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Madison's fears in the late eighteenth century, especially those concerning the Alien and Sedition Acts which were aimed at and primarily used against the Jeffersonian opposition, have been borne out more than once. Controversy arose during the Civil War when President Lincoln suspended the writ of habeas corpus, asking rhetorically whether all the laws but that one should go unenforced while the rebellion threatened the government's existence. 6

The tension between security and liberty was also apparent during World War I with the 1918 amendments to the Espionage Act and the "Red Scare" that followed the war in 1919-1920; again during World War II with the internment of Japanese-Americans and the military trial and execution of German saboteurs, including an American citizen; and during the Cold War with FBI and other surveillance of the civil rights movement and citizen dissenters. One of the chief concerns of citizens about national security powers remains that government officials will be tempted to use such powers not for the protection of the country but for their own political ends. These fears were realized in the mid-1970s when the Watergate scandal of 1972-1973 led to the revelations of secret government activities, some of them criminal and many of them illegal. Indeed one of the impeachment charges against President Nixon (voted out of the Judiciary Committee but never voted on by the House of Representatives because Nixon resigned) specifically alleged that the President had "engaged in conduct violating the constitutional rights of citizens ... and impairing the due and proper administration of justice ... by ... misusing the FBI, Secret Service, and other government employees by allowing their information to be used for purposes other than national security or the enforcement of law; and using campaign contributions and the CIA in attempt to sway the fair trial process." 7

Hearings before the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, known as the Church Committee after its chairman, Senator Frank Church of Idaho, revealed violations that extended well outside the White House to federal intelligence and law enforcement agencies. The committee's multi-volume report is essential reading on the potential risks to liberty from claims of national security necessity and secrecy.

The Church committee report is also essential to an understanding of the origins of much of our current legislative framework governing intelligence oversight. Before the mid-1970s, there was little law and there were few lawyers focused on rules governing secret national security activities, from domestic wiretapping to foreign covert activities around the world, to the deployment of US military forces overseas. That began to change with the post-Watergate and Church Committee laws, including the Foreign Intelligence Surveillance Act of 1978, 10 the Inspector General Act of 1978, 11 and the Intelligence Oversight Act of 1980. 12
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These acts are not without detractors who view them as unjustified encroachments on executive power. The Administration of President George W. Bush took the view that executive powers could trump statutory limits protecting individual rights, for example, relating to interrogation of wartime detainees and to surveillance powers, which were asserted to be essentially without limit during time of war. These views were reflected in legal opinions issued after September 11, 2001 by the Justice Department’s Office of Legal Counsel,13 although these opinions ceased to be controlling authority before the end of the Bush Administration.

The post-Watergate statutes have done much to enhance a culture of compliance with law within the federal bureaucracy, particularly including the defense and intelligence agencies. In government as in private organizations, culture matters. Without a deeply ingrained respect for legal compliance in our personnel cadres, any organization can subvert any statutory scheme. Making oversight functions effective is an essential and on-going task. In the view of one of us, that task must be calibrated so it does not unreasonably impede management functions.

Chief Justice Earl Warren observed what was at stake in ensuring the defense of the nation in the late 1960s, “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”14 Philip Bobbitt, a leading professor of law and strategy, has taken this view one step further, arguing that the preservation of liberties is a critical weapon against terror:

[W]e are beginning to appreciate that states of consent [democracies] are intimately connected to the protection of human rights—indeed, that protecting human rights is their reason for being—and that international institutions have a responsibility to protect persons from their own governments when these rights are grossly violated. We are beginning to see also that the security of democratic societies, the centrality of human rights, and the vitality of consensual international institutions are critical to combating terror. None can flourish in an atmosphere of terror, and each has a critical role in defeating this threat to governments that are based on consent.15

The tension between security and liberty cannot be resolved in the abstract. Indeed, some security measures may enhance liberty. Determining what policies best serve both security and liberty, and are constitutional and wise, can be answered only in specific circumstances by examining a particular dilemma and its particular resolution. Generalities about the relationship between national
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security and civil liberties at best only provide a framework for further investigation and a statement of principles to guide that investigation.

In selecting the readings that follow, we have chosen a combination of key sources that have stood the test of time and more recent work whose staying power remains to be tested. Guided by the view that readers need to understand the concrete national security policy choices made by the political branches, we include various national security strategy documents that rarely, if ever, find a place in this discussion. Believing that the study of past security risks and lapses is important, we include the Report of the 9/11 Commission.
ESSAYS

THE NEW NATIONAL SECURITY CANON

STEPHEN I. VLADeCK

Why have victims of post-September 11 governmental misconduct met with virtually no success thus far in pursuing damages claims arising out of the government's alleged abuses? One explanation is that these cases are nothing more than one piece of a larger puzzle in which fewer and fewer civil plaintiffs have been able to recover in any suit alleging official misconduct. After all, it is a familiar trope that the Supreme Court has shown increasing skepticism in recent years toward civil plaintiffs in damages suits against government officers. Complicating matters, because reasonable minds continue to disagree about the legality of the surveillance, detention, and treatment of terrorism suspects (and a host of other controversial measures) since September 11, different perspectives on the underlying legal questions will necessarily color our view of whether the absence of relief in these cases is a new—or troubling—development.

In this Essay, I aim to provide a deeper answer to this question by looking carefully at the evolution of four different general doctrines in federal courts jurisprudence that have figured prominently in national security civil suits over the past decade: the availability of Bivens remedies; federal common law defenses to state-law suits against government contractors; qualified immunity; and the political question doctrine. To determine whether the lack of recovery in post-September 11 civil litigation differs in kind or merely degree from that which is true more generally, I contrast the state of these doctrines in non-national security cases with how the same law has been applied in suits with national security over- or under-tones. As I conclude, closer inspection

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reveals fairly compelling evidence for the emergence of a new "national security canon," a body of rules unique to national security cases that, at least thus far, all cut against allowing relief in suits that might otherwise be able to proceed to judgment. Absent a change in direction, this trend will have two sets of consequences: First, national security policy will, in most cases, increasingly come to be an area over which the political branches exercise near-plenary control (thereby perpetuating, whether correctly or not, the argument that courts lack the institutional competence to resolve such claims). Second, as such, we may well come to understand the emergence of the national security canon over the past decade as another example of the "normalization of the exception"—the accommodation into existing law of practices and policies typically embraced only by virtue of their exigency and fleeting duration. As the national security canon becomes more deeply ingrained, so too the likelihood that it will expand into contexts other than those in which it has thus far been recognized.

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INTRODUCTION

As of May 2012, not a single damages judgment has been awarded in any of the dozens of lawsuits arising out of post-September 11 U.S. counterterrorism policies alleging violations of plaintiffs' individual rights.\(^1\) For some, this result simply testifies to the thoughtfulness and care with which the government has conducted the "war on terrorism"; it follows that there is no need for damages if no rights

\(^1\) Obviously, this figure does not take into account suits in which settlements were reached—a set that is certainly not empty. Nor does it include pending cases where the current posture supports recovery for the plaintiff. Rather, the question is simply whether any court has awarded damages in a challenge to a post-September 11 counterterrorism or other national security initiative. So far, the answer has been no. See Developments in the Law—Access to Courts, 122 HARV. L. REV. 1151, 1159 (2009) (describing how no torture cases against the United States have moved past summary judgment).
have actually been violated. For others, this outcome is a function of the legality of the government’s conduct and the novelty of the measures adopted after September 11—and the corresponding idea that, whether or not the government crossed the line, the law was not “clearly established” such that individual officers should be held liable for whatever transgressions may have occurred. Still, others take a more cynical view, seeing in this body of jurisprudence a systematic effort to create a form of functional impunity—a creation of new doctrinal barriers to relief that deny recovery even where extant precedent would otherwise appear to have supported it.

Assessing who has the better of this argument is a difficult endeavor. For starters, it is now a familiar trope that the Supreme Court has shown increasing hostility toward civil plaintiffs in most damages suits against government officers—and not just those implicating national security policies. Whatever fealty the Warren and early Burger Courts may have demonstrated toward suits challenging official action, it can hardly be gainsaid that the Rehnquist and Roberts Courts have systematically made it more difficult for civil plaintiffs to obtain damages in cases arising out of governmental misconduct. In that vein, the absence of meritorious damages claims arising out of counterterrorism initiatives may merely be part of a larger pattern in which fewer and fewer civil plaintiffs


3. See, e.g., Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083–84 (2011) (concluding that in order for a government officer to be liable in damages actions, his conduct must have violated “clearly established” law of which a reasonable officer in his position knew or should have known).

4. See, e.g., Elizabeth A. Wilson, “Damages or Nothing”, The Post-Boumediene Constitution and Compensation for Human Rights Violations After 9/11, 41 SETON HALL L. REV. 1491, 1492–93 (2011) (describing how the outcomes of many post-Boumediene cases have been determined solely by the impact of immigration law and not with reference to actual culpability).

5. See Andrew M. Siegel, The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 TEX. L. REV. 1097, 1106–07 (2006) (asserting that the current Court has a particular disdain for litigation and has “tightened the conditions under which successful litigants can recover damages or attorney’s fees” in suits against the government); see also Daniel J. Meltzer, The Supreme Court’s Judicial Passivity, 2002 SUP. CT. REV. 343, 356–62 (identifying a similar pattern); Judith Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 IND. L.J. 223, 224 (2003) (arguing that the Rehnquist Court was unwilling to create remedies without explicit congressional permission).

6. See Gary S. Gildin, The Supreme Court’s Legislative Agenda to Free Government From Accountability for Constitutional Deprivations, 114 PENN ST. L. REV. 1333, 1384 (2010) (reviewing the Roberts Court’s § 1983 jurisprudence and concluding that the current Court is likely to be hostile to litigants seeking liberalized remedies for victims of governmental wrongdoing).
have been able to recover in any suit alleging official misconduct. 7

In addition, there is no consensus as to the underlying legality—or lack thereof—of much of the challenged governmental conduct in national security cases. 8 So long as reasonable minds continue to disagree about the legality of the surveillance, detention, and treatment of terrorism suspects (and a host of other controversial measures) since September 11, it can hardly be surprising that different perspectives on the underlying legal questions will necessarily color our view of whether the absence of relief in these cases is a new—or troubling—development. 9

Whereas most of this debate has been couched in terms of generalizations, I aim in this Essay to illuminate the conversation with specifics—to look carefully at the evolution of four different general doctrines in federal courts jurisprudence that have figured prominently in national security civil suits over the past decade: the availability of Bivens remedies; federal common law defenses to state-law suits against government contractors; qualified immunity; and the political question doctrine. 10 To determine whether the lack of

7. Indeed, such reasoning extends to the Court's aggressive reinvigoration of state sovereign immunity, its reluctance to recognize implied statutory causes of action, its narrowing of the scope of federal rights that can be enforced via 42 U.S.C. § 1983, and so on. See Resnik, supra note 5, at 224 (arguing that the current Court has been unwilling to grant damages to civil plaintiffs in actions against the government absent an explicit congressional mandate).

8. To take just one example, there appears to still be disagreement about whether the torture of detainees at Abu Ghraib and elsewhere was in fact illegal. See, e.g., Arthur S. Brisbane, The Other Torture Debate, N.Y. Times, May 15, 2011, at WK5 (illustrating that many believed the interrogation methods used post-September 11 at Abu Ghraib and elsewhere did not amount to torture).

9. For a thoughtful take on the role of "hindsight bias" in these cases, see generally Peter Margulies, Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law, 96 Iowa L. Rev. 195 (2010), discussing "hindsight bias" in the context of encouraging officials' innovation through flexible approaches to damages claims.

10. This list will strike some as arbitrary. After all, one could easily also include the availability of Article III standing in suits challenging national security policies, see, e.g., Amnesty Int'l USA v. Clapper, 638 F.3d 118, 121-22 (2d Cir. 2011) (holding that petitioner does have Article III standing to challenge the constitutionality of the 2008 amendments to the Foreign Intelligence Surveillance Act of 1978), petition for cert. filed, No. 11-1025 (U.S. Feb. 17, 2012), pleading requirements under Rule 8 of the Federal Rules of Civil Procedure, see Ashcroft v. Iqbal, 556 U.S. 662, 665 (2009) (considering whether the Respondent's complaint failed to plead sufficient facts to state claim as required under Rule 8), or the state secrets privilege, see, e.g., Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc) (holding that the state secrets doctrine required the plaintiffs' challenge to the defendant's role in their extraordinary rendition be dismissed), cert. denied, 131 S. Ct. 2442 (2011). With regard to the first two, however, I do not believe there are clear examples of contemporary cases adopting "new" rules in national security cases. And with regard to the state secrets privilege, leaving aside the general oversaturation of quality scholarship the topic has already received, two full-length articles, in particular, have considered in detail whether post-September 11 developments have
recovery in post-September 11 civil litigation differs in kind or merely degree from that which is true more generally, I contrast the state of these doctrines in non-national security cases with how the same law has been applied in suits with national security over- or under-tones. 11

To that end, Part I situates the analysis by providing a capsule summary of the state of the canon with respect to each of these doctrines on September 10, 2001. In Part II, I turn to the key doctrinal developments since September 11 in each field. As Part II will establish, careful study of the relevant jurisprudence yields three significant, but not necessarily consistent, conclusions: First, in each of these four areas, there have been cases in which courts have recognized newfound "national security"-based reasons to foreclose recovery by plaintiffs. Second, some of the most profound obstacles to recovery have been articulated on more general terms, such that their application is not necessarily confined to challenges to counterterrorism policies. Third, virtually all of the national security-specific rules have been articulated by lower courts, with little more than tacit endorsement by the Supreme Court. In contrast, the Court has played a more direct role in identifying some of the more cross-cutting obstacles to recovery. Thus, although the emergence of a new national security canon has primarily been a project of the lower courts, the Supreme Court's more general constriction of civil remedies against government officers may well have emboldened, however indirectly, particularly aggressive doctrinal innovation at the circuit level. At the same time, the Court has steadfastly refused to address virtually any of the national security-specific doctrinal developments, however presented. 12

Finally, in the Conclusion, I turn to the normative implications of the trends identified in Part II. Although I suspect readers will react

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11. In that regard, this Essay builds off a shorter, earlier piece I wrote focusing specifically on the proliferation of amorphous "national security" concerns in Bivens litigation. See Stephen I. Vladeck, National Security and Bivens After Iqbal, 14 LEWIS & CLARK L. REV. 255, 257-58 (2010) (suggesting that Bivens remedies can, and should, play a meaningful role in national security cases because Bivens likely provides the sole means of redress for constitutional violations).

differently to the emergence of the new national security canon that Part II identifies, I anticipate two specific effects going forward: First, absent a change in direction, national security policy will, in most cases, increasingly come to be an area over which the political branches exercise near-plenary control (thereby perpetuating, whether correctly or not, the argument that courts lack the institutional competence to resolve such claims). Second, as such, we may well come to understand the emergence of the national security canon over the past decade as another example of the "normalization of the exception"—the accommodation into existing law of practices and policies typically embraced only by virtue of their exigency and fleeting duration.¹³

I. THE FEDERAL COURTS CANON ON SEPTEMBER 10, 2001

A. Bivens Remedies

The doctrinal evolution of Bivens remedies has been well- and often-traced.¹⁴ Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics was a 1971 decision in which the Supreme Court for the first time recognized that, in certain circumstances, the Constitution itself provides a cause of action for damages for constitutional violations by federal officers.¹⁵ Thus, in Bivens, the Court recognized a damages claim arising out of an alleged Fourth Amendment violation, holding that such remedies should be available unless: (1) Congress had displaced them with a comprehensive alternative;¹⁶ or (2) "special factors counseling hesitation" militated against relief.¹⁷ In that regard, Bivens filled a critical remedial gap, since no federal statute provided a general cause of action for obtaining damages for constitutional violations by federal—as opposed to state—officers.¹⁸

¹³. See, e.g., OREN CROSS & FIONNUALA NI AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 296 (2006) (arguing that the normalization phenomenon can cause the state to accept controversial emergency powers); cf. Harold D. Laswell, The Garrison State, 46 AM. J. SOC. 455, 477–548 (1941) (suggesting that such normalization is inevitable in the modern industrial state).

¹⁴. For one of the most comprehensive (and recent) examples, see James E. Pfander, The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, in FEDERAL COURTS STORIES 275, 295–96 (Vicki C. Jackson & Judith Resnik eds., 2010), observing that the Court's "unsteady" path in Bivens litigation has created substantial uncertainty about what Bivens litigants must prove to prevail.


¹⁶. Id. at 397.

¹⁷. Id. at 396–97.

¹⁸. At the time, the FTCA did not authorize suits arising out of intentional torts or claims not recognized as torts in the law of the state in which they accrued. See generally James E. Pfander & David Balinantis, Rethinking Bivens: Legitimacy and
Indeed, notwithstanding intervening amendments to the Federal Tort Claims Act (FTCA), there remains no such statute today. Although Bivens was somewhat controversial, the Court's first two follow-up decisions only expanded its scope. Thus, in Davis v. Passman, the Court extended Bivens to encompass a claim for sex-based discrimination in violation of the equal protection principles enmeshed within the Fifth Amendment's Due Process Clause. And in Carlson v. Green, the Court allowed a Bivens claim to proceed against a prison warden based on the claim that the warden had denied an inmate access to timely medical care in violation of the Eighth Amendment's ban on cruel and unusual punishments. Although the government argued in Green that the FTCA displaced Bivens in that case, Justice Brennan explained that Congress can only oust Bivens if it "provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective," which Congress had not so declared in the case of the FTCA.

In retrospect, Green was the high-water mark for Bivens remedies. In the 32 years since, the Court has not only declined to recognize any other constitutional provisions that can be enforced via Bivens, but it has shown an unwillingness to apply the three pro Bivens decisions

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19. In 1974, Congress amended the intentional tort exception to the FTCA to create liability for certain intentional torts for law enforcement officers. See Pub. L. No. 93-253, 88 Stat. 50 (1974) (codified as amended at 28 U.S.C. § 2680(h) (2006)). And in 1988, Congress in the Westfall Act created a comprehensive scheme for substituting the federal government in virtually all state-law tort suits against federal officers arising out of the scope of their employment. See Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b) (2006)). As Jim Pfander and David Baltmanis have argued, these statutes, the legislative history of both of which positively discussed Bivens, could be seen as providing at least congressional acquiescence in the Supreme Court's decision. Pfander & Baltmanis, supra note 18, at 131-34.


21. See Pfander, supra note 14, at 295-96 (recounting the Court's initial expansion of Bivens to encompass damages for Equal Protection Clause and Eighth Amendment violations).

22. 442 U.S. 228 (1979).

23. Id. at 230-31.


25. Id. at 16-18.

26. Id. at 17-18.

27. Id. at 18-19.

28. Id. at 19-20 (emphasis added).
to even the most minutely different facts. 29

The retrenchment took place simultaneously along two axes—the two exceptions Justice Brennan identified in Bivens itself. Thus, in a series of cases beginning in the 1980s, the Court held that various federal statutory schemes displaced Bivens relief, even though none of those schemes satisfied the requirement from Green that Congress have "explicitly declared [the relevant scheme] to be a substitute for recovery directly under the Constitution and viewed as equally effective." 30 Thus, Bush v. Lucas 31 refused to recognize a First Amendment retaliation claim arising out of the civil service, based on the existence of an internal administrative process under the Civil Service Reform Act in which the plaintiff's constitutional claims were "fully cognizable." 32 And the Court in Schweiker v. Chilicky 33 rejected Bivens relief in a claim alleging a due process violation in the processing of federal Social Security benefits, deferring to the complex scheme of administrative and judicial remedies provided by the Social Security Act. 34 Whether or not Congress in these cases had intended to displace Bivens, the decisions at least rested on the (however dubious) premise that Congress had indeed so provided. Moreover, "[t]o the extent that the logic of Bivens turned on the possibility that it was 'durable or nothing,' that concern was not as strongly implicated in cases where federal law did not force that choice." 35

The far more significant retrenchment of Bivens, though, took place through the other exception Justice Brennan identified—the existence of "special factors counseling hesitation" before courts should recognize a self-executing constitutional damages remedy. 36 At first, the Court's "special factors" jurisprudence focused on claims

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30. Green, 446 U.S. at 19–20 (emphasis added).
32. Id. at 385–86.
34. Id. at 419–20.
35. Vladeck, supra note 11, at 264.
36. In Bivens itself, Justice Brennan gave only two examples: United States v. Standard Oil Co., 332 U.S. 301, 316 (1947), in which the U.S. government was the plaintiff (and therefore could have created the liability it sought to enforce), and Wheelin v. Wheeler, 373 U.S. 647, 648 (1963), in which an employee of Congress was sued for allegedly exceeding his delegated authority—hardly a constitutional claim. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 408 U.S. 388, 396–97 (1972).
arising out of the military. Thus, in *Chappell v. Wallace,* handed down the same day as *Bush v. Lucas,* the Court focused on the unique nature of the military’s internal system of discipline as a “special factor” counseling against the recognition of a *Bivens* claim by enlisted personnel against their superior officers alleging racial discrimination (notwithstanding the application of *Bivens* to equal protection claims in *Davis v. Passman*). Four years later, the Court in *United States v. Stanley* concluded that there were “special factors” weighing against a *Bivens* remedy for an action brought by a serviceman claiming that he was secretly subjected to LSD as part of an Army experiment:

> The “special facto[r]” that “counsel[s] hesitation” is . . . the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate . . . . We hold that no *Bivens* remedy is available for injuries that “arise out of or are in the course of activity incident to service.”

As I have suggested before, both *Chappell* and *Stanley* concerned the hyper-specific issue of civil lawsuits arising out of military service, an area in which the courts had a record of according substantial deference to the political branches that pre-dated *Bivens* by decades. Thus, as with *Rush* and *Schmeiker,* these early decisions could be seen as relatively narrow carve-outs to an otherwise vibrant doctrine.

But the Court’s next two *Bivens* decisions sent quite the opposite message. In *FDIC v. Meyer,* the Court declined to recognize a *Bivens* remedy based on a due process claim against the Federal Savings and Loan Insurance Corporation, holding that “special factors” generally counseled against *Bivens* remedies against federal agencies. As Justice Thomas explained, “[i]f we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government.” Similarly, in *Correctional Services Corp. v. Mailesko,* decided just two months after the September 11 attacks, the Court

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38. *Id.* at 304.
40. *Id.* at 683–84 (alterations in original) (quoting *Bivens,* 403 U.S. at 596; *Feres v. United States,* 340 U.S. 135, 146 (1950)).
42. 510 U.S. 471 (1994).
43. See *Id.* at 485–86 (specifying that the damages remedies applied under *Bivens* would inappropriately affect federal fiscal policy if awarded against federal agencies).
44. *Id.* at 486.
refused to extend *Bivens* to a suit against the private operators of a federal halfway house, even though the underlying claim closely mirrored that which the Court had approved in *Green*.65 Without specifically explaining why "special factors" counseled hesitation, Chief Justice Rehnquist held that *Bivens* relief should only be recognized "to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct."66

Indeed, although it was decided shortly after September 11, *Malesko* helps drive home the state of *Bivens* jurisprudence at the outset of the war on terrorism: The Court had shown increasing skepticism toward recognizing "new" *Bivens* claims primarily by relying on the idea of "special factors"; but at the same time, the Court had never rejected *Bivens* relief when such a claim was the only means by which the plaintiff could vindicate a constitutional claim against a federal officer.67 Despite the objections of Justices Scalia and Thomas to the entire *Bivens* enterprise,68 the Court had quite carefully left open the possibility that, in a case where the choice was truly between "*Bivens* or nothing,"69 the Justices might choose the former.

### B. Contractor Preemption

Unlike *Bivens*, where significant pre-September 11 case law helped to illuminate the trend in the Supreme Court's approach, only one

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65. *Id.* at 63.
66. *Id.* at 70.
68. See *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . . As the Court points out, we have abandoned that power to invent 'implications' in the statutory field. There is even greater reason to abandon it in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress."). For a critique of Justice Scalia's analogy to the Court's implied statutory remedy jurisprudence, see Stephen I. Vladeck, *Bivens Remedies and the Myth of the 'Heady Days*', 8 U. ST. THOMAS L.J. 514 (2012).
69. See Pfander & Baltmanis, *supra* note 18, at 123 (contending that when *Bivens* claims are denied, most plaintiffs are unable to pursue state-law theories).
decision by the Supreme Court prior to 2001 specifically spoke to the question of “contractor preemption,” i.e., cases in which the federal government’s interests justified judicial recognition of a federal common law rule barring state-law claims against government contractors.51 That (controversial) case was the Court’s 1988 decision in Boyle v. United Technologies Corp.52

Boyle arose out of the crash of a military helicopter.53 The heirs of one of the decedents brought a state-law wrongful death action against the contractor responsible for designing the helicopter, alleging that a design flaw in the escape hatch prevented the decedent (who had survived the initial crash into the Atlantic Ocean) from escaping before he drowned.54

Writing for a 5-4 Court, Justice Scalia held that such a state-law claim was “displaced” by federal common law.55 At the outset, he emphasized case law holding that “obligations to and rights of the United States under its contracts are governed exclusively by federal law,”56 as is “the civil liability of federal officials for actions taken in the course of their duty.”57 Although Boyle involved a government contractor and not a federal employee, the Court still noted that in both instances the government’s interest in having the work completed remains constant.58 Thus, Justice Scalia explained that imposing liability on government contractors would be adverse to the interests of the United States because government contractors would respond by either: (1) raising procurement prices or (2) declining to follow design specifications.59

51. To be sure, there are other contexts in which federal interests have been held to justify the displacement via federal common law of state-law remedies, including cases in which the relevant considerations sounded in foreign policy. See, e.g., Am. Ins. Ass’n v. Garamendi, 530 U.S. 396, 397 (2001) (holding that a California statute requiring disclosure of certain World War II insurance policy information was preempted by foreign policy considerations). But Boyle and its progeny bespeak a unique form of preemption, as articulated below. See infra notes 53-55 and accompanying text.
53. Id. at 502.
54. See id. at 502-04 (summarizing the case’s background).
55. Indeed, the Court consciously appeared to distinguish in Boyle between “displacement” and “preemption” of state law. The latter occurs when positive federal law ousts state law by virtue of the Supremacy Clause; the former occurs when federal common law is the culprit. See, e.g., id. at 507-08 n.3 (noting explicitly that the Court is referring to the displacement of state law and not preemption); cf. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2554-55 (2011) (referring to the statutory “displacement” of federal common law).
56. Boyle, 487 U.S. at 504.
57. Id. at 505.
58. Id.
59. Id. at 507.
That federal interests were triggered, though, was not the end of the inquiry. Instead, Justice Scalia then explained that such interests justify the displacement of state law only when "a 'significant conflict' exists between an identifiable 'federal policy or interest' and the [operation] of state law," or the application of state law would 'frustrate specific objectives' of federal legislation. As he concluded, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.' . . . But conflict there must be."

Turning to the case at hand, Justice Scalia found the existence of precisely such a conflict, since the government contract imposed on the contractor a duty to install the escape hatch pursuant to the government's specifications while the plaintiff claimed the contractor had a conflicting duty to deviate from those specifications by including other escape hatch mechanisms. In other words, in an area of such strong federal concern, state-law claims should not be allowed to go forward when they present such a square conflict with existing (and presumptively valid) federal policy choices. This was especially so, Justice Scalia reasoned, because of the FTCA, which specifically exempts from suit claims arising out of a government officer's performance of a "discretionary function." Because "[w]e think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision," it was that much clearer that the strong federal interest not only counseled against state-law claims, but against any liability whatsoever.

The Supreme Court has not reconsidered (or extended) Boyle since it was decided. At least before September 11, however, lower courts had primarily understood Boyle as nothing more than an extension of the FTCA's "discretionary function" exception to a particular type of state-law tort suits against contractors, whether because it was a "derivative immunity" or a form of "federal common law preemption." In 2000, for example, the Fifth Circuit cited Boyle for the proposition that "[g]overnment contractor immunity is derived from the government's immunity from suit where the performance of

60. Id. (alteration in original) (citations omitted).
61. Id. at 507–08 (citations omitted).
62. Id. at 509.
63. See id. at 509–10.
64. Id. at 500–01.
65. Id. at 511.
a discretionary function is at issue."  

