 2001, opposing President Bush’s order establishing military commissions). *But see* Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 595–96 (2008) (criticizing Posner and Vermeule’s arguments).

108. GOLDSMITH & POSNER, *supra* note 9, at 203.

109. *See* GOLDSMITH, *supra* note 1, at 65.

tralegal" action that was not possible in the "post-Watergate hyper-legalization of warfare"<sup>110</sup> confronting the Bush Administration.

## B. Problems with the Lawfare Paradigm

### 1. International Law and the Founding Period

The lawfare critics' legitimacy argument glosses over American courts' long-time use of international law, which has roots in the Constitution itself. Article III gives federal courts jurisdiction over cases affecting foreign diplomatic officials.<sup>111</sup> According to the Supreme Court of the United States, this textual grant stemmed from the Framers' recognition that international law *required* them to provide some redress for violations of diplomatic immunity.<sup>112</sup> In the early *Charming Betsy* case, Chief Justice Marshall announced the principle that courts would construe statutes to avoid conflict with international law.<sup>113</sup> Marshall saw what Goldsmith denies—that customary international law has a pedigree entailing the considered judgment and practice of nations over time.<sup>114</sup> Recently, the Supreme Court has interpreted international law broadly in the course of construing the Uniform Code of Military Justice ("UCMJ"), holding that Common Article 3 of the Geneva Convention, incorporated by reference into the UCMJ, was intended to fill gaps in coverage and ensure a floor of

---

110. *Id.* at 81.

111. U.S. CONST. art. III, § 2.

112. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–16 (2004).

113. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

114. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 493–95 (1998) (explaining that U.S. courts viewed customary international law as general common law due in part to international law's foundations in state practice); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 299 (2005) (noting that customary international law arises out of "consistent practices that states follow out of a sense of legal obligation"); cf. Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 442 (2004) [hereinafter Margulies, *Judging Terror*] (arguing that courts should interpret statutes authorizing force as being consistent with international humanitarian law). But see Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 155–56 (arguing for judicial deference to executive interpretation of statute providing remedies to aliens for violation of law of nations, based on the executive's superior institutional competence); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1226–27 (2007) (arguing that the *Charming Betsy* canon skews democracy by importing norms with less legitimacy and guarantees of "quality" than decisions by the President).

protection for virtually all persons detained in hostilities, including alleged members of Al Qaeda.<sup>115</sup>

## 2. *International Law Constraints and the Upholding of Constitutional Norms*

The lawfare critics also fail to recognize that international law's constraints reinforce constitutional norms. Like a canary in a coal mine, violations of international law have often signaled the emergence of grave constitutional difficulties. Consider, for example, the limited naval war with France in the late 1790s and early 1800s. In the *Charming Betsy* case, the Court read a statute to preserve the rights of neutrals under the law of nations, holding that a statute limiting American trade with France did not authorize the seizure of a Danish vessel.<sup>116</sup> In the same year, the Court held that the executive had exceeded its constitutional power by disregarding a statute that permitted capture of a vessel heading to France, but not one departing from a French port.<sup>117</sup> By violating the statute, the President sought to interpose his judgment about the scope of allowable captures for that of Congress, which has express constitutional authority in this area.<sup>118</sup> The Court's decision (in another Marshall opinion) redressed the constitutional balance. Further, the Alien and Sedition Acts, which scholars and historians widely agree violated First Amendment protections, were enacted during the quasi-war with France.<sup>119</sup> Habits of constraint in observing international law could have tempered excesses in the constitutional arena.<sup>120</sup>

115. *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006). For background on the principles and development of international humanitarian law, see generally *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (Michael Howard et al. eds., 1994).

116. *Charming Betsy*, 6 U.S. (2 Cranch) at 120–21.

117. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176–78 (1804).

118. See U.S. CONST. art. I, § 8, cl. 11 (providing that Congress has the power to “make rules concerning captures on land and water”).

119. Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547, 566 (2007).

120. But see POSNER & VERMEULE, *supra* note 9, at 140–41 (arguing that government's tendency to stretch the limits of law in emergencies recedes as exigencies fade). This Article does not address the use of international law to interpret constitutional provisions such as the Eighth Amendment or the Due Process Clause. See *Roper v. Simmons*, 543 U.S. 551, 577–78 (2005) (holding that Eighth Amendment bar on “cruel and unusual” punishment prohibited imposing death penalty on juveniles). Compare Timothy K. Kuhner, *The Foreign Source Doctrine: Explaining the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389, 1390–95 (2007) (arguing for giving weight to international law when interpreting certain open-ended provisions of the Constitution), with McGinnis & Somin, *supra* note 114, at 1186–88, 1224–26 (arguing that international law suffers from “democracy deficit” which makes its use in interpreting the Constitution unwise).

The danger to constitutional legitimacy posed by disregarding international law is also evident in post-September 11 developments. *Hamdan v. Rumsfeld*<sup>121</sup> was a case not just about the interpretation of Common Article 3, but about the permissible scope of executive authority, and whether the executive could disregard language in the UCMJ requiring that military commissions and courts-martial have comparable procedural protections wherever practicable.<sup>122</sup> Moreover, to reach this question, the *Hamdan* Court also had to reaffirm the importance of habeas corpus rights and the need for a clear statement from Congress manifesting its wish to limit habeas protections. Similarly, the Military Commissions Act ("MCA") passed to address the impact of the *Hamdan* decision also has significant constitutional gaps in the area of procedural safeguards.<sup>123</sup> Goldsmith, in contrast, views the MCA as a "victory" for the Administration.<sup>124</sup> He also assumes the constitutionality of the Act, without addressing its procedural flaws.<sup>125</sup>

To his credit, Goldsmith addresses the problem of executive unilateralism in an important prudential argument, asserting that openness from the executive is often the most efficacious course in dealings with Congress, the courts, the public, and the international community.<sup>126</sup> For Goldsmith, however, this prudential argument does not and should not lead to greater substantive limits on the authority of the political branches. Indeed, he insists that a statute with even more truncated procedural protections than the MCA would have passed constitutional muster.<sup>127</sup> The recent tenor of the Su-

121. 548 U.S. 557 (2006).

122. See Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 761, 765–70 (2006–2007) (discussing role of courts in reviewing military commission procedures and rulings); David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 354–62 (2007) (arguing for prudential approach that where possible interprets MCA in light of principles of constitutional and international law).

123. See, e.g., 10 U.S.C. § 948r(c) (2006) (authorizing the admittance of statements obtained by torture under certain circumstances); see also Peter Margulies & Laura Corbin, *Reliability and the Interests of Justice: Interpreting the Military Commissions Act of 2006 to Deter Coercive Interrogations*, 12 ROGER WILLIAMS U. L. REV. 750, 768–70 (2007) (analyzing provisions of the MCA); cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (striking down MCA provisions that sought to limit federal courts' jurisdiction over writs of habeas corpus).

124. See GOLDSMITH, *supra* note 1, at 139.

125. See *id.* at 138–39 (discussing the MCA's passage).

126. See *id.* at 205–09 (discussing Bush Administration's unilateralism).

127. *Id.* at 139–40. Goldsmith's most recent work reflects a more finely grained analysis of procedural safeguards in the detention of suspected terrorists. See generally Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention*

preme Court on the MCA in *Boumediene v. Bush*,<sup>128</sup> however, suggests something different. At the argument, even the Solicitor General conceded readily that the Court could read procedural protections into the MCA's gaps and seemed to share the concern of five Justices that any other interpretation would render the statute constitutionally infirm.<sup>129</sup>

Goldsmith's legitimacy argument also does not adequately acknowledge the premises of American foreign relations law that guard against international domination. Goldsmith rightfully criticizes the most sweeping internationalist claim, which holds that Congress lacks the power to modify certain international obligations, including those in customary international law. The Court, however, has repeatedly held that Congress is free to modify those obligations, in the same way that it can amend or repeal statutes.<sup>130</sup>

### 3. *International Law and United States Power*

Similar concerns rebut the lawfare critics' claim that international law limits the political branches' effectiveness. Often, as Goldsmith acknowledges, the United States uses international law and institutions to both vindicate norms and serve American interests.<sup>131</sup> In many cases, such as the Declaration of Paris of 1856 on maritime rights, the establishment of the United Nations, the enactment of the Geneva Conventions, and the United Nations' promulgation of rules

---

*Models*, 60 STAN. L. REV. 1079 (2008) (discussing the evolving procedural criteria for detention).

128. 128 S. Ct. 2229.

129. See Linda Greenhouse, *Justices Ready to Answer Detainee Rights Question*, N.Y. TIMES, Dec. 6, 2007, at A32 (noting that as the Justices expressed skepticism about government's initial argument that procedural safeguards were not required, Solicitor General Clement "began throwing pieces of [that argument] over the side. He even suggested for the first time that under the available procedures, the appeals court would be able to reach the ultimate judgment of ordering a detainee's release"). This argument was unavailing as the Court determined that a clear holding that the statute was unconstitutional was necessary to provide guidance for the future. See *Boumediene*, 128 S. Ct. at 2275–77; see generally Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008) (discussing factors for deciding between prompt resolution of a constitutional dispute and statutory interpretation that avoids resolution of the constitutional issue).

130. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("Congress may modify [treaty] provisions, so far as they bind the United States . . ."); see also William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 26–27 (2007), <http://www.harvardlawreview.org/forum/issues/120/feb07/dodge.pdf> (stating that customary international law may be "limited or overridden democratically").

131. See GOLDSMITH, *supra* note 1, at 63 (discussing State Department objections to memo, written by Goldsmith for Defense Secretary Rumsfeld, that argued for a stronger line against international legal institutions).

after September 11 requiring member states to enact anti-terrorist legislation, the United States has been a prime catalyst for change.<sup>132</sup>

In other cases, the constraints imposed by international and domestic law have focused American efforts in a salutary fashion. As an example, consider the course of discussions between the United States and Britain during the Civil War regarding the Union blockade of the Confederacy. In Goldsmith and Posner's facile account, the United States enforced the blockade by attacking neutral ships, permitting its own interests to overwhelm the position on international law that it had advanced for decades.<sup>133</sup> As usual, however, parsimony promotes incomplete facts. One detailed study suggests that the United States and Britain negotiated against a backdrop of broad agreement about international law.<sup>134</sup> International law influenced the approaches of both President Lincoln and Secretary of State William H. Seward,<sup>135</sup> who, with the exception of one minor incident inflated by Goldsmith and Posner, respected neutral rights.<sup>136</sup> Despite the imperative to defeat the Confederacy and enforce the blockade, concerns about international law led the Administration to discipline both the American ambassador to London<sup>137</sup> and naval officers who had interfered with trade.<sup>138</sup> The discipline of the naval officers occurred even though

---

132. See S.C. RES. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001) (calling on states to implement relevant anti-terrorist legislation); OLIVE ANDERSON, *A LIBERAL STATE AT WAR: ENGLISH POLITICS AND ECONOMICS DURING THE CRIMEAN WAR* 253, 272 (1967) (discussing the importance of United States influence on treaty establishing maritime rights); Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56, 64 (2007) ("[T]he United States has had strong incentives to participate in formulating, supporting, and strengthening the Geneva Conventions and the law of war."); cf. Asli U. Bali, *International Law and the Challenge of Terrorism*, 9 J. ISLAMIC L. & CULTURE 1, 22–24 (2004) (discussing Security Council resolutions); Kim Lane Scheppele, *Other People's PATRIOT Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 91–95 (2004) (discussing passage of UN Security Council Resolution No. 1373 and the European Union's antiterrorism laws in the wake of 9/11).

133. See GOLDSMITH & POSNER, *supra* note 9, at 46–48.

134. See David M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 333, 365–70 (2006).

135. *Id.* at 367.

136. *Id.* at 359–61; see also MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 141 (1991) (noting that "[t]hroughout the Civil War, most blockade-runners, even after capture by the Union blockading squadrons, went scot-free, as international law prescribed;" also noting Secretary of State Seward's rebuke of Navy Secretary Gideon Welles for requiring that captured British blockade-runners agree not to engage in blockade-running in the future as a condition of their release; Seward believed that such a requirement "is not warranted by public law").

137. See Golove, *supra* note 134, at 370.

138. *Id.* at 361 n.64.



prize courts in the United States would almost certainly have upheld the officers' decisions.<sup>139</sup>

Indeed, constraints on executive decisions have been a mainstay of American law and politics since the dawn of the Republic, with precious little net impact on the effectiveness of policymakers. In the *Charming Betsy* case, for example, a navy commander was ordered to pay damages for improperly seizing a vessel owned by a national of a neutral state.<sup>140</sup> In *Little v. Barreme*,<sup>141</sup> Chief Justice Marshall, in an opinion for the Court, ordered a navy captain to pay damages for seizing a vessel in violation of a statute, holding that instructions from the executive could not "legalize an act which without those instructions would have been a plain trespass."<sup>142</sup> Ten years later, a court fined General Andrew Jackson for contempt of court after Jackson declared martial law, detained judges, and abridged press freedoms in the wake of his victory in the Battle of New Orleans.<sup>143</sup> After the Spanish-American War, the Supreme Court in *The Paquete Habana*<sup>144</sup> ordered the government to pay damages to the owner of a Cuban coastal fishing vessel seized by the navy.<sup>145</sup> To consummate the destroyer deal with Britain during World War II, President Roosevelt and Attorney General Jackson stretched the constraints of statutory and international law of neutrality beyond the breaking point to keep Nazi Germany at bay.<sup>146</sup> They did so, however, not merely for the sake of expedience, but to promote goals that have become pillars of the post-war global legal order: increased international cooperation, regard for human rights, and protection against aggression.<sup>147</sup>

139. *Id.*

140. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 72–73, 125 (1804). As the *Charming Betsy* case demonstrates, courts have also been more than capable of calibrating the exposure of officials to avoid harshness and chilling effects on initiative. *See id.* at 123–24, 125 (ordering remand so that lower court could reduce damages in keeping with captain's good faith).

141. 6 U.S. (2 Cranch) 170 (1804).

142. *Id.* at 176–77, 179.

143. *See* Caleb Crain, *Bad Precedent: Andrew Jackson's Assault on Habeas Corpus*, NEW YORKER, Jan. 29, 2007, at 78. Over twenty-five years later, the aged Jackson persuaded Congress to reimburse him. *Id.* at 84.

144. 175 U.S. 677 (1900).

145. *Id.* at 713–14.

146. *See* Margulies, *When to Push the Envelope*, *supra* note 77, at 666–67 (discussing gaps in Jackson's analysis of statutory and international law).

147. *See* JACKSON, *supra* note 75, at 93–103 (discussing back story of destroyer deal); *see also* GOLDSMITH, *supra* note 1, at 48–49, 192–205 (praising Roosevelt and Jackson while understating the constraints that they faced); *cf.* Jonathan A. Bush, "The Supreme . . . Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324, 2365–66 (2002) (noting Jackson's view of aggressors as "outlaws from the international community"). For a concise account of the trajectory of international law from the

As a final demonstration of the defects of parsimony and the productive role of constraint, consider another more recent blockade—the American response to the Cuban Missile Crisis. Participants in the American strategy sessions have noted that concerns about international law and the global reputation of the United States played a profound role, starting with Robert Kennedy's view that an all-out attack on Cuba would be "Pearl Harbor in reverse."<sup>148</sup> Drawing back from the precipice, the United States fashioned a more tailored response—the limited blockade of Cuba—which led to a peaceful resolution. Ignoring this history, Goldsmith and Posner dismiss the American response as a series of concessions to Communist regimes.<sup>149</sup>

If the lawfare critics minimize the productive role of constraint, they also commit a complementary error by exaggerating the benefits of an interest-based strategy in foreign affairs. While no strategist should continually disregard her country's interests, deploying a rhetoric of interests invites substantial agency costs.<sup>150</sup> An interests-based strategy is not always an impeccably calm and measured process. Sometimes, an interest-based analysis camouflages a "garbage can" of clashing institutional agendas and overreaching by government officials.<sup>151</sup> Great world powers often fall prey to this phenomenon. Consider the case of Britain's strategy and tactics during the Crimean War, which Goldsmith and Posner cite to rebut the Supreme Court's claims in *The Paquete Habana* that customary international law protects coastal fishing vessels.<sup>152</sup> The Crimean War, a conflict fought by Britain, not out of self-defense, but because of a perceived geo-political interest in containing Russia, cost the lives of thousands of British soldiers, prompted the discredit and eventual collapse of a British gov-

---

Treaty of Westphalia to the post-war era, see Christopher J. Borgen, *Triptych: Sectarian Disputes, International Law, and Transnational Tribunals in Drinan's Can God and Caesar Coexist?*, 45 J. CATH. LEGAL STUD. 11, 20–24 (2006).

148. Margulies, *When to Push the Envelope*, *supra* note 77, at 670; see ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 9 (1971).

149. See GOLDSMITH & POSNER, *supra* note 9, at 178.

150. Goldsmith and Posner recognize these costs, but leave them at the margins of their analysis. *Id.* at 104–06.

151. See generally Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1 (1972) (discussing the garbage can model in the context of organized anarchies).

152. *The Paquete Habana*, 175 U.S. 677, 708 (1900). The *Paquete Habana* Court also recognized that legislative or executive rulings could displace customary international law, thereby preserving democratic legitimacy. See *id.* at 700 (indicating that a "controlling executive or legislative act" or comparably controlling "judicial decision" could trump customary international law).

ernment,<sup>153</sup> spurred international disdain,<sup>154</sup> and ended inconclusively.<sup>155</sup> One treatise writer cited by the Court asserted that the British attacked coastal fishing vessels, despite the prevalent view echoed in the decision that such vessels were engaged in “honest[ ] . . . peaceful industry,” not aid to belligerents.<sup>156</sup> Goldsmith and Posner argue that the practices of Royal Navy commanders vitiated the international consensus that the *Paquete Habana* Court purported to discern.<sup>157</sup> The Court, however, cited naval reports that the fishing vessels supplied the Russian military.<sup>158</sup> If these reports accurately stated the Royal Navy’s views, seizing the ships served a military purpose and therefore did not violate the rule announced in the case.

Careful examination of the history of the Crimean conflict reveals a third possibility—contemporary naval accounts may have touted a strategic objective to cover up wanton destruction that was not expressly authorized, but was instead a product of insufficient discipline among English forces. Military operations included the sacking of towns, accompanied by the pillaging of museums and looting of relics.<sup>159</sup> As the *Paquete Habana* Court noted, the campaign had a “limited” impact on Russian supplies because the Russians had ample re-supply routes over land.<sup>160</sup> In fact, the episode illustrates not a fail-

153. See ANDERSON, *supra* note 132, at 33–35 (discussing failure of Lord Aberdeen as British Prime Minister at the start of the Crimean conflict and accession to power of Lord Palmerston).

154. See PAUL W. SCHROEDER, AUSTRIA, GREAT BRITAIN, AND THE CRIMEAN WAR: THE DESTRUCTION OF THE EUROPEAN CONCERT 294–95 (1972) (discussing disillusionment with Britain’s role domestically and internationally).

155. See ANDERSON, *supra* note 132, at 275 (describing end of the war as an “anti-climax”). Some might find parallels here to a continuing conflict closer to home.

156. *The Paquete Habana*, 175 U.S. at 699–700 (citing 4 M. CHARLES CALVO, LE DROIT INTERNATIONAL § 2372, at 326–27 (Arthur Rousseau ed., 5th ed. 1896)).

157. GOLDSMITH & POSNER, *supra* note 9, at 71–72.

158. *The Paquete Habana*, 175 U.S. at 699–700.

