

Boston College International and Comparative Law Review

Volume 32

Issue 2 *The Pen, the Sword, and the Waterboard:
Ethical Lawyering in the "Global War on Terroism"*

Article 7

5-1-2009

Going Forward: Improving the Legal Advice of National Security Lawyers

William J. Dunn

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Legal Profession Commons](#)

Recommended Citation

William J. Dunn, *Going Forward: Improving the Legal Advice of National Security Lawyers*, 32 B.C. Int'l & Comp. L. Rev. 241 (2009), <http://lawdigitalcommons.bc.edu/iclr/vol32/iss2/7>

This Symposium Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

GOING FORWARD: IMPROVING THE LEGAL ADVICE OF NATIONAL SECURITY LAWYERS

WILLIAM J. DUNN*

Abstract: Attorney General Mukasey was correct when he noted that national security lawyers traditionally oscillate between aggression and timidity. Debates about which extreme is “better,” however, miss the larger point; namely, that these cycles are driven by factors that the competent national security lawyer has a duty to understand. Such a thorough knowledge allows lawyers in this field to dampen the harmful oscillation and render the best legal advice possible. After identifying factors that affect the rendering of such counsel, the author makes several specific policy recommendations that will assist lawyers—who are “uniquely suited to bear this responsibility”—in this critical task.

INTRODUCTION

The commencement remarks of Attorney General Michael Mukasey at Boston College Law School stirred debate about the proper role of a government lawyer in providing legal advice regarding complex, challenging, and gravely important issues of national security.¹ Attorney General Mukasey provided his vision of how lawyers should “do law” in this environment.² The premise underlying his vision is that lawyers partake in and contribute to “cycles of timidity and aggression,” where the national security community oscillates between periods of controversial, aggressive energy and risk-averse retrenchment.³ The lesson drawn by the Attorney General and the advice he imparted on

* Attorney at the law firm Ropes & Gray, LLP. The author graduated from Boston College Law School in 2006. Prior to law school, he worked as an intelligence analyst for the Department of the Navy and the Department of Defense, where he focused on issues of military strategy and doctrine; he served as a crisis analyst and briefer at the National Military Joint Intelligence Center in the Pentagon.

¹ See, e.g., Peter Schworm, *Some at BC Seek to Uninvite Mukasey from Commencement*, BOSTON GLOBE, Mar. 23, 2008, at B5.

² See Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT'L & COMP. L. REV. 179, 184 (2009).

³ *Id.* The Attorney General referenced that term as used by former head of the Office of Legal Counsel, Jack Goldsmith. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 163 (2007).

the graduating class is that the threat posed by terrorism today raises the stakes too high for national security lawyers to fall back into the role of risk-averse and obstructionist actors.⁴

The Attorney General provides a valid lesson to aspiring lawyers. Lawyers in all capacities must counsel clients, and the indispensable ingredient of sound counsel is the ability to render a judgment that not only sets out, but seeks to resolve the balance between the costs and benefits of a particular action.⁵ A lawyer who advises a client solely based on a worst case scenario does not achieve this balance. In the context of national security issues, the failure to provide sound counsel leads unnecessarily to constraints on governmental actors in the pursuit of legitimate and necessary aims.⁶

These constraints carry costs, as demonstrated by the tragically flawed legal opinions rendered by the Federal Bureau of Investigation's (FBI) National Security Law Unit. In these opinions, FBI lawyers prevented an investigation into Khalid al-Mihdhar by relying on a fictional legal wall between intelligence and criminal agencies that purportedly did not allow the sharing of information.⁷ Mihdhar had connections with the terrorist bombings of the U.S. embassies in Africa and the attack against the U.S.S. Cole.⁸ He later assisted in the hijacking of American Airlines Flight 77 that was flown into the Pentagon.⁹

The problem with the Attorney General's analysis lies not with his description of the proper role of a lawyer as counselor, or even his conclusion that lawyers cannot recoil in the face of public scrutiny or legal uncertainty into an obstructionist, ultra-conservative position regarding national security law. The Attorney General errs by not looking critically at both the crests and troughs of the "cycles of timidity and aggression."¹⁰ More specifically, the Attorney General myopically focuses on the reactive, dependent side of that historical pendulum without considering the equally—if not more—important lessons that must be drawn from the independent, causation side of governmental over-

⁴ See generally Mukasey, *supra* note 2.

⁵ See Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 31–34 (1996).

⁶ See GOLDSMITH, *supra* note 3, at 163.

⁷ See THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 181–82, 231–39, 270–72 (2004).

⁸ *Id.* at 151.

⁹ *Id.* at 231–40.

¹⁰ In his remarks, the Attorney General focuses almost exclusively on the risk-averse side of the "pendulum." See Mukasey, *supra* note 2, at 184.

reaching.¹¹ He errs because he sees the retrenchment of the intelligence community and presumably the growth of risk-averse counsel as a choice, rather than an atmosphere forced upon them by a public seeking to right a listing governmental vessel and to recapture rights ceded to claims of necessity.¹²

When considering both sides of this cycle together, governmental overreaching to achieve temporal objectives reveals itself as short-sighted. By overreaching, the government may address a risk it perceives to be genuine.¹³ If it is accomplished, however, through the use of illegal or unduly aggressive means, the resulting public backlash may not only strip away the excess but also incapacitate the agency or agent.¹⁴ In that resulting anemic atmosphere, national security threats continue, but the government is less capable of addressing them.¹⁵ As a result, by taking a comprehensive view of this cycle of action and reac-

¹¹ “We cannot afford to invite another ‘cycle of timidity’ in the intelligence community; the stakes are simply too high.” *Id.* at 185.

¹² In fact, the Attorney General advises that a good lawyer should “tune out all this white noise” and does not address the fact that the public, in response to egregious overreaching asserts its constitutional voice through demands on its representatives. *Id.* at 185.

¹³ Furthermore, history often demonstrates that such risks were not as dire as perceived. “After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.” William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, 18 *ISR. Y.B. HUM. RTS.* 11, 11 (1988). Some noteworthy examples of perceived risks that, with the benefit of hindsight, may be viewed as overreactions include Andrew Jackson’s suspension of habeas corpus and the arrest of Federal District Judge Dominick Hall after the Battle of New Orleans, President Abraham Lincoln’s suspension of habeas corpus on April 27, 1861, despite little actual threat to Washington D.C., and the now infamous internment of Japanese-Americans after Pearl Harbor where the government argued, among other reasons, that the Japanese-Americans were sending signals to Japanese submarines. See MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW* 35–36 (2006) (describing circumstances surrounding the arrest of Judge Hall); Malick W. Ghachem & Daniel Gordon, *From Emergency Law to Legal Process: Herbert Wechsler and the Second World War*, 40 *SUFF. U. L. REV.* 333, 340 (2007) (discussing military justifications for internment of Japanese-Americans); David Greenberg, *Lincoln’s Crackdown*, *SLATE*, Nov. 30, 2001, <http://www.slate.com/id/2059132> (detailing Abraham Lincoln’s suspension of habeas corpus).

¹⁴ See GOLDSMITH, *supra* note 3, at 163. The risk-averse nature of legal advice criticized by the 9/11 Commission was, in many respects, a reaction to the aggressive posturing of William J. Casey—lawyer and President Ronald Reagan’s first Director of the CIA—who went so far as to literally move the Office of the General Counsel for the CIA outside of the headquarters. He followed up this symbolic move with a philosophical and practical shift in President Carter’s anemic intelligence policy. See Dorian D. Greene, *Ethical Dilemmas Confronting Intelligence Agency Counsel*, 2 *TULSA J. COMP. & INT’L L.* 91, 105–06 (1994).

¹⁵ See GOLDSMITH, *supra* note 3, at 163–64.

tion, governmental overreaching leads in the long run to periods of less security.¹⁶

While overreaching is correctly criticized on both national security and civil liberties grounds, this must not translate into a similar error of wholesale criticism of aggressive action. Instead, such criticism must validate the Attorney General's point regarding the need to avoid obstructionist counsel that would hinder the government's ability to neutralize threats to national and public safety. The September 11, 2001 terrorist attacks are evidence of the very real security threats that this nation faces. The legal landscape that governs many of the issues relative to national security is complex, and those issues arise during moments of great stress and much uncertainty, often with incomplete information. Those who promote an inflexible view on civil liberties, and who would promote them at all costs over security needs, are just as dangerously wrong on this topic as those who espouse deference to unchecked executive power.

The overarching lesson, therefore, is not simply to avoid retrenchment into a system of poor counsel; it is to moderate governmental action through counsel at all stages of the historical cycle to eliminate the unnecessary peaks of aggression and the perilous valleys of risk-averse action.¹⁷ Such counsel considers and balances the broader values at stake. It looks to the law as written to determine the full scope of legally permissible action, but it understands holistically the other constitutional, institutional, and values-based limits that exist and apply.¹⁸ It also considers the effect of such counsel beyond the urgencies of the moment and views the needs of national security as a constant imperative, fully served only through the avoidance of the backlash and entrenchment that result from governmental overreaching.¹⁹

¹⁶ See Peter Margulies, *Risk, Deliberation, and Professional Responsibility*, 1 J. NAT'L SEC. L. & POL'Y 357, 369 (2005).

¹⁷ See Margulies, *supra* note 16, at 360 (describing the government lawyer's role in overreaching).

¹⁸ As Lorie Graham argues, a lawyer must not be simply an "able advocate," but also a "responsible advisor" who "considers the legal, moral, economic, social and political factors of the situations." Graham, *supra* note 5, at 43-44.

¹⁹ This perspective of the need for moderation in policy is analogous to Aristotle's writing on ethics where he concludes that "virtue is a mean in the sense that it aims at the median." ARISTOTLE, *NICOMACHEAN ETHICS* 42-43 (Martin Ostwald trans., 1962) ("[B]ad men have many ways, good men but one."). Though legal decisions in many ways remains binary—there is a right and a wrong for most actions—a general ethical approach where the decision maker aspires to experience specific emotions "at the right time, toward the right objects, towards the right people, for the right reason, and in the right manner,"

This presents a difficult task because law is written in universal terms, and national security questions push the envelope of exceptions in the most complex, ambiguous, and dangerous situations.²⁰ Additionally, recognition that these difficult issues must be considered and judged with respect to a long-term, historical focus does not alleviate the challenges faced by those making real-time decisions.²¹ To that end, universal, necessary premises provide little practical assistance in this area.²² A dialectic, however, on the pragmatic aspects of the balance that an ethical lawyer must address when facing a choice between national security imperatives and civil liberties begins with a reasoned investigation into these issues on which generalizations may soundly rest.²³ Lawyers, by training, skill, access, and rules of professional conduct, are uniquely situated to bear this responsibility.²⁴ The sections that follow cannot address all such factors, but they seek to begin the dialectic and reasoned investigation by addressing the key elements that affect the rendering of sound counsel. This Article concludes with suggestions on how to implement practical and pragmatic solutions for the problems facing the national security community.

I. FACTORS THAT AFFECT COUNSEL ON NATIONAL SECURITY LAW MATTERS

Extolling an imperative for national security lawyers to provide sound, holistic counsel does not suggest that those who fail in this regard do so for lack of good faith. Instead, those failures are often the result of systemic, institutional, and process factors that impede the application of sound judgment. In no area of law are such factors more prevalent than in national security law, where information and time

provides a useful framework to handle these difficult questions. *See id.* at 43; Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227, 1248 (2002) (recognizing Aristotle's contribution to ethics with regard to terrorism, but stating that it provides little in the form of practical assistance once a terrorist is caught).

²⁰ *See* ARISTOTLE, *supra* note 19, at 141 (“[A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms.”).

²¹ *See* Graham, *supra* note 5, at 48 (citing philosopher Amelie Oksenberg Rorty).

²² *See id.*

²³ *See id.* The value of such ethical standards is best described by Michael Ignatieff, who writes, “Ethics matter, not just to constrain the means we use, but to define the identity we are defending and to name the evil we are facing.” MICHAEL IGNATIEFF, *THE LESSER EVIL* 167 (2004).

²⁴ *See generally* LOUIS D. BRANDEIS, *BUSINESS—A PROFESSION* 313–27 (1914) (noting that legal training leads to the development of judgment); James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 439 (2007) (discussing legal skills and their relevance to working in the intelligence community).

may be in short supply, while stress and responsibility are abundant. Likewise—and for the same reasons—in few areas of law are such decisions more important.²⁵

A. *Slowing Decisional Velocities*

On critical issues of national security, lawyers who must provide counsel on key aspects of governmental action participate in a decision-making process similar to that which occurs in a crisis.²⁶ Again, lawyers must overcome barriers to effective decision-making, such as incomplete information, unreliable predictions about the consequences of various courses of action, and a lack of fixed criterion upon which an option may be tested.²⁷

Every crisis includes three driving factors or “velocities” that shape the decision-making process.²⁸ They include the velocity of events, the velocity of response, and the velocity of assessment and decision.²⁹ The first requires a factual understanding of the events that have occurred, the steps, progression, and speed of the events that are unfolding, and a conclusion as to what events are considered unacceptable. The second velocity is shaped by the possible responses, the factors affecting those responses, and the amount of time provided to respond before unacceptable events occur. The third velocity is both the most critical and the most dependent on the other two, because the time allocated to reach a decision is shaped by the understanding and management of the first two velocities.³⁰

Actors in this process must seek to identify, isolate, and decelerate the first two velocities to the greatest extent possible. This process reduces the need to reach a decision before sufficient information is gathered, options are explored, and deliberation occurs.³¹ Where the first two velocities are not understood or managed, the velocity of decision unduly accelerates and results in rushed judgment.

²⁵ See *Comey*, *supra* note 24, at 442–43. As John Keegan writes, “Force finds out those who lack the virtue to wield it.” JOHN KEEGAN, *THE MASK OF COMMAND* 312 (1987).

²⁶ See *Comey*, *supra* note 24, at 442–43; Margulies, *supra* note 16, at 370–71. Cf. LT. COL. GEORGE E. MOORE, *UNDERSTANDING CRISIS DECISION MAKING*, Strategy Research Project, U.S. Army War Coll. (Apr. 15, 1996) (discussing crisis decision making in the military).

²⁷ See Alexander George, *The “Operational Code”: A Neglected Approach to the Study of Political Leaders and Decision-Making*, 13 INT’L STUDIES Q. 190, 197–98 (1969).

²⁸ See KEEGAN, *supra* note 25, at 348–49.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.* at 349.

One famous example of applying a rational, multi-pronged approach to decision-making occurred during the Cuban Missile Crisis. On October 14, 1962, a U.S. U-2 reconnaissance aircraft revealed that Soviet medium-range ballistics missile sites were being built in Cuba.³² President John F. Kennedy learned of this development two days later, and immediately organized a group of advisors termed the Executive Committee of the National Security Council (ExComm).³³ President Kennedy defined the outer limits of the first velocity by determining that Soviet nuclear armed ballistic missiles in Cuba would not be acceptable, but provided ExComm the freedom to deliberate openly on response options and to advise suggested strategies by consensus.³⁴ Despite a vociferous opinion by the military advisors, including the entire Joint Chiefs of Staff, for a comprehensive military response, ExComm spent the first day gathering facts about the threat.³⁵

Marshall Carter, Deputy Director of the Central Intelligence Agency (CIA), helped define the second velocity by noting that the Soviet missiles could be fully operational within two weeks, thus marking the outermost boundary for a response.³⁶ Deliberations continued, each side drawing up detailed plans for action and vetting those plans against the others.³⁷ Government lawyers played an integral role in these deliberations, creatively interpreting international law to provide the flexibility to institute a quarantine against Cuba.³⁸ This option proved valuable, since it avoided using the term “blockade,” an action that, under international law, could be considered an act of war. The President finally approved the quarantine on October 21, 1962, a decision that many conclude defused a potentially catastrophic emergency.³⁹

This approach to decision-making in the face of dire threats to national security is applicable to a lawyer’s efforts to provide sound counsel.⁴⁰ The same three velocities exist in and affect every request for le-

³² McGEORGE BUNDY, DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS 391 (1988); ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 23–26 (1969).

³³ ELIE ABEL, THE MISSILE CRISIS 44–46 (1966); KENNEDY, *supra* note 32, at 29–31.

³⁴ See KENNEDY, *supra* note 32, at 33–34.

³⁵ KEEGAN, *supra* note 25, at 347; KENNEDY, *supra* note 32, at 36–37.

³⁶ See 12 U.S. DEP’T OF STATE, PUB NO. 10410, FOREIGN RELATIONS OF THE U.S.: 1961–1963, CUBAN MISSILE CRISIS AND AFTERMATH 1–25, available at http://www.state.gov/www/about_state/history/frusXI/01_25.html; see also KEEGAN, *supra* note 25, at 347.

³⁷ KENNEDY, *supra* note 32, at 45.

³⁸ See Margulies, *supra* note 16, at 371.

³⁹ KENNEDY, *supra* note 32, at 48.

⁴⁰ See KEEGAN, *supra* note 25, at 346–49; Margulies, *supra* note 15, at 371.

gal advice.⁴¹ Where the velocities of events and the need for a response are identified and understood, the velocity of decision may be assessed and addressed with maximum allowance for factual review, deliberation, consideration, and creativity.⁴² This may still result in decisions rendered without the full benefit of time and complete information, but this organizational plan provides a framework that seeks to manage these factors and attempts to avoid any unnecessary acceleration of the decision-making process.⁴³

B. Systemic Biases

Axiomatic to any attempt at thoughtful and well-considered counsel is the need for a true balancing of imperatives. The famous Middle Eastern scholar and jurist Ibn Khaldun wrote about how systemic bias affects the standard of evidence required to accept particular claims.⁴⁴ As used in this context, a systemic bias is an inherent tendency to favor a particular outcome by raising or lowering the standard of evidence required to support that claim.⁴⁵ Khaldun wrote that the result of such systemic biases is an intrusion upon accurate historical analysis because the conclusions drawn are not based upon a rational and objective weighing of facts.⁴⁶ Instead, a thumb is placed on one side of the scale.⁴⁷

Though Khaldun looked at this problem through a macro, historical lens, he identified a problem that affects all balancing tests—namely the predisposition of a decision maker to value one side of an argument or some contributing claims more than others.⁴⁸ In the context of national security law, the systemic bias is held by advocates on both

⁴¹ See KEEGAN, *supra* note 25, at 348.

⁴² See Margulies, *supra* note 16, at 371.

⁴³ See KEEGAN, *supra* note 25, at 348–49 (“Pace is, indeed, the crux.”).

⁴⁴ See IBN KHALDUN, *THE MUQADDIMAH* 24–26, 35–39 (N.J. Dowood, ed., Franz Rosenthal, trans., 1981). For an analogous explanation of how such a systemic bias may affect racial considerations in hiring due to an unconscious bias, see generally Kelly Glasheen & Tejal K. Patel, *Symposium Introduction: Unconscious Discrimination Twenty Years Later: Application and Evolution*, 40 CONN. L. REV. 927 (2008).

⁴⁵ See KHALDUN, *supra* note 44, at 24–26, 35–39.

⁴⁶ See *id.*

⁴⁷ See *id.* Also integral to Khaldun’s criticism is the reliance on transmitters—or what could be considered unreliable secondary sources today—to draw historical lessons without regard to the factual inaccuracy inherent to such a process. *Id.* at 35–36.

⁴⁸ See *id.*; see also Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 484 (2008) (discussing history and law’s mutual goals of establishing facts in order to provide a workable understanding of the truth).

sides of the debate.⁴⁹ As Aristotle wrote, “people’s characters take their bias from the steady direction of their activities.”⁵⁰

1. The War Imperative

Through the eyes of an intelligence analyst or policymaker, threats are everywhere. Potential threats appear in shopping malls and on trains, and they color the vision of commercial aircraft taking off near vacant, unguarded lots and of tankers meandering their way through city harbors.⁵¹ Threats come through message traffic submitted by attaché officers, valid and false informants looking for a steady stream of money, collection assets that capture images or signals, and from analytical models that seek to predict action.⁵² Not only do intelligence analysts and policymakers live in this atmosphere of constant threats, but the burden of responsibility for eliminating them sharpens their importance and urgency.⁵³

Governmental actors at all levels in this atmosphere are susceptible to a systemic bias that is unduly deferential to a “war imperative,” with the term “war” broadly including any military action taken to protect

⁴⁹ There may even be a psychological bias in favor of hawkish or aggressive behavior that supports the adoption of a war imperative. See Daniel Kahneman & Jonathan Renshon, *Why Hawks Win*, FOREIGN POL’Y, Jan. 1, 2007, at 34. See generally DOMINIC D. P. JOHNSON, OVERCONFIDENCE AND WAR (2004).

⁵⁰ Graham, *supra* note 5, at 47.

⁵¹ See, e.g., *Asia Pirates “Training for Terrorist Attack,”* LLOYD’S LIST INT’L, Oct. 15, 2003, at 8 (describing terrorists training to hijack a ship and detonate it in a port or shipping choke-point); James A. Lewis, *Commercial Aviation and MANPADS: Threat or Theory* (Jan. 2006), available at http://www.csis.org/media/csis/pubs/060101_manpads.pdf; Transportation Security Administration Office of Intelligence, *Mass Transit System Threat Assessment* (2008), available at <http://msnbcmedia.msn.com/i/msnbc/sections/tvnews/masstransitsystemthreatassessment.pdf>. See generally RICHARD CLARK, AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR (2004).