And in an earlier case, the Seventh Circuit described Boyle as holding that, "under certain circumstances, government contractors are shielded from state tort liability [only] for products manufactured for the Armed Forces of the United States."  

Indeed, pre-September 11 cases relying on Boyle invariably involved relatively minor variations on the underlying theme: plaintiffs seeking to use state law to recover against contractors for claims that would have been barred under the discretionary function exception if brought directly against the responsible government officers. Virtually all of these suits arose in the products liability context.  

C. The Political Question Doctrine  

Whereas Bivens and Boyle both go to the availability vel non of a cause of action arising out of governmental (or government contractor) misconduct, there are also a number of defenses in suits challenging official action, including the political question doctrine. Although it has its origins in Marbury v. Madison, in contemporary terms, the political question doctrine is shorthand for the recognition that there are some disputes ill-suited for judicial resolution, either because the Constitution commits their resolution to other branches or because the claims lack "judicially manageable standards."  

Despite the amount of attention the doctrine receives and its prominence in the lower courts, "[t]he political question doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed," as Judge Kavanaugh of  

68. Chief Justice Rehnquist explained Boyle as standing for the proposition that, "[w]here the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense."  
69. As noted above, I do not consider the state secrets privilege in this Essay.  
70. Supra note 10 (noting the parameters of this Essay as well as providing helpful citations to more complete discussions of the state secrets privilege before and after September 11).  
71. 5 U.S. (1 Cranch) 137, 170–71 (1809) ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.").  
72. These are two of the six factors articulated in Baker v. Carr, 369 U.S. 186, 217 (1962). Over time, they have come to be seen as the two dominant considerations. See, e.g., El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 856, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment) (noting that, over the past fifty years, the Court has exclusively relied on these two Baker factors in applying the political question doctrine), cert. denied, 131 S. Ct. 997 (2011).
the United States Court of Appeals for the District of Columbia Circuit recently explained. Indeed, only twice in the past half-century has the Court relied on the existence of a "textually demonstrable commitment" to another branch to dismiss a case on political question grounds, and the cases involving the absence of "judicially manageable standards" have all fallen within the same subject-matter: challenges to "partisan" gerrymandering.

Thus, in Nixon v. United States, decided in 1993, the Court threw out a suit by former federal judge Walter Nixon seeking to contest the means by which he was removed from office. After being impeached by the House of Representatives, Nixon was tried before a special Senate committee, which was empowered to "receive evidence and take testimony" before reporting back to the full body, which then proceeded to reach a verdict pursuant to the constitutionally prescribed procedure. Nixon claimed that the proceedings before the committee were inconsistent with the constitutional requirement that he be tried by the Senate because the full Senate was barred from participating in the evidentiary hearings. For a unanimous Court (although some Justices offered different rationales), Chief Justice Rehnquist held Nixon's claims to be barred by the political question doctrine. According to Rehnquist, the text of the Constitution (which invests the Senate with the "sole" power to "try")

72. El-Shefa, 607 F.3d at 856 (Kavanaugh, J., concurring in the judgment).
73. See Nixon v. United States, 506 U.S. 224, 228–29 (1993) (concluding that exclusive power to adjudicate the merits of impeachment proceedings against federal judges is textually committed to the Senate by virtue of Art. I, § 3, cl. 6); Gilligan v. Morgan, 415 U.S. 1, 10 (1974) (explaining that surveillance over the weaponry, training, and standing orders of the National Guard are responsibilities vested exclusively in the executive and legislative branches).
76. Id. at 228.
77. Id. at 226–28.
78. Id. at 228.
79. Justices White and Souter each wrote separate opinions concurring only in the judgment. See id. at 239–40 (White, J., concurring in the judgment) (reasoning that the Court did not have jurisdiction to ensure that the Senate "tried" impeached officials, but that the Senate had met that standard in the instant case); id. at 252–54 (Souter, J., concurring in the judgment) (agreeing that judicial interference in Senate impeachment trials would lead to impermissible consequences, but suggesting that review might nevertheless be available in cases of egregious misconduct by the Senate).
80. Id. at 231–33 (majority opinion).
cases of impeachment) categorically precluded judicial second-guessing of the means by which such a trial was conducted.

As for cases raising a lack of judicially manageable standards, a good (albeit post-September 11) example is the Court’s 2004 decision in Vieth v. Jubelirer. There, voters challenged the constitutionality of Pennsylvania’s redistricting plan following the 2000 census, arguing that, because of the Pennsylvania legislature’s partisan gerrymandering, the new district maps violated the “one person, one vote” rule of Reynolds v. Sims. In 1986, the Supreme Court had concluded in Davis v. Bandemer that the Equal Protection Clause of the Fourteenth Amendment empowered federal judges to circumscribe partisan gerrymandering. Writing for a four-Justice plurality in Vieth, however, Justice Scalia emphasized the extent to which no remotely manageable standard had emerged in the eighteen intervening years that could draw the line between “good politics and bad politics.” Put more bluntly, no one had been able to articulate a sufficiently clear set of standards to explain whether—and to what extent—district lines drawn for one political party’s partisan advantage would violate Article I, Article IV, or the Equal Protection Clause.

The political significance of the decision aside, the critical point about Vieth for present purposes is the extent to which that prong of the political question doctrine has only surfaced in contemporary disputes along similar lines. In ascertaining the scope of the political question doctrine in national security cases after September 11, it is the first of the Baker v. Carr factors, and not the second, that will prove critical.

D. Qualified Immunity

Finally, perhaps the most commonly invoked defense in suits challenging official action is officer immunity. Although some
officers are entitled to "absolute immunity" when acting in particular capacities, the doctrine of far more relevance here is "qualified immunity," which provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In enunciating the current standard in Harlow v. Fitzgerald in 1982, the Court famously disclaimed reliance upon subjective considerations (such as malice or bad faith), opting instead for an objective inquiry that could be resolved in most cases on the pleadings, or at worst, at summary judgment.

The qualified immunity test itself has undergone only modest revisions since Harlow. In Anderson v. Creighton, for example, the Court clarified that:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Thus, most of the doctrinal innovation with regard to qualified immunity has centered not on whether the right of the plaintiff in question was "clearly established," but whether the unlawfulness of the officer's conduct was "apparent." A subtle distinction in theory, it has proved rather significant in practice.

Separate from the standard to apply in qualified immunity cases is the means by which qualified immunity claims are resolved.

93. Thus, qualified immunity "is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 529 (1985). To that end, the denial of a qualified immunity defense is subject to immediate interlocutory appeal under the collateral order doctrine. Id. at 524-30.
95. Id. at 640.
96. See, e.g., Hope v. Peizer, 556 U.S. 720, 729 (2002) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (citation omitted) (internal quotation marks omitted)).
97. See, e.g., Henry v. Purnell, 652 F.3d 524, 534-35 (4th Cir.) (en banc) (rejecting officer's argument that he was entitled to qualified immunity because it was not clearly established that shooting a fleeing nontreating misdemeanor would be unlawful under the circumstances), cert. denied, 132 S. Ct. 781 (2011).
Typically, a qualified immunity defense presents two analytically distinct questions: (1) whether the officer’s conduct was unlawful (the “legality” question); and (2) whether the unlawfulness should have been apparent in light of clearly established law (the “liability” question). Although an officer cannot be liable unless his conduct was also unlawful, the same is not true in reverse. As such, courts might be tempted to assume, without deciding, that the conduct was unlawful in cases in which the law was not yet clearly established, since the defendant prevails regardless of the legality of his conduct.98 Such an approach, however, would potentially thwart the development of forward-looking law, since courts would not be “establishing” any legal rules going forward.99

To ward against that possibility, the Supreme Court in June 2001 mandated a particular “order-of-battle” in qualified immunity cases, holding in Saucier v. Katz100 that lower courts should answer the legality question first in all cases, including those in which the defendant will nevertheless prevail on liability.101 As Justice Kennedy explained for the majority:

This is the process for the law’s elaboration from case to case . . . . The law might be deprived of this explanation were a court: simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.102

Thus, qualified immunity on the eve of September 11 had two salient characteristics. First, under Anderson, the central question was whether the unlawfulness of the defendant’s conduct (and not the plaintiff’s underlying right) was apparent in light of “clearly established” law. Second, under the so-called “Saucier sequence,” even in cases in which that standard could not be met, courts still had a duty to answer the legality question—and to thereby articulate forward-looking principles of constitutional law to govern future cases, even if they were ultimately irrelevant to the disposition of the case sub judice.

98. See, e.g., County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (recounting that the District Court granted summary judgment on a qualified immunity theory by assuming, without deciding, that a substantive due process violation had taken place, but then holding that the law was not established with sufficient clarity to justify § 1983 liability).
99. See id. (stating that an immunity determination alone would not create any standards for future cases).
101. Id. at 206.
102. Id. at 201.
II. THE FEDERAL COURTS CANON AFTER SEPTEMBER 11, 2001

It seems silly to ask whether the terrorist attacks of September 11 and the government’s various responses thereto have had an impact on the federal courts. Quite obviously, much has changed over the past eleven years. But there is a critical difference in this context between correlation and causation. Thus, in this Part, I revisit the four doctrinal areas surveyed in Part I, and examine some of the critical developments in each since September 11. As this Part will demonstrate, some of the innovations of the past decade seem to have very little to do with national security concerns, whereas others are entirely a creature of such concerns.

A. Bivens Remedies

The Supreme Court has handed down two significant Bivens decisions since September 11. In the first, Wilkie v. Robbins, the Court rejected a Bivens claim arising out of a series of run-ins between a ranch owner and U.S. Bureau of Land Management officials over an easement, which led to charges of harassment and retaliation. The Court’s analysis identified “a special factor counseling hesitation quite unlike any we have recognized before.” The Court harped on the “difficulty” that would result from finding a new Bivens remedy to redress Robbins’s individual and distinct injuries collectively, because “a general provision for tort-like liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of Bivens actions.” Although the special factor identified in Wilkie was new, the Court again seized on the likelihood that each of Robbins’s individual claims likely had an adequate remedy under federal or state law.


104. Bivens has also been at issue in two additional cases. In Hartman v. Moore, 547 U.S. 250 (2006), the Court addressed the elements a plaintiff must plead in order to make out a retaliatory prosecution Bivens claim without addressing the availability of a Bivens remedy in any more detail. Id. at 251. And in Hu v. Castillo, 130 S. Ct. 1845 (2010), the Court held that the Public Health Service Act, 42 U.S.C. § 238(a), provides a statutory alternative to Bivens claims against Public Health Service employees arising out of their official duties. 130 S. Ct. at 1853. Neither decision broke new ground in Bivens jurisprudence.


106. Id. at 561–62.

107. Id. at 577 (Ginsburg, J., concurring in part and dissenting in part).

108. Id. at 562 (majority opinion).

109. See id. (asserting that legislation would be better suited to remedy
Finally, just this Term, the Court in *Minneci v. Pollard* superseded *Bivens*; rejecting a claim against an individual employee working for a private contractor operating a federal prison on the ground that adequate remedies were almost certainly available under state law. Although the claim closely mirrored that which the Court had approved in *Green*, the Court held that “Pollard’s Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an ‘alternative, existing process’ capable of protecting the constitutional interests at stake.”

In both *Wilkie* and *Pollard*, then, the Court continued the trend of declining to recognize “new” *Bivens* claims, albeit on fairly narrow terms in each instance. *Wilkie* recognized a “new” “special factor” in the form of the potential floodgates of recognizing a zealously-based property-rights *Bivens* claim; *Pollard* suggested that adequate state-law remedies may by themselves be sufficient to displace *Bivens* at least where the defendant is a private contractor operating under color of state law, rather than a government officer.

In contrast to the Supreme Court’s cautious skepticism, three different circuit courts have recognized a new obstacle to *Bivens* claims in national security cases—a “special factor” based on the sensitivity of the government’s national security policies. Properly understood, such a “special factor” both (1) unduly incorporates other doctrinal concerns into cause-of-action analysis and (2) would therefore bar any and all recovery to the relevant plaintiffs, going a critical step beyond anything the Supreme Court has ever sanctioned.

The first decision to reach this result was the D.C. Circuit’s holding in *Rasul v. Myers* (Rasul II). *Rasul II* was a damages suit brought by non-citizens formerly detained as “enemy combatants” at Guantánamo Bay, Cuba, alleging a series of violations of their statutory, constitutional, and treaty-based rights in their detention.

government overreach than judicially created factors).
111. See id. at 623–24 (stating that state tort law can be effective in preventing constitutional violations).
112. Id. at 623. As Carlos Vázquez and I argue in a forthcoming article, *Pollard* may thereby refocus *Bivens* analysis on the relationship between federal and state remedies—as opposed to the recognition of one to the exclusion of the other. See Vázquez & Vladec, supra note 48.
113. See Wilkie, 551 U.S. at 561 (contemplating the danger of a “‘too much’ standard”).
114. See Pollard, 132 S. Ct. at 621.
and treatment while in custody. Initially, the D.C. Circuit rejected the plaintiffs' claims on qualified immunity grounds, holding that because the detainees had no legally cognizable rights, it necessarily followed that the defendants' alleged misconduct could not have been unlawful. After the Supreme Court held in Boumediene v. Bush that the Constitution's Suspension Clause "has full effect" at Guantánamo, the Court "GVR'd" Rasul for reconsideration in light of that holding. On remand, the Court of Appeals reaffirmed its qualified immunity holding, but added a footnote identifying an alternative, equally fatal bar to recovery—one borrowed from Judge Janice Rogers Brown's concurrence in the original panel opinion—"federal courts cannot fashion a Bivens action when 'special factors' counsel against doing so. The danger of obstructing U.S. national security policy is one such factor." Perhaps because of that cryptic footnote, the Supreme Court denied certiorari the second time around.

Just over six months after the D.C. Circuit's decision in Rasul II, the en banc Second Circuit reached a similarly themed result in Arar v.

116. See id. at 528. The lead plaintiff in Rasul II was also the lead plaintiff in Rasul v. Bush, 542 U.S. 466 (2004) (holding that the federal courts have statutory jurisdiction over habeas petitions brought by non-citizens detained at Guantánamo).
119. Id. at 771.
120. A "GVR" order is a summary order from the Supreme Court granting certiorari, vacating the decision below, and remanding for reconsideration in light of an intervening development—usually a new decision by the Court on a related issue. See generally Lawrence v. Chater, 516 U.S. 163, 168-66 (1996) (describing GVRs and deciding that issuing such orders is within the Court's discretionary certiorari jurisdiction).
124. Rasul II, 563 F.3d at 532 n.5. Specifically, the footnote relied on the D.C. Circuit's 1985 decision in Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985). There, then-Judge Scalia had declined to recognize a Bivens claim arising out of the Iran-Contra affair, arguing that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." Id. at 209. Even Sanchez-Espinoza, though, turned on the fact that the allegedly unconstitutional conduct took place on foreign soil, and not, as in Rasul, on the grounds of a U.S. military base over which no other country was sovereign. Id. at 206-07.
Ashcroft. Arar, a dual Canadian-Syrian citizen, was arrested by U.S. authorities at JFK International Airport in September 2002 because he was (apparently wrongfully) suspected of involvement with al Qaeda. Arar was subsequently detained (and allegedly abused) for thirteen days before he was subjected to "extraordinary rendition" to Syria, where he remained in custody for just under one year. Arar subsequently brought a damages suit against the U.S. officers responsible for his initial detention, his treatment while in U.S. custody, and his subsequent transfer to Syria.

In affirming the district court's dismissal of Arar's suit, the en banc Second Circuit held that his Bivens claims were unavailing because a special factor counseled hesitation—to wit, "rendition." As Chief Judge Jacobs wrote for a 7-4 en banc majority, "in the context of extraordinary rendition, [a Bivens] action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation." Noting that "[h]esitation is 'counseled' whenever thoughtful discretion would pause even to consider," the Court of Appeals concluded that damages suits seeking remedies against officials who were implementing extraordinary rendition policies would impermissibly entrench the courts in deciding the validity of these important national security policy questions. Suggesting in addition that the classified nature of much of the evidence was also a reason to hesitate, the Court of Appeals declined to recognize a Bivens claim.

Unlike Rasul II, the Arar decision provoked a series of dissents. Judge Sack, in particular, wrote to emphasize the extent to which "heeding 'special factors' relating to secrecy and security is a form of double counting inasmuch as those interests are fully protected by the state-secrets privilege." Judge Calabresi agreed, noting that the court already had appropriate methods for protecting secrets.

126. 585 F.3d 559 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010).
127. Id. at 563.
128. Id. at 565-66.
129. See id. at 567 (detailing the complaint that Arar filed against federal officials for harms resulting from his detention and removal to Syria).
130. Id. at 563.
131. Id. at 574.
132. Id.
133. Id. at 575.
134. Id. at 576.
135. Id. at 580.
136. Id. at 583 (Sack, J., concurring in part and dissenting in part).
137. See id. at 635 (Calabresi, J., dissenting) (agreeing with Judge Sack's observation that the denial of a Bivens remedy on national security grounds is
Thus, he suggested that rejecting *Bivens* suits merely “because state secrets might be revealed is a bit like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures.”\(^{138}\) Notwithstanding the force of the double-counting concern, or the more general point that incorporating case-specific concerns about defenses into analysis of the general availability of a cause of action dangerously conflates longstanding bodies of precedent,\(^{139}\) the Supreme Court denied certiorari, with no dissents.\(^{140}\)

Whereas *Rasul II* and *Arar* both involved non-citizen plaintiffs whose constitutional rights were unclear, at best, the third case in the trilogy is quite the opposite. In *Lebron v. Rumsfeld*,\(^{141}\) the Fourth Circuit upheld the dismissal of a *Bivens* suit on behalf of Jose Padilla, a U.S. citizen challenging the legality of his long-term extrajudicial detention within the United States as an “enemy combatant” and his treatment therein.\(^{142}\) Writing for a unanimous panel, Judge Wilkinson emphasized the “special factors” that, in the court’s view, counseled hesitation:

> First, the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government.\(^{143}\)

In so holding, Judge Wilkinson provided perhaps the most detailed analytical underpinnings to the reasoning first deployed in *Rasul II* and *Arar*; the amorphous special factor identified in the two earlier cases is, in fact, a series of considerations generally reflecting the constitutional and practical difficulties courts face whenever they are

\(^{138}\) *Id.* at 635 (footnote omitted); *see also id.* at 657 (“These, then, are the majority’s determinative ‘special factors’: a mix of risks that are amply addressed by the state secrets doctrine and policy concerns that inhere in all *Bivens* actions and in innumerable every-day tort actions as well.”).

\(^{139}\) *See, e.g., Viadeck, supra* note 11, at 275–77 (discussing use of various government defenses to articulate a special factor counseling hesitation).

\(^{140}\) 130 S. Ct. 5409 (2010). Presumably, because she was on the Second Circuit throughout most of the en banc proceedings, Justice Sotomayor did not participate. *See id.* (noting that Justice Sotomayor did not take part in considering the petition for certiorari).

\(^{141}\) 670 F.3d 540 (4th Cir. 2012).

\(^{142}\) *Id.* at 548.

\(^{143}\) *Id.*
asked to review “military affairs,” including the alleged abuse of citizens by the military within the territorial United States.\textsuperscript{14} If this is a “special factor” counseling hesitation against inferring a \textit{Bivens} remedy, one is hard-pressed to imagine any challenge to the conduct of national security policy, whether here or overseas, that could survive such a test.

Moreover, to whatever extent the courts have identified other novel special factors in cases less-directly implicating national security and foreign affairs over the past decade, one can immediately identify two material differences. First, in the national security context, the “special factors” analysis seizes on the general inappropriateness of \textit{any} judicial interference with governmental action in the relevant arena.\textsuperscript{146} Second, and related, the \textit{Bivens} decisions in the national security cases are therefore unlike \textit{Wilkie, Pollard}, and other lower-court holdings; in \textit{Rasul II, Arar}, and \textit{Lebron}, it really was “\textit{Bivens} or nothing.”\textsuperscript{146} Each time, the Court of Appeals chose the latter.\textsuperscript{147}

\textbf{B. Contractor Preemption}

Whereas the cases discussed above go to the difficulty in identifying a cause of action against federal officers for post-September 11 civil liberties abuses, the same difficulty presumably should not have hampered attempts to hold government contractors liable in cases in which they allegedly violated plaintiffs’ rights while acting under color of federal law. Indeed, as \textit{Pollard} held in rejecting a \textit{Bivens} claim, it is the more normal course to use state—rather than

\textsuperscript{144} Id. at 548-50.
\textsuperscript{145} See, e.g., \textit{id.} at 549 (“Further supporting judicial deference is the Constitution’s parallel commitment of command responsibility in national security and military affairs to the President as Commander in Chief.”).
\textsuperscript{146} See \textit{id.} at 552-56 (refusing to consider a \textit{Bivens} claim where interests of other branches of government would be adversely affected); \textit{Arar v. Ashcroft}, 585 F.3d 559, 580-81 (2d Cir. 2009) (en banc) (rejecting a \textit{Bivens} claim where the court determined that the merits of the counterterrorism policy at issue should be left to Congress), \textit{cert. denied}, 130 S. Ct. 3409 (2010); \textit{Rasul II}, 565 F.3d 527, 552 n.5 (D.C. Cir.) (per curiam) (denying a \textit{Bivens} claim because no liability should be available), \textit{cert. denied}, 130 S. Ct. 1015 (2009).
\textsuperscript{147} The one exception to this pattern thus far was the Seventh Circuit’s decision in \textit{Vance v. Rumsfeld}, 653 F.3d 591 (7th Cir. 2011), \textit{reh’g en banc} granted, Nos. 10-1687, 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011), in which the Court of Appeals held that a \textit{Bivens} remedy was available—and that qualified immunity did not bar—a claim by U.S. citizens arising out of their allegedly unlawful detention and mistreatment by U.S. agents while they were working for a private Israeli security firm. \textit{Id.} at 594. The Seventh Circuit has since granted the government’s petition for rehearing en banc, and heard argument on February 8, 2013. \textit{SEVENTH CIRCUIT COURT OF APPEALS}, http://www.ca7.uscourts.gov/tdocs/docs.txt?caseno=10-1687&submit=show&dt&yr=10&num=1687 (last visited May 3, 2012).
federal—law to measure the liability of private contractors. 148

Nevertheless, when victims of torture at Abu Ghraib brought a civil suit against the defense contractors allegedly responsible for at least some of the abuse, a divided panel of the D.C. Circuit held in Saleh v. Titan Corp. 149 that the plaintiffs' state-law claims were barred under a Boyle-like theory, even though the lawsuit did not implicate a "discretionary function." 150 Invoking, instead, the distinct "combatant activities" exception to the FTCA, 151 Judge Silberman, writing for the panel majority, explained that "the [Boyle] court looked to the FTCA exceptions to the waiver of sovereign immunity [more generally] to determine that the conflict was significant and to measure the boundaries of the conflict." 152

Thus, the Court of Appeals could look to the combatant activities exception to identify the requisite "conflict" between state tort suits and federal policy. 153 Relying on a Ninth Circuit decision that held that "the combatant activities exception was designed 'to recognize that during wartime encounters[,] no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action,'" 154 the D.C. Circuit held that the same should be true for private military contractors. 155 "[I]t is the imposition per se of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield," 156 Judge Silberman explained. Thus, the D.C. Circuit articulated the principle of "battlefield preemption," i.e., that "the federal government occupies the field when it comes to warfare, and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty." 157

Judge Garland sharply dissented, identifying two central flaws in the majority's analysis. First, as he explained:

Boyle has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both. Hence, these cases are not "within the area where the policy

150. Id. at 6.
151. See 28 U.S.C. § 2680(j) (2006) (exempting from liability "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").
152. Id.
153. Id. at 6 & n.3.
154. See id. at 7 (alteration in original) (quoting Kooi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992)).
155. Id. at 7–8.
156. Id. at 7.
157. Id. (citing Boyle v. United Techs. Corp., 487 U.S. 500, 500 (1988)).
of the 'discretionary function' would be frustrated," and they present no "significant conflict with federal interests. Preemption is therefore not justified under Boyle.  

Second, and as significantly, Boyle’s analysis centered both textually and analytically on the FTCA’s discretionary function exception—and not on the general idea that preemption could be derived from any or all of the FTCA’s statutory exceptions. Otherwise, as Judge Garland suggested, “there is no reason to stop there. The FTCA’s exceptions are not limited to discretionary functions and combatant activities . . . . Once we depart from the limiting principle of Boyle, it is hard to tell where to draw the line.” Nonetheless, despite the unusual (and strident) dissent from Judge Garland, along with a surprisingly equivocal amicus brief from the U.S. government respecting certiorari, the Supreme Court denied certiorari in Saleh.  

Perhaps emboldened by the denial of certiorari in Saleh, the Fourth Circuit subsequently relied heavily on the D.C. Circuit’s analysis in throwing out another pair of state-law tort suits also arising out of Abu Ghraib. Thus, after holding in Al-Quraishi v. L-3 Services, Inc. that rejection of a Boyle-like defense was subject to an immediate interlocutory appeal under the collateral order doctrine, a divided panel of the Court of Appeals followed Saleh in Al Shimari v. CACI International, Inc. After extensively recounting the D.C. Circuit’s analysis, Judge Niemeyer held that “[t]he uniquely federal interest in conducting and controlling the conduct of war, including intelligence-gathering activities within military prisons, thus is simply incompatible with state tort liability in that context.” As if the point were not sufficiently clear, Judge Niemeyer concluded with the

158. Id. at 23 (Garland, J., dissenting) (footnote omitted) (citations omitted).
159. See id. One might also object that the FTCA exception is not for all military activities, but rather for “combatant” activities. So construed, it may not even be clear that, had the same claims been brought under the FTCA against U.S. servicemembers, the exception would have barred relief.
160. Id.
161. In a brief invited by the Supreme Court, the Obama Administration took fairly substantial issue with much of the D.C. Circuit’s analysis, but nevertheless recommended that certiorari be denied given the narrowness of the claims and the lack of a circuit split. See Brief for the United States as Amicus Curiae, Saleh v. Titan Corp., 131 S. Ct. 9055 (2011) (No. 09-1313), 2011 WL 2134985, at *11–13.
162. 131 S. Ct. at 9055.
164. Id. at 205.
166. Id. at 419–20.
observation that "[w]hat we hold is that conduct carried out during war and the effects of that conduct are, for the most part, not properly the subject of judicial evaluation," and then penned a separate concurrence suggesting that, even if Saleh was wrongly decided, the political question doctrine would bar recovery. Judge King, who dissented from the recognition of interlocutory appellate jurisdiction in Al-Quraishi, dissented on the merits in Al Shimari, largely reprising Judge Garland’s dissent from Saleh. The plaintiffs then sought rehearing en banc, this time with the support of the Obama Administration. And on May 11, 2012, the en banc Fourth Circuit held by an 11–3 vote that the Court of Appeals in fact lacked interlocutory appellate jurisdiction over the two district court decisions denying the contractors’ motions to dismiss, remanding to allow the district court to proceed to discovery and summary judgment on the merits. At the same time, the Court of Appeals expressed no view on the merits (including the Boyle preemption question)—and several of the judges in the majority hinted in concurring opinions that they were sympathetic to the contractors’ defenses.

What is telling about both Saleh and the (now vacated) panel decision in Al Shimari is how dramatically they differ from other applications of Boyle in the circuit courts, even after September 11. As with the pre-September 11 jurisprudence surveyed above, other post-September 11 cases have stuck to the “narrow” understanding of Boyle—as only applying in cases implicating the “discretionary function” exception at most, and even then, only comfortably in cases arising out of products liability. Thus, whereas the Bivens jurisprudence reveals the recognition of a new kind of “special factor” against a backdrop in which more and more special factors have been

167. Id. at 420.
168. See id. at 420–25 (Niemeyer, J., concurring separately).
169. Id. at 427–36 (King, J., dissenting).
172. See, e.g., id. at *10 n.14.
173. See id. at *13 (Duncan, J., concurring). But see id. at *14 (Wynn, J., concurring) (emphasizing that the jurisdictional dismissal intimated no opinion whatsoever on the merits).
174. See, e.g., In re Katrina Canal Breaches Litig., 620 F.3d 455, 460–61 (5th Cir. 2010) (looking only at whether Boyle’s three conditions are met in the product liability context).
identified, the Boyle jurisprudence reflects a categorical and fundamental expansion of a previously circumscribed doctrinal rule, grounded in, but hardly confined to, amorphous national security considerations.

C. The Political Question Doctrine

As Judge Niemeyer’s concurrence in the original panel decision in Al Shimari suggested, the political question doctrine has also become an increasingly prominent defense in post-September 11 national security cases. And yet, because the political question doctrine has always fared better in the lower courts than in the Supreme Court, it is more difficult to ascertain whether, in this context, the uptick in political question cases can be ascribed to unique national security considerations, or rather as part of a more general pattern.

Consider in this regard the litigation in El-Shifa Pharmaceutical Industries Co. v. United States. After the U.S. government destroyed a Sudanese pharmaceutical plant in 1998, the government claimed in various statements that it had neutralized a potential chemical weapons facility. The owner of the plant, who maintained his innocence, brought two separate suits: a takings claim arising out of the destruction of his property, and an FTCA claim premised on the allegedly defamatory nature of the government’s public statements. In 2004, the Federal Circuit dismissed the takings claim, relying on the political question doctrine. Because the “enemy property” doctrine would bar recovery if the plant was in fact a chemical weapons factory, the Court of Appeals reasoned that “the

175. See supra Part II.A (exploring the Court’s skepticism toward new Bivens remedies as demonstrated by its recognition of new “special factors”).
176. See Al Shimari, 653 F.3d at 420–25 (Niemeyer, J., concurring separately) (applying the Baker factors to the conduct of military contractors in Iraq).
177. Compare Boumediene v. Bush, 553 U.S. 725, 744 (rejecting the government’s argument that questions of sovereignty are subject to the political question doctrine), with El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842–43 (D.C. Cir. 2010) (en banc) (dismissing suit on political question doctrine grounds because “[a] plaintiff may not . . . clear the political question bar simply by ‘recasting foreign policy and national security questions in tort terms’” (quoting Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005))), cert denied, 131 S. Ct. 997 (2011), and Schroder v. Bush, 263 F.3d 1169, 1173 (10th Cir. 2001) (affirming application of political question doctrine to dismiss farmers’ suit requesting that the government maintain certain favorable market conditions).
179. Id. at 838.
180. Id. at 839–40.
181. Id. at 839.
182. El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1546, 1555–56 (Fed. Cir. 2004); see also Stephen I. Vladeck, Enemy Aliens, Enemy Property, and Access to the Courts,
Constitution, in its text and by its structure, commits to the President the power to make extraterritorial enemy property designations such as the one made regarding the appellants' Plant. In other words, the Constitution committed to the President the unreviewable right to be wrong in targeting overseas enemy property. The Supreme Court denied certiorari.

As for the defamation claim, the en banc D.C. Circuit took a somewhat more nuanced approach in 2010, but nevertheless rejected it under the political question doctrine. As Judge Griffith explained in writing for the en banc majority, "[t]he political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion." Thus,

[t]he case at hand involves the decision to launch a military strike abroad . . . . The law-of-nations claim asks the court to decide whether the United States' attack on the plant was "mistaken and not justified." The defamation claim similarly requires us to determine the factual validity of the government's stated reasons for the strike. If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and the plaintiffs ask us to do just that.

Like the Federal Circuit, then, the D.C. Circuit concluded that the Constitution contains a textually demonstrable commitment of such decision-making power to the political branches. And as in the Federal Circuit case, the Supreme Court denied certiorari.

But whether such analysis is convincing in the context of U.S. military operations overseas, lower courts have also relied on the political question doctrine to bar claims against contractors. For example, the same day as the panel decided Al-Quraishi and Al Shimari, the Fourth Circuit relied on the political question doctrine to throw out a U.S. servicemember's claim that he was injured due to the negligence of a government contractor. Writing for a

183. El-Shifa, 378 F.3d at 1307.
185. See El-Shifa, 607 F.3d at 858.
186. Id. at 842.
187. Id. at 844.
unanimous panel (at least as to the judgment) in *Taylor v. Kellogg Brown & Root Services, Inc.* Judge King held that such a claim could not go forward because "an analysis of [the defendant's] contributory negligence defense would 'invariably require the Court to decide whether . . . the Marines made a reasonable decision' in seeking to install the wiring box to add another electric generator at the Tank Ramp"—without which the plaintiff would not have been injured by the contractor." That is to say, the political question doctrine barred adjudication of claims against contractors, at least where the contractor was operating under the military's control and where "national defense interests were closely intertwined with the military's decisions governing [the contractor's] conduct."

In so holding, the Fourth Circuit relied heavily on an earlier decision by the Eleventh Circuit rejecting an analogous claim against a government contractor by the wife of a servicemember who was seriously injured in an accident in Iraq caused by an employee. As the Court of Appeals explained in *Carmichael v. Kellogg, Brown & Root Services, Inc.*:

> Because the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, it would be impossible to make any determination regarding [the defendant's'] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. Yet it is precisely this kind of scrutiny that the political question doctrine forbids.

To be fair, the decisions in both *Taylor* and *Carmichael* went out of their way carefully to explain why the specific claims at issue *would* necessarily bring "military judgments and decisions under searching judicial scrutiny." Indeed, the Fifth Circuit reversed and remanded the dismissal of analogous cases on the ground that it was *not* clear whether that would inevitably be true. Thus, these political question cases turn on remarkably narrow terms—claims against government contractors arising out of foreign military operations

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2011).
190. *Id.*
191. *Id.* at 411–12.
192. *See id.* at 411 (assessing the extent to which the government contractor was under the military's control).
193. *Id.*
194. *Id.* at 410.
196. *Id.* at 1982–83.
197. *Id.* at 1983.
198. *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008).
that necessarily implicate particular military decisions.

At the same time, it is difficult to identify a Supreme Court decision endorsing the underlying principle that the political question doctrine categorically precludes judicial second-guessing of sensitive military judgments and decisions, either directly or insofar as they affect the conduct of military contractors. To the contrary, legion arc decisions emphasizing that not all cases involving the military are barred by the political question doctrine. Therefore, even if the reasoning of these political question decisions is specific and their application limited, they still reflect a fundamental misconception of the underlying principles. Perhaps El-Shifa came closest to a convincing explanation—that the concern is with judicial interference with the actual conduct of military operations overseas. But if that is the review that the political question doctrine forbids, the Taylor and Carnichael courts appear to have skipped a few steps by failing to explain in detail how specific combat decisions would necessarily be called into question simply by allowing civil litigation to go forward.

Finally, it is worth emphasizing that similar carelessness concerning the political question doctrine can be found in non-national security decisions by post-September 11 circuit courts, as well. In Zivotofsky v. Secretary of State, a divided panel of the D.C. Circuit threw out a lawsuit in which U.S. citizen parents sought to enforce their statutory right to have the passport of their child born in Jerusalem read “Jerusalem, Israel.” Because the statute conflicts with executive branch policy, which does not recognize Jerusalem as the capital of Israel, the State Department refused to comply. The parents promptly sued, only to have their claims thrown out. Writing for the panel majority in the D.C. Circuit, Judge Griffith held that the parents’ claims were foreclosed by the political question doctrine because the President’s “recognition” power was exclusive, and therefore unreviewable. Concurring in the judgment, Judge Edwards agreed that the President’s recognition power was exclusive,

199. See, e.g., id. at 562 (determining that the political question doctrine did not bar suit against a government contractor, despite its military affiliations, because the plaintiffs pled a plausible set of facts regarding fraud and misrepresentation that would not require the court to question the Army’s role).
202. See id. at 1228–30 (explaining why the political question doctrine extended to the Executive’s power to recognize foreign governments).
203. Id. at 1231–32.
but concluded that, as a result, the statute in question was necessarily unconstitutional—not that the courts lacked the power to say so.\textsuperscript{204}

On certiorari, the Supreme Court agreed with Judge Edwards, ruling 8-1 that the political question doctrine did not bar the Zivotofsky's claim.\textsuperscript{205} As Chief Justice Roberts explained for the majority, "determining the constitutionality of § 214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution.... Either way [that question is answered], the political question doctrine is not implicated."\textsuperscript{206} In an important and incisive concurrence, Justice Sotomayor agreed, elaborating that "it is not whether the evidence upon which litigants rely is common to judicial consideration that determines whether a case lacks judicially discoverable and manageable standards. Rather, it is whether that evidence in fact provides a court a basis to adjudicate meaningfully the issue with which it is presented. The answer will almost always be yes...."

Other examples of lower courts zealously applying the political question doctrine after September 11 abound. But because they run the gamut,\textsuperscript{207} it is difficult to draw conclusions from them other than that, as was true before September 11, the lower courts seem far more positively disposed toward the political question doctrine than the Supreme Court. To that end, one might dismiss the newfound uses of the doctrine in national security cases as further examples of the deeper underlying trend. Yet, the increasingly uncritical view that claims implicating almost any military judgments thereby trigger the political question doctrine may suggest that, as with the 	extit{Broens} and contractor preemption cases noted above, these decisions constitute a new, though modest, departure from extant precedent.

\textbf{D. Qualified Immunity}

I have saved the most voluminous body of law for last. Even assuming the existence of a cause of action and the lack of categorical defenses to recovery in civil suits arising out of

\textsuperscript{204} See \textit{id.} at 1233–45 (Edwards, J., concurring) (establishing that the political question doctrine was inapplicable given the "commonplace" issues of statutory construction).
\textsuperscript{205} Zivotofsky \textit{ex rel.} Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).
\textsuperscript{206} \textit{Id.} at 1428.
\textsuperscript{207} \textit{Id.} at 1435 (Sotomayor, J., concurring in part and concurring in the judgment).
\textsuperscript{208} See, e.g., Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938 (5th Cir.) (dismissing a class action brought by gasoline retailers alleging that national oil production companies were engaged in a price-fixing conspiracy on ground that claims were barred by political question doctrine), \textit{cert. denied}, 132 S. Ct. 566 (2011).
counterterrorism or other national security policies, a plaintiff must still demonstrate not just that his rights were violated, but that the unlawfulness of the defendant's conduct should have been apparent in light of clearly established law.\(^9\) As noted above, this was the D.C. Circuit's basis for rejecting liability in *Rasul I*,\(^{10}\) and one of its two bases for doing so in *Rasul II*.\(^{11}\) In *Ashcroft v. al-Kidd*,\(^{12}\) the one damages suit challenging post-September 11 counterterrorism policies in which the Supreme Court has reached the merits, qualified immunity was the ultimate ground for denying review.\(^{13}\) In light of the novelty of the threat the country has faced and the policies the government has undertaken to face that threat, it can hardly be surprising that a defense that forecloses liability in cases where the law was unsettled has played a particularly central role in post-September 11 litigation.

Still, two developments in qualified immunity jurisprudence bear mention. First, in a case having nothing to do with national security, the Supreme Court in *Pearson v. Callahan*\(^{14}\) unanimously disposed of the *Saucier* sequence in light of practical, procedural, and substantive concerns raised by lower court judges.\(^{15}\) As Justice Alito wrote for the Court:

> [W]hile the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.\(^{16}\)

Although the Court still stressed that the *Saucier* sequence "is often beneficial,"\(^{17}\) such reasoning presupposes that lower courts will waste their time reaching holdings that are (1) constitutionally grounded and (2) no longer necessary to the result. Not surprisingly, such opinions have been few and far between since *Pearson*.

As a result, because qualified immunity will preclude recovery in

\(^{209}\) See Anderson v. Creighton, 483 U.S. 635, 640 (1987) (explaining that it is not enough that an action has previously been held to be unlawful; rather, the unlawfulness must be apparent).
\(^{210}\) See supra note 117 and accompanying text.
\(^{211}\) See supra notes 115–116 and accompanying text.
\(^{212}\) 131 S. Ct. 2074 (2011).
\(^{213}\) See id. at 2085–85 (discussing Ashcroft's qualified immunity from a potential Fourth Amendment violation).
\(^{214}\) 555 U.S. 223 (2009).
\(^{215}\) Id. at 234–35.
\(^{216}\) Id. at 256.
\(^{217}\) Id.
cases raising novel challenges to governmental counterterrorism policies (whether because the policy is novel or because the plaintiff’s legal claim is), the practical effect of Pearson is that such novelty will seldom be disturbed. For example, suppose a plaintiff challenged a novel governmental policy as applied to him at T₁. At T₁, the relevant court decides that the defendant is entitled to qualified immunity because the unlawfulness of his conduct was not apparent in light of clearly established law. Under Saucier, that holding would come alongside judicial articulation of the relevant law going forward (including perhaps a holding that the policy is unlawful). Under Pearson it likely will not. If a different plaintiff is now subjected to the same treatment at T₂, qualified immunity will again bar recovery at T₂.

In contrast, if the court at T₁ had articulated a forward-looking rule as Saucier required, then the law would have been clearly established at T₂ such that the plaintiff should now be able to recover at T₂.²¹⁸

A good example of this problem in practice is Jose Padilla’s Bivens suit against John Yoo, alleging that the opinions Yoo wrote while serving in the Justice Department’s Office of Legal Counsel directly contributed to Padilla’s mistreatment while in military custody. In May 2012, the Ninth Circuit dismissed Padilla’s suit based on its conclusion that Yoo was entitled to qualified immunity.²¹⁹ In particular, the Ninth Circuit so held because (1) it was not clearly established from 2001 to 2003 that “cruel, inhuman, or degrading treatment” (CIDT) shocks the conscience; and (2) it was similarly not clearly established during the same time period whether the specific mistreatment Padilla alleged was torture (which did clearly shock the conscience) or CIDT. And yet, despite its detailed analysis of the state of the law from 2001 to 2003, and its apparent recognition of how close a case Padilla’s was, the panel pretermitted its analysis after holding that the relevant law was not clearly established between 2001 and 2003, expressly invoking Pearson as justifying its decision to set no precedent going forward about the state of the law today.²²⁰

Of course, this problem is hardly confined to national security cases.²²¹ As the Padilla litigation demonstrates, however, what


²²⁰. Id. at *15 n.16 ("We have discretion to decide which of the two prongs of qualified immunity analysis to address first. Here, we consider only the second prong." (citation omitted)).

²²¹. See, e.g., Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (stating he "would end the failed
separates national security litigation in this context is the absence of other opportunities for the articulation of forward-looking constitutional principles. Whereas ordinary First, Fourth, Fifth, and Eighth Amendment claims can arise in a number of contexts other than suits for retrospective relief (e.g., in suits for prospective relief or as defenses to criminal prosecutions), there are a vanishingly small set of challenges to national security policies that will be justiciable in those contexts. Thus, the general rule articulated in Pearson will wreak particular havoc in the national security context, potentially freezing (or, at a minimum, substantially slowing) the development of constitutional law with regard to the surveillance, detention, and treatment of terrorism suspects.

The second development is less about the order of battle than the substance of qualified immunity analysis. Although courts have historically applied qualified immunity with relative evenhandedness to government officers at all levels of service, a provocative concurrence by Justice Kennedy in the al-Kidd case suggests that this might perhaps be incorrect in national security litigation. As he there explained:

A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States . . . [or] guess at when a relatively small set of appellate precedents have established a binding legal rule. If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security . . . . Nationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.

To be sure, Justice Kennedy was writing only for himself in this passage. Still, if this is more than just a fleeting observation, it might suggest that unique national security concerns do play (and perhaps

\textit{Saucier experiment now} in a high school freedom of speech case).

222. See, e.g., Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 419 (4th Cir. 2011) (suggesting that the very purposes of tort law conflict with the pursuit of warfare), vacated, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

223. See Vladeck, \textit{supra} note 11, at 275–78.


225. \textit{Id.} at 2087 (citations omitted).
have been playing) a role in judicial assessment of qualified immunity. At a minimum, Justice Kennedy's concurrence suggests that at least some jurists are far more willing to find no liability in national security cases than they would in non-national security cases raising comparable constitutional claims. Unless such holdings were based on the conclusion that the substantive law was different in the national security context, it would be hard to see how they could be consistent with the broader understanding of immunity doctrine.

**CONCLUSION: TAKING STOCK OF THE NEW NATIONAL SECURITY CANON**

Whatever its full contours, the above analysis has hopefully been persuasive as to the existence of a new national security canon—a body of jurisprudence in which distinct (and sometimes poorly articulated) national security concerns have prompted courts to disfavor relief, even when either: (1) relief should otherwise have been available; or (2) other settled (and topically neutral) doctrines would likely have foreclosed relief in any event. Thus, where federal officer defendants are concerned, courts have relied heavily on the absence of *Bivens* remedies, with qualified immunity as an available fallback. And where the defendants are private contractors operating under color of federal law, the *Bivens* cases have focused on the availability of state-law remedies, whereas the state-law tort cases have focused on the unique federal interest justifying preemption. Ultimately, given the heads-we-win, tails-you-lose quality to this body of decision-making, it is difficult to rebut the conclusion that, at least at the circuit level, more is going on than just faithful application of existing precedent. The question then becomes what to make of this development.

In the short-term, this jurisprudential pattern suggests that victims of governmental overreaching in the conduct of national security policy will primarily have to turn to the political branches for redress, since retrospective judicial remedies will likely be unavailing. Such a development might put only that much more pressure on the growing body of scholarship suggesting that, especially during national security crises, meaningful checks and balances can be found internally within the Executive Branch. As significantly, such case law might eventually force the Supreme Court to reassert its role in these cases in a manner that gives these newfound doctrinal accommodations a far narrower compass than they might otherwise enjoy. Indeed, given that most of the case law identified in Part II arises out of a minority of jurisdictions (the Second, Fourth,
Eleventh, and D.C. Circuits), one response might be that these circuits are merely outliers whose extreme views have distorted the state of play.

But if what in fact has taken place over the last decade is a testament to a longer-term pattern, one that neither the political branches nor the Supreme Court disrupt in the near future, then we must confront a more alarming possibility: that as these "national security"-based exceptions increasingly become the rule in contemporary civil litigation against government officers—whether with regard to new "special factors" under Bivens, new bases for contractor preemption under Boyle, proliferation of the political question doctrine, or even more expansive reliance upon the qualified immunity defense—the line between the unique national security justifications giving rise to these cases and ordinary civil litigation will increasingly blur. Thus, wherever one comes down on the virtues and vices of this new national security canon, perhaps the most important point to take away is the need to carefully cabin its scope. Otherwise, exceptions articulated in the guise of such unique fact patterns could serve more generally to prevent civil liability for government misconduct and to thereby dilute the effectiveness of judicial review as a deterrent for any and all unlawful government action—not just those actions undertaken in ostensibly in defense of the nation.
Elective affinities?
Human rights and humanitarian law

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Abstract  
Complementarity and mutual influence inform the interaction between international humanitarian law and international human rights law in most cases. In some cases when there is contradiction between the two bodies of law, the more specific norm takes precedence (lex specialis). The author analyses the question of in which situations either body of law is more specific. She also considers the procedural dimension of this interplay, in particular concerning the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing.

Traditionally, international human rights law (IHRL)¹ and international humanitarian law (IHL)² are two distinct bodies of law with different subject matters and different roots, and for a long time they evolved without much mutual influence. This has changed. A brief overview of historical developments and of recent cases shows that – whatever the understanding of governments in 1864, 1907 or 1949 – there is today no question that human rights law comes to complement humanitarian law in situations of armed conflict. In international jurisprudence, case law since the report of the European Commission of Human Rights on northern Cyprus after the Turkish invasion¹ and continuing through to later national and

* The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC. Some parts of this article are reproduced from "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Israel Law Review*, Vol. 40 (2007), pp. 310-55.
international jurisprudence on the Palestinian territories, Iraq, the Democratic Republic of the Congo or Chechnya leaves no doubt as to the applicability of human rights to situations of armed conflict.

In short, these regimes overlap, but as they were not necessarily meant to do so originally, one must ask how they can be reconciled and harmonized. As M. Bothe writes,

"[T]riggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue-related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes."

How human rights and humanitarian law can apply coherently in situations of armed conflict is still a matter of discussion. Jurisprudence over the last few years has changed the picture considerably and, to a certain extent, the law is constantly evolving. Jurisprudence on concrete cases will, hopefully, provide more clarity over time. So far, some areas are becoming clearer and in other areas patterns are emerging but are not consolidated.

This article seeks to provide some parameters which can inform the interplay between human rights and humanitarian law in a given situation. Indeed, two main concepts should govern their interaction: complementarity and mutual influence of the respective norms in most cases, and in some cases precedence of the more specific norm (lex specialis) when there is contradiction between the two bodies of law. The question is: in which situations is either body of law the more specific?

Lastly, the procedural dimension will be considered, for that is possibly where the interplay between human rights law and humanitarian law has its most practical effect: what are the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing?

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1 In the following, "international human rights law", "human rights law" and "human rights" are used interchangeably.
2 In the following "international humanitarian law", "humanitarian law" and "law of armed conflict" are used interchangeably.

The full article can be found at: [http://www.icrc.org/eng/assets/files/other/icrc-871-droge1.pdf](http://www.icrc.org/eng/assets/files/other/icrc-871-droge1.pdf)
Losing the Forest for the Trees:  
Syria, Law and the Pragmatics of Conflict Recognition

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In a war zone, some buildings are obvious targets – command centers, weapons depots, enemy hideouts – and some are not, like schools, hospitals, media centers. But in the battle for Syria, where rules of war do not apply and where civilians are facing a savage massacre, the house that served as a makeshift press center in the rebel district of Bab Amr is ground zero. Destroying that target would go a long way toward allowing the regime of Bashar Assad to flatten the entire enclave without the whole world watching.¹

The world has watched for over a year as President Bashar al-Assad’s armed forces have employed unrestrained and overwhelming combat power against the most recent uprising of the Arab Spring. What began as tens of thousands of unarmed protesters marching in the face of bullets and artillery shells has turned into a seemingly unending struggle between the regime’s opponents – protesters, dissident army units, and other fighters – and the military forces loyal to the regime. The unavoidable conclusion resulting from reports emanating from Syria is that the government’s tactic of choice has been to indiscriminately and relentlessly attack entire towns, villages and cities in an attempt to terrorize opponents and thereby repress the uprising once and for all.

Massive human suffering associated with heavy-handed government response to internal dissident threats is nothing new; indeed, images such as those coming from Syria are notoriously reminiscent of many previous “internal” armed conflicts. From the Spanish Civil War to Sierra Leone to Rwanda to Sudan, internal wars have showcased the most heinous acts humans can commit. The brutality and human suffering associated with these conflicts spurred one of the most important evolutions in international law

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during the twentieth century: the extension of international humanitarian regulation into this realm of sovereign authority. Since the advent of the 1949 Geneva Conventions, the international community has steadily expanded and reinforced the application of the law of armed conflict ("LOAC") to situations of internal armed violence to regulate state and opposition conduct for the clear and imperative purpose of mitigating the suffering inevitably associated with these situations, especially suffering inflicted on innocent civilians and opposition forces who have been rendered hors de combat. Today, it is simply axiomatic that the LOAC regulates the conduct of hostilities and the protection of persons during all armed conflicts, whether inter or intra-state.

As important as this development has been for limiting the suffering associated with war, it is equally axiomatic that the LOAC plays no role absent a situation that rises to the level of armed conflict. Accordingly, the increasingly robust package of international humanitarian protections the law mandates is not triggered if the facts on the ground do not support an objective fact-based determination of armed conflict. And, because of its treaty foundation and the relatively recent role of international criminal jurisprudence assessing when this law applies, the meaning of armed conflict has become increasingly legalistic. Indeed, this shift in emphasis from practical and pragmatic factual assessment to a legalistic "test" is reflected in what many today apply as an "elements" test: unless certain proposed elements are independently satisfied, a situation cannot be designated an armed conflict, even when the totality of the facts and circumstances cry out for international humanitarian legal regulation. The unfortunate effect of this evolution from practical to legal is that the international community, figuratively speaking, seems incapable of seeing the humanitarian forest for the trees.

The current situation in Syria holds the potential to become a pivotal moment in the development of the law of conflict recognition. The ongoing brutality reminds the world of the importance of extending international humanitarian regulation into the realm of non-international armed hostilities; however, the very chaos produced by those hostilities reveals critical fault lines in the current "elements" approach to determining the existence of an armed conflict. From almost the very inception of the government response to the Syrian opposition, most people, if asked to describe what is happening in
Syria, would have used terms such as war, conflict, hostilities, or something comparable. Indeed, it is almost incomprehensible that those caught up in the chaos and violence - government soldiers, dissident fighters, innocent civilians, journalists, foreign observers - would seriously question the assertion that they were involved in a "war". And yet the international legal discourse evinced a clear reluctance to acknowledge the existence of armed conflict until the legalistic elements test was apparently objectively satisfied, in the summer of 2012, at least fifteen months after the violence erupted. Prior to this point in time, the international community spoke of massive human rights violations, repression, even massacres - but not war or armed conflict. This reluctance highlights a clear disparity between the object and purpose of the LOAC and the increasingly legalized and formalistic interpretation of the law's triggering provisions in relation to non-international hostilities. This is especially discouraging in light of the motivation for adopting the armed conflict trigger: mitigate the impact of technical legal formulas when determining the applicability of humanitarian protections.

Before 1949 and the drafting of the Geneva Conventions, international law contained no positive law applicable to internal conflicts, and as these conflicts were perceived as occurring within the zone of state sovereignty, minimal authority existed for the applicability of customary regulatory norms. The inclusion of Common Article 3 in those Conventions, which imposed limited but critically important standards of conduct on participants in internal conflicts, was revolutionary. This unprecedented intrusion into state sovereignty was motivated by the recognition that the brutality associated with internal conflict necessitated the imposition of international obligation to respect, at a

\(^2\) International Committee of the Red Cross, Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting, July 17, 2012, http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm ("The ICRC concludes that there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country (including, but not limited to, Homs, Idlib and Hama). Thus, hostilities between these parties wherever they may occur in Syria are subject to the rules of international humanitarian law.").


\(^4\) ICRC, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 19-23 (Oscar M. Uhler & Henri Coursier eds., 1958) [hereinafter GC III COMMENTARY].

\(^5\) EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 32 (Cambridge Univ. Press 2008) ("Civil conflicts were generally thought to fall within the reserved domain of each state. The state was free to decide on the means to restore peace and order."). See also MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.1.2 (2004) [hereinafter U.K. MANUAL].
bare minimum, fundamental humanitarian principles at the core of the laws and customs of war. The need for respect for these principles – focused principally on protecting individuals who never took or are no longer taking an active role in hostilities – was equally logical regardless of whether the conflict was internal or inter-state in nature. Accordingly, Common Article 3 reflected a simple premise: armed conflict, whether internal or international, triggers international legal regulation. As the states that adopted the 1949 Conventions understood so well, any other approach would leave the protection of individuals detrimentally impacted by the brutality of internal armed violence to the whims of the state, a situation already considered untenable by 1949.

In 1949, the drafters of the Geneva Conventions sought to have the law apply as broadly as possible to conflicts occurring between states and non-state entities in order to maximize its effectiveness and reach. In 1994, the first case before the International Criminal Tribunal for the former Yugoslavia ("ICTY") set forth a comprehensive definition of armed conflict, specifically defining non-international armed conflict as “protracted armed violence between a state and an organized armed group or between two or more organized armed groups.” At the time, the Tribunal emphasized again the need for a broad and comprehensive application of the LOAC in order to fulfill the object and purpose of the law. Over time, the two key factors that the Tribunal identified – the intensity of the fighting and the organization of the parties – have morphed into a highly technical test for the definition of non-international armed conflict, a test ostensibly requiring independent satisfaction of both of these elements before a situation of armed conflict may properly be recognized. This “elements test”, which has gained substantial momentum in international legal discourse, requires satisfaction of each element as an

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6 ICRC, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE CIVILIAN PERSONS IN TIME OF WAR 26, 44 (Oscar M. Uhler & Henri Coursier eds., 1958) [hereinafter GC IV COMMENTARY].
7 Id., at 26.
8 LA HAYE, supra note 5, at 38 ("The Spanish Civil War and its catalogue of violations made states aware of the necessity to adopt some treaty norms dealing with means and methods of warfare in civil wars, but real developments were not possible until after the Second World War."). See also Historical Atlas of the Twentieth Century, http://users.eols.com/mwhite2820century.image #FAQ, noting that the estimated number of people killed in civil wars during the inter-war years are: 18,800,000- Russian Civil War (1918-21); 3,000,000- Chaco War (Paraguay and Bolivia) (1932-35); 2,500,000- Chinese Civil War (1945-49); 365,000- Spanish Civil War (1936-39).
9 GC IV COMMENTARY, supra note 6 at 36.
10 Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Oct. 2, 1995).
independent requirement, instead of understanding them as factors in a totality assessment. This development undermines the original objective of Common Article 3. Focusing on the events in Syria, this article critiques how what was originally conceived as an analytical framework morphed into an overly legalistic “elements” test for the recognition of the existence of non-international conflict, and how this evolution actually undermines the original purpose of the non-international armed conflict concept.

The impact of this strict “elements test” was apparent in an early report by the United Nations Commission of Inquiry for Syria. In stating that the situation in Syria was not an armed conflict, the Commission of Inquiry explained that the opposition parties in Syria were not sufficiently organized to satisfy this test.\(^\text{11}\) The effect was that the world witnessed a retrograde of international humanitarian efficacy: Syria appeared objectively to be a lawless conflict like those that inspired the adoption of Common Article 3; one in which the regime employed its full arsenal of combat capability to shell entire cities and neighborhoods at will, block the provision of humanitarian assistance, and target journalists and medical personnel directly. The LOAC is specifically designed to address exactly this type of situation. Core LOAC principles developed over time to mitigate the suffering inherent in such widespread and intense hostilities. Human rights law, which applies in the absence of an armed conflict, simply does not contemplate such massive uses of military power and therefore does not contain, for example, an obligation for states to allow access for humanitarian relief organizations or a prohibition on targeting medical personnel. Nor is the international criminal accountability regime associated with human rights law nearly as effective as the law of armed conflict in addressing humanitarian abuses.

Syria is therefore a symbolic and painful reminder of why the drafters of the Conventions recognized a need to distinguish internal disturbances – generating a peacetime law enforcement response – from armed conflict.\(^\text{12}\) Although Common Article 3 addresses only humanitarian protections and not the means and methods of warfare,

\(^\text{12}\) Int'l Comm. of the Red Cross, Commentary on the Additional Protocols to the Geneva Conventions 1354-1355 (1977) [hereinafter Additional Protocols Commentary].
inherent in the dividing line it establishes was a recognition that these protections are essential to offset the humanitarian consequences attendant with the employment of the state’s combat capabilities to repress an internal threat. Quite simply, Common Article 3 was a recognition that states need no “test” to decide to employ a heavy-handed military response to internal challenges. Instead, what was needed was an international standard to ensure that when such force is unleashed, the participants in the hostilities become bound to respect the most fundamental norms of humanitarian protection.

Indeed, one of the most fundamental differences between peacetime and wartime is the authority to employ deadly force. During war, armed forces employ lethal force against enemy personnel and objects as a first resort. In contrast, the peacetime authority to use force – regulated by international human rights principles – restricts lethal force to a measure of last resort permitted only based on individualized threat determinations. In theory, therefore, the absence of armed conflict means that governments are bound by the more restrictive parameters of international human rights law, which would therefore provide greater protection to civilians from government violence. Reality, however, demonstrates that the essential dividing line is not between the application of human rights law and the LOAC, but between the LOAC and no law at all. As highlighted by the opening quote, the primary concern today for Syrians is not “peacetime vs. wartime”, but “wartime vs. totally unrestrained brutality”. Marking this dividing line and establishing a pragmatic trigger for application of the LOAC’s regulatory framework to balance military needs and humanitarian protections was the primary objective of Common Article 3 and the subsequent evolution of the law regulating non-international armed conflict, and perhaps its most important contribution to humanitarian interests. Syria reinforces exactly why this is so and why the strict “elements test” that has evolved over the past two decades detracts from the law’s applicability precisely when it is most needed.

In the first section, this article will analyze the object and purpose of the LOAC with respect to non-international armed conflicts and will highlight the goals of the

drafters of the Geneva Conventions in establishing a pragmatic triggering mechanism for the application of the law. In particular, this section will demonstrate why a broad conception of non-international conflict is essential to contain the brutality historically endemic during such conflicts and why the nature of the government response to an internal challenge must also be a key factor in assessing the situation. This analysis highlights and helps recall what the framers of Common Article 3 had in mind when they created this extraordinary treaty provision.

The second section will trace the evolution of non-international armed conflict "recognition", specifically focusing on the Prosecutor v. Tadic opinion and how that opinion evolved into an "elements test" through subsequent ICTY and other jurisprudence. The rigidity of this evolving test fails to effectuate the underlying objective of conflict identification, especially in the internal hostilities context. The story of conflict recognition – or lack thereof – in Syria provides a compelling example of the consequences of this rigidity. Finally, the third section demonstrates how a totality of the circumstances approach better serves core LOAC objectives of humanitarian protection. Rather than inflexible independent requirements, the Tadic factors should serve as a conceptual guidepost for a totality of the circumstances assessment of the existence of non-international conflict and how to distinguish these situations from lower level types of violence that do not trigger the law of armed conflict, such as riots and internal disturbances. In support of this argument, an analogy to U.S. constitutional criminal jurisprudence is offered as an intriguing insight into the contrasting impact of these two approaches to conflict identification.

The object and purpose of the law forms a key framework for defining intensity and organization, for understanding how they relate to each other and combine to manifest an armed conflict, and for recognizing how other factors, such as the government’s response, affect our perception of intensity and organization. Together, these layers of analysis demonstrate the need for a conceptual – rather than technical – framework guided by the object and purpose of the law. The current discourse on Syria highlights the dangers of allowing an overly-technical "test" to override – and undermine – logic, with the obvious deleterious impact on human life. A more flexible totality of the
circumstances approach to conflict identification – one that relies heavily on the Tadic factors but utilizes them to guide a much more pragmatic factual assessment - will contribute to fulfilling the humanitarian goals so central to the original inclusion of Common Article 3 in the 1949 Conventions.

I. Why LOAC Regulates Non-International Armed Conflicts

In the aftermath of World War II, the international community aimed to enhance the humanitarian protections for war victims by revising the Geneva Conventions.\(^{14}\) Three Geneva Conventions that had been in force during the war were updated, and one entirely new Convention was created. The states that came together for this important revision process shared a collective motivation: close the numerous gaps and loopholes exposed during the cataclysmic events of World War II in order to better achieve the humanitarian objectives of international law.\(^{15}\) These efforts culminated in the four 1949 Geneva Conventions, each of which addressed the plight of a distinct category war victims (the wounded and sick in the field, the wounded, sick, and shipwrecked at sea, prisoners of war, and civilians).\(^{16}\) These four treaties have since earned the distinct status of universal ratification, and unquestionably form the very foundation of international humanitarian law.\(^{17}\)

Of the many lessons learned in the “battle laboratory” of twentieth century conflicts culminating with World War II – lessons that inspired the revisions to the Conventions – two were especially significant. First, human suffering associated with armed hostilities, or de facto war, is not limited to conflicts between states, but is often even more pervasive during civil, or non-international, wars. Second, without a clear and

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\(^{14}\) Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906; Convention Relative to the Treatment of Prisoners of War, 27 July 1929.

\(^{15}\) GC IV COMMENTARY, supra note 6 at 3-6.


\(^{17}\) J.-M. HENCKAERTS AND L. DOWSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 3 Vols. xv (Cambridge Univ. Press 2005)
pragmatic trigger for application of treaty provisions developed to provide humanitarian protection to war victims, even the most comprehensive treaty regime is functionally meaningless.\textsuperscript{18}

Each of these lessons reflected the delta between de facto war and de jure war. While it may seem axiomatic that international legal regulation of war is applicable to any situation that manifests the obvious indicia of "war" – armed hostilities between belligerent groups seeking to impose their will on each other – in reality no such pragmatic synchronization existed prior to 1949. Civil wars were not considered "wars" in the international legal sense because of the absence of an inter-state contest.\textsuperscript{19} Accordingly, the law developed to regulate war was inapplicable to these intra-state, or internal hostilities. This was in large measure a consequence of the dormancy of the historically effective concept of belligerency, a concept that extended international legal regulation to belligerent parties in civil war.\textsuperscript{20} In such situations, belligerent recognition of a dissident group resulted in the imposition of international rights and obligations as if the entity were a state. However, the recognition of belligerent status fell victim to an increasingly bi-polar world, resulting in the politicization of what had previously been a predominant de facto doctrine. Failing to acknowledge belligerent status resulted in a troubling lacuna in international legal regulation of large-scale internal conflicts, such as the one in Spain that claimed upwards of 500,000 lives.\textsuperscript{21} Conflicts such as the Spanish Civil War unquestionably satisfied any pragmatic definition of "war" – widespread and intense hostilities between belligerent groups. However, the political hobbling of the doctrine of belligerency coupled with the absence of an internationally defined and binding standard for determining compulsory applicability of the law of war (a term that

\textsuperscript{18} GC III COMMENTARY, supra note 4 at 19-20..
\textsuperscript{19} OPPENHEIM, L. OPPENHEIM'S INTERNATIONAL LAW §§74-5 (Hersch Lauterpacht ed., 7th ed. 1952) (arguing that the "Law of Nations" mandates that only "full sovereign States alone possess the legal qualifications to become belligerents" and that "half and part sovereign States are not legally qualified to become belligerents.").
\textsuperscript{20} See e.g., Yair M. Lotstein, The Concept of Belligerency in International Law, 166 MIL. L. REV. 109-141 (2000).
is today synonymous with humanitarian law or the LOAC) left this category of hostilities immune from international legal regulation.22

In response, the drafters of the Geneva Conventions included in each of the four treaties articles dictating situations of treaty applicability.23 The clear purpose was to create a truly de facto standard for determining the applicability of Geneva law, a standard that would more effectively protect victims of war by preventing definitional law avoidance and hopefully nullifying the corrosive effect of political agendas in assessing law applicability. As a result, the focal point for determining applicability would no longer be “war” – a term susceptible to interpretive avoidance – but instead “armed conflict.”24 Accordingly, article 2 common to the four treaties (Common Article 2) required application of the full corpus of the treaties to any international - or inter-state - armed conflict. And, in response to the humanitarian suffering associated with armed hostilities in the purely intra-state context, all four treaties also included an article imposing limited international humanitarian obligations on parties engaged in non-international armed conflicts: Common Article 3.25 While the technical effect of each of these treaty provisions only applied to the Conventions themselves, they evolved over

22 See Lootsteen, supra note 20 at 115-117 (analyzing the impact of the Spanish Civil War on the development of Common Article 3); see generally ANTONY BEEVOR, THE SPANISH CIVIL WAR (1982). During this period, brutal internal conflicts in other states, such as Paraguay, Russia, and China challenged this customary expectation that professional armed forces engaged in armed conflict would conduct themselves in accordance with principles of disciplined warfare. The estimated number of people killed in civil wars during the inter-war years are: 18,800,000 in the Russian Civil War (1918-21); 3,000,000 in the Chaco War (Paraguay and Bolivia) (1932-35); 2,500,000 in the Chinese Civil War (1945-49); 365,000 in the Spanish Civil War (1936-39). Matthew White's Homepage, Historical Atlas of the Twentieth Century, http://users.croals.com/mwhite28/20centry.htm (last visited Feb. 14, 2007).
23 See Common Article 2 and Common Article 3.
24 GC IV COMMENTARY, supra note 6 at 20. See also Sylvain Vite, Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations, 91 INT’L REV. RED CROSS 69, 70 (2009)
25 Common Article 3 states: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”
time to represent the definitive standard for assessing LOAC applicability to each
category of armed conflict.\textsuperscript{26}

This did not mean, however, that all uncertainty was eliminated from law
applicability analysis. Instead, the focal point of that uncertainty shifted from the
meaning of the term "war", to the meaning of the term "armed conflict." This was never
particularly complicated in the context of inter-state hostilities, or international armed
conflicts. Relying principally on the International Committee of the Red Cross ("ICRC")
Commentary to Common Article 2, any hostilities between the regular armed forces of
two or more states as the result of an inter-state dispute qualified as an international
armed conflict triggering the full corpus of the Conventions and the LOAC writ large.\textsuperscript{27}
The non-international context, however, was far more complex.

Extending international humanitarian regulation to situation of internal hostilities
certainly seemed justified by the brutality that defined such struggles. However, it also
represented an intrusion into a heretofore area of maximum domestic sovereignty.
Precisely when this intrusion becomes justified may be obvious at the extreme – for
example the type of civil war like the one in Spain, involving widespread and large-scale
"force on force" battles between what are in effect two traditional armies. But as the
nature of the internal violence descends down the scale of intensity and opposition
organization, the line between armed conflict and civil disturbance becomes uncertain.
Because internal civil disturbances below the threshold of armed conflict were viewed as
matters of domestic sovereignty, identifying this demarcation point was in 1949, and
remains today, a key source of uncertainty – a reality painfully illustrated by the recent
brutal events in Syria.\textsuperscript{28}

\textsuperscript{26} See INT’L & OPERATIONAL LAW DEPT., THE JUDGE ADVOCATE GEN.’S SCH., LAW OF WAR WORKSHOP
DESKBOOK 25-34 (Bill J. Brian et al. eds., 2000).
\textsuperscript{27} GC IV COMMENTARY, supra note 6 at 20 ("[a]ny difference arising between two States and leading to
the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the
Parties denies the existence of a state of war."). Uncertainty can persist even in the context of international
armed conflict, however; see Geoffrey S. Corn and Sharon Finnegan, America’s Longest Held Prisoner of
War: The Legal Odyssey of General Manuel Noriega, 71 LA. L. REV. 1111 (2011)
\textsuperscript{28} GC IV COMMENTARY, supra note 6 at 30-37.
A. Containing Brutality

It is, of course, self-evident that one way to contain or limit the brutality of warfare is to prevent warfare itself. Efforts to achieve this important humanitarian goal have and must continue to be a central focus of much of international law and diplomacy, irrespective of the “character” of the potential conflict. However, over time the branch of the law intended to mitigate the risks associated with the inevitable failure of these efforts – the *jus in bello* or LOAC – seems to have become in the view of many experts an alternative modality to achieve this purpose. At its most basic conception, applying a strict and often times difficult legal equation to determine the existence of armed conflict enables international disavowal of such situations even when the pragmatic metrics “on the ground” indicate otherwise. The motivation for this approach is almost certainly a desire to limit the consequences of armed hostilities by preventing states or non-state groups from legitimately claiming the broad powers associated with armed conflict. As laudable as this may be, it is both inconsistent with the underlying rationale of the Geneva Convention conflict recognition framework, and produces a negative operational and humanitarian impact.

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30 Interestingly, this theory runs directly counter to the drafters’ fundamental goal of eliminating “law avoidance” with regard to interstate hostilities. See e.g., GC IV COMMENTARY, supra note 6 at 22-23 (“By its general character, [the first] paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of de facto hostilities is sufficient. It remains to ascertain what is meant by ‘armed conflict’. The substitution of this much more general expression for the word ‘war’ was deliberate. It is possible to argue almost endlessly about the legal definition of ‘war’. A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression ‘armed conflict’ makes such arguments less easy.”); Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 Mil. L. Rev. 66, 83 (2005) (“It is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.”).
Nothing in the Commentary to Common Article 3 suggested that a primary or even secondary function of this landmark development was to limit resort to armed hostilities.\textsuperscript{32} Instead, the Commentary confirms that the article was intended as a highly pragmatic humanitarian remedy to the reality that armed conflicts, especially in the intra-state context, would manifest themselves in diverse and often unpredictable permutations, more amenable to a totality of the circumstances assessment than a technical legal assessment, such as the “elements” test. The goal was clear: maximize applicability of international humanitarian protection for victims of these historically brutal conflicts.\textsuperscript{33}

The current discourse, which considers the applicability of LOAC solely as a distinguishing line from the peacetime regime of human rights law and domestic law enforcement mechanisms, simply fails to account for LOAC’s historic purpose of mitigating the humanitarian suffering inherent in warfare, especially internal warfare. As far back as the Old Testament, leaders and societies imposed some limitation on the conduct of hostilities; these early regulations were directed at reducing the violence visited on certain groups, such as women and children, or prisoners, for example.\textsuperscript{34} The founding of the ICRC itself was a response to the horrors of war and an effort to introduce a measure of humanity into the brutality of combat and mitigate wartime

\textsuperscript{32} Indeed, by 1949, the strict separation between the \textit{jus ad bellum} – the law governing the resort to force and the central paradigm for efforts to outlaw war – and the \textit{jus in bello} was firmly entrenched and an important aspect of the equal application of LOAC during armed conflict. \textit{See} USA v. William List et al., (Case No. 7), in \textit{11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1247–8 (1950)} (citing \textit{2 LASSA OPPENHEIM & ARTHUR WATTS, INTERNATIONAL LAW 174}) (“whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other.”).

\textsuperscript{33} GC IV COMMENTARY, \textit{supra} note 6 at 34. \textsc{Lindsay Moir, The Law of Internal Armed Conflict} 32 (2002) (restrictive definition of armed conflict leads to a restrictive reading of Common Article 3). \textit{See also} Rogier Bartels, \textit{Timelines, Borders and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts}, 91 INT’L. REV. RED CROSS 35 n.9 (2009) (describing how Professor Erik Castren, an attendee at the Diplomatic Conference of 1949, characterized the lack of a definition of armed conflict not of an international character as a deliberate choice to prevent a limited reading of Common Article 3).

\textsuperscript{34} \textit{See e.g., Howard Levie, Terrorism and War: The Law of War Crimes} 9 (1992) (citing \textit{Numbers} 31:7–12; \textit{Deuteronomy} 3:6–7, 20:14–17; \textit{Samuel} 15:3) (noting that the Old Testament contains “numerous admonitions for, and records of, the slaughter of men, the transplanting of the women and children, the plunder of beasts and other property, the looting and wanton destruction of cities, etc.”); Gregory P. Noone, \textit{The History and Evolution of the Law of War}, 47 NAVAL. L. REV. 176 (2000).
suffering. Throughout this long stretch of history, international human rights law did not exist, of course. LOAC was thus the primary – in fact exclusive – restraint on the imposition of violence as a tool of policy.

Today, sixty-plus years after the modern human rights movement began with the Universal Declaration of Human Rights, this historic and central purpose of LOAC has faded from the discourse, overtaken by concerns about identifying the threshold between the peacetime regime of law enforcement – applicable to riots and internal disturbances, for example – and the armed conflict paradigm of LOAC. Unfortunately, however, Syria demonstrates all too tragically that the potential for unmitigated cruelty and brutality has not faded commensurately. The result is a failure to use the tool of LOAC for one of its key purposes. Thus, the international community must not forget that just as LOAC’s applicability threshold identifies the dividing line between peacetime law and wartime law, so the application of LOAC equally represents the even more fundamental demarcation between law and no law at all, between a measure of humanity and wholly unmitigated brutality. Ignoring this reality has too high a price in human suffering.

Furthermore, this reluctance to identify armed conflict in the context of a situation where peacetime paradigms are insufficient thus produces a gap in legal protection and obligation: in essence an invitation to unrestricted warfare. LOAC is historically adamant in its rejection of gaps in the law, for the basic reason that gaps inherently undermine LOAC’s central goals of protecting civilians during hostilities and minimizing the suffering inherent in war. Allowing a situation that produces a consequential gap in legal protection and regulation simply runs counter to LOAC’s very object and purpose.

36 LOAC’s concern with comprehensive application can be found in numerous areas, such as the foundational principle of equal application of the law; see Adam Roberts, The Equal Application of the Laws of War: A Principle Under Pressure, 90 INT’L REV. RED CROSS 931 (2008); or in the insistence that all persons merit some protection under the law, regardless of the nature of their status or position; see GC IV COMMENTARY, supra note 6 at 49 (“In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.”).
Equally problematic is the loss of a fairly well established regime of international criminal accountability for violations of these core norms of armed conflict. While it is not inconceivable that widespread human rights violations may result in international criminal responsibility, it remains a reality that the accountability structure associated with violations of international humanitarian law is much more predictable – a factor that must inevitably impact much needed deterrence in such situations.

It may be true that the international community should be reluctant to acknowledge situations of armed conflict if and when such reluctance serves as a deterrent to a heavy-handed government response to internal opposition threats. Unfortunately, there seems to be little evidence indicating such an impact. Instead, state forces exploit the legal uncertainty of such situations in their attempts to deal decisive blows to emerging threats. Common Article 3’s drafters seemed to recognize this risk, leaving the definition of armed conflict to the pragmatic metrics of each situation. Unless and until it is established that linking conflict regulation to the strict elements approach currently in vogue actually inhibits the resort to combat power by governments responding to internal threats, the underlying totality approach reflected in the Commentary to Common Article 3 should prevail. The goal must be constant: synchronize the applicability of conflict regulation with the reality of armed conflict and actively avoid any willful blindness to such realities.


40 GC IV COMMENTARY, supra note 6 at 35-36.
B. What Role for the Government’s Response?

This reminder of LOAC’s core purpose highlights the need to allocate substantial weight to the nature of the state response to emerging internal opposition threats when assessing LOAC applicability to such situations. As Syria demonstrates, failing to account for a state’s wholly unrestrained use of force as the method for repressing internal opposition creates a genuine risk of a legal uncertainty and humanitarian catastrophe, especially when such certainty is most needed. The Geneva Conventions trigger for LOAC application rests on an objective and pragmatic framework, seeking to divorce applicability from the rhetoric of states. Just as Common Article 2’s paradigm for international armed conflict eliminates the opportunity for states to engage in law avoidance by creating an objective trigger untethered to declarations of war or other public pronouncements, so Common Article 3 also introduced the same objective approach to internal armed conflict. Internal violence is fundamentally a threat to the government’s authority; therefore, analyzing how the government responds to such violence must be a major component of any such objective determination. At the same time, the nature of the government’s actions cannot be the determinative or exclusive component, for the very reason that the Geneva Conventions substituted the term “armed conflict” for war: any trigger for the law that rests solely on governmental rhetoric or action will lose that essential objectivity. To better understand how and when to incorporate the nature of the government’s response into the conflict recognition analysis, it is important to examine how this consideration was viewed at the time Common Article 3 was drafted.

The ICRC Commentaries to the Conventions offered what has always been understood as a series of important factors to guide non-international armed conflict identification - the critical distinction between civil disturbance below the threshold of armed conflict and the type of internal violence crossing that threshold triggering humanitarian regulation. The Commentary emphasized that no factor or combination of factors should be considered dispositive. Instead, it seems apparent that a totality of the circumstances analytical approach was proposed, requiring a true case-by-case analysis.

41 *Id.*
of each individual situation. Perhaps more importantly, this assessment was to be
guided by the very motivational purpose of establishing international humanitarian
regulation for non-international armed conflicts: maximizing application of Common
Article 3. Why, Pictet asked, would anyone object to such application? “What
Government would dare to claim before the world, in a case of civil disturbances which
could justly be described as mere acts of banditry, that, Article 3 not being applicable, it
was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take
hostages?” Even in the “close call” situation, the result of recognizing the existence of
an armed conflict merely required the humane treatment of individuals who no longer
posed a threat to the state – an obligation equally applicable in peacetime.

What the Commentary failed to recognize when it posed this question, however,
was that crossing the threshold from peacetime civil disturbance to internal armed
conflict triggers not only the humanitarian protections of Common Article 3, but also a
range of robust state powers justified only in the context of an armed conflict, most
significantly the power to kill as a first resort based on status presumptions. Perhaps this
was implicitly recognized by the Commentary’s emphasis on the significance of state
resort to regular armed forces as a factor indicating the existence of armed conflict. If it is
assumed that the use of such capability will involve a use of combat power normally
associated with war, then it does indeed suggest the existence of armed conflict, for the
simple reason that the armed forces called upon to respond to the internal opposition
threat would implicitly invoke LOAC authority in the execution of their operations.

This is, however, a universally valid assumption. States routinely utilize
regular armed forces to augment law enforcement efforts, and many states maintain

42 Id.
43 Id.
44 Id. at 36. Tragically, reports from Syria demonstrate precisely this conduct. See Pro-Assad forces
reportedly kill over 220 in assault on Syrian village, HA’ARETZ, July 13, 2012 (describing wounded and
bodies in fields, houses, rivers after a government attack on the town of Taramseh).
45 GC IV COMMENTARY, supra note 6 at 36.
46 See Corn, supra note 13; See ILA Report, supra note 31, at 4.
47 See Geoffrey S. Corn and Eric T. Jensen, Untying the Gordian Knot: A Proposal for Determining
Applicability of the Laws of War to the War on Terror, 81 TEMPLE L. REV. 787 (2008).
permanent national military police, or gendarmerie.\textsuperscript{48} Thus, the answer to the Commentary question is clear: objection to an expansive application of Common Article 3 does not necessarily reflect opposition to imposing an international legal obligation on the state to ensure the humane treatment of inoffensive individuals, it reflects opposition to the premature and unjustified use of LOAC powers by a state to address an internal crisis.\textsuperscript{49} This is certainly a legitimate concern. However, what does not seem to have been adequately considered in contemporary conflict recognition discourse is whether a strict legal test for the existence of armed conflict – a test substantially more demanding than the totality approach proposed by the Commentary to Common Article 3 – achieves this objective.

Perhaps if it could be established that states are increasingly hesitant to unleash the full force and effect of their military capabilities to respond to nascent internal opposition threats because they do not believe the “elements” of armed conflict are satisfied, this shift from a totality to a more juridical approach would have merit. This, however, is a highly dubious proposition. Instead, it seems that limiting recognition of armed conflict through a strict elements test may produce the exact opposite effect of exposing victims of hostilities to increased brutality as the result of the legal regulatory uncertainty – if not paralysis - generated by this approach. In such situations, it should come as no surprise that a government determined to extinguish a nascent opposition would seek to exploit this regulatory uncertainty to maximum advantage. Nothing could be more inconsistent with the original motivation for Common Article 3.

II. The Evolution of Non-International Armed Conflict Recognition

As noted above, there is no dispute that Common Article 3 was included in the 1949 Geneva Conventions for the specific purpose of mitigating the humanitarian suffering associated with brutal internal armed struggles. Indeed, the original proposal by the ICRC went much further, suggesting that no distinction should be made between

\textsuperscript{48} Gendarmeries are paramilitary law enforcement units that retain a mix of military and police functions. Notable examples include the Italian \textit{Carabinieri}, the Turkish \textit{Jandarma}, and the French \textit{Gendarmerie Nationale}. While these states organize these forces differently, the melding of traditional police work with the attributes and duties of military forces is the common thread.

\textsuperscript{49} See ILA Report, supra note 31, at 33 (discussing the chances of human rights violations when states assert belligerent powers outside the context of an armed conflict).
“types” of armed conflicts, for the simple reason that human suffering was simply not contingent on whether an armed conflict was international or internal. Although ultimately rejected by the state parties to the treaties, this original proposal remains a powerful reminder of the underlying goal of the compromise that evolved into Common Article 3: prevent the type of humanitarian suffering international law had been incapable of addressing prior to 1949.

Naturally, a key question associated with the new article was determining exactly when internal disturbances crossed the triggering threshold from a domestic criminal law problem to an international humanitarian law problem, precisely because states remain reluctant to countenance international humanitarian intrusions into what they view as domestic matters. Although Common Article 3’s black letter text does not provide further clarification as to when a given situation constitutes an armed conflict to trigger LOAC, its objective was abundantly clear: implement the post-World War II focus on the need to extend LOAC applicability to internal conflicts.

Common Article 3’s text emphasizes the provision’s goal of minimum humanitarian protections in all situations and offers little guidance with regard to applicability. The applicability threshold was, however, a major focus of the associated Commentary. According to the Commentary, it was both impossible and ill-advised to attempt to identify a specific test for determining the applicability of common Article 3; rather the Commentary proposed what is best understood as a totality of the circumstances analysis intended to effectuate the underlying humanitarian objectives of the new article: interpret common Article 3 as broadly as possible.

The Commentary offers critical insight into the intent of the drafters in the form of

50 GC III COMMENTARY, supra note 4 at 31, explaining that the ICRC originally submitted a draft of Article 2 including the following paragraph: “In all cases of armed conflict which are not of an international character, especially in cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict and shall have no effect on that status.”

51 GC IV COMMENTARY, supra note 6 at 35-36.


53 GC IV COMMENTARY, supra note 6 at 36 (“Does this mean Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of [the suggested criteria]? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.”).
indicative – but not dispositive – factors or characteristics of a common Article 3 conflict, based on the nature and behavior of both state and non-state parties. For example, the response of the state is a critical component, in particular whether it employs its regular armed forces in combating the non-state actor, and whether it has recognized the non-state actor as a belligerent. As noted above, ignoring the nature of the government’s response in pursuit of conflict recognition is a serious shortcoming and fails to take into account the practicalities of the situation. In addition, several considerations can provide useful guidance for understanding whether violence or hostilities have progressed beyond internal disturbances; such as whether the non-state actor: 1) has an organized military force; 2) has an authority responsible for its acts; 3) acts within a determinate territory, having the means of ensuring respect for the Geneva Conventions; and 4) acts as a de facto governing entity and its armed forces are prepared to obey the laws of war. These factors or considerations are just that: factors and considerations. The Commentary explains that the idea of defining the term “conflict” was abandoned after some debate, as was the inclusion of a list of “a certain number of conditions on which the application of the Convention would depend.” Rather, as explained above, the drafters intended Common Article 3 to have as broad a scope as possible. Nor can it be ignored that the drafters of both the article and the Commentary were, by necessity, basing their catalogue of factors on their collective experiences, indicating that as the nature of conflict evolves, so must the relevance of other potential conflict identification indicators.

In 1992, the importance of Common Article 3’s objective – to mitigate the brutality of internal wars and mandate a minimum level of humane treatment – was elevated to unprecedented international attention when the break up of the former

54 Geoffrey S. Corn, What Law Applies to the War on Terror?, in THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 17 (Michael Lewis et al. eds., 2009). See also Abella v. Argentina (La Tablada), Case 11.137, Inter-Am. C.H.R., Report No. 55/97, ¶¶ 155 (1997) (noting that one important consideration in finding the existence of an armed conflict was that the President “ordered that military action be taken to recapture the base and subdue the attackers.”).
55 GC IV COMMENTARY, supra note 6 at 35-36. None of these factors is dispositive; rather, these and other factors may be used to distinguish acts of banditry, short-lived insurrection, or terrorist acts from armed conflict. Prosecutor v. Haradinaj, Case No. ICTY IT-04-84-T, Judgment, ¶ 49 (Apr. 3, 2008); Vite, supra note 24 at 76-77; Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 84 (Nov. 30, 2005); Tadic, supra note 10, ¶¶ 562-567; Prosecutor v. Lukic & Lukic, Case No. IT-98-32/1-T, Judgment, ¶¶ 879-888 (July 20, 2009) (all applying different and overlapping factors to determine whether an armed conflict existed).
56 GC IV COMMENTARY, supra note 6 at 35.
Yugoslavia rapidly devolved into widespread armed violence. A new front in the regulation of such hostilities emerged: the extension of international criminal responsibility for violations of the laws and customs of war to situations of internal armed conflict. This important development necessitated, however, identification of the armed conflict demarcation point not as a matter of policy or theory, but as a jurisdictional predicate to the imposition of this criminal responsibility.\(^{57}\) The conflict in the former Yugoslavia, and the international decision to impose criminal responsibility on the participants of that conflict, generated the first—and by any measure seminal—international judicial opinion analyzing the existence of an internal armed conflict,Prosecutor v. Tadić. The methodology utilized by the Tribunal to assess the situation in Bosnia evolved into what is often characterized as the “elements test”, an approach to conflict analysis that is potentially undermining the objectives that originally motivated the adoption of Common Article 3.

A. Tadić and its Framework

In Tadić, the first case heard by the ICTY, the Tribunal immediately faced the question of whether the situation in the former Yugoslavia was an armed conflict. In particular, charges brought under Article 2 (grave breaches of the Geneva Conventions) and Article 3 (violations of the laws and customs of war) of the Statute of the ICTY applied only to situations of armed conflict,\(^{58}\) rendering this determination a jurisdictional predicate to any criminal responsibility for the alleged violation of these provisions. In a decision on interlocutory appeal, the Appeals Chamber of the ICTY set forth the modern definition of armed conflict:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.\(^{59}\)

\(^{57}\) Tadić, supra note 10 at ¶ 66.

\(^{58}\) ICTY Statute, Article 2 (The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention . . .”); ICTY Statute, Article 3 (“The International Tribunal shall have the power to prosecute persons violating the laws or customs of war.”).

\(^{59}\) Tadić, supra note 10 at ¶ 70.
In the context of examining the broader purposes and goals of Common Article 3 and understanding its application, it is important to note that the Appeals Chamber emphasized that the notion of armed conflict has a broad geographical and temporal scope. This broad scope is directly related to the protective purposes of the Geneva Conventions; the Tribunal specified that “the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations” and that “the temporal scope of the applicable rules clearly reaches beyond the actual hostilities.”60 As such, the Tribunal looked to the object and purpose of LOAC as a guide in understanding the reach and parameters of the law’s application. This definition has not only been the driving factor in the ICTY’s jurisprudence, but was also adopted by the drafters of the Rome Statute establishing the International Criminal Court (“ICC”))61 and by the International Criminal Tribunal for Rwanda (“ICTR”).62 It continues to be the most common and oft-cited contemporary definition of armed conflict.

In its decision on the merits, the Tadic Trial Chamber took this definition and the Commentary’s broad-stroke guidelines – noted above – and expounded on the meaning and parameters of non-international armed conflict under Common Article 3. Fleshing out the definition, the Tribunal thus laid the foundation for what was to become the two-prong “elements test” – the ultimate legacy of Tadic. The court stated:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purposes, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.63

Importantly, the Trial Chamber further noted that factors relevant to identifying the threshold between armed conflict and lower level types of violence – riots, terrorist activities, etc. – are discussed in the Commentary. In a brief analysis, the Trial Chamber

60 Id., at ¶ 69.
61 Rome Statute, supra note 37, articles 8(2)(f).
63 Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment ¶ 562 (May 7, 1997).
then concluded that given the ongoing hostilities and the nature of the parties to the conflict in Bosnia, "at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the law or customs of war embodied in Article 3 common to the four Geneva Conventions . . ." \(^{64}\)

The *Tadic* definition quickly became the determinative statement on what constitutes armed conflict. Subsequent cases at the ICTY and the ICTR relied on the definition of armed conflict as protracted violence between the government and organized armed groups or between two or more armed groups as the paradigm for identifying the existence of an armed conflict. \(^{65}\) In most of these cases, the tribunal examined the nature of the fighting and the relevant parties in some fashion in order to determine if the facts of the situation objectively fit within the definition as set forth in *Tadic*. However, the *Tadic* definition and the reference to intensity and organization as useful considerations were not applied as a test of "factors". Rather, the tribunals noted the relevance of intensity and organization and used the two considerations as guides in understanding the evidence presented regarding the situation at hand. Thus, even in many of the cases routinely cited for the proposition that *Tadic* established a two-part test of factors, the terms "intensity" and "organization" do not appear as identifiable factors or – in some cases – even at all.

In *Prosecutor v. Delalic* and *Prosecutor v. Kordic & Cerkez*, for example, decided in the first few years after *Tadic*, neither the Trial Chamber nor the Appeals Chamber set forth intensity and organization as distinct factors that were required to be independently satisfied in assessing the existence of a conflict. \(^{66}\) Even later, nearly ten years after *Tadic*, the Tribunal continued to explore the existence of armed conflict as a predicate for the imposition of criminal responsibility using the foundational *Tadic* definition without the further step of a test of elements or factors. *Prosecutor v. Halilovic*, decided in 2005,

\(^{64}\) *Id.* at ¶ 568.


does not mention the words “intensity” or “organization”; the Tribunal assesses the nature of the hostilities and military operations and concludes that an armed conflict existed at the relevant time. 67 One year later, the Tribunal took a similar approach in Prosecutor v. Hadzihasanovic & Kubura, looking at the escalation and continuation of the hostilities and the efforts to broker a deal between the two different sides to the conflict, again without reference to specific factors of intensity and organization. 68 Finally, in Prosecutor v. Martic, decided in 2007, the Trial Chamber again provides the definition of armed conflict without any further breakdown into specific factors or elements to be satisfied. 69 The ICTR generally followed the same approach, helping to establish the Tadic definition of armed conflict as the definitive modern definition for use not only by the ICTY, but also by a variety of national and international courts and tribunals around the world. 70 Note as well that neither the ICTY nor the ICTR was forced to consider the quantitative relationship between these two “factors”, as both conflicts overwhelmingly satisfied any parameters of intensity and organization.

B. The Strict Elements Test Takes Hold

Over time, however, Tadic appears to have morphed into a formal test of elements. Challenges to the ICTY’s jurisdiction over events in Kosovo appear to have been the primary catalyst for this evolution in how Tadic is understood. Starting with the Prosecutor v. Milosevic case, 71 the ICTY began to alter its presentation of the Tadic definition of armed conflict and how it should be applied. Rather than setting forth the definition, looking at the evidence proffered regarding situation at issue, and reaching an determination as to the existence of a conflict based on an overall understanding of who is fighting, how they are fighting, where they are fighting, for how long, and so on, the Tribunal began to state the definition and then immediately list two factors: intensity and

67 Halilovic, supra note 65 at ¶ 160-173.
69 Martic, supra note 65 at ¶ 41.
70 See e.g., Akayseu, supra note 62, at ¶ 620; Prosecutor v. Rutaganda, Case No. ICTR-95-1C, Judgment, ¶ 92 (March 14, 2005).
71 See Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 14-32 (June 16, 2004).
organization. Analysis then proceeded solely within the construct of a two-part test, with little or no regard for any of the other considerations discussed in the Commentary or elsewhere, such as the nature of the government response, the involvement of the international community, or others.

A trio of cases cemented the two factors as a strict elements test for determining the existence of an armed conflict – *Prosecutor v. Limaj*, *Prosecutor v. Haradinaj*, and *Prosecutor v. Boskoski* – the first two addressing events in Kosovo and the latter events in Macedonia. *Limaj*, decided in 2005, provided a new and extensive analysis of intensity and organization as the apparently exclusive determinative factors in applying the *Tadic* definition of armed conflict to the facts at hand. The *Limaj* judgment devotes forty-two paragraphs to the analysis of the requisite organization of the parties and thirty-four paragraphs to analyzing the intensity of the fighting. In so doing, the judgment laid the foundation for a comprehensive elements test – one that would itself ultimately include lists of sub-factors and components. Three years later, the Tribunal left no doubt as to the reliance on this strict elements test. In *Haradinaj*, the Trial Chamber first devoted extensive attention to formulating the test based on past precedent and then, like *Limaj*, engaged in extensive analysis of the facts regarding the fighting solely within the framework of intensity and organization.

*Boskoski* involved alleged crimes committed in the northern part of the former Yugoslav republic of Macedonia in 2001. Events in Macedonia had not yet come before the ICTY and the charges therefore mandated a fresh examination of whether there was an armed conflict in existence at the time so as to attach international criminal responsibility for violations of the laws and customs of war. As in the previous two cases, the Trial Chamber began with the *Tadic* definition and expressly stated that the

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72 See e.g., *id.*, para 17 (“For the purposes of this Motion, the relevant portion of the *Tadic* test, which has been consistently applied within the Tribunal, is “protracted armed violence between governmental authorities and organized armed groups”. This calls for an examination of (1) the organisation of the parties to the conflict and (2) the intensity of the conflict.”).  
definition had to be applied by examining intensity and organization, to the exclusion of other considerations discussed in the Commentary. The judgment explains:

The Trial Chamber in Tadic noted that factors relevant to this determination are addressed in the Commentary to Common Article 3 of the Geneva Conventions. These “convenient criteria” were identified by the drafters of Common Article 3 during negotiations of the Geneva Conventions in order to distinguish an armed conflict from lesser forms of violence, although these were rejected from the final text. While these criteria give some useful indications of armed conflict, they remain examples only. The drafters of the Commentary were of the view that Common Article 3 should be applied as widely as possible and could still be applicable in cases where “armed strife breaks out in a country, but does not fulfil any of the above conditions”. The Trial Chamber in Limaj, after having reviewed the drafting history of Common Article 3, concluded that “no such explicit requirements for the application of Common Article 3 were intended by the drafters of the Geneva Conventions”. Consistent with this approach, Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved depending on the facts of each case.

In effect, the interpretation of the Tadic definition of armed conflict had thus fully morphed into a test of two exclusive and independent factors: intensity and organization.

Throughout the same process, the understanding of intensity and organization themselves as useful indicators of the existence of armed conflict also changed and transformed into an elements test. In a variety of cases, the ICTY has highlighted key factual information that helps to demonstrate the intensity of fighting, such as the number, duration, and intensity of individual confrontations; the types of weapons and other military equipment used; the number of persons and types of forces engaged in the fighting; the geographic and temporal distribution of clashes; the territory that has been captured and held; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. Frequency of confrontations and the involvement of the United Nations Security Council also prove to be indicative of

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75 Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment ¶ 175 (July 10, 2008).
76 Id., ¶ 176.
77 Haradinaj, supra note 74 at ¶ 49; Limaj, supra note 73 at ¶¶ 135–43; Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶¶ 564–65 (May 7, 1997).
intensity for the purposes of identifying an armed conflict. Similarly, with regard to organization, cases have focused on a range of information about the groups involved in the conflict, such as a hierarchical structure; territorial control and administration; the ability to recruit and train combatants; the ability to launch operations using military tactics; the ability to enter peace or cease-fire agreements; the ability to issue internal regulations; and the ability to coordinate multiple units.

There is little doubt that all of these various considerations are useful means for assessing the intensity of fighting and the organizational framework of parties to a conflict. However, the regular application of the Tadić definition through an elements test has further influenced the presentation and analysis of intensity and organization into factor tests of their own, only serving to solidify the formalized nature of the inquiry. A look at how the examination of organization as a key element of the armed conflict test has changed offers a useful example of the overall dynamic. Early cases focused on whether the hostilities involved at least two sides fighting against each other, without too much further detail. The Tribunal has regularly referred to "some degree of organization" when broadly characterizing this pillar of its armed conflict analysis. Indeed, this phrasing coincides with the ICRC’s characterization of "a minimum of organization" as a feature of non-international armed conflicts. Seeking evidence of some organization is obviously logical, as the law itself is framed in terms of "parties" to an armed conflict.

Over time, however, organization began to be understood as a strictly independent requirement, and analyzed also as series of factors, such as the five categories of factors

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78 See Haradinaj, supra note 74 at ¶ 49; Vite, supra note 24 at 76–77 (discussing a range of indicators of armed conflict beyond those referenced in the text above, including the government’s response and the collective nature of the fighting). See also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 537 (March 14, 2012).


80 Limaj, supra note 73 at ¶ 89 (referring to a 1999 ICRC Working Paper submitted to the Preparatory Commission for the establishment of the elements of crimes for the International Criminal Court, which stated that armed conflict involves hostilities between armed forces that are organized to a greater or lesser extent).

set forth in Boskoski: factors signaling the presence of a command structure; factors indicating the ability to carry out military operations in an organized manner; factors indicating a level of logistics; factors relevant to whether the group has sufficient discipline to implement LOAC; and factors demonstrating that the group can speak with "one voice." As a result, the focus of the organization inquiry shifted from identifying some modicum of organization to satisfy the "party" element of armed conflict, enabling consideration of how this element interrelates with the intensity of operations, to an independent requirement. Several cases have also detailed components of an intensity analysis as well, listing many of the considerations identified in the previous paragraph. Notwithstanding the relevance of any one or more of the various sub-factors the cases have identified, the effect of a factor-based analysis for intensity and organization has only served to solidify the idea of a strict elements test for the definition of armed conflict.

The application of this strict elements test has taken hold beyond the ICTY's jurisprudence and has seemingly become the authoritative standard for assessing conflict recognition in situations of internal violence. In May 2005, motivated by the United States' assertion of a "global war on terror" in response to the attacks of September 11, 2001, the Executive Committee of the International Law Association (ILA) approved a mandate for the Use of Force Committee to produce a report on the meaning of war or armed conflict in international law. In effect, the U.S. consistently claimed the right to exercise belligerent privileges applicable only during armed conflict anywhere in the world where members of terrorist groups are found. This position ran directly contrary

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82 Boskoski, supra note 75 at ¶ 199-203.
83 Prosecutor v. Mrksic, Radic & Slijvancanin, Case No. IT-95-13/1-T, Judgment ¶ 407 (Sept. 27, 2007) ("Relevant for establishing the intensity of a conflict are, inter alia, the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and if so whether any resolutions on the matter have been passed."). See also Haradinaj, supra note 74; Limaj, supra note 73.
84 See e.g., Vite, supra note 24 at 77 ("When one or other of these two conditions [intensity or organization] is not met, a situation of violence may well be defined as internal disturbances or internal tensions.").
to a trend of states generally attempting to avoid acknowledging involvement in wars or armed conflicts. The ILA report relied substantially on the Tadic definition of armed conflict and “confirmed that at least two characteristics are found with respect to all armed conflict: 1.) The existence of organized armed groups; 2.) Engaged in fighting of some intensity.” The report continued:

The Committee, however, found little evidence to support the view that the Conventions apply in the absence of fighting of some intensity. For non-state actors to move from chaotic violence to being able to challenge the armed forces of a state requires organization, meaning a command structure, training, recruiting ability, communications, and logistical capacity. Such organized forces are only recognized as engaged in armed conflict when fighting between them is more than a minimal engagement or incident.

In reaching this conclusion, the report effectively wraps the past few decades of conflict recognition and analysis in the cloak of intensity and organization, placing a solid veneer on the strict elements test formulated by the ICTY over the past several years.

C. Conflict Recognition in Syria

On March 18, 2011, Syrian activists called for a national day of rage in the aftermath of popular uprisings in Egypt, Libya, and Tunisia. Syrian troops opened fire on the demonstrations in Dera’a, killing five people, accelerating the pace of the discontent in Syria that had simmered since December 2010. Between March and June 2011, demonstrations continued to spread throughout Syria. The Assad regime used military force in a manner that can in no way be reconciled with a constabulary mission. Instead,

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87 Edith Lederer, U.N. Seeks to Stop Use of Child Soldiers, NEWSDAY, Apr. 23, 2004, http://www.radicalparty.org.it/node/5070254 (describing how Russia and Britain held up a Security Council Resolution condemning the use of child soldiers in armed conflicts until both Chechnya and Northern Ireland were removed from the list of armed conflicts).
88 ILA Report, supra note 31 at 1-2.
89 Id.
the nature of the force employed was a patent example of a state unleashing combat power to quell an internal insurrection—most notably the deployment of Syrian infantry and mechanized units. On July 29, 2011, a group of deserted Syrian officers released a video announcing the formation of the Free Syrian Army (“FSA”).\textsuperscript{91} At the same time, disparate groups of Syrians began resisting the regime with armed violence on a local level. After the formation of the FSA, some of the local groups professed allegiance to the FSA while others did not. Those resisting the regime armed themselves with automatic weapons and rocket propelled grenades, as well as improvised explosive devices.

Over the course of the fall and winter, the struggle between the regime and the opposition became increasingly militarized, with extensive combat in cities throughout the country and steady reports of large-scale military attacks on towns and residential areas, atrocities, and escalating violence.\textsuperscript{92} By spring, heavy fighting continued and the Syrian rebels continued to gain in numbers, helped by defections from the Syrian Army and the regime. Throughout this time, the wholly unrestrained nature of the fighting continued, with government forces reportedly attacking towns and cities indiscriminately with tanks, mortars, helicopter gunships and other heavy weaponry.\textsuperscript{93}

In September 2011, the United Nations Human Rights Council established an Independent International Commission of Inquiry to investigate alleged violations of human rights from March 2011 onward in Syria.\textsuperscript{94} The Commission has since issued two

\textsuperscript{93} Syrian army moves to wrest Damascus suburbs from rebels, BBC (Gr. Brit.), Jan. 29, 2012 (Syrian army uses tanks and mortar shells against suburban Damascus); Julian Borger and Mona Mahmood, Syrian troops bombard sealed off suburb of Homs, THE GUARDIAN (Gr. Brit.), Feb. 9, 2012 (Syrian tanks, gunships, and artillery bombard city of Homs; 100 civilians die in early stages of what would become the Siege of Homs).
reports and at least one periodic update, in November 2011, February 2012 and May 2012, respectively. As fighting has raged between the government forces and the opposition – leaving civilians trapped in an increasingly dangerous and deadly zone of combat throughout the country – the Commission’s reports offer a telling, and troubling, example of the new thoroughly formalized elements test for identifying an armed conflict in accordance with the definition the ICTY originally set forth in *Tadic*.

The first report, issued in November 2011, described widespread combat operations by regular state armed forces and an increasingly violent response to the protests. Upwards of 3,500 civilians had been killed and some defectors and regime opponents had organized themselves into the Free Syrian Army. 95 By November, the report stated, “military and security forces carried out operations in Homs, Dar’a, Hama, Dayr Az Zawr and Rif Damascus,” including in residential areas; in Homs, “[a]ccording to eyewitnesses, tanks deployed in and around the city frequently fired at residential buildings.” 96 Estimates were that 260 civilians were killed in the last week of October and first two weeks of November. “According to information received, a small number of defectors claiming to be part of the Free Syrian Army engaged in operations against State forces, killing and injuring members of military and security forces.” 97 In assessing the applicable law that would guide its analysis of alleged crimes in Syria, the Commission expressed its concern that the events in Syria risked rising to the level of an internal armed conflict, which, of course, would trigger the application of LOAC. The Commission stated that the test for an internal armed conflict consisted of the two criteria of intensity and organization and then concluded:

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96 Id., para 39.
97 Id.
The commission was unable to verify the level of the intensity of combat between Syrian armed forces and other armed groups. Similarly, it has been unable to confirm the level of organization of such armed groups as the Free Syrian Army. For the purposes of the present report, therefore, the commission will not apply international humanitarian law to the events in the Syrian Arab Republic since March 2011.\(^\text{98}\)

Although the situation in the fall of 2011 in Syria was certainly not clear-cut one way or the other, a comparison of some of the factual descriptions in the report with similar brief descriptions in early cases before the ICTY shows the extent to which intensity and organization have become a strict test of elements.

Three months later, the Commission issued a second report, focused on the period between November 2011 and February 2012. The report noted that the crisis had become “increasingly violent and militarized” and that the “rise of an armed opposition led the Government to intensify its violent repression.”\(^\text{99}\) Describing the violence, the Commission stated that Free Syrian Army groups had launched offensive operations against police stations, government forces, and checkpoints. Government forces continued to shell residential areas with heavy weapons. The Commission referenced numbers of casualties among civilians, armed forces and police officers as well. Finally, with regard to the opposition forces, the report explained that many “anti-Government armed groups identify themselves as FSA and consist of defectors (mainly from the army) and an increasing number of armed civilians,” and the leadership’s control (from abroad) over the different FSA groups inside the country remained unclear.\(^\text{100}\) At this time, one year after the start of the violence and at a time when armed opposition groups and the government fought throughout the country for control of areas from Homs to Idlib to Damascus, the Commission continued to adhere rigidly to a formalistic and strict application of a two factor test for the existence of an armed conflict:

While the commission is gravely concerned that the violence in certain areas may have reached the requisite level of intensity, it was unable to verify that the Free Syrian Army (FSA), local groups identifying

\(^{98}\) Id., ¶ 99.


\(^{100}\) Id. at ¶ 18.
themselves as such or other anti-Government armed groups had reached the necessary level of organization.\textsuperscript{101}

The juxtaposition of the events in Syria at the time and the Commission’s methodology dramatically demonstrates the effect of the strict elements test. Thousands of civilians and hundreds of soldiers had been killed.\textsuperscript{102} The Free Syrian Army and other groups were engaging in military operations in towns across the country and were able to force government groups out of and even consolidate control in selected areas. Most of all, the government was using nearly the full extent of its military capabilities – including attacks from the air – against the opposition forces and the civilian population, creating a situation of unrestrained brutality and combat with no regulation and no respite.

Finally, in May 2012, the Commission issued a Periodic Update on events since March 2012. The Commission stated that it “has taken note of the intensity of the violence in the Syrian Arab Republic as well as the increasingly organized nature of armed groups in some areas.”\textsuperscript{103} It nonetheless described the situation as one in which “gross violations continue unabated in an increasingly militarized context.”\textsuperscript{104} At the same time, the international community remained reluctant to use the term “armed conflict” to describe events in Syria. As late as May 2012, the ICRC refrained from characterizing events across the country as an internal armed conflict, noting instead only that the fighting in Homs and Idlib likely rose to the level of an internal armed conflict.\textsuperscript{105}

\textsuperscript{101} \textit{Id.} at ¶ 13. The Commission explained further that it “uses the term ‘FSA group’ to refer to any local armed group whose members identify themselves as belonging to the FSA, without this necessarily implying that the group has been recognized by the FSA leadership or obeys the command of the FSA leadership abroad.” \textit{See also Syria not in Civil War But Situation Grave: ICRC, REUTERS, December 8, 2011.}


\textsuperscript{104} \textit{Id.}, ¶ 2.

\textsuperscript{105} \textit{Update 2 – Some Syria Violence Amounts to Civil War – Red Cross}, REUTERS, May 8, 2012 (noting also that “[o]nly late did they determine that Syrian rebels represent an “organized” opposition force.”).
In mid-July, the ICRC announced that it viewed the situation in Syria as a non-international armed conflict, thus triggering the application of LOAC.\footnote{Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes, Reuters, July 15, 2012.}

For over sixty years, the international community has recognized and upheld the essential need to regulate internal armed conflicts. Through treaty, customary law and international and national jurisprudence, the international community has steadily expanded the law applicable to such conflicts, so that today there is increasingly less distinction between the law of international armed conflict and the law of internal armed conflict.\footnote{See e.g., Michael N. Schmitt, Targeting and International Humanitarian Law in Afghanistan, Naval War College International Law Studies 307, 308 (2009) ("the [LOAC] norms governing attacks during international armed conflicts, on one hand, and non-international armed conflicts, on the other, have become nearly indistinguishable.").} More importantly, the fundamental goals of LOAC remain the same regardless of the characterization of the conflict. As the ICTY stated in the very same \textit{Tadic} decision that set forth the modern definition of armed conflict,

\begin{quote}
Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State?\footnote{\textit{Tadic}, supra note 10 at ¶97.}
\end{quote}

These questions resonate as strongly as ever in Syria. In response to an internal challenge, the Assad regime – like so many other despotic regimes facing similar challenges in the past – unleashed the full fury of its combat power to cower the nascent anti-regime movement. For fifteen months, Syrian armed forces deliberately attacked civilians and civilian property, targeted ambulances and journalists, and prevented or restricted the delivery of humanitarian assistance, all with absolutely no respect for the most fundamental tenets of conflict regulation. By any measure, this was an unjustified, immoral, and intolerable use of force. And yet sixty years of international law designed to ensure that when a state resorts to military force to protect internal interests, that force is subject to the same core regulation as force applied in interstate hostilities, was rendered prostrate by an overly technical conception of the conditions triggering the
law’s application – as profound a distortion of the origins of the law as could be imagined.

The ultimate outcome of this distortion has been an unacceptable dilution of the core purpose of LOAC: limit the brutality of armed violence and protect civilians and belligerents from unnecessary suffering and gratuitous violence. While the jurisprudential evolution of the broad and somewhat amorphous definition of armed conflict must be acknowledged as a positive development in the law, this is only the case if that development is interpreted and understood to effectuate the object and purpose of the law. The events in Syria demonstrate that what is needed is a more pragmatic understanding of what has evolved into a strict “elements” test, one that preserves the wisdom of focusing on these important elements, but does so within a pragmatic framework sufficiently responsive to the countless permutations of situations necessitating applicability of the law. Allowing this pragmatic foundation to morph into a formalized legalistic elements test undermines the very purpose of the profoundly important development of Common Article 3 and the regulation of internal conflict: restraining the brutality of what have historically been the most brutal of conflicts. The process of conflict recognition must therefore align more closely with LOAC’s goals in order to ensure the most extensive fulfillment of those goals. How this reconciliation may be achieved is illustrated by a source of law from a radically different context, but one that reflects an almost identical process of distortion of a core pragmatic purpose of the law and restoration of that purpose through a more refined methodology of relying on guiding “elements” to assess a critical legal question: U.S. probable cause jurisprudence.

III. Totality of the Circumstances: To Better Serve LOAC’s Object and Purpose

_Tadic_ is without question an invaluable contribution to the conflict recognition and characterization landscape. However, as the preceding discussion emphasizes, we believe that how the opinion has evolved into a strict elements test actually undermines the original purpose of Common Article 3 and the Commentary’s proposed conflict assessment methodology. This concern arises not because these elements are inappropriate to that recognition process; rather, it is because they have become transformed into inflexible requirements, distorting the totality approach manifested in
the Commentary. In order to reconnect this recognition process to its origin, this strict elements test must be reconceived, and the Tadic elements must instead be understood as two guiding pillars in the totality of the circumstances analysis. Such an approach will preserve the analytical value of these “elements”, eliminate the unnecessary and unjustified inflexibility that has evolved around these pillars, and provide a much more effective template for making a pragmatic assessment of the existence of an armed conflict, one that is not hobbled by a requirement to completely satisfy both of these elements, or pillars.

A. An Analogy to U.S. Constitutional Criminal Jurisprudence

Conflict assessment, especially in the non-international context, must be pragmatically driven. And a totality approach to this assessment process better serves this goal than a strict elements test. In support of this assertion, U.S. constitutional criminal law, and specifically jurisprudence on the assessment of probable cause, offers a remarkably useful analogy. We recognize that probable cause analysis is legally inapposite to armed conflict recognition analysis. But we believe that similarities in the objectives of both these “tests” justifies consideration of the approach adopted by the U.S. Supreme Court as a model for assessing the existence of non-international armed conflicts.

Pursuant to the Fourth Amendment of the U.S. Constitution, probable cause is the constitutional requirement to justify issuance of a search warrant.\(^{109}\) Normally, assessing probable cause is relatively uncomplicated; such as when it is based on a police officer’s own observation of criminal activity, or on scientific or eyewitness reports. Loosely analogous to the traditional civil war in conflict recognition analysis, these situations are so self-evident that resort to an analytical methodology is basically unnecessary. However, the challenge of assessing probable cause becomes far more complex and difficult when the source of information is an informant’s tip of criminal activity.\(^{110}\) In

\(^{109}\) U.S. CONST. amend. 4; WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE §3.3(a).
\(^{110}\) Aguilar v. Texas, 378 U.S. 108, 114 (1964) (establishing that a magistrate should know some of the underlying circumstances relied on by an informant and some of the underlying circumstances which allowed an officer to conclude that the informant was reliable); Spinelli v. United States, 393 U.S. 410, 416
this situation, the only first-hand observation of criminal activity comes from the
informant, and while police investigation in response to the tip may confirm non-criminal
details of the tip, the probable cause determination will ultimately reflect a ratification of
the tip, or “opinion” of ongoing criminal activity.\textsuperscript{111} How the Supreme Court addressed
the assessment of such tips, and more importantly the value of utilizing a totality of the
circumstances approach to such assessments, provides a useful example of how a similar
approach would more effectively synchronize the \textit{Tadic} elements with the pragmatic
purpose of at the core of conflict recognition.

In 1964, in the case of \textit{Aguilar v. Texas},\textsuperscript{112} the Supreme Court addressed the issue
of when an informant’s tip establishes probable cause to support a warrant. The Court
held that “[T]he magistrate [the neutral officer making the probable cause assessment]
must be informed of some of the underlying circumstances relied on by the person
providing the information and some of the underlying circumstances from which the
affiant [the officer requesting the warrant and presenting the tip as the basis for the
warrant] concluded that the informant, whose identity was not disclosed, was creditable
or his information reliable.”\textsuperscript{113} Much like the \textit{Tadic} decision, this holding evolved into a
“two prong” test for assessing probable cause: first, the magistrate must assess the
underlying circumstances informing the tip (the foundation of knowledge upon which the
tip is based), and second, the magistrate must be provided information to establish the
informant’s veracity.\textsuperscript{114} Although the \textit{Aguilar} decision never addressed how each of
these prongs interrelates with the other, like the \textit{Tadic} elements, these “two prongs”
evolved into strict individual requirements, with each prong treated independently in the
probable cause assessment.

In 1969, the Supreme Court revisited this issue, and this time endorsed this “two
prong” test when it decided \textit{U.S. v. Spinelli}.\textsuperscript{115} In \textit{Spinelli}, the Court reviewed the

\footnotesize
(1969) (magistrate should also know the underlying circumstances and context from which an informant
had concluded a crime had been committed); \textit{Illinois v. Gates}, 462 U.S. 213, 238 (1983) (reversing the
\textit{Aguilar-Spinelli} two pronged test in favor of a “totality of the circumstances” test).
\textsuperscript{111} \textit{Spinelli} 393 U.S. at 423 (White J., concurring).
\textsuperscript{112} \textit{Aguilar} 378 U.S. at 114.
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Gates}, 462 U.S. at 278-84.
\textsuperscript{115} \textit{Spinelli}, 393 U.S. at 413.
propriety of a warrant issued based on a confidential informant’s tip. The Court concluded the tip was insufficient to establish probable cause because both prongs of the *Aguilar* two-prong test were lacking. According to the Court, the tip failed to satisfy both prongs of the Aguilar two prong test, because it offered no reason to conclude the informant was reliable (the veracity prong), nor did it provide the type of predictive details indicating the informant obtained his information from Spinelli or from inside access to Spinelli’s alleged criminal activities (the basis of knowledge prong). As a result, there was nothing from which a neutral reviewing official could rely on to conclude the tip sufficiently reliable to establish probable cause.\footnote{116} Ostensibly because the evidence was insufficient to meet the requirements of either prong of the standard, the relationship of each of the prongs was once again omitted from the decision.

Lower courts, however, began to fill this void. These two cases came to be known as the *Aguilar/Spinelli* “two prong” test for establishing probable cause.\footnote{117} Pursuant to this test, lower courts assumed that each of these prongs had to be sufficiently established to find probable cause. Although the Court never indicated such a strict compartmented analysis was necessary, it nonetheless evolved as the accepted meaning of these decisions. Thus, while the deficiency of the informant’s tip in *Spinelli* implicated a total failure to provide adequate information on either the informant’s foundation of knowledge or credibility, these were subsequently understood as independent requirements.\footnote{118} Much like the *Tadic* decision, the subsequent evolution of the *Aguilar/Spinelli* test potentially transformed it into a standard more demanding than the Court ever intended to impose.\footnote{119}

Unlike *Tadic*, however, this evolution itself became the object of critique by the Court that created the conditions that led to its adoption: the Supreme Court. The strict two-prong test, requiring independent satisfaction of each prong, itself came before the

\footnote{116} *See id.* at 415-417.
\footnote{117} Gates, 462 U.S. at 230 n.5, 234 n.9 (describing the “entirely independent character” of both prongs and their rigid application by lower courts).
\footnote{118} *Id.* at 228 (describing the Illinois Supreme Court’s belief that the *Aguilar-Spinelli* test implemented a rigid test); 229 (describing how the Illinois Supreme Court used an “elaborate set of legal rules” in an effort to evaluate “veracity, reliability and basis of knowledge” under *Aguilar-Spinelli*).
\footnote{119} *Id.* at 232 n.7.
Court in 1984 in the case of Illinois v. Gates.\textsuperscript{120} In Gates, a magistrate issued a search warrant based on an anonymous tip, but a tip that included significant indicia that the informant had intimate knowledge of the suspect’s criminal activities (growing and selling large amounts of marijuana). Police investigated the tip, and corroborated much of the information provided by the informant, to include future travel activity of the suspect. Based on this information, a Magistrate issued a warrant to search the suspect’s home. Police subsequently discovered large amounts of marijuana in the home and the suspect’s car.\textsuperscript{121}

The suspect was convicted at trial, and when his appeal reached the Illinois Supreme Court, the strict two-prong Aguilar/Spinelli test doomed the government’s case.\textsuperscript{122} Even though police had corroborated sufficient information to establish the informant provided the tip of criminal activity with a solid foundation of knowledge, the anonymity of the informant left the “credibility/veracity” prong of the two-prong test almost totally vacant. As a result, the Illinois Supreme Court “reluctantly” concluded that the magistrate erred in issuing the warrant.\textsuperscript{123} This crystallized the issue that had been brewing for two decades: was it necessary to treat each of the two Aguilar/Spinelli prongs as independent requirements? Or, were they better understood as a framework to guide a totality of the circumstances analysis of probable cause?

The Supreme Court’s answer was emphatic – because probable cause is a practical, common sense assessment of all facts and circumstances, the inflexibility of the strict two-prong approach that evolved from its earlier opinions actually undermined the very purpose of probable cause assessment.\textsuperscript{124} Instead, these two prongs are properly understood as a framework to guide a totality of the circumstances assessment of probable cause, an assessment that furthers the practical and pragmatic objective of determining a “fair probability” of an alleged fact.\textsuperscript{125} According to the opinion:

\textsuperscript{120} Id. at 228.
\textsuperscript{121} Id. at 227.
\textsuperscript{122} Id. at 229.
\textsuperscript{123} Id. at 230.
\textsuperscript{124} See id. at 234.
\textsuperscript{125} Id. at 238.
We agree with the Illinois Supreme Court that an informant’s “veracity,” “reliability,” and “basis of knowledge” are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is “probable cause” to believe that contraband or evidence is located in a particular place.\textsuperscript{126}

Central to the Court’s opinion was the pragmatic nature of probable cause, a standard that was never intended to connote a strict legal test:

Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a “practical, nontechnical conception.” . . . “In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”\textsuperscript{127}

As these comments illustrate, probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules.

The Court then explained why a totality of the circumstances approach to assessing probable cause better served the underlying objectives of this common sense assessment. The Court’s articulation of this relationship is, in the authors’ opinion, remarkably suited to the issue presented in this article: whether the objectives of armed conflict assessment are furthered or undermined by viewing the Tadic elements as two distinct requirements.

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a “substantial basis for . . . conclud[ing]” that probable cause existed. . . . We are convinced that this flexible, easily applied standard will better

\textsuperscript{126} Id. at 214.
\textsuperscript{127} See id. at 231.
achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli.*

It is of course obvious that none of this analysis had anything to do with identifying the armed conflict demarcation point. However, the value in considering this evolution of probable cause analysis is that like the conflict classification debate, it turned on the validity of imposing a strict two-prong "elements" test for this assessment. Furthermore, the pragmatic nature of the probable cause determination laid the entire analytical foundation for the *Gates* opinion. Both of these considerations are easily and properly extended to the conflict recognition debate. As the Supreme Court did with regard to probable cause, the ICRC Commentary indicates almost without question that conflict recognition was intended to be a pragmatic, practical, and common sense assessment. Indeed, the primary rational for adopting the term "armed conflict" was the inherent flaw in the overly legalistic assessment of "war." And like conflict recognition analysis, a seminal judicial decision providing a logical and rational framework for conducting this assessment has evolved into a strict, overly legal two-prong "elements" test. Modifying only a few words in the preceding opinion extract highlights the logic of this analogy:

> The task of *conflict recognition* is simply to make a practical, common-sense decision whether, given all the circumstances related to the ongoing confrontation between the state and opposition groups, including the "intensity of hostilities" and "organization of opposition forces", there is a fair probability that the situation has crossed the threshold from civil disturbance to armed hostilities. And the duty of a assessing state or international organization is simply to ensure that there is a "substantial basis for ... conclud[ing]" that an armed conflict has commenced. We are convinced that this flexible, easily applied standard will better achieve the accommodation of state and humanitarian interests that international law requires than does the approach that has developed from *Tadic.*

Adopting this totality of the circumstances methodology for conflict recognition does not, as illustrated by the modified extract, in any way diminish the importance of the *Tadic* factors. Instead, it lodges those factors within a framework that is better suited for making practical and common sense assessments than for technical legal assessments.

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128 *Id.* at 238.
That pragmatic value enhances the significance of these factors, which will continue to
guide this analytical process.

Indeed, like the Gates approach, a totality of the circumstances methodology in
conjunction with the Tadic elements would result in those elements serving as two
essential guideposts for making the pragmatic conflict recognition assessment. Why will
this better serve the objectives of the law? In Gates, the Court recognized that no matter
how solid the basis of knowledge was for an anonymous tip, a strict two-prong approach
would prohibit a finding of probable cause because the anonymity of the informant would
preclude any assessment of veracity/reliability.\textsuperscript{130} However, the Court also recognized
that in practical terms, this made no sense. If the objective is to inform a common
sense/practical determination of probable cause, an overwhelming indication that the
informant’s tip is based on inside and intimate access to the alleged criminal activity,
validated by independent police corroboration, effectively self-validated the veracity
requirement.\textsuperscript{131} In other words, when it is established that the tip is based on a clear and
compelling basis of knowledge, that basis itself provides sufficient indicia of veracity.
Thus, as the Gates Court concluded, the totality approach better served the objectives of
assessing probable cause: it permits the overwhelming satisfaction of one “prong” or
“element” to offset a reduced quanta of indicia on the other prong/element,\textsuperscript{132} an outcome
impossible by treating each prong/element as a strictly independent requirement.

\section*{B. Understanding Intensity and Organization as a Framework}

Whether and when a state is justified in resorting to combat power to respond to
an internal dissident threat is undoubtedly a complex question. The Commentary is clear
that recognition of an internal armed conflict is in no way intended to legitimize the
opposition or their use of force.\textsuperscript{133} However, what history seems to demonstrate

\textsuperscript{130} See Gates, 462 U.S. at 229.
\textsuperscript{131} See id. at 241.
\textsuperscript{132} See id. at 238.
\textsuperscript{133} GC III COMMENTARY, supra note 4 at 43-44 ("This clause is essential. Without it Article 3 would
probably never have been adopted. It meets the fear that the application of the Convention, even to a very
limited extent, in cases of civil war may interfere with the de jure Government’s suppression of the revolt
by conferring belligerent status, and consequently increased authority and power, upon the adverse Party . ..
Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the de jure
Government that the adverse Party has authority of any kind; it does not limit in any way the Government’s
repeatedly is that states almost always tend to err on the side of aggressiveness when they feel threatened by such movements. This is unsurprising. A state seeking to preserve its warrant will almost always perceive even a nascent and poorly organized armed opposition movement as a critical national security challenge. From an operational and tactical perspective, it is often precisely at this point in the threat evolution that a massive and heavy-handed combat response will be perceived as decisive. Expecting the state to calmly wait for the opposition to coalesce into an organized force capable of sustained combat operations *before* it makes maximum use of its almost always initially superior capability is simply counterintuitive.

Proponents of a strict elements test for conflict recognition emphasize that until these requirements are satisfied, government forces are legally obligated to respond within a law enforcement legal framework.\(^{134}\) Perhaps if there was a viable method to strictly enforce this consequence of the elements test it would have greater merit, but there is not. Instead, it borders on axiomatic that when the state calls its combat trained forces from the barracks to deal with an internal opposition threat, those forces are going to operate in a manner that maximizes their operational and tactical advantage. Have there been exceptions to this norm? Of course. But building a humanitarian protection paradigm on the exception while ignoring the rule is debilitating, and Syria is a quintessential manifestation of this reality. First, the forces themselves enter the fray uncertain as to the law that regulates their actions. As noted in the introduction, the sad reality is that this will often be perceived not as limited authority, but as authority with no limits. They will rarely see themselves as robustly armed police – why would they be called out of the barracks if that was what was needed? And yet, the constant emphasis that the opposition is insufficiently organized to qualify as a “real” enemy and therefore

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right to suppress a rebellion by all the means – including arms – provided by its own laws; nor does it in any way affect that Government’s right to prosecute, try and sentence its adversaries, according to its own laws. In the same way, the fact of the adverse Party applying the Article does not give it any right to any new international status, whatever it may be and whatever title it may give itself or claim.”).

they are not "really" in an armed conflict will suggest that the only rule is rapid repression.\textsuperscript{135}

This obviously creates uncertainty for the forces called upon to respond to the opposition threat. But far more problematic is the degradation of humanitarian protections applicable to the response. Government forces will seek to exploit the nascent organization of opposition or dissident movements with the application of overwhelming force, creating a situation wholly unsuited for normal peacetime legal regulation. In this context, issues such as lawful objects of attack, precautions in the attack, minimization of collateral damage, clear standards of protection for those rendered \textit{hors de combat}, protection for the wounded and sick, establishment of neutral zones, and access to humanitarian relief become essential. These are all aspects of conflict regulation derived from the LOAC, yet refusing to recognize the existence of armed conflict eviscerates the efficacy of these norms by rendering them inapplicable.

In the conflict recognition context, therefore, the utility of the \textit{Gates} logic and emphasis on the totality of the circumstances is apparent. In a situation where the intensity of the hostilities is relatively low, indicia of opposition military organization would prove critical to a practical determination of armed conflict. Without satisfaction of both of these prongs, the low level of violence is itself insufficient to meet the objective of the analysis: preventing premature LOAC invocation and application to this situation is therefore best addressed through a peacetime law enforcement framework and regulated exclusively by human rights principles. The same result would be logical where an opposition group was loosely organized, but had yet to engage in action creating a significant intensity of violence. In that situation, the inchoate nature of hostilities would justifiably indicate that neither the state nor the opposition group had fully committed to participation in an armed conflict.

But what if a situation exists where the intensity of hostilities element is overwhelmingly satisfied, while the organizational element is lacking. Under a strict

application of the Tadic elements test, this situation could never amount to an armed conflict. The discourse about the situation in Syria makes this point all too clearly. But from a pragmatic perspective, this conclusion seems inconsistent with the humanitarian objectives of conflict recognition, precisely because the overwhelming intensity of the hostilities brings one of LOAC’s core purposes – mitigating the brutality of and suffering during war – to center stage. Indeed, a situation of intense hostilities without significant opposition force organization indicates the exact type of heavy-handed government military response that necessitates humanitarian regulation. A full-blown use of military combat power is precisely the type of government response that must be effectively regulated, and the LOAC is far better suited to that purpose than human rights law. No less, it is unfortunately all too common that the very governments that resort to overwhelming combat power to repress opposition are also unlikely to feel bound by any relevant human rights obligations. Suggesting that human rights law can provide sufficient protection for those most in need in such situations is simply burying one’s head in the sand.

Furthermore, relying on a lack of opposition organization to deny the existence of armed conflict and the applicability of this international regulatory framework effectively incentivizes indiscriminate brutality by the government. If, at the inception of an opposition movement, the government responds with overwhelming combat power, it may actually prevent organizational efforts, thereby avoiding the consequences of LOAC applicability. And it may even incentivize deliberate dispersal of opposition capabilities in an effort to minimize indicia of organization and thereby undermine the legitimacy of any state assertion of armed conflict.136 Thus, overwhelming satisfaction of the intensity prong should produce an analogous effect to the overwhelming satisfaction of the basis prong in the Gates model. Widespread and intense hostilities would offset the requirement to identify significant opposition organization. While some evidence of

136 This totality analysis is equally valuable when addressing the status of military operations against transnational non-state organizations, especially when such organizations utilize dispersal and lack of traditional belligerent organization as tactical force multiplier. This certainly seems to be consistent with the continued U.S. assertion that it is engaged in an ongoing armed conflict with al Qaeda. While this assertion remains as controversial today as it was at inception; see ILA Report, supra note 31; it seems clear that it is the intensity of the risk and continued terrorist threat that dominates this assessment, even as al Qaeda’s organization has been decimated.
organization would be necessary, dispersed and nascent movements would satisfy that requirement in the context of such intensity. This approach also comports with the original conception that while an armed conflict requires two parties fighting against each other, some minimal degree of organization is sufficient to conclude that two sides are engaged in combat.

The claim that the same result would be justified by overwhelming satisfaction of the organization prong of the Tadic test with little or no intensity of hostilities is a more difficult argument to sustain. It is perhaps logical to infer the existence of armed conflict as the result of a highly organized dissident force, for example a breakaway military group preparing to initiate hostilities against the government. For these reasons, such an inference is less compelling than the inverse relationship between intensity and organization. There are countless examples of highly organized and peaceful opposition movements. For example, opposition movements to governments frequently are able to quickly organize mass protests and other actions of civil disobedience. Examples such as Tahrir Square in Egypt during that chapter of the Arab Spring, or the civil disobedience efforts in Panama opposing General Noriega leading up to the U.S. invasion, illustrate that these movements may at times attain a high level of organization. However, it would be inconsistent with Pictet’s conception of the civil/armed conflict threshold to suggest that organization, even coupled with widespread activity in opposition to the government, qualifies as an armed conflict. Unless and until that opposition involves some significant level of violence – violence that triggers a military response by the government utilizing the traditional tools and tactics of combat – it does not meet the test for armed conflict, even under a more flexible totality approach. Some hostilities must be necessary for a situation to qualify as an armed conflict – as is inherent in the term “armed” – although it does seem logical to reduce the intensity threshold when there is overwhelming satisfaction of organization.

Interestingly, the Gates decision also offers an example of how these inverse relationships might not justify the same conclusion. In a concurring opinion, Justice White critiqued the majority’s failure to distinguish between the effect of overwhelming satisfaction of the foundation prong compared to the inverse hypothetical: overwhelming
satisfaction of the veracity prong with no indicia of a solid basis for the tip.\textsuperscript{137} White noted that in the latter situation, it would be illogical to find probable cause, because the magistrate would have no independent basis for reaching that finding. Instead, it would simply reflect the ratification of an opinion of criminality based on the veracity of the source of the opinion. White also noted that it was inconceivable that a magistrate would properly issue a warrant based solely on the assurance of a police officer that evidence would be located where the officer said it existed. If, White asked, this type of “trust me” affidavit is insufficient to establish probable cause, how could a tip from a private citizen be considered sufficient?\textsuperscript{138} Thus, White acknowledged that overwhelming satisfaction of the foundation prong with little or no indicia of veracity as the result of the anonymity of the informant might justify a finding of probable cause because the magistrate could independently assess the foundation. In effect, as long as there is solid foundation, the magistrate has a valid independent basis to assess the reliability of the tip. However, where there are no indicia of foundation, a tip from even the most trustworthy source – such as an experienced and trustworthy police officer – would not alone establish probable cause. Instead, some foundation for the tip had to be provided, although a high level of veracity could reduce the foundation requirement.

\textsuperscript{137} Gates, 462 U.S. at 273-274 (White J., concurring). White noted: The Court reasons, ante at 233, that the “veracity” and “basis of knowledge” tests are not independent, and that a deficiency as to one can be compensated for by a strong showing as to the other. Thus, a finding of probable cause may be based on a tip from an informant “known for the unusual reliability of his predictions” or from “an unquestionably honest citizen,” even if the report fails thoroughly to set forth the basis upon which the information was obtained. \textit{Ibid.} If this is so, then it must follow \textit{a fortiori} that the affidavit of an officer, known by the magistrate to be honest and experienced, stating that [contraband] is located in a certain building” must be acceptable. \textit{Spinelli}, 393 U.S. at 393 U. S. 424 (WHITE, J., concurring). It would be “quixotic” if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause. \textit{Ibid.} But we have repeatedly held that the unsupported assertion or belief of an officer does not satisfy the probable cause requirement. \textit{See, e.g., Whiteley v. Warden}, 401 U. S. 560, 401 U. S. 564-565

\ldots

Thus, as I read the majority opinion, it appears that the question whether the probable cause standard is to be diluted is left to the common sense judgments of issuing magistrates. I am reluctant to approve any standard that does not expressly require, as a prerequisite to issuance of a warrant, some showing of facts from which an inference may be drawn that the informant is credible and that his information was obtained in a reliable way.

\textsuperscript{138} \textit{Id.}
This bifurcated assessment model seems equally well suited to conflict recognition. As noted above, overwhelming satisfaction of the intensity prong should reduce the requirement for established opposition organization. In contrast, overwhelming satisfaction of the organization prong is analogous to overwhelming satisfaction of veracity in White's conception of the totality of the circumstances test: it alone cannot eliminate the requirement for some level of hostilities. It would, however, permit a finding of armed conflict at a much earlier point in the hostilities continuum. This is a logical outcome, for it is the "totality" effect of an opposition group poised to engage in hostilities - as manifested through indicia of organization - combined with the initiation of those hostilities that indicates armed conflict has been initiated.

In comparing the two possible examples - high intensity with low organization, or high organization with low intensity - we can see why a more comprehensive "totality of the circumstances" approach is essential to the pragmatic and operationally effective application of LOAC. No two situations of violence are the same and no two will pose the same questions regarding the nature of the hostilities and the capacity of the opposition forces. Recognizing this diversity, the consequences for conflict recognition, and the need to analyze intensity, organization and other relevant factors within a comprehensive framework helps to ensure a more practical application of the LOAC trigger in Common Article 3. Analogy to the Gates opinion is merely offered as a means of highlighting the dangers of allowing such elements to evolve into strict independent requirements, and the benefit of a more flexible understanding of those elements, especially how they interrelate. If doing so better reconciles armed conflict recognition with the underlying humanitarian objectives of the LOAC, this methodology will better serve the interests of all those affected by such violence.

IV. Concluding Thoughts

Like all legal regimes, the LOAC requires thorough legal analysis and, as a result, can be susceptible to overly legalistic approaches. It is essential, however, to constantly emphasize that the LOAC addresses life and death, and in the starkest manner possible. This is a body of law that recognizes the right of warring parties to destroy enemy personnel and property, accepts incidental civilian casualties (in accordance with the
principle of proportionality), and regulates lethal weapons, among a host of other components of the law. Its protections equally focus on the most fundamental of human needs: protection from attack, care for the wounded, respect for the dead, protection for medical personnel and facilities and more. The LOAC – and especially applicability analysis – is ultimately undermined when technicalities inhibit its core purposes and protections – the consequences of overly narrow or inapt application are simply too great to contemplate.

In addition, LOAC has a long tradition of relying on the object and purpose of the law in response to changing circumstances and uncertainties. As Jean Pictet wrote in 1985,

\[ \text{[t]he International Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. . . . They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination.}^{139} \]

The LOAC’s basic principles – military necessity, humanity, distinction and proportionality – have thus always guided interpretations to preserve and protect the law’s core values. In much the same way, the LOAC’s essential purposes, including mitigating the brutality and suffering of war, have a similar role to play, especially in the realm of conflict recognition. Just as reliance on LOAC’s basic principles helps protect against interpretations of the law that undermine their goals, so a reminder of LOAC’s historic purpose must drive a recalibration of the conflict recognition process from one of technical legalities to one of a totality of the circumstances aimed at a pragmatic protective framework. If not, Syria serves as an all too tragic reminder of the danger of not seeing the forest for the trees.

\[ ^{139} \text{JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW, 59-60 (1985).} \]
Law of War Detention:
The Intersection with Human Rights
Dick Jackson
U.S. Army
Agenda

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• Law of War Detention
• A Domestic Human Rights Regime
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Human Rights Council
Fourteenth session
Agenda item 3
Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Report of the Special Rapporteur on extrajudicial, summary
or arbitrary executions, Philip Alston

Addendum

Study on targeted killings

Summary

In recent years, a few States have adopted policies that permit the use of targeted killings, including in the territories of other States. Such policies are often justified as a necessary and legitimate response to "terrorism" and "asymmetric warfare", but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal frameworks. This report describes the new targeted killing policies and addresses the main legal issues that have arisen.

* Late submission.
** Owing to time constraints, the present report is circulated as received, in the language of submission only.
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I. Introduction

1. A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. In recent years, a few States have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States.

2. Such policies have been justified both as a legitimate response to “terrorist” threats and as a necessary response to the challenges of “asymmetric warfare.” In the legitimate struggle against terrorism, too many criminal acts have been re-characterized so as to justify addressing them within the framework of the law of armed conflict. New technologies, and especially armed combat aerial vehicles or “drones”, have been added into this mix, by making it easier to kill targets, with fewer risks to the targeting State.

3. The result of this mix has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks – human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions. Moreover, the States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum.

4. In terms of the legal framework, many of these practices violate straightforward applicable legal rules. To the extent that customary law is invoked to justify a particular interpretation of an international norm, the starting point must be the policies and practice of the vast majority of States and not those of the handful which have conveniently sought to create their own personalized normative frameworks. It should be added that many of the justifications for targeted killings offered by one or other of the relevant States in particular current contexts would in all likelihood not gain their endorsement if they were to be asserted by other States in the future.

5. This report describes the publicly available information about new targeted killing policies and addresses the main legal issues that have arisen. It identifies areas in which legal frameworks have been clearly violated or expanded beyond their permissible limits; where legal issues are unclear, it suggests approaches which would enable the international community to return to a normative framework that is consistent with its deep commitment to protection of the right to life, and the minimization of exceptions to that constitutive principle.

6. The Special Rapporteur is grateful to Hina Samai of the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice, New York University School of Law, for her superb assistance in the preparation of this report. He is also grateful to Sarah Knuckey for her comments, and Nishant Kumar and Anna De Courcy Wheeler for research assistance.
II. Background

A. Definition of “targeted killing”

7. Despite the frequency with which it is invoked, “targeted killing” is not a term defined under international law. Nor does it fit neatly into any particular legal framework. It came into common usage in 2000, after Israel made public a policy of “targeted killings” of alleged terrorists in the Occupied Palestinian Territories. The term has also been used in other situations, such as:

- The April 2002 killing, allegedly by Russian armed forces, of “rebel warlord” Omar Ibn al Khattab in Chechnya.2

- The November 2002 killing of alleged al Qaeda leader Ali Qaeda Seryan al-Harithi and five other men in Yemen, reportedly by a CIA-operated Predator drone using a Hellfire missile.3

- Killings in 2005 – 2008 by both Sri Lankan government forces and the opposition LTTE group of individuals identified by each side as collaborating with the other.4

- The January 2010 killing, in an operation allegedly carried out by 18 Israeli Mossad intelligence agents, of Mahmoud al-Mabhouh, a Hamas leader, at a Dubai hotel.5 According to Dubai officials, al-Mabhouh was suffocated with a pillow; officials released videotapes of those responsible, whom they alleged to be Mossad agents.6

8. Targeted killings thus take place in a variety of contexts and may be committed by governments and their agents in times of peace as well as armed conflict, or by organized armed groups in armed conflict.7 The means and methods of killing vary, and include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.8

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1 Infra, section II.B. Orna Ben-Naftali & Keren Michaeli, We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int’l L.J. 233, 234 (2003). Although this report uses the common terms “terrorism” and “terrorist”, I agree with the Special Rapporteur on the promotion and protection of human rights while countering terrorism that the continuing lack of a “universal, comprehensive and precise” definition of these terms hampers the protection of human rights, E/CN.4/2006/98, para. 50, and in particular, the right to life. The work of the Ad Hoc Committee established under GA Res. 51/210 to work on a draft convention on international terrorism is critical and urgent.
7 This report focuses only on killings by States and their agents because, as yet, no non-state actors have sought to justify specific “targeted killings.”
9. The common element in all these contexts is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. In a targeted killing, the specific goal of the operation is to use lethal force. This distinguishes targeted killings from unintentional, accidental, or reckless killings, or killings made without conscious choice. It also distinguishes them from law enforcement operations, e.g., against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.

10. Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal. This is in contrast to other terms with which “targeted killing” has sometimes been interchangeably used, such as “extrajudicial execution”, “summary execution”, and “assassination”, all of which are, by definition, illegal.

B. New targeted killing policies

11. The phenomenon of targeted killing has been present throughout history. In modern times, targeted killings by States have been very restricted or, to the extent that they are not, any de facto policy has been unofficial and usually denied, and both the justification and the killings themselves have been cloaked in secrecy. When responsibility for illegal targeted killings could be credibly assigned, such killings have been condemned by the international community – including by other States alleged to practice them.

12. More recently, however, a few States have either openly adopted policies that permit targeted killings, or have formally adopted such a policy while refusing to acknowledge its existence.

Israel

13. In the 1990s, Israel categorically refused to admit to targeted killings, stating, when accused, that “the [Israeli Defense Force] wholeheartedly rejects this accusation. There is no policy and there never will be a policy or a reality of willful killing of suspects... the
principle of the sanctity of life is a fundamental principle of the L.D.F.\textsuperscript{15} In November 2000, however, the Israeli Government confirmed the existence of a policy pursuant to which it justified targeted killings in self-defence and under international humanitarian law (IHL) because the Palestinian Authority was failing to prevent, investigate and prosecute terrorism and, especially, suicide attacks directed at Israel.\textsuperscript{16} This was reinforced by the issuance, in 2002, of a legal opinion (only part was published) by the Israeli Defense Force Judge Advocate General on the conditions under which Israel considered targeted killings to be legal.\textsuperscript{17}

14. The majority of Israeli targeted killings have reportedly taken place in “Area A”, a part of the West Bank under the control of the Palestinian Authority.\textsuperscript{18} The targets have included members of various groups, including Fatah, Hamas, and Islamic Jihad, who, Israeli authorities claimed, were involved in planning and carrying out attacks against Israeli civilians.\textsuperscript{19} Means used for targeted killings include drones, snipers, missiles shooting from helicopters, killings at close range, and artillery.\textsuperscript{20} One study by a human rights group found that between 2002 and May 2008 at least 387 Palestinians were killed as a result of targeted killing operations. Of these, 234 were the targets, while the remainder were collateral casualties.\textsuperscript{21}

15. The legal underpinnings of these policies were subsequently adjudicated by the Israeli Supreme Court in December 2006.\textsuperscript{22} The court did not as a general matter either prohibit or permit targeted killings by Israeli forces, holding instead that the lawfulness of each killing must be determined individually. It found without detailed discussion that the customary law of international armed conflict was the applicable law, and did not consider the application of either human rights law or the IHL of non-international armed conflict. It rejected the Government’s contention that terrorists were “unlawful combatants” subject to attack at all times. Instead, it held that the applicable law permitted the targeted killing of civilians for such time as they “directly participated in hostilities”\textsuperscript{23} as long as four cumulative conditions were met:

- Targeting forces carried the burden of verifying the identity of the target as well as the factual basis for meeting the “direct participation” standard.

- Even if the target was legally and factually identified by the Government as legitimate, State forces could not kill the person if less harmful means were available.

- After each targeted killing, there must be a retroactive and independent investigation of the “identification of the target and the circumstances of the attack”, and

\textsuperscript{15} Na’ama Yashuvi, Activity of the Undercover Units in the Occupied Territories, B’Tselem (1992).


\textsuperscript{17} Gideon Alon & Amos Harel, IDF Lawyers Set ‘Conditions’ for Assassination Policy, Haaretz, 2 Feb. 2002.


\textsuperscript{19} Naftali & Michaeli, supra note 1 at 247-50.


\textsuperscript{21} Id.

\textsuperscript{22} Israel High Court of Justice, The Public Committee Against Torture et al. v. The Government of Israel, et al. HCJ 769/02, Judgment of 14 Dec. 2006 (PCATI).

\textsuperscript{23} Id. at paras. 31-40.
Any collateral harm to civilians must meet the IHL requirement of proportionality.  

16. Subsequently, it has been reported that Israeli forces have conducted targeted killings in violation of the Supreme Court’s requirements. The reports, denied by Israeli officials, were allegedly based on classified documents taken by an IDF soldier during her military service; the soldier has been charged with espionage.

17. Israel has not disclosed the basis for its legal conclusions, and has not disclosed in detail the guidelines it uses to make its targeted killings decisions, the evidentiary or other intelligence requirements that would justify any killing, or the results of any after-action review of the conformity of the operation with the legal requirements.

The USA

18. The United States has used drones and airstrikes for targeted killings in the armed conflicts in Afghanistan and Iraq, where the operations are conducted (to the extent publicly known) by the armed forces. The US also reportedly adopted a secret policy of targeted killings soon after the attacks of 11 September 2001, pursuant to which the Government has credibly been alleged to have engaged in targeted killings in the territory of other States. The secret targeted killing program is reportedly conducted by the Central Intelligence Agency (CIA) using “Predator” or “Reaper” drones, although there have been reports of involvement by special operations forces, and of the assistance of civilian contractors with the implementation of the program.

19. The first credibly reported CIA drone killing occurred on 3 November 2002, when a Predator drone fired a missile at a car in Yemen, killing Qaed Senyan al-Harib, an al-Qaeda leader allegedly responsible for the USS Cole bombing. Since then, there have reportedly been over 120 drone strikes, although it is not possible to verify this number. The accuracy of drone strikes is heavily contested and also impossible for outsiders to verify. Reports of civilian casualties in Pakistan range from approximately 20 (according to anonymous US Government officials quoted in the media) to many hundreds.

20. The CIA reportedly controls its fleet of drones from its headquarters in Langley, Virginia, in coordination with pilots near hidden airfields in Afghanistan and Pakistan who handle takeoffs and landings. The CIA’s fleet is reportedly flown by civilians, including both intelligence officers and private contractors (often retired military personnel).

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24 Id. at paras. 39, 40 and 60.
25 Uri Blau, IDF Rejects Claims it Killed Palestinians in defiance of Court, Haaretz, 27 Nov. 2008.
28 Council of Europe, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paras. 58-64.
34 Mayer, supra note 3.
35 Id.
According to media accounts, the head of the CIA’s clandestine services, or his deputy, generally gives the final approval for a strike. There is reportedly a list of targets approved by senior Government personnel, although the criteria for inclusion and all other aspects of the program are unknown. The CIA is not required to identify its target by name; rather, targeting decisions may be based on surveillance and “pattern of life” assessments.

21. The military also has a target list for Afghanistan. A Senate Foreign Relations Committee Report released on 10 August 2009 disclosed that the military’s list included drug lords suspected of giving money to help finance the Taliban. According to the report, “[t]he military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield . . . standards for getting on the list require two verifiable human sources and substantial additional evidence.”

22. The Legal Adviser to the Department of State recently outlined the Government’s legal justifications for targeted killings. They were said to be based on its asserted right to self-defence, as well as on IHL, on the basis that the US is “in an armed conflict with Al Qaeda, as well as the Taliban and associated forces.” While this statement is an important starting point, it does not address some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms.

Russia

23. Russia has described its military operations in Chechnya, launched in 1999, as a counter-terrorism operation. During the course of the conflict, Russia has reportedly deployed “seek and destroy” groups of army commandoes to “hunt down groups of insurgents” and has justified reported targeted killings in Chechnya as necessitated by Russia’s fight against terrorism. This justification is especially problematic in so far as large parts of the population have been labeled as terrorists. Although there are credible reports of targeted killings conducted outside of Chechnya, Russia has refused to acknowledge responsibility or otherwise justify the killing, and also refused to cooperate with any investigation or prosecution.

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36 Id.
37 Id.
38 Id.
40 Id. at 15-16.
41 Harold Koh, Legal Adviser, Department of State, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Soc’y of Int’l Law (25 Mar. 2010).
42 Saradzhyan, supra note 8 at 183.
43 E.g., BBC, Chechen Rebel Basayev Dies, 10 July 2006 (alleged killing by Russian special forces of Chechen rebel leader Shamil Basayev).
44 E.g., Anna Le Huerou and Amandine Regamey, Russia’s War in Chechnya, in Samy Cohen, Democracies at War Against Terrorism at 222 (2008).
24. In summer 2006, the Russian Parliament passed a law permitting the Russian security services to kill alleged terrorists overseas, if authorized to do so by the President.\textsuperscript{46} The law defines terrorism and terrorist activity extremely broadly, including "practices of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action," and also any "ideology of violence."\textsuperscript{47}

25. Under the law, there appears to be no restriction on the use of military force "to suppress international terrorist activity outside the Russian Federation."\textsuperscript{48} The law requires the President to seek the endorsement of the Federation Council to use regular armed forces outside Russia, but the President may deploy FSB security forces at his own discretion. According to press accounts, at the time of the law's passage, "Russian legislators stressed that the law was designed to target terrorists hiding in failed States and that in other situations the security services would work with foreign intelligence services to pursue their goals."\textsuperscript{49} Legislators also "insisted that they were emulating Israeli and US actions in adopting a law allowing the use of military and special forces outside the country's borders against external threats."\textsuperscript{50}

26. There is no publicly available information about any procedural safeguards to ensure Russian targeted killings are lawful, the criteria for those who may be targeted, or accountability mechanisms for review of targeting operations.

C. New technology

27. Drones were originally developed to gather intelligence and conduct surveillance and reconnaissance. More than 40 countries now have such technology. Some, including Israel, Russia, Turkey, China, India, Iran, the United Kingdom and France either have or are seeking drones that also have the capability to shoot laser-guided missiles ranging in weight from 35 pounds to more than 100 pounds. The appeal of armed drones is clear: especially in hostile terrain, they permit targeted killings at little to no risk to the State personnel carrying them out, and they can be operated remotely from the home State. It is also conceivable that non-state armed groups could obtain this technology.\textsuperscript{51}

III. Legal issues

A. The applicable legal frameworks and basic rules

28. Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the interstate use of force.\textsuperscript{52} The basic legal rules applicable to targeted killings in each of these contexts are laid out briefly below.


\textsuperscript{47} Id. art. 3.

\textsuperscript{48} Id. art. 6.

\textsuperscript{49} Peter Finn, In Russia, A Secretive Force Widens, Washington Post, 12 Dec. 2006.

\textsuperscript{50} Steven Eks, Russia Law on Killing Extremists Abroad, BBC, 27 Nov. 2006.

\textsuperscript{51} Dan Ephron, Hezbollah's Worrisome Weapon, Newsweek, 11 Sept. 2006 (reporting that Iran has provided weaponized drones to Hezbollah).

\textsuperscript{52} A/61/311, paras. 33-45 (detailed discussion of "arbitrary" deprivation of life under human rights law).
In the context of armed conflict

29. **The legal framework**: Both IHL and human rights law apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*.\(^{53}\) To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.\(^{54}\)

30. **Under the rules of IHL**: Targeted killing is only lawful when the target is a “combatant” or “fighter”\(^ {55}\) or, in the case of a civilian, only for such time as the person “directly participates in hostilities.”\(^ {56}\) In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity,\(^ {57}\) and everything feasible must be done to prevent mistakes and minimize harm to civilians.\(^ {58}\) These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprials or punitive attacks on civilians are prohibited.\(^ {59}\)

Outside the context of armed conflict

31. **The legal framework**: The legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force. Although these standards are sometimes referred to as the “law enforcement” model, they do not in fact apply only to police forces or in times of peace. The “law enforcement officials” who may use lethal force include all government officials who exercise police

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\(^{57}\) Proportionality requires an assessment whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. AP I, arts. 51(5)(b) and 57; Henckaerts & Oswald-Beck, Customary International Humanitarian Law Rules, ICRC (2005) (ICRC Rules) Rule 14.

\(^{58}\) Precaution requires that, before every attack, armed forces must do everything feasible to: (i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property. AP I, art. 57; ICRC Rules 15-21. “Everything feasible” means precautions that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Melzer, supra note 9 at 365.

\(^{59}\) AP I, art. 51 (2); HPCR Commentary section C.18.
powers, including a State's military and security forces, operating in contexts where violence exists, but falls short of the threshold for armed conflict.60

32. **Under human rights law:** A State killing is legal only if it is required to protect life (making lethal force proportionate) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force necessary).61 The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others.62 The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.63

33. This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the sole objective of an operation. Thus, for example, a “shoot-to-kill” policy violates human rights law.64 This is not to imply, as some erroneously do, that law enforcement is incapable of meeting the threats posed by terrorists and, in particular, suicide bombers. Such an argument is predicated on a misconception of human rights law, which does not require States to choose between letting people be killed and letting their law enforcement officials use lethal force to prevent such killings. In fact, under human rights law, States’ duty to respect and to ensure the right to life65 entails an obligation to exercise “due diligence” to protect the lives of individuals from attacks by criminals, including terrorists.66 Lethal force under human rights law is legal if it is strictly and directly necessary to save life.

**The use of inter-state force**

34. **The legal framework:** Targeted killings conducted in the territory of other States raise sovereignty concerns.67 Under Article 2(4) of the UN Charter, States are forbidden from using force in the territory of another State.68 When a State conducts a targeted killing in the territory of another State with which it is not in armed conflict, whether the first State violates the sovereignty of the second is determined by the law applicable to the use of inter-state force, while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or human rights law.

35. **Under the law of inter-state force:** A targeted killing conducted by one State in the territory of a second State does not violate the second State’s sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to

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60 Code of Conduct for Law Enforcement Officials, GA Res. 34/169 of 17 December 1979 (Code of Conduct), art. 1, commentary (a) and (b); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, (Basic Principles), preamble, note.
62 A/61/311, paras. 42-44.
63 A/61/311, para. 41.
65 ICCPR, Art. (2)(1).
68 UN Charter, art. 51.
use force in self-defence under Article 51 of the UN Charter, because (i) the second State is responsible for an armed attack against the first State, or (ii) the second State is unwilling or unable to stop armed attacks against the first State launched from its territory. International law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate.  

36. While the basic rules are not controversial, the question of which framework applies, and the interpretation of aspects of the rules, have been the subject of significant debate. Both issues are addressed in greater detail below.

B. Sovereignty issues and States’ invocation of the right to self-defence

Consent

37. The proposition that a State may consent to the use of force on its territory by another State is not legally controversial. But while consent may permit the use of force, it does not absolve either of the concerned States from their obligations to abide by human rights law and IHL with respect to the use of lethal force against a specific person. The consenting State’s responsibility to protect those on its territory from arbitrary deprivation of the right to life applies at all times. A consenting State may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law.

38. To meet its legal obligations, therefore, the consenting State should, at a minimum, require the targeting State to demonstrate verifiably that the person against whom lethal force is to be used can be lawfully targeted and that the targeting State will comply with the applicable law. After any targeted killing, the consenting State should ensure that it was legal. In case of doubt, the consenting State must investigate the killing and, upon a finding of wrongdoing, seek prosecution of the offenders and compensation for the victims.

The right to self-defence

39. In the absence of consent, or in addition to it, States may invoke the right to self-defence as justification for the extraterritorial use of force involving targeted killings. As noted above, international law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate. Controversy has arisen, however, in three main areas: whether the self-defence justification applies to the

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69 UN Charter, art. 2(4).
70 ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US) [1986] ICJ Rep., para. 194 (Military and Paramilitary Activities); O. Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1633-34 (1984). In the context of self-defence, force is proportionate only if it used defensively and if it is confined to the objective.
71 Military and Paramilitary Activities, para. 246. Pakistan and Yemen may have consented to targeted drone killings by the US in their territory. Eric Schmitt and Mark Mazzetti, In a First, US Provides Pakistan with Drone Data, NY Times, 13 May 2009; Joby Warrick and Peter Finn, CIA director says secret attacks in Pakistan have hobbled al-Qaeda, Wash. Post., Mar. 18, 2010.
75 U.N. Charter art. 51; Schachter, supra note 70 at 1633-34.
use of force against non-state actors and what constitutes an armed attack by such actors; the extent to which self-defence alone is a justification for targeted killings; and, the extent to which States have a right to "anticipatory" or "pre-emptive" self-defence.

Self-defence and non-state actors

40. It has been a matter of debate whether Article 51 permits States to use force against non-state actors. The argument that it does not finds support in judgments of the International Court of Justice (ICJ) holding that States cannot invoke Article 51 against armed attacks by non-state actors that are not imputable to another State.26 On the other hand, some States, including the US, argue that Article 51 does not displace the customary international law right to act in self-defence, including against non-state actors, and that State practice supports that position.77 Commentators find support for that argument in Security Council Resolutions 1368 and 1373 issued in the wake of the September 11 attacks,78 as well as NATO's invocation of the North Atlantic Treaty's Article 5 collective self-defence provision.79 But even if it were to be accepted that Article 51 has not displaced customary law, the reality is that it will only be in very rare circumstances that a non-state actor whose activities do not engage the responsibility of any State will be able to conduct the kind of armed attack that would give rise to the right to use extraterritorial force. In such exceptional circumstances, the UN Charter would require that Security Council approval should be sought.

41. A more difficult question concerns the extent to which persistent but discrete attacks, including by a non-state actor, would constitute an "armed attack" under Article 51. In a series of decisions, the ICJ has established a high threshold for the kinds of attacks that would justify the extraterritorial use of force in self defence.80 In its view, sporadic, low-intensity attacks do not rise to the level of armed attack that would permit the right to use extraterritorial force in self-defence, and the legality of a defensive response must be judged in light of each armed attack, rather than by considering occasional, although perhaps successive, armed attacks in the aggregate. While this approach has been criticized,81 few commentators have supported an approach that would accommodate the invocation of the right to self-defence in response to most of the types of attack that have been at issue in relation to the extraterritorial targeted killings discussed here. Any such approach would diminish hugely the value of the foundational prohibition contained in Article 51.

The relationship between self-defence and IHL and human rights law

42. The second area of controversy arises particularly in the context of the use of force by the US against alleged terrorists in other countries, especially Pakistan. Some US scholars and commentators advocate a "robust" form of self-defence in which, once the doctrine is invoked, no other legal frameworks or limiting principles — such as IHL — would

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76 Wall Opinion; Armed Activities, para. 216.
77 Sefaer, supra note 74 at 107.
apply to targeted killings. Under this view, once it is justified to use force in self-defence, IHL and human rights law would not be applicable to that use of force. This approach reflects an unlawful and disturbing tendency in recent times to permit violations of IHL based on whether the broader cause in which the right to use force is invoked is "just," and impermissibly confuses jus ad bellum and jus ad bellum. Proponents of a "robust" right to self-defence cite to the ICI's Nuclear Weapons Advisory Opinion, in which the court found that "the threat or use of nuclear weapons would generally" violate IHL, but held that it could not conclude that such threat or use "would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." While this aspect of the opinion has been criticized as being vague and confusing, it seeks to address only the most extreme situation involving a State's very survival. Invoking such an extreme exception to permit the violation of IHL on self-defence grounds in the type of situations under consideration here would be tantamount to abandoning IHL.

43. The "robust" self-defence approach also ignores the very real differences between the law of inter-state force and the law applicable to the conduct of hostilities. Whether the use of force is legal is a question that usually arises at the start of an armed conflict, while the law applicable to the conduct of that armed conflict applies throughout it. The limitations on each are distinct. Proportionality under self-defence requires States to use force only defensively and to the extent necessary to meet defensive objectives, whereas the test for proportionality under IHL requires States to balance the incidental harm or death of civilians caused by an operation to the military advantage that would result. Necessity in self-defence requires a State to assess whether it has means to defend itself other than through armed force, while necessity in IHL requires it to evaluate whether an operation will achieve the goals of the military operation and is consistent with the other rules of IHL. Finally, the "robust" self-defence approach fails to take into account the existence of two levels of responsibility in the event that a targeted killing for which self-defence is invoked is found to be unlawful. Violation of the limitations on the right to self-defence results in State and individual criminal responsibility for aggression. There is also liability for the unlawful killing itself — if it violates IHL, it may be a war crime. The Articles on State Responsibility make abundantly clear that States may not invoke self-defence as justification for their violations of IHL.

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85 Nuclear Weapons, para 25.


88 Nuclear Weapons, Dissenting Opinion of Judge Higgins, para. 5.

89 ILC, Articles on State Responsibility at 166-67.
44. In sum, even if the use of inter-state force is offered as justification for a targeted killing, it does not dispose of the further question of whether the killing of the particular targeted individual or individuals is lawful. The legality of a specific killing depends on whether it meets the requirements of IHL and human rights law (in the context of armed conflict) or human rights law alone (in all other contexts).

Anticipatory and pre-emptive self-defence

45. The third key area of controversy is the extent to which States seek to invoke the right to self-defence not just in response to an armed attack, but in anticipatory self-defence, or alternatively, as a pre-emptive measure in response to a threat that is persistent and may take place in the future, but is not likely to take place imminently. Under a restrictive view of Article 51, the right to self-defence may only be invoked after an attack has taken place. In contrast, under a more permissive view that more accurately reflects State practice and the weight of scholarship, self-defence also includes the right to use force against a real and imminent threat when "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation." A third view, invoked exceptionally by the US Bush administration, but which apparently may still reflect US policy, would permit "pre-emptive self-defence", the use of force even when a threat is not imminent and "uncertainty remains as to the time and place of the enemy's attack." This view is deeply contested and lacks support under international law.

C. The existence and scope of armed conflict

46. Whether an armed conflict exists is a question that must be answered with reference to objective criteria, which depend on the facts on the ground, and not only on the subjective declarations either of States (which can often be influenced by political considerations rather than legal ones) or, if applicable, of non-state actors, including alleged terrorists (which may also have political reasons for seeking recognition as a belligerent party). Traditionally, States have refused to acknowledge the existence of an armed conflict with non-state groups. The reasons include not wanting to accord such groups recognition as "belligerents" or "warriors", and instead being able to insist that they remain common criminals subject to domestic law. States also do not want to appear "weak" by acknowledging that they are unable to stop large scale violence, and/or that rebels or insurgent groups have control over State territory. In recent times, for example, the United Kingdom (with respect to Northern Ireland) and Russia (with respect to Chechnya) have refused to acknowledge the existence of internal armed conflicts.

47. On the other hand, both the US and Israel have invoked the existence of an armed conflict against alleged terrorists ("non-state armed groups"). The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State’s domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

48. Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restrict States’ ability to kill arbitrarily.

49. The IHL applicable to non-international armed conflict is not as well-developed as that applicable to international armed conflict. Since 11 September 2001, this fact has often been cited either to criticize IHL in general or as a justification for innovative interpretations which go well beyond generally accepted approaches. It is true that non-international armed conflict rules would benefit from development, but the rules as they currently exist offer more than sufficient guidance to the existence and scope of an armed conflict. The key is for States to approach them with good faith intent to apply the rules as they exist and have been interpreted by international bodies, rather than to seek ever-expanding flexibility.

50. There are essentially four possibilities under international law for the existence of an armed conflict:

(i) The conflict is an international armed conflict.

(ii) The conflict is a non-international armed conflict meeting the threshold of Common Article 3 to the Geneva Conventions.

(iii) The conflict is a non-international armed conflict meeting the threshold of both Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions

(iv) The level of violence does not rise to the level of an armed conflict, but instead isolated and sporadic and human rights law determines the legality of the use of lethal force.

51. The test for the existence of an international armed conflict is clear under IHL: "Any difference arising between two States and leading to the intervention of armed forces" qualifies as armed conflict, regardless of its intensity, duration or scale. The IHL of

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95 Koh, supra note 41; PCATI supra note 22.
96 Adjutant General’s Office, General Orders No. 100, Instructions for the Government of Armies of the US in the Field (Lieber Code), 24 April 1863, art 14; Nuclear Weapons, para. 78.
97 Geneva Conventions I to IV, Common Art. 2(1); ICRC, Commentary on the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field 32 (Jean S. Pictet ed., 1952);
international armed conflict applies also to “all cases of total or partial occupation of the territory of a High Contracting Party” to the Geneva Conventions.\textsuperscript{98} Following these criteria, an international armed conflict cannot exist between a State and a non-state group.\textsuperscript{99}

52. The tests for the existence of a non-international armed conflict are not as categorical as those for international armed conflict. This recognizes the fact that there may be various types of non-international armed conflicts. The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions.\textsuperscript{100} Under treaty and customary international law, the elements which would point to the existence of a non-international armed conflict against a non-state armed group are:

(i) The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians.\textsuperscript{101} The criteria include:\textsuperscript{102}

- Minimal level of organization of the group such that armed forces are able to identify an adversary (GC Art. 3; AP II).
- Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command) (GC Art. 3; AP II).
- Engagement of the group in collective, armed, anti-government action (GC Art. 3).
- For a conflict involving a State, the State uses its regular military forces against the group (GC Art. 3).
- Admission of the conflict against the group to the agenda of the UN Security Council or the General Assembly (GC Art. 3).

(ii) There must be a minimal threshold of intensity and duration. The threshold of violence is higher than required for the existence of an international armed conflict. To meet the minimum threshold, violence must be:\textsuperscript{103}

- “Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (AP II).
- “[P]rotracted armed violence” among non-state armed groups or between a non-state armed group and a State;\textsuperscript{104}

\textsuperscript{98} Geneva Conventions I to IV, Common Art. 2(2); AP I, art. 1(4).
\textsuperscript{99} Thus, it was legally incorrect for the US Bush Administration to claim that its right to conduct targeted killings anywhere in the world was part of its “war on terror”, which it classified as an “international armed conflict” against al Qaeda. Communication of the US regarding the Killing of Harith al-Yemeni, 4 May 2006, A/HRC/4/20/Add.1, p. 344.
\textsuperscript{100} AP II, Art. 1(1).
\textsuperscript{101} Lindsay Moir, The Law of Internal Armed Conflict, 2002.
\textsuperscript{103} The tests listed are independent of one another and for each threshold a different set of IHL rules might apply, but such distinctions are not crucial to the present analysis.
• If an isolated incident, the incident itself should be of a high degree of
intensity, with a high level of organization on the part of the non-state armed
group;\textsuperscript{104}

(iii) The territorial confines can be:

• Restricted to the territory of a State and between the State’s own armed
forces and the non-state group (AP II); or

• A transnational conflict, i.e., one that crosses State borders (GC Art. 3).\textsuperscript{106}

This does not mean, however, that there is no territorial nexus requirement.

53. Taken cumulatively, these factors make it problematic for the US to show that –
outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational
non-international armed conflict against “al Qaeda, the Taliban, and other associated
forces”\textsuperscript{107} without further explanation of how those entities constitute a “party” under the
IHL of non-international armed conflict, and whether and how any violence by any such
group rises to the level necessary for an armed conflict to exist.

54. The focus, instead, appears to be on the “transnational” nature of the terrorist threat.
Al-Qaeda and entities with various degrees of “association” with it are indeed known to
have operated in numerous countries around the world including in Saudi Arabia,
Indonesia, Pakistan, Germany, the United Kingdom and Spain, among others, where they
have conducted terrorist attacks. Yet none of these States, with the possible exception of
Pakistan, recognize themselves as being part of an armed conflict against al-Qaeda or its
“associates” in their territory. Indeed, in each of those States, even when there have been
terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and
intensity of such attacks has not risen to the level of an armed conflict. Thus, while it is true
that non-international armed conflict can exist across State borders, and indeed often does,
that is only one of a number of cumulative factors that must be considered for the objective
existence of an armed conflict.

55. With respect to the existence of a non-state group as a “party”, al-Qaeda and other
alleged “associated” groups are often only loosely linked, if at all. Sometimes they appear
to be not even groups, but a few individuals who take “inspiration” from al Qaeda. The idea
that, instead, they are part of continuing hostilities that spread to new territories as new
alliances form or are claimed may be superficially appealing but such “associates” cannot
constitute a “party” as required by IHL – although they can be criminals, if their conduct
violates US law, or the law of the State in which they are located.

56. To ignore these minimum requirements, as well as the object and purpose of IHL,
would be to undermine IHL safeguards against the use of violence against groups that are
not the equivalent of an organized armed group capable of being a party to a conflict –
whether because it lacks organization, the ability to engage in armed attacks, or because it
does not have a connection or belligerent nexus to actual hostilities. It is also salutary to
recognize that whatever rules the US seeks to invoke or apply to al Qaeda and any
“affiliates” could be invoked by other States to apply to other non-state armed groups. To
expand the notion of non-international armed conflict to groups that are essentially drug

\textsuperscript{104} Tadic, supra note 97, para. 70

\textsuperscript{105} IACHR, Juan Carlos Abella v. Argentina, Report No. 55/97, OEA/Ser.L./V.//II.95, doc. 7 rev. 271
para. 151 (1997).

\textsuperscript{106} Common Article 3 is universally applicable and not limited to internal conflicts. Nuclear Weapons,
paras. 79-82.

\textsuperscript{107} Kolt, supra note 41; Hamdan v. Rumsfeld, 548 US 547 (2006).
cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the IHL and human rights frameworks.

D. Who may lawfully be targeted, when, and on what basis

57. The greatest source of the lack of clarity with respected to targeted killings in the context of armed conflict is who qualifies as a lawful target, and where and when the person may be targeted.

58. In international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL). Under the IHL applicable to non-international armed conflict, the rules are less clear. In non-international armed conflict, there is no such thing as a “combattant.” Instead – as in international armed conflict – States are permitted to directly attack only civilians who “directly participate in hostilities” (DPH). Because there is no commonly accepted definition of DPH, it has been left open to States’ own interpretation – which States have preferred not to make public – to determine what constitutes DPH.

59. There are three key controversies over DPH. First, there is dispute over the kind of conduct that constitutes “direct participation” and makes an individual subject to attack. Second, there is disagreement over the extent to which “membership” in an organized armed group may be used as a factor in determining whether a person is directly participating in hostilities. Third, there is controversy over how long direct participation lasts.

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not “reward” an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities. The key, however, is to recognize that regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.

61. Some types of conduct have long been understood to constitute direct participation, such as civilians who shoot at State forces or commit acts of violence in the context of hostilities that would cause death or injury to civilians. Other conduct has traditionally been excluded from direct participation, even if it supports the general war effort; such conduct includes political advocacy, supplying food or shelter, or economic support and propaganda (all also protected under other human rights standards). Even if these activities ultimately impact hostilities, they are not considered “direct participation.” But there is a middle

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108 AP I, art. 48; AP I, art. 51(2) (defining lawful targets); HPCR Commentary section A.I.(y)(1). The term “combattant” is not defined in IHL, but may be extrapolated from Geneva Convention III, art. 4(A); Ryan Goodman, The Detention of Civilians in Armed Conflict, 103 Am. J. Int’l L. 48 (2009).
110 AP I, art. 51(3); AP I, art. 50(1) (defining civilian). AP I, arts. 13(3) and 51(3); Geneva Conventions III and IV, art. 3; AP II, arts. 4 and 13(3).
111 For this reason I have criticized non-state armed groups for using civilians as human shields and locating their military operations in areas heavily populated by civilians. A/HRC/11/2/Add.4, paras. 9, 23, 24.
ground, such as for the proverbial “farmer by day, fighter by night”, that has remained unclear and subject to uncertainty.

62. In 2009, the ICRC issued its Interpretive Guidance on DPH, which provides a useful starting point for discussion. In non-international armed conflict, according to the ICRC Guidance, civilians who participate directly in hostilities and are members of an armed group who have a “continuous combat function” may be targeted at all times and in all places. With respect to the temporal duration of DPH for all other civilians, the ICRC Guidance takes the view that direct participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act (e.g., loading bombs onto a plane), and participation terminates when the activity ends.

63. Under the ICRC’s Guidance, each specific act by the civilian must meet three cumulative requirements to constitute DPH:

(i) There must be a “threshold of harm” that is objectively likely to result from the act, either by adversely impacting the military operations or capacity of the opposing party, or by causing the loss of life or property of protected civilian persons or objects; and

(ii) The act must cause the expected harm directly, in one step, for example, as an integral part of a specific and coordinated combat operation (as opposed to harm caused in unspecified future operations); and

(iii) The act must have a “belligerent nexus” — i.e., it must be specifically designed to support the military operations of one party to the detriment of another.

64. These criteria generally exclude conduct that is clearly indirect, including general support for the war effort through preparation or capacity building (such as the production of weapons and military equipment). They also exclude conduct that is protected by other human rights standards, including political support for a belligerent party or an organized armed group. Importantly, the ICRC’s Guidance makes clear that the lawfulness of an act under domestic or international law is not at issue, rather, the sole concern of the direct participation inquiry is whether the conduct “constitute[s] an integral part of armed confrontations occurring between belligerents.” Thus, although illegal activities, e.g., terrorism, may cause harm, if they do not meet the criteria for direct participation in hostilities, then States’ response must conform to the lethal force standards applicable to self-defence and law enforcement. In general, the ICRC’s approach is correct, and comports both with human rights law and IHL.

65. Nevertheless, the ICRC’s Guidance raises concern from a human rights perspective because of the “continuous combat function” (CCF) category of armed group members who may be targeted anywhere, at any time. In its general approach to DPH, the ICRC is correct to focus on function (the kind of act) rather than status (combatant vs. unprivileged belligerent), but the creation of CCF category is, de facto, a status determination that is

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112 ICRC Guidance at 66.
113 ICRC Guidance at 66-68
114 IIPCR Commentary section C.28(2), n. 278; Nils Melzer, Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, 42 NYU J. Int‘l L. and Politics, 829, 858 (2010).
115 Id. at 859.
116 Hague Regulations IV, art. 22; AP I, arts. 35(1) and 51 (discussing hostilities).
117 Melzer, supra note 114 at 861.
118 ICRC Guidance at 66.
questionable given the specific treaty language that limits direct participation to "for such time" as opposed to "all the time."

66. Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function. If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong. In addition, States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function ("recruiters, trainers, financiers and propagandists") or form the political wing of an organized armed group (neither of which is a basis for attack).\(^{119}\)

67. Especially given the ICRC's membership approach to CCF, it is imperative that the other constituent parts of the Guidance (threshold of harm, causation and belligerent nexus) not be diluted. It is also critical that DPH not include combat service support functions (selling food, providing supplies). While this may, in the view of some, create inequity between State forces and non-state actors, that inequity is built into IHL in order to protect civilians.

68. The failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the "battlefield" who have links to the insurgency may be targeted and killed.\(^{120}\) This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute DPH.

69. Given the ICRC's promulgation of its Guidance, and the hesitant or uncertain response of some States to date, in order for the issues to be addressed comprehensively, it would be very timely for there to be a convening of State representatives, including particularly those from key military powers, together with the ICRC and experts in human rights and IHL. Such a convening would perhaps be most useful if held under the auspices of a neutral body, such as the High Commissioner for Human Rights. The group could discuss and revise (if necessary) the ICRC's Guidance after a careful review of best practices.

E. Who may conduct a targeted killing

70. Reported targeted killings by the CIA have given rise to a debate over whether it is a violation of IHL for such killings to be committed by State agents who are not members of its armed forces. Some commentators have argued that CIA personnel who conduct targeted drone killings are committing war crimes because they, unlike the military, are "unlawful combatants", and unable to participate in hostilities. This argument is not supported by IHL. As a threshold matter, the argument assumes that targeted killings by the CIA are committed in the context of armed conflict, which may not be the case. Outside of armed conflict, killings by the CIA would constitute extrajudicial executions assuming that

\(^{119}\) CRC Guidance at 31-36.

\(^{120}\) Afghanistan's Narco War supra note 39 at 16 (2009).
they do not comply with human rights law. If so, they must be investigated and prosecuted both by the US and the State in which the wrongful killing occurred. The following discussion assumes, without accepting, that CIA killings are being conducted in the context of armed conflict.

71. Under IHL, civilians, including intelligence agents, are not prohibited from participating in hostilities. Rather, the consequence of participation is two-fold. First, because they are “directly participating in hostilities” by conducting targeted killings, intelligence personnel may themselves be targeted and killed. Second, intelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct (assuming they complied with IHL requirements). Thus, CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.

72. It is important to note that if a targeted killing violates IHL (by, for example, targeting civilians who were not “directly participating in hostilities”), then regardless of who conducts it – intelligence personnel or State armed forces – the author, as well as those who authorized it, can be prosecuted for war crimes.

73. Additionally, unlike a State’s armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely and causing a higher risk of prosecution both for war crimes and for violations of the laws of the State in which any killing occurs. To the extent a State uses intelligence agents for targeted killing to shield its operations from IHL and human rights law transparency and accountability requirements, it could also incur State responsibility for violating those requirements.121

F. The use of less-than-lethal measures

74. As discussed above, the intentional use of lethal force in the context of law enforcement is only permitted in defence of life. Thus, outside the context of armed conflict, law enforcement officials are required to be trained in, to plan for, and to take, less-than-lethal measures – including restraint, capture, and the graduated use of force – and it is only if these measures are not possible that a law enforcement killing will be legal.122 States should ensure public disclosure of the measures taken to “strictly control and limit the circumstances” in which law enforcement officers may resort to lethal force, including the level of force used at each stage.123 The legal framework must take into account the possibility that the threat is so imminent that graduated use of force is not possible, and ensure appropriate safeguards are in place so that the assessment of imminence is reliably made.124

75. Although IHL does not expressly regulate the kind and degree of force that may be used against legitimate targets, it does envisage the use of less-than-lethal measures: in

121 In response to Freedom of Information Act litigation seeking the legal basis for alleged CIA targeted killings, the CIA has said that it cannot even confirm or deny the existence of any records because that information is classified and protected from disclosure. See Letter from CIA Information and Privacy Coordinator, 9 March 2010, available at http://www.aclu.org/national-security/predator-drone-foia-cia-letter-refusing-confirm-or-deny-existence-records.
124 A/61/311, paras. 49-51.
armed conflict, the “right of belligerents to adopt means of injuring the enemy is not unlimited” and States must not inflict “harm greater that that unavoidable to achieve legitimate military objectives.” The limiting principles are not controversial – States may only exercise force that is militarily necessary and consistent with the principle of humanity. As the ICRC Guidance recognizes “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”

76. The position taken by the ICRC in its Guidance has been the subject of controversy. The Guidance states that, “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.” Some critics interpret this statement as requiring the use of a law enforcement paradigm in the context of armed conflict. However, as the Guidance makes clear, it states only the uncontroversial IHL requirement that the kind and amount of force used in a military operation be limited to what is “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.” Especially in the context of targeted killings of civilians who directly participate in hostilities, and given that IHL does not create an unrestrained right to kill, the better approach is for State forces to minimize the use of lethal force to the extent feasible in the circumstances.

77. Less-than-lethal measures are especially appropriate when a State has control over the area in which a military operation is taking place, when “armed forces operate against selected individuals in situations comparable to peacetime policing,” and in the context of non-international armed conflict, in which rules are less clear. In these situations, States should use graduated force and, where possible, capture rather than kill. Thus, rather than using drone strikes, US forces should, wherever and whenever possible, conduct arrests, or use less-than-lethal force to restrain. As the ICRC’s Guidance intended to make clear, “the international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law and the jus ad bellum.”

78. In addition, precautionary measures that States should take in armed conflict to reduce casualties include:

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125 Convention (IV) respecting the Laws and Customs of War on Land, adopted on 18 Oct. 1907, entered into force, 26 Jan. 1910 (Hague IV Regulation); AP I, art. 35(1)
126 Nuclear Weapons, para. 78.
127 AP I, art. 1(2); Hague IV Regulations, preamble; Geneva Convention III, art. 142; Geneva Convention IV, art. 158.
128 ICRC Guidance at 82.
129 ICRC Guidance at 17 and 77.
131 ICRC Guidance at 77.
132 Hague IV Regulations, art. 22.
134 ICRC Guidance at 80-81.
135 Sassoli & Olson, supra note 109, at 611.
• Provide effective advance warning to the civilian population, through leaflets, broadcast warnings, etc. in the areas in which targeted killings may take place.\textsuperscript{137} The warnings must be as specific as possible.\textsuperscript{138}

• Any such warning does not, however, discharge the obligation to distinguish between lawful targets and civilians. "Warnings are required for the benefit of civilians, but civilians are not obligated to comply with them. A decision to stay put — freely taken or due to limited options — in no way diminishes a civilian’s legal protections."\textsuperscript{139}

• The use of civilians as "shields" is strictly prohibited.\textsuperscript{140} But one side's unlawful use of civilian shields does not affect the other side's obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.\textsuperscript{141}

G. The use of drones for targeted killing

79. The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person.\textsuperscript{142} It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited.\textsuperscript{143} However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.

80. The greater concern with drones is that because they make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. States must ensure that the criteria they apply to determine who can be targeted and killed — i.e., who is a lawful combatant, or what constitutes "direct participation in hostilities" that would subject civilians to direct attack — do not differ based on the choice of weapon.

81. Drones’ proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.

82. Drones may provide the ability to conduct aerial surveillance and to gather "pattern of life" information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability

\textsuperscript{137} 1907 Hague Regulations, art. 26; AP I, art. 57.

\textsuperscript{138} Thus, I, together with three other Special Rapporteurs, previously criticized Israel for overly broad warnings. A/HRC/2/7, ¶ 41.

\textsuperscript{139} A/HRC/2/7, para. 41.

\textsuperscript{140} AP I, art. 51(7); AP I, art. 50(3); HPCR Commentary section G.45; A/HRC/2/7; A/HRC/11/2/Add.4.

\textsuperscript{141} AP I, art. 58; A/HRC/2/7, paras. 30, 68-70 (Israel and Lebanon); A/HRC/11/2/Add.4, paras. 9, 23-24 (Afghanistan).

\textsuperscript{142} Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, The Telegraph, 6 July 2009.

\textsuperscript{143} The general prohibition under IHL is against weapons that violate the principle of distinction or cause unnecessary suffering. See HPCR Commentary, section C.
enhances the ability of a State’s forces to undertake precautions in attack. But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

83. It was clear during my mission to Afghanistan how hard it is even for forces on the ground to obtain accurate information. Testimony from witnesses and victims’ family members, showed that international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation. International forces all too often based manned airstrikes and raids that resulted in killings on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based. States must, therefore, ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.

84. Furthermore, because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audio-feed, there is a risk of developing a “Playstation” mentality to killing. States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instill respect for IHLL and adequate safeguards for compliance with it.

85. Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State’s own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.

86. Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHLL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor. It could also theoretically claim that human rights law’s requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation” – would be met. This hypothetical presents the same danger as the “ticking-time bomb” scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.

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145 A/HRC/11/2/Add.4, paras. 14–18, 70.
147 infra III.B.
H. The requirements of transparency and accountability

87. The failure of States to comply with their human rights law and IHL obligations to provide transparency and accountability for targeted killings is a matter of deep concern. To date, no State has disclosed the full legal basis for targeted killings, including its interpretation of the legal issues discussed above. Nor has any State disclosed the procedural and other safeguards in place to ensure that killings are lawful and justified, and the accountability mechanisms that ensure wrongful killings are investigated, prosecuted and punished. The refusal by States who conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.\(^{149}\)

88. Transparency is required by both IHL\(^{150}\) and human rights law.\(^{151}\) A lack of disclosure gives States a virtual and impermissible license to kill.

89. Among the procedural safeguards States must take (and disclose) with respect to targeted killings in armed conflict are:

- Ensure that forces and agents have access to reliable information to support the targeting decision.\(^{152}\) These include an appropriate command and control structure,\(^{153}\) as well as safeguards against faulty or unverifiable evidence.\(^{154}\)
- Ensure adequate intelligence on "the effects of the weapons that are to be used ..., the number of civilians that are likely to be present in the target area at the particular time; and whether they have any possibility to take cover before the attack takes place."\(^{155}\)
- The proportionality of an attack must be assessed for each individual strike.\(^{156}\)
- Ensure that when an error is apparent, those conducting a targeted killing are able to abort or suspend the attack.\(^{157}\)

90. In order to ensure that accountability is meaningful, States must specifically disclose the measures in place to investigate alleged unlawful targeted killings and either to identify

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\(^{150}\) Geneva Conventions, art. 1; AP I, arts. 11, 85 (grave breaches), 87(3); Geneva Conventions I-IV, articles 50/51/130/147;


\(^{152}\) HPCR Commentary section G.32(a).

\(^{153}\) Id.

\(^{154}\) HPCR Commentary section G.32(a)-(c) and 39.

\(^{155}\) HPCR Commentary section g.32(e).

\(^{156}\) Sandoz, AP Commentary, AP I, art. 57, section 2207.

and prosecute perpetrators, or to extradite them to another State that has made out a prima facie case for the unlawfulness of a targeted killing.  

91. States have also refused to provide factual information about who has been targeted under their policies and with what outcome, including whether innocent civilians have been collaterally killed or injured. In some instances, targeted killings take place in easily accessible urban areas, and human rights monitors and civil society are able to document the outcome. In others, because of remoteness or security concerns, it has been impossible for independent observers and the international community to judge whether killings were lawful or not.

92. Transparency and accountability in the context of armed conflict or other situations that raise security concerns may not be easy. States may have tactical or security reasons not to disclose criteria for selecting specific targets (e.g. public release of intelligence source information could cause harm to the source). But without disclosure of the legal rationale as well as the bases for the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum. It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. The fact that there is no one-size-fits-all formula for such disclosure does not absolve States of the need to adopt explicit policies.

IV. Conclusions and recommendations

General

93. States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake. They should specify the bases for decisions to kill rather than capture. They should specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures they would take. If a State commits a targeted killing in the territory of another State, the second State should publicly indicate whether it gave consent, and on what basis.

- States should make public the number of civilians collaterally killed in a targeted killing operation, and the measures in place to prevent such casualties.
- The High Commissioner for Human Rights should convene a meeting of States, including representatives of key military powers, the ICRC and human rights and IHL experts to arrive at a broadly accepted definition of “direct participation in hostilities.”

Specific requirements under human rights law, applicable in and outside armed conflict, include:

- States should disclose the measures taken to control and limit the circumstances in which law enforcement officers may resort to lethal force. These include:
  - Permissible objectives (which may not include retaliation or punishment but must be strictly to prevent the imminent loss of life);

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158 Geneva Conventions (I-IV), arts. 49/50/129/146; Geneva Convention (IV), arts. 3 and 4. AP I, art 75.
• the non-lethal tactics for capture or incapacitation that must be attempted if feasible;
• the efforts that must be made to minimize lethal force, including specifying the level of force that must be used at each stage;
• the legal framework should take into account the possibility that a threat may be so imminent that a warning and the graduated use of force are too risky or futile (e.g., the suspect is about to use a weapon or blow himself up). At the same time, it must put in place safeguards to ensure that the evidence of imminence is reliable, based on a high degree of certainty, and does not circumvent the requirements of necessity and proportionality.

• Disclosure of the measures in place to provide prompt, thorough, effective, independent and public investigations of alleged violations of law.
• The appropriate measures have been endorsed in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. These should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations. The State's duty to investigate and prosecute human rights abuses also applies in the context of armed conflict and occupation.

Specific requirements under IHL, applicable in armed conflict, include:

• Disclosure of the measures in place to investigate alleged unlawful targeted killings and either to identify and prosecute perpetrators, or to extradite them to another State that has made a prima facie case for the unlawfulness of a killing.

• Ensure that State armed forces and agents use all reasonably available sources (including technological ones such as intelligence and surveillance) to obtain reliable information to verify that the target is lawful. These measures, which should be publicly disclosed to the extent consistent with genuine security needs, include:
  • State armed forces should have a command and control system that collects, analyzes and disseminates information necessary for armed forces or operators to make legal and accurate targeting decisions.
  • Targeted killings should never be based solely on “suspicious” conduct or unverified – or unverifiable – information. Intelligence gathering and sharing arrangements must include procedures for reliably vetting targets, and adequately verifying information.
  • State forces should ensure adequate intelligence on the effects of weapons to be used, the presence of civilians in the targeted area, and whether civilians have the ability to protect themselves from attack. It bears emphasis that State forces violate the IHL requirements of proportionality and precaution if they do not do everything feasible to determine who else is, or will be, in the vicinity of a target – and thus how many other lives will be lost or people injured – before conducting a targeted killing.
  • In the context of drone attacks and airstrikes, commanders on the ground and remote pilots may have access to different information (e.g. based on human intelligence, or visuals from satellites); it is incumbent
on pilots, whether remote or not, to ensure that a commander's assessment of the legality of a proposed strike is borne out by visual confirmation that the target is in fact lawful, and that the requirements of necessity, proportionality and discrimination are met. If the facts on the ground change in substantive respects, those responsible must do everything feasible to abort or suspend the attack.

- Ensure that compliance with the IHL proportionality principle is assessed for each attack individually, and not for an overall military operation.

- Ensure that even after a targeting operation is under way, if it appears that the target is not lawful, or that the collateral loss of life or property damage is in excess of the original determination, targeting forces have the ability and discretion to cancel or postpone an attack.

- Ensure procedures are in place to verify that no targeted killing is taken in revenge, or primarily to cause terror or to intimidate, or to gain political advantage.

- Especially in heavily populated urban areas, if it appears that a targeted killing will risk harm to civilians, State forces must provide effective advance warning, as specifically as possible, to the population.

  - Warning does not, however, discharge the obligation to distinguish between lawful targets and civilians.

  - Although the use of civilians as “shields” is prohibited, one side’s unlawful use of civilian shields does not affect the other side’s obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.
THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS

THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES

I. *The Copenhagen Process on the Handling of Detainees in International Military Operations* (*The Copenhagen Process*) was launched on 11 October 2007 and was concluded in Copenhagen on 19 October 2012. Representatives from Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom, and the United States of America participated in *The Copenhagen Process* meetings. Representatives of the African Union (AU), the European Union (EU), the North Atlantic Treaty Organisation (NATO), the United Nations (UN), and the International Committee of the Red Cross (ICRC) also attended *The Copenhagen Process* meetings as observers. Representatives of civil society were also consulted at various stages of *The Copenhagen Process*;

II. During *The Copenhagen Process* meetings participants – while not seeking to create new legal obligations or authorizations under international law – confirmed the desire to develop principles to guide the implementation of the existing obligations with respect to detention in international military operations; by facilitating a common approach *The Copenhagen Process* should contribute to ensuring the humane treatment of detainees and the effectiveness of international military operations;

III. Participants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations;

IV. Participants recalled and reiterated the relevant obligations of States, international organisations, non-State actors and individuals under applicable international law, recognizing in particular the challenges of agreeing upon a precise description of the interaction between international human rights law and international humanitarian law;

V. Participants were motivated by the will to reinforce the principle of humane treatment of all persons who are detained or whose liberty is being restricted, to ensure respect for applicable international humanitarian law and human rights law by the detaining, transferring and receiving States and organisations as well as non-State actors and individuals;

VI. Participants were also inspired by the good practices that States and organisations have developed in international military operations;

VII. Participants recognised the particular challenges that arise in handling detainees in international military operations in the context of non-international armed conflict situations and peace operations including in regard to the transfer of detainees;
VIII. *The Copenhagen Process Principles and Guidelines* are founded on the legal principles that all persons who are detained or whose liberty is being restricted must be treated humanely, that any detention must be conducted in accordance with applