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Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis

Simon Chesterman
New York University School of Law

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SECRETS AND LIES: INTELLIGENCE ACTIVITIES AND THE RULE OF LAW IN TIMES OF CRISIS

*Simon Chesterman**

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I. INTRODUCTION

Is it possible for international law to regulate activities that, by definition, must take place covertly? This question has bedeviled domestic constraints on intelligence gathering and is even more challenging to the prospect of an international regime on intelligence activities. International law has traditionally had little to say directly about intelligence, with state practice (for instance, widespread espionage, wiretapping, and satellite reconnaissance) contradicting ostensible *opinio juris* (routine denunciation of foreign intelligence activities). Various treaty regimes touch on intelligence, but there is virtually no prospect of a treaty emerging that would define the contours of acceptable intelligence gathering, because no state would agree to be bound by the limits on intelligence gathering it would demand of its peers.¹

This Article will consider generally the prospects for an approach to intelligence activities based on the rule of law, focusing on the problem of covertness. In particular, it will examine the debate over how law should deal with crises, epitomized by the “ticking time-bomb” hypothetical. On the one hand, some call for a pragmatic recognition that, *in extremis*, public officials may be required to act outside the law and

* Global Professor and Director of the New York University School of Law Singapore Program; Associate Professor of Law, National University of Singapore. I am grateful to R. Rueban Balasubramaniam, David A. Jordan, and Victor V. Ramraj for their comments on earlier drafts of this text. The Article is part of a larger research project on intelligence and international law. See further SIMON CHESTERMAN, *SHARED SECRETS: INTELLIGENCE AND COLLECTIVE SECURITY* (2006); Simon Chesterman, *The Spy Who Came In from the Cold War: Intelligence and International Law*, 27 MICH. J. INT’L L. 1071 (2006). The present Article draws closely on work first published as *Deny Everything: Intelligence Activities and the Rule of Law*, in *EMERGENCIES AND THE LIMITS OF LEGALITY* (Victor V. Ramraj ed., forthcoming).

1. See generally Simon Chesterman, *The Spy Who Came In from the Cold War: Intelligence and International Law*, 27 MICH. J. INT’L L. 1071 (2006).

should seek after-the-fact ratification of their “extra-legal measures.”² On the other hand, others argue that the embrace of “extra-legal measures” misconceives the rule of law, underestimates the capacity of a constitutional order to deal with crises, and overestimates the ability and willingness of skittish publics to reign in officials.³ These two positions have recently become identified with the works of Oren Gross and David Dyzenhaus, respectively, although the debate is, of course, far older than these agonists of post-September 11 constitutionalism. As Dyzenhaus acknowledges, the question of whether the response of the executive in emergencies is constrained by law was an argument that Victorian jurist A.V. Dicey had with himself a century ago;⁴ Gross traces the essence of his own argument back two centuries further to John Locke’s theory of prerogative power.⁵

What the two approaches have in common is that they presume a measure of public deliberation on the appropriate response to crises. Gross calls explicitly for a process of *ex post facto* ratification of extra-legal measures; Dyzenhaus prefers to encourage experiments in institutional design subject to the rule of law. The problem with both accounts is that the various activities contemplated in this discussion—assassination, torture, unregulated detention, surveillance unfettered by civil liberties—are typically conducted on a covert basis. Covertneess may be deemed necessary for reasons of effectiveness, but also for political expediency: the damage to a state that admits that it tortures may be more lasting than the harm torture is intended to avert.

The Article first visits the debate over exceptionalism as exemplified by Gross’s extra-legal measures model, focusing on the question of whether *ex post* ratification could ever be a practical constraint on otherwise unlawful behavior that is normally intended to be shielded from public scrutiny. It then turns to the question of whether public deliberation is a realistic prospect, drawing on three cases in which something approaching Gross’s extra-legal measures model has been adopted by the United States: the use of aggressive interrogation techniques that push the limits of torture, secret detention and extraordinary rendition of suspects, and warrantless electronic surveillance. The fourth Part presents an alternative lens through which to view assertions, whether publicly

2. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011 (2003).

3. David Dyzenhaus, *The State of Emergency in Legal Theory*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 65 (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2005).

4. *Id.* at 65–66. See also A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 412–24 (10th ed. 1959).

5. Gross, *supra* note 2, at 1102. See also JOHN LOCKE, TWO TREATISES OF GOVERNMENT 166 (Peter Laslett ed., Cambridge University Press 1988) (1690).

debated or not, that illegal conduct was justified: that such assertions should be seen not as calls for *ex post* ratification of the conduct, but instead as calls for using such justification as a mitigating factor in the imposition of penalties. The Conclusion is broadly consistent with Dyzenhaus' critique of Gross, but points to further challenges for the rule of law, given the apparent incentives in extreme situations not merely to circumvent the law but to remain silent about it.

II. RATIFICATION

Oren Gross's extra-legal measures model proposes to inform public officials that

they may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions. It is then up to the people to decide, either directly or indirectly (e.g., through their elected representatives in the legislature), how to respond to such actions. The people may decide to hold the actor to the wrongfulness of her actions, demonstrating commitment to the violated principles and values. The acting official may be called to answer, and make legal and political reparations, for her actions. Alternatively, the people may act to approve, *ex post*, the extralegal actions of the public official.⁶

A central requirement of such an approach is candor: "To be implemented properly, the model calls for candor on the part of government agents, who must disclose the nature of their counter-emergency activities."⁷

Indeed, candor is seen as one of the virtues of the model. Gross refers in passing to the use of illegal interrogation techniques—notably torture—by Israel's General Security Service (GSS) during the 1980s. Gross uses the example of Israel's Landau Commission investigating GSS interrogation methods to show the hypocrisy of legal systems that are aware of a pattern of conduct but unwilling to acknowledge it normatively.⁸ Evidence of such hypocrisy supports Gross's position, and the ambiguity embraced by the Landau Commission suggests that some

6. Gross, *supra* note 2, at 1023.

7. *Id.* at 1024.

8. *Id.* at 1045 (quoting ISRAELI GOV'T PRESS OFFICE, COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987), *reprinted in* 23 ISR. L. REV. 146 (1989)).

societies are prepared to countenance extralegal activity. But it also ignores the fact that the Israeli Supreme Court struck down the methods of the GSS in 1999, specifically holding that detainees could not be tortured.⁹ The President of the Court issued an unusual and eloquent coda to the judgment:

This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome difficulties.¹⁰

The Court left open the possibility that an individual official might nevertheless claim a defense of necessity, but this would be a legal claim in its own right, quite different from the argument that such an official should be allowed or encouraged to act outside the law in the hope that the law might be changed or the wrong ignored.¹¹

Gross might respond that this is precisely an example of his model working, as the Court refused to provide the sort of *de facto* ratification embraced by the Landau Commission. Yet the Court's decision also suggests deep problems in the role Gross ascribes to ratification. The precise manner of ratification is presented as an open list of possibilities, ranging from bills of indemnity to reelection of a president who has run on a policy justifying selective use of torture.¹² Such an open range of possibilities, however, fails to present a coherent model in which conduct may be seen as having been ratified. The most concrete example given is the police officer who tortures a suspect in order to locate the ticking bomb, an ideal-type hypothetical that has no precedent except in fiction (notably the "real-time" television series *24*)¹³ but nonetheless is repeatedly invoked to justify more general use of torture. In the extra-legal measures model, the officer may be sacked, prosecuted, sued, or impeached,¹⁴ but for the model to be coherent, a formal choice *not* to pursue any of

9. HCJ 5100/94 Pub. Comm. Against Torture v. Israel [1999] IsrSC 53(4) 1, 23, available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf. Gross makes a passing reference to the case but only to cite the difficult role of judges in a society like that of Israel. Gross, *supra* note 2, at 1122 n.478.

10. *Pub. Comm. Against Torture* [1999] IsrSC 53(4) 1 at 37.

11. Necessity is discussed in Part IV, *infra*.

12. Gross, *supra* note 2, at 1099.

13. See Jane Mayer, *Whatever It Takes: The Politics of the Man Behind "24"*, *NEW YORKER*, Feb. 19, 2007, at 66.

14. Gross, *supra* note 2, at 1099.

these punitive avenues should be ratified by “the people.” The clearest example of how this might happen is through legislation intended to immunize “public officials from any potential civil or criminal liability,”¹⁵ though the extraordinary case of *Little v. Barreme*¹⁶ (in which the captain of a U.S. vessel was found guilty of violating a law prohibiting transactions with French entities, lost an appeal to the Supreme Court, but was reimbursed by Congress for his fines and expenses with interest), is surely the exception that proves the rule.¹⁷ More importantly, Gross’s switch from singular examples to plural—presumably necessary in order to avoid the requirement for individualized legislation—exemplifies the temptations inherent in the slippery slope down which we have begun to descend.

Political ratification is no more coherent. The fact that more Americans voted Republican in 2004 cannot sensibly be understood as ratifying widely reported abuses of power, any more than the fact that more voted Democrat in 2006 can be understood as evincing a change of heart and desire for prosecutions. Much as a victorious political party is wont to claim a mandate, it is inconceivable that an election would be fought on issues defined clearly enough or won by a margin sufficient to warrant the conclusion that otherwise illegal conduct has been ratified.

Gross addresses other possibilities such as prosecutorial discretion, recalcitrant juries, and executive pardons in a couple of sentences.¹⁸ Of these, prosecutorial discretion and executive pardons seem the most likely forms of ratification, though both are exercised by an executive branch that is most likely also to be the author of the impugned conduct. Prosecutorial discretion in particular begs the question of what impact a policy that may encourage vigilantism, on the basis that well-justified acts will be exonerated, will have on more general police investigative practices.

III. DELIBERATION

Whatever form of ratification is contemplated, a central claim of the extra-legal measures model is that all of the measures can be acknowledged openly.¹⁹ Indeed, Gross suggests that this open ratification, activating a kind of public responsibility, is the main contribution of the

15. *Id.*

16. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

17. *See* Gross, *supra* note 2, at 1109–10.

18. *Id.* at 1115. *See generally* OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006).

19. Gross, *supra* note 2, at 1099–1100.

model to analogous discussions in Weber and Walzer.²⁰ An act that would normally be illegal

must be aimed at the advancement of the public good and must be openly, candidly, and fully disclosed to the public. Once disclosed, it is a matter for the general public, either directly or through its elected representatives, to ratify, *ex post*, those actions that have been taken on its behalf and in its name, or to denounce them.²¹

Quite apart from the challenge posed to the rule of law by public officials “openly” and “candidly” violating the law, “[o]pen and candid acknowledgment by the authorities of the need to resort to extralegal measures”²² would amount to an admission of guilt for the purposes of any punitive proceedings, and it is therefore unlikely in the absence of some preexisting guarantee that *ex post* ratification is more than a mere possibility.

As Dyzenhaus observes, the model’s assumption of an atmosphere of fear among a population threatened by terrorism makes it highly likely that an expectation of after-the-fact validation of illegal official acts may arise, and that it would be met easily.²³ In a limited number of high-profile crises that may be true, but in operational terms it is more likely that precisely the same logic that allows officials to violate existing laws will encourage them to keep those actions secret. Officials may do this for pragmatic reasons of effectiveness; they may be reluctant to discuss precise interrogation practices for fear of forewarning enemies and frustrating the purpose of the methods, or to acknowledge surveillance methods that might alert targets of investigation. A second set of concerns encouraging secrecy involves the broader ramifications of a government openly acknowledging that it violates norms that are not merely domestic but international. Claims that interrogation had enabled authorities to avert terror plots did not reduce the damage to the moral standing of the United States caused by revelations of abuse at Abu Ghraib, Guantánamo Bay, and secret CIA detention facilities. Indeed, periodic assertions that a new plot had been discovered—in at least some cases years old and not beyond the planning stages—appeared to have

20. *Id.* at 1105 (referring, *inter alia*, to Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H.H. Gerth & C. Wright Mills eds. & trans., 1946), and Michael Walzer, *Political Action: The Problem of Dirty Hands*, in WAR AND MORAL RESPONSIBILITY 62 (Marshall Cohen et al. eds., 1974)).

21. *Id.* at 1111–12.

22. *Id.* at 1127.

23. Dyzenhaus, *supra* note 3, at 72–73.

been invoked opportunistically precisely to deflect criticism.²⁴ A third reason to be hesitant about embracing public deliberation to limit extra-legal adventures is that it is not typically elected officials who engage in the relevant investigative or intelligence activities. Such actors—the police, intelligence operatives, special forces—are unlikely to be responsive to the political pressures that the extra-legal measures model would invoke as the primary check on their behavior.

This Part briefly discusses three areas in which the United States has pushed the limits of domestic and international legality as part of an effort to respond to security threats. The three areas—torture, secret detention and extraordinary rendition, and unlawful surveillance—do not correspond directly to the three reasons for secrecy outlined above, but they illustrate the manner in which such decisions are made and justified.

Vice President Dick Cheney articulated the general tenor of decisions to be made by the executive branch five days after September 11, 2001, when he suggested a broad but undisclosed agenda for combating future terrorist attacks in an interview on NBC's *Meet the Press*:

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.²⁵

In the end, much of the administration's anti-terror agenda was debated publicly, but this tended to be the result of investigative journalism or disclosures in the course of legal action on behalf of affected individuals. There was little evidence of willingness on the part of the administration to have arguments over legality "openly, candidly, and

24. For example, when defending the use of warrantless wiretaps within the United States by the National Security Agency, the Bush Administration offered the example of Iyman Faris—a truck driver with a fanciful plot to destroy the Brooklyn Bridge with a blowtorch—as evidence of the value provided by the extralegal measures employed under the controversial "Terrorist Surveillance Program." See Mark Hosenball & Evan Thomas, *Hold the Phone; Big Brother Knows Whom You Call: Is That Legal, and Will It Help Catch the Bad Guys?*, NEWSWEEK, May 22, 2006, at 22.

25. Interview with U.S. Vice President Cheney on *Meet the Press* (Sept. 16, 2001), quoted in HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 9 (2005), available at <http://hrw.org/reports/2005/us0405/us0405.pdf>.

fully disclosed.”²⁶ On the contrary, questionable conduct was asserted, at times improbably, to fall within the law. The most troubling conduct was simply denied.

In the case of torture, for example, the Bush administration maintains the official position that it neither uses nor condones torture. Since 2001, however, it has authorized interrogation techniques widely regarded as torture, including by its own Department of State in annual human rights reports on the practice of other countries.²⁷ The United States is a party to the Convention against Torture, and torture is prohibited under U.S. law whether or not it occurs within the jurisdiction of the United States.²⁸ Nevertheless, in an August 2002 memorandum, the Department of Justice Office of Legal Counsel outlined the standards of conduct permitted under the U.S. domestic law implementing the Convention against Torture. Among other things, this memorandum adopted an exceptionally narrow definition of torture, which it limited to physical pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” or mental suffering that results in “significant psychological harm of significant duration, e.g., lasting for months or even years.”²⁹ The memorandum was one of a series of legal maneuvers adopted in the context of the “war on terror” that included, among other things, attempts to interpret the Geneva Conventions as having an extremely limited scope of application.³⁰

None of this analysis was intended to be made public. The growing allegations of mistreatment by U.S. officials were harder to ignore fol-

26. Gross, *supra* note 2, at 1111.

27. Human Rights Watch, Descriptions of Techniques Allegedly Authorized by the CIA (Nov. 21, 2005), <http://hrw.org/english/docs/2005/11/21/usdom12071.htm>.

28. 18 U.S.C. §§ 2340–2340A (2004).

29. Memorandum from Jay C. Bybee, Department of Justice Office of the Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002), available at <http://www.tomjoan.org/bybeememo.htm>.

30. The Bush Administration refused to apply the Geneva Conventions to captured al Qaeda or Taliban fighters during the U.S. war in Afghanistan. President Bush’s military order governing the detention of combatants during the conflict, Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), allowed the trial of Taliban or al Qaeda combatants by military commissions, arguably in violation of the Geneva Conventions. Although the U.S. Supreme Court eventually struck down this order in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), it was largely reinstated by the U.S. Congress with the passage of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C. and at 28 U.S.C. § 2241).

lowing a seminal *Washington Post* article in December 2002,³¹ but it was only after photographic evidence of abuse leaked from the Abu Ghraib prison in April 2004 that the issue came to be publicly debated. Even then, most of the discussion was driven by the response to unauthorized leaks of information, including the August 2002 Department of Justice memorandum and other documents.

The Department of Defense repudiated the legal position of the August 2002 memorandum on December 30, 2004, but no definition of torture has been provided in its place.³² Among other contradictory signals, the Bush administration later opposed efforts led by Senator John McCain to strengthen the legal prohibition of torture.³³ A particular controversy continues on the question of “waterboarding”—a technique whereby interrogators bind a detainee to a board slanted at a decline, place cellophane over his face, and pour water on his head, resulting in a physiological response similar to drowning. In March 2005, then-CIA Director Porter J. Goss called waterboarding a “professional interrogation technique.”³⁴ In October 2006, Vice President Cheney appeared to agree with the use of waterboarding, specifically for Khalid Sheikh Mohammed, concurring with the statement that a “dunk in water” for such an individual is a “no-brainer” if it saves American lives.³⁵ White House Press Secretary Tony Snow later attempted to clarify that Cheney had not been referring to waterboarding but merely to a literal “dunk in the water,”

31. Dana Priest & Barton Gellman, *US Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01.

32. Although no specific definition has been provided for torture, the U.S. Defense Department has responded to the detainee abuse scandals by issuing a revised and comprehensive set of guidelines governing all military interrogations. On September 6, 2006, the U.S. Army issued a new field manual on interrogations to replace the former Field Manual (FM) 34–52 which had been published in 1992. The new manual details the nineteen techniques that may be used during the interrogation of detainees by U.S. military personnel. The list is exhaustive and the techniques listed represent the only methods that may ever be used. See U.S. DEP'T OF THE ARMY, FIELD MANUAL 2–22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), available at <http://www.fas.org/irp/doddir/army/fm2-22.3.pdf>. This manual, however, does not apply to intelligence agencies outside of the military. The U.S. Central Intelligence Agency, for example, is not bound by the manual, and its specific interrogation methods remain unknown to the general public. See Christopher Graveline, *The Unlearned Lessons of Abu Ghraib*, WASH. POST, Oct. 19, 2006, at A29.

33. See, e.g., Kate Zernike, *Senate Approves Broad New Rules to Try Detainees*, N.Y. TIMES, Sept. 29, 2006, at A1.

34. Mark Mazzetti, *CIA Worker Says Message on Torture Got Her Fired*, N.Y. TIMES, July 22, 2006, at A11.

35. Interview by Scott Hennen with Vice President Cheney, the White House, Washington, D.C. (Oct. 24, 2006), available at www.whitehouse.gov/news/releases/2006/10/20061024-7.html.

prompting a reporter to ask, “so ‘dunk in the water’ means what, we have a pool now at Guantánamo, and they go swimming?”³⁶

A similar dynamic was evident in revelations of and debate over the U.S. practice of secret detention and extraordinary rendition. Following occasional reports of secret detention centers, or “black sites,” at Bagram Air Force Base in Afghanistan³⁷ and Guantánamo Bay’s Camp Echo,³⁸ it was another *Washington Post* article in November 2005 that revealed the scale of the program and growing debates within the CIA about its legality and morality.³⁹ At the request of senior officials, the *Post* did not publish the name of the Eastern European countries—believed to be Poland and Romania—involved in the program, but stated that sites in the program also included Afghanistan, Guantánamo Bay, and Thailand. The reason given for the overseas location of the black sites was that U.S. domestic law prohibiting such secret detention would not apply there; the CIA was operating on the authority of an order issued by President Bush on September 17, 2001.⁴⁰

Secrecy was also needed, however, in order not to raise legal questions in the foreign jurisdictions themselves. When published reports in June 2003 revealed the existence of the site in Thailand, Thai officials insisted that it be closed.⁴¹ The CIA abandoned plans to develop its facility in Guantánamo Bay when U.S. courts began to exercise greater authority over military detainees in the main part of the facility.⁴² The response from the CIA to the *Post* report was to request the Justice Department to open a criminal investigation to determine the source of the information.⁴³ A senior intelligence officer, Mary O. McCarthy, was later fired from the CIA, apparently in connection with the earlier story.⁴⁴ President Bush first acknowledged the use of secret prisons in September 2006, shortly before moving fourteen suspects from CIA detention to

36. Press Briefing, White House Press Secretary Tony Snow (Oct. 27, 2006), available at www.whitehouse.gov/news/releases/2006/10/20061027-1.html.

37. Priest & Gellman, *supra* note 31.

38. David Rose, *Revealed: The Full Story of the Guantánamo Britons*, OBSERVER, Mar. 14, 2004.

39. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005.

40. *Id.* Cf. David Johnston, *CIA Tells of Bush’s Directive on the Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14 (detailing the disclosure of classified documents signed by President Bush related to CIA detention and interrogation of terror suspects).

41. Priest, *supra* note 39.

42. *Id.*

43. David Johnston & Carl Hulse, *CIA Asks for Criminal Inquiry over Secret-Prison Article*, N.Y. TIMES, Nov. 9, 2005, at A18.

44. David S. Cloud, *Colleagues Say CIA Analyst Played by Rules*, N.Y. TIMES, Apr. 23, 2006, at A1.

the military detention camp at Guantánamo Bay, which in theory ended the program.⁴⁵

The total number of detainees in black sites has been estimated at about one hundred. An additional hundred are believed to have been involved in the program of extraordinary rendition, the transfer of untried persons to other countries for imprisonment and interrogation—in particular to countries with records of abuse and torture of detainees, such as Egypt, Jordan, Morocco, Pakistan, and Uzbekistan.⁴⁶ An official directly involved in the process described it to the *Washington Post* in the following way: “We don’t kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.”⁴⁷ Authority for such forcible transfers is apparently outlined in a memorandum from March 13, 2002, entitled “The President’s Power as Commander in Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations.”⁴⁸ The Bush administration has refused to release or describe this memorandum, but it is referred to in the August 2002 memorandum on interrogation methods.⁴⁹

Prominent examples of extraordinary rendition include the Syrian-born Canadian citizen Maher Arar, who was detained in the United States in September 2002 before being flown to Jordan and then Syria, where he was interrogated and tortured by Syrian authorities. A year later he was released without charge and returned to Canada, where a public inquiry cleared him of any suspicion, sharply criticized the Royal Canadian Mounted Police and other government departments, and led to a formal protest over U.S. treatment of Arar.⁵⁰

Another relatively well-documented case concerns Hassan Mustafa Osama Nasr, also known as Abu Omar, an Egyptian cleric apparently abducted by the CIA from Milan in February 2003. He was taken to a U.S. base in Aviano, Italy, and then flown to Egypt, where he was taken into custody. In April 2004 he was released, and he telephoned his wife, informing her among other things that he had been tortured with electric

45. Scott Shane, *Detainees’ Access to Lawyers Is Security Risk, CIA Says*, N.Y. TIMES, Nov. 5, 2006, at A29.

46. Priest & Gellman, *supra* note 31.

47. *Id.*

48. Bybee, *supra* note 29, at 38.

49. *Id.* See also Dana Priest & Dan Eggen, *Terror Suspect Alleges Torture: Detainee Says US Sent Him to Egypt Before Guantanamo*, WASH. POST, Jan. 6, 2005, at A01.

50. See DENNIS O’CONNOR, COMM’N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006), available at www.ararcommission.ca. Among the criticisms of the Royal Canadian Mounted Police were allegations that it had tried to silence a reporter covering the case by raiding her home and office. See Ian Austen, *Canada’s Police Commissioner Resigns over Deportation Case*, N.Y. TIMES, Dec. 7, 2006, at A7.

shocks, had lost hearing in one ear, and could barely walk. Shortly after this call he appears to have been rearrested by Egyptian authorities and has not been heard from since.⁵¹ In June 2005, an Italian judge issued a warrant for the arrest of thirteen U.S. citizens said to be agents or operatives of the CIA.⁵² Investigations by the *New York Times* indicated that, of the thirteen names, eleven were probably aliases; public records showed that some names received social security numbers less than ten years earlier, and that some had addresses that were post office boxes in Virginia known to be used by the CIA.⁵³ In April 2006, shortly after the Italian general election, the outgoing Justice Minister announced that he would not seek extradition of an expanded list of twenty-two CIA officers,⁵⁴ but two high-ranking Italian intelligence officers were later arrested for alleged complicity in the kidnapping.⁵⁵

A third area where U.S. government activity not only pushed the bounds of legality, but clearly went beyond established law, is in the area of electronic surveillance. Interception of telephone calls by the National Security Agency (NSA) between a party in the United States and a party in a foreign country is governed by the Foreign Intelligence Surveillance Act (FISA), which allows for interception when a warrant is procured in advance or, in some circumstances, within seventy-two hours of beginning the intercept. A warrant may be issued if “there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power.”⁵⁶ The law was passed in 1978 following intelligence scandals; in the following years, the Foreign Intelligence Surveillance Court—established under FISA to review requests for surveillance warrants against suspected intelligence targets inside the United States—rejected just five of almost 19,000 requests for wiretaps and search warrants.⁵⁷ Under the program in question even this check on the NSA’s activities was removed in cases where it was suspected that one party to a phone conversation had links to a terrorist organization such as al Qaeda. The presidential authorization that created the program is classified and it appears that even congressional

51. Stephen Grey & Don van Natta, *13 with the CIA Sought by Italy in a Kidnapping*, N.Y. TIMES, June 25, 2005, at A1.

52. *Id.*

53. Adam Liptak, *Experts Doubt Accused CIA Operatives Will Stand Trial in Italy*, N.Y. TIMES, June 27, 2005, at A8.

54. Peter Kiefer, *Italian Minister Declines to Seek Extradition of CIA Operatives*, N.Y. TIMES, Apr. 13, 2006, at A6.

55. Ian Fisher & Elisabetta Povoledo, *Italy's Top Spy Is Expected to Be Indicted in Abduction Case*, N.Y. TIMES, Oct. 24, 2006, at A3.

56. 50 U.S.C. § 1805(a)(3) (2000).

57. Carol D. Leonnig, *Secret Court's Judges Were Warned About NSA Spy Data*, WASH. POST, Feb. 9, 2006, at A01 (citing figures from 1979 to 2004).

intelligence committees were only partially briefed on its scope, though President Bush has said the authorization is renewed “approximately every 45 days.”⁵⁸ Administration lawyers defended the program alternately on the basis that congressional authorization was implied in the Congressional Joint Authorization for the Use of Military Force of September 18, 2001, or that the president enjoys the inherent power to authorize such activities in his constitutional role as Commander-in-Chief.⁵⁹ These arguments have been largely rejected by legal academics, and the program was declared unconstitutional by a district court judge, though her decision has been stayed pending appeal to the Sixth Circuit Court of Appeals.⁶⁰ A series of legislative proposals to deal with the controversy are at various stages in Congress, ranging from a proposal to grant retroactive amnesty for warrantless surveillance conducted under presidential authority to reassertions of FISA as the exclusive means of authorizing foreign surveillance.⁶¹

Once again, however, open discussion of the program and remedies for apparent violation of the law was involuntary. The *New York Times* learned of the program in 2004 but was persuaded by the Bush administration not to publish the story for more than a year.⁶² Only when the story was published—in part, it seems, because the information was shortly to be disclosed in a book by one of the journalists involved⁶³—did congressional leaders begin to challenge the legality of the program. In a press conference, Attorney General Alberto Gonzales said that the administration had “discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.”⁶⁴ He later clarified that he had intended to say that it would have been difficult, if not impossible, to obtain legislation without compromising the program. For his part, President Bush declared that leaks to the press concerning the program

58. George W. Bush, President’s Radio Address (Dec. 17, 2005), available at www.whitehouse.gov/news/releases/2005/12/20051217.html.

59. Eric Lichtblau & James Risen, *Legal Rationale by Justice Dept. on Spying Effort*, N.Y. TIMES, Jan. 20, 2006, at A1.

60. *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

61. Walter Pincus, *Specter Offers Compromise on NSA Surveillance*, WASH. POST, June 9, 2006, at A04.

62. James Risen & Eric Lichtblau, *Bush Lets US Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

63. See JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

64. Press Briefing, Alberto Gonzales, Attorney General, and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

were “a shameful act” that was “helping the enemy.”⁶⁵ He added that he assumed a Justice Department investigation into the leak was moving forward, though there appears to have been no effort on the part of investigators to contact the journalists involved.⁶⁶

In each of these cases—torture, extra-judicial detention, and warrantless surveillance—the relevant officials clearly never intended to engage in public deliberation on the legality of the practice. The reasons for embracing secrecy in counterterrorism operations may be well-founded. In 1998, for example, the *Washington Times* reported that the NSA was able to monitor Osama bin Laden’s satellite phone.⁶⁷ Soon after the story was published, bin Laden ceased using the phone and largely disappeared from the reach of U.S. intelligence. A CIA agent who ran the bin Laden desk at the time has suggested that a direct causal link can be drawn between publication of the article and the September 11 attacks on the United States.⁶⁸ Nevertheless, once embraced, a culture of tolerating secrecy in pushing the limits of law is difficult to contain. As the Church Committee found in the 1970s during the inquiries that led to the adoption of FISA, the doctrine of “plausible deniability” was developed in order to avoid attribution of illegal conduct to the United States for covert operations.⁶⁹ Evidence before the Committee, however, clearly demonstrated that the concept, initially intended to protect the United States and its operatives from the consequences of disclosures, soon expanded to “mask decisions of the president and his senior staff members.”⁷⁰

It appears unrealistic, therefore, to put much hope in the prospect that decisions to take extra-legal measures will ever be made either openly or candidly. This conclusion changes the calculus for responding to conduct that may violate the law, and in particular suggests the need for great caution in presuming that illegal conduct will be ratified. On the contrary, it suggests the need to adopt a precautionary approach that does not assume the good faith of interested officials serving as judges in their own cause.

65. Press Conference of the President (Dec. 19, 2005), available at www.whitehouse.gov/news/releases/2005/12/20051219-2.html; Dan Eggen, *White House Trains Efforts on Media Leaks: Sources, Reporters Could Be Prosecuted*, WASH. POST, Mar. 5, 2006, at A01.

66. Press Conference of the President, *supra* note 65.

67. Patrick Radden Keefe, *Cat-and-Mouse Games*, N.Y. REV. BOOKS, May 26, 2005, at 41. See also Martin Sieff, *Terrorist Driven by Hatred for US, Israel*, WASH. TIMES, Aug. 21, 1998, at A1.

68. Keefe, *supra* note 67.

69. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, COVERT ACTION AND A VEHICLE FOR FOREIGN POLICY IMPLEMENTATION, S. REP. NO. 91-465, pt. 2, Section B, at 11 (1975).

70. *Id.*

IV. MITIGATION

How, then, should a legal system deal with rare circumstances in which violations of the law may be perceived as justified or even necessary?

Necessity itself provides a partial remedy, though the examples discussed in this Article would not all fall within its relatively narrow framework. To be successful, a necessity defense must typically demonstrate that the harm sought to be avoided was greater than the harm caused, that there was no reasonable alternative to the action taken, and that the actor did not create the danger he or she sought to avoid. A key question is whether the honest belief of the accused is sufficient to justify the defense: in Gross's hypothetical, it is highly likely that the decision whether or not to ratify torture would depend on whether the tortured person did in fact know where the ticking bomb was located, not on whether the torturer believed it to be the case.

The American Law Institute adopted a belief-based "choice of evils" approach to the question of necessity in its Model Penal Code:

Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.⁷¹

The Department of Justice Office of Legal Counsel cited this definition of necessity as "especially relevant in the current circumstances" in the August 2002 memorandum that purported to authorize torture outside the United States.⁷² Assuming the existence of al Qaeda sleeper cells plotting against the United States on a scale equal to or greater than the September 11 attacks, the memorandum argued that "any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives."⁷³ The memo claimed that two factors shape the contours of a necessity defense to torture: the degree of

71. MODEL PENAL CODE § 3.02.

72. Bybee, *supra* note 29, at 39–40.

73. *Id.* at 41.

certainty that an individual has information needed to prevent an attack, and the likelihood and scale of that attack.⁷⁴

This opportunistic reading of the prohibition of torture—ignoring, among other things, the explicit intention at international law that the prohibition of torture be nonderogable—adopts a logic similar to that of Gross: one constructs an ideal-type situation in which a reasonable person would countenance torture, and then extends this reasoning to assert that the prohibition on torture is inherently qualified.⁷⁵ The flaw in this approach is that the ticking time-bomb scenario is both highly seductive and wildly implausible. Henry Shue's critique is dated but worth quoting at length:

Much more important from the perspective of whether general conclusions applicable to ordinary cases can be drawn are the background conditions that tend to be assumed. The proposed victim of our torture is not someone we suspect of planting the device: he is the perpetrator. He is not some pitiful psychotic making one last play for attention: he *did* plant the device. The wiring is not backwards, the mechanism is not jammed: the device *will* destroy the city if not deactivated.

. . . The torture will not be conducted in the basement of a small-town jail in the provinces by local thugs popping pills; the prime minister and chief justice are being kept informed; and a priest and doctor are present. The victim will not be raped or forced to eat excrement and will not collapse with a heart attack or become deranged before talking; while avoiding irreparable damage, the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquilizer.⁷⁶

Even Shue concludes that if the precise facts of the ticking bomb scenario were satisfied, it would not be possible to deny the permissibil-

74. *Id.* Departures from the Convention against Torture in the U.S. implementing legislation were interpreted as supporting this view. Torture was not defined as the intentional infliction of severe pain or suffering "for such purpose[] as obtaining from him or a third person information or a confession"; by removing this purpose element, "Congress allowed the necessity defense to apply when appropriate." In addition, the requirement in the Convention against Torture that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" was not incorporated in the text of Section 2340. *Id.* at 41 n.23.

75. *Cf.* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 82–84 (2005).

76. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 142 (1978).

ity of torture.⁷⁷ But the implausibility of the perfect scenario is precisely why there is a rule against torture without the possibility of derogation.

For similar reasons, necessity as a defense in criminal law is circumscribed extremely narrowly. In the paradigmatic case of *R v. Dudley and Stephens*, two men were shipwrecked at sea for almost three weeks before killing and eating their cabin boy. Even so, they were convicted and sentenced to death:

It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"—

"So spake the Fiend, and with necessity,

The tyrant's plea, excused his devilish deeds."

It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.⁷⁸

The sentence was later commuted to six months' imprisonment by Queen Victoria.

Taking seriously the argument that certain forms of *ex post* ratification may encourage (or at least not discourage) official acts necessary for security while maintaining a degree of uncertainty appropriate to discourage abuse, it is possible to distinguish at least four ways in which ratification might operate. First, it might assert the absence of a wrong through a general amnesty. Second, it could acknowledge a wrong but absolve it, through some form of indemnification. Third, an act might

77. *Id.* at 141.

78. *R v. Dudley & Stephens*, (1884) 14 Q.B.D. 273 (Eng.).

attract formal legal sanction but with a minimal penalty imposed. Fourth, through the exercise of discretion, no action might be taken to investigate an alleged wrong. Of these, only the third approach would appear to maintain the uncertainty that is at the heart of Gross's model, yet this is more properly seen not as a call for ratification of an act but as mitigation in punishment for a wrong.

A better view, then, may be not to think in terms of ratifying the wrong but mitigating the penalty. This is distinct from legal absolution—if prosecuted, an individual would still have a conviction entered against his or her name—but in extraordinary circumstances discretion may be exercised at the imposition of penalties. Such an approach has the virtue of reaffirming the legal norm and imposing at least nominal sanction, while recognizing that further punishment may serve no social purpose.

An analogy may be made with the legal status of euthanasia. Though legalized in a few jurisdictions, euthanasia is regarded generally as a grave challenge to the legal system. Arguments in favor of patient autonomy and the reality of medical practice must be weighed against the danger of eroding the bright-line rule that prohibits intentional killing.⁷⁹ The ethical and religious response has been to qualify the intent component of this prohibition, relying on somewhat artificial doctrines such as double effect (an overdose of morphine is intended to relieve pain, rather than to kill) and act-omission (withholding food or hydration that leads to death is distinct from administering poison).⁸⁰ The legal response, in a number of cases, has been to affirm the bright-line rule but impose no penalty.⁸¹

Obviously, as the demand for any such violation of an established norm increases, so the need for legal regulation of the "exception" becomes more important. This seems to be occurring in the case of euthanasia, as medical advances have increased the discretion of doctors in making end-of-life decisions. In many jurisdictions, continued reliance on the possibility of bringing a homicide charge is now seen as an

79. See, e.g., SELECT COMMITTEE ON MEDICAL ETHICS, REPORT, 1994, H.L. 21-1 of 1993-94, ¶ 260 (Walton Report) (U.K.).

80. See generally EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES (John Keown ed., 1995).

81. See, e.g., R v. Cox, (1992) 12 B.M.L.R. 38 (U.K.). Dr. Nigel Cox was unable to control the pain of a patient suffering from rheumatoid arthritis who repeatedly begged him to kill her. Making no attempt to conceal what he was doing, he gave her a lethal injection of potassium chloride. A nurse reported the action and he was charged with attempted murder (by this time the body had been cremated and there was no evidence that the injection was the operative cause of death). He was convicted of attempted murder but given a one-year suspended sentence; the General Medical Council reprimanded him but permitted him to remain a practicing doctor. John Harris, *Euthanasia and the Value of Life*, in EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES, *supra* note 80, at 6, 7.

inadequate legal response to the ethical challenges posed by euthanasia.⁸² There appears to be no such groundswell of support for a change in the law in relation to the various forms of criminal conduct contemplated in this discussion.

International law also provides some support for an approach involving condemnation without significant punishment. In the *Corfu Channel* case, Britain claimed that its intervention in Albanian territorial waters was justified on the basis that no other states were prepared to deal with the threat of mines planted in an international strait. The International Court of Justice rejected this argument in unequivocal terms,⁸³ but held that a declaration of illegality was itself a sufficient remedy for the wrong.⁸⁴ Similarly, after Israel abducted Adolf Eichmann from Argentina to face criminal charges, Argentina lodged a complaint with the Security Council, which passed a resolution stating that the sovereignty of Argentina had been infringed and requesting Israel to make “appropriate reparation.”⁸⁵ Nevertheless, “mindful” of the concern that Eichmann be brought to justice, the Security Council’s resolution on the matter clearly implied that “appropriate reparation” would not involve his physical return to Argentina.⁸⁶ The governments of Israel and Argentina subsequently issued a joint communiqué resolving to “view as settled the incident which was caused in the wake of the action of citizens of Israel which violated the basic rights of the State of Argentina.”⁸⁷

It might be argued that the approach here is similar to *ex post* ratification. Indeed, the exercise of discretion in the mitigation of penalty might take place either in a judicial process, such as imposing a token penalty, or as part of an executive pardon in the manner of Queen Victoria’s commutation of the cannibals’ sentences. But by requiring a judicial

82. See Simon Chesterman, *Last Rights: Euthanasia, the Sanctity of Life and the Law in the Netherlands and the Northern Territory of Australia*, 47 INT’L & COMP. L.Q. 362 (1998), and sources there cited.

83. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9) (merits) (“The Court cannot accept this line of defense. The Court can only regard the alleged right of intervention as a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.”).

84. *Id.* at 36.

85. S.C. Res. 138, U.N. Doc S/4349 (June 23, 1960).

86. *Id.*

87. Joint Communiqué of the Governments of Israel and Argentina, Aug. 3, 1960, reprinted in 36 I.L.R. 59. As the prohibition of the use of force is an obligation *erga omnes*, however, a simple waiver by the target state—particularly a waiver by a regime put in power by the intervening state, as in the case of the U.S. invasion of Panama in 1989—would not obviate the need to explain the action to the larger international community. See Simon Chesterman, *Rethinking Panama: International Law and the US Invasion of Panama, 1989*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 57 (Guy S. Goodwin-Gill & Stefan A. Talmon eds., 1999).

process first to determine the existence of the wrong, mitigation reduces the danger of an executive asserting for itself the right to approve conduct that is never scrutinized. The key difference is trust: as the cases discussed in this Part show, there is little reason to trust the candor of an executive to disclose openly alleged wrongs perpetrated in the name of national security. In the absence of investigative journalists at newspapers such as the *New York Times* and the *Washington Post*, few if any of the questionable conduct discussed here would have been exposed to any form of public scrutiny. This is not to suggest that a mitigation approach would encourage any more candor—on the contrary, it assumes that political and legal incentives will always encourage secrecy. Nevertheless, the possibility of prosecution and punishment will do more to improve behavior than formalized endorsement of wrongdoing asserted to be in the national interest.

V. CONCLUSION

As Oliver Wendell Holmes, Jr., famously warned a century ago, hard cases make bad law.⁸⁸ Justice Holmes' observation seems especially apt here. But the context from which the cliché is typically lifted also bears examination. As Holmes noted, the hard cases are frequently the great ones:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.⁸⁹

How the current historical period will be viewed, what effects the war on terror will have on norms that had until very recently been regarded as well settled, and what role lawyers and academics will play in shaping those norms depends very much on the consequences of the hydraulic pressure currently at work on the international system.

"The Americans can always be counted on to do the right thing," Winston Churchill once observed, ". . . after they've exhausted all the

88. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904).

89. *Id.* at 400–01. Holmes, of course, was writing in dissent.

alternatives.”⁹⁰ There is, in the wake of the repudiation of the torture memorandum, the renewed vigilance on the part of the judiciary,⁹¹ and the falling of scales from the eyes of the American public, some reason to hope that the cliché will be borne out, and that the considered outcome of public deliberation within the United States will be a reaffirmation of the rule of law even in times of crisis.

90. Quoted in Michael Hirsh, *Bloody Necessary*, WASH. MONTHLY, Apr. 2005, at 43, 47.

91. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting). In criticizing the government’s detention of Hamdi without charge or trial, Scalia turned to the Founding Fathers:

The Founders well understood the difficult tradeoff between safety and freedom. “Safety from external danger,” Hamilton declared,

is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.

The Federalist No. 8, p. 33. The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it. Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.

Id. at 578–79.