

*“3 Rs” for Cultivating an Ethical Culture in a Hybrid Environment:
Rules, Responsibilities, and Realities*

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As leaders and lawyers, we strive to create and maintain an “ethical culture” – an environment where members are willing to highlight ethics issues, enforce ethics standards, and allow others to raise ethics issues freely.

In many ways, this is more than an issue confined to legal practitioners; it is a basic leadership core competency.

A. Especially in a national security environment, public service requires trust.

Practice Tip: Recent national-level documents highlight this linkage. For example, personal ethics issues were recently the focus of a publicly-available GAO report to multiple Congressional committees titled, “*Military Personnel: Additional Steps Are Needed to Strengthen DOD’s Oversight of Ethics and Professionalism Issues*” (September 2015).

- This report underscored the fact that professionalism and sound ethical judgment are essential functions.
- GAO’s particular focus areas include financial disclosure rules, conflicts of interest, gift acceptance, and travel-related issues.
- The report also highlighted specific instances of investigations that run the spectrum of various acts of alleged misconduct.
- Even though this report was generated within a military/DoD context, it contains lessons that are applicable across many (if not all) large organizational cultures. These lessons are applicable both inside and outside of the government.

Practice Tip: Issues of personal ethics are also highlighted in the February 2015 “*National Security Strategy*,” where particular emphasis is placed on the intention to “recruit and retain the best talent while developing leaders committed to an ethical and expert profession of arms.”

To the uninitiated, ethics rules can seem needlessly complex and of uneven application: This can seem more pronounced at extremely senior levels, where staffs become smaller and there is a higher level of integration and interaction among personnel from across a variety of governmental agencies and employers. Such a “hybrid” environment can complicate one’s legal practice in this area.

Practice Tip: These environmental aspects of everyday work can raise issues that are broader than merely technically legal ones – these include third party perceptions and senior leaders’ accountability in a somewhat “blurred” environment insofar as “reporting chains” are concerned.

As an additional complicating factor, different people -- who may work side-by-side, and day-to-day -- may have very different ethical/personal conduct obligations as contractors, political appointees, military members, and federal employees. Furthermore, ethics issues can arise unexpectedly and can consume significant time and energy if not handled correctly.

Plus, the stakes can get very high for our clients: In today's often-times "zero tolerance" environment, a mere allegation of wrongdoing can rightly launch a good-faith investigation, perhaps accompanied by reassignment of duties/location and detachment from previous co-workers. Understandably, this can have its own mission impact (even aside from the mission impact of the underlying alleged misconduct).

Practice Tip: Navigating this terrain can be difficult for even the most experienced senior leaders. When senior leaders themselves become the focus of these kinds of investigations, the outcome might have the effect of a "decapitation" effect – something military professionals usually think about only in the context of kinetic operations.

A more theoretical kind of analysis can be useful in a national security context but is also useful in a non-national security context: For example:

Clausewitz is a classic for military strategists and leaders. His writings speak to "tendencies" or "characteristics" of conflict. These so-called "tendencies" include (1) emotional tendencies and motivations, (2) non-rational forces like chance, friction, and probability, and (3) rational traits like calculation and reason.

In many ways, such ideas can be exported outside of the military mission sets ... and maybe even to the everyday practice of law!

But Clausewitz went even further – he tied these "tendencies" to three groups of people: the "people," the "military," and the "government." These correlations can teach us a lot, and his "trinity" (a staple of classic military education) becomes particularly important when one contemplates the importance of "trust" to all three parts of the trinity.

In fact, one might be able to substitute a variety of public institutions for the "military" in Clausewitz' framework (for example: the bar, the police, the medical profession, elected officials).

Practice Tip: Clausewitz was right, of course. Trust is critical, and in the light that Clausewitz casts the issue, the idea of ethics as a legal discipline takes on entire new meaning and importance. For example, this is especially true when one internalizes another of Clausewitz' observations about military professionals: "The soldier trade, if it is to mean anything at all, has to be anchored in an unshakeable code of honor. Otherwise, those of us who follow the drums become nothing more than a bunch of hired assassins, walking around in gaudy clothes ... a disgrace"

Practice Tip: It's worth considering whether the same might be true of any profession which can exert power over (or apply force to) others. "The law" is certainly no exception.

I often hear objections to ethics rules, saying they're too detailed and too limiting. However, I would argue that in ethics-related issues, the "little things" really do matter. As many military professionals know, the "little things" can make a huge difference to mission success – especially in matters of discipline and/or command and control. Our history is replete with examples.

Furthermore, many cultural and religious traditions include references to how one must be trusted with small things before being trusted with larger ones. We're no stranger to this idea in the military, either. Bottom line, "little" indiscretions can erode trust -- sometimes permanently. That's why we must be especially mindful in this area.

The role of lawyers: To that end, lawyers help clients navigate rules. That job is important, but we also help our client-leaders build an ethical culture. And that's about much more than just "following the rules."

Practice Tip: Over the last 20 years of practice, I've found that lawyers -- because of our particular levels of education, perspective, leadership, and experience -- are uniquely qualified to advise our clients in ethics issues requiring sound judgment. We should not shrink away from our responsibilities here.

This idea fits with Rule 2.1 of the ABA Model Rules of Professional Conduct: "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."

There's also a critical "safe harbor" in our ethics practice that prompts us to be involved in these situations: If an employee seeks advice before taking action, makes a full and accurate disclosure of the facts and circumstances and acts in good faith reliance upon the advice of an ethics counselor, administrative disciplinary action will not be taken against the employee if the ethics advice is later determined to be incorrect.

Practice Tip concerning OGE's well-published "14 General Principles" of ethical conduct: In some ways, they are just a few critical concepts that are applicable across all of the federal government. All 14 provide an extremely useful "bumper sticker" for our dealings with clients and other audiences, but they really fit into these broad categories:

- Public Service = Public Trust
- Financial rules & conflicts of interest / Gifts
- Treat people fairly
- Use government property and resources correctly
- We must report fraud / waste / abuse / corruption
- We must avoid even the appearance of wrongdoing

B. Specific ethical concerns that can erode public trust in an institution:

1. Federal statute on conflicts of interest: See 18 U.S.C. § 208

- Employees may not participate personally and substantially through decision, approval, recommendation, advice, investigation or otherwise:
 - In a judicial proceeding, application, ruling, determination, contract, claim, controversy, charge, or other particular matter
 - In which the employee or their spouse, minor child, partner, organization in which the employee is an officer or employee, or company with whom the employee is negotiating for employment

- Has a financial interest
- Particular Matter = a matter that involves deliberation, decision or action that is focused on the interests of specific persons or a discrete and identifiable class of persons

As shorthand (for illustration purposes), this bears some similarities with Rule 1.7 and 1.8 (current clients), 1.9 (former clients), and 1.11 (lawyers who have served as government officers and employees) of the ABA Model Rules of Professional Conduct concerning conflicts of interest.

But there's more than just the criminal statute: i.e., the "Impartiality Rule" (5 C.F.R. § 2635.502): The C.F.R. provision has a broader application and farther reach than the criminal statute above. There are two tests:

An employee is disqualified from participating in a particular matter where the employee:

- knows that a matter is likely to have a direct and predictable effect on the financial interests of a member of his household, or
- knows that a person with whom he has a covered relationship is or represents a party to such matter and the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality

An employee has a covered relationship with (much broader than the criminal statute):

- A person, other than prospective employer, with whom the employee has or seeks a business, contractual or other financial relationship (other than routine consumer transaction);
- Members of the household and relatives with whom the employee has a close personal relationship;
- A person for whom the employee's spouse, parent or dependent child serves as an officer, director, trustee, general partner agent, attorney, consultant, contractor or employee;
- Former business partners, clients, and employers (within last year or last two years if received extraordinary severance payment);
- Organizations in which the employee is an active member.

2. Gifts (A host of federal statutes are on-point, but most of the day-to-day guidance resides throughout 5 C.F.R. § 2635)

- General Rule: Employees shall not, directly or indirectly, solicit or accept a gift from a "prohibited source" or one given because of the employee's official position.
- "Prohibited Source": any person or entity that seeks official action, does or seeks to do business, is regulated by, or has interests substantially affected by the employee's official duties.
- Gift definition: May be any tangible or intangible item of value, such as: cash, service, entertainment, hospitality, travel or travel-related expenses; discount, loan, or forbearance.
- Exclusions: Greeting cards & plaques, refreshments served as other than part of a meal (coffee, donuts, etc.); benefits/discounts available to public, government employees, or all military; gifts to the Government; anything paid for by the Government under a contract
- Most common exceptions:

- Gifts of \$20 or Less. Unsolicited gifts with a market value of \$20 or less per source, per occasion, so long as the total value of all gifts received from a single source during a calendar year does not exceed \$50
- Gifts based on a personal relationship
- Speaking engagements: On the day of participation can include conference fees, food, instructions & materials, other items integral to the event.
- Widely Attended Gatherings (WAGs)
- Gifts from foreign governments: there are detailed protocols for refusing/accepting/keeping such gifts, as well as issues involving security reviews and rules for gifts under \$375
- Payment of travel expenses: An outside entity may indicate that it is willing to pay for the employee's travel expenses. 31 U.S.C. § 1353 provides for acceptance of unsolicited payment of travel expenses as a gift to the Government under certain conditions. Travel and the gift must be approved in advance and in writing by the travel approving authority and the appropriate ethics official.

3. Use of Government Resources (5 C.F.R. § 2635): Generally, employees may not use government property, including official time, for other than authorized purposes. They also may not use the time of a subordinate for other than official duties, unless authorized by statute or regulation. Exception: Subject to supervisor approval, employees may use government resources for personal purposes IF it is approved by the agency and the use:

- Does not adversely affect the performance of official duties;
- Is of reasonable duration and frequency;
- Serves a legitimate public interest (such as keeping the employee at their desk);
- Does not reflect adversely on government; and
- Creates minimal or no significant additional cost to government.

Warning: Employees should also check service regulations applicable to particular categories of resources (e.g., travel regs, IT assets, etc.). Even though personal use may not violate the ethics rules, it may violate these.

Government electronics: (General rules follow – but can obviously differ by agency)

- Internet – Can be used for short internet searches to permissible sites. But, the use must not reflect poorly on the government, so no gambling, “adult,” or controversial websites, or other actions that unduly burden the system such as unauthorized audio/video streaming
- E-mail – Can be used for short personal e-mails / No right of privacy - even in personal e-mails / No potentially offensive material, improper jokes, political material, “adult” content.
- *Practice Tip:* In addition to potentially Agency-specific rules there's a common sense approach – users must remember that there are important records implications, too.

Social Media: *Practice Tip:* Very useful for ethics practitioners to review the OGE Legal Advisory from April 2015. Over-arching principles to consider from an “ethics rules” point of view:

- Conflict of interest rules

- Impartiality in official duties
- Misuse of government property and time
- Reference to government title, and the appearance of official sanction
- Seeking employment
- Endorsing others
- Use of nonpublic information
- Fundraising

4. Post-Government Employment: This area includes a wide range of governing statutes/regulations: See especially 18 U.S.C. §§ 207, 208, 2101-2107, 5 C.F.R. §§ 2635, 2637, 2641) *General Rule:* When seeking non-Federal employment, employees must:

- Disqualify from official participation
- In any particular matter
- That has a direct and predictable effect on the financial interests
- Of entities with whom the employee is discussing future employment.

Disqualifications must be in writing and delivered to, at a minimum, supervisor and to ethics counsel.

18 USC § 207: In the area of post-government employment there are important “representational bans”:

- Permanent (“Lifetime”) Ban: Bars all former employees from representing another before any federal agency or court regarding particular matters involving specific parties in which they participated personally and substantially at any time during Federal service. “Lifetime” means the lifetime of the particular matter (*e.g.*, the underlying contract).
- 2-Year Ban: Bars all former employees from representing before any Federal agency or court regarding particular matters involving specific parties that were under their official responsibility during their last year of Federal employment.
- 1-Year Cooling Off: Bars “Senior Employees” for one year after leaving a senior position from representing another before their former agency to seek official action. (This is 2 years for political appointees of the Obama Administration.)
- Additional rules apply to procurement-related officials

C. A possible explanation for unethical behavior: This is a topic that is studied throughout DoD’s educational systems. The effort is to alert current and future leaders at all levels to the possible pitfalls that can be found at the intersection of increasing levels of authority and responsibility.

Practice Tip: One particular article on this point was (somewhat) widely read and circulated several years ago and is now making something of a “comeback”: “The Bathsheba Syndrome” (*Journal of Business Ethics*, 1993) – authors point to the strong possibility that “success can lead to failure”:

- Success causes some leaders to become complacent and lose focus
- Success results in privileged access to info and people
- Success permits power over resources
- Success can mislead some leaders into believing that they can manipulate outcomes

As leaders become more senior, these ideas become increasingly important to consider – and lawyers can help.

D. Understanding and Assisting Our Clients: All of the foregoing becomes more useful in the broader context of “knowing our clients.”

Practice Tip: Many of my clients are intensely familiar with a wide variety of popular leadership/business texts that have legal undertones. As their lawyers, knowing their substance is important to framing our legal advice. (What follows is not intended to be a “reading list;” it’s merely a frame of reference. No endorsement intended):

What Got You Here Won’t Get You There (Marshall Goldsmith):

- The trouble with success
- 20 habits that hold you back
- How we can change for the better
- “Pulling out the stops” (candor + honesty)

Getting Things Done (David Allen): It seems that I’m always asking myself:

- Who’s my client?
- Who’s on my team?
- What’s the priority? What’s my end-state?
- (I need to update my “battle-book.”) *Practice Tip:* these are very useful.

Leading Change (John Kotter) Steps for successful change – and making it “stick”

Understanding people and why they do what they do:

- *Start with Why* (Simon Sinek)
- *Little Book of Economics* (Greg Ip)
- *Who Says Elephants Can’t Dance?* (Louis Gerstner)
- *The Goal* (Eliyahu Goldratt)

Basic Leadership (as opposed to “Management” – I believe that there’s a difference, but both have their place) (Some of these are classic ideas and others are new.)

- *The Servant as Leader* (Robert Greenleaf)
- *Lean In* (Sheryl Sandberg)
- *Leaders Eat Last* (Simon Sinek)
- New ideas of collaborative leadership (*Practice Tip:* There are some new decidedly non-military ideas in this area.)
- *Black Swan* (Nassim Taleb)

E. Conclusion: Over-arching advice for lawyers who are cultivating the “ethical culture” I mentioned at the outset:

- Remember the basics
- Remain vigilant
- Speak up and engage

Editor's Note : We expect the Court to issue opinions in one or more argued cases at 10 a.m. on Wednesday. We will begin live blogging at 9:45 a.m. that morning.
 On Wednesday the Court hears oral arguments in *Nebraska v. Parker*. Lyle Denniston previewed the case for us.
 On Wednesday the Court also hears oral arguments in *Sturgeon v. Frost*. Todd Henderson previewed the case for us.

Breaking News : This morning the Supreme Court granted *United States v. Texas*, the Obama administration's appeal regarding its immigration policy. The Court also added three additional cases to its merits docket. The order list is [here](#).



Lisa McElroy *Guest*

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Book review: Allegiance — to rules or justice?

"The Court is a place of great responsibility. It is a temple of truth. We who work here must dedicate ourselves to worship and service [I]f you have come here for any other purpose, you will be disappointed."

— Justice Felix Frankfurter to protagonist Caswell ("Cash") Harrison, at the beginning of Cash's clerkship for Justice Black

When Kermit Roosevelt's new novel, *Allegiance*, begins in December 1941, the Japanese have just bombed Pearl Harbor. Cash Harrison, the protagonist, is disappointed to fail the draft physical — his feet, it would seem, are not sturdy enough to take him through the long marches required in war. Now he cannot serve his country during World War II, or so he thinks. As it turns out, he is called to a different kind of service — as a clerk at the United States Supreme Court.

Cash starts out questioning, even demonstrating that becoming a law clerk is a paltry role compared to that of a soldier fighting on the front lines ("As I knock . . . [on the front doors of the Supreme Court] the insignificance of my fist against the metal tells me I've been had."). But, early on, he realizes that clerks may indeed make a profound difference ("[T]he job is little like my expectations, less like my dreams. The boredom [is] leavened only by the knowledge that with any one of these [cert.] petitions I could be making a catastrophic error. Recommend a denial and I might bury an issue of national importance Petition after petition they come, an unending stream."). With that starting point, Cash proceeds to examine the role of the law, of rules, of justice, and their intersection in that marble palace that Felix Frankfurter calls the temple of truth, one whose motto above the doors on which he pounded his fist reads "Equal Justice Under Law."

Like so many other classic novels — and, make no mistake about it, this one deserves to be a classic, read in history and government and literature courses alike — *Allegiance* is a coming-of-age story. It is a love story. It is a story of betrayal, and disillusionment, and redemption.

Certainly, Cash struggles through a literal loss of innocence, and, like so many memorable protagonists who have gone before him, his innocent view of the world changes, too, prompting him to redefine concepts like taste and identity and, yes, allegiance. He is betrayed by friends, disillusioned by politics, and redeemed — perhaps — in a decision to point his life's path after the war (tumultuous and catastrophic for the world and for Cash) in an unexpected direction.

But what makes *Allegiance* a transformative read is Roosevelt's use of metaphor, subtly likening the Court and its jurisprudence in the first half of the twentieth century to a young person finding his way in the world and through a war, as Cash is. Roosevelt, in examining the history of the Japanese internment camps and laying bare the government's advocacy and the Court's decision-making in *Korematsu v. United States*, shines the spotlight on a Court that was deeply divided, deciding cases while navigating, yes, allegiances in one of the great Justice rivalries, one that became more deeply entrenched in each case.

And, of course, even as Justices Hugo Black and Felix Frankfurter fought bitter battles (as a family friend, a judge, comments to Cash before his clerkship interview, "there is a war at the Court if you care to look for it") about the Court's role in governance, the debate took on a life of its own, laying the groundwork for a jurisprudential theoretical battle that still divides judges and scholars, and, yes, Supreme Court Justices seventy years later. How should we interpret the Constitution? How should judicial review properly be exercised? How should politics guide decision-making — and should we acknowledge that they do? "Should we," in the words of Roosevelt's Frankfurter, "allow people to use our courts, our laws against us? To use the law as an instrument of war?" Should we follow the rules at all costs, even if our allegiance to the rule of law results in grave injustice?

Is the Supreme Court a temple of truth?

Through Cash's experiences, the reader comes to ask those questions and seek – even find – deep answers, or at least more thoughtful questions.

What, for example, should a Justice, or a clerk, or an advocate do when he realizes that the facts upon which the Court is deciding a case are fabricated or massaged or altered just a bit to create a justiciable or, perhaps even more significant, landmark controversy? As the story unfolds and details the *Korematsu* litigation, Cash is faced with exactly that decision – one that certainly calls to mind Dale Carpenter's account of *Lawrence v. Texas* or the secret briefs in the Pentagon Papers case – as he considers whether the Japanese internment camps and their residents' renunciation of their U.S. citizenship rights, even if "legal," are immoral and unjust because they derive from a patently untrue depiction of facts relating to their threat to America.

Which leads Cash to the next question, one Roosevelt teases out throughout the book. Should that concern us – lawyers, law clerks, judges, Justices? If the result – national security – is correct, do the means really matter? Especially if the means used are legal, passed into law by Congress, ordered by the President?

We ask which should trump, the law (or, as Roosevelt's characters mostly refer to the law, "rules") or justice.

And what if the law and the facts are unclear? Should we view that as an opportunity to clarify the law in a way consistent with our compassionately driven end goals, or should we try at all costs to read through the murkiness to come away with a correct reading, a true understanding, a binding definition of the law, no matter what its effect on the people it governs? As Cash reflects after a conversation with Justice Black about the humanity inherent to all legal controversies, "Cases are like stories . . . [T]he people and the happenings in a case are just a pool of muddy water where the law swims like an elusive fish, which glints as it turns and vanishes again. At Columbia [Law School] they taught us to seine that pond, to let the water slip away and hold only the bright fish in our minds." And later, when faced with a case against a Japanese-American man who has refused to comply with an order to evacuate his home and go to the camps, "The lawyers have brought me a story, of a man who walked into the FBI office and told them he would not go. Through those murky waters I draw the seine of intellect. I am looking for the bright fish of the law, but I find nothing. I am lost; I am adrift in an endless sea, and there is no law, neither in the sun-dappled shallows nor the dark abyssal depths. There are only men."

In this lies the heart of the controversy between Black, a proponent of total incorporation of the Bill of Rights into the Fourteenth Amendment, and Frankfurter, its staunchest opponent. At one point, Black comments to a confused Cash, "We have law to protect us from our best instincts as well as our worst." But Frankfurter offers what would seem to be the opposite view. "You understand, Cash, how important it is for a judge to put aside his personal desires. Most of all his desire for approval from his crowd. A judge can have no loyalties except to abstractions, to truth and justice."

No loyalties to people, then, litigants, those imprisoned for no reason other than their national heritage, those forced to salute a flag against their religious beliefs, those who have renounced their citizenship under a false understanding and a false sense of assumptions.

And we are back to truth. And the temple where it resides. If it does. And the path to get there. Through law? Through justice? Through political approval? Through lies? Through love, for people, for an institution, for the rule of law?

Perhaps some of these many questions might have been easier to answer had Roosevelt made the history slightly more transparent, easier to grasp. He proves himself a serious student of early twentieth-century events, a quality that adds rigor and veritas to the novel but occasionally leaves the reader scrambling back a few pages to recall just who a character is or figure out just what is happening and where. It is because the author is so familiar with the time period and the historical and societal issues that the novel springs to life; it could be, however, that very familiarity prevents him from taking the reader through just a bit more slowly so that she can keep up.

Just like the reader, though, Cash must march forward, on those feet deemed insufficient for battle, with allies on whom he is not sure he can depend, and eventually against enemies he discovers along the way. Joining the Department of Justice after his clerkship, tapped to take on a key role in the Japanese internment camp controversy, he asks, "Who do we serve, the lawyers of Justice? The Department, the President, America, the law? . . . Law requires care . . . ; it grows where we nourish it and dies where we cut it."

How do we care for the law? How do we nourish it? Can we count on one institution, one made up of nine flawed individuals, to have the answer? Is the Supreme Court a temple in which we pray, a setting for divine inspiration and truth? Or is it merely a marble building, with massive doors, with warriors inside, secretly fighting for each one's individual definition of what's right, what's true, what's just? Cash notes again and again, throughout the book, that "[T]he Court can bend the rules to get the right result." And, "[i]t doesn't matter what the law says, not if there's something you want enough." He asks, "And we enforce the law, no matter what it is?" and he struggles with the answer. "That's what the Department of Justice does, yes."

And then we think again, what about the people? The people, about whom Roosevelt's Black says, "There's real people in these cases. . . And you should never forget that. They like tapioca, and they can't stand onions, and they wake in a dark night and don't know where they are or why. You don't want to stop seeing their faces."

You don't want to stop seeing their faces. And yet the law is hard to grasp, to see, to understand below the murky water. The fish dart to and fro, obscuring it in the moment it is most needed. To some, we can suppose, the murky water is an evil, clouding our clear view of the law. To others, perhaps, the role the murky water performs is justice, occluding rules that are slippery and scaly, allowing us to ignore the bright and shiny colors of the tempting fish and focus on what is truly right.

At the end of *Allegiance*, three years after he begins his clerkship, Cash calls up a memory of his first weeks at the Court. "When I first met you, you said that [the Supreme Court] was a temple of truth." Cash reminds Justice Frankfurter. And then, Frankfurter reminds him of an even greater truth – a truth about the fiction of a Court above politicking, above vote-trading, above rule-breaking. "We are at war, and in time of war there is only one rule. Form your battalion and fight."

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LEGAL STUDIES RESEARCH PAPER SERIES

RESEARCH PAPER 44

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

Peter Margulies
Professor of Law

**This paper can be found in final form at
30 Fordham Int'l L. J. 642 (2007)**

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

Peter Margulies*

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

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

² See Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *TORTURE: A COLLECTION* 61-75 (Sanford Levinson ed., 2004).

³ See Jose Alvarez, *Torturing the Law*, 37 Case W. Res. J. Int’l L. 175, 215-21 (2006) (discussing interaction of lawyers’ ethical obligations and dictates of international and domestic law); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat’l Sec. L. & Pol’y 455 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. Nat’l Sec. L. & Pol’y 409 (2005).

This loss of equipoise is especially acute where, as in the case of Guantanamo, policies entail detention without trial. American history has shown that regimes of mass detention undermine the legal system's values. A number of sorry episodes, most notably the internment of Japanese-Americans in World War II,⁴ demonstrate that detentions develop an institutional momentum that undermines accountability, fairness, and equality. This Article offers a framework for determining when pushing the envelope in national security crises is justifiable as a matter of law and legal ethics.

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

The Article is in three parts. Part I discusses the adverse effects of detention policies on legal ethics and the integrity of the justice system. Part II uses a broader lens to describe costs to the United States' credibility and reputation. Part III sets out the test for pushing the envelope, and discusses two examples from history: Lend-Lease and the

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

Cuban Missile Crisis. The goal of the Article is to show that legal ethics in national security strategy must reject absolutes. A blind aggrandizement of executive power will pose ethical and policy problems. However, a risk-averse position that avoids pushing the envelope can also pose dangers. Judgment, not a categorical approach, is necessary to discern the most prudent path.

I. National Security, Detention, and Lawyers' Ethics

Detention of perceived national security threats outside the traditional confines of the criminal justice system strains the ethics of government lawyers. Detention may be necessary in exigent situations.⁵ Nevertheless, the charged atmosphere of national security advice and litigation can cast legal ethics as a luxury that the attorney can ill afford. In this context, institutional and ideological factors can erode compliance with ethical norms.

Institutional factors include the familiar collective action problem of the “race to the bottom.” While government lawyers do not bill by the hour, they do compete for power, prestige, and influence.⁶ In the national security arena, government lawyers

⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (authorizing detention of suspected terrorist apprehended in theatre of war, subject to procedural protections); cf. Margulies, *Zone of Twilight*, supra note _ (discussing appropriateness of narrowly tailored detention); Stephen I. Vladeck, Note, *The Detention Power*, 22 *Yale L. & Pol’y Rev.* 153 (2004) (expressing doubt about authority of executive to detain individuals without express congressional approval).

⁶ Competition is often a beneficial phenomenon, sharpening the competence of the participants and producing goods that match consumer needs. Allocating power, prestige, and influence through other criteria, including status, race, or ethnicity, has obvious downsides. However, competition can also have a negative effect on public goods, including the overall integrity of the system. “Market failure” of this kind is a compelling rationale for regulation of competition, generally, and lawyer’s ethics in particular. Cf. Lucian Arye Bebchuk & Christine Jolls, *Managerial Diversion and Shareholder Wealth*, 15 *J.L. Econ. & Org.* 487, 487-88 (1999) (discussing importance of regulation to ensure transparency in executive compensation); George C. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 *Harv. L. Rev.* 1102, 1116 (2004) (noting need to regulate self-interest of corporate managers).

compete for influence on decisionmakers by signaling their willingness to tolerate conduct that is close to the line of legality.⁷ In the short term, a lawyer who tells a decisionmaker what that senior official wants to hear receives even more attention. This attention generates more prestigious assignments. In addition, the lawyer gets to see her recommendations played out in actual government policy.⁸

Ideological allegiances also play a major role in this process. For many lawyers in the current Administration, any tensions with legal ethics are at best hiccups that distract from the main mission: restoring the power of the Presidency.⁹ This view has a compelling origin story: a narrative attributed to the Framers, in which the President wields virtually untrammelled power in foreign affairs. Supposed constraints on the President in domestic or international law are suspect. The problem is that this origin story of executive power badly distorts the Framers' words, actions, and intent. While

⁷ Comparable problems led to the abdication of corporate lawyers' gatekeeping role in the Enron debacle. See JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 205-6 (2006); Peter Margulies, Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime, __ Rutgers L. Rev. __ (forthcoming 2006); Milton C. Regan, Jr., Ethics in Corporate Representation: Teaching Enron, 74 Fordham L. Rev. 1139, 1146-47 (2005) (Enron traders divided world into "those who 'got it' and those who didn't"); William H. Simon, Introduction: The Post-Enron Identity Crisis of the Business Lawyer, 74 Fordham L. Rev. 947, 948-49 (2005) (discussing costs stemming from mistakes by agents that damage entity's interests).

⁸ Affective ties between attorney and client also play a role in this process. Lawyers often turn to public service because they feel inspired by a particular public official. This was certainly true, for example, of lawyers who served Presidents Roosevelt, Kennedy, and Reagan. The approval of these charismatic figures may attain a special import for the lawyer, overwhelming ethical scruples. Moreover, lawyers want to be seen by clients whom they admire, respect, and depend on for career advancement as "getting with the program."

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

⁹ See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. Chi. L. Rev. 1639, 1654 (2002)

the Framers recognized that in emergencies the President had certain institutional advantages, they also recognized the need for collaboration between the branches.¹⁰ In addition, they understood the importance of treaty obligations and other authority under international law.¹¹ However, ideological champions of presidential power can dismiss these critiques as the carps and cavils of the uninitiated.

Once the policy universe includes extraordinary detention regimes, institutional momentum takes over.¹² The lack of accountability becomes seductive. The new solution goes off in search of problems to solve.¹³ As Twain said, “Give someone a hammer and they look for a nail.”¹⁴ In this environment, a spectrum of legal ethics problems emerge from lawyers’ eagerness to justify the new approach. For example, lawyers risk counseling their policymaker clients to engage in illegal acts or target minorities. Lawyers also may display a lack of candor with courts. I discuss each issue in turn.

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

¹¹ See Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”, 99 Colum. L. Rev. 2095 (1999).

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

¹³ Means for implementing a policy often influence identification and analysis of the underlying problem. See, e.g., 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”).

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

A. Assisting the Client's Illegal Acts

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

The roots of the Bush administration disregard for law stem from an episode – Iran-Contra – where the Reagan administration disregarded both a federal statute and international norms. Much of the administration's view that it is not only permitted, but virtually *required* to disregard otherwise applicable law flows from the Minority Report issued by Republican members of the House Select Committee investigating the Reagan Administration's attempts to both provide weapons to the Iranians and undermine the

¹⁵ See Model Rule 1.2(d), and DR 7-102(A)(7) (lawyer may not “[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent”)

¹⁶ See Alvarez, *supra* note __; Clark, *supra* note __; Margulies, *Lawyers and Collective Illegality*, *supra* note __.

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

¹⁸ See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 6637-39 (1952) (Jackson, J., concurring).

government of Nicaragua.¹⁹ Doing the latter involved violating a federal statute, the Boland Amendment, that barred aid to the Contra rebel group.²⁰ It also involved significant tension with international law norms that forbid the unjustified use of military force by one nation against another through nongovernmental surrogates or the nation's own military forces.²¹ In aiding the Contras, and then lying about it to Congress, the administration turned its back on the *Youngstown* framework and cost itself credibility at home and abroad.

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

¹⁹ See STEPHEN DYCUS, et al., NATIONAL SECURITY LAW 482-86, 505 (3rd ed. 2002); see also Jeffrey Rosen, Power of One: Bush's Leviathan State, New Republic, July 24, 2006, at 8, 9-10 (discussing origins of Bush administration view in Iran-Contra affair); Jane Mayer, The Hidden Power: A Secret Architect of the War on Terror, The New Yorker, July 3, 2006, at 44, 49 (noting role of long-time Cheney aide David Addington in the Minority Report and policy in the Bush administration).

²⁰ See DYCUS, et al., supra note __, at 491-93.

²¹ The International Court of Justice held that the United States, while it had sponsored the Contras' violent activities, lacked "effective control" over their actions. See *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). Ironically, more recent events, including the state manipulation of private death squads in the former Yugoslavia and the international community's revulsion at the involvement of the Taliban in supporting Al Qaeda, have arguably led to a broader test for determining a nation's responsibility for the actions of private groups. See *Prosecutor v. Tadic*, Judgment, NO IT-94-1-A, para. 137 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgment/tad-aj990715e.pdf>; cf. Vincent-John Proulx, Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?, 23 Berkeley J. Int'l L. 615, 630-41 (2005) (arguing that broader standard is appropriate to encourage state diligence).

²² See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, art. 1, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for purposes of punishment, intimidation, discrimination, or extracting a confession).

license to mistreat detainees.²³ In addition, this cramped definition was inconsistent with the purpose and meaning of the War Crimes Act, which relies on international standards.²⁴

The Administration ran into further trouble with its national security wiretapping policy.²⁵ This policy violated specific provisions in the Foreign Intelligence Surveillance Act, which require the government to seek a warrant within 3 days of beginning surveillance, and allow 15 days of warrantless surveillance during a war. By opining that the President could act inconsistently with FISA, the Administration's lawyers again ran afoul of the venerable *Youngstown* framework.

While gray areas are common in national security law, issues such as torture and warrantless wiretapping also feature some reasonably clear boundaries. In isolated, highly exigent situations, government conduct that crosses the line may be difficult to

²³ Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), in Mark Danner, *Torture And Truth: America, Abu Ghraib, and the War on Terror* 115, 145 (2004) [hereinafter *Memo for Alberto Gonzales*] (arguing that federal statute criminalizing practice of torture “must be construed as not applying to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority”); but see Sanford Levinson, *Contemplating Torture*, in *TORTURE: A COLLECTION*, supra note __, at 23, 28-30 (criticizing analysis in torture memos); cf. Margulies, *Beyond Absolutism*, supra note __ (arguing for pragmatic focus on interaction of norms and institutions in torture debate).

²⁴ See John Yoo & Robert J. Delahunty, U.S. Dep’t of Justice, Office of Legal Counsel, *Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, in STEPHEN DYCUS, et al., *NATIONAL SECURITY LAW* 45, 47-48 (Supp. 2005-06), citing then-current 18 U.S.C. sec. 2441(c)(3) (2005) (war crimes included violations of common Article 3 of the Geneva Convention, such as torture and cruel, inhuman, or degrading treatment). In the recently enacted Military Commissions Act, Congress diluted the provision dealing with Common Article 3 by specifying that only “grave breaches,” not mere violations were prohibited. See 18 U.S.C. sec. 2441(d)(2007). Congress retained the prohibition on torture and cruel and inhuman treatment. *Id.*

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

condemn categorically.²⁶ However, lawyers who consistently advise conduct that straddles the boundary blur the distinction between attorney and accomplice.²⁷

B. Targeting Based on Race

Another disturbing aspect of lawyering on matters of detention is reliance on stereotypes and profiling. Generalizations about citizens and immigrants have been a mainstay of national security policy since World War I.²⁸ In contrast, rules against “bias or prejudice” in the practice of law are of recent origin.²⁹ An unduly rigid application of ethical restrictions on bias might chill lawyering even where ethnicity, religion, or national origin was one criteria among many. However, more robust interpretation of the ethical rules would promote liberty, equality, and accountability. In addition, decreasing reliance on stereotypes in decisions about arrest, detention, and deportation would promote efficiency in law enforcement and national security policy.

²⁶ See Margulies, *Beyond Absolutes*, supra note __. But see Kim Lane Scheppelle, *Hypothetical Torture in the “War on Terrorism,”* 1 J. Nat’l Sec. L. & Pol’y 285 (2005) (critiquing facile and frequent use of “ticking bomb” scenario to justify torture).

²⁷ See Margulies, *Lawyers and Collective Illegality*, supra note __; cf. Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 Md. L. Rev. 173 (2003) (discussing ethical risks for criminal defense lawyers).

²⁸ See Office of the Inspector General, U.S. Dep’t of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) (critiquing criteria used to detain aliens after September 11); cf. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 Asian L.J. 1 (2001) (exploring common themes between Japanese-American internment and post-September 11 measures); Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 Sw. L. Rev. 449 (2005) (discussing history).

²⁹ See Model Rule 8.4 cmt. 3.

The ethical stricture against lawyers' "words or conduct" that manifest bias echoes clear prohibitions in international law.³⁰ For example, the International Covenant on Civil and Political Rights (ICCPR) bars discrimination on the basis of nationality, race, religion, and other factors, and imposes duties on states to implement this prohibition. While the United States has limited the legal force of the ICCPR, the overarching principle of non-discrimination commands wide respect. In an increasingly interdependent world, equality is a good for its own sake. Moreover, on the international stage, a commitment to the principle of equality also encourages reciprocity by countries and communities that might otherwise be suspicious of each other's motives.³¹ This element of reciprocity is important because politicians throughout the world often act against minority communities under the guise of national security.³² Legal advice that limits resort to this gambit will promote a positive brand of reciprocity, as well as a more focused national security strategy that concentrates on genuine threats.

Unfortunately, government lawyers addressing national security policies that rely on stereotypes have failed to consider international law norms barring discrimination. For example, after September 11 the administration engaged in a round-up of

³⁰ See International Covenant on Civil and Political Rights, G.A. Res. 2200, art. 2(1), art. 26, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 *Brook. J. Int'l L.* 495, 515-19 (2006); cf. Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 *Am. U. Int'l L. Rev.* 557, 570-73 (2006) (discussing legal options regarding state adherence to provisions of international agreements on hate speech, and problems with prosecuting hate speech in international tribunals).

³¹ Cf. Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"*, 5 *Theoretical Inquiries L.* 47, 72 (2004) (stressing importance of dialogue between transnational nongovernmental organizations and United States on human rights issues).

³² See BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 81 (2001) (discussing persecution of immigrant dissidents).

undocumented aliens from Middle Eastern and South Asian countries.³³ However, there is no evidence that legal advice to the Bush Administration on measures such as the round-up considered international law norms or the impact of such actions on public opinion abroad. While the Administration has engaged in negotiation with certain countries regarding the detention of their nationals at Guantanamo, these negotiations have been ad hoc, without the bedrock of principle that would comply with the spirit of international norms and persuade international audiences of the United States' good faith. Administration lawyers have also defended measures such as the immigration round-up as justified exercises of executive authority.³⁴ While the content of the Administration lawyer's arguments has not affirmatively promoted stereotypes, one can argue that the deference to policies based on stereotypes, not particularized proof, urged by the lawyers nonetheless "manifests" bias.

Government lawyers dealing with national security issues have been similarly unconstrained by provisions of American law that require particularized suspicion and equal treatment under law. In the Civil War, a complicated case which I discuss in greater detail later in this article, military authorities used the suspension of habeas corpus to detain thousands of citizens, some appropriately (particularly early in the conflict), but others on charges so nebulous that the detainee's jailers could not even recall them when asked.³⁵ In World War I, the Administration rounded up dissidents,

³³ See DAVID COLE, ENEMY ALIENS (2003) Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002) (describing the marginalization of particular communities after September 11).

³⁴ At least one court has agreed. See *Turkmen v. Ashcroft*, 2006 U.S. Dist. Lexis 39170 (E.D.N.Y. June 14, 2006).

³⁵ Cf. MARK NEELY, THE FATE OF LIBERTY 52-65 (1991) (discussing examples of abusive confinement during Civil War).

many of them Jews like the anarchist Emma Goldman,³⁶ and imprisoned or deported over a thousand. The government's actions during World War II, however, present the most troubling case for both policy and lawyer's ethics.

The legal defense of the internment policy hinged on a stereotype of Japanese-Americans as insidious and inscrutable security risks.³⁷ Ironically, the narrative shaped by government lawyers acknowledged the discrimination that Japanese-Americans had frequently faced in America, but then leveraged that history of discrimination to paint Japanese-Americans as a resentful and cloistered minority eager to exact their revenge on United States interests. Based on the government lawyers' skillful advocacy, the Supreme Court accepted this argument in *Hirabayashi v. United States*.³⁸ Once accepted by the Court, these arguments formed part of the backdrop for the Court's holding in *Korematsu*³⁹ upholding a statute that criminalized resistance to the forced evacuation of Japanese-Americans from their homes.

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

³⁶ See PETER IRONS, JUSTICE AT WAR 15 (1983).

³⁷ Lawyers honed this strategy despite their private doubts. *Id.*

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

³⁹ See *Korematsu v. United States*, 323 U.S. 214 (1944).

C. Lack of candor with the tribunal

Another disturbing effect of detention policies has been the lack of candor thereby promoted among lawyers charged with defending the government. Candor with the tribunal has been among the most important ethical dictates of the lawyer. Without candor with the tribunal, the adversary system cannot function. For this reason, ethical rules prohibit the lawyer from making a false statement of law or fact to a tribunal, or “failing to correct” a false statement previously made.⁴⁰ Unfortunately, episodes of detention – sometimes involving illustrious American lawyers – have revealed a lack of compliance with this ethical norm.

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

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

⁴⁰ See AM. BAR ASS'N, MODEL RULES OF PROF. CONDUCT, Rule 3.3 (2005). The Model Code of Professional Responsibility, an earlier codification of ethical rules first adopted in 1908 and still in force in a majority of states, has comparable rules. See MODEL CODE OF PROF. RESPONSIBILITY, DR 7-102(A)(5) (2005) (prohibiting the lawyer from knowingly making a false statement of law or fact).

Department setting out the basis for the government's policy. DeWitt's report was the fulcrum for the lawyers' lack of candor.

DeWitt made a number of damning claims in the report, including the charged assertion that the government had documented Japanese-American radio transmissions from the West Coast to the forces of the Japanese Empire. DeWitt also asserted that threats of violence by whites prevented the voluntary movement of Japanese-Americans from the West Coast to less sensitive areas further east. The report asserted that the failure of a voluntary program of evacuation and resettlement justified the evacuation and internment policy.⁴¹ Both of these claims were false. An investigation by the Federal Bureau of Investigation (FBI) failed to find any documented instances of radio transmissions.⁴² Indeed, the FBI concluded that these claims were fabrications.⁴³ In addition, the facts wholly failed to demonstrate that violence against Japanese-Americans would have doomed a voluntary program.⁴⁴

Fidelity to ethical rules requiring candor with the tribunal would have required a clear distinction between the discredited claims in the DeWitt Report and the facts as stated in the government's brief. A straightforward disavowal of the report would have been the action most appropriate for avoiding any misapprehension on the part of the Court. Several Justice Department lawyers wished to take this step. However, Wechsler, at McCloy's urging, decided that a less precise caveat was appropriate.⁴⁵

⁴¹ See IRONS, *supra* note __, at 294-95.

⁴² *Id.* at 291.

⁴³ *Id.*

⁴⁴ *Id.* at 294-95, 299-300.

⁴⁵ See Norman Silber & Geoffrey Miller, Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler, 93 Colum. L. Rev. 854, 886-90 (1993).

Wechsler drafted a footnote that said the following: “We have specifically recited in this brief facts relating to the justification for the Evacuation, of which we ask the Court to take judicial notice, and we rely upon the... [DeWitt] Report only to the extent that it relates to such facts.”⁴⁶ However, this cryptic footnote failed to fulfill the Justice Department lawyers’ duty under the ethical rules. First, the footnote failed to adequately identify those portions of the DeWitt Report that the lawyers knew to be false. This invited confusion on the part of the Court, particularly since the Court had already relied on the report in the *Hirabayashi* case.⁴⁷ Second, on its own terms, the footnote was faulty. While the Justice Department asked the Court to take judicial notice of the report’s accuracy on the matter of violence against Japanese-Americans, the facts did not provide the clarity and certainty that judicial notice demands.⁴⁸

Ultimately, the Court in *Korematsu* relied on the DeWitt Report as a basis for upholding the statute criminalizing failure to report to a government facility.⁴⁹ In another case, *Ex Parte Endo*,⁵⁰ issued on the same day, the Court granted the secret wish of the Justice Department’s lawyers and held that the executive lacked statutory authority to detain a concededly loyal Japanese-American.⁵¹ While this decision effectively ended the internment program,⁵² *Korematsu*’s holding has retained its impact in American

⁴⁶ See IRONS, *supra* note __, at 290-91.

⁴⁷ *Id.* at 291 (including the assertion in *Hirabayashi* that the “opportunity for espionage and sabotage” justified the evacuation).

⁴⁸ *Id.* at 299-300.

⁴⁹ *Korematsu v. United States*, 323 U.S. 214, 219 n. 2, 223-24 (1944).

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

⁵¹ See Jane B. Baron & Julie Epstein, *Is Law Narrative?*, 45 Buff. L. Rev. 141, 160 (1997) (noting Wechsler’s recollection that, in *Endo*, the Justice Department lawyers “lost and were delighted to lose”).

⁵² See Gudridge, *supra* note __.

history and culture. No case better demonstrates the pressures that undermine lawyer's fidelity to ethical rules in national security matters, and the ill effects yielded by government lawyers' failure to internalize ethical norms..

Lawyers in the Bush Administration have also acted in a fashion that suggests a lack of candor on issues of detention. Consider the case of Brandon Mayfield, a Portland lawyer whom the FBI arrested in May 2004 as a material witness in the investigation of the Madrid train bombing.⁵³ The FBI had examined a third-hand version of a fingerprint found at the scene, and matched that print with Mayfield.⁵⁴ Prosecutors submitted an affidavit asserting that Spanish authorities agreed with the fingerprint analysis of the FBI.⁵⁵ Based on the affidavit, a judge approved a covert search of Mayfield's residence and Mayfield's detention for seventeen days as a material witness. Federal authorities released Mayfield after they conceded that the fingerprints did not match.⁵⁶ In fact, FBI agents knew from the start that Spanish authorities *disagreed* with the FBI's fingerprint analysis.⁵⁷ If the prosecutor knew or came to know about this disagreement, making a contrary assertion in the affidavit or failing to alert the judge upon discovering the discrepancy between the facts and the pleadings submitted would be a violation of the

⁵³ See Sarah Kershaw & Eric Lichtblau, *Spain Had Doubts Before U.S. Held Lawyer in Blast*, N.Y. Times, May 26, 2004, A1.

⁵⁴ Id. Cf. Darryl K. Brown, *Rationalizing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 Colum. L. Rev. 801, 823-24 (2004) (noting surprisingly weak reliability of fingerprint evidence).

⁵⁵ See Office of the Inspector General, U.S. Dep't of Justice, *A Review of the FBI's Handling of the Brandon Mayfield Case* (January 2006), at www.usdoj.gov/oig/special/s06101/final.pdf (last visited March 6, 2006) (hereinafter OIG Rep't).

⁵⁶ See Kershaw & Lichtblau, *supra* note __.

⁵⁷ The FBI's focus on Mayfield, who was entirely unconnected to the Madrid attacks, may have stemmed from evidence relating to Mayfield's religion and professional associations: Mayfield was a practicing Muslim, had called the head of a local Islamic organization, and had represented a terrorism defendant in a completely unrelated family law case. But see OIG Rep't, *supra* note __ (claiming that Mayfield's religious affiliations and legal experience had no impact on law enforcement decisions).

duty of candor.⁵⁸ The government recently settled a subsequent civil suit by Mayfield, agreeing pay him \$2 million.⁵⁹

Government lawyers have also discounted the need for candor in the extensive litigation surrounding Jose Padilla, an American citizen whom the government detained for three and a half years as an alleged enemy combatant. In *Padilla v. Hanft*,⁶⁰ Judge Luttig of the Fourth Circuit, an ideological soul-mate of the Administration, told the sad story of government lawyers' slippery strategy in arguing for the legality of Padilla's detention. Those lawyers almost certainly knew that if the Fourth Circuit agreed, the government would moot out the dispute by charging Padilla with criminal violations, rather than face Supreme Court review.

Judge Luttig responded with a blistering opinion that called the government's good faith into question. After observing that the government had "steadfastly maintaining that [Padilla's detention]... was imperative in the interest of national security,"⁶¹ Luttig noted the peculiar coincidence that the governments filing of criminal charges occurred just two days before the government's brief in support of Padilla's

⁵⁸ While the OIG cleared DOJ attorneys of any wrongdoing, see OIG Rep't, supra note __, the report does not explain how an alert prosecutor could have failed to ask FBI agents appropriate questions about the fingerprint analysis. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749 (2003) (discussing complex relationship between agents and prosecutors); see generally Rule 3.8, cmt. 1, AM. BAR ASS'N, MODEL RULES OF PROF. CONDUCT (2005) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate"); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 Vand. L. Rev. 381, 439-41 (2002) (discussing regulation of prosecutors by courts). If Mayfield *had* turned out to be factually guilty, the misrepresentations in the affidavit could have been considered both material and entered into in bad faith, thus requiring exclusion of evidence obtained through a search authorized in reliance on the affidavit. See *Franks v. Delaware*, 438 U.S. 154, 164-72 (1978) (discussing requirements for accuracy in affidavits supporting warrant applications).

⁵⁹ See Eric Lichtblau, U.S. Will Pay \$2 Million to Lawyer Wrongly Jailed, N.Y. Times, Nov. 30, 2006, at A18.

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

⁶¹ Id. at 584.

continued detention was due in the Supreme Court.⁶² Luttig inferred from these facts that the government had filed the indictment to avoid Supreme Court review of Padilla's detention.⁶³ In conducting litigation with these stakes, so "imbued with significant public interest,"⁶⁴ the court continued, the government should not engage in forum-shopping.⁶⁵

The government's tactics, the court observed, had serious institutional consequences for the government's credibility in the war on terror – consequences that the government (as well as its legal advisors) had underestimated in their hurried search for an expedient solution to their litigation dilemma.⁶⁶ Referring to the government's switching of stories regarding the basis for Padilla's detention and subsequent indictment – from a lurid plan to obtain a "dirty bomb" that would spew radiation to a more mundane effort to aid Muslim fighters in Bosnia and Chechnya,⁶⁷ the court added the chilling view that the government had through its dance of expedience both damaged its own claims to detention in truly exigent circumstances and "left... the impression that Padilla may have been held for... years... by mistake."⁶⁸

⁶² Id.

⁶³ Id. at 585.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id. at 587.

⁶⁷ Id. at 584.

⁶⁸ Id. at 587. National security cases where the government has brought criminal charges display problems similar to the lack of candor described in the text, including the withholding of exculpatory evidence. See *Koubriti v. United States*, 336 F. Supp.2d 676 (E.D. Mich. 2004) (granting government's motion to vacate convictions on grounds, inter alia, that prosecutor failed to disclose views of government experts that a drawing in defendants' possession was not a schemata of a missile base in preparation for an attack, but simply a crude map of the Middle East); *United States v. Wilson*, 289 F. Supp.2d 801 (S.D. Tex. 2003) (in case of former CIA operative convicted of trafficking in arms on behalf of Libya, court found that prosecutors may have willfully deceived the court by stating that defendant lacked government authorization for many of his activities).

The ramping up of plans to try high-level terrorism suspects before military commissions will only exacerbate issues of candor with the tribunal. The Military Commissions Act requires that tribunals categorically exclude evidence based on torture.⁶⁹ It also mandates the exclusion of evidence obtained by methods other than torture if that evidence is not reliable.⁷⁰ Prosecuting attorneys in these cases will face enormous pressure to conceal, minimize, or misrepresent the methods used.⁷¹ In high-profile criminal cases, such pressures are often present.⁷² In the terrorism prosecutions, where the stakes include the release of individuals who appear by any calculation to be dangerous to the United States, the pressures will be very difficult to withstand.

II. Agency Costs of Detention Gone Awry: Damage to Reputation, Credibility, and Legitimacy

In addition to the adverse effects on lawyers' ethics and the integrity of the legal system, a misconceived detention regime can generate an array of agency costs. As defined here, agency costs are costs borne by an entity, including a country such as the

⁶⁹ See Pub. L. No. 109-481, 10 U.S.C. sec. 948r(b)(2006). Congress enacted the MCA after the Supreme Court struck down the President's order establishing military commissions. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); cf. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65 (2006) (analyzing *Hamdan*); Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in Hamdan v. Rumsfeld*, *Cato Sup. Ct. Rev.* 51 (2005-06) (same).

⁷⁰ 10 U.S.C. sec. 948r(c).

⁷¹ See Peter Margulies, *The Military Commissions Act, Coerced Confessions, and the Role of the Courts*, *Crim. Justice Ethics* (forthcoming 2007), at http://ssrn.com/sol3/papers.cfm?abstract_id=954415 (arguing that courts should use statutory interpretation, supervisory authority, and construction of fundamental constitutional rights to address issues of coercion).

⁷² See *New York v. Wise*, 752 N.Y.S.2d 837, 845-46 (Sup. Ct. N.Y. Co. 2002) (granting prosecution motion to vacate convictions in New York's infamous "Central Park Jogger" case, based on government's disregard of pervasive and material inconsistencies in the alleged "confessions" of the defendants, and discovery of new DNA evidence indicating that another individual had committed the crime in question).

United States, by the decisions of the entity's leaders. The regime of detention established after September 11 has injured United States interests by impairing the perceived legitimacy of United States actions on a global scale and weakening the system of international governance in which the United States has a principal stake.

A. Legitimacy

Commentators have long argued that one of the greatest attributes of the United States is its “soft power” – its ability to persuade and influence other countries through cultural, social, and political strength, without the use of force.⁷³ This soft power hinges on perceptions that the United States acts fairly in international relations.⁷⁴ The observance of human rights and international humanitarian norms is a central element in such perceptions of fairness.

When the United States signals that it takes such human rights norms seriously, the world responds, as it did during the founding of the United Nations. Pressure on the human rights front also contributed to the collapse of Communist regimes in Russia and Eastern Europe. By the same token, United States defection from international law norms can discredit those who seek adherence to such norms around the world, and bolster regimes that seek to oppress their own people. Ironically, a regime that disregards

⁷³ 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”).

⁷⁴ See Harold Koh, *On American Exceptionalism*, 55 *Stan. L. Rev.* 1479 (2003).

such norms may eventually trigger a revolution, as the case of Iran demonstrates.⁷⁵ Such drastic shifts do not serve the interests of the United States.

A studied disregard of international law also foregoes valuable opportunities to collaborate with other countries and international organizations on improvements in the international law system. International law may well be unduly idealistic in some respects, without sufficient regard for the prerogatives of individual states and the need for flexibility in the conduct of foreign affairs. If this is true, the soundest strategy is to work to reform international law by making international agreements and tribunals more sensitive to such concerns.⁷⁶ Unilateral repeal, modification, or disregard of international law short-circuits this process, impeding dialogue and legal innovation within international law. A lawyer giving advice needs to consider these opportunity costs.

B. The Challenge of Finding an Exit Strategy

The detention of suspected terrorists at Guantanamo⁷⁷ also lacks a clear exit strategy. Without a clear exit path, the government loses control over the behavior of detainees. In addition, the lack of an exit path makes it more likely that the experience of

⁷⁵ See STEPHEN KINZER, *OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 196* (2006) (observing that attempts by the United States to dislodge democratically elected regimes in Iran and elsewhere exacerbated anti-American sentiments).

⁷⁶ See Jane E. Stromseth, *New Paradigm of the Jus Ad Bello?*, 38 *Geo. Wash. Int'l L. Rev.* 561, 571-72 (2006) (discussing challenges to the current paradigm on the use of force in international law, while suggesting that appropriate changes are possible within international law framework); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 *Stan. L. Rev.* 415, 421-26 (2006) (arguing that definitions of the permissible use of force can be adopted to address the threat of terrorism).

⁷⁷ See Diane Marie Amann, *Guantanamo*, 42 *Colum. J. Transnat'l L.* 263 (2004); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 *Loy. L. Rev.* 1, 44-53 (2004) (arguing that detainees are entitled to due process protections).

detention will radicalize detainees, making them more likely to engage in violence if they ever are released.

Controlling any detained population is difficult with both sticks and carrots. In prison, inmates have a clear exit – they leave when their term is up. Often, they can get time off for good behavior, or at least avoid serving additional time by refraining from criminal conduct while in prison. In other facilities without fixed terms of confinement, such as psychiatric facilities, expert diagnoses hasten release. However, at Guantanamo, these incentives do not operate, since the government appears to wish to hold many of the detainees indefinitely. Accordingly, interrogators have far fewer incentives to provide to detainees for obtaining worthwhile information or ensuring good behavior.⁷⁸

The experience of being held indefinitely may also be a self-fulfilling prophecy. This experience can instill militancy where none had been present, producing an implacable foe of the United States. If radicalized individuals are eventually released, preventing violence in the future may be difficult.

Finally, the peculiar status of Guantanamo as a facility for foreign nationals also triggers international law obligations accepted by the United States that impede an exit strategy. Even if the United States wished to release the great bulk of the detainees at Guantanamo, the Convention Against Torture (CAT)⁷⁹ would create obstacles. Under the CAT, the United States cannot release detainees to a country where they are likely to be

⁷⁸ See Tim Golden, *The Battle for Guantanamo*, N.Y. Times Magazine, Sept. 17, 2006, at 60, 65-66.

⁷⁹ See Convention Against Torture, *supra* note __, art. 3(1); cf. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1145-64 (4th ed. 2005) (analyzing non-refoulement (no return) obligation under the CAT); Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 670-85 (2006) (same).

tortured. Unfortunately, the government's labeling of the detainees as terrorists increases the likelihood of bad treatment if they are returned to their country of origin. Many countries of the world practice torture, and the fact that a country has signed and ratified the CAT is no guarantee of a commitment to avoid this practice (as American citizens have discovered in the wake of revelations about Guantanamo and Abu Ghraib). Without assurances, release of detainees to their countries of origin violates international law.

The result is that Guantanamo is Humpty Dumpty in reverse. When Humpty Dumpty shattered into pieces, it was impossible to put him back together. Here, in contrast, since Guantanamo has been established, it will be difficult to take it apart. A broader commitment to understanding and working within international law would have prompted greater caution in setting up Guantanamo. However, since administration policymakers and their attorneys disparaged international law, they were ill-situated to provide this valuable advice.

C. Torture and Institutional Momentum

Finally, authorizing conduct in tension with international law triggered institutional drift toward coercive interrogation as the norm, rather than the exception. Here, too, the government's policymakers and counselors were less than prescient. It is true that then-White House Counsel Gonzales noted that permitting "alternative methods" of interrogation could adversely affect "military culture."⁸⁰ However, Gonzales'

⁸⁰ See Alberto Gonzales, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, in STEPHEN DYCUS, et al., NATIONAL SECURITY LAW, 2005-06 Supp. at 52, 54 ("a determination that ... [the Geneva Convention] does not apply to al Qaeda and

response to this concern – that the military would not back-slide from commitments to the principles of Geneva because President Bush had “directed” them to adhere to those principles⁸¹ – fails to recognize the mixed messages about international law conveyed by the Bush administration. The signals sent by Gonzales himself that the Geneva Conventions were “quaint” and “obsolete”⁸² helped pave the way for the abuses at Abu Ghraib and Guantanamo. As the race to the bottom dynamic predicts, people resort to coercion when norms are ambiguous and coercive methods are expedient.⁸³ Coercion moves from exception to default rule. This process crowds out alternatives, such as building rapport between captor and captive, that seasoned professionals view as more effective.⁸⁴

D. Summary

In sum, the institutional consequences of the President’s decisions on detention and interrogation boxed the Bush administration into largely unproductive policies. While then-White House counsel Gonzales wrote that declining to apply the Geneva

the Taliban could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct”).

⁸¹ Id. at 55-56.

⁸² Id. at 53.

⁸³ See Louis M. Seidman, *Torture’s Truth*, 72 U. Chi. L. Rev. 881, 893 (2005); Peter Margulies, *Beyond Absolutism: Legal Institutions in the War on Terror* (Review Essay), 60 U. Miami L. Rev. 309, 313 (2006).

⁸⁴ Moreover, the recently-enacted Military Commissions Act (MCA) accelerates the institutionalization of coercive interrogation. The MCA permits the introduction into evidence in military commissions of evidence obtained by coercion before December 30, 2005, as long as that evidence is “reliable.” See Pub. L. No. 109-481, 10 U.S.C. sec. 948r (2006). Unless courts interpret the MCA to exclude such evidence, further damage will result to the United States’ credibility. See Margulies, *The MCA, Confessions, and the Courts*, *supra* note _.

Conventions “[p]reserves flexibility” and “holds open options,”⁸⁵ the opposite is true.

Coercive interrogation and arbitrary detentions at Guantanamo in fact imposed significant opportunity costs on the United States, hampering a transition to more productive and legally defensible methods.

III. Pushing the Envelope Justified

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

⁸⁵ See Gonzales, *supra* note __, at 53.

A. Dialogic Disposition

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

A dialogic disposition can entail ratification after the fact.⁸⁶ However, a commitment to seek such ratification should be part of the original decision. Moreover, an effort to secure ratification should follow the original decision in a reasonable period of time, typically six months or less. Attempts at ratification that are forced on a decisionmaker and post-date the decision by a substantially longer period cannot really count as dialogue.⁸⁷

Timely post-hoc ratification is also appropriate from a legal ethics perspective. The ethics rules permit advocates to seek a good-faith modification of existing law.⁸⁸

⁸⁶ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 *Yale L.J.* 1011, 1108 (2003) (discussing Jefferson's view).

⁸⁷ For this reason, the Bush administration's belated efforts to secure approval for its policies on detention, coercive interrogation, and national security surveillance through the Military Commissions Act of 2006 do not meet the dialogic disposition criterion. These late entries responded to court decisions and media disclosures.

⁸⁸ See Rule 1.2; Rule 8.4.

Since legal advisors contemplate that external audiences and institutions will have to ratify a policy, they have incorporated the transparency that the ethics rules demand. Advisors believe that their changes will be approved by relevant audiences and institutions. They build the provision of this opportunity into their advice. While pushing the envelope may still create tension with the ethics rules, this tension is ultimately productive, leading to changes in the law that the rules recognize as both inevitable and desirable.

B. Consideration of institutional consequences

Legal advisers should also consider the institutional consequences of particular decisions. At their best, lawyers grasp not only legal doctrine but how institutions work. The rules of legal ethics encourage lawyers to offer advice on non-legal consequences.⁸⁹ Prudent legal advice should point out not only the benefits if a proposed action is successful, but the risk of error in estimating the likelihood of success. Particularly when success hinges on the convergence of variables, the risk of error may be high. However, lawyers with blind spots engendered by ideology, aspirations for career advancement, or intoxication with making an impact may systematically overestimate the probability of success, while discounting the risk of failure. A cardinal challenge for national security lawyers is guarding against this oversight without embracing risk aversion as a panacea.

In the case of a proposal involving detention of national security risks outside normal channels, history provides a clear account of the risks. As we have seen, these consequences can include the erosion of the legal system's integrity, lawyers' ethics, and

⁸⁹ See Rule 2.1; Katyal, *supra* note __, at 119-20.

the ideal of equality. Such programs, as tempting as they may seem when first proposed, have substantial opportunity costs. Particularly when they involve violations of international law, they undermine the nation's credibility, and make forging international consensus more difficult. In addition, a decision to approve detention that challenges international law norms can also be difficult to reverse. Lawyers advising decisionmakers must assess the difficulty of exiting from a policy, once it becomes counterproductive.

At the same time, lawyers must assess the consequences of failing to take action. When national security crises such as the destruction of railways and bridges in Maryland linking Washington, D.C. to the North emerge, adherence to the letter of the law can risk the entire structure of democracy and self-government. Lincoln argued persuasively that here the long-term view argued for some temporary curtailing of habeas corpus, asking in his message to Congress, "[A]re all the laws *but one* [habeas] to go unexecuted, and the government itself go to pieces, lest that one be violated?"⁹⁰ One can view Lincoln's suspension of habeas at this place and time as a narrowly tailored response to an existential threat, in which the institutional costs of inaction outweighed the costs of decisive measures to contain the Maryland insurrection.⁹¹

Moreover, Lincoln was discerning in the timing of the suspension, holding it in abeyance until after the Maryland legislature considered a secession vote. While others, including generals (Winfield Scott) had urged the arrest of secessionist Maryland

⁹⁰ See NEELY, *FATE OF LIBERTY*, *supra* note __, at 12.

⁹¹ See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 16-17 (2003); Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now – The Southern Rebellion and September 11*, 60 N.Y.U. Ann. Surv. Am. L. 463, 466 (2004).

legislators, Lincoln thought better of this strategy. First, Lincoln noted that the legislators had a “clearly legal right to assemble.”⁹² Lincoln also noted that the remedy of suspension would only complicate the challenging political situation, observing that, “we *can* not permanently prevent their action. If we arrest them, we can not long hold them as prisoners; and when liberated, they will immediately re-assemble, and take their action.”⁹³ Through clear-headed insight into institutional consequences, Lincoln appreciated that suspension of habeas, whatever its virtues in dealing with the precarious military situation in the early days of the Civil War, would never be a solution to the political challenges faced by his Administration.⁹⁴

Unfortunately, this insight did not prevent Lincoln’s administration, with his tacit or active consent, from using suspension of habeas corpus as an expedient through the rest of the conflict.⁹⁵ Through the rest of the war, Lincoln’s administrators and generals used habeas readily to arrest and detain a wide spectrum of people – approximately 13,000⁹⁶ - often without any official indication that these individuals were disloyal or plotting violence.⁹⁷ Indeed, the ready availability of arrest and detention, more than any conduct by those actually arrested and detained, accounted for its use. Lincoln seemed to

⁹² See NEELY, THE FATE OF LIBERTY, *supra* note __, at 6.

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 9 (“Suspending the writ of habeas corpus was not originally a political measure, and it would never become primarily political.”).

⁹⁵ See Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 Ga. L. Rev. 699, 718 (2006) (discussing Lincoln’s suspension of habeas corpus).

⁹⁶ See NEELY, THE FATE OF LIBERTY, *supra* note __, at 23,

⁹⁷ *Id.* at 20-21.

exhibit little interest in stopping these adverse institutional consequences, even when they provided fodder for his opponents.⁹⁸

C. Harmonization with Evolving Norms

Policymakers at certain crucial junctures in American history have defied the letter of the law to promote equality, dignity, and nonaggression. A purposive style of interpretation drives these decisions, premised on the goals served by constitutional or international law. Examples include the protection of human dignity in the Emancipation Proclamation,⁹⁹ safety from aggression, as in Roosevelt's Lend-Lease program, or the use of tailored and limited force to prevent a wider conflict, as in the Kennedy Administration's approach to the Cuban Missile Crisis. While each of these measures could also claim a pragmatic justification, each represented a conscious break with the past. Moreover, despite the tension triggered with existing norms, each decision vindicates the rule of law.

The law must reckon with evolving norms because societies and circumstances change. Sometimes values integral to the founding of an entity become submerged under the weight of popular fears, sectarian interests, or bureaucratic in-fighting. In such situations, a return to first principles is essential. Both Lincoln and Frederick Douglass,

⁹⁸ Id. at 18 ("the impact of the [subsequent arrest of legislators] on later Maryland elections is difficult to determine, but they were more likely harmful than helpful to the administration's cause by supplying an issue to the opposition.").

⁹⁹ See Sanford Levinson, Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?, 2001 U. Ill. L. Rev. 1135, 1142-43; cf. id. at 1149 (outlining argument that Lincoln's actions, whatever their provenance, were ratified by the Thirteenth and Fourteenth Amendments); see also Michael Stokes Paulsen, The Emancipation Proclamation and the Commander in Chief Power, 40 Ga. L. Rev. 807, 814-23 (2006) (defending Emancipation Proclamation as legitimate exercise of presidential authority in time of war).

for example, understood that the struggle against slavery was about distilling the ideals of the Declaration of Independence and renouncing the bargain with evil represented by the Constitution's treatment of that "peculiar institution."¹⁰⁰ The renewed founding embodied in this return to first principles is not a rejection of the rule of law, but a necessary step in affirming the rule of law's continued relevance.

Both legal ethics and international law recognize the importance of change in the law. Rule 1.2 permits lawyers to challenge existing law, not only directly through litigation, but also indirectly through legal advice to groups engaging in civil disobedience. International law, for its part, elaborates and augments core principles in the formation of customary international law. While fundamental norms, such as the prohibition on torture, are *jus cogens* and therefore inviolable, other values and applications flow from an accretional process that reflects actions by states and tribunals, as well as surveys of the landscape by learned students of the process. Moreover, although detecting emerging norms is not always easy, the Supreme Court has indicated that courts have the competence to accomplish this task.¹⁰¹ If courts have this power, lawyers certainly have the aptitude to make similar calls.

¹⁰⁰ See MARK NEELY, *THE LAST BEST HOPE OF EARTH: ABRAHAM LINCOLN AND THE PROMISE OF AMERICA* 154 (1995) (discussing the rhetorical strategies at play in the Gettysburg Address); JAMES OAKES, *THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS* 61-69 (2007) (articulating Lincoln's view that both Declaration of Independence and Constitution contemplated progress toward the end of slavery, and that preservation of the Union was necessary for achievement of this goal); cf. MILNER S. BALL, *THE WORD AND THE LAW* 146-49 (1993) (discussing Frederick Douglass' views); Peter Margulies, *Progressive Lawyering and Lost Traditions* (Review Essay), 73 *Tex. L. Rev.* 1139, 1177-78 n. 228 (1995) (same).

¹⁰¹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (discussing process of adjudication under Alien Tort Statute, which allows plaintiffs to seek relief in United States courts for violations of the "law of nations").

D. Lend-Lease

As one example of a national security decision that meets the above criteria, consider the Lend-Lease program. In Lend-Lease, President Franklin D. Roosevelt agreed, prior to the United States' entry into World War II, to send American destroyers to Britain in exchange for a commitment by the British to lease bases in the Caribbean to America. Roosevelt made the agreement with British Prime Minister Winston Churchill without prior consultation with Congress.¹⁰² Despite the utility of the agreement in holding Nazi Germany at bay, Lend-Lease was inconsistent with both statutory and international law.

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

¹⁰² See ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932-45*, at 246-47, 256-60 (1979). (discussing chronology of Lend-Lease agreement, including post-agreement approval and appropriations by Congress); cf. ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 93-103 (John Q. Barrett ed., 2003) (account by Roosevelt's Attorney General, later Supreme Court Justice).

Neither of Jackson's arguments stands up to scrutiny. On the question of whether material was "essential," while Jackson's argument about net benefits is resourceful, there was no evidence that Congress contemplated aggregating costs and benefits as Jackson outlined. There was, however, ample evidence that Congress wished to avoid moves that might yield foreign entanglements. On the implications for neutrality of sending material to belligerents, Jackson's distinction between material built for that purpose and material built for another purpose but subsequently converted into aid to a belligerent seems sophistic at best.¹⁰³

Viewed in this stark light, Jackson's opinion appears to counsel the willful evasion, if not outright defiance, of both international and domestic law. Under Rule 1.2(d), and DR 7-102(A)(7) (lawyer may not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent"), Jackson clings tenuously to the vine of subjective intent, arguing in essence that his belief compensates for the lack of reasonable support for his position. That lack of support also permits an inference that the lawyer, particularly a well-placed government lawyer with access to all advice, did not actually believe that the action was lawful. (Jackson also remained silent while Roosevelt, not in an actual court but in the court of public opinion during an election year, was at best less than candid about the existence of an agreement with Churchill.)

However, three factors make this stance appropriate. First, Roosevelt insisted on a far-reaching debate within his administration on the legality of the program, actively

¹⁰³ See Aaron Xavier Fellmeth, A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-41, 3 Buff. J. Int'l L. 413, 473-80 (1996-97); cf. United States Attorney General, Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 U.S. Op. Atty. Gen. 484, 486-88 (1940) (relying on *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936)). The reliance of Jackson on *Curtiss-Wright*, which also supplied the clincher for Yoo's arguments in the Torture Memos, suggests that Jackson was less than confident in his statutory arguments.

encouraging skepticism about whether Lend-Lease would be consistent with Congress's commands. Roosevelt also sought congressional authorization within six months of the agreement (although after the election). After powerful public statements by Roosevelt, including his memorably simple comparison of Lend-Lease with the loan of a garden hose to a neighbor whose house was on fire, Congress gave its approval.

Second, Jackson's position is clearly consistent with evolving international norms. The law of neutrality, for example, seemed also painfully irrelevant to the crucible of World War II. It did nothing, for example, to prevent the wholesale slaughter that the Nazis were preparing for Jews and other groups. In this sense, the law of neutrality obstructed realization of ideals that are essential in a legitimate world order, including freedom from force and want.¹⁰⁴ Indeed, the announcement of the Atlantic Charter by Roosevelt and Churchill demonstrated that both men were committed to a new international regime prior to America's entry into the war.¹⁰⁵ After the war, the formation of the United Nations renewed commitments to comprehensive norms such as the prohibition of aggression. Fulfilling this vision required resistance to the Axis powers, with their dreams of global domination. Roosevelt and Jackson grasped that fact, even as they discounted the letter of the law.

Third, institutional consequences cut toward Roosevelt and Jackson's view. Disclosure of the Lend-Lease agreement during the 1940 election could have roiled the voters, and encouraged posturing by congressional leaders, as well as a possible filibuster by committed isolationists. In this charged environment, the initiative may have withered

¹⁰⁴ See DALLEK, *supra* note __, at 8-9 (discussing formation of Roosevelt's views as Assistant Secretary of the Navy in Wilson administration)

¹⁰⁵ See Dallek, *supra* note __, at 282-85.

on the vine, with significant adverse effects on British confidence and the war effort. By controlling the timing, Roosevelt waited until the moment was ripe politically. In the process, Roosevelt and Jackson got some grime on their hands. However, their maneuvering avoided a greater ethical failure – the crime of doing nothing.¹⁰⁶

E. The Cuban Missile Crisis

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

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

¹⁰⁶ See Walzer, *supra* note __, at 61-75.

The second problem arose because an attack would not meet the test of *The Caroline*, Daniel Webster's framing of a nation's right to use force in self-defense, or of Article 51 of the United Nations Charter,¹⁰⁷ which arguably codifies the customary international law principle articulated in Webster's letter. Under this test, a nation can use force to prevent an imminent attack. Since it was not clear that the Cubans would use the missile imminently – or indeed at all -- the United States could not meet this test.

Tellingly, administration lawyers considered not merely the abstract principle, but the institutional consequences that would have emanated from the use of force in this context. Robert Kennedy warned that other nations and history itself would perceive the United States unfavorably if we emulated the aggression of the Axis Powers during World War II. He insisted that an attack would amount to "Pearl Harbor in reverse."¹⁰⁸

To reconcile legal concerns with the need to take decisive action that would lead to removal of the Soviet missile, the lawyers articulated a "quarantine" argument justifying a limited naval blockade of Cuba.¹⁰⁹ However, the blockade also appeared inconsistent with international law barring the unjustified use of force.¹¹⁰ While a limited blockade targeting Soviet vessels was a more proportionate response to the threat posed by the missiles than an all-out attack, the blockade nevertheless involved the application of military power against another sovereign nation. Moreover, if the threat posed by the

¹⁰⁷ See U.N. Charter, art. 51.

¹⁰⁸ See ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 9 (1971) (recounting Kennedy's passing a note to his brother, the President, after listening to arguments for an air attack on Cuba, that said, "I now know how Tojo felt when he was planning Pearl Harbor"); Evan Thomas, Bobby at the Brink, *Newsweek*, Aug. 14, 2000, at 49, 51; cf. Chayes.

¹⁰⁹ See Richard N. Gardner, *Future Implications of the Iraq Conflict: Neither Bush nor the "Jurisprudes"*, 97 Am. J. Int'l L. 585, 587-88 (2003) (discussing quarantine approach).

¹¹⁰ See U.N. Charter, art. 2, para. 4.

missiles was not imminent, than *any* use of force was unjustified under international law.¹¹¹

However, the quarantine approach ultimately fares better under the test for pushing the envelope. First, a purposive approach to international law suggests that the quarantine approach harmonizes effectively with evolving norms. Article 2(4) of the U.N. Charter prohibits the use of force only “against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.”¹¹² One can argue that this qualifying language permitted United States policymakers a small window for the limited blockade that President Kennedy imposed.¹¹³ Moreover, the quarantine approach represented a determined effort by the world’s greatest power to limit force and promote a negotiated outcome. On the level of practice and symbolism, the self-restraint practiced by the United States nurtured values at the heart of international law.

Second, the United States showed a dialogic disposition throughout the crisis. The administration focused intently on gaining assent from our allies in the region, through the Organization of American States (OAS).¹¹⁴ President Kennedy also submitted the problem to the United Nations, which knew of the quarantine but took no action. Kennedy consulted in this fashion, although matters were exigent, time was short,

¹¹¹ See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 25-40 (1974) (discussing perspectives on legality of quarantine rationale).

¹¹² See U.N. Charter, art. 2, para. 4.

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

¹¹⁴ See CHAYES, *supra* note __, at 41-68.

and the United States faced the single gravest crisis of the post-World War II period.¹¹⁵ The ultimate resolution of the crisis, which also hinged on an unspoken bargain by the United States to remove missiles from Turkey that threatened Russia,¹¹⁶ similarly demonstrates this commitment to dialogue.¹¹⁷

Finally, institutional consequences were manageable, at least compared with alternatives. A limited blockade authorized by the OAS provided legal and political cover for the administration, and placed the Soviet Union on the defensive in the court of international public opinion. Limiting the use of force reduced – although it did not eliminate – the prospect of nuclear war. In contrast, doing nothing about the missiles would have eroded political support for the administration, and generated momentum for a more extreme military response.¹¹⁸ A straightforward swap of Soviet missiles in Cuba for American missiles in Turkey would have allowed Russia to claim control of the international strategic agenda in a fashion that could have prejudiced United States interests.¹¹⁹ Particularly since the do-nothing and straightforward swap options commanded virtual no support among the significant players, pushing the envelope with

¹¹⁵ See CHAYES, *supra* note __, at 3 (quoting sources suggesting that President Kennedy believed the risk of nuclear war ranged from 33-50 percent).

¹¹⁶ See CHAYES, *supra* note __, at 94-100.

¹¹⁷ The decision of the United States, with approval of the United Nations, to intervene militarily in Afghanistan after September 11 presents an even stronger case for legality. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l L. 1, 4-7 (2004) (discussing gap in traditional categories of international humanitarian law); cf. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 16-35 (2002) (arguing intervention could be viewed under international law as legitimate use of self-defense against “armed attack”).

¹¹⁸ See CHAYES, *supra* note __, at 31 (noting that legal advisor from the State Department “could not counsel passivity”); cf. GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 58 (1971) (discussing reasons for rejecting “do nothing” option).

¹¹⁹ *Id.* at 58-59.

the quarantine approach was the most appropriate response for legal advisors to the President.

Conclusion

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

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

Knowing when to push the envelope is the central responsibility of the national security lawyer; this Article has offered some modest ground rules for the effort.