⁵² Intelligence analysts are inundated with raw information. It must be noted, however, that information is not intelligence. Intelligence requires a further step, where analytical methods, corroboration, and experience are brought to bear to shape that information into usable and accurate judgments. Bruce Berkowitz, *The Big Difference Between Intelligence and Evidence*, WASH. POST, Feb. 2, 2003, at B1, B5.

⁵³ See PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY 87–90, 114 (2003). These threats are not fully known and may not be exaggerated. The U.S. State Department maintains a list of over 100,000 names of persons potentially linked to terrorists and before the invasion of Afghanistan, al Qaeda may have trained over 70,000 people. See Paul Rosenzweig, *Civil Liberties and the Response to Terrorism*, 42 DUQ. L. REV. 663, 677 (2004); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J. concurring in part) (“[T]he responsibility for security will naturally amplify the claim that security legitimately raises.”).

against situations of extreme danger.⁵⁴ The war imperative is an assertion of necessity that leverages the fear of dire consequences for the security of the country and the lives of its citizens in support of a particular course of action.⁵⁵

At times, the assertion of a war imperative is justified. The Founders recognized the need for the government to respond quickly and decisively to imminent threats.⁵⁶ The vesting of the executive power in one individual attests to the Founders' belief that such threats may require presidential action without the benefit of congressional deliberation.⁵⁷ As Justice Jackson said in *Terminiello v. Chicago*, the Constitution is not a "suicide pact," and its structure must accommodate the ability of the government to act in self-preservation.⁵⁸

The problem with a war imperative is that it is usually presented with urgency, generality, and secrecy. The extreme urgency of its assertions seeks to supplant countervailing values, policies, and interests.⁵⁹ The generality fails to differentiate among various types and levels of

⁵⁴ In the infamous Supreme Court decision *Korematsu v. United States*, the Court adopted such language when justifying the relocation and detention of Japanese-Americans during World War II. See 323 U.S. 214, 218–19 (1944). The Court referred to the "military imperative[s]" that justified the relocation and detention without substantive reference to the intrusion on the rights of the affected people. See *id.*; see also HEYMANN, *supra* note 53, at 15 ("Public fears and anger are immediate and powerful; threat to civil liberties or divisions within the society or among allies are more remote and far less urgent or demanding."); Eugene Gressman, *Korematsu: A Melange of Military Imperatives*, 68 LAW & CONTEMP. PROBS. 15, 19–21 (2004). In many ways, the "war imperative" is analogous to what is termed the "crisis thesis" that motivates the courts to adopt a jurisprudence that allows for a greater curtailment of rights and liberties. See GEOFFREY R. STONE, *PERILOUS TIMES* 547 (2004); Lee Epstein, Daniel E. Ho, Gary King & Jeffrey Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 11–12 (2005).

⁵⁵ See HEYMANN, *supra* note 53, at 87, 114–15. This is not to say that such fear may not be genuinely perceived as likely to occur. See GOLDSMITH, *supra* note 3, at 165 (discussing how the original torture memoranda were issued in an atmosphere of fear).

⁵⁶ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 8–9 (2d ed., rev. 2004). The key discussion in this regard at the Constitutional Convention occurred between James Madison, Roger Sherman, and Eldridge Gerry where the term "declare" was used to describe Congress's war powers to ensure the ability of the President to "repel and not commence war." JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 475–77 (1966). Additionally, one need look no further than the Preamble to the U.S. Constitution to see the emphasis the Founders placed on the role of the government to provide security to the new nation. See U.S. CONST. pmb.

⁵⁷ See FISHER, *supra* note 56, at 8–9; MADISON, *NOTES*, *supra* note 56, at 475–77.

⁵⁸ 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159–60 (1963); *Edmond v. Goldsmith*, 183 F.3d 659, 663 (7th Cir. 1999).

⁵⁹ HEYMANN, *supra* note 53, at 114 ("The very notion of "war" is intended to suggest urgency and a priority that supervenes most other claimants for attention in our domestic and foreign policy.").

threats and obstructs a careful analysis of its merits.⁶⁰ Secrecy limits deliberation and quiets many who would otherwise probe or possibly object.⁶¹ Each of these aspects of a war imperative makes it difficult, if not impossible, to conduct a true balancing of the costs and benefits of its recommended course.⁶² It also provides an attractive vehicle to insulate arguments from debate or criticism or to hide illegal or problematic actions.⁶³

National Intelligence Director Mike McConnell recently provided an example of an appeal to a war imperative in an attempt to prevent public debate on amendments to the Foreign Intelligence Surveillance Act (FISA).⁶⁴ McConnell stated, “The fact we’re doing it this way means that some Americans are going to die”⁶⁵ This statement was a general, urgent assertion that sought to squelch public hearings on modifications to the protective statutory scheme that governed domestic electronic surveillance.⁶⁶ What McConnell’s statement lacked, however, were details on the type or level of threat posed. If the concern was the release of sensitive information to the public, limited closed sessions

⁶⁰ See *id.* at 87 (“The metaphor of war makes [balancing imperatives] more difficult. It tends to obscure the differences among the threats we face and to distract attention from a careful analysis of . . . what we can do.”). Some have even argued that reporters embedded with the military in Iraq develop this systemic bias. Jack Shafer, *Full Metal Junket: The Myth of the Objective War Correspondent*, SLATE, Mar. 5, 2003, <http://www.slate.com/id/2079703>.

⁶¹ See BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 142–43 (2008) (detailing the small group of policymakers in the Bush administration who had knowledge of the secret foreign intelligence surveillance program following 9/11).

⁶² See HEYMANN, *supra* note 53, at 87.

⁶³ See *id.* at 114; Margulies, *supra* note 16, at 361. The war imperative is similar to an appeal to national security to prevent further discussion or investigation. Such appeals have been famously used to cover up illegal or embarrassing actions, such as President Nixon’s role in Watergate. See GELLMAN, *supra* note 61, at 100. The government tried to assert the state secrets evidentiary privilege to prevent the introduction of damaging evidence in *United States v. Reynolds*. See 345 U.S. 1, 4–5 (1953); see also Appendix of Docket Entries Subsequent to the Original Record, available at <http://www.fas.org/sgp/othergov/reynoldspetapp.pdf>. State secrets were also used to justify the imposition of martial law and suspension of habeas corpus in New Orleans by Andrew Jackson during the War of 1812. See WARSHAUER, *supra* note 13, at 19, 35–36. But see *Herring v. United States*, 424 F.3d 384, 386–87 (3d Cir. 2006) (dismissing fraud upon the court action, which had been brought after the disclosure of documents originally withheld by government because of national security concerns).

⁶⁴ See Interview by Chris Roberts with Mike McConnell, National Intelligence Director, EL PASO TIMES, Aug. 22, 2007, available at http://www.elpasotimes.com/news/ci_6685679.

⁶⁵ *Id.* Justice Scalia, in dissent in *Boumediene v. Bush*, used similar language when describing the consequences of allowing detainees at Guantanamo Bay to challenge the legality of their detentions through habeas corpus: “It will almost certainly cause more Americans to be killed.” 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting).

⁶⁶ See GELLMAN, *supra* note 61, at 142–43.

could be used. If it was the need to prevent a complete stoppage of the surveillance program, that would counsel quick and decisive action, but would not prevent public hearings. Instead, McConnell used a general threat of unverifiable dire consequences as an attempt to win an argument.⁶⁷

The approval and likely practice of torture with the consent of lawyers highlights the effect and negative consequences of a war imperative. As former Assistant Attorney General for the Office of Legal Counsel (OLC) Jack Goldsmith asked, “How could this have happened?”⁶⁸ The likely answer, according to Goldsmith, is that the atmosphere during the Summer of 2002 was thick with threat reporting and the policy-makers, as well as the intelligence analysts, were convinced that another attack loomed.⁶⁹ In addition, the United States had several senior al Qaeda leaders in custody, including Abu Zubaydah.⁷⁰ Though it is unclear, it may be presumed that war imperatives motivated the authoring of the “Torture Memo,” leading the OLC lawyers to approve actions that, upon reflection, carried grave costs without overriding security benefits.⁷¹

National security lawyers must be conscious of the systemic bias that favors war imperatives and combat their distortion of legal counsel. To do so, a lawyer must reject general assertions of necessity and insist upon further facts regarding the type and level of threat.⁷² One must

⁶⁷ See Interview with Mike McConnell, *supra* note 64.

⁶⁸ GOLDSMITH, *supra* note 3, at 165.

⁶⁹ *Id.* at 165–66.

⁷⁰ *Id.* at 166.

⁷¹ See *id.* at 165–66; IGNATIEFF, *supra* note 23, at 136–37 (discussing the security dilemma with respect to torture techniques); Daniel Kanstroom, *On “Waterboarding”: Legal Interpretation and the Continuing Struggle for Human Rights*, 32 B.C. INT’L & COMP. L. REV. 203, 207 (2009); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 290–91 (2004) (discussing *Chavez v. Martinez*, 538 U.S. 760 (2003), and the Court’s rejection of arguments that imminent threats could allow extreme measures of interrogation).

⁷² Margulies, *supra* note 16, at 360–61 (discussing the need for governmental lawyers to insist on particularity in support of governmental assertions of need); see HEYMANN, *supra* note 53, at 87. As Aharon Barak argues in the context of judging, a lawyer should not view “security considerations” as magic words, but should instead insist on specifics to ensure that any such assertion is not pretext. In discharging this duty, a lawyer should neither be naïve nor cynical. See Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 157–58 (2002). Ironically, lawyers can find guidance on how analytically to attempt such a narrowing by looking to a similar effort applied to understanding the contours of arguments that entail individual, constitutional rights. For example, the paradigm of qualified immunity decisions shares the qualities of a national security decision by requiring a definition of individual rights to be adjudged within a balancing test that measures it against a governmental need. See, e.g., *Scott v. Harris*, 550

deliberate with other lawyers as a check on his or her reasoning and perception of the problem.⁷³ In an intelligence community that requires compartmentalization of information, this may require the courage to demand information or access that is not normally provided.⁷⁴ This must all be done with recognition that other values, such as civil liberties and civil rights, may challenge and even trump some security imperatives.⁷⁵ This is especially necessary when the nation is facing what the executive branch considers an open-ended war on terrorism.⁷⁶ In the end, combating a war imperative may come down, as James Comey states, to the ability to say “No . . . into a storm of crisis, with loud voices all around, with lives hanging in the balance.”⁷⁷

2. Rejecting Civil Liberties Absolutism

Just as a lawyer must have the ability to say “no” under pressure, a national security lawyer must have the ability to say “yes” when the balance favors security.⁷⁸ The principle duty of a national security lawyer is to protect the common good.⁷⁹ This requires the synthesis of security

U.S. 372, 383 (2007). Additionally, as in the case of Fourth Amendment analysis, it has been argued:

To create a workable framework, one must look at the countless instances where the Fourth Amendment has application and ask how reasonableness can have any coherent meaning across that range of intrusions. The methods by which the courts address this challenge will largely determine how much liberty we have and how much the government can intrude. Courts and commentators could throw up their arms at such a task and decline to look beyond the specifics of each case. But such case-by-case analysis is inimical to individual freedom and fails to develop coherent standards to guide government agents.

Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1043.

⁷³ The imposition of secrecy and the prevention of deliberation with other agencies are two reasons why the legal analysis supporting many of the Bush administration's policies has been so widely criticized. See GELLMAN, *supra* note 61, at 136 (describing David Addington's practice of preventing the circulation of OLC memoranda).

⁷⁴ See Greene, *supra* note 14, at 99 (discussing the compartmented nature of information in the intelligence community).

⁷⁵ IGNATIEFF, *supra* note 23, at 136–37; Comey, *supra* note 24, at 443.

⁷⁶ See IGNATIEFF, *supra* note 23, at 136–37 (describing the risk to liberty and morality posed by a war on terrorism); Grenville Byford, *The Wrong War*, FOREIGN AFF. (July/Aug. 2002). “The ‘war on terrorism’ might continue in perpetuity, and it is unclear who is authorized to declare it over.” Paul Hoffman, *Human Rights and Terrorism*, 26 HUM. RTS. Q. 932, 940 (2004).

⁷⁷ Comey, *supra* note 24, at 444.

⁷⁸ See *id.*

⁷⁹ See Greene, *supra* note 14, at 103–05.

concerns and the protection of civil rights because the absence of either, in the long run, would undermine the democracy that the lawyer serves.⁸⁰ Though civil rights contribute to this aspect of the common good, their principle function is to protect the individual from someone else's understanding of what constitutes the good of society.⁸¹ As a result, without minimizing this contribution to the development of dignity and respect for individuals—especially as a countermajoritarian force—the absolutism of rights as a trump card against all security concerns must be rejected by those responsible for the good of the collective.⁸²

Terrorism presents an amorphous and asymmetric threat with few conventional indications and warnings.⁸³ The difficulty of detecting terrorist threats is compounded by the magnitude of the potential consequences of failure. The destruction wrought by the terrorist attacks on September 11 pale in comparison to the very real threats of a nuclear detonation or a radiological dispersal attack.⁸⁴ The countervailing aspect of the terrorist threat is its undeterminable duration.⁸⁵ When considering the degree to which civil liberties must flex to accommodate these threats, the inability to declare victory raises concerns that the ceding of rights for wartime imperatives may be permanent.⁸⁶

In light of these countervailing concerns, a distinction must be drawn between imminent and programmatic threats.⁸⁷ Civil liberties

⁸⁰ See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 31 (2006) (providing a framework for how one could define a particular right and balance it against the needs of security); Hoffman, *supra* note 76, at 934 (“History shows that when societies trade human rights for security, most often they get neither.”).

⁸¹ Chris Brown, *Universal Human Rights: A Critique*, in HUMAN RIGHTS IN GLOBAL POLITICS 109–10 (Tim Dunne & Nicholas J. Wheeler eds., 1999).

⁸² See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 303–04 (2003); Brown, *supra* note 81, at 110; Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 136 (Stuart Hampshire ed., 1978).

⁸³ See GOLDSMITH, *supra* note 3, at 73 (discussing President Roosevelt's visits to the “map room” during World War II so that he, quoting historian Doris Kearns Goodwin, “could visualize the progress of the war.”).

⁸⁴ See GELLMAN, *supra* note 61, at 160 (quoting Wayne Downing's concern with al Qaeda's interest in chemical weapons, radiological dispersion devices and nuclear weapons); IGNATIEFF, *supra* note 23, at 146; National Intelligence Council, *National Intelligence Estimate: The Terrorist Threat to the US Homeland* 5 (July 2007), http://www.dni.gov/press_releases/20070717_release.pdf.

⁸⁵ Hoffman, *supra* note 76, at 940.

⁸⁶ See IGNATIEFF, *supra* note 23, at 145–46; Hoffman, *supra* note 76, at 940.

⁸⁷ See Paul Rosenzweig, *Principles for Safeguarding Civil Liberties in an Age of Terrorism, Executive Memorandum No. 854* (The Heritage Found., Jan. 31 2003), <http://www.heritage.org/Research/HomelandSecurity/em854.cfm> (discussing the need for a methodology in

must flex more in response to the former because the latter allow more time for reflection and deliberation on how best to address a particular action.⁸⁸ Additionally, the urgency of an imminent threat may lead to a greater intrusion than necessary to ensure success, but the resulting intrusion is a limited one that will cease once the threat expires.⁸⁹

The Supreme Court, in *City of Indianapolis v. Edmond*, grappled with this division when holding unconstitutional a highway checkpoint.⁹⁰ The Court held that the checkpoint violated the Fourth Amendment where the primary purpose was general crime control.⁹¹ The Court stated, however, that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”⁹² The same intrusion would occur through the surgical use of a highway checkpoint, but the type of threat would limit the duration and extent of its use.⁹³

Additionally, the division between imminent and programmatic threats instructs how the Bush administration should have approached the need for increased foreign intelligence surveillance after September 11. Few would likely criticize the President’s use of the increased

order to determine from a legal and policymaking perspective what measures in response to the terrorist threat are “too much”). Just War theorists often talk about this point within that context as whether a “positive danger” exists. See Maryann Cusimano Love, *Globalization, Ethics, and the War on Terrorism*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 65, 71 (2002). A further division may even be required between imminent threats that constitute emergencies that require extreme action and those that may be reacted to with a more moderate approach. Cf. Igor Primoratz, *A Philosopher Looks at Contemporary Terrorism*, 29 CARDOZO L. REV. 33, 49 (2007) (discussing the merits of just war theorist Michael Walzer’s arguments on imminent threats).

⁸⁸ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); cf. Grundgesetz für die Bundesrepublik Deutschland art. 80a (noting the German Basic Law’s allowance for a “state of defense” for imminent attacks); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (allowing the government to punish inflammatory speech where it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

⁸⁹ For example, the International Covenant on Civil and Political Rights provides a comprehensive framework for the protection of human and civil rights. It recognizes, however, that certain public emergencies may require a narrow and temporary deviation from that framework. The deviation must be only to the extent “strictly required by the exigencies of the situation.” International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 4. Further, some derogations are expressly not allowed under that provision. *Id.* art. 4(2).

⁹⁰ 531 U.S. at 46–48.

⁹¹ *Id.* at 44.

⁹² *Id.*

⁹³ See *id.*; see also *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (viewing the Fourth Amendment’s reasonableness standard in light of the exigency of the governmental need).

surveillance capabilities of the National Security Agency (NSA), even if technically outside of the strictures of FISA, had it been necessary to thwart an imminent attack and employed for a limited duration.⁹⁴ The use of the NSA assets was not, however, so limited.⁹⁵ Instead, the President sought to employ this surveillance program as a programmatic response to general terrorist threats.⁹⁶ Both a limited and protracted use of these assets resulted in intrusions on privacy rights, but while those rights properly flexed in light of imminent need, they were unduly infringed upon once time allowed for deliberation on the consequences of the governmental action.⁹⁷

Drawing the distinction between imminent and programmatic threats is easier said than done. Many threats seem imminent, but are later revealed to be based upon unreliable information.⁹⁸ The costs of these errors are significant when the means employed result in restrictions on civil rights. Lawyers will never meaningfully reduce the errors made in deciphering intelligence, nor should they be engaged in that process. Lawyers, for all their skill, are not intelligence analysts, and determinations about credibility and likelihood of attacks should be left to the experts.⁹⁹ Lawyers can require, however, a response narrowly tailored to the threats faced.¹⁰⁰ Where imminent threats exist, a lawyer may sanction activity that pushes the envelope of legality and challenges civil liberties, but only with assurances that aggressive actions will cease once the threat is over.

⁹⁴ The provisions of FISA itself contemplated such flexibility. See FISA, 50 U.S.C. § 1805(f); S. Rep. No. 95-604, at 52 1978 U.S.C.C.A.N. at 3953; see also GOLDSMITH, *supra* note 3, at 183.

⁹⁵ See GELLMAN, *supra* note 61, 145-46; GOLDSMITH, *supra* note 3, at 181-82.

⁹⁶ See GELLMAN, *supra* note 61, 145-46.

⁹⁷ In this example, even after the disclosures of the secret Terrorist Surveillance Program, the Bush administration was still able to negotiate with Congress for the needed reforms to the FISA. In the White House Press Release after President Bush signed recent amendments to the bill, the President stated, "The bill will allow our intelligence professionals to quickly and effectively monitor the communications of terrorists abroad while respecting the liberties of Americans here at home. The bill I sign today will help us meet our most solemn responsibility: to stop new attacks and to protect our people." Remarks on Signing the FISA Amendments Act of 2008, 44 WEEKLY COMP. PRES. DOC. 975 (July 10, 2008).

⁹⁸ See PHILIP BOBBITT, TERROR AND CONSENT 291-92 (2008) (discussing the speculative aspect of intelligence and the need to act upon that evidence).

⁹⁹ This expertise is, however, rightly challenged after the inaccurate judgments on the credibility of various intelligence sources leading up to the war with Iraq. See Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOREIGN AFFAIRS, Mar. 1, 2006, at 15.

¹⁰⁰ In some ways, there were attempts to narrow the Terrorist Surveillance Program's intrusion by restricting it from capturing and analyzing the "content" of communications. See GELLMAN, *supra* note 61, at 149.

The necessary question that arises from this discussion is whether any rights are indeed absolute, even in the face of an imminent terrorist threat.¹⁰¹ This properly focuses on the use of torture—a topic garnering much criticism after the disclosures of its use on at least three detainees.¹⁰² The use of torture and its damage to the human dignity of an individual is different from all other types of intrusions.¹⁰³ First, it is irreparable. Wounds to human dignity cannot heal; the scars they leave both to the target and the society that allowed it to occur are lasting.¹⁰⁴ This prohibition corresponds with the Kantian ethical framework that human beings never be treated as a means for some other ends.¹⁰⁵ Some means are inherently so corrupt that no matter the intention, they cannot be justified.¹⁰⁶

Second, it is fundamental to society in general, and to democracies in particular, that the entire purpose of collective action is to protect each other against our worst tendencies.¹⁰⁷ The thread that binds this

¹⁰¹ See IGNATIEFF, *supra* note 23, at 136–37; Kanstroom, *supra* note 71, at qqq; Kreimer, *supra* note 71, at 278, 290–91.

¹⁰² See HEYMANN, *supra* note 53, at 109–11. See generally Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION, 257, 265 (Sanford Levinson ed., 2004); Kreimer, *supra* note 71; David Luban, *Liberalism, Torture, and the Ticking Bomb*, VA. L. REV. 1425, 1430 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45; Charles Krauthammer, *The Truth About Torture*, WEEKLY STANDARD, Dec. 5, 2005, at 21; Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, at A10.

¹⁰³ See IGNATIEFF, *supra* note 23, at 140; Kreimer, *supra* note 71, at 295–96; Waldron, *supra* note 102, at 1693 (discussing the prohibition on torture as a *malum prohibitum* offense). Daniel Kanstroom analogizes the word torture to words such as genocide and slavery that may have been contentious once, but that today are “settled political, legal, and moral disputes.” Kanstroom, *supra* note 71, at 276.

¹⁰⁴ See IGNATIEFF, *supra* note 23, at 143 (discussing the torture experienced by Jean Amery at the hands of the German SS before being sent to Auschwitz: “[S]omeone who has been tortured is never capable of being at home in the world again.”).

¹⁰⁵ See Bernhard Schlink, *The Problem with “Torture Lite,”* 29 CARDOZO L. REV. 85, 88 (2007).

¹⁰⁶ Michael Ignatieff provides a useful rejoinder to those who see a contradiction between engaging in a war and yet prohibiting the use of torture by stating: “The first one takes a life; the second abuses one.” See IGNATIEFF, *supra* note 23, at 137. This is also partly due to the relationship between the torturer and the victim, with the former degrading him- or herself as much through the process. See Luban, *supra* note 102, at 1430. It should be noted that President Bush himself recognized and spoke to the prohibition against torture, though admittedly hedging on whether the prohibition was categorical. See The President’s News Conference (Jan. 26, 2006), 42 WEEKLY COMP. PRES. DOC. 125, 134 (Jan. 30, 2006) (“No American will be allowed to torture another human being anywhere in the world.”).

¹⁰⁷ See IGNATIEFF, *supra* note 23, at 144 (“[L]iberal democracy has been crafted over centuries precisely in order to combat the temptations of nihilism, to prevent violence

society is not economic or simply enlightened self-interest, but the common values of life and law.¹⁰⁸ As citizens, we give up power to the government to ensure order, but the price of such sacrifice has a limit.¹⁰⁹ The price that cannot be paid for security is the violation of that which is most sacred—our own human dignity and the respect we have for that value in others.¹¹⁰

The use of torture results in such extreme costs that even the most serious national security imperatives would likely fail to justify it.¹¹¹ This falls short of an absolutist position because it is impossible to condemn its use in the recently abused, yet still problematic, hypothetical “ticking time bomb” situation where other values could take precedence.¹¹² The

from becoming an end in itself.”). A similar concept affected the organization of Congress, where James Madison wrote, “passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.” THE FEDERALIST No. 55, at 339 (James Madison) (Bantam Dell 1987).

¹⁰⁸ See Waldron, *supra* note 102, at 1737 (arguing that allowing torture or defining torture narrowly to allow for it constructively to occur would corrupt the American legal system). The short-sighted nature of the use of torture includes practical concerns as well as ethical and moral ones. The use of torture by French authorities in Algeria is considered a major factor in the former’s loss of that colony. See HEYMANN, *supra* note 53, at 112; Waldron, *supra* note 102, at 1684. Persons subjected to torture also may become the next generation of terrorists willing to plan and carry out the very acts the torture is intended to frustrate. See IGNATIEFF, *supra* note 23, at 141. Finally, a decision that torture is permissible deprives American troops of clear laws of war that prohibit such methods if they are captured. See William H. Taft IV, Memorandum to Alberto Gonzalez, Counsel to the President, (Feb. 2, 2002), *available at* http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf.

¹⁰⁹ See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 5–7 (2005); HEYMANN, *supra* note 53, at 113, 179.

¹¹⁰ “The pain of torture by design negates the vision of humanity that lies at the core of a liberal democracy.” Kreimer, *supra* note 71, at 298. For a strong argument against the ticking time bomb hypothetical generally used to undermine an absolutist view on the prohibition of torture, see Luban, *supra* note 102, at 1440–45.

¹¹¹ “Torture is alien to our Constitution both because it impinges on bodily integrity, and because it assaults the autonomy and dignity of the victim.” See Kreimer, *supra* note 71, at 294–95; see also Kanstroom, *supra* note 71, at qq (discussing that the fundamental premise of human rights law as “the inherent dignity of each person and the basic ideal of inalienable rights.”).

¹¹² See Krauthammer, *supra* note 102. The most revolting aspect of the recent revelations of the use of torture and extreme interrogation techniques by the United States government has been its sanction by lawyers and other policymakers after deliberation and thought, rather than in the “ticking time bomb” scenario often used as a defense for exceptions to a general prohibition. See Luban, *supra* note 102, at 1452–53; Waldron, *supra* note 102, at 1683, 1718–19 (“[A] case can be made that torture is now to be regarded as alien to any system of law.”).

use of torture must remain, however, categorically prohibited, subject only to potential affirmative defenses of necessity or duress.¹¹³

Absolutists on civil liberties enjoy reciting Benjamin Franklin's quote, "Those who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."¹¹⁴ The key word in this quotation is the modifier "essential." Lawyers must be able to draw lines where essential liberties are at stake and where even imminent threats cannot justify certain actions. That said, lawyers must also be capable of making the tough and unpopular decisions that encroach on liberties, but they must only do so in response to an imperative that must be addressed. If done through limited and circumscribed means, the temporary encroachments will realign once security is assured.¹¹⁵

C. *The Criminalization of the Laws of War*

Mostly due to the "cycles of aggression" in the 1960s–1970s and the mid-1980s, as well as growth of international law governing the laws of war, Congress has passed a myriad of domestic statutes that expose civilian governmental officials, politicians, and former military personnel to criminal liability.¹¹⁶ National security lawyers are often placed in a position to render legal opinions that will guide policymakers and op-

¹¹³ See generally Paola Gaeta, *May Necessity Be Available as a Defense for Torture in the Interrogation of Suspected Terrorists*, 2 J. INT'L CRIM. JUST. 785 (2004); Michael Slackman, *What's Wrong with Torturing al Qaeda Higher-Ups?*, N.Y. TIMES, May 16, 2004, at 44.

¹¹⁴ MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (A.J. Valpy ed., 1818). A similar point was made while criticizing a protest by Georgetown University students. See Michelle Malkin, *Dowdifying Ben Franklin* (Jan. 25, 2006), <http://michellemalkin.com/2006/01/25/dowdifying-ben-franklin/>.

¹¹⁵ As President Lincoln wrote, "Nor am I able to appreciate the danger apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and *habeas corpus* throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life." See ABRAHAM LINCOLN, *Letter to Erastus Corning and Others*, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 699, 705 (Roy P. Basler ed., 1946).

¹¹⁶ See GOLDSMITH, *supra* note 3, at 64–65, 163–64; Comey, *supra* note 24, at 443–44; Robert J. Delahunty & John C. Yoo, *Peace Through Law? The Failure of a Noble Experiment*, 106 MICH. L. REV. 923, 926–28 (2008). The two most notable statutes of this nature are the War Crimes Act and the Torture Act. See 18 U.S.C. § 2441 (1996); 18 U.S.C. §§ 2340, 2340A (2002); see also GELLMAN, *supra* note 61, at 163.

erators on how to perform their duties without exposing themselves or their clients to criminal punishment.¹¹⁷

The criminalization of war is both an understandable reaction to previous abuses and a severe hindrance to the collection of intelligence and the prevention of future terrorist attacks.¹¹⁸ On one hand, there are many benefits to maintaining such domestic criminal laws. First, it is the right of the people, through their legislature, to define what actions are so repugnant to the conscience of society that they will be deemed criminal regardless of the motivation or intention of the actor. Second, some statutes, like the War Crimes Act, are intended to comply with international obligations.¹¹⁹ Finally, applying such standards to government actors allows the United States to argue for similar standards and treatment, and to pursue international terrorists through obligations imposed on other countries.¹²⁰

¹¹⁷ See GELLMAN, *supra* note 61, at 169 (noting the advice given by Navy general counsel Alberto Mora to “Protect your client.”); see also COMEY, *supra* note 24, at 443 (discussing the ramifications of providing a legal blessing to policymakers and operators).

¹¹⁸ See GOLDSMITH, *supra* note 3, at 64–65, 163–64.

¹¹⁹ See David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 391–92 (2008) (describing Congress’ motivation for passing the War Crimes Act as ensuring that grave violations of the Geneva Conventions could be prosecuted in the United States).

¹²⁰ See Taft, *supra* note 108. There are at least twelve international treaties to which the United States is a signatory that operate to assist in the prosecution of international terrorists. See International Convention for the Suppression of the Financing of Terrorism, *adopted* Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 39 I.L.M. 270 (2000); International Convention for the Suppression of Terrorist Bombings, *adopted* Jan. 9, 1998, S. TREATY DOC. NO. 106-6, 37 I.L.M. 249; Convention on Marking of Plastic Explosives for the Purpose of Detection, *done* Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 30 I.L.M. 726 (1993); International Maritime Organization, Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, I.M.O. Doc. SUA/CON/16/Rev.1, 1678 U.N.T.S. 304; International Maritime Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.M.O. Doc. SUA/CON/15, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, *done* Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 27 I.L.M. 627; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, S. TREATY DOC. NO. 96-43, 1456 U.N.T.S. 124 (1997); International Convention Against the Taking of Hostages, G.A. Res. 146, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (1977); Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Convention]; Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

The negative side of this development is that lawyers and other government agents who must act in times of crisis fear that they will be subject to criminal liability.¹²¹ The increasing number of CIA agents who take out professional responsibility insurance to protect themselves against lawsuits evidences this fear.¹²² This is a major—if not primary—cause of risk-averse action.¹²³ Lawyers become reluctant to sanction creative legal actions due to their inability to state with full certainty whether such actions will result in criminal exposure, especially with a change in administrations and the benefits of hindsight.¹²⁴ This fear is acute in cases where the criminal laws at issue include relativistic and ambiguous standards.¹²⁵ As the Attorney General correctly identified in his remarks, the closing off of these avenues by lawyers places the United States in a vulnerable security position, especially with regard to a growing and amorphous threat like international terrorism.¹²⁶

Still, despite the propensity for this development to cause risk-averse conduct, the decriminalization of the intelligence community is incomprehensible after the Bush administration's rampant disregard for the rule of law. Ironically, their attempts to avoid potential criminal exposure not only heightened the calls for such prosecutions, but also affirmed the need to restrict specific aspects of executive conduct.¹²⁷

A realization of the negative effect that potential criminal liability has on the creativity and aggressiveness of government actors should

¹²¹ The laws of war, instead, allow for a balance between considerations of humanity and military necessity not found in criminal law. See Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War*, 6 J. INT'L CRIM. JUST. 21, 36 (2008). The fear of civil liability is also present and affecting government employees. See, e.g., *Idema v. Rice*, 478 F. Supp. 2d 47 (D.D.C. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

¹²² See Scott Shane, *The Question of Liability Stirs Concern at the C.I.A.*, N.Y. TIMES, Sept. 16, 2006, at A12; R. Jeffrey Smith, *Worried CIA Officers Buy Legal Insurance*, WASH. POST, Sept. 11, 2006, at A1. This practice began most notably after the Iran-Contra Scandal. See *Morning Edition: For CIA Agents, Insurance Sometimes Necessary* (NPR radio broadcast Dec. 14, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5052915>.

¹²³ See GOLDSMITH, *supra* note 3, at 164; Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93, 152 (2008).

¹²⁴ See Pines, *supra* note 123, at 131–32.

¹²⁵ See R. Jeffrey Smith, *War Crimes Act Changes Would Reduce the Threat of Prosecution*, WASH. POST, Aug. 9, 2006, at A01 (discussing the relative terms “degrading” and “humiliating” as used in the War Crimes Act).

¹²⁶ See Mukasey, *supra* note 2, at 183.

¹²⁷ See GELLMAN, *supra* note 61, at 175–76 (rejecting the application of Geneva rules for detainees to avoid the application of the War Crimes Act); see also *id.* at 355 (noting that the effort to expand Presidential powers has resulted in a net decrease of those powers).

spurn a narrowing of applicable criminal statutes.¹²⁸ The goals of such a review should be the following: substitute civil liability for criminal liability where possible; narrow ambiguous standards to precise actions with specific definitions; include a statutory defense for a reasonable belief that the actions taken were lawful;¹²⁹ and require the federal government to provide counsel and indemnify government actors for all judgments except where intentional illegal conduct is proven. This review will not alleviate all concerns over the promotion of risk-averse action, but will address its root causes without losing the desired deterrent effect.

D. *Retaining Objectivity and Independence Through Distance*

When addressing legal questions that balance national security imperatives against civil liberties, a lawyer must also recognize institutional factors that affect judgment. Nothing is more important to the role of a counselor than the need for distance from the client.¹³⁰ A lawyer must always be aware that an ability to remain objective when considering a client's needs, values, and demands is necessary.¹³¹ This ability challenges private lawyers,¹³² but is much harder in the national security arena, where the dual roles of a lawyer as counselor and contributor to policy decisions are blurred.¹³³

¹²⁸ The process should be similar to the one seen in the Military Commissions Act of 2006 that narrowed the War Crimes Act by expressly criminalizing specific acts. See Azra B. Zaidi, *The Military Commissions Act and Its Impact on Our Justice System*, 25 BUFF. PUB. INT. L.J. 1, 17–18 (2007).

¹²⁹ Examples would include entrapment by estoppel or innocent intent. See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 568 (1965).

¹³⁰ See Greene, *supra* note 14, at 91; Margulies, *supra* note 16, at 366.

¹³¹ “[I]t is essential that the general counsel and lawyers on [staff at intelligence agencies] be independent, strong-minded and conceive of the office in a broader role than merely serving as the personal legal counsel to the agency head.” Daniel B. Silver, *The Uses and Misuses of Intelligence Oversight*, 11 Hous. J. INT’L L. 7, 13 (1989). Aristotle argued that objectivity is also a necessary ingredient to ethics. See Graham, *supra* note 5, at 26.

¹³² Partly in response to these difficulties, the American Bar Association attempted to clarify the role of lawyer as distinct from the lawyer’s client. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.13 (2007). This Rule applies—at least in theory—to government agencies. *Id.* cmt. 9. See generally E. Norman Veasey & Christine Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1 (2006).

¹³³ See GOLDSMITH, *supra* note 3, at 129–30 (describing the extraordinary influence that government lawyers had over war policy in the Bush administration); see also Greene, *supra* note 14, at 105 (discussing how lawyers constitute part of the intelligence agency’s operational team); David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2002 (2008) (noting the professional responsibility requirements that JAG attorneys retain their independence). In addition, a public lawyer arguably serves a public interest

Consider the role of David Addington in the Bush administration. As counsel and then Chief of Staff to Vice President Dick Cheney, Addington played a central role in many of the most important and criticized events of the past eight years.¹³⁴ Addington's professional association with Cheney reaches back to the 1980s when he was counsel to the House Permanent Select Committee on Intelligence.¹³⁵ Cheney, as a representative from Wyoming, sat on that panel.¹³⁶ They remained colleagues and friends, and, importantly, shared an ideological view of executive power that became a linchpin in policy decisions after the 2000 election.¹³⁷ Though Addington's role in the Bush administration was as a legal counselor, he regularly attended strategy sessions on issues such as how to discredit Joseph Wilson after his public criticism of the Bush administration.¹³⁸ To this date, there is no solid evidence that Addington broke the law, but his relationship with Cheney suggests a role devoid of the distance necessary to remain objective.¹³⁹ Though it remains speculation, it is reasonable to surmise that this closeness hindered Addington in the provision of solid counsel.¹⁴⁰

To provide sound counsel, a lawyer must avoid such excessive intermingling.¹⁴¹ Policing such boundaries is undoubtedly difficult, but it may be achieved through an awareness of the costs from such a rela-

that may be more demanding than the situations generally faced by private litigants. *See* BRANDEIS, *supra* note 24, at 314, 320.

¹³⁴ *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, *NEW YORKER*, July 3, 2006, at 44; Dana Milbank, *In Cheney's Shadow, Counsel Pushes the Conservative Cause*, *WASH. POST*, Oct. 11, 2004, at A21.

¹³⁵ *See* Milbank, *supra* note 134; *see also* GELLMAN, *supra* note 61, at 40–41; GOLDSMITH, *supra* note 3, at 77.

¹³⁶ *See* Milbank, *supra* note 134.

¹³⁷ *See id.*

¹³⁸ *See* Murray Waas & Paul Singer, *Addington's Role in Cheney's Office Draws Fresh Attention*, *NATIONALJOURNAL.COM* (Oct. 30, 2005), <http://www.nationaljournal.com/about/njweekly/stories/2005/1030nj1.htm> (describing how Wilson accused the Bush administration of misrepresenting information about a CIA mission to Niger to investigate whether Iraq had attempted to obtain uranium).

¹³⁹ Former Solicitor General Ted Olson described David Addington as Dick Cheney's "eyes, ears, and voice." GOLDSMITH, *supra* note 3, at 77. One former high-ranking lawyer for the Bush administration stated that "Addington was more like Cheney's agent than like a lawyer." *See* Mayer, *supra* note 134. Though the legality of the advice remains questionable, historian Arthur Schlesinger, Jr. described Addington's legal advice in defense of torture as "No position taken has done more damage to the American reputation in the world—ever." *See id.*

¹⁴⁰ *See* GELLMAN, *supra* note 61, at 355.

¹⁴¹ *See* Greene, *supra* note 14, at 91; Margulies, *supra* note 16, at 366.

tionship.¹⁴² Government lawyers must avoid being placed in the position of a policymaker,¹⁴³ just as any lawyer must avoid deciding legal issues for his or her client.¹⁴⁴ While a lawyer may and must provide legal advice, it is essential that he or she avoid intruding upon the province of decision-making—an exercise of power that is reserved to a client.¹⁴⁵ Where a lawyer fails to self-monitor, the role between lawyer and client disappears and the quality of objective counsel diminishes.¹⁴⁶

This breakdown occurs not simply because the lawyer becomes an agent of power instead of a legal advisor, but also because the admission of subjectivity reduces an important quality of counsel. Abraham Lincoln described this quality when discussing the character needed by all citizens to prevent the growth of despotism and to ensure the perpetuation of the U.S. political system.¹⁴⁷ Lincoln stated that all citizens must foster and apply a “cold, calculated, unimpassioned reason” to see past emotional appeals that allow for the rise of a Napoleon or a Caesar.¹⁴⁸ Lincoln was arguing for the need for objectivity.¹⁴⁹

Reason and objectivity, while important for all citizens, are most important for lawyers charged with guiding policymakers on the proper balance between national security and civil liberties.¹⁵⁰ The ability to leverage distance and to apply a well-developed, objective analytical approach to a problem ensures that the legal opinions accurately reflect the needed compromise between those conflicting imperatives.¹⁵¹ While

¹⁴² The costs are not just bad policy and poor counsel. Some legal ethics scholars believe that Bush administration lawyers may have crossed the ethical line regarding criminal conduct for the facilitation of illegal torture methods. See David Luban, *Selling Indulgences: The Unmistakable Parallel Between Lynne Stewart and the President's Torture Lawyers*, SLATE, Feb. 14, 2005, <http://www.slate.com/id/2113447>.

¹⁴³ Government lawyers should never be in a position where their role is to justify rather than confront governmental policy. See Greene, *supra* note 14, at 106.

¹⁴⁴ See Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 841–42 (2000).

¹⁴⁵ Such a clear cut statement is, admittedly, difficult to keep in many areas of law. The difficulty of the ideal, however, does not and should not undermine the efforts to reach that state. See Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2567–69 (1993) (discussing the difficulties of a client-centered approach when practicing poverty law).

¹⁴⁶ “Lawyers who buy into their clients’ goals without reservation, or, worse promote their own goals or agendas as their clients’ own, limit their own professional usefulness.” Margulies, *supra* note 16, at 366.

¹⁴⁷ See LINCOLN, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois January 27, 1838*, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS, *supra* note 115, at 84–85.

¹⁴⁸ See *id.* at 84.

¹⁴⁹ See *id.* at 84–85.

¹⁵⁰ See Margulies, *supra* note 16, at 366–67; Silver, *supra* note 131, at 13.

¹⁵¹ See Margulies, *supra* note 16, at 366–67; Silver, *supra* note 131, at 13.

lawyers themselves must police these boundaries and ensure objectivity, organizations responsible for the resulting government policy must implement these lessons through institutional requirements. These include forced deliberation on key legal issues and the separation of functions between legal advisors and policymakers—all of which failed to occur during the Bush administration.¹⁵²

E. *Preparing for Crisis*

A national security lawyer should understand that any balance between national security and civil liberties may be historically unique, but that in the broad view it is not without precedent. Understanding the lessons of those precedents will aid legal analysis amidst even the most stressful, immediate security imperatives.¹⁵³ A lawyer in such a role must, therefore, prepare for the unforeseen crisis.

Much is made of the pressures that a lawyer must face when deciding issues of importance to national security. While pressures exist, a historically-minded individual will find commonalities that guide many of the hard choices.¹⁵⁴ Many key legal decisions that the Bush administration faced after September 11 evidence this point.¹⁵⁵ The Terrorist Surveillance Program is undeniably similar to the electronic surveillance conducted by the NSA from the late 1950s to the early 1970s.¹⁵⁶ Immigration restrictions and increased surveillance for persons of Arab

¹⁵² See, e.g., GELLMAN, *supra* note 61, at 162–68 (describing how David Addington drafted a four-page memorandum that rejected Geneva protections for detainees in Afghanistan and circumvented inter-agency review and vetting before getting the President to sign the executive order authorizing the action).

¹⁵³ The moderating effect of historical knowledge and context is similar to the use of precedents in judicial decision-making. See BENJAMIN CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 20 (1921); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976). The use of precedent (which relies on a line of cases) as opposed to *stare decisis* (which may focus on one case alone) is a more accurate comparison in such a case. See Frederick G. Kempin, *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 30 (1959).

¹⁵⁴ For example, many comparisons between modern and historical terrorism demonstrate a similar relationship between the methods employed and the governmental order that existed. See BOBBITT, *supra* note 98, at 23–25.

¹⁵⁵ Ironically, the Bush administration's defenses of such activities often cherry-pick this relevant history to support its position. See, e.g., DEPT. OF JUST., *LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT* 7–8 (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

¹⁵⁶ See Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 148–58 (2006).

descent share some racial profiling similarities to the Japanese internment following the attacks on Pearl Harbor.¹⁵⁷ The Bush administration's attempt to employ streamlined military commissions to try enemy combatants drew many parallels to the commissions used by President Roosevelt in 1942 to try eight Nazi saboteurs.¹⁵⁸ Even more similarities exist with the trial of two additional German saboteurs in 1945—a process extolled by Secretary of War Henry Stimson to redress the mistakes of 1942.¹⁵⁹

The historical parallels that exist between many of the legal decisions that drove key policies during the post-September 11 attacks confound even the most strident believer in the maxim that, “what’s past is prologue.”¹⁶⁰ The Bush administration, at this point in our historical analysis, has repeated history in many instances and embraced the very same disastrous and embarrassing policies.¹⁶¹ The question that must come to every person’s mind who considers this issue is why such historical guidance was ignored during the past seven years. More specifically, where were the lawyers during this process?¹⁶²

It is certainly possible that the lawyers who faced these situations were aware of this history but were ignored or not consulted.¹⁶³ It is more likely that key lawyers lacked this historical focus when faced with

¹⁵⁷ See *Korematsu*, 323 U.S. at 216–18 (describing restrictions imposed on citizens of Japanese ancestry); Rachel L. Swarns, *Special Registration for Arab Immigrants Will Reportedly Stop*, N.Y. TIMES, Nov. 22, 2003, at A16; Asian American Legal Defense and Education Fund, *Special Registration: Discrimination and Xenophobia as Government Policy*, Nov. 2003, at 4–5, available at http://www.citylimits.org/images_pdfs/pdfs/SpecialRegistrationReport.pdf (providing statistics that 95% of those targeted were Muslim). See generally DAVID LYON, SURVEILLANCE AFTER SEPTEMBER 11 (2003). This also draws eerie parallels to 1987, when plans existed to quarantine persons of Arab descent in the United States if war erupted in the Middle East between Israel and various countries. See Lisa Belkin, *For Many Arab-Americans, F.B.I. Scrutiny Renews Fears*, N.Y. TIMES, Jan. 12, 1991, at 11.

¹⁵⁸ See FISHER, *supra* note 56, at 205–07.

¹⁵⁹ *Id.* at 207–08.

¹⁶⁰ WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

¹⁶¹ See, e.g., Linda Greenhouse, *Justices, 5–4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES, June 13, 2008, at A1; Linda Greenhouse, *Treaty Doesn't Give Foreign Defendants Special Status in U.S. Courts, Justices Rule*, N.Y. TIMES, June 29, 2006, at A22; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹⁶² Judge Stanly Sporkin made a similar peroration during the Savings and Loan Crisis of the 1980s. See *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

¹⁶³ There are many reports of lawyers, including the military Judge Advocates, being shut out from the decisions affecting important legal issues. See Seymour M. Hersh, *Annals of National Security: The Gray Zone*, NEW YORKER, May 24, 2004, at 38 (quoting Scott Horton, former chairman of the New York City Bar Association's Committee on International Human Rights).

time-pressured decisions.¹⁶⁴ For the purposes of this Article, judgment of past actions is of a little value. Instead, the point is a prospective one. If a lawyer seeks to provide counsel on key issues of national security—the defining issues of our generation—the preparation for such decisions must begin well before the need arises.¹⁶⁵

This is not simply an appeal to understanding legal precedent. It is a call to historical study of national security law in a practical and pragmatic manner, akin to Victor Davis Hanson's call for students to study war and the inevitability of conflict rather than focusing solely on the desire for peace.¹⁶⁶ It is also similar to Thucydides' statement that he would be satisfied if his *History of the Peloponnesian War* was "judged useful by those inquirers who desire exact knowledge of the past as an aid to the understanding of the future, which in the course of human things must resemble if it does not reflect it . . ."¹⁶⁷ There is no denying that the challenges faced in the past will resurface. The need now is to prepare the next generation of lawyers who will be entrusted with the responsibilities of judgment.¹⁶⁸

F. *Developing a Record for Judgment*

Finally, the choice between competing imperatives may provide an example to one facing a similar situation in the future.¹⁶⁹ The process by which important decisions are reached should operate in a manner

¹⁶⁴ Many lawyers in the Bush administration were allegedly given their important positions due to loyalty and religious affiliation rather than merit and independence. See, e.g., Eric Lipton, *Colleagues Cite Partisan Focus by Justice Official*, N.Y. TIMES, May 12, 2007, at A1; Charlie Savage, *Missouri Attorney a Focus in Firings*, BOSTON GLOBE, May 6, 2007, at A1; Alan Cooperman, *Bush Loyalist Rose Quickly at Justice*, WASH. POST, Mar. 30, 2007, at A15.

¹⁶⁵ In the aftermath of the invasion of Iraq, many critics point to a lack of historical understanding as a major cause of the failures in war strategy, including second-hand accounts that President Bush failed to understand that Arabs in Iraq were divided into Shia and Sunni. See George Packer, *Dreaming of Democracy*, N.Y. TIMES, Mar. 2, 2003, § 6 (Magazine), at 64.

¹⁶⁶ See Victor Davis Hanson, *Why Study War*, CITY J. (Summer 2007), available at http://www.city-journal.org/html/17_3_military_history.html.

¹⁶⁷ THE LANDMARK THUCYDIDES, A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 16 (Robert B. Strassler ed., 1996).

¹⁶⁸ See Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L.J. 266, 268 (2007) (arguing for the development of methods of thinking that prepare lawyers for leadership, including the need for breadth of mind).

¹⁶⁹ The importance of using an accurate, well-developed record is evidenced by the *coram nobis* suit that overturned Fred Korematsu's conviction, based on documents that the government suppressed at the time of the original litigation. See *Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D. Cal. 1984); Richard Goldstein, *Fred Korematsu, 86, Dies; Lost Key Suit on Internment*, N.Y. TIMES, Apr. 1, 2005, at C13.

that allows for peer and historical judgment with a humble recognition that mistakes may be made and that the balance reached may be in error.¹⁷⁰ Lawyers have a responsibility to balance these imperatives within a process that seeks openness and preserves the facts that led to and supported the legal conclusions.¹⁷¹ This not only allows the public to judge the specific action contemporaneously, but it provides an accurate and complete factual record for historical analysis and reflection upon each specific decision within a broader context.¹⁷² This reflection provides historical lessons that provide precedent and give guidance.¹⁷³

Both the need to avoid insulation of decision-making through secrecy and the need to develop an accurate factual record from which parties may judge those decisions are challenged today. The Bush administration asserted the state secret evidentiary privilege and executive privilege with unprecedented breadth.¹⁷⁴ Attorney General Mukasey himself advised the President to assert executive privilege to discussions between Cheney and the FBI.¹⁷⁵ The Bush administration took steps to limit the use of the Freedom of Information Act for intelligence information and to undermine the Presidential Records Act.¹⁷⁶ The factual

¹⁷⁰ See Heineman, *supra* note 168, at 270 (concluding with a hope that lawyers will aspire to lead “tempered by humility at the complexity, difficulty, discipline, and self-sacrifice inherent in the task.”).

¹⁷¹ Lawyers are governed by multiple rules of Professional Responsibility that require openness and honesty to the court and the provision of accurate, comprehensive evidence, even if that evidence is damaging to one’s case. See *Brady v. Maryland*, 373 U.S. 83, 88 (1963); Margaret Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002); see also MODEL RULES OF PROF’L CONDUCT R. 3.3 (discussing duty of candor to the court).

¹⁷² See Landes & Posner, *supra* note 153, at 250. Historiography depends upon intermediary sources, such as judicial or administrative records, to understand historical facts and draw historical lessons.

¹⁷³ See Landes & Posner, *supra* note 153, at 250.

¹⁷⁴ See Dana Priest, *Secrecy Privilege Invoked in Fighting Ex-Detainee’s Lawsuit*, WASH. POST, May 13, 2006, at A03; Henry Lanman, *Secret Guarding: The New Secrecy Doctrine So Secret You Don’t Even Know About It*, SLATE, May 22, 2006, <http://www.slate.com/id/2142155>. The Obama administration does not appear to be backing away from these positions. See John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12.

¹⁷⁵ See Dan Eggen, *Mukasey Refuses to Prosecute Bush Aides*, WASH. POST, Mar. 1, 2008, at A02; Laurie Kellman, *Bush Claims Privilege to Withhold CIA Leak Records*, BOSTON.COM, July 16, 2008, http://www.boston.com/news/nation/washington/articles/2008/07/16/bush_claims_executive_privilege_on_cia_leak. The original letter written by Attorney General Mukasey to President Bush is available at <http://oversight.house.gov/documents/20080716104027.pdf>.

¹⁷⁶ See H.R. COMM. ON GOV’T REFORM—MINORITY STAFF SPECIAL INVESTIGATION DIV., REPORT ON SECRECY IN THE BUSH ADMINISTRATION 3–4, 32–34 (2004) (report prepared for Rep. Henry Waxman); Exec. Order No. 13233, 66 Fed. Reg. 56025 (Nov. 1, 2001) (eliminating the time limit for disclosure of Presidential records); Editorial, *Sunshine on*

justifications for the detention of enemy combatants at Guantanamo Bay went unchallenged until the *Boumediene* decision due to the restriction on the collateral challenge of habeas corpus.¹⁷⁷ The Bush administration also sought immunity for telephone companies who may have broken the law at the government's behest.¹⁷⁸ Immunity not only insulates the companies and possibly the government from liability, but also removes cases from the adjudicatory process, a process that serves to place such actions into a factual record and before the public.¹⁷⁹ Finally, and perhaps most atrociously, there are reports about the destruction of evidence of interrogation techniques that could include torture.¹⁸⁰

Though we still operate in the realm of speculation, government lawyers drove or provided pivotal support for the policy positions on many of these issues.¹⁸¹ On each of these decisions, one can debate the needs of security used to justify the insulation of decisions, practices, or information from the public. The fundamental problem, however, is that such insulation prevents the proper functioning of an integral process of judgment. Regardless of the historical lessons drawn from such judgment, the value of hindsight properly based on facts cannot

History, N.Y. TIMES, Mar. 12, 2007; John Wertman, *Bush's Obstruction of History*, WASH. POST, Feb. 26, 2006, at B07.

¹⁷⁷ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (holding that detainees have a right to habeas corpus to challenge their detention before an Article III judge); Robert Barnes, *Justices Say Detainees Can Seek Release*, WASH. POST, June 13, 2008, at A1.

¹⁷⁸ See Eric Lichtblau, *Senate Votes for Expansion of Spy Powers*, N.Y. TIMES, Feb. 13, 2008, at A1.

¹⁷⁹ See *In re National Security Agency Telecommunications Records Litigation*, 564 F. Supp. 2d 1109 (N.D. Cal., July 2, 2008) (moving to dismiss based on 50 U.S.C. § 1885a(a)(1)-(5)); Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69-71 (2006) (explaining the importance of the jury system and of jury pronouncements).

¹⁸⁰ See Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. TIMES, Dec. 7, 2007, at A1; Glenn Greenwald, "Missing" Evidence is Familiar Bush Pattern, SALON.COM, Dec. 7, 2007, http://www.salon.com/opinion/greenwald/2007/12/07/cia_evidence.

¹⁸¹ Both Attorneys General Mukasey and Alberto Gonzales have played prominent roles in many of these decisions. See, e.g., Eggen, *supra* note 175; Hersh, *supra* note 163; Mayer, *supra* note 134, at 2 (describing the Bush administration's position on the applicability of the Geneva Conventions to detainees at Guantanamo); Mark Mazzetti & David Johnston, *Outside Prosecutor to Investigate Destruction of C.I.A. Tapes*, INT'L HERALD TRIB., Jan. 2, 2008, <http://www.iht.com/articles/2008/01/02/america/cia.php> (noting that the investigation will look into the role of White House lawyers, including Alberto Gonzales). But see Mark Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*, N.Y. TIMES, Dec. 8, 2007, at A1 (discussing how the decision to destroy interrogation tapes was made without consulting top CIA lawyers).

be ignored. It is only through this reflection that historical truths are developed and applied to subsequent events.¹⁸²

The success or failure of the development of such truths can lead to serious consequences for a society. The value of the factual record developed during the Nuremberg trials is undeniable, as they stand as an intellectual and historical bulwark against Holocaust deniers.¹⁸³ After the end of apartheid in South Africa, the Truth and Reconciliation Committee led to an emotional healing and understanding among two sides of a bitter conflict.¹⁸⁴ In Croatia, however, a historical barrier of bitterness remains between the Croats and Serbs over the true extent of the atrocities wrought by the Ustashe. The number of deaths diverges greatly—between 60,000 and 700,000—and still remains a source of contention and a hindrance to reconciliation.¹⁸⁵

The point is that facts matter. They matter in understanding the atmosphere in which decisions were made and they matter in their contribution to the development of a progressive history—one that attempts to glean lessons from the past to inform decisions of the future. An ethical lawyer operating in this realm understands both the need to learn that history and to engage in a process that promotes such growth. Both elements contribute to sound legal counsel. The lawyer who applies lessons from the past moderates the instant debate through context and broader historical visions. Similarly, the lawyer who conducts

¹⁸² See Wertman, *supra* note 176 (“But for better or worse, these records belong to the American people and should be available so that future generations can learn from the triumphs and failures of our past leaders.”). As Fred Korematsu wrote as amicus curie in *Hamdi v. Rumsfeld*, “Only by understanding the errors of the past can we do better in the present.” Brief of Amicus Curiae Fred Korematsu in Support of Petitioner at 3, 542 U.S. 507 (2004).

¹⁸³ See Leila Nadya Sadat, *Judgment at Nuremberg: Foreword to the Symposium*, 6 WASH. U. GLOBAL STUD. L. REV. 491, 499 (2007); cf. Michael P. Sacharf, *The International Trial of Slobodan Milosevic: Real Justice or Realpolitik?*, 8 ILSA J. INT’L & COMP. L. 389, 390 (2001–2002) (discussing how a factual record developed through the trial would aid education about the atrocities that occurred).

¹⁸⁴ See Cassandra Fox Charles, *Truth vs. Justice: Promoting the Rule of Law in Post-Apartheid South Africa*, 5 SCHOLAR 81, 91–93 (2002–2003); cf. Carstein Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT’L L. 952, 953 (2001) (noting the twin goals of the Truth Commission for East Timor as development of a record to understand the truth and to assist in national reconciliation).

¹⁸⁵ See ROBERT D. KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* 5–6 (1993) (“Numbers are all that have ever counted in Zagreb. For instance, if you were to say that the Croatian Ustashe . . . murdered 700,000 Serbs at Jesenovac . . . you would be recognized as a Serbian nationalist who despises Croats as well as Albanians But if you were to say that the Ustashe fascists murdered only 60,000 Serbs, you would be pegged as a Croat nationalist”); MARCUS TANNER, *CROATIA: A NATION FORGED IN WAR* 152 (1997).

legal balancing in a manner mindful of the needs for openness and the preservation of a factual record contributes to the continued provision of moderate counsel.

II. IMPLEMENTATION

The debate over the proper role of a national security lawyer is a contentious one with passionate advocates on both sides. It is a debate that easily dissolves into the academic and esoteric, but it must translate into the practical and pragmatic or be resigned to echo in irrelevance. The need for relevance is daunting whenever a resolution must be firm enough to withstand dual and often opposing pressures, yet flexible enough to apply to unique challenges.

The factors discussed above must be internalized and applied by the individuals entrusted with national security duties. The following list, however, contains aspects of the discussion that may be implemented either institutionally or legislatively to assist legal counsel in the national security context.

- **Deliberation.** Legal counsel must be allowed and required to deliberate with peers within one's agency and with lawyers of other government agencies. In crisis situations that require legal counsel, agencies should convene non-hierarchical committees of various agency lawyers to deliberate and propose a consensus-based opinion.¹⁸⁶
- **Access.** Legal counsel must be given the security clearance to access the intelligence reporting, intelligence sources, and analysis that provide the foundation for assertions of security imperatives.¹⁸⁷
- **Office of Legal Counsel Memoranda.** For an OLC memorandum to have binding legal effect on Executive employees, it must be reviewed and signed, though not necessarily approved, by lawyers for all cabinet-level departments.
- **Disclosure.** A bipartisan Congressional committee should review in closed session all OLC memoranda issued during the Bush ad-

¹⁸⁶ According to James Comey, John Ashcroft regrets the certification of the Terrorist Surveillance Program and stated that the security requirements surrounding the program were so tight that he could not get the advice he needed to adjudge its legality. GELLMAN, *supra* note 61, at 304.

¹⁸⁷ This would prevent policy makers from dividing up the facts provided to each legal advisor to guarantee the results they desired. See GELLMAN, *supra* note 61, at 287 (describing Vice President Cheney and David Addington's use of the bureaucracy to return outcome determinative decisions).

ministration. This committee should make public all memoranda not essential to current national security needs and issue the equivalent of the 9/11 Commission Report on the substance and decision-making process that led to regrettable opinions.

- **Decriminalization of War.** A bipartisan Congressional committee should review all criminal statutes that cover traditional areas of the laws of war. The committee should propose changes to the laws that incorporate the elements discussed above.

CONCLUSION

Lawyers are up to the task of moderating government action even in the most stressful, challenging times. In fact, it is the tough question and the courageous answer that define our profession. A resolute determination to do law and do it righteously, however, will by itself fail to guide one through a seemingly intractable dilemma. Instead, a lawyer must prepare for such moments by developing and putting into practice an ethical and decision-making framework that defines the competing velocities and seeks moderation. A lawyer must leverage the cultivated skill of objectivity and ensure client distance to see issues for what they are and not look through the lens of systemic bias. A lawyer must have limits; just as one must be capable of ranking degrees of threats, so too must the lawyer play the obstructionist when action entails an impermissible cost.

These qualities may appear as unobtainable ideals, and a full embrace and effectuation by any fallible person seems unrealistic. Just as our recent history raises concerns about how many in our government have handled such balancing, however, recent events also highlight the ability of many to shoulder that duty. A full account of the events that occurred within the government and military after September 11 is still in development. The story that is emerging puts lawyers at the center of many atrocious decisions, but also at the forefront of courageous actions. The military Judge Advocates have shown during this war on terrorism an unfailing commitment to civil liberties, while upholding their sworn duties to protect and serve the nation.¹⁸⁸ They have suffered personal loss, including the sacrifice of careers and promotions, to follow

¹⁸⁸ See generally Ellen Yaroshfsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law*, 36 HOFSTRA L. REV. 563 (describing the stories of Lt. Cdr. Charles Swift, Maj. Michael Dan Mori, and Lt. Cdr. Matthew Diaz); Hersh, *supra* note 163 (describing the JAGs actions in response to Secretary of Defense Rumsfeld's disregard for the Geneva Conventions).

their convictions.¹⁸⁹ Civilian lawyers, such as James Comey, Jack Goldsmith, Patrick Philbin, and even John Ashcroft, have demonstrated the ability to say no to programs that violated an expanded view of legal constraints in an atmosphere of immense pressure and dire responsibility.¹⁹⁰ They did so not as mere obstructionists, but as lawyers who sought to put extralegal programs on sound legal foundations.¹⁹¹

The task now is to analyze what contributed to and hindered the provision of sound legal advice during the period after September 11. It is to isolate and consider the various factors that affect the lawyer in a national security context and to reach pragmatic and practical solutions to those problems. In doing so, we provide our best chance at developing a system where proper restraints against government overreaching are imposed and a devastating backlash of risk-averse retrenchment is avoided.

¹⁸⁹ See Yaroshefsky, *supra* note 188, at 571 (noting that Lt. Cdr. Swift was passed over for promotion and forced into retirement).

¹⁹⁰ See GELLMAN, *supra* note 61, at 291–305 (describing the efforts of civilian lawyers in the Bush administration to fix the Terrorist Surveillance Program).

¹⁹¹ See *id.* at 291 (describing Jack Goldsmith's desire to fix the Terrorist Surveillance Program and not simply stop it).