159. See CLIVE PONTING, THE CRIMEAN WAR: THE TRUTH BEHIND THE MYTH 267–68 (2004) (stating that an eyewitness to the destruction of a museum saw British and French troops destroy every artifact—“[n]ot a single bit of anything that could be broken or burnt . . . had been exempt from reduction by hammer or fire”); see also J.B. CONACHER, BRITAIN AND THE CRIMEA, 1855–56, at 100 (1987) (describing “looting and disorder” on the part of British forces during this episode); cf. D.S. RICHARDS, CONFLICT IN THE CRIMEA: BRITISH REDCOATS ON THE SOIL OF RUSSIA 123–25 (2006) (recounting that British commanders had sent in cavalry to curb excesses of their own troops and to suppress news of “atrocities,” including rape; reports of abuses triggered adverse reaction in the United States, although British leaders believed that campaign was a strategic success).

160. *The Paquete Habana*, 175 U.S. at 699; PONTING, *supra* note 159, at 268. In other venues of the conflict, the British navy was similarly ineffectual. See *id.* at 49 (noting that the naval campaign in the Baltic resulted in “attacking a few undefended towns . . . and destroying mainly British property” with no strategically important victories, leading to disgrace for British naval commander).

ure to crystallize international custom—the evidence is a wash—but the irrationality with which “interests” are often constituted through flawed institutions.

Contemporary examples echo this problem of interest and irrationality. In the war in Iraq, for example, Secretary Rumsfeld pushed his agenda of military reform, championing a “lean, mean” American force and silencing those who believed that a larger cohort of troops would be necessary.<sup>161</sup> Additionally, consider coercive interrogation. Here, tactics reveal a different dynamic—if organizations have a tool or toy in their arsenal, they often seek to use it. As Mark Twain said, “To a man with a hammer, everything looks like a nail.”<sup>162</sup> The accumulation of institutional momentum toward greater use of force occurs even when force is not useful or tactically sound. Most analysts agree that, at least over the broad run of cases, coercion, including torture, is ineffective because of imperfect knowledge.<sup>163</sup> Torture subjects typically know less than what we think they know, and often tell us what we want to hear. The natural standpoint of the torturer is to assume that the silent captive is concealing something, while the voluble captive is imparting useful information—but in fact the opposite may be the case. However, the mission creep phenomenon, in which organizations expand their job description to seek greater visibility and higher budgets, suggests that institutional actors will often use the new tool, even in the absence of verifiable results.<sup>164</sup>

---

161. See Edward N. Luttwak, Op-Ed., *So Few Soldiers, So Much to Do*, N.Y. TIMES, Nov. 4, 2003, at A25 (arguing that the Bush Administration sent too few combat-trained soldiers to Iraq).

162. See Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION, *supra* note 41, at 257, 271 (quoting Twain); see also HIRSCHMAN, *supra* note 12, at 152 (discussing force of habits); Annette C. Baier, *Trusting People*, [6 ETHICS] PSYCHOL. PERSP 137, 147 (1992) (noting the self-reinforcing nature of habits, including habits of trust and mistrust); cf. Paul J. DiMaggio & Walter W. Powell, *Introduction*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 19 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (“[H]abit must not be seen as a purely passive element in behavior, but rather as a means by which attention is directed to selected aspects of a situation, to the exclusion of competing aspects that might turn choice in another direction.”); Samuel Issacharoff, Comment, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671, 675 (2002) (observing that experts exhibit “group think” behavior that obscures options and perspectives); Sally S. Simpson & Nicole Leeper Piquero, *Low Self-Control, Organizational Theory, and Corporate Crime*, 36 L. & SOC’Y REV. 509, 535 (2002) (analyzing incentives within bureaucracies).

163. See Henry Shue, *Torture*, in TORTURE: A COLLECTION, *supra* note 41, at 47, 55 (noting the possibility of torturing persons who genuinely do not have the sought after knowledge).

164. See SCHWARZ & HUQ, *supra* note 7, at 46 (discussing mission creep during Franklin Roosevelt’s Administration). But see POSNER & VERMEULE, *supra* note 9, at 155–56 (rejecting slippery slope arguments based on institutional pathologies).

In sum, Goldsmith and Yoo cultivate parsimony to the detriment of both accurate description and sound prescription. Goldsmith's view that the legal constraints faced by officials today are new does not explain the history of constraint going back to the founding of the Republic. Similarly, although Goldsmith and Yoo recognize that reputation is an important value, their work fails to acknowledge the utility of constraint under international law as a device for preserving and enhancing reputation. Without constraint, excess overwhelms a purely prudential regard for reputation, as the OLC's work product after September 11 demonstrates.

### III. THE WAGES OF ENTREPRENEURSHIP: THE CONTENT AND CONSEQUENCES OF OLC LEGAL MEMORANDA AFTER SEPTEMBER 11

The dubious theoretical analyses of the lawfare critics were just the beginning of the story. After September 11, Goldsmith and Yoo were called upon to issue concrete guidance to the Administration on tactics in the war on terror. In this trying period, both men believed that national security hinged on recognition of the risks to legitimacy and efficacy they perceived in international law. Legal advice reflecting this recognition was a necessary element in the Bush Administration's strategy, providing both legitimacy and risk management.<sup>165</sup> For the critics of lawfare, the opportunity to provide guidance was thus part of a mission. The mission was strategic, but also professional. Vanquishing internationalist premises in legal policy would be a test run for an intellectual journey—a return to what the critics of lawfare viewed as the authentic beginnings of American foreign affairs law.

It did not turn out that way. Yoo's guidance failed basic tests of sound lawyering, and may have run afoul of a range of legal norms. Goldsmith showed deep character and a dedication to legal craft in withdrawing Yoo's guidance, but continued to champion a reductive view of legal constraints. As we shall see, the result was a grave injury to America's reputation, and through statutes like the Military Commissions Act, the entrenchment of a legal regime that unduly discounted both international obligations and constitutional duties.<sup>166</sup> In addition, the far-flung system of detention and coercive interroga-

---

165. Cf. Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1910–11 (2006) (arguing that lawyers who engage in risk management run the risk of shirking their ethical responsibilities).

166. See generally Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (arguing that habeas relief does not require the possession of rights).

tion authorized in the lawfare critics' guidance yielded satellite misconduct, including possible obstruction of justice, as in the destruction of the CIA tapes of the questioning of suspected Al Qaeda operatives. To analyze these wages of entrepreneurship, I turn first to the contents of the memos themselves.

*A. Strained Constructions: Analyzing the Content of the OLC Memos*

To grapple with the content of the OLC memos, I break them up into three categories. The first category includes the so-called "Bybee Memo" on permissible techniques in coercive interrogation, which was actually authored by John Yoo,<sup>167</sup> and eventually withdrawn by Jack Goldsmith. The second category includes the successor to the Bybee Memo, written by Daniel Levin, the acting head of the OLC following Goldsmith's departure, and the reported-on, but still secret, memo by Stephen Bradbury, who followed Levin as acting Assistant Attorney General. The third category includes the opinion written by Goldsmith regarding Article 49 of the Geneva Convention, which prohibits an occupying power from deporting or transferring illegal aliens from occupied territory.

*1. Misplaced Analogies*

In the months after September 11, John Yoo, who had left Berkeley to take a position with the OLC, drafted a remarkable memo. Yoo examined the provisions of the War Crimes Act and the Torture Act (the "Acts"), which made torture by United States personnel critical and sought to narrow interpretation of the Acts to make prosecution of United States personnel impossible.<sup>168</sup> Unfortunately, Yoo's interpretations were so strained that, as one commentator observed, they amounted to "torturing the law."<sup>169</sup>

---

167. For clarity, I refer to this memo as the Yoo memo.

168. See Memorandum from Jay S. Bybee, Asst. Att'y Gen., to Alberto Gonzales, Counsel to President (Aug. 1, 2002) [hereinafter Yoo Memo], in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); cf. LUBAN, *supra* note 7, at 177–80, 200–02 (critiquing the torture memos); see also Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b) 120 Stat. 2600 (2006) (defining war crimes under 18 U.S.C. § 2441 without including conduct that violates Common Article 3 of the Geneva Conventions, such as "outrages upon personal dignity" and "humiliating and degrading treatment"); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 349–50 (2007) (asserting that lawyers authorizing conduct that violates Geneva Conventions can be prosecuted in foreign or international fora, and possibly in the United States).

169. See José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 215–21 (2006) (discussing how the torture memos violated rules of professional responsibility); cf. PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 72–77 (2008) (describing Yoo's work on interrogation); Norman W. Spaulding, *Professional*

For example, Yoo pointed to language in the torture statute requiring that a perpetrator of torture cause severe pain with specific intent.<sup>170</sup> Yoo opined that a captor who imposed severe pain on a subject to elicit a confession or information lacked the requisite specific intent because his ultimate goal was not to cause severe pain.<sup>171</sup> The statute, however, nowhere carves out this exception. Indeed, an exception for seeking information would eviscerate the statute, because captors often use paradigmatic torture techniques—such as extinguishing a lighted cigarette on the skin of a subject—for the purpose of securing information. This is common knowledge for anyone who has seen a World War II movie with a grinning Gestapo official advising a prisoner that, “We have ways of making you talk.” Indeed, the Convention Against Torture (“CAT”) specifically mentions the “interrogational torture” situation as an example of a prohibited practice.<sup>172</sup> Congress omitted this language from the text of the torture statute, giving Yoo his opening. However, unless one believes (with no support in the text or the legislative history) that Congress wished to exempt the Gestapo situation from the torture statute’s coverage, this argument does not pass the laugh test.<sup>173</sup>

Yoo’s construction of the phrase “severe pain” is even more strained. Yoo looked to other laws that mentioned severe pain in unrelated contexts, having nothing to do with the war on terror. For example, Yoo cited a statute that required the federal government to reimburse medical care for undocumented aliens facing health care emergencies.<sup>174</sup> The statute made clear that coverage was unavailable for routine health care needs.<sup>175</sup> Undocumented aliens are a perennial political football, and Congress apparently decided to ignore the risk that routine illness on the part of undocumented people, left untreated, would soon spread to the documented population. In cases

---

*Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1975–76 (2008) (discussing Yoo’s motivation and suggesting remedies for the future).

170. 18 U.S.C. § 2340(1) (2000).

171. Yoo Memo, *supra* note 168, at 175.

172. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1(1), U.N. GAOR, 39th Sess., 93d plen. mtg., U.N. Doc. A/Res/39/46 (Dec. 10, 1984) [hereinafter Convention against Torture].

173. The only plausible reading of this language is that the harm (“severe pain”) that the victim suffered could not be merely accidental or fortuitous, but instead had to be the product of a conscious design by the captor. *See id.* Indeed, courts have interpreted the other implementing legislation of the CAT in this way and there is no reason to think that the meaning of the criminal statute implementing the CAT is any different. *See Lavira v. Att’y Gen.*, 478 F.3d 158, 166–67 (3d Cir. 2007) (discussing CAT standard in the context of an alien advancing a defense to deportation).

174. Yoo Memo, *supra* note 168, at 176 (citing 8 U.S.C. § 1369 (2000)).

175. 8 U.S.C. § 1369.

of clear emergencies, however, where a patient is experiencing severe pain equivalent to organ failure—is near death—coverage is permitted.<sup>176</sup> Yoo's analogy, however, is flawed. A refusal to reimburse medical treatment of nonemergency conditions does not authorize the government to engage in conduct that may *create* such conditions.<sup>177</sup>

Yoo also argued that a necessity defense should be available when a captor uses coercion to elicit information that is beneficial in avoiding future harm to innocents.<sup>178</sup> Here, Yoo ignores two concerns. First, a high frequency of successful necessity defenses is substantially equivalent to an *ex ante* authorization.<sup>179</sup> If one can count on the defense, the effect is the same. Moreover, while the torture statute does not mention defenses, the CAT allows no exceptions whatsoever.<sup>180</sup> Precluding the defense is certainly more consistent with the prophylactic purpose of the statute. The legislative history of the MCA similarly does not suggest that Congress wished to allow the defense. So here again, Yoo's analysis hangs on contestable interpretive conventions, without express support in text, purpose, or legislative history.

In addition, Yoo says nothing about the *Charming Betsy* canon, which would require a construction of a statute that avoids conflict with international law.<sup>181</sup> Yoo's reading of the torture statute conflicts with both the CAT and the status of torture as a violation of *jus cogens*—fundamental customary international law. However, Yoo does

---

176. *Id.*

177. See Luban, *supra* note 38, at 1452–60 (criticizing Yoo memo and premises underlying it); Wendel, *Legal Ethics*, *supra* note 7, at 80–85 (same); Wendel, *Professionalism as Interpretation*, *supra* note 7, at 1224–32 (same). Assuming that Yoo knew that waterboarding was one of the tools the Bush Administration wished to use, it is also odd that Yoo ignored the recent history of water torture, including investigation of abuses by United States personnel combating rebels in the Philippines during the early 1900s, convictions of Japanese military personnel for performing water torture on United States prisoners during World War II, and a conviction on federal charges of a Texas sheriff accused of using water torture to secure a confession. See *United States v. Lee*, 744 F.2d 1124, 1127 (5th Cir. 1984) (rejecting Texas sheriff's appeal that was based on trial court's refusal to sever cases); see also 154 CONG. REC. S948–49 (daily ed. Feb. 13, 2008) (remarks of Sen. Whitehouse) (discussing history of waterboarding); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 478–88, 502–04 (2007) (discussing case law).

178. Yoo Memo, *supra* note 168, at 207–09.

179. See Peter Margulies, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 318 (2006) [hereinafter Margulies, *Beyond Absolutism*] (noting that acquittals of torturers may “normalize the incidence of torture-lite or torture”).

180. Convention against Torture, *supra* note 172, art. 2.

181. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).



not acknowledge the relevance of the *Charming Betsy* canon, let alone endeavor to explain why it does not apply.<sup>182</sup>

Finally, in his boldest move, Yoo argues that the statutes do not really matter, in any event. The President, he claims, has the power to order coercion of any kind, by virtue of being Commander in Chief.<sup>183</sup> Armed with this premise, Yoo invokes the doctrine of constitutional avoidance, asserting that one must read the torture statute to give the President a blank check.<sup>184</sup> Any other reading, Yoo insists, would represent an unconstitutional power grab *by the legislature*.<sup>185</sup>

Yoo's position here is against the great weight of precedent. His response is to trot out a long-time favorite of executive unilateralists, *United States v. Curtiss-Wright*.<sup>186</sup> The facts in *Curtiss-Wright*, however, do not support this broad proposition because Congress had expressly delegated to the President the authority upheld in that case.<sup>187</sup> Moreover, Yoo fails to mention the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>188</sup> which holds that the power of the President is at its lowest ebb when the President acts against the wishes of Congress on a matter committed to rule by both branches.<sup>189</sup> The

182. Yoo does mention the *Charming Betsy* rule in another memo, but in a fashion that renders it virtually toothless as a check on executive action. According to Yoo, the rule is merely a clear statement rule, which Congress can overcome by making its intention plain. See Draft Memorandum from John Yoo, Deputy Asst. Att'y Gen. & Robert J. Delahunty [sic], Spec. Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense (Jan. 9, 2002) [hereinafter Yoo & Delahunty Draft Memo], in *THE TORTURE PAPERS*, *supra* note 168, at 38, 74 n.122. While this interpretation is literally correct, it fails to capture the depth of commitment to international norms as default rules that is evident in Marshall's opinion. See *Charming Betsy*, 6 U.S. (2 Cranch) at 118 ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can *never* be construed to violate neutral rights . . . further than is warranted by the law of nations.") (emphasis added). Moreover, elsewhere in the memo Yoo proceeds to have his cake and eat it, too. Having observed that Congress can *violate* international law if it does so plainly, Yoo argues that any attempt by Congress to *broadly construe* international law protection of Al Qaeda and Taliban detainees would be an unconstitutional infringement on the powers of the President. See Yoo & Delahunty Draft Memo, *supra* note 182, at 47, 74 & n.122.

183. Yoo Memo, *supra* note 168, at 200.

184. *Id.* at 203.

185. *Id.* at 207.

186. 299 U.S. 304 (1936). The *Curtiss-Wright* Court discusses the importance of the President's powers in foreign affairs and states that "[w]e should hesitate long before limiting or embarrassing such powers." *Id.* at 322 (quoting *MacKenzie v. Hare*, 239 U.S. 299, 311 (1915)).

187. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring).

188. 343 U.S. 579.

189. *Id.* at 637–38; see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 720–21 (2008) (proposing framework for analyzing *Youngstown* "Box 3" problems).

*Youngstown* Court applied this analysis to strike down President Truman's seizure of the steel mills when a labor dispute allegedly imperiled the supply of equipment to our troops in Korea.<sup>190</sup> Surely, a dispute about torture would prompt similar solicitude for Congress, which has the power to declare war, regulate the army and navy, and pass legislation implementing treaties.

Yoo's memo is problematic for a number of reasons. First, it enables the regime of detention and coercive interrogation that emerged after September 11. Goldsmith, who ultimately withdrew the memo after he became head of OLC, acknowledges that the memo "could be interpreted as if [it] were designed to confer immunity for bad acts."<sup>191</sup> Viewed in this light, it arguably violated the lawyer's duty to avoid assisting a client in a crime or fraud.<sup>192</sup> In addition, Yoo's memo arguably violates the lawyer's duty of competence<sup>193</sup> because of its failure to identify and distinguish relevant legal authority.

Goldsmith's withdrawal of the Yoo memo demonstrated both courage and character, but left intact the mantle of issue entrepreneur. Goldsmith seems genuinely troubled by the "blank check" that Yoo provided to interrogators<sup>194</sup> and chagrined by the damage it caused to the reputations of the OLC and the whole Justice Department.<sup>195</sup> Nevertheless, Goldsmith returns too readily to his lawfare critique, blaming the "criminalization of warfare" for contributing to Yoo's excesses.<sup>196</sup> In addition, Goldsmith divorces the craft of lawyering from the substance of the detention and coercion regime. He implies that there was nothing improper about the practices themselves, asserting that the chief flaw with Yoo's memo was that it was "wildly broader than was necessary to support *what was actually being done*."<sup>197</sup> He applauds the memo written by his successor at the OLC that supplanted Yoo's work, describing it as a "careful and nuanced analysis."<sup>198</sup> The chief virtue of the successor memo for Goldsmith was that this attention to craft made for a more credible argument that the detainees had not been abused.<sup>199</sup>

---

190. *Youngstown*, 343 U.S. at 583, 585.

191. GOLDSMITH, *supra* note 1, at 150.

192. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008).

193. *Id.* R. 1.1.

194. *See* GOLDSMITH, *supra* note 1, at 151.

195. *Id.* at 158.

196. *Id.* at 164.

197. *Id.* at 150 (emphasis added).

198. *Id.* at 165.

199. *See id.* at 164–65.

## 2. *From True Believers to Technocrats*

The next memo sent out by the Administration on the torture front represents a significant improvement in tone, but a more equivocal gain in substance. Daniel Levin, a veteran of legal national security positions who had never espoused a grand theory, wrote the memo—having become acting head of OLC after Goldsmith resigned. Levin's memo, issued in the aftermath of Abu Ghraib, starts with the observation that "[t]orture is abhorrent."<sup>200</sup> Levin deserves substantial credit for clear and resonant language that accurately represented the consensus on this issue. If one reads the memo more carefully, however, loopholes appear, justifying what the Administration had already done.<sup>201</sup>

First, as noted above, the memo says that everything approved under the old memo would be legal under the Levin memo, too.<sup>202</sup> This dovetails conveniently with the Administration's standard line on Abu Ghraib—that none of the egregious abuse was authorized and that it all resulted from a kind of *Animal House* or "night-shift" syndrome among the military personnel at the prison. However, we know that a broad repertoire of coercive techniques was used first at Guantanamo and then brought to Iraq by the former Guantanamo commander, General Geoffrey Miller. In other settings, CIA operatives used waterboarding, at least for three high-level Al Qaeda detainees. The Levin footnote signals that all of this activity comported with the law.

The Levin memo backs up this signal of impunity with a parsing of the test for torture that ignores the text and purpose of the CAT and federal law. Consider the most notorious interrogation prac-

---

200. See Memorandum from Daniel Levin, Acting Asst. Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004) [hereinafter Levin Memo], in *THE TORTURE DEBATE IN AMERICA*, *supra* note 7, at 361.

201. See LUBAN, *supra* note 7, at 180–82 (stating that Levin's memo "provide[d] ample cover for interrogators").

202. Levin Memo, *supra* note 200, at 362 n.8. In June 2008, Levin testified to Congress that this footnote meant simply that if Yoo had used Levin's analysis, Yoo would still have approved a wide range of interrogation techniques. See *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part Two) Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *House Hearing*] (testimony of Daniel Levin), available in Fed. News Serv. (June 18, 2008). Levin's explanation of the footnote as merely a description of Yoo's subjective state of mind seems at odds with both the objective language of the footnote and Goldsmith's understanding of it. See GOLDSMITH, *supra* note 1, at 164–65. Levin acknowledged that his drafting of the footnote was imprecise. See *House Hearing*, *supra* (statement of Daniel Levin). Levin also asserted that an interrogator who had relied on Yoo's memo and "went up to the limits of what it allowed . . . would be violating the law." *Id.*

tice—waterboarding. To waterboard a subject, interrogators place the subject on a board, place a towel over his face, and pour running water over the towel. As long as the water is running, it is virtually impossible for the subject to breathe without ingesting water in through the lungs. As survivors note, waterboarding is not “simulated” drowning—it *is* drowning.<sup>203</sup> Because the torture statute bars the imposition of severe pain *or* suffering, waterboarding would seem to fit within the definition.

The Levin memo addresses this issue by opining that torture has a durational component—it must occur in a fashion that is not transitory.<sup>204</sup> This convenient qualification is less far-fetched on the surface than the arguments made by Yoo, but potentially leaves loopholes just as large. After all, as was said above, putting out a lighted cigarette on someone’s arm does not take a long time. Few would argue, however, that this procedure does not constitute torture. Similarly, waterboarding is often brief, as the subject begins to ingest more and more water in a vain attempt to breathe, and panic takes over. Under the circumstances, the brevity of the experience does not remove it from torture’s realm. Because the text, purpose, and legislative history of the statute support this broader interpretation of what constitutes torture, the duration requirement resembles the towel interrogators use in waterboarding—it is “made up . . . out of whole cloth.”<sup>205</sup>

The irony here is that despite the Levin memo’s preservation of impunity, the Administration resented Levin’s vivid anti-torture language and his going off the reservation in one striking episode. Levin, a methodical attorney who did not like loose ends,<sup>206</sup> wanted to de-

---

203. See Wallach, *supra* note 177, at 469, 482–90 (describing water-torture survivors’ experiences); Dana Milbank, *Logic Tortured*, WASH. POST, Nov. 2, 2007, at A2 (same). Fearing death, most subjects start talking within a minute or so, although whether they actually reveal useful information is a subject of debate. In training exercises for United States military personnel, where no one is supposed to die, trainers will briefly move the hose away from the subject’s face to allow the subject to catch a quick breath. A skilled interrogator would also do this in the field, because otherwise the subject might pass out and actually drown before imparting any information. In the field, however, when an interrogator feels pressure to get results from a recalcitrant subject, mistakes can happen.

204. Levin Memo, *supra* note 200, at 373–74.

205. See LUBAN, *supra* note 7, at 182.

206. I should disclose here that I knew Levin in the 1980s when we worked together on litigation supporting the rights of people with mental disabilities. See *Klostermann v. Cuomo*, 463 N.E.2d 588, 591, 594 (N.Y. 1984) (holding claims of people with mental disabilities for community services and housing were justiciable). Levin was then, and I assume continues to be, a nonideological person guided by ideals of professional craft and an innate sense of decency. My criticism of his work on the memo requires an acknowledgement that I and most other critics of the Bush Administration have not faced the difficult calls that Levin and Goldsmith confronted—calls which presidents of both parties encour-

cide for himself whether waterboarding was torture. News reports indicate that Levin underwent waterboarding so that he could gain better insight into the real world consequences of the Justice Department's legal opinions.<sup>207</sup> The experience apparently led Levin to call for far more stringent regulation of the practice.<sup>208</sup> On the one hand, this episode suggests the folly of both seasoned technocrats and parsimonious theorists alike. "Stringent regulation" of abusive techniques will not launder conduct that is inherently abusive. Moreover, even if regulation could have this effect in theory, in practice the lack of transparency surrounding the technique and the exigencies of the situation will create overwhelming incentives for abuse. On the other hand, the denouement of Levin's foray into the mindset of the interrogation subject demonstrated the Administration's view that only true believers need apply: incoming Attorney General Gonzales told Levin that he would not be nominated as permanent head of OLC.<sup>209</sup>

Because one technocrat proved to have too many scruples, the Administration shopped around for another who was free of these encumbrances. It settled on Steven Bradbury, an acolyte of Kenneth Starr.<sup>210</sup> Bradbury proved to be more ideologically driven than Levin, carrying the Administration's water on the MCA, where he argued to Congress that eviscerating detainees' access to courts and allowing evidence obtained by coercion met constitutional muster.<sup>211</sup> Bradbury also wrote secret opinions which allowed for coercive interrogation using a combination of techniques, including deafening music for a prolonged period, sleep deprivation, and extremes of hot and cold.<sup>212</sup> While the torture statute does not mention combinations, their use seems to defy the MCA's purpose. Moreover, permitting the practice is imprudent as an institutional matter. As with waterboarding, stringent regulation of combinations will only go so far. Authorizing the

---

ter. See *House Hearing*, *supra* note 202 (testimony of Daniel Levin) (testifying that "the legal issues . . . are . . . extremely difficult," guidance from the framers is "murky, at best," and "[t]he stakes are high. You're often told that lives, and perhaps many, many lives are at stake, and classification concerns often limit whom you can consult"). In suggesting later in this Article ways of more effectively regulating OLC's work product, I try to keep in mind the complexity of that context and acknowledge that risk aversion also has costs.

207. Scott Shane, *A Firsthand Experience Before Decision on Torture*, N.Y. TIMES, NOV. 7, 2007, at A22.

208. Cf. *House Hearing*, *supra* note 202 (statement of Daniel Levin) (stating that "there were certain changes in practices as a result of the change in legal analysis" embodied in his memo).

209. *Id.*

210. See Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, OCT. 4, 2007, at A1.

211. See *id.* (discussing Bradbury's congressional testimony).

212. See *id.*

practice will inevitably transform interrogators and senior officials alike into Twain's man with a hammer looking for a nail. In addition, the turn to coercion will shift attention away from developing efficacious noncoercive techniques, like those that proved successful in debriefing Nazi captives during World War II.<sup>213</sup>

3. *Lawyerly Craft Enabling Dubious Practices: Goldsmith's Draft Article 49 Memo*

Legal issues about interrogation concerned not just the manner of questioning, but its locale. Here I return to Goldsmith, to consider his draft opinion on Article 49 of the Fourth Geneva Convention.<sup>214</sup> This memo passes ethical muster because it openly acknowledges contrary authority on almost all relevant points. That acknowledgement, however, is not complete, ignoring the same imperative for a purposive reading of international obligations that Yoo slights in his memo. Moreover, the memo's inconsistencies in method suggest a strong result orientation. Consequently, having credited Goldsmith for substantial character, courage, and judgment in repudiating the Yoo torture memos, we cannot completely absolve Goldsmith himself of responsibility for the torture archipelago that the Bush Administration has created in the wake of September 11.

In the memo, Goldsmith states that Article 49 does not bar the deportation of undocumented aliens from occupied Iraq, or their "brief" detention elsewhere for purposes of interrogation.<sup>215</sup> These conclusions, however, do not square with the text or context of Article 49. Article 49 by its terms bars an occupying power from deporting or transferring any "protected person[ ]" from a country under occupation.<sup>216</sup> Viewed from the perspective of the International Committee of the Red Cross ("ICRC"), which merits deference as the organization charged with responsibility for monitoring compliance with the Geneva Conventions, Article 49 is an absolute prohibition designed to

---

213. See Brian Albrecht, *Uncovering Nazi Secrets; Vet Can Now Talk of PO Box 1142*, CLEV. PLAIN DEALER, Jan. 11, 2008, at B1 (discussing secret American program for debriefing Nazi notables such as rocket scientist Wernher von Braun).

214. See Draft Memorandum from Jack L. Goldsmith III, Asst. Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Mar. 19, 2004) [hereinafter Goldsmith Draft Memo], in THE TORTURE PAPERS, *supra* note 168, at 367.

215. *Id.* at 380.

216. Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)].

bar “disappearances” wrought by an occupied power.<sup>217</sup> The provision, which prohibits deportations or transfers for any purpose, has an institutional, prophylactic purpose of the kind that lawfare critics habitually marginalize: it ensures that in the fluid period of an occupation, an occupying power will not be able to serve expedience by removing persons from the territory. Moreover, Article 49 works in tandem with other provisions of international treaty and customary law which bar cruel, inhuman, and degrading treatment and torture. If an occupying power can transfer residents of one state to another, it also can hide them from view, and then engage in abusive interrogation techniques with impunity. In ignoring this concern, Goldsmith fails to give Article 49 the purposive reading that customary international law requires.<sup>218</sup>

In addition to disregarding the prophylactic purpose of the provision and declining to defer to the ICRC, Goldsmith disregards the plain meaning of the text. Article 49 bars the “deportation[ ]” or “transfer[ ]” of persons by an occupying power from occupied territory.<sup>219</sup> In American law, deportation has a specific meaning that covers exactly what Goldsmith approves—the removal of aliens who have violated immigration laws.<sup>220</sup> Goldsmith argues that deportation has a different meaning in Article 49, claiming Article 49 deals with the transportation of lawful residents of an occupied territory to concentration camps outside the territory, as the Nazis did during World War II.<sup>221</sup> He then argues that “transfer” has the same meaning as “deportation,”<sup>222</sup> even though it seems more logical and consistent with the provision’s purpose that the drafters would have added the term

217. See ICRC, International Humanitarian Law—Fourth 1949 Geneva Convention, <http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument> (last visited Nov. 17, 2008) (providing commentary to Article 49).

218. See Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (providing rules of treaty interpretation); see also LUBAN, *supra* note 7, at 184–88 (critiquing Goldsmith’s Article 49 draft opinion). Goldsmith did act diligently in urging United States authorities in Iraq to carefully document the illegal status of transferees. Goldsmith Draft Memo, *supra* note 214, at 374 n.9. Goldsmith fails to recognize, however, that when an occupying power has influence over the occupied country’s government, changes to the immigration status of disfavored groups may result. Indeed, during the Nazi occupation, compliant governments in France, Hungary, and Croatia stripped Jews of their citizenship, making them illegal aliens. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT’L L. 295, 323–25 (2007) (discussing historical background of Article 49). An occupier’s careful documentation of this status should not mitigate the violation of international law.

219. Geneva Convention (IV), *supra* note 216, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.

220. See 8 U.S.C. § 1227(a) (2006) (providing classes of deportable aliens).

221. Goldsmith Draft Memo, *supra* note 214, at 369–70.

222. *Id.* at 371.

“transfer” to close any gaps created by their referring to “deportation.” Because the proposed practice deals with illegal aliens, not those who are lawful, he argues that Article 49 is not an obstacle.<sup>223</sup>

The interpretive strategy of reading “deportation” and “transfer” as redundant is inconsistent with a hermeneutic tack Goldsmith takes later in the memo. In seeking to avoid the plain meaning of Article 49’s text, he argues that this reading would render redundant Article 51, which bars forced labor, and Article 76, which bars deportation of those accused of offenses and who must be detained in the occupied country.<sup>224</sup> The ICRC contends, however, that these provisions merely reemphasize and reiterate the central obligation contained in Article 49.<sup>225</sup> This view is clearly more consistent with the purposes of each provision. In any case, if Goldsmith embraces redundancy when the result supports the government’s preferred option, as in the construction of “deportation” and “transfer,” a commitment to lawyerly craft should require the same tolerance when the results point in the other direction.

Through much of the memo, Goldsmith proceeds without considering the institutional mission creep that enables abuses. If transparency is not present, abuse is far more likely. Because detentions outside an occupied territory will probably be secret, abuses will occur. Since Goldsmith does not “know” that abuses will occur,<sup>226</sup> he is on safe ethical ground.<sup>227</sup> Lawyers, however, should do more, including offering advice where needed on the institutional consequences of their client’s actions.<sup>228</sup> Goldsmith appears to reject this stance.<sup>229</sup> Goldsmith’s position here echoes his view of Yoo’s memo—he believed there that procedural safeguards were in place to minimize

---

223. *Id.* at 380.

224. *Id.* at 378.

225. *See id.* at 379 n.13 (noting the ICRC’s position).

226. *See* GOLDSMITH, *supra* note 1, at 172–73 (asserting lack of knowledge about whether advice was sought in connection with a “broader rendition program”).

227. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2008) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal . . .”).

228. *See id.* R. 2.1 (encouraging the lawyer to offer advice on nonlegal consequences); *see generally* Peter Margulies, “Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213 (1990) [hereinafter Margulies, “Who Are You to Tell Me That?"] (arguing that public interest lawyers and others have an obligation to discuss nonlegal issues with clients).

229. *See* GOLDSMITH, *supra* note 1, at 147–48 (“OLC’s ultimate responsibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result.”). Other passages in the book suggest that Goldsmith is a prudentialist at heart, concerned with institutional reputation. *See id.* at 158 (discussing his decision to withdraw the Yoo memo). Goldsmith has yet to succeed in reconciling the parsimonious and prudentialist elements of his perspective.



abuse and criticized Yoo for unnecessarily sweeping language. Here, too, Goldsmith assumes that no abuse will occur, which is why he endorses brief detentions. Moreover, the emphasis on brief detentions takes on a more ominous tone if one considers the Levin memo, with its durational qualification for torture. Sometimes, despite Levin and Goldsmith's view, even a brief detention is problematic. To serve the abiding interests of the United States, a national security lawyer should pay more attention to these institutional concerns.

*B. Issue Entrepreneurs at the OLC and the Consequences of Ignoring Consequences*

Issue entrepreneurs who give short shrift to institutional consequences incur long-term costs for the institutions they serve. These long-term costs are often not evident immediately, when the issue entrepreneur earns plaudits for forging a new discourse and trashing old icons. In absorbing the praise, the issue entrepreneur also legitimates expedient actions, including the coercive interrogation at issue in each memo discussed above.<sup>230</sup> This legitimation, however, comes with severe costs for the reputational interests of the entity receiving the advice. In addition, issues like coercive interrogation generate an institutional overhang that dominates future discourse and crowds out other priorities. Moreover, the volatile transitions wrought by issue entrepreneurs, in the coercive interrogation context and in private sector debacles such as Enron, can inspire satellite misconduct such as perjury or obstruction. This misconduct undermines the integrity of institutions.

As with many issue entrepreneurs, the legitimation function of the lawfare critics was crucial. The legitimation function served instrumental ends—as Goldsmith concedes, officials could use the memos to engage in abuses with impunity.<sup>231</sup> This instrumental account, however, short-changes the lawfare critics' importance. Even before September 11, the lawfare critics provided an intellectual and normative imprimatur for efforts to expand executive power at the

---

230. Here, again, Goldsmith's withdrawal of Yoo's memo and his insistence that Iraqi captives were protected under the Geneva Conventions complicate the picture. One could plausibly argue that Goldsmith's championing of the lawfare paradigm actually positioned him well to take these courageous steps. Goldsmith got the OLC job, as he concedes, because people like David Addington believed that he would play the same role as John Yoo. *Id.* at 30. If Addington and others had understood from the start that Goldsmith's commitment to legal craft would temper his advice, the OLC position may have gone to someone with fewer scruples.

231. *Id.* at 150.

expense of congressional authority and international law.<sup>232</sup> The lawfare critics' prominence in elite journals in the late 1990s dovetailed perfectly with the mission of restoring executive power espoused by Vice President Cheney and Cheney's counsel, David Addington. This prominence gave the movement for executive power new cachet, and sharpened its story of a return to the origins of the Republic. Taken together, expedience and a compelling origin story produced a tipping point.<sup>233</sup>

The OLC lawyers of the Bush Administration had something else in common with other issue entrepreneurs. As noted above, a stylized iconoclasm or disturbing of boundaries often helps issue entrepreneurs get noticed. Yoo and Goldsmith demonstrated this technique. Yoo's failure to cite *Youngstown* and his use of a statute with marginal relevance to coercive interrogation, along with his sweeping claims for presidential power, have been described as bad lawyering, or as studied ignorance. They also had a more expressive function, however, demonstrating his contempt for the traditions that customary international law and the *Youngstown* framework embody. Goldsmith, who never relinquished a commitment to lawyerly craft, reacted with ruefulness and regret to this spectacle. Indeed, Yoo's excesses triggered Goldsmith's attempt to have it both ways. As a reaction to Yoo, Goldsmith sought to preserve the lawfare critique while also rejecting the Bush Administration's imprudent unilateralism. In his Article 49 draft, however, Goldsmith engages in a more unobtrusive brand of idol-smashing. In approving the removal of undocumented aliens

---

232. Goldsmith did not share Yoo's executive unilateralism in all respects. While he believed the President had authority to detain and try enemy combatants without express congressional authority, he also believed that more robust procedural safeguards were necessary. *See id.* at 28–29. His wholesale critique of international law, however, muted this difference. *Id.* at 28 (discussing Addington's detailed knowledge of Goldsmith's views on international law).

233. A number of lawyers within the government dissented from this view. *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 147, 196–99 (2007) (discussing criticism of Addington's and Yoo's policies by William H. Taft IV, Legal Advisor for the State Department, and other Justice Department lawyers, including Deputy Attorney General Jim Comey); Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1819–21 (2007) (discussing dissent by military lawyers).

Goldsmith's book on the Bush Administration, despite what this Article contends is its mixed message, has clearly helped focus attention on the poor track record of the Administration. *See Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 5–37 (2007) (testimony of Jack Goldsmith on background of torture memos and dispute about the Administration's Terrorist Surveillance Program); *cf.* 153 CONG. REC. S15011–12 (daily ed. Dec. 7, 2007) (remarks of Sen. Whitehouse) (castigating the unduly expansive interpretation of presidential power given in classified OLC opinions).

from Iraq, Goldsmith declines to cite or distinguish the Vienna Convention's dictum that treaties like the Geneva Conventions should be interpreted according to their purpose.<sup>235</sup> This conspicuous failure is not inadvertent. Rather, it is rooted in Goldsmith's lawfare narrative, which dismisses the benefits that other scholars have claimed accompany the Vienna Convention's rules on interpretation. Goldsmith's Article 49 memo was a manifestation of this disdain.<sup>235</sup>

The tipping point engineered in part by the lawfare critics had significant consequences.<sup>236</sup> Commentators on American foreign policy contend that the United States' greatest strength lies in its "soft power"—its ability to leverage cultural, social, and political vitality to persuade other countries without the use of force.<sup>237</sup> The efficacy of soft power depends on perceptions that the United States acts fairly,<sup>238</sup> as measured by observance of human rights and international humanitarian norms. American defection from international law norms discredits those who promote such norms as an answer to extremists. It also gives a valuable rhetorical tool to despotic regimes that wish to resist constructive change.<sup>239</sup> Popular indignation at this intransigence can result in a violent reaction that puts extremists in power, as the case of Iran demonstrates.<sup>240</sup> In this fashion, the volatil-

234. In fairness, Goldsmith does not ignore purpose; rather, he argues that one should interpret the purpose of Article 49 narrowly, to encompass only permanent removal of lawful residents of the occupied territory. See Goldsmith Draft Memo, *supra* note 214, at 371. The Vienna Convention's guidance here suggests, however, that broad interpretations are favored. See Vienna Convention, *supra* note 218. Goldsmith does not acknowledge this guidance.

235. See GOLDSMITH & POSNER, *supra* note 9, at 97–98 (arguing that Vienna Convention adds nothing to initial processes of treaty formation and ratification in reducing dangers of prisoner dilemma games in foreign affairs).

236. The discussion in this paragraph borrows in large part from an earlier piece. See Margulies, *When to Push the Envelope*, *supra* note 77, at 657–58.

237. 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").

238. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1487 (2003) (arguing that perceptions that the United States adheres to double standards weakens its soft power).

239. Margulies, *When to Push the Envelope*, *supra* note 77, at 658.

240. See STEPHEN KINZER, *OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 196* (2006) (noting that efforts by the United States to dislodge democratically elected regimes in Iran and elsewhere exacerbated anti-American sentiments). Antiterror measures passed by Congress can also have unintended policy consequences, even when they pass constitutional muster. For example, consider terrorist financing restrictions such as the federal material support statute, which bars the provision of material support to terrorist activity or terrorist organizations. See 18 U.S.C. § 2339A & B (2000 & Supp. V 2007). Without due care in enforcement, the material support statute can unduly

ity bred by the decline of American soft power damages American interests and legitimacy abroad.

Issue entrepreneurship during times of crisis can also impair the deliberation necessary for sound political judgment at home. Here again, institutional pathologies distort rationality. Politics is path-dependent—one event serves as a catalyst for reactions, even when those reactions would not be optimal from a long-term perspective.<sup>241</sup> In setting a path to follow, the executive has the advantage of dispatch. Once the executive sets the agenda, she can lock the country into place. For example, if the *Charming Betsy* canon has descriptive as well as normative force, Congress may not wish to cavalierly pass legislation opposed to international law.<sup>242</sup> Once the President acts, however,

---

chill charitable giving by Muslims seeking to fulfill obligations of their faith. It can also further polarize the political environment overseas by forcing groups to replace contributions by moderates with funding from extreme elements in countries such as Saudi Arabia where antiterrorism efforts are sometimes spotty in implementation. See Nina J. Crimm, *Muslim-Americans' Charitable Giving Dilemma: What About a Centralized Terror-Free Donor Advised Fund?*, 13 ROGER WILLIAMS L. REV. (forthcoming 2008) (discussing obligation rooted in Islam of *zakat* or sacrifice to assist the less fortunate and risk of alienation if antiterror laws frustrate fulfillment of this duty; suggesting an organizational structure that would facilitate giving while meeting antiterror goals through transparency and monitoring); Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1351–53 (2004) (discussing policy consequences of antiterror legislation); Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT'L L. REV. 65, 75–84 (2007) [hereinafter Margulies, *Laws of Unintended Consequences*] (same); see also DAVID COLE, *ENEMY ALIENS* 76 (2003) (arguing that the material support statute is unconstitutional); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 486–92 (2007) (arguing that some conspiracy prosecutions under material support laws are surrogates for preventive detention because defendants' acts are remote in time, scope, or certainty of implementation from actual violence). But see Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134–37 (9th Cir. 2007) (upholding material support statute as serving significant governmental objective and imposing merely incidental burden on free speech; rejecting vagueness challenge to statutory prohibition of provision of “personnel,” while finding prohibitions on provision of “training” and “expert advice or assistance” void for vagueness).

241. See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001) (defining path-dependence). Goldsmith and Posner recognize the influence of such processes, but maintain the virtues of their parsimonious model. See GOLDSMITH & POSNER, *supra* note 9, at 7–9 (discussing critiques to rational choice theory).

242. Cf. Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 73–76 (2007) (arguing that the President should be more constrained by treaties and customary international law than by statutes because such forms of international law embody long-term practice of states—as in customary international law—and unique collaboration between Congress and the President—as in the case of treaties). But see Yoo, *Globalism and the Constitution*, *supra* note 97, at 1963 (noting that the Senate is “the sole legislative participant in the treaty power”).

impetus for enacting such a regime increases because of concern about otherwise exposing state officials or private actors cooperating with them to legal liability. Path-dependence produces a hasty congressional rubber stamp, such as the Military Commissions Act, which also raises substantial constitutional issues.<sup>243</sup> Eventually, as in foreign affairs, a massive counter-reaction may ensue, such as the Non-Detention Act,<sup>244</sup> passed in the wake of the Cold War, which sought to deny

---

243. See *supra* notes 123–129 and accompanying text. For an interesting argument that civilian courts also have problems in handling terrorism cases, see A. John Radsan, *The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417, 1417–19 (2005) (arguing that problems with prosecution of Zacarias Moussaoui stemmed from lack of fit between security concerns and the criminal justice system, and that the Department of Defense should have detained Moussaoui).

Constitutional issues also emerged in related areas, particularly in the Administration's Terrorist Surveillance Program ("TSP"). The TSP involved access to millions of electronic communications, many of them made by persons in the United States. Although we know relatively little about the TSP, the program's extensive warrantless surveillance seemed to violate the procedures set out by Congress in the Foreign Intelligence Surveillance Act ("FISA"). See, e.g., 50 U.S.C. § 1809(a)(1) (2000) (prohibiting electronic surveillance without statutory authorization); cf. Ellen C. Yaroshesky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203 (2006) (discussing challenges for defense counsel imposed by FISA). Administration justifications of the TSP were made using the same inherent authority argument John Yoo made in his memo: arguing that the President's Article II status as Commander in Chief gave him this power and that, in any event, Congress had implicitly authorized surveillance under the Authorization for Use of Military Force ("AUMF") of September 18, 2001. See Letter from William E. Moschella, Asst. Att'y Gen., to The Honorable Pat Roberts, Chairman, Sen. Select Comm. on Intelligence, et al. (Dec. 22, 2005), available at <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf>; cf. John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 566 (2007) (arguing for the constitutionality of TSP).

The Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), cast substantial doubt on the government's assertions regarding the TSP. In *Hamdan*, the Court held that the AUMF did not authorize the unilateral establishment of military commissions by President Bush, when those commissions violated the international law of war that Congress had incorporated by reference into the Uniform Code of Military Justice. *Id.* at 593–94. By analogy, the AUMF also did not authorize the comprehensive surveillance program occurring within the United States embodied in the TSP. To his great credit, Goldsmith opposed the very broad TSP initially implemented by the President, but it is unclear whether he opposed the revised program, which was adopted after objections by Goldsmith, Attorney General Ashcroft, and Deputy Attorney General James Comey. See Goldsmith, *supra* note 1, at 182; see also John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 105–06 (2006) (arguing that the TSP is unconstitutional); David Alan Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice Over Internet Protocol*, 47 B.C. L. REV. 505, 544 (2006) (arguing that TSP violated evolving Fourth Amendment standards). But see Orin S. Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create a "Reasonable Expectation of Privacy?"*, 33 CONN. L. REV. 503, 504–05 (2001) (arguing that individuals using encryption may have subjective expectation of privacy, but such an expectation is not normatively reasonable under the Fourth Amendment).

244. See 18 U.S.C. § 4001(a) (2000).

the President *any* authority to detain an individual, regardless of the exigency of the situation.<sup>245</sup> Here, as in the international realm, volatility does not serve abiding values.<sup>246</sup>

Because of path-dependence, unduly risky actions taken by officials at one point can hamstring future decisionmakers. Attorney General Michael B. Mukasey, someone who by all accounts is a decent and honest public servant, has appeared evasive and equivocal because of his refusal to answer questions about whether waterboarding constitutes torture. He has compounded this impression with recent remarks that the facts and circumstances might determine whether waterboarding fits the bill.<sup>247</sup> Subsequent observations that it would

---

245. *Id.* But see *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (authorizing detention of alleged terrorist under AUMF); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2106 (2005) (arguing that AUMF trumps Non-Detention Act); Margulies, *Judging Terror*, *supra* note 114, at 421–25 (arguing that AUMF provides sufficient authority for interstitial, narrowly tailored detention); Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85 N.C. L. REV. 1687, 1695–98 (2007) (discussing Justice O'Connor's plurality opinion in *Hamdi v. Rumsfeld*); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 157, 190–92 (2004) (expressing doubt about executive authority to detain individuals without express congressional approval).

246. Before a counter-reaction develops, the nature of political markets will often encourage hasty appeals to the use of force. A political candidate who fails to endorse the use of force and the maximum discretion in its use looks “soft.” That is one reason that official lists of terrorist states or organizations rarely shrink—politicians who make or oversee such lists find advantage in expanding the terrorist groups targeted, while no one wants to call for removing a group from the watch list. See Margulies, *Laws of Unintended Consequences*, *supra* note 240, at 81 (discussing political liability of appearing soft on terrorism). Just as politicians rarely say that sentences for criminals are too high, or that fewer aliens should be deported for engaging in illegal conduct, the capacity and discretion to use force tends to expand in the political marketplace. The same dynamic encourages harsher criminal laws. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 29 (2007) (“[T]he ability of the state to take drastic action against convicted wrongdoers provides an unparalleled constitutional avenue of action.”); see also Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2237–51 (2003) (discussing factors that broaden the scope of criminal liability under federal statutes); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–39 (2001) (noting convergence of interests between legislators and prosecutors that broadens scope of criminal law); cf. Richman & Stuntz, *supra* note 25, at 618–24 (discussing dynamics of federal criminal prosecution of terrorists).

247. See Richard B. Schmitt, *Is It Torture? He's Still Not Ready to Say*, L.A. TIMES, Jan. 30, 2008, at A10 (stating that, during a Senate Committee hearing, Mukasey declined to provide a definitive opinion on whether waterboarding constituted torture); cf. Dan Eggen, *Justice Official Defends Rough CIA Interrogations; Severe, Lasting Pain is Torture, He Says*, WASH. POST, Feb. 17, 2008, at A3 (reporting on testimony of Steven Bradbury, acting chief of OLC, that waterboarding as practiced by Bush Administration did not constitute torture). Mukasey has permitted an ethics inquiry into OLC memos on interrogation, conducted by the Justice Department's Office of Professional Responsibility. See Scott Shane, *Waterboarding Focus of Inquiry by Justice Dept.*, N.Y. TIMES, Feb. 23, 2008, at A1.

be inappropriate for the Justice Department to prosecute officials for violations of the torture statute when those officials relied on OLC advice have fleshed out the portrait of a good man stuck with the results of past excesses for which he was not responsible. Congressional frustration at Mukasey's equivocations has made it difficult to gather political momentum for needed changes in staffing and policy at the Justice Department, as the Department seeks to recover from the disastrous reign of former Attorney General Gonzales.<sup>248</sup>

A final externality generated by issue entrepreneurship on coercion and international law concerns the integrity of government officials. As the response to Abu Ghraib revealed, norms like the international and domestic rules against torture can be diluted, but not extinguished. Eventually, departures will become a matter for shame, regret, or anxiety about legal exposure. These factors drive the occurrence of satellite misconduct revolving around the interrogation regime, including obstruction of justice and perjury. The destruction of the CIA tapes of interrogation sessions illustrates this risk.<sup>249</sup> Satellite misconduct further undermines the integrity of the officials implementing the policy, particularly of the lawyers involved. In this way, issue entrepreneurs dealing with inherently dangerous or intrusive programs create negative externalities in legal ethics that persist even if the government seeks to resume observance of international norms.

#### IV. APPROACHES TO REGULATING ISSUE ENTREPRENEURS ON NATIONAL SECURITY MATTERS

If issue entrepreneurship is a problem, the next question is what to do about it. There are a number of options, including criminal law, tort law, structural remedies, and informal norms. The criminal and tort law options are both novel for lawyers giving advice, yet perhaps more apt in this setting than in others that lack the potential for such high negative externalities. The *Bivens* action filed recently against John Yoo<sup>250</sup> may herald greater use of these avenues. The informal norms approach has also gained traction. For each approach, one

---

248. The Administration's insistence that the Senate confirm Steven Bradbury as permanent head of the OLC, despite Bradbury's role in drafting legal opinions that condoned abusive interrogations, has also contributed to this problem of institutional overhang. See Peter Baker, *Bush Urges Vote on Nominees; Senate Democrats Aim to Stall Till '09*, WASH. POST, Feb. 8, 2008, at A17.

249. See Scott Shane, *Prosecutor to Review Official Handling of C.I.A. Tapes*, N.Y. TIMES, Feb. 10, 2008, at A23 (discussing the destruction of interrogation tapes).

250. See Complaint at 3, *Padilla v. Yoo*, No. 08-0035 (N.D. Cal. Jan. 4, 2008) (bringing civil rights action against Yoo in his individual capacity).

should question whether the option in question enhances deliberation about the difficult issues facing lawyers giving national security advice. Evaluation should keep in mind that remedies will apply not only to the current Administration, but to those in the future.

### A. *Criminalizing National Security Advice*

Criminalizing legal advice of any kind seems like a stretch, at first glance. Legal rules protect the attorney-client relationship, most obviously through an evidentiary privilege designed to promote communication. The threat of criminal prosecution may erect a barrier between lawyer and client, making communication more difficult. That being said, one can construct an argument for criminal prosecution when the lawyer gives certain kinds of advice.

The centerpiece of this argument would be the classification of legal authorization as a crime of complicity, such as aiding and abetting.<sup>251</sup> Terrorist prosecutions include cases where culpability has attached because of the dissemination of an authorization for violence.<sup>252</sup> A factfinder should determine that the authorizing party knowingly assisted unlawful acts, and that her actions contributed significantly to the acts' occurrence. This authorization theory would support liability for a cleric who endorsed specific acts of violence as being consistent with religious teachings with the knowledge that members of the group would act on this endorsement.<sup>253</sup>

---

251. Cf. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 212–29 (2000) (discussing case law and advancing theory of complicity based on participation and “authorship” of shared enterprise). For example, a lawyer giving advice that enabled the torture of a suspect, including a suspect at a so-called CIA “black site” abroad, could be charged with aiding and abetting a war crime or a violation of the torture statute. The Supreme Court has recently limited civil liability for aiding and abetting under the securities laws and expressed some concern about negative externalities that could be triggered by such a cause of action. See *Stoneridge Inv. Partners v. Scientific-Atlanta*, 128 S. Ct. 761, 771–72 (2008).

252. See *United States v. Sattar*, 314 F. Supp. 2d 279, 296–99 (S.D.N.Y. 2004) (reviewing indictment of an attorney for aiding a translator pass messages to an imprisoned foreign terrorist organization leader); cf. Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 448–52 (2007) (arguing that accomplices should be judged by their direct contribution to harm alleged and that distinction between principal and accomplice is incoherent and should be eliminated).

253. See, e.g., *United States v. Rahman*, 189 F.3d 88, 116–18 (2d Cir. 1999) (upholding cleric's conviction of conspiracy and solicitation of attack against the United States); cf. Margulies, *The Virtues and Vices of Solidarity*, *supra* note 62, at 197–200 (discussing how clerics and others may be liable for “signaling” their followers to engage in terrorist activity).



The lawyer who advises that inherently violent acts<sup>254</sup> such as coercive interrogation are permissible is not in theory different from the offending cleric. One might argue that the lawyer's advice is often hypothetical. The client asks, "If we did X, would that be legal?" The lawyer merely responds in kind. On this view, the lawyer cannot have knowledge of any specific acts that the client will commit after receipt of the lawyer's advice.

In the OLC context, however, this argument is unpersuasive. The government is a repeat player. It has significant opportunities to implement the lawyer's advice, whether or not it does so in a given case. Certainly, the distance between authorization and action is no greater than it would be for a cleric who declares that his associates can make Europe a free-fire zone.<sup>255</sup> In both cases, the individual that asked for the authorization knows that the question is not an idle one.

The next argument is that the prospect of criminal prosecution will induce unwelcome risk aversion in the government lawyer. Sometimes, the lawyer has to make tough calls, in which authorizing a violent act, such as a targeted killing, may protect United States persons against greater danger.<sup>256</sup> To deal with this issue, courts could require a jury to find that a defendant's advice was clearly in violation of settled law. The legal system asks juries to make this kind of decision all the time in the tort setting; in principle, the criminal context is no different.<sup>257</sup>

Despite the colorable case for criminal prosecution, this option fails because of its adverse consequences not only for the quality of legal judgment offered in the future by the President's advisers, but

---

254. See *Direct Sales Co. v. United States*, 319 U.S. 703, 711–13 (1943) (noting that seller's active encouragement of sales of inherently dangerous goods, coupled with knowledge of illegal activities, would support conspiracy charge).

255. I do not claim here that the United States government and a terrorist group are morally equivalent. Terrorists target civilians engaged in ordinary activities, including shopping, working, and taking public transportation. There is no credible evidence that United States officials do this, even though civilians may become collateral damage in the use of force.

256. See William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679–81 (2003) (discussing rationales in international and domestic law justifying targeted killing in carefully tailored circumstances).

257. Christopher Kutz argues that risk aversion is an appropriate stance when the lawyer's advice sets the stage for "gross violence," whether that violence is from private individuals or from the state. Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in *THE TORTURE DEBATE IN AMERICA*, *supra* note 7, at 241, 245. Kutz further argues that lawyers should have a safe harbor when they fully air the arguments against their stated position. *Id.* at 246. But see JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* 23–24 (2007) (arguing for criminal penalties); Markovic, *supra* note 168 (same).

also for the quality of the politics practiced by both parties. If Twain was right about the man with the hammer, we should be wary about the effects of giving partisan politicians the tool of criminal prosecution. The Independent Counsel statute, for example, too often substituted criminal investigations for the more challenging and important task of political debate on the issues.<sup>258</sup> As Robert Jackson noted decades ago, targeting a particular individual for investigation always risks unfairness because no one is perfect, and a prosecutor looking for wrongdoing will often find it.<sup>259</sup> If one could prosecute a John Yoo, one could also imagine a prosecution of a lawyer who acted as Robert Jackson did in the destroyer deal with Britain during World War II.<sup>260</sup> Each prosecution will increase the resentment of the other side, leading to a downward spiral of mutual recriminations. In addition, the threat of prosecution may make administrations more secretive, thus further impairing the quality of political discourse.<sup>261</sup>

The independent counsel investigation of Ted Olson reflects this concern. While Olson's eagerness to assert executive privilege regarding an independent agency—the EPA—was unduly doctrinaire, congressional Democrats' successful pressure for a criminal investigation was an excessive response. The entire matter would have been better handled through political avenues, including ongoing congressional oversight of both the EPA and the Justice Department.

Investigations of this kind have a nasty way of not just bringing law into politics to an inappropriate degree, but also bringing politics into law. The risk is particularly great because the conduct charged, as in Olson's case, will often involve satellite crimes like perjury and obstruction. While pretextual prosecutions are sometimes necessary to protect the integrity of the system, they give prosecutors a huge

---

258. See Lund, *supra* note 5, at 66 (discussing the shortcomings of the Independent Counsel law).

259. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19–20 (1940) (highlighting the potential of a prosecutor to abuse power by inappropriately focusing on certain individuals or groups).

260. See 39 Op. Att'y Gen. 484, 486–88 (1940); cf. JACKSON, *supra* note 75, at 93–103 (discussing background of destroyer deal, which eventually led to Lend-Lease legislation). I believe that Jackson acted properly because the process he and President Roosevelt engaged in was far more transparent than the process leading to issuance of the torture memos. See *supra* notes 75–77 and accompanying text; cf. GOLDSMITH, *supra* note 1, at 192–205 (discussing destroyer deal); Margulies, *When to Push the Envelope*, *supra* note 77, at 666–69 (same). In a volatile and polarized political climate, however, playing “gotcha” is often the activity of the moment, sweeping up dubious and worthy public servants alike.

261. This chilling effect is one reason that I propose a presumptive safe harbor from criminal prosecution for administrations that promptly make legal opinions public. See *infra* notes 373–380 and accompanying text.

amount of discretion which can easily be abused.<sup>262</sup> Leaks to burnish the prosecutor's reputation or embarrass the defense may become common.<sup>263</sup> These externalities suggest that criminal prosecution is often a cure worse than the disease.

### B. Tort Liability and OLC

Damages actions, like the one recently filed by Jose Padilla against John Yoo,<sup>264</sup> have the same virtues and problems as criminal liability. Damages actions can be based on group wrongdoing to address the plausible deniability that governmental organizations devise to shield themselves. Tort suits can also bring out valuable information about tipping points in organizational wrongdoing, much as legal scrutiny of the Enron debacle brought to light data about corporate misconduct.<sup>265</sup>

A tort suit regarding legal authorization for torture would be styled as a *Bivens* action, seeking to hold officials accountable for violations of constitutional rights.<sup>266</sup> In Padilla's case, if Yoo's legal recommendation was a significant cause<sup>267</sup> of the plaintiff's detention for

262. See Richman & Stuntz, *supra* note 25, at 590–91 (discussing the balance of power a prosecutor has in pretextual cases); cf. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 899–901 (2000) (arguing for greater control of prosecutorial discretion in cases involving parents allegedly using interstate travel to avoid paying child support).

263. See John Q. Barrett, *The Leak and the Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information*, 68 FORDHAM L. REV. 613, 632–33 (1999) (discussing the power of an investigative leak to affect personal lives, work, and general happiness).

264. See Complaint, Padilla v. Yoo, No. 08-0035 (N.D. Cal. Jan. 4, 2008).

265. See Regan, *supra* note 67, at 1141–42 (discussing how an examination of Enron's transactions during bankruptcy proceedings brought to light the fraudulent activity); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1, 12–15 (2005) (arguing that the culture of "ambivalently bureaucratic business[es]" may help explain the Enron scandal).

266. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389–92 (1971) (addressing claim that federal narcotics agents' activities violated the Fourth Amendment); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 266–67 (E.D.N.Y. 2006) (explaining that plaintiff's claims of "torture and coercive interrogation" fall under a *Bivens* analysis), *aff'd*, 532 F.3d 157 (2d Cir. 2008); cf. *id.* at 261–62 (discussing aiding and abetting liability under Torture Victim Protection Act). See generally James Barron, *U.S. Appeals Court to Rehear Case of Deported Canadian*, N.Y. TIMES, Aug. 15, 2008, at B4 (reporting that Second Circuit will rehear *Arar* case en banc).

267. On the question of causation in aiding and abetting liability, see *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 740–42 (7th Cir. 2007) (holding that plaintiff must demonstrate causation-in-fact to prevail on claim that alleged fundraisers for Hamas aided and abetted terrorist attack, while further explaining that collective wrongdoing often has many causes and that defendants' conduct need not be principal cause of harm to support liability), *reh'g granted and vacated* No. 05-1815, 2008 U.S. App. Lexis 12925 (7th Cir. June 16, 2008).

almost two years under conditions of extreme sensory deprivation and human isolation,<sup>268</sup> Yoo is arguably liable in the same fashion as other officials in on the decision, such as Defense Secretary Rumsfeld. The inherently dangerous nature of the activity—coercive interrogation—that Yoo endorsed buttresses this theory of tort liability.

Moreover, suits like Padilla's aid the cause of transparency in government. Few administrations have been as secretive as the Bush Administration. A source of particular frustration has been the secrecy surrounding legal analysis of the Administration's initiatives, including heightened interrogation techniques, National Security Agency surveillance, and so on. Even *in camera* inspection of some of the legal opinions withheld from view would be a victory. Moreover, there is always the possibility that publicity around the lawsuit would prompt further public disclosure, authorized or not, as occurred with the torture memos in the wake of Abu Ghraib. While secrets should not be revealed lightly, the Administration's determination to make the law itself secret is an effort perilous to democracy.

One can also argue that the many threshold questions in Padilla's suit are not necessarily obstacles to liability. Attorney-client privilege may well have been waived, at least as to already public documents like the Yoo memo. The state secrets doctrine<sup>269</sup> may not apply either, given the public disclosure of Padilla's detention and the conditions of his confinement, although the exact information that led to Padilla's arrest may be covered if it came from interrogation of other Al Qaeda detainees. The "special factors counseling hesitation" under *Bivens* may include embarrassment to a foreign power, but may not include embarrassment to the United States government, which is potentially embarrassed in any *Bivens* action.<sup>270</sup> Qualified immunity may not apply, particularly because some of Yoo's analysis, such as his analogy to the statute providing emergency medical coverage for undocumented aliens, would be laughable if the stakes were not so high. The

---

268. Padilla alleges that Yoo publicly admitted that he made this recommendation. See Complaint at 19, *Padilla v. Yoo*, No. 08-0035 (N.D. Cal. Jan. 4, 2008).

269. See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1250–53 (2007) (discussing general role of state secrets doctrine in post September 11 cases).

270. See *Arar*, 414 F. Supp. 2d at 281–82 (holding that embarrassment to Canada, which had allegedly cooperated in Arar's rendition to Syria, constitutes a special factor under *Bivens* analysis). Special factors could include the same risk of disclosure of sensitive intelligence information discussed in the text with respect to the state secrets doctrine.

plaintiffs face obstacles here that are significant, but perhaps not insurmountable.<sup>271</sup>

However, just as in the criminal context, there are reasons to be wary of tort litigation. Damages actions like Padilla's will not necessarily make national security lawyers more conscientious overall; instead, they may merely personalize a systemic problem. Targeting John Yoo may be emotionally satisfying, but it is hardly a panacea for the perennial dilemmas facing national security lawyers. Moreover, training fire on one law professor brings to mind Robert Jackson's warning about the dangers of investigating those who are currently unpopular. The better course might be to use political pressure to persuade the Administration to release the remaining legal opinions, and to engage Yoo on the merits.

*C. Prudence, Best Practices, and Preaching to the Choir: Informal Norms*

Another response to Yoo has come from veterans of the Clinton era OLC, who have suggested informal norms to regulate the issue entrepreneurship of the lawfare critics, while recognizing that the President also has a sphere of lawful authority. The informal norms approach has yielded a valuable document comprised of suggested guidelines for the OLC that will mitigate issue entrepreneurship in the future,<sup>272</sup> for example by urging open dissemination of OLC opinions whenever possible. The informal norms approach, however, has three problems that limit its utility. First, its guidelines are aspirational, looking toward the long-term health of the OLC. Long-term concerns tend to recede in emergencies, when they are most needed. Second, because the informal norms proponents hail almost exclusively from Democratic administrations, they lack the inclusiveness to formulate comprehensive norms or effectively impose reputational sanctions. Third, as a matter of substance, the informal norms approach does not give the President sufficient flexibility.

---

271. Regarding the qualified immunity issue, Yoo will assert that courts considered Padilla's habeas petitions for a number of years without reaching a definitive conclusion. In addition, Yoo would be able to cite the complicated venue questions in the case, arguably having the effect of prolonging Padilla's confinement. Padilla's own lawyers decided to maintain their lawsuit in the Second Circuit, where Padilla was initially detained as a material witness, instead of filing in the Fourth Circuit, where Padilla was held for the bulk of the detention period. The Supreme Court eventually held that habeas jurisdiction over Padilla was available only in the Fourth Circuit. See *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004). Holding Yoo responsible for the tactical decision made by Padilla's attorneys seems unfair.

272. See Johnsen, *supra* note 5, at 1603–10 (highlighting ten helpful OLC guidelines).

The first problem with the guidelines is their aspirational content. They are a valuable first step, but an emergency often places long-term concerns on the back-burner. Attorneys are people, too, and invoking long-term concerns can seem like party-pooing. No one wants to be a party-pooer. Long-term concerns like those involving individual rights can also seem irrelevant in an emergency, when the government is bracing for the next attack. Finally, even mentioning long-term concerns in such a climate can prejudice the lawyer's ability to get a job. Government employers looking to hire an issue entrepreneur with a disdain for "lawfare" do not really want to hear about how the entrepreneur will temper her ideological pursuits with a concern for the country's reputation. If the government official was interested in this concern, he would not be interviewing this particular candidate. Similarly, the candidate gets signals from the government about what kind of candidate will get the nod. Goldsmith candidly acknowledges that this tacit sidelining of reputation and rights concerns occurred in his interview process.<sup>273</sup> It would seem likely to recur. In this sense, the informal norms approach has the inverse problem of the tort and criminal strategies—they over-enforce norms, while the informal norms approach leads to under-enforcement.

The second problem with the informal norms approach is the underinclusiveness of its stakeholders. In recent decades, issue entrepreneurship has largely been a factor in Republican administrations. This, to be sure, was not always true. One could point to aggressive legal interpretations during Democratic administrations—for example, opinions supporting the escalation in Vietnam.<sup>274</sup> One could also point to aggressive legal interpretations during the Roosevelt Administration—Jackson's opinion on the destroyer deal might fit the bill, for example, although Jackson was never an advocate for unfettered executive power or disregard of international law. Legal opinions supporting Roosevelt's court-packing proposal might also qualify. Much earlier, during Jefferson's Administration, Attorney General Levi Lincoln was an issue entrepreneur, albeit one who wished to curtail the power of the federal government.

Nevertheless, if one considers recent history, the history of entrepreneurship encompasses figures like Rehnquist, Olson, Charles Fried,<sup>275</sup> and Goldsmith, who mixed entrepreneurship on some issues

---

273. See GOLDSMITH, *supra* note 1, at 29–30 (describing his interview process).

274. See Leonard C. Meeker, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP'T ST. BULL. 474 (1966), *reprinted in* DYCUS ET AL., *supra* note 78, at 209.

275. See generally FRIED, *supra* note 86.

with more balanced analysis on others,<sup>276</sup> along with lawyers who took a starker line, like Douglas Kmiec<sup>277</sup> and Yoo. There are some legitimate reasons for the way that issue entrepreneurship has occurred and thrived disproportionately in Republican administrations. Republicans tend to see the permanent government of the bureaucracy as a Democratic preserve, bearing the partisan stamp of its New Deal beginnings.<sup>278</sup> Republicans practice issue entrepreneurship to combat the perceived institutional advantage of Democrats in the permanent government.<sup>279</sup> This distrust of the permanent government, however, means that Republicans will not feel bound by informal understandings that do not include them and will not share the stake that Democrats have in enforcing those understandings.<sup>280</sup> That

276. Rehnquist's rejection of the view that the President is empowered to impound lawfully appropriated funds is a cardinal illustration here, along with Goldsmith's withdrawal of the Yoo memo and his opinion that Iraqi captives were entitled to Geneva rights.

277. See DOUGLAS W. KMEIC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* 179–88 (1992) (asserting expansive view of the President's power over foreign affairs in the context of the Iran-Contra episode); cf. FRIED, *supra* note 86, at 168 (discussing dispute between Fried, on the one hand, and John Bolton and Kmiec, on the other, regarding the utility of argument for strict separation of powers). Despite Kmiec's long record of championing executive branch authority, he apparently has found the aggressive posture of the Bush Administration too much to stomach. See SAVAGE, *supra* note 233, at 243–44 (noting, in regard to presidential signing statements that amount to a *sub silentio* veto of legislation, Kmiec's comment that "[t]he President is not well served by the lawyers who have been advising him"). Kmiec has also contended recently that Barack Obama is a worthy heir of the Reagan mantle. See Douglas W. Kmiec, *Reaganites for Obama? Sorry, McCain. Barack Obama is a Natural for the Catholic Vote*, SLATE, Feb. 13, 2008, <http://www.slate.com/id/2184378/>.

278. See FRIED, *supra* note 86, at 15 (discussing the Reagan Revolution's opposition to the New Deal's entrenchment of bureaucracy).

279. Cf. *id.* at 154–55 (discussing intractability of permanent government); SAVAGE, *supra* note 233, at 281–86 (discussing efforts in first and second Bush Administrations to control bureaucracy).

280. Republicans may also be disturbed by an unattractive side of the informal norms approach (although not the one practiced by the principals of the "OLC in exile" group): the shunning that Yoo has encountered in some portions of the legal academy. See Robert Collier, *Furor Over UC Prof's Brief on War; He Advised Bush on Prisoners' Rights*, S.F. CHRON., June 7, 2004, at A1 (reporting on petition drive asking Yoo to resign his faculty position). Criticism of Yoo is undoubtedly appropriate; however, shunning can come to resemble the personal targeting that occurred with some risk earlier in our history. Condemnation of Yoo for one episode, no matter how significant, should not end his career, or tar those who rightly believe that Yoo has worthwhile insights to offer on a number of international and constitutional law topics, including the history of the treaty power. See, e.g., Yoo, *Globalism and the Constitution*, *supra* note 97, at 1960–61 (marshalling historical evidence to demonstrate that the Framers and state ratifying conventions did not believe that all treaties were inherently self-executing, and more controversially, to argue that all treaties require implementing legislation). But see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2126–37 (1999) (disputing Yoo's second, more controversial thesis). Surely the proof is in the pudding—if the work is useful, it should be applauded; if it is not, it should be vigorously

means that the risk of issue entrepreneurship will remain high in Republican administrations.

The final problem with the informal norms approach is its failure to give the President sufficient flexibility. The guidelines indicate that the OLC should provide the President with the “best” view of the applicable law.<sup>281</sup> If this means merely that the OLC should clearly and honestly set forth the relevant authority found in the Constitution, judicial decisions, and statutes, it is hard to disagree. However, the guidelines may mean something stronger—that the most *accurate* reading of a particular source of authority, for example, a statute, is necessarily the “best” reading. In the statutory context, therefore, the best reading would be the one most consistent with legislative intent (assuming no serious constitutional questions). While this is often true, one can think of situations where it is not—FDR’s destroyer deal, for one. There are situations where the President should act according to a view of the law that is *not* the most accurate, because of pressing interests or values.<sup>282</sup> The OLC should be free to give the President advice to this effect, as long as the advice is public, takes account of contrary authority, and meets other criteria I set out later in this Article.<sup>283</sup> Limiting OLC to a narrow definition of the “best” reading ignores the situations where a different action by the President serves the national interest.<sup>284</sup>

#### D. *Structural Remedies: A New Foundation, or Rearranging the Deck Chairs?*

In light of the inadequacies of the criminal, tort, and informal norms approaches, some commentators have proposed structural fixes to problems with OLC and with executive branch decisionmak-

criticized. The identity of the author may at the margins color perceptions, particularly if Yoo opines on matters where his views may seem like an apologia. The author’s identity, however, should not substitute for evaluation of the work on its merits, and should not harm scholars who collaborate with Yoo and who have not engaged in the problematic conduct that Yoo has displayed.

281. See Johnsen, *supra* note 5, at 1605 (stating that the OLC should guide the President with the best understanding of all legal implications).

282. For one account of different approaches to the problem of presidential power in emergencies, see CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 275–76 (2d ed. 2006) (citing Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1386–88 (1989)) (distinguishing between absolutist, relativist, and liberal constitutionalist approaches).

283. See *infra* Part VI.

284. The guidelines might be susceptible to an alternative reading in which the “best” interpretation reflects the President’s considered judgment in exigent circumstances. The guidelines, however, do not squarely address what factors might guide the President’s legal advisors in such a situation.



ing.<sup>285</sup> For example, Neal Katyal has proposed that many of the advisory functions of the OLC be turned over to an adjudicative entity structured as an independent agency.<sup>286</sup> Nina Pillard has argued that OLC lawyers should engage more with others in the executive branch and has recommended a larger role for the Justice Department's Inspector General.<sup>287</sup> These structural approaches have significant promise but also raise more questions than they answer.

The most serious problem is that the adjudicator proposal does not have sufficient flexibility to deal with the wide range of pressing problems that confront a President, particularly in the realm of foreign affairs and national security. An adjudicative model contemplates time to submit briefs, affidavits, and exhibits from each side. However, in an emergency situation such as the Cuban Missile Crisis or even the French overture that resulted in the Louisiana Purchase, time may be short, and the window for action may close. To a significant degree, then, an adjudicative approach builds in risk-aversion in a way that may not be most productive for American interests.

The adjudicative model may also be too rigid from a substantive perspective. It will tend to apply judicial precedent because that is the most natural source of authority for an adjudicative body. Judicial precedent, however, may not suit the myriad of situations where procedural or other obstacles leave the executive as the sole decisionmaker.<sup>288</sup> In addition, the adjudicator's definition of the "best" interpretation will typically devolve to the question of accuracy, whether or not that reading matches national interests. Moreover, because executive authority often lacks a practical check because of the presence of a political question that defeats judicial review,<sup>289</sup> it seems odd to empower an adjudicative entity to decide matters raising such

285. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–41 (2006) (discussing how the OLC's structure and goals may affect its advice to the President); cf. Pillard, *supra* note 5, at 748–58 (discussing structural reforms in OLC, including a greater role for the Justice Department Office of the Inspector General); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 897–909 (2007) (criticizing Katyal's proposals as unduly rigid or utopian, but proposing prudential strategies, such as bipartisanship in appointments, that might have comparable effects). Goldsmith has endorsed the prudential structural measures, such as bipartisanship in wartime appointments, suggested by Posner and Vermeule. See GOLDSMITH, *supra* note 1, at 203–05 (approving of Roosevelt's bipartisan appointments).

286. See Katyal, *supra* note 285, at 2337.

287. See Pillard, *supra* note 5, at 754–58.

288. See McGinnis, *supra* note 5, at 382–89 (discussing court-centered view); Pillard, *supra* note 5, at 683–84 (same).

289. See *Baker v. Carr*, 369 U.S. 186, 214–17 (1962) (discussing a number of realms where political questions predominate, including the duration of hostilities); cf. *id.* at 217

concerns. By the same token, if the entity declines "jurisdiction" on this basis, the executive is left with no guidance whatsoever.

One should also be concerned about the legitimacy of such a tribunal and the quality of the input it receives. Courts in America are legitimate in part because they are adversarial. Inquisitorial proceedings are rare, at least in courts, with exceptions limited to certain kinds of contempt citations. Moreover, the Supreme Court has held that standing to sue requires concretely adversarial relationships between the parties, not just because of Article III, but also because concreteness sharpens the issues.<sup>290</sup> In the structural reform model's adjudicative entity, it is not clear who will oppose the position taken by the President, or what institutional interest will impel that fortunate entity to argue zealously in opposition. Admittedly, the State Department might be a capable and eager adversary on some international law issues. However, this may not always be the case.<sup>291</sup> Without a sure source of adversarial inputs, the tribunal is left gazing at its own navel, which is not always an edifying view.

The President can also seek to exit the adjudicative option by seeking advice elsewhere, such as the White House Counsel. This exit strategy would make legal advice even more political and less independent.<sup>292</sup> While Katyal suggests that courts could encourage use of the adjudicator by withholding deference to decisions that were made through a different route,<sup>293</sup> courts may not elect to take this tack. Moreover, the various doctrines permitting deference are so manipulable that the signals to the President will inevitably be mixed.

In sum, the structural approach is also no panacea. There is much to be learned, however, from a "clean sheet of paper" exercise

---

(noting that a "lack of judicially discoverable and manageable standards" may signal the presence of a political question).

290. *Id.* at 204.

291. In addition, bringing in the State Department raises another problem inherent in the scheme: like the game of whack-a-mole, the adjudicator proposal may merely shift political influence to another part of the process. The President will have an incentive to select both a Director of Adjudication and a Secretary of State who march in lock-step with the President, because that will be the only way to preserve maximum flexibility for the executive.

292. The unique prestige of the OLC may make exit less likely. See MARYANNE BORRELLI ET AL., THE WHITE HOUSE 2001 PROJECT, REP. NO. 29, THE WHITE HOUSE COUNSEL'S OFFICE 12 (2000), available at <http://whitehousetransitionproject.org/files/counsel/Counsel-OD.PDF> (quoting C. Boyden Gray, White House Counsel under President George H. W. Bush, as observing that, "[w]e [the White House] were free to ignore their advice but you knew . . . you did so at your peril because if you got into trouble you wouldn't have them there backing you up, you wouldn't have the institution backing you up").

293. See Katyal, *supra* note 285, at 2340 (explaining that courts can encourage "internal checks" by implicitly promising judicial deference).

involving the architecture of legal decisionmaking in the executive branch. In particular, measures to encourage reporting to Congress, disclosures to the public, and involvement by other entities, such as Inspectors General, are worth investigating further.

*E. The Ethical National Security Lawyer: An Oxymoron?*

Some have suggested that state disciplinary authorities investigate John Yoo for violations of the ethical rules governing attorney conduct.<sup>294</sup> As noted, Yoo may have violated Rule 1.1, which requires that the lawyer give competent advice,<sup>295</sup> and Rule 1.2, which bars the lawyer from counseling the client to commit a crime or fraud, or assisting the client in doing so.<sup>296</sup> One could also argue that regardless of Yoo's conduct, further attention to the distinctive problems of national security lawyers is appropriate in the drafting of ethical standards. The first option is unattractive, for reasons I explain here, while the second has promise as part of a pragmatic approach, as I explain in the next section.

The disciplinary options are not unprecedented. While state disciplinary authorities would surely be reluctant to head into this thicket in the broad run of cases, they have done so.<sup>297</sup> In the District of Columbia and New York bars, there are pools of expertise to evaluate these issues.

Nevertheless, the same "gotcha" externalities bedevil the ethics option for Yoo. Targeting Yoo allows many critics of the Administration to feel good, but does little to address the systemic problems that Yoo represents. In addition, the ethics rules do not provide a clear avenue for sanctioning Yoo. In particular, the word "knows," which qualifies the lawyer's duty to avoid counseling a client to engage in illegal behavior, forms a significant obstacle.<sup>298</sup> The word is in the

---

294. See Michael E. Tigar, *What Lawyers, What Edge?*, 36 HOFSTRA L. REV. 521, 536–37 (2007). The Justice Department could also reprimand an OLC attorney who has violated ethics rules or department policy, or file a grievance against the attorney with a state bar. See Shane, *supra* note 247 (describing Justice Department investigation of OLC opinions).

295. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

296. *Id.* R. 1.2(d); see Clark, *supra* note 17, at 465–69; Harris, *supra* note 17, at 420.

297. See LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 390–94 (2005) (discussing case of Abraham Sofaer, former law professor, federal judge, and State Department legal advisor, who was disciplined for representing the Libyan government in connection with Libya's role in the bombing of Pan Am flight 103 years after Sofaer had participated in U.S. government decisions to use force against Libya based on Libya's role in previous terrorist attacks).

298. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008).

rules to set up high barriers in precisely this situation.<sup>299</sup> Expecting bar disciplinary counsel, who typically focus on theft from clients and more mundane concerns, to interpret the term more broadly is unrealistic.

These issues do not apply to revisions of the ethics rules that might codify some of the best practices that commentators from the "OLC in exile" have identified, as part of a repertoire of reforms. I will turn to this task in the final section of the Article.

## V. A MODEL OF DIALOGIC EQUIPOISE

To respond to these concerns, we need a deliberative model that rejects the issue entrepreneur role, sidesteps the downsides of the regulatory frameworks set out above, and exemplifies both a commitment to abiding values and the capacity to respond to exigent situations. On difficult national security questions, the OLC lawyer cannot be merely a "neutral expositor" of the law, advising the President to mechanically comply with the most accurate reading of legislative intent.<sup>300</sup> Yet, by the same token, the lawyer giving national security advice cannot content herself with a situational approach, taking direction on an ad hoc basis from each occupant of the executive office. Instead, the lawyer should take an institutional approach,<sup>301</sup> centering on upholding what I call dialogic equipoise between the branches.

In an earlier article, I argued that lawyers needed to maintain a balance or equipoise between entrepreneurial activity—attracting clients through advocacy of particular positions or fashioning of distinctive litigation styles—and gatekeeping—preserving the integrity of the

---

299. For a bracing, if not cynical, account of the language in legal ethics codes, see Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 641–52 (1981) (arguing that professional self-regulation usually serves the profession's interests, rather than interests of the public).

300. See Moss, *supra* note 5, at 1323–24 (explaining that the OLC has used "constitutional practice" to support the President's military use where Congress has not explicitly given guidance). In areas where Congress has constitutional authority, however, statutory text that is clear should compel compliance, absent substantial questions about constitutionality. For an example of such serious questions, ultimately vindicated by the Supreme Court, see Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1355–56 (1953) (setting out President Roosevelt's view, contrary to Jackson's own, that the portion of Lend-Lease Act allowing Congress to suspend aid to Britain by means of a concurrent resolution was invalid); Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 35 (1994) (noting Supreme Court decision in *INS v. Chadha*, 462 U.S. 919 (1983)), *reprinted in* H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 577–80 (1999).

301. For another take on this institutional conception, see McGinnis, *supra* note 5.

legal system, even when the result may harm a client.<sup>302</sup> The first attribute is compelled by the need for client autonomy and by the lawyer's freedom under the First Amendment to forge a professional identity; the second is inherent in the lawyer's democratic role of intermediary between public and private interests.<sup>303</sup>

The model of dialogic equipoise rests not only on a conception of the lawyer's role but also on a pragmatic conception of the separation of powers in national security matters, which also entails checks and balances.<sup>304</sup> The overlapping powers given to the political branches, such as the authority to declare war and provide for the armed forces given to Congress under Article I of the Constitution, and the authority given to the President as Commander in Chief, are perhaps the most prominent example. Ideally, interpretations of this architecture in both the courts and the political branches<sup>305</sup> not only should provide "latitude of interpretation for changing times"<sup>306</sup> but also seek to prevent the power of any one branch from dominating the others.

#### A. *Transparency, Tailoring, and Dialogic Equipoise*

This model rests on two elements: transparency and tailoring. Transparency calls for dialog between the branches, within the executive branch, and with the public, to develop a sense of stake and optimize the quality of decisions. Tailoring, like the equitable tailoring that courts do to take into account the interests of parties and the

---

302. See Margulies, *Lawyers' Independence*, *supra* note 4, at 952–54. I argued that this balance had two key elements: (1) avoiding prior knowledge of a client's wrongdoing, which would tend to make the advocate or adviser into an accomplice, and (2) preserving the ability to give the client bad news. *Id.* I also argued that this approach was relevant to the advice context, and that John Yoo, who had reason to know that the government would act on his opinion by using coercive tactics in interrogations also failed to accurately account for contrary precedent or accurately characterize authority that allegedly supported his view, had failed this test on both counts. *Id.* at 977–78.

303. *Id.* at 943–44. Kronman's model of the lawyer as source of wisdom and prudence captures this dimension. See KRONMAN, *supra* note 13, at 128–34 (describing a good lawyer as one who is both sympathetic and detached in the lawyer-client relationship).

304. The Framers expressly sought this "distributed and blended" approach to power, as opposed to a model where each branch had powers hermetically sealed from those of the others. See THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

305. See Morrison, *supra* note 18, at 1240–44 (discussing executive branch interpretation); Pillard, *supra* note 5, at 676–84 (same); cf. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1599–1615 (2005) (book review) (discussing problems with theories that prioritize interpretation by legislative and executive branches over court-centered view).

306. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

public interest,<sup>307</sup> requires that the lawyer seek to accommodate both the rationale and content of proposed executive action within the constitutional scheme of overlapping authority among the branches.

The role conception that drives the dialogic equipoise model stems not only from the logic of the separation of powers but also from the lawyer's function in representing collective entities and the historical function of the Attorney General. Under the Model Rules, lawyers representing collective entities such as corporations must act in the best interests of the organization.<sup>308</sup> On significant occasions, such as when a person, like a CEO, that the lawyer would ordinarily look to for direction on the organization's behalf acts against the entity's interests, the lawyer has an obligation to uphold those interests. This institutional obligation reduces the agency costs that flow from the self-dealing or myopia of particular managers, and promotes continuity within the organization.<sup>309</sup> The sense of institutional obligation within the dialogic equipoise model also echoes the background understanding that existed at the founding of the function of the Attorney General, derived from English law.<sup>310</sup> A minimum of objectivity was part and parcel of this understanding.<sup>311</sup> Edmund Randolph, the first Attorney General of the United States, set the tone with opinions on the establishment of the Bank of the United States that were measured, taking into account the most cogent arguments for and against the proposal.<sup>312</sup>

Because the model seeks to reduce the agency costs of executive overreaching, it also preserves the long-term perspective that emergencies can sometimes obscure. Transparency can help prevent the loss of executive power and credibility that can follow in the wake of executive overreaching. Transparency also preserves the legitimacy and international reputation of the United States by displaying the executive's confidence that it can rally others to its cause and respond

---

307. See *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944) (explaining that the public interest should inform a court's grant of injunctive relief).

308. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2008).

309. See Margulies, *Lawyers' Independence*, *supra* note 4, at 957–58 (citing Enron as an example).

310. See Moss, *supra* note 5, at 1310 n.27 (citing English commentator who noted that tradition and the unwritten understanding of England's ancient "constitution" established the basic requirement that the Attorney General "must not allow political considerations to affect his actions in those matters in which he has to act in an impartial and even quasi-judicial way").

311. See Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 118–20 (1994) (discussing an early Attorney General's ability to provide honest and independent analysis).

312. *Id.*

to their concerns. This is what the drafters of the Declaration of Independence had in mind when they claimed “a decent Respect [for] the Opinions of Mankind.”<sup>313</sup> Maintaining reputation allows the United States to exercise “soft power”<sup>314</sup> that will often be more effective than brute force.<sup>315</sup> In this fashion, a dialogic equipoise model enhances long-term stability and aids in refining current policies.

Moreover, transparency does not necessarily frustrate timely action, including the use of force when that is necessary. In the Cuban Missile Crisis, for example, the Administration engaged in a wide and vigorous internal debate and subsequently consulted with foreign capitals and international organizations.<sup>316</sup> The destroyer deal between the United States and Britain featured a robust internal debate. Most recently, dialog with Congress and the United Nations preceded the decision by the United States to intervene militarily in Afghanistan after September 11. Government attorneys should urge dialog and advise the President of the adverse consequences attending a lack of transparency.

Just as dialog yields results that preserve American leverage, tailoring an executive response will have similar benefits. Courts use tailoring to ensure that extraordinary remedies such as injunctions serve the public interest and respect the rights of the parties.<sup>317</sup> Under established principles of equity, a court will take care that an injunction uses the minimum amount of coercion—and, by correlation, the minimum amount of judicial capital—necessary to ensure compliance with the law. Similarly, when lawyers advise the President that a planned action is permissible, they should ensure that both the claim of executive authority and the action authorized intrude to the minimum extent on the interests of other branches, the rights of individuals, and the core principles of international law. In the Cuban Missile Crisis, for example, the Kennedy Administration rejected an all-out attack on Cuba and opted instead for a limited blockade in large part

---

313. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

314. See NYE, *supra* note 237, at 35 (emphasizing the necessity of cultivating friendship and cooperation with foreign countries, particularly European nations).

315. See Margulies, *When to Push the Envelope*, *supra* note 77, at 657–58.

316. *Id.* at 671.

317. See John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1387, 1389 (2007) (discussing how injunctions play an important role in public programs); cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1039–40 (2004) (discussing role of remedies in fostering innovation and flexibility in government institutions). For a classic analysis, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

because of concerns about the international reputation of the United States.<sup>318</sup>

The equipoise contemplated here is fluid, not static, in keeping with events. Just as balancing on a bicycle or a high beam typically requires movement, the President's authority resists a rigid interpretation.<sup>319</sup> To permit the "scope and elasticity"<sup>320</sup> necessary in a changing world, a legal advisor can approve bounded, interstitial actions like the blockade during the Cuban Missile Crisis that clash with the most accurate reading of a statute or of international law.<sup>321</sup> As long as those actions have been the subject of robust dialog, interstitial movements of this kind enhance democracy. Like attempts in court to challenge the weight of precedent, such interstitial moves can highlight possible discontinuities between current understandings and pressing realities, and further the evolution of the law.<sup>322</sup>

---

318. See KENNEDY, *supra* note 148, at 9 (recounting Attorney General's argument that an all-out attack on Cuba would be "Pearl Harbor in reverse"); cf. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 25-40 (1974) (discussing international law issues).

319. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

320. *Id.*

321. The blockade ordered by President Kennedy in response to the Soviets' placement of offensive nuclear missiles on the island of Cuba was probably not a reaction to an "imminent" threat of force, and therefore would not be considered self-defense under international law. See U.N. Charter art. 51 (establishing the inherent right of individual self-defense upon an armed attack); cf. Margulies, *When to Push the Envelope*, *supra* note 77, at 669-72 (discussing legal basis for the blockade). Nevertheless, at least one prominent issue entrepreneur who usually urged a limited role for executive power in foreign affairs supported the blockade, citing the tailoring that typified Kennedy's approach. See Louis Henkin, Comment in CHAYES, *supra* note 318, at 149, 152-53 (discussing how international law limited U.S. options during the Cuban Missile Crisis). In the future, issues of information security will test the flexibility and integrity of the legal framework governing the use of force. See Mark R. Shulman, Note, *Discrimination in the Laws of Information Warfare*, 37 COLUM. J. TRANSNAT'L L. 939, 961-66 (1999) (questioning the need to discriminate between military and civilian targets in information warfare); cf. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 913-30 (1999) (discussing circumstances where force might be appropriate response to computer attack, particularly when attack can be reasonably viewed as a component of a strategy resulting in an armed assault).

322. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008) (stating that a lawyer may "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"). Other branches besides the executive have on occasion made use of measures that pose tensions with the separation of powers but are justifiable on an interstitial basis. In approving the independent counsel statute, Chief Justice Rehnquist, who was a functionalist in his view of the separation of powers, asserted that Congress had the power to place the appointment of certain executive officers in the courts of law. Rehnquist also noted that the role of the independent counsel was limited in jurisdiction and tenure. *Morrison v. Olson*, 487 U.S. 654, 671 (1988). As the Court recognized in *Olson*, courts have long had the power to appoint attorneys to prosecute criminal



*B. Equipose in Action: Lincoln and Habeas Corpus*

For a still-controversial example of dialogic equipose, consider Lincoln's suspension of habeas in April 1861.<sup>323</sup> At that time, Marylanders sympathetic to the Confederacy attacked Union troops,<sup>324</sup> impeded the movements of state militias coming to the aid of Washington, D.C.,<sup>325</sup> and burned railroad bridges from Baltimore to the North.<sup>326</sup> Maryland officials, who were either unwilling or unable to control the ensuing mob violence, demanded that Lincoln promise that no Union forces would travel through the state.<sup>327</sup>

If Congress had been in session, it might have taken action to prevent the encirclement of the capital and restore order in Maryland. However, Congress had adjourned.<sup>328</sup> Nevertheless, statutes permitted the President to call out the militia to preserve the authority of the federal courts.<sup>329</sup> These statutes arguably contemplated the declaration of martial law. Under martial law, the government enjoyed the same power it possessed after the suspension of habeas corpus.<sup>330</sup> In light of all of these factors, Lincoln took the extraordi-

contempt charges. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793–96 (1987). Some of these devices, including the independent counsel statute, were unwise. It was best in the long run, however, to leave this realization to the political process, rather than mandate it as a matter of constitutional law.

323. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 26–60 (1998) (discussing background to Lincoln's suspension of habeas corpus); Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 716–17 (2006) (discussing Lincoln's suspension of habeas corpus).

324. JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 184–85* (2006).

325. See Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post-9-11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS 25, 35 (2003).

326. Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U. BALT. L. REV. 11, 14–15 (2004).

327. SIMON, *supra* note 324, at 185.

328. DANIEL FARBER, *LINCOLN'S CONSTITUTION* 117 (2003).

329. See *Ex parte Field*, 9 F. Cas. 1, 6–7 (C.C.D. Vt. 1862) (No. 4,761) (citing the Militia Act of 1795); cf. FARBER, *supra* note 328, at 162 (discussing *Field*); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 175–77 (2004) (same). Interestingly, Chief Justice Taney had also, prior to the Civil War, articulated a robust view of the President's power to call out the militia to quell insurrections. See *Luther v. Borden*, 48 U.S. 1, 43 (1849) (asserting that judicial review of the President's decision would be a “guarantee of anarchy”).

330. Buchanan's Attorney General, J.S. Black, displayed a risk aversion that failed the test of dialogic equipose. Instead of recognizing that Union military force might be necessary to uphold the authority of the federal courts in the event of a rebellion, Black counseled that pervasive anti-federal feeling in any state would render presidential attempts to restore federal authority futile and thus “wholly illegal.” See *Power of the President in Executing the Laws*, 9 Op. Att'y Gen. 516, 523 (1860). Buchanan's instructions to Black may have foreordained this result. See POWELL, *supra* note 300, at 168.

nary measure of suspending habeas corpus on the route between Philadelphia and Washington, D.C.<sup>331</sup> He stuck to his decision in the face of an opinion by Chief Justice Taney in *Ex parte Merryman*<sup>332</sup> that required the government to produce an individual arrested on suspicion of helping to drill a Confederate unit.<sup>333</sup> Lincoln also demonstrated transparency, convening Congress for a special session on July 4, 1861, sending a message explaining his actions and seeking ratification of wartime measures.<sup>334</sup>

In his message, Lincoln offered a pragmatic reading of the Constitution's Take Care Clause,<sup>335</sup> consistent with a dialogic equipoise model. Lincoln argued that the Take Care Clause's injunction that the President "take care that the laws be faithfully executed" did not mandate mere ministerial implementation, but at least in times of crisis required a quantum of judgment.<sup>336</sup> Viewed as a rule of reason, the Take Care Clause permitted interstitial departures to address exigent circumstances. Taney's view in *Merryman* was more rigid. Taney based his holding that the President could not unilaterally suspend habeas on the placement of the Suspension Clause<sup>337</sup> in Article I, which deals with the powers of Congress.<sup>338</sup> Lincoln responded that the textual placement of the Suspension Clause was not dispositive. According to Lincoln, framing "laws" in the plural required attention to "[t]he whole of the laws," rather than pondering a single law in isolation.<sup>339</sup> Employing the metaphor of home and dwelling place

331. FARBER, *supra* note 328, at 16–17, 163; 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).

332. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

333. NEELY, *supra* note 136, at 10; see FRANK J. WILLIAMS, JUDGING LINCOLN 63 (2002) (noting that Merryman was accused of recruiting a unit of soldiers for the Confederacy, and then serving as a drillmaster for the unit). Taney dismissed these charges as "vague and unsupported accusations." See *Ex parte Merryman*, 17 F. Cas. at 147. Taney also discounted the threat to federal authority in Maryland, asserting that "there had never been the slightest resistance" to the lawful exercise of federal power in the state. *Id.* at 152.

334. See President's Message to Congress in Special Session (July 4, 1861) [hereinafter July 4 Message], in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy B. Basler ed., 1953).

335. U.S. CONST. art. II, § 3.

336. See July 4 Message, *supra* note 334, at 429–30 (quoting U.S. CONST. art. II, § 3).

337. U.S. CONST. art. I, § 9.

338. *Ex parte Merryman*, 17 F. Cas. at 148.

339. July 4 Message, *supra* note 334, at 430; see also ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 58–59 (First Mariner Books 2004) (discussing Lincoln's exercise of power); Barron & Lederman, *supra* note 2, at 998–1000 (arguing that Lincoln's actions were essentially contingent and provisional, and did not rest on absolutist conception of presidential power). Against the weight of historical consensus, Neely views Lincoln's message to Congress as muddled and hesitant. See NEELY, *supra* note 136, at 11–13. This quali-

that had served Lincoln so well in his “house divided” speech on the effects of slavery,<sup>340</sup> he argued that his duty lay in ensuring that constitutional government did not “go to pieces” as it faced the existential threat of insurrection and secession.<sup>341</sup> On this view, the Take Care Clause required an interstitial violation of one of the laws, including the Suspension Clause, if the alternative was permitting “all the laws, *but one*, to go unexecuted . . . .”<sup>342</sup>

In contrast to Lincoln’s interstitial approach, Attorney General Edward Bates’s opinion upholding suspension—sent to Congress shortly after Lincoln’s message—failed the test of dialogic equipoise.<sup>343</sup> While Bates couched his argument in part in the legislative authorization provided by the statutes of 1795 and 1807, he also made

fied tone, however, may simply suggest that Lincoln was wary of absolute pronouncements and recognized the importance of tailoring.

340. See MARK E. NEELY, JR., *THE LAST BEST HOPE OF EARTH: ABRAHAM LINCOLN AND THE PROMISE OF AMERICA* 46–48 (1995) (discussing Lincoln’s speech at the Republican convention on June 16, 1858).

341. July 4 Message, *supra* note 334, at 430.

342. *Id.* The Supreme Court arguably ratified Lincoln’s interstitial approach. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court struck down the use of military commissions to try non-belligerents in areas where the federal courts were functioning. The Court acknowledged, however, that “in a great crisis” such as the Civil War, the government needed the flexibility to detain people who posed an imminent danger. *Id.* at 125 (observing that “exigency” would require suspension of writ when “immediate public investigation according to law may not be possible; and . . . the peril to the country may be too imminent to suffer such persons to go at large”).

343. See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74 (1861). One influential school of thought asserts that interstitial acts by the President are “extra-legal,” even when they may be justifiable in exigent circumstances. Proponents of this view argue that keeping interstitial acts in this realm minimizes the risk that an excess of power will distort the normal processes of law. See OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 123–27 (2006) (analyzing Jefferson’s view); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1099–1109 (2003) (same); cf. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1003 (2004) (arguing that emergency measures create their own momentum). Like dialogic equipoise, the extra-legalist account emphasizes transparency and ratification by Congress, the courts, or both. But see Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 47–48 (Mark Tushnet ed., 2005) (arguing that requirements of transparency and ratification impose merely weak proceduralist duties on the executive). The extra-legalist view, however, suffers from an unduly narrow reading of what constitutes legality. Over time, interstitial departures such as the Louisiana Purchase, Lincoln’s habeas suspension, and Roosevelt’s destroyer deal become part of a common law of executive practice. Shaping that common law to the whole fabric of American constitutionalism requires a nuanced understanding of the factors underlying each departure. See Margulies, *Beyond Absolutism*, *supra* note 179, at 322–23 (critiquing extra-legalist model); cf. Morrison, *supra* note 18 (discussing legal interpretation in the executive branch); Pillard, *supra* note 5 (same). Armed with this understanding, we can discern whether future departures are appropriately tailored or ultra vires. The extra-legalist account impedes this understanding.

an absolutist case for presidential power that does not depend on the temporary condition of a congressional recess.<sup>344</sup> In addition, Bates argued that the justification for suspension is a political question, not susceptible to judicial resolution.<sup>345</sup> Whether Bates's lack of reservations stemmed from his ideological commitments,<sup>346</sup> or—more cynically—his doing Lincoln's bidding in a "good cop, bad cop" routine for Congress's benefit, Bates's absolutism struck an ominous tone that I will return to shortly.

Before exploring this point, however, I should note that other measures taken by presidents in trying times fit the interstitial elements of dialogic equipoise. Roosevelt's destroyer deal with Britain was discussed publicly before Attorney General Jackson issued his opinion approving the transaction and was ratified by Congress early in the next year when it enacted the Lend-Lease program into law.<sup>347</sup> The destroyer deal was modest, dealing with over-age destroyers, and did not work a wholesale transfer of American military might to the British.<sup>348</sup> John F. Kennedy's response to the Cuban Missile Crisis was also tailored and included robust internal dialog within the Administration, consultation with allies, and submission of the matter to the Organization of American States.<sup>349</sup>

Each of these initiatives also led to other valuable developments in the law. The presidential power that Lincoln displayed in the suspension of habeas corpus was a direct antecedent of the power he wielded in the Emancipation Proclamation, which was subsequently ratified by the Thirteenth Amendment<sup>350</sup> and is now embodied in

---

344. 10 Op. Att'y Gen. 74, 80–83 (1861).

345. *Id.* at 86; cf. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 335–36 (2006) (arguing against view that suspension is political question).

346. See POWELL, *supra* note 300, at 179–80 (considering Bates' views).

347. See Barron & Lederman, *supra* note 2, at 1042–47.

348. See JACKSON, *supra* note 75, at 93–103.

349. See Margulies, *When to Push the Envelope*, *supra* note 77, at 669–72. In addition, shortly before the crisis began, Congress passed a resolution about Cuba aimed at enhancing the President's leverage. See SCHLESINGER, *supra* note 339, at 174–75. But see *id.* (discussing unwillingness of influential senators to give the President advance authorization to commence hostilities). If the President had consulted Congress during this Cold War episode, legislators may well have pressed for a more aggressive response.

350. See Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1142; cf. *id.* at 1149 (discussing argument that Thirteenth and Fourteenth Amendments ratified Lincoln's actions, whatever their constitutionality and justification at the time); 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 wartime authority). Lincoln's leveraging of both lawful and interstitial authority was even more skillful and sustained in his measures directed against slavery, starting with his July 4, 1861, recommendation that Congress pass a confiscation act that freed slaves em-

strong international antislavery norms.<sup>351</sup> Roosevelt's destroyer deal led to the Lend-Lease Act,<sup>352</sup> which contributed materially to the defeat of Hitler and indirectly to establishment of the United Nations after World War II.<sup>353</sup> Kennedy's tailored response to the Cuban Missile Crisis led to the negotiation the next year of the nuclear test ban treaty with the Soviet Union.<sup>354</sup>

---

played in aiding the Confederacy in areas captured by Union forces. See JAMES OAKES, *THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS* 143 (2007).

351. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (prohibiting slavery in all forms).

352. See Barron & Lederman, *supra* note 2, at 1046–47.

353. See ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1945*, at 7–9 (1979) (discussing evolution of Roosevelt's views on world governance, stemming from his experience as Assistant Secretary of the Navy in the Wilson Administration); Bush, *supra* note 147, at 2365–67 (discussing Robert Jackson's views on aggression and international law).

354. See President John F. Kennedy, Commencement Address at American University (June 10, 1963), available at <http://www.american.edu/media/speeches/Kennedy.htm> (calling on Khrushchev and the Soviet Union to work with the United States to reach a comprehensive nuclear test ban treaty).

For a contemporary example of dialogic equipoise, consider an opinion by another Bush Administration OLC Deputy Assistant Attorney General, Patrick Philbin. In a 2003 opinion, Philbin opined that the Immigration and Naturalization Service had statutory authority to detain an alien pending deportation for a period longer than the 90 days. See *Limitations on the Detention Authority of the Immigration and Naturalization Service*, Op. Off. Legal Counsel (Feb. 20, 2003), <http://www.usdoj.gov/olc/INSDetention.htm> (discussing Section 241(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(1)(A) (2000)). To justify a reasonable delay, Philbin first advanced a purposive reading of the statute: careful checking would promote foreign policy and national security goals closely related to immigration regulation. *Id.* The statute expressly gave the government the authority to reject removal to a specific country if removal would be “prejudicial to the United States.” 8 U.S.C. § 1231(b)(2)(C)(iv) (2000). This authority would be inconsistent with a requirement that the government release the alien within the United States. Second, the Supreme Court had indicated that deference to the executive may be appropriate in removal cases involving terrorist activity to avoid gaps in the “Nation’s armor.” *Zadydas v. Davis*, 533 U.S. 678, 695–96 (2001). The publication of Philbin’s opinion was the final step in the interstitial process. Once the opinion was published, Congress was free to examine the issue. Congress’s failure to act would signal legislative acquiescence in the practice, bringing it within Box 2 of Justice Jackson’s *Youngstown* analysis, where the President’s decisions are entitled to some deference. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). For a discussion on acquiescence theory, see *Dames & Moore v. Regan*, 453 U.S. 654, 668–69, 678–88 (1981); *Youngstown*, 343 U.S. at 610–11; H. Jefferson Powell, *The President’s Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 538–39 (1999).

Philbin’s painstaking analysis here and elsewhere came at a price. After Bush’s reelection, Solicitor General Paul Clement wanted to hire Philbin as his principal deputy. David Addington, Vice President Cheney’s counsel, expressed opposition. Newly appointed Attorney General Alberto Gonzales acquiesced to Addington. See GOLDSMITH, *supra* note 1, at 171; SAVAGE, *supra* note 233, at 198.

Nevertheless, the sage advisor must realize that interstitial moves may linger in an unhealthy fashion, outliving their utility and engendering lasting harm. The lawyer providing national security advice should carefully underline that an interstitial move that affects individual rights, such as Lincoln's suspension of habeas, should lapse at the earliest possible opportunity. In the case of suspension, this should have happened in July of 1861, when Congress was in session, able to vote for suspension itself (as it ultimately did in 1863),<sup>355</sup> and when the threat of secession and insurrection in Maryland had eased. Lincoln's failure to do this counts as a retreat from the dialogic equipoise model, resulting in the detention with minimal due process of some 13,000 citizens.<sup>356</sup> Few of the detainees posed a threat and many were detained because they expressed doubt about the Union cause in public, or because a neighbor or erstwhile friend reported some private conversation to settle a score.<sup>357</sup> Indeed, congressional ratification of the suspension did not end the constitutional difficulties faced by the government. Consistent with the institutional overhang phenomenon mentioned earlier, Congress sacrificed liberty for perceived security, enacting the regime of military commissions that the Court struck down in *Ex parte Milligan*.<sup>358</sup> Lawyers considering interstitial departures should recognize the asymmetry between the ease of initiating an intrusive regime in a time of crisis and the difficulty of ending that regime once its rationale has evaporated.

### C. *Can Equipoise Encompass Torture?*

The allowance for interstitial action under this model preserves presidential flexibility. Does it make the lawyer too pliable? For example, it might be possible to argue that torture of one suspect believed to have valuable information would be merely interstitial. The short answer here is that torture is covered by a categorical bar under international law. The CAT prohibits it, with no exceptions.<sup>359</sup> In addition, under customary international law, torture is a violation of *jus cogens* from which states cannot derogate.<sup>360</sup> Although Congress could violate this prohibition, courts would require the clearest possi-

---

355. See NEELY, *supra* note 136, at 68.

356. *Id.* at 23.

357. See *id.* at 57-60 (recounting the circumstances surrounding various detentions).

358. 71 U.S. 2 (1866).

359. Convention against Torture, *supra* note 172, art. 2.

360. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) (1987).

ble statement of legislative intent. Acquiescence would not be sufficient.

In addition, as I have noted, under an appropriate reading of the *Charming Betsy* canon, courts would construe the Torture Act as consistent with *jus cogens*. Because Congress passed the torture statute, and more recent legislation such as the McCain Amendment,<sup>361</sup> pursuant to its textually granted authority under the Constitution to “define and punish . . . Offences against the Law of Nations,”<sup>362</sup> this would leave the would-be torturer where we found him, in *Youngstown’s* Box 3, where the President’s power is at its “lowest ebb.”<sup>363</sup>

The Supreme Court has never said that the President has the authority to violate international law; indeed, in *Hamdan v. Rumsfeld*, the Court found that the President lacked authority to unilaterally establish tribunals that violated Congress’s incorporation of the law of war.<sup>364</sup> Some might suggest that a lawyer advised the President to do what was necessary and later count on legislation from Congress to retroactively grant impunity to the perpetrators. This was arguably what happened with the passage of the Military Commissions Act of 2006. Under a dialogic equipoise model, however, the President’s disclosure would have been inadequate because it was both involuntary and delayed for over two years after coercive interrogations began.<sup>365</sup>

Torture should also not be viewed as interstitial because it is both immeasurable and irreversible. Individuals’ tolerance for pain varies, so the infliction of pain is not susceptible to precise measurement. In this sense, torture is distinct from detention, which we can measure in terms of the time involved. Very brief periods of restraint are permissible in ordinary law enforcement,<sup>366</sup> while the Supreme Court has frowned on indefinite detention without due process.<sup>367</sup> Although

361. See S. Amend. 1977, 109th Cong., 151 CONG. REC. S10908 (2005) (enacted) (prohibiting inhumane and degrading treatment of prisoners in United States government custody); Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1403, 119 Stat. 347 (2005).

362. U.S. CONST. art. I, § 8.

363. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

364. *Hamdan v. Rumsfeld*, 548 U.S. 557, 559–60 (2006).

365. Margulies, *When to Push the Envelope*, *supra* note 77, at 662 n.88; see also Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 268 (2007) (comparing Bush Administration’s view of extra-statutory presidential authority to approach taken by presidents Jefferson and Lincoln).

366. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (identifying circumstances in which police officers may detain and search individuals).

367. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517–21 (2004) (explaining that the United States may detain enemy combatants “for the duration of the relevant conflict” and that “indefinite detention for the purpose of interrogation is not authorized”).

Daniel Levin's OLC memo seeks to define torture in durational terms,<sup>368</sup> this definition does not reckon with torture's lasting psychological consequences. Because of these psychological ramifications, torture is irreversible. While the trauma of brief detention may fade upon release, we have no such assurance about the psychological fragmentation that torture engenders.<sup>369</sup> Torture's stains on national reputation are similarly difficult to eradicate. In light of these concerns, a dialogic equipoise model would reject any *ex ante* authorization of interrogation based on physical harm.<sup>370</sup>

## VI. ENFORCING DIALOGIC EQUIPOISE: A COMPREHENSIVE REGIME

If we grant that an institutional model of government lawyering stressing dialogic equipoise is superior, we are left with the question of how to enforce it. The bad news here is that no single approach will do the trick—as we have seen, each method, including criminal and tort liability, informal norms, structural reform, and professional discipline, has problems. If we use these methods in combination, however, we may arrive at an effective and fair compliance regime.<sup>371</sup> This pragmatic approach would rely on tort and criminal law to lend teeth to the informal norm school's urging of transparency. It would turn to prospective changes in ethics law, devoted to the special issues facing national security lawyers, to encourage best practices, including citing and distinguishing contrary authority in the provision of advice and relying on the argument for presidential action that is least intru-

---

368. See Levin Memo, *supra* note 200, at 372–74 (discussing “prolonged mental harm” under the Convention against Torture).

369. See Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 904–09 (2005) (stating that “[e]ven when the victim[ ] . . . survives, torture is a kind of death precisely because it reduces the victim to his body”).

370. This prohibition would include threats of physical harm to the captive or to third parties. See Margulies & Corbin, *supra* note 123. Justice Scalia evidently disagrees. See *Scalia Says He Sees a Role For Physical Interrogations*, N.Y. TIMES, Feb. 13, 2008, at A17. For a more thoughtful defense of coercive interrogation in isolated circumstances entailing the prevention of catastrophic harm, see generally PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* (2005). Even if the lawyer should not authorize infliction of physical pain for purposes of interrogation, this does not mean that Fifth Amendment standards appropriate for domestic law enforcement must govern all aspects of the interrogation of terrorists. For example, full *Miranda* warnings may be impractical or unwise, depending on the place and purpose of interrogation. See *United States v. Bin Laden*, 132 F. Supp. 2d 168, 187–88 (S.D.N.Y. 2001) (holding that United States agents interrogating foreign national abroad did not have to inform subject that he would be provided with an attorney upon his request when circumstances made such a guarantee impracticable).

371. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 847–53 (1992) (offering an optimal compliance strategy).



sive on the separation of powers.<sup>372</sup> Finally, to address the problem of satellite misconduct, this pragmatic regime suggests a structural reform that posits greater involvement for Inspectors General, in conjunction with the OLC. I discuss these possible provisions in turn.

### A. *Disclosure as Safe Harbor*

If criminal and tort liability seem harsh, one solution might be to make disclosure a presumptive safe harbor through legislation or court rulings. Disclosure will promote both deliberation and accountability. Ideally, it will also spur efforts at consensus.

Disclosure as a safe harbor is already a common theme in administrative, corporate, and tort law. Deference in administrative law follows from a deliberative process that is transparent and open to input from interested parties.<sup>373</sup> Corporations that timely disclose possible market-moving events shift responsibility to investors.<sup>374</sup> Professionals

372. These changes in the law governing lawyers could be the result of specialized standards, such as the ABA's Criminal Justice Standards, or changes to the Model Rules themselves. See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587–91 (discussing areas in which Model Rules could provide additional guidance for prosecutors). But see Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 518–20 (1992) (cautioning that ethics regulation can unduly chill prosecutors or even prompt exit from domain of professional regulation).

373. This disclosure and dialog is a crucial underpinning for the deference that the Court often accords to administrative decisions. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 853–59, 863–65 (1984) (describing an agency's lengthy dialog with various stakeholders through notice and comment procedures prior to issuing regulations); see also *Riegel v. Medtronic*, 128 S. Ct. 999, 1005, 1011 (2008) (discussing Food and Drug Administration reporting requirements imposed on pharmaceutical companies as backdrop for holding that federal law preempts state tort law in suits on medical devices); cf. Peter L. Strauss, *Within Marbury: The Importance of Judicial Limits on the Executive's Power To Say What the Law Is*, 116 YALE L.J. POCKET PART 59, 62 (2006), [http://thepocketpart.org/images/pdfs/63\\_a.pdf](http://thepocketpart.org/images/pdfs/63_a.pdf) (discussing the importance of public dialog and participation as a rationale for deference in administrative law); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2669–70 (2005) (arguing that deference to presidential interpretations can be problematic when deference conflicts with civil liberties). The rationale for deference has sparked particularly heated discussion in the realm of presidential authority over foreign affairs. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 673–75 (2000) (discussing virtues of appropriately cabined doctrine of deference in foreign affairs); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1765–71 (2007) (discussing variation among schools of thought on deference doctrine). Compare Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204–07 (2007) (arguing for deference to executive), with Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1257–75 (2007) (arguing against blanket deference to executive).

374. See JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 205–06 (2006) (discussing relationship between Securities and Exchange Commission regulations and advice by corporate lawyers that promotes timely disclosure by

who obtain informed consent from those they serve also have a safe harbor.<sup>375</sup>

National security advice should operate along the same lines. Once disclosure of a legal opinion is made, the onus of responsibility shifts to other stakeholders to register their views. In a public setting, the Brandeisian remedies of “sunlight”<sup>376</sup> and “more speech”<sup>377</sup> can flourish. The media, the public, and voices in the blogosphere<sup>378</sup> can examine the analysis.<sup>379</sup> In addition, the prospect of public scrutiny will be a valuable ex ante incentive for more candor and comprehensive analysis in OLC opinions. Absent disclosure, both criminal and tort liability should be in play.<sup>380</sup>

### B. Consideration of Institutional Consequences

Legal advisers should also consider the institutional consequences of particular decisions. As I have discussed, decisions have spillover effects. The rules of legal ethics encourage lawyers to offer

publicly traded companies); cf. Perino, *supra* note 55, at 919–21 (discussing enforcement of federal securities laws by lawyers for aggrieved investors).

375. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2008) (permitting informed consent to cure conflicts of interest in certain situations where lawyer reasonably believes that she could effectively represent client's interests); cf. Troy E. Elder, *Poor Clients, Informed Consent, and the Ethics of Rejection*, 20 GEO. J. LEGAL ETHICS 989, 1002–11 (2007) (discussing complexity of informed consent for clients living in poverty); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 920–40 (1994) (discussing difficulties of implementing informed consent doctrine).

376. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants . . .”).

377. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

378. These voices include David Luban, Brian Tamanaha, Scott Horton, Sanford Levinson, and Marty Lederman on Balkinization, <http://balkin.blogspot.com/>; Lawrence Solum on the Legal Theory Blog, <http://lsolum.typepad.com>; and commentators on The Volokh Conspiracy, <http://volokh.com>, Legal Ethics Forum, <http://www.legaethicsforum.com>, and *Opinio Juris*, <http://opiniojuris.org>.

379. For a discussion of the overstated dichotomy between transparency and security in an analogous setting, see generally Mary L. Lyndon, *Secrecy and Access in an Innovation Intensive Economy: Reordering Information Privileges in Environmental, Health, and Safety Law*, 78 U. COLO. L. REV. 465 (2007).

380. Government lawyers may be required to offer advice in complex and exigent circumstances where disclosure is not feasible. One example is advice on whether a proposed military action is consistent with international law mandates on proportionality and discrimination between military and civilian targets. See Shulman, *supra* note 321, at 961–66. Another concerns advice about a targeted killing of a terrorist engaged in the planning or execution of attacks against American civilians or military personnel. See Banks & Raven-Hansen, *supra* note 256, at 682–87. In these situations, qualified immunity and related doctrines will shield the lawyer from legal exposure. See Peter H. Schuck, *Suing Our Servants: The Courts, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (discussing immunity issues).

advice that goes beyond doctrine, to assess such non-legal ramifications.<sup>381</sup> Because lawyers often represent repeat players, they are well situated to grasp how a legal regime will affect institutions. Prudent legal advice should point out not only the benefits if a proposed action is successful, but the consequences of failure. If the risk of failure is high, this advice may be thoroughly unwelcome to the client. Dialogic equipoise works, however, only when lawyers have the gumption to give clients bad news about both legal and non-legal risks. A rule requiring, not merely permitting, such advice in the national security area would counteract issue entrepreneurship.

The post-September 11 legal memos on law and terrorism would fail this test. Both Yoo's memo on permissible interrogation techniques and Goldsmith's Article 49 memo failed to identify or analyze the possibility that interrogation techniques identified as legal would expand into clearly illegal conduct. They also utterly failed to acknowledge the risk that their opinions would not adequately shield personnel who have engaged in coercive interrogation. In this event, as we have seen with the recent revelations about destruction of CIA tapes, the likelihood of satellite misconduct rises exponentially. Here, too, the competent lawyer should note the hazard on the horizon.

*C. There's No News Like Bad News: Citing and Distinguishing Contrary Authority*

James Comey, who resigned as Deputy Attorney General because he, like Goldsmith, grew nervous about the Bush Administration's stubbornly unilateralist ways, has advised lawyers that saying "No" is a vital asset for the government lawyer.<sup>382</sup> One way of saying "No" is to give clients a full accounting of the authority arrayed against them. The informal norms school has pressed this task as a best practice for

---

381. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); Katyal, *supra* note 61, at 120 (discussing Model Rule 2.1 and arguing that law schools should encourage discussion about attorneys' moral obligations to clients); cf. Margulies, "Who Are You to Tell Me That?," *supra* note 228, at 214 & n.3, 221–44 (discussing lawyer's role in offering advice on institutional and social consequences); Radack, *supra* note 5, at 42–45 (suggesting special rule that would encourage government lawyers to offer advice on morality).

382. See Dan Eggen & Paul Kane, *FBI Chief Disputes Gonzales on Spying; Mueller Describes Internal Debate*, WASH. POST, July 27, 2007, at A1 (noting opposition of both Comey and FBI Director Robert Mueller to the original version of Terrorist Surveillance Program); see also Margulies, *Lawyers' Independence*, *supra* note 4, at 952–54 ("Giving the client bad news is the other cornerstone of equipoise.").

OLC lawyers. Lawyers are already required to cite and distinguish contrary authority when they appear in court.<sup>383</sup> Lawyers providing advice should have the same responsibility. This obligation may make some lawyers into wet blankets. Sometimes, however, wet blankets are less dangerous than true believers.

*D. Modesty Loves Comity: Least Drastic Accounts of Presidential Power*

Another grave flaw of the Yoo memos, here identified by Goldsmith, is their sweeping view of presidential power. Dialogic equipoise, with its emphasis on tailoring, would require the national security lawyer to offer the most modest account of presidential power sufficient to justify the objective, and to authorize only interstitial departures from Jackson's *Youngstown* framework. Under this view, the President's power—outside of clear textual grants of authority such as the pardon power—would only rarely be sufficient in the face of congressional opposition. When congressional authorization clearly excluded an action, such as the boarding of ships leaving French ports in *Little v. Barreme*<sup>384</sup> or the limits on warrantless surveillance under FISA,<sup>385</sup> the lawyer would generally recommend complying with the scope of the authorization, and taking care to avoid exceeding it.<sup>386</sup>

A default that disfavors sweeping assertions of executive power will facilitate comity between the branches and avoid needless adverse consequences. Just as Brandeis urged courts to choose the most modest ground of decision available,<sup>387</sup> lawyers for the executive should avoid the epic assertions of executive power proclaimed by Yoo. Instead, lawyers for the President should emulate the Court's methodology under *Youngstown*, first focusing on ways in which Congress could have expressly or impliedly authorized presidential action, or acquiesced in such action. Taking the least drastic alternative view will also have beneficial ex ante effects, encouraging lawyers to pay attention to lawyerly craft, synthesizing Supreme Court decisions and other appli-

---

383. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2008) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . .").

384. 6 U.S. (2 Cranch) 170 (1804).

385. 50 U.S.C. § 1801 (2000).

386. Exceptions would include situations where decisive action was required to repel a military threat, as in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), although even here the competent lawyer would take care to mention signs of acquiescence or consent in Congress.

387. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring).

cable law, instead of ignoring the legal landscape.<sup>388</sup> For example, in *Hamdi v. Rumsfeld*,<sup>389</sup> the government would have been better served by a more modest argument that conceded the need for procedural safeguards, instead of provoking an inter-branch conflict that the Court resolved by declining to give the President a “blank check.”<sup>390</sup>

### E. Harmonization with Emerging Norms

The preference for modest claims of presidential authority can in rare instances clash with the need for legal change. Faced with exigent circumstances and a legal regime outpaced by emerging humanitarian norms, the President may act. Transparency and tailoring, however, should inform such humanitarian interventions.

Both legal ethics and international law acknowledge the need for mechanisms that encourage legal transitions.<sup>391</sup> Rule 1.2 of the Model Rules of Professional Conduct permits lawyers to challenge existing law through litigation and through legal advice to groups engaging in civil disobedience.<sup>392</sup> The core case under Rule 1.2 concerns advocacy of legal positions that are contrary to precedent. One can argue, however, that the allowance of advice regarding civil disobedi-

388. One important caveat here is that the lawyer should exercise restraint in recommending a broad interpretation of a statute on the ground that a narrow construction will unduly limit the President's constitutional prerogatives. Constitutional avoidance strategies of this kind create a real risk of self-dealing by the executive, which has an obvious incentive to maximize its own powers. This imperial deployment of avoidance is one of the problems with Yoo's memo. See *supra* Part III.A.1; cf. Kinkopf, *supra* note 23, at 1180–81 (discussing how executive branch lawyers sometimes play with “[l]oaded [d]ice” in their interpretation of statutes). See generally Morrison, *supra* note 18 (discussing constitutional avoidance in the executive branch); Christopher H. Schroeder, *Loaded Dice and Other Problems: A Further Reflection on the Statutory Commander in Chief*, 81 IND. L.J. 1325, 1327–30 (2006) (arguing that more concrete involvement by Congress can minimize executive self-dealing). The better solution here is to condition recourse to constitutional avoidance on other criteria, including consideration of adverse authority and institutional consequences. In areas like detention and trial of alleged terrorists, where the courts have imposed limits on the President's ability to act unilaterally, legal advice should recognize those limits. Concern about harm to the United States' reputation caused by revelations about interrogation abuses should counsel further caution.

389. 542 U.S. 507 (2004).

390. See *id.* at 536. Interestingly, perhaps dictated by “situation sense” and the relational history or course of conduct on detainee litigation between the government and the Court, Solicitor General Clement took a far more modest and tempered view in *Boumediene* of what Congress intended, arguing that the Court could find ample procedural safeguards in the MCA and the Detainee Treatment Act (“DTA”) and that would make the MCA an adequate substitute for habeas, instead of throwing all his eggs in the basket that the detainees simply were not entitled to habeas relief. See Greenhouse, *supra* note 129.

391. This passage is drawn from Margulies, *When to Push the Envelope*, *supra* note 77, at 665–66.

392. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008).

ence contemplates self-help in pressing situations. International law also allows change. Fundamental norms, such as the prohibitions on torture and slavery, become *jus cogens* through an accretionary process that reflects actions and assertions by states and the analysis of experts. Although detecting emerging norms is not always easy, courts are competent to perform this role.<sup>393</sup> The executive has a similar function in interstitial situations. Executive action, however, should be open, submitted for the approval of the legislature, courts, and the public.

The first humanitarian intervention was not really an “intervention” at all because it concerned a domestic matter: the emancipation of persons living in slavery in the United States. Though often justified under the President’s war powers, Lincoln’s Emancipation Proclamation<sup>394</sup> was of course inconsistent on its face with Chief Justice Taney’s infamous *Dred Scott*<sup>395</sup> opinion. The Emancipation Proclamation was also broader than the war power alone may have permitted because it freed enslaved persons throughout the Confederacy, including those far from the battle lines who played no role in supporting the war effort.<sup>396</sup> To close the gap, Lincoln argued that emancipation was “an act of justice” consistent with the “considerate judgment of mankind.”<sup>397</sup> In making this argument, Lincoln invoked the regard for internationally recognized norms that drove the Declaration of Independence.<sup>398</sup> Lincoln’s argument also tacitly acknowledged the trajectory of international human rights law, in which emancipation had acquired extraordinary momentum.<sup>399</sup> Moreover, the Emancipation Proclamation was public and interstitial, as the product of a concerted policy that Lincoln had pursued and his per-

---

393. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–15 (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”).

394. President Abraham Lincoln, Emancipation Proclamation (Jan. 1, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 28 (Roy P. Basler ed., 1953).

395. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

396. See Levinson, *supra* note 350, at 1143–45.

397. Lincoln, Emancipation Proclamation, *supra* note 394, at 30; cf. Levinson, *supra* note 350, at 1142 (noting Lincoln’s invocation of war powers as “legal justification” for liberating slaves).

398. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (seeking justification in “opinions of mankind”).

399. See Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 557–95 (2008) (discussing evolution of international law regarding slavery). The suppression of the slave trade, which Lincoln had vigorously supported, predated emancipation. *Id.* at 627–28; cf. OAKES, *supra* note 350, at 157–59 (describing Lincoln’s efforts to end the slave trade).

ception that the end of the Civil War would in any case spell an end to the peculiar institution.<sup>400</sup>

Today, presidents could justify commitments of troops abroad for humanitarian purposes focusing on the elimination of genocide.<sup>401</sup> For example, intervention in Rwanda to stop the genocide there would have been justified, even absent congressional authorization. The tailoring principle, however, would forbid intervention for other purposes, such as a preference for regime change. In addition, legal advisors should nurture the transparency gained by collaboration with international institutions such as the United Nations or the North Atlantic Treaty Organization.<sup>402</sup>

#### *F. The Case for Structure: Rule 3.4, the OIG, and the OLC*

We also need structural reform to deal with the problem of satellite misconduct. One option would be to put in place a procedure for executive branch lawyers who become aware that personnel in their agency possess potentially incriminating materials and are considering destroying those items. Here, Rule 3.4 of the Model Rules of Professional Conduct would generally give the lawyer a safe harbor if the lawyer advised against destruction of the material.<sup>403</sup> Another provision, Rule 1.13, would permit a lawyer to climb the ladder of the entity leadership structure to alert senior officials of the problem<sup>404</sup> and

---

400. *Id.* at 154 (describing Lincoln's promotion of the Confiscation Act and his interpretation, not mentioned in the statutory text, that slaves confiscated by Union forces would henceforth be free persons); *cf. id.* at 154–55 (noting Lincoln's assessment that "the people would not permit" the return of confiscated slaves to their masters and his view that the consequences of secession would deal slavery a "mortal wound").

401. *See* Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), at 174, U.N. GAOR, 3d Sess., 179th plen. mtg., U.N. Doc. A/810 (Dec. 9, 1948). The first Bush Administration offered a legal justification for the intervention in Somalia centering on the importance of humanitarian aid; the passage of United Nations Security Council Resolution 794, S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992), authorizing the use of force to protect relief personnel; and the authority of the President to protect Americans abroad. *See* Authority to Use United States Military Forces in Somalia, 16 Op. Off. Legal Counsel 8, 9–12 (1992).

402. A competent legal advisor should also recommend timely notice to Congress of humanitarian intervention, equivalent to the notice required under the War Powers Resolution. *See* 50 U.S.C. § 1543 (2000) (outlining reporting requirements). Intervention, whatever the rationale, unaccompanied by such notice has often failed to take into account the consequences of unilateral presidential action. *See* DYCUS ET AL., *supra* note 78, at 266–68 (discussing aborted 1980 mission to rescue American hostages in Iran).

403. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2008) ("A lawyer shall not . . . unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . .").

404. *Id.* R. 1.13 (stating in part that "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter

might permit disclosure not forbidden by substantive law<sup>405</sup> if the senior official declined to act appropriately.

As the recent CIA tape destruction episode demonstrates, however, the current ethical and governmental checks on overreaching of this kind, including document destruction, are inadequate. According to published reports, initial meetings on the tapes included Gonzales, Addington, and John Bellinger, then-counsel to the National Security Council.<sup>406</sup> Bellinger cautioned the CIA to preserve the tapes, but Gonzales and Addington may have been more equivocal; indeed, some reports suggest that top White House lawyers argued vigorously for the tapes' destruction.<sup>407</sup> Climbing the ladder is useless in this situation. The President does not want to know about the problem because knowing would undermine the stance of plausible deniability that the Administration wishes to cultivate. Merely providing advice also serves to offer bureaucratic cover, while doing little or nothing to preserve the tapes.

To address this problem, the attorney in a subordinate agency such as the CIA should be required, under federal law and in the ethics code, to disclose the possibility of material evidence destruction to the Inspector General of the agency.<sup>408</sup> Because of the independence of the Inspectors General, this disclosure will promote transparency and ensure the existence of a record. The Inspector General can then at her discretion seek an opinion about the destruction from the OLC. This process will enforce integrity and deliberation and deter the manufacture of plausible deniability.

---

to higher authority in the organization, including . . . to the highest authority that can act on behalf of the organization").

405. Substantive law limitations might include contractual limits on disclosure to which the individual agreed upon joining the government.

406. See Scott Shane & Mark Mazzetti, *Tapes by C.I.A. Lived and Died to Save Image*, N.Y. TIMES, Dec. 30, 2007, at A1.

407. See Mark Mazzetti & Scott Shane, *Bush Lawyers Discussed Fate of C.I.A. Tapes*, N.Y. TIMES, Dec. 19, 2007, at A1.

408. See Inspector General Act of 1978, 5 U.S.C. app. § 2 (2006) (stating the Office of Inspector General's purpose is to "prevent and detect fraud and abuse" in governmental programs); cf. Pillard, *supra* note 5, at 754–58 (urging heightened role for Department of Justice Inspector General in collaborating with OLC). Expanded authority for the Justice Department's Inspector General may require amending the Inspector General Act. See 5 U.S.C. app. § 8E(b)(2), (3) (2006) (requiring the Inspector General to refer matters regarding the professional conduct of Justice Department lawyers to the Justice Department's Office of Professional Responsibility).



## VII. CONCLUSION

These measures are necessary because the advantages of parsimony manifest themselves immediately, while parsimony's costs are often latent. Issue entrepreneurs bask in the plaudits that accompany an aesthetically satisfying theory, and invite the brickbats of those who would never agree in the first place. The lawfare critics traveled this path with their critique of international law and their wariness about judicial intervention. For the lawfare critics, constraint was unnecessary and ordinary prudence would aid policymakers in preserving good will. As the lawfare critics moved toward a tipping point in their dismantling of the framework of constraint, they paid insufficient attention to the weak reed that prudence would become when stripped of these protections. The resulting loss of reputation for the United States represents the real wages of issue entrepreneurship.

As is often true, identifying a problem is easier than fashioning a remedy. Criminal and tort law solutions risk personalizing the problem. The informal norms approach advances a valuable repertoire of best practices, but lacks stakeholders among the national security conservatives who have been most prone to issue entrepreneurship in the recent past. Structural reforms raise issues about legitimacy, and risk a perversely heightened political influence.

To address the costs of issue entrepreneurship for legal advice on national security matters, lawyers should turn to a model of dialogic equipoise. This model resists parsimonious formulas, instead recognizing that the challenge of governing in changing times requires two values: transparency and tailoring. Dialogic equipoise allows the President flexibility in taking action, even when that action contravenes the most accurate reading of sources of authority. Action, however, must be both interstitial—with a clear exit strategy—and publicly disclosed.

To implement the dialogic equipoise model, this Article recommends a blended approach. A safe harbor for publicly disclosed legal opinions will encourage disclosure, promote sound legal analysis, and refine the corpus of executive lawmaking. Legal ethics norms requiring consideration of institutional consequences and assertion of the least drastic rationale for executive power will encourage prudence, while giving the executive needed flexibility. Finally, giving Inspectors General and the OLC a formal role in ruling on issues of document destruction will curb the satellite misconduct that often enters in the wake of failed issue entrepreneurship.

Adoption of a model of dialogic equipoise will not be easy. Although much successful national security advice, such as the response

to the Cuban Missile Crisis, matches the model, it faces cogent critiques on the Left and Right. Those on the Left may argue that the model gives the executive too much power, and licenses continuing disregard for the rule of law among the President's legal advisors. Those on the Right may argue that the model gives the permanent bureaucracy a veto, placing obstacles in the way of mandates for change. Each of these critiques identifies plausible risks. Indeed, any pre-commitment mechanism generates the risk that some party will be obliged to bear costs it otherwise could have avoided, or forego gains it could otherwise have achieved because that party has assumed obligations in common with other stakeholders. Constitutionalism is an ongoing experiment in dialog and reciprocity, with these risks of pre-commitment front and center. National security lawyers play a vital role in this venture, reconciling risks with abiding values. A model of dialogic equipoise can reinforce deliberation when exigencies obscure the teachings of prudence.