



2007


What's International Law Got to Do With It? Transnational Law and the Intelligence Mission

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28 Mich. J. Int'l L. 639-661 (2007)

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WHAT'S INTERNATIONAL LAW GOT TO DO WITH IT? TRANSNATIONAL LAW AND THE INTELLIGENCE MISSION

*James E. Baker**

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I. INTRODUCTION

The United States faces an immediate and continuous threat of terrorist attack using weapons of mass destruction,¹ including nuclear weapons. The intelligence function and national security law, including international law—or more accurately transnational law—are central to addressing this threat. Indeed, international law is more relevant today in addressing this threat than it was before September 11.

Part II of this Article describes a continuum of contemporary threats to U.S. national security, with a focus on nonstate terrorism. Part III addresses the role of intelligence and national security law, and in particular law addressed to process, in combating these threats. Good process advances the liberty and safety interests embodied in the concept of national security. Good process improves the quality of decision. It

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The views expressed in this Article are those of the author and do not necessarily reflect the views of the Court of Appeals for the Armed Forces, the National Security Council, or any other governmental entity.

1. Biological, chemical, radiological, and nuclear weapons. Of course, the United States, and other states, face the prospect of catastrophic attacks using other means as well. The September 11 attacks are a case in point. Consider as well the prospect of remote cyber attacks or the prospect that a tractor-trailer loaded with conventional dynamite can leave a crater 600 feet in diameter with life-threatening collateral effects reaching to 7,000 feet in diameter. Spencer S. Hsu & Sari Horowitz, *Impervious Shield Elusive Against Drive-by Terrorists*, *WASH. POST*, Aug. 8, 2004, at A1 (citing Bureau of Alcohol, Tobacco, Firearms and Explosives statistics).

also enhances accountability, which in turn improves decision. Where good process is defined in law to include executive directive, it is better insulated from the immediate imperatives of secrecy and speed.

Part IV addresses the relationship between the intelligence function and international law. Most observers, and many operatives, instinctively find this juxtaposition oxymoronic. However, the Part argues that transnational law can facilitate the intelligence function.

Part V describes the responsibilities of the intelligence lawyer. One duty of the intelligence lawyer is to guide decisionmakers to lawful results. However, intelligence lawyers should also guide decisionmakers to preferred outcomes, based on legal policy² and American legal values. These legal values, including values expressed in international law, often reflect good national security policy and are not just a distinguishing characteristic of constitutional democracy. This means that, as with intelligence itself, national security law depends on the human factor—lawyers who have the moral courage to identify and apply the law and legal policy in good faith.

II. THE THREAT

Discussion of national security law should start with discussion of the threat. National security law is not an abstraction, but a mechanism to address real threats and preserve our constitutional values while doing so. Therefore, we cannot effectively address the role of intelligence, the role of law, and the relationship between the two without defining the threat.

Differences in legal perspective may reflect different perceptions of the threat and not in fact different perceptions of the law. For example, in the context of terrorism, the central constitutional debate involves the scope of the commander in chief's authority. Lawyers generally agree that the president not only has the constitutional authority to defend the United States from attack; he has a duty to do so. However, active debate has centered on whether the United States is presently "under attack" for constitutional purposes.

In the intelligence realm, if one believes that the United States faces an imminent and continuing threat of a mass casualty attack, one must surely favor broad and flexible intelligence authority. On the other hand, if one believes the threat is exaggerated, transient, or both, one might reasonably advocate a narrower authority, including more emphasis on substantive limitations, rather than procedural safeguards, when using the intelligence instrument. Regardless of how significant one perceives the threat to be, anyone who believes that national security encompasses liberty and security values should also favor an active

2. By legal policy, I mean prudential judgments about the application of the law, including, for example, advice on choosing between lawful alternatives.

process of internal and external appraisal. Such a process of appraisal helps to ensure not only that intelligence actions are lawful, but also that they are effective and consistent with American values.

In my view, the United States faces four immediate and potentially catastrophic threats, broadly defined. First is the threat of terrorist attack using a weapon of mass destruction (WMD): a chemical, biological, or nuclear device. Second, in defending against this threat, the United States may take measures that degrade the quality of our democracy and do so permanently, because the threat from catastrophic terrorism is indefinite. Third, we may not agree as a society on the nature of the threat and therefore the nature of the response. In failing to agree, we may compromise by splitting the difference when it comes to authority, rather than by maximizing authority and applying a proportionate measure of appraisal to the use of necessary authority. In doing so, we may fail to fully protect against a WMD attack or to preserve those values that underpin both our security and our liberty. These same legal values are national security values, because the rule of law applied at home and abroad will help diminish the appeal of jihadism overseas. Fourth, in addressing the threat of terror and perhaps in coping with the war in Iraq, we run the risk that we will degrade our ability to address this century's other certain threats—nuclear proliferation, instability in the Middle East, pandemic disease, environmental degradation, and energy and economic rivalry. This may occur because we are distracted, divided, or because we are exhausted.³

Jihadist⁴ terrorists have tried, and are trying, to obtain weapons of mass destruction. The jihadists' tactical objectives likely include the

3. For purposes of this symposium, I have chosen to focus on the first threat; however, these threats are interrelated and need to be addressed in a collective and comprehensive fashion.

4. A note on terminology: John Brennan, a former head of the CIA's Counterterrorism Center and the interagency Terrorist Threat Integration Center (now the National Counterterrorism Center), points out that linking terrorism with jihad "unwittingly transfer[s] the religious legitimacy inherent in the concept of jihad to murderous acts that are anything but holy." John Brennan, *We've Lost Sight of His Vision*, WASH. POST, Feb. 26, 2006, at B4.

The problem with the term "terrorist" is that it reaches too far, covering a genre or generalized set of tactics that can describe the environmental extremist that burns down an SUV dealership as well as the al Qaeda operative intent on blowing up New York. Former Representative and 9/11 Commission Vice Chairman Lee Hamilton tells the story of former Deputy Secretary of Defense Richard Armitage leaving a meeting and bemoaning that "[w]e can't even agree on who we are fighting." Hamilton points out that in one newspaper he counted eight different terms to describe the terrorist opponent, including "terrorists," "Islamists," and "Al-Qaeda affiliates." Lee Hamilton, Landon Lecture at Kansas State University (Mar. 29, 2005), available at <http://www.mediarelations.K-state.edu/WEB/News/NewsReleases/hamiltonext305.html>.

Accepting Brennan's point, I have chosen "jihadist" in a value-neutral manner, so as to delink terrorism from the adjective "Islamic." "Terrorist" falls short as well because it is too general a term for the focus I wish to apply to those persons, organizations, and movements that are committed to engaging in mass casualty incidents, potentially using WMD. "Jihadist" is also the term in present use by the intelligence community, as reflected in the declassified portions of the 2006 National Intelligence Estimate on Iraq. NATIONAL INTELLIGENCE ESTIMATE: TRENDS IN GLOBAL TERRORISM: IMPLICATIONS FOR THE UNITED STATES (2006). This report was compiled by multiple U.S. intelligence agencies and released by the House Committee on Intelligence.

physical destruction of New York City and Washington, D.C., and in the interim, the conduct of symbolic and mass casualty events. Their strategic objectives likely include the erosion of democracy as a symbol of transitional hope in the Middle East, South Asia, and Africa, as well as the diminution of American cultural influence in the Islamic world.

Terrorism, of course, is not a new threat. A counterterrorism center has existed at the CIA since 1986; the threat of hijacking dates from at least the 1960s. However, today's threat is distinct. First, terrorism today comes with the backdrop of nuclear weapons. The International Atomic Energy Agency (IAEA) has documented over 100 instances where nuclear material has gone missing in the past decade, with seventeen confirmed instances involving weapons-grade enriched uranium or plutonium.⁵ This trend continues. Recent statements by officials at the Department of Homeland Security indicate that "[t]he incidents tracked by the department, based on its reporting and information from foreign diplomatic and intelligence sources, average about twice the number made public each year by the IAEA," and range from 200–250 incidents a year.⁶ Further, while Iran and North Korea present their own proliferation concerns, they are also a potential source of WMD for nonstate actors. Harvard Professor Graham Allison and others have argued that it does not in fact take a rocket scientist to make a nuclear weapon; it takes fissionable material.⁷ Thus, this contest is potentially about the survival of the state, by which I mean the survival of a process of government dedicated to the ideals of tolerance, due process, transparency, and freedom. This also means that the United Kingdom's experience with the IRA, for example, is useful, but it is a mistake to look back rather than forward in calibrating our response.

Second, this conflict is distinct because we do not face a fixed military opponent, but rather a threat from a variety of organizations and individuals unified in their hatred and their tactics. As a result, success is not ultimately defined militarily by territory seized and held, as in World War II, or necessarily through the resolution of distinct political issues. Moreover, the opponent does not need territory, armies, or a chain of command to fight this conflict. Unlike the Cold War or even World War II, the logic of rational deterrence against the use of WMD does not pertain to the nonstate jihadist.

5. IAEA, *Illicit Trafficking Database (ITDB)* (2003), available at www.iaea.org/NewsCenter/Features/RadSources/PDF/itdb_31122003.pdf.

6. Richard Willing, *Nuclear Traffic Doubles Since '90s*, USA TODAY, Dec. 26, 2006, at 1A.

7. GRAHAM ALLISON, *NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE* 92–98 (2004).

Third, the threat is perpetual and indefinite. While the capture or death of the opponents' leaders and actors matters, this is not a threat that can be addressed through attrition alone. Only a handful of dedicated individuals is necessary to sustain this threat. So long as a supply of WMD precursors exists in the world's arsenals, laboratories, and power plants, the jihadist will seek to obtain them.

Fourth, this conflict is different because for the American public (but not its national security services) this is an intermittent conflict. It requires inconvenience at the airport, and, for some, sorrow and fear, but to date it has not required societal sacrifice proportionate to the threat. In a 2006 poll of security experts representing a spectrum of political and national security views, eighty-four percent responded that the United States would suffer a terrorist attack on the scale of September 11 within the next ten years.⁸ The public at large does not appear to share this concern to the same degree. Although a degree of optimism bias may be at play, just as the public did not perceive a domestic threat before 9/11, the public may not perceive the threat to be nuclear in character. Surely, if the public perceived the threat as nuclear, voters and the political leaders they elect of both parties would not place tax breaks before implementation of a comprehensive and complete homeland security regime. Surely, if the public perceived the threat as nuclear and biological, we would more readily take concrete steps to curtail our dependence on foreign oil and reap the foreign policy capital from doing so. Rather than conclude that most Americans have knowingly signed on to a constitutional suicide pact, I conclude that we lack a public consensus in all but rhetoric regarding the risks of terrorism and the costs and benefits of response.

Finally, while we might contain the threat from this conflict with sustained commitment, the jihadist need only get through once with a WMD weapon to deeply change the nature of American society—its optimism, its humanity, its tolerance, and its sense of liberty. So long as there is a supply of young, disgruntled men and women in the world, the potential for such an attack will remain.

There is such a source of future jihadists. Indications are that it is growing. Global polls reflect widespread support for jihadists like Osama bin Laden. A 2004 Pew Poll reflected bin Laden's enduring popularity, with favorable ratings of fifty-five percent in Jordan, sixty-five percent in Pakistan, and forty-five percent in Morocco.⁹ Moreover, the war in Iraq has produced at least a generation—the next generation—of

8. CTR. FOR AM. PROGRESS, FOREIGN POLICY AND TERRORISM INDEX (2006), available at <http://www.americanprogress.org/kf/tersurveypoll.pdf>.

9. Pew Global Attitudes Project, *Nine Nation Survey*, Mar. 2004, <http://pewglobal.org/reports/pdf/206topline.pdf>.

jihadists, as Afghanistan produced the generation before. The generation beyond, one suspects, is at work in madrasahs throughout South Asia (and potentially beyond in Africa and the Balkans, depending on where Wahabbists and others have set up schools). Moreover, many in the jihadist camp view casualties as martyrs, which encourages rather than discourages others from the further pursuit of terrorist means. Before September 11, a handful of jihadist websites operated; there are now over 5,000.¹⁰

For these reasons, even if we succeed in deterring attack over time, we cannot ever know if we have “won.” Nor can we ever assume that we have “won” because we cannot ignore a threat that can kill thousands, perhaps millions, and potentially undermine our way of life with a single successful attack.

III. INTELLIGENCE AND NATIONAL SECURITY LAW

If there is room to debate the likelihood of a WMD attack, and I am glad to say there is, there is no room to debate the importance of intelligence¹¹ in preventing it. Pick your metaphor. Intelligence is the oxygen, the blood, or the fuel of counterterrorism. As Marine commander Maj. Gen. Dennis Hejlik has said, during previous wars it was easy to find the enemy, but hard to kill him.¹² In this conflict, it is hard to find the enemy, but easy to kill him. Equally important, intelligence is decisive in identifying fissionable material that is at risk and in severing the enemy from potential illicit sources of WMD on the black market. Therefore, it is no surprise that many of the critical counterterrorism tools are intelligence instruments, including electronic surveillance, rendition, liaison, data-mining, and covert action. These are also among the most controversial security instruments, in part because they can raise difficult policy choices as well as difficult legal *and* legal values questions.

10. Arnaud de Borchgrave, *Iran Scores in World War*, WASH. TIMES, Aug. 24, 2006, at Commentary Page.

11. When I refer to intelligence I am referring to information relevant to national security decisionmaking garnered from certain sources and methods of collection and analysis. Thus, “intelligence” describes the source, not necessarily the quality of the information. Generally speaking, there are five intelligence functions: collection; analysis and dissemination; liaison; covert action; and counterintelligence. See *IN THE COMMON DEFENSE*, *supra* note *, Introduction.

12. General Hejlik said: “If you look at the way warfare had been in the past, it was easy to find the enemy, but hard to finish the enemy because everyone fought en masse. That’s totally changed. Now it’s extremely hard to find the enemy, and relatively easy to finish him.” See Chip Jones, *Special Operations, Special Purpose*, MARINE CORPS NEWS ROOM: OCTOBER 2006 ARCHIVES, Oct. 29, 2006, available at <http://www.marine-corps-news.com/2006/10/>.

Even if we agree on the nature of the threat and the role of intelligence, commentators are less certain about the role of law and legal values in this conflict, or better put, more divided about the role of law. Secretary of State Dean Acheson said "the survival of states is not a matter of law."¹³ More recently, commentators have taken to citing Justice Jackson's statement that "the Constitution is not a suicide pact."¹⁴ The presumption is that the law should not be read or applied in a manner that restricts national security. If this is true of the Constitution, then it is certainly true of international law.

But law matters. Law enhances national security by improving results. It is also a security value and not just a liberty value. It is law, for example, that distinguishes the manner in which the United States uses force from terrorism through adherence to the international legal principles of discrimination, military objective, proportionality, and necessity. The question is not whether law and intelligence should be linked in U.S. practice, but how best to apply law to intelligence to advance our national security interests and values.

Law can contribute to the intelligence mission in at least two ways.¹⁵

1) *Substantive Authority*: Law provides substantive authority to act, and in many cases act boldly. This is true with respect to each of the five intelligence functions. The Constitution and statutes provide authority to collect and analyze intelligence and counterintelligence, as well as conduct liaison and covert action. In *Totten, Administrator v. United States*, an 1875 case involving an effort by the estate of a Union spy to collect on a secret contract with President Lincoln, the Supreme Court stated:

We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during war, as commander in chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. Our objection is not the contract, but to the action upon it in the court of Claims. The service stipulated by the contract was a secret service; the information sought was to

13. Dean Acheson, Remarks at the Proceedings of the American Society of International Law, 57th Annual Meeting 13–15 (1963), reprinted in *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 107, 108 (Robert J. Beck et al. eds., 1996).

14. *Terminello v. Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).

15. Whether law does so depends on the lawyer, a subject addressed in Part V this Article.

be obtained clandestinely, and was to be communicated privately; the employment and the service were equally concealed.¹⁶

Totten remains good law.¹⁷ Statutory law also provides exceptions to facilitate the performance of these functions, for example exemptions pertaining to false visas and false identification.¹⁸

Totten is a broad statement of presidential authority to conduct intelligence activities. Nonetheless, whatever the scope of the president's inherent authority, the president acts at the zenith of his authority when he is also acting pursuant to legislative authority.¹⁹ Practitioners—meaning both lawyers and operatives—may sometimes overlook this truism as well as its possible impact on policy and the conduct of intelligence activities. Where the law is clear *and* is clearly exercised, risk-taking generally increases. This is true in the field and it is true in Washington.

Clear expressions of statutory authority also help to sustain long-term public support for the intelligence function and some of its necessary, but more controversial missions (of course, where there is clear constitutional and statutory authority there may be less overall controversy). Officers who experienced the 1970s, or those who have studied that period, will appreciate the importance of generating and sustaining public understanding of and support for the intelligence function. It is more important now than ever because this is a perpetual conflict and we will only succeed in deterring the worst-case scenarios through aggressive use of the intelligence instrument, risk-taking, and the recruitment of intellectually and culturally diverse talent.

(2) *Process*. In my view, intelligence risk-taking and public confidence is achieved not through public disclosure, but through the application of good process that is both secret and accountable. Law, by which I mean statutory law and executive directive, can provide essential processes for appraising intelligence functions before and after their use. To be clear, process can be effective or dysfunctional, or more colloquially, good or bad. Good process includes key viewpoints and expertise in the decision-making chain. Good process drives debate to decision and consensus to implementation. Good process permits the management of multiple crises at once. In other words, sound process allows policymak-

16. *Totten, Adm'r v. United States*, 92 U.S. 105, 106 (1875).

17. *See Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003).

18. *See* 18 U.S.C. § 1546 (2000) (Fraud and misuse of visas, permits, and other documents); 18 U.S.C. § 1028 (2000) (Fraud and related activity in connection with identification documents and information).

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

ers and intelligence officers to effectively manage the daily twenty-first century national security tableaux.

Good process is particularly important in the intelligence arena for at least four reasons. First, the success or failure of our intelligence effort will depend on our success in addressing various risks. We must calibrate the risk to our officers and agents in the field in a manner commensurate with the threat against which they are collecting. Similarly, we must find and hold an optimum balance between the risk of operational penetration and force protection with the necessity of having a diverse cultural and language pool from which to draw officers, linguists, and analysts. We must also find the right balance between the immediate imperative of identifying and disrupting the threat and the risk that in doing so we forego our legal and moral values. In the longer run it is these values that will sustain public support at home and our alliances abroad, ultimately diminishing the appeal of the opponent. Each risk requires a process where leadership can preview operational choices at the tactical and strategic level and review results so as to recalibrate our risk posture. We need to ask if we have calibrated these risks accurately in each context presented, and we must do so on a daily basis, not just when there is a real or perceived intelligence failure.²⁰

Second, process is essential in any endeavor with the functional and bureaucratic scope of the U.S. intelligence mission, and that must cover the number and range of human and natural threats to U.S. national security. On the bureaucratic side, there are currently sixteen intelligence community components. That is the official number; there are many more producers and consumers of intelligence if one includes homeland security. Homeland security is, after all, the objective of national security—the protection of our physical security and the preservation of our values. With homeland security, for example, the meat inspector or customs agent, and not just the case officer or the satellite, may prove the critical source of intelligence. If the national security threat comes in the form of bird flu, then the private health care professional may become the essential field agent. Consider as well that in San Diego,

20. The unintended strength of the National Intelligence Reform Act of 2004, S. 2845, 108th Cong. (2004), was that while intending to “demote” the Director of Central Intelligence or the CIA through the creation of the Directorate of National Intelligence (DNI), the bill in fact resulted in a promotion: allowing more attention by the head of the CIA to the daily management of the complexities and risks associated with human intelligence collection. Similarly, there are two unintended weaknesses in the bill. First, the creation of a DNI suggests that bureaucratic and legal adjustments can “fix” rather than facilitate what is ultimately a leadership challenge. Second, it creates the impression that the primary intelligence player is the DNI, not the president. This is not so. Only the president has the bureaucratic and constitutional wherewithal to fuse all-source intelligence and lead the intelligence community as intelligence commander in chief.

twenty-eight separate entities have a role in providing for homeland security. That means that San Diego County alone has twenty-eight separate, organizational intelligence producers and consumers.²¹ In short, process is more, not less, important when dealing with homeland security, which is organized horizontally across the federal government and vertically from national to local government.

In this regard, the Joint Terrorism Task Force concept and process, with parallel state fusion centers, is a homeland security success story.²² State Department lawyer Ed Cummings used to counsel his team about “the importance of being there” at the moment of decision.²³ The same can be said of the intelligence analyst or warning officer. “The importance of being there” in the same room cannot be overlooked: analysts must see essential information and break down the cultural and personality barriers that often impede intelligence fusion.

Third, process also determines whether and when lawyers get involved, which is to say, how law and legal values are applied, if at all, to the intelligence functions. This depends not just on legal directives, but on senior leaders who respect the law and the role of lawyers, and understand that legal values promote national security policy. Rule of law defines who we are. It distinguishes us from our opponents. Leading by example (*ductus exemplo*) allows us to make demands of our allies. However, law as a security value is subjective and harder to measure in result than the success or failure of steps taken to advance our physical security.

Fourth, where the intelligence function is concerned, external mechanisms of appraisal are muted and tempered, if they exist at all. As Justice Jackson remarked, “[t]he tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.”²⁴ Given the legitimate necessity for security and sometimes speed, process takes on added importance—opening the aperture wide enough for thoughtful review, but not so wide as to risk overexposure. Good process may provide the

21. David Wood, ‘Interoperability’ Issue still Bedevils Emergency Response, NEWHOUSE NEWS SERV., Mar. 2, 2006, <http://www.newhouse.com>.

22. See *The FBI Transformation Since 2001: Hearing Before the H. Appropriations Subcomm. on Science, the Departments of State, Justice and Commerce, and Related Agencies*, 109th Cong. 254–95, 314–33 (2005) (statement of Robert S. Mueller III, Director, Federal Bureau of Investigation); Karen DeYoung, *Five Years Later: The Bureaucratic Front: a Fight Against Terrorism—and Disorganization*, WASH. POST, Aug. 9, 2006, at A1.

23. Cummings was a career attorney in the State Department’s legal office who headed the political-military affairs office for many years. He died of cancer in February 2006. See *Lawyers and Wars: A Symposium Issue in Honor of Edward R. Cummings*, 38 GEO. WASH. INT’L L. REV. 493 (2006).

24. *Youngstown*, 343 U.S. at 634.

only basis for identifying and evaluating risks and then fixing accountability for the policy and intelligence judgments regarding those risks. Of course, many national security decisions are close calls. Identifying counterviews, if it does not change decisions, may well influence tactics in mitigation of those risks. And as I noted earlier, process and accountability also increase risk-taking when authority and responsibility are clear.

Without such processes being fixed in law, they might not occur at all or may only incorporate certain views. Speed and security would likely always carry the day. One of the functions of the intelligence lawyer is to demonstrate to operatives and policymakers that speed and security do not necessarily present a zero-sum equation with process and law. Good process leads to better security results. Process embedded in law, in turn, is a source of continuity and national security strength. It guards against secrecy and sophistry at times of peril and it protects policies dependent on long-term commitment from floundering or straying off course in times of calm.

Stop to think about it: the majority of framework intelligence laws are procedural. This is the case, for example, with two of the most important intelligence tools: covert action and electronic surveillance (at least as authorized in the Foreign Intelligence Surveillance Act).²⁵ The present processes for the internal and external appraisal of rendition and liaison activities are less evident, but good process is no less important. Congress has determined that covert action bears particular policy and legal risks, and therefore should be subject to a particular process of review and reporting. Presidents have more or less agreed with, or at least acquiesced in, this judgment through executive practice and process. However, activities once subject to vigorous review as covert action may become "traditional" in the context of a perpetual conflict and thus reside outside established processes of review. Similarly, clandestine military and intelligence liaison activities historically have received less internal preview or review.²⁶ But particularly in a counterterrorism setting they raise many of the same policy and legal risks as covert action, including the risk of national security failure. Given the importance of intelligence, the question is not whether we should engage in these

25. Foreign Intelligence Surveillance Act (FISA), Pub. L. No. 95-511, tit. I, 101, 92 Stat. 1783 (1983) (codified at 50 U.S.C. §§ 1801-11 (1996)). For a discussion of the legal arguments for and against an inherent presidential authority, as well as a discussion of the legal policy arguments that should inform such a debate, see *IN THE COMMON DEFENSE*, *supra* note *, at ch. 5.

26. James E. Baker, *From Cold War to Long War: Covert Action in U.S. Legal Context*, in 3 *STRATEGIC INTELLIGENCE* 157 (Loch K. Johnson ed., 2007).

activities, but what process should be used in approving and appraising their use.

IV. INTERNATIONAL LAW AND INTELLIGENCE

International law and intelligence are also conceptually linked. This is intuitive. Where the threat is transnational in character, the U.S. response should be transnational as well. The United States must contextually draw on all the national security instruments to address the WMD threat. This includes offensive operations as well as implementation of a concentric homeland defense. What is perhaps less intuitive to intelligence specialists is the degree to which international law is relevant to and can facilitate the intelligence mission.

Such a statement is easy to turn into a truism depending on how one defines "international law." Therefore, rather than define international law in a manner that validates my observation, I will use the definition of public international law offered to judges by the American Society of International Law (ASIL):

Public international law [is] the law which regulates the intercourse of nations . . . the building blocks of international law, broadly understood, include a wide range of activities and regimes beyond treaties, such as domestic statutes with extraterritorial application, the transnational coordination of regulatory agencies, and the treatment of aliens by foreign governments. In sum, today's lawyer is increasingly involved in what some commentators have called transnational law, a term coined by Phillip Jessup "to include all law which regulates actions or events that transcend national frontiers." At issue is . . . the web of legal regimes between and within countries that is the result of globalization.²⁷

This broad definition accurately describes the web of U.S., international, and foreign law applicable to the intelligence functions.

The ASIL definition provides a useful baseline because it transforms international law from an abstraction into its component parts. Some of these parts are operational and some are distantly aspirational, especially where war and peace and human rights are concerned. The definition also makes the essential point for intelligence practice that when we talk about international law we are really talking about transnational law, not a narrow, treaty-based definition of international law.

27. DAVID BEDERMAN ET AL., *INTERNATIONAL LAW: A HANDBOOK FOR JUDGES* 2-3 (Am. Soc'y of Int'l Law ed., 2003).

This perspective also belies the suspicion that where national security is concerned, there is really no such thing as international law so much as there is national interest, which may or may not align with international law. States ultimately will act in their own interests and not out of a sense of international legal obligation. Nowhere is this instinct more ingrained than in the intelligence function. To turn a phrase from President Reagan, international law is about trust; national intelligence is about verification.²⁸

But there is no question that transnational law is a critical component of the intelligence function. International law can constrain the performance of intelligence functions; more likely, it will affect the policy and legal costs and risks associated with intelligence activities in the event of disclosure. However, international law can also serve as a useful, if not essential, national security tool. In these respects, international law may be more relevant in today's perilous times than it was before September 11.

Let me suggest a few ways international law can contribute—indeed must contribute—if we are to wield the intelligence instrument most effectively to detect and deter WMD terrorism. I do so not out of some blind faith in international law, but out of a sense of national interest, which also happens to reflect an international interest in combating terrorism and thus protecting human rights and advancing public order.

1) Process, Policy, and Permit. First, international law can provide the structure and process for the effective collection, sharing, and use of intelligence. This is evident in the context of traditional international law mechanisms like extradition treaties and Mutual Legal Assistance treaties, which have as their purpose criminal prosecution, but also in the terrorism context, the production of intelligence and the disruption of terrorist activities.

Where ordinary mechanisms of extradition are not used, the United States and other states practice rendition and extraordinary rendition. In U.S. practice, rendition addresses considerations of speed, secrecy, and security, while facilitating intelligence collection and the disruption of terrorist cells. Rendition also provides cover, or plausible deniability, to sending states that may not otherwise want to be seen to assist the United States or assume the risk of terrorist retribution. Rendition may also be used where the United States has a security or intelligence interest in a subject, but lacks a sufficient basis to detain or prosecute the subject himself.

28. Ronald Reagan often used the adage "trust, but verify." See, e.g., Associated Press, *Historic Missile Treaty Signed; Leaders Pledge Further Efforts for Arms Control*, L.A. TIMES, Dec. 8, 1987, at A1.

Rendition is not a new practice.²⁹ Many of the principles of law debated today derive from the 1960 rendition of Adolf Eichmann,³⁰ the 1972 Toscanino case,³¹ and the Yunis line of opinions addressing an extraordinary rendition from Beirut in 1987.³² However, the WMD threat has placed new tension between the imperative to gather intelligence and disrupt attack on the one hand, and America's legal values and the policy benefits of espousing those legal values in a clear and committed manner on the other hand. It has also led to new tension over the transnational legal principles involving self-defense, international humanitarian law pertaining to torture and *non-refoulement*, and state sovereignty. With rendition, domestic law, international law, foreign law, and legal policy are all at play.

I have already noted how domestic law *can* play an important role in providing procedures to check and balance the inevitable and appropriate intelligence interest in speed, security, and information. Extraordinary rendition is an excellent example of a context in which such process is vital. Indeed, with rendition, process may determine substance. For example, a process that only includes representatives from one agency, or from one segment of one agency, will not provide the same depth of per-

29. As noted in the U.S. Attorneys' Manual, an extraordinary rendition may entail no more than an effort to lure a suspect from one point to another, or it may amount to what is in the eyes of local or foreign law a kidnapping. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, § 9-15.000, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrn.htm#9-15.100. In this sense, policymakers and lawyers might wisely test the facts as opposed to their description in evaluating the legal and policy implications of a given rendition. Moreover, policymakers and lawyers must also consider that in the course of a protracted conflict, the heretofore extraordinary rendition may indeed become ordinary (or in covert action parlance, "traditional") without sufficient amendment of operative bureaucratic mechanisms prompting interagency or senior level review of those actions raising the most difficult policy and legal questions.

30. The story of the rendition of Adolf Eichmann from the streets of Buenos Aires to a Jerusalem courtroom has been cited dozens of times. See, e.g., Helen Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961). The resulting trial can be found at CA 336/61 *Eichmann v. Attorney Gen.* [1962] IsrSC 16(3) 2033, reprinted in 36 I.L.R. 277 (1968).

31. In *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), an accused drug smuggler was abducted from Uruguay and transported to Brazil, where he was interrogated and tortured in the presence of U.S. agents prior to being brought into U.S. federal court. The Second Circuit held that due process required a court to divest itself of jurisdiction over the person of a defendant where it had been acquired as the result of the government's deliberate, unnecessary, and unreasonable invasion of the accused's constitutional rights.

32. Fawaz Yunis, a citizen of Lebanon, was suspected of being involved in the 1985 hijacking of a Jordanian airliner that had American passengers on board. Yunis escaped after all hostages were released and the plane was destroyed. In 1987, U.S. agents located Yunis and lured him into international waters off the coast of Cyprus. They then forcefully returned him, via U.S. naval ships and aircraft, to the United States on charges of hostage-taking and aircraft piracy. The federal district court for the District of Columbia allowed his prosecution under the 1988 Hostage Taking Act. *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988).

spective as an interagency process that includes at least a devil's advocate to test operational assumptions, the potential for mistaken identity, and the policy value or legal necessity for assurances. In Justice Jackson's words, the immediate will be stressed over the long term.³³ Where the government's internal process is agency specific, it is the lawyers who have the specific responsibility to ensure that considerations of legal policy are tested and factual assumptions about identity and assurances validated.

International law can also provide procedural checks and balances that at the same time advance speed and security in rendition practice. Where there are agreements in place on the process of rendition, for example, transfers can be made in a timely manner without the necessity for negotiation over assurances, access, or intelligence. The United Kingdom has concluded such a public agreement with Jordan.³⁴ Other agreements may be secret. By further example, there is indication that a key actor in the July 2005 London bombings, which killed fifty-two people, was the subject of a rendition request from the United States before the attack, but that the sending state balked out of concern that the United States would not treat the subject in a manner which in the view of the sending state was consistent with international law. Regularized process, documented in an overt or clandestine binding agreement, can address such concerns in advance and facilitate timely intelligence collection when it matters most.

Similarly, international law can facilitate liaison relationships generally. Where agreements are in place, we do not have to reinvent the wheel. Tried and agreed mechanisms can maximize speed and secrecy while minimizing the qualitative risks of receiving intelligence from unknown sources with unknown agendas and unknown records.

This is also true in the case of mechanisms like the Proliferation Security Initiative (PSI). The PSI is a political agreement between like-minded states regarding principles and processes for identifying and boarding maritime vessels and aircraft of proliferation concern. While the PSI *chapeau* is nonbinding, the United States has used the PSI as an umbrella under which to conclude a number of bilateral ship-boarding agreements with maritime flag states. From the perspective of national security process, I like to think of the PSI as a Global PD-27, the 1978 presidential directive that still governs U.S. interagency process for addressing non-military incidents, including maritime interdictions. As an

33. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

34. Memorandum of Understanding Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, U.K.-Jordan, Aug. 10, 2005, 44 I.L.M. 1511, available at <http://www.statewatch.org/news/2005/aug/uk-jordan-MOU.pdf>.

intelligence matter, I like to think of the PSI as essentially a functional liaison agreement.

Here, international law is providing a process that in theory will expedite decision at moments of crisis. If the predicate intelligence proves unfounded we will have acted in accord with agreed principles, and states should be no less inclined to share intelligence with us the next time around. But it is a nascent regime that is relatively untested. Moreover, I confess to engaging in some optimism bias of my own.

What I would like to see is the PSI, and more broadly nonproliferation, elevated to the top of the national security agenda and given the same surge of energy and anger that has driven the United States to conclude Article 98 agreements with parties to the International Criminal Court. The threat of WMD terrorism warrants such treatment. Consider as well the importance of regular process in transmitting passenger lists pursuant to air travel agreements, financial transactions, and the placement of technical and human monitors at foreign ports. Each is a product of transnational law, for which the same arguments apply, *mutatis mutandis*, to the PSI.

Nor should we overlook the fact that much of our nonproliferation information is derived through international law, including through IAEA mechanisms that are a product of verification agreements concluded pursuant to Article IV of the Treaty on the Nonproliferation of Nuclear Weapons (NPT).³⁵ As Iran and North Korea have demonstrated, international law, in this case in the form of a treaty, bears no guarantees of compliance. Even worse, the NPT provides a degree of cover to Iran by validating the right to peaceful nuclear energy and the capacity to generate it. But the NPT is a window, in some cases the only window into nuclear proliferation in states of concern.

There is perhaps no more transparent example of the link between international law and intelligence than the relationship between U.S. maritime security and agreements established through the International Maritime Organization (IMO). Recall that U.S. law requires inbound vessels to provide ninety-six hours' notice before arriving in U.S. ports and to identify on their manifests the five prior ports of call.³⁶ Vessels are also required to have security plans and security officers and to install Automated Identification Systems, which are basically "identification friend or foe" transponders for vessels on the high seas. These requirements and processes derive from the 2004 amendments to the Safety of

35. Treaty on the Non-Proliferation of Nuclear Weapons art. IV, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

36. Ports and Waterways Safety, 33 C.F.R. §§ 160.1–160.215 (2006).

Life at Sea Treaty (SOLAS), concluded under the auspices of the IMO.³⁷ In short, international law provides both a mechanism (the IMO) and a vehicle (SOLAS) to accomplish the intelligence goal—maritime domain awareness.

The United States might have imposed such requirements on its own, but as with nonproliferation and sanctions regimes generally, the concept only works if the costs are shared and the restrictions are uniform in application. Otherwise, the U.S. maritime industry would find itself in a costly commercial prisoner's dilemma with only marginal security benefit. The approximately 7,500 foreign flagged vessels that visit U.S. ports each year would remain outside the regime, while the 9,500 registered American vessels, which arguably pose the least U.S. security risk, would assume the cost of compliance. The IMO and the Government Accountability Office both report only partial compliance due to the cost involved, among other factors.³⁸ Moreover, we can be sure that some vessels will not comply, a group that will obviously include ships engaged in illicit traffic. Nevertheless, we should not overlook the benefit of even partial compliance to maritime domain awareness, changing the number of vessels approaching the U.S. coast that might fall into the "high interest" board category, or warranting the placement of a Sea Marshal on the bridge when entering the approaches to a U.S. port. Here again, the aphorism rings true: trust, but verify.

2) *National Security Policy*. International law fosters good intelligence in two additional ways. First, the principles embodied in international law are often good national security policy and not just "law." Where the United States acts or is perceived to act in a manner consistent with international law, it is more likely to receive transnational support, including intelligence support from like-minded governments.

Milt Beardon, a renowned CIA case officer, illustrates the connection through graphic reference to Soviet pilots during their war in Afghanistan.³⁹ Beardon recounts seeing a picture of a Soviet pilot who committed suicide upon parachuting to the ground rather than risk capture by the Mujahedeen. Beardon subsequently persuaded his Afghan contacts to treat captured Soviet pilots humanely, by which he meant in accord with the principles of the Geneva Conventions. He did so out of a

37. International Convention for the Safety of Life at Sea, *opened for signature* Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 (amended 2004).

38. See generally GOV'T ACCOUNTABILITY OFFICE, MARITIME SECURITY: SUBSTANTIAL WORK REMAINS TO TRANSLATE NEW PLANNING REQUIREMENTS INTO EFFECTIVE PORT SECURITY (2004), available at <http://www.gao.gov/new.items/d04838.pdf>.

39. Milt Bearden, *When the C.I.A. Played by the Rules*, N.Y. TIMES, Nov. 4, 2005, at A27.

sense of legal obligation and in hopes of generating reciprocal treatment, but also because it might lead to better intelligence. Sure enough, Beardon recounts, some captured Soviet pilots who were treated humanely were in due course induced to defect to the intelligence advantage of the United States and the Mujahedeen. I am not suggesting that if I were to parachute into Taliban territory today I would receive gracious treatment. I am suggesting that international law often reflects good national security policy along with good legal policy.

The converse is also true: where the United States acts, or is perceived to act, outside international law, it may receive less intelligence support. Consider the above example of the 2005 London bombings and the delay in the rendition of a critical subject. Consider as well the reaction to a purported rendition from Milan, Italy,⁴⁰ and the confirmed renditions of Maher Aher⁴¹ and Khaled al Masri.⁴² Although I cannot demonstrate so empirically, I think it is fair to say that these cases have not improved or facilitated future intelligence cooperation and sharing with the countries in question. The State Department Legal Adviser has suggested as much.⁴³ The damage to U.S. public diplomacy from these cases is certainly disproportionate to the intelligence gained.

International law can also provide a framework for aggressive intelligence operations, such as those conducted pursuant to a lawful right of self-defense. Consider the decision of President Clinton to authorize Afghan tribals to kill or capture Osama bin Laden in the 1990s. As a matter of law, this decision was predicated on a determination by relevant lawyers—before the 1998 embassy bombings—that the United States might lawfully kill bin Laden and his lieutenants as a matter of self-defense. In terms of process, this judgment was initiated by lawyers and was predicated on a factual briefing by CIA experts on the al Qaeda threat. Moreover, the change in legal paradigm from a law enforcement model to one based on the law of armed conflict applied equally to intelligence operations executed through clandestine assets as well as overt military means like cruise missiles.

However, this example also illustrates that transnational law constrains as well as permits intelligence operations. Let me give you three examples drawn from different applications of transnational law, involv-

40. See Ian Fisher & Elisabetta Povoledo, *Italy Seeks Indictments of C.I.A. Operatives in Egyptian's Abduction*, N.Y. TIMES, Dec. 6, 2006, at A12.

41. See Ian Austen, *Canada Will Pay \$9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 27, 2007, at A5.

42. See Colin Nickerson, *Germany Issues Warrant for 13 CIA Operatives*, BOSTON GLOBE, Feb. 1, 2007, at A3.

43. Craig Whitlock, *Testimony Helps Detail CIA's Post-9/11 Reach; Europeans Told of Plans for Abductions*, WASH. POST, Dec. 16, 2006, at A1.

ing U.S. criminal law, treaty law, and foreign law. When President Clinton authorized U.S. forces and contacts to attack bin Laden, he did so in a manner that was consistent with the law of armed conflict as it was understood to be implemented in U.S. criminal law at the time.⁴⁴ Thus, the President's authorization included instruction that if bin Laden or his lieutenants surrendered or were captured, they were to be treated humanely, that is, not executed or tortured (acts prohibited by international law as implemented in U.S. criminal law).

International treaties may also raise the costs and consequences of conduct, at least if that conduct is discovered or disclosed. One illustration is the 1983 mining of Nicaraguan harbors and subsequent litigation in the International Court of Justice.⁴⁵ As referenced earlier, foreign law has also come into play in a number of rendition contexts. Certain countries are now effectively operationally off-limits to U.S. intelligence actors who have correctly or incorrectly been identified in relation to events occurring in those countries. One is also reminded of the *Rainbow Warrior* incident and the prosecution of French intelligence agents in New Zealand.⁴⁶ More recently, diplomatic relations between Israel and New Zealand were strained when two alleged Mossad agents were prosecuted for trying to obtain New Zealand passports with false identities.⁴⁷ The incident underscores the fact that the application of foreign law to national intelligence activities is not solely a U.S. consideration, but is endemic to the function. A meaningful process of preview will identify and weigh the application of transnational law, including the availability of alternative means or mitigating measures to address or diminish such risks.

3) *Intelligence and the Law*. As law may shape the conduct of intelligence, intelligence also shapes the law. I have described how transnational law can facilitate and in some cases constrain the intelligence functions. The two are also linked in a third critical manner:

44. As a matter of policy, the President expressed a preference that bin Laden be captured rather than killed.

45. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

46. The *Rainbow Warrior* was a boat operated by Greenpeace and had traveled to the South Pacific in 1985 to protest nuclear testing in French Polynesia by the Government of France. On July 10, while the boat was docked in Auckland harbor, agents from the French foreign intelligence service affixed explosive devices to the ship's hull and detonated them, sinking the boat. One crew member was killed. Two French agents were caught, tried, and imprisoned. See *New Zealand Police, Rainbow Warrior Bombing*, <http://www.police.govt.nz/operation/wharf/>. See generally DOUGLAS PORCH, *THE FRENCH SECRET SERVICES* 459-60 (1995).

47. *Frozen Ties on Low Flame, Despite Diplomatic Sanctions*, *FIN. TIMES* (London), Dec. 2, 2004.

intelligence and intelligence capacity shape international law, particularly with respect to the use of force.

Whether international lawyers like it or not, the threat of WMD terrorism, and in particular nuclear terrorism, has transformed the manner in which the U.S. government views self-defense. On a tactical level, the PSI is an effort to shape the law through customary practice and provide a process for doing so. On a strategic level, the preemption doctrine is also an effort to shape international law in a manner that accounts for the inability to determine factually the moment at which the threat of WMD terrorism is imminent.

Once obtained by terrorists, WMD is particularly difficult to locate. As a result, there is understandable pressure to apply existing doctrines of law in a manner that permits the use of force against nascent and potential threats or, alternatively, to reshape the law to permit the use of force before WMD threats cross the line of confirmed imminence. This tension between traditional concepts of imminence and the inchoate nature of the WMD threat was first seen in U.S. practice with the cruise missile strikes against the al Shifa pharmaceutical plant in Khartoum, Sudan, in 1998. In doctrine and practice, this tension arose anew in the promulgation of the so-called “preemption doctrine” and in the 2003 invasion of Iraq. It is also clear that other states have considered the same tension between traditional legal concepts and the incapacity of intelligence to detect the moment of imminent threat, as did Israel prior to the 1981 Osirak airstrike.

In the cases of al Shifa and Iraq,⁴⁸ the decision to use force was based on intelligence judgments about the risk of WMD falling into terrorist hands. The legal determinations regarding the use of force hinged on intelligence judgments as well. Three immediate conclusions follow. First, lawyers who make judgments about the resort to force and the means and methods used need to understand intelligence—its strengths, limitations, and its distinctions from “evidence.” Second, the ability to engage in anticipatory self-defense or preemption depends on intelligence capacity. Thus, to the extent these concepts reflect international law, it is law that favors states with robust intelligence capacity. Third, legal evaluation of U.S. actions to preempt terrorism will turn in large measure on the validity of our intelligence judgments. This means that where anticipatory force is used, policymakers and intelligence officials should feel increased pressure to show at least part of their intelligence hand in order to make their legal case.

48. In the case of Iraq, U.S. lawyers argued that the United States possessed a right to use force based on Iraq's material violation of the Gulf War ceasefire. However, in policy presentation it is clear that President Bush was advancing a theory of preemption.

V. DUTY OF THE INTELLIGENCE LAWYER

An intelligence lawyer told me a story, perhaps apocryphally, about meeting a lawyer from the KGB at the end of the Cold War. In an effort to find common ground, he asked the KGB officer about the nature of his work and the number of lawyers at the KGB. The KGB lawyer responded, "Two: one to handle pay and one to handle retirement."

Apocryphal or not, the story raises a number of questions regarding the role of the intelligence lawyer in U.S. practice. How should the lawyer define her role? Should the lawyer play a passive or active role? Should the lawyer engage on operational matters, or stay within a "traditional" legal lane of contracts, personnel law, and Freedom of Information Act litigation? If the lawyer does engage, should international law factor in her analysis consistently, or only if it is implemented in U.S. law? Finally, should the lawyer provide legal policy input, or limit her advice to the law?

In my view, consideration of these questions starts with recognition of the source of the lawyer's duty: the Constitution. Intelligence lawyers, like other government lawyers, take an oath to the Constitution, not the president and not the agency concerned. In the case of "officers" in a constitutional sense, this is a product of constitutional law. In the case of inferior officers or employees, it is a product of statute.⁴⁹ But here we get to the human factor: what part of the Constitution will the intelligence lawyer emphasize—those sections addressed to security, liberty, or both?

The practice of intelligence law is either very easy or very difficult. The lawyer may choose to play a passive role. Buttressed by principles of security and compartments, the lawyer may wait for issues to arise. Using this approach, the lawyer may well find legal issues limited to questions of retirement and benefits. Or, he may choose a role similar to the mafia *consigliere*: advising how to stay out of trouble, always getting to "yes" while offering secret advice and sometimes secret sophistry. Finally, the lawyer may play an active role, guiding policymakers and operatives to preferred outcomes, recognizing that law—including international law—can be a positive national security policy value.

I hope I have not set up too much of a straw man. For in fact, I think the answer is contextual. Part of the practice of intelligence law is understanding how to triage the work. That means that if the lawyer wants to maintain credibility, she cannot make a federal case out of every issue. Nonetheless, it is obvious that I favor an active role for the intelligence lawyer, because I believe in both the law and in returning to the predicate threat. I believe good process is a product of good law, and that good

49. See IN THE COMMON DEFENSE, *supra* note *, at ch. 10.

process results in better intelligence, which results in better national security. Moreover, in my experience, it is the lawyer who is best situated to uphold both. That is the lawyer's constitutional duty.

In the context of today's threat, intelligence officers and the officials who set intelligence policy, up to the policymaker in chief, have a duty to push the intelligence envelope and to push it hard. Do not lose sight of the threat: a nuclear attack on a major American city. However, this means speed, secrecy, and immediate short-term security benefits will be emphasized at the policy table. In this procedural context, the lawyer is an essential role player. The lawyer may be the only actor aware of applicable procedural requirements or the only actor who can identify the legal policy risks and benefits associated with conduct as well as the national security policy benefits they bear.

This is a tough job. In intelligence law, it is easy to get to "yes." It is much harder to guide to "yes" while at the same time maximizing potentially competitive legal policy values. To begin, the lawyer must first be at the table, which is no small feat in a secret and compartmented world. Once at the table, the lawyer must hold his or her position. The table is also a lonely place. This may be literally true; perhaps only one lawyer is granted access to the details of the problem or stationed with the component in question and thus must make the threshold legal calls alone. It is also lonely because, more often than not in the intelligence context, the lawyer may find she alone has the mission of playing the skunk, or at least a duty to play the skunk if no one else does, because she is an officer of the court, or in this case the Constitution. Some may think the lawyer is more the devil than the devil's advocate.

The national security bus is also a difficult bus to hail, and if necessary, to stop. Where lives are at stake, guidance may be perceived as an obstacle, process as delay. It is also human nature to identify with the mission and the team. Lawyers enter this field in part because they believe in the national security mission. In this area, lawyers also know that if they say "no," their advice may result in the loss of critical intelligence or an opportunity to capture or kill a terrorist. Some lawyers bend under such pressure or find refuge in secret and Delphic advice. The key is not to lose sight of the lawyer's role and duty in doing so—to guide to "yes," but if necessary to say "no," and to do so in a manner consistent with American legal values, while distinguishing between the law and legal policy.

The lawyer has a number of mitigating options. First is to remember that the oath of service is to the Constitution and that the Constitution protects security and liberty. Second, it never hurts to explain to the policymaker how the law relates to good legal and national security policy

rather than offering lectures on Grotius. Third, the lawyer should never give the operative or policymaker a reason to exclude the lawyer and therefore the law. Never leak. Identify deadlines and never miss them. And never go home. Practice endurance. Alternatively, be there when it counts by knowing in what forum and at what time decisions are made and not just recorded.

Fourth, the lawyer must move the problem up or out. Good process tests and evaluates, but also moves issues to authoritative and timely points of decision. Otherwise, action officers have incentive to take issues off-track, where decisions can be made rapidly, in part because certain views or agencies can be avoided. This is true of national security law as well. If the facts are not established, the lawyer should fix them or engage an official who can, like the Director of National Intelligence. If the law is uncertain, or critical actors divided, the lawyer should move the question to an authoritative level of resolution and judgment, like the attorney general or the president.

Fifth, lawyers should return to appraise their legal work just as policymakers should return to appraise the efficacy of policy and the intelligence options taken. Do procedures that appear logical in law, with exceptions and waivers, nonetheless result in unintended cultural effects for those responsible for their implementation in the field? Has the president's directive been implemented in the manner intended, or has it lost its meaning along the way, as in the game of telephone? Have the instructions been interpreted as a Marine infantry officer would read them, or with the caution of a government bureaucrat numbed to oversight and investigation, and which did the president intend?

Finally, in the end it is also useful to remember that, like intelligence, law ultimately depends on the human factor. The law can facilitate intelligence collection and activities, with incentives and authorities, but ultimately it depends on the asset who betrays, the analyst who evaluates, and a president who leads. Law is also a human endeavor. Good law can encourage process and accountability. But while we may be a nation of laws, in intelligence practice the law depends on the moral integrity and sense of duty of the lawyer on the line who dares to enter the decision-making ring and then calls it as he or she sees it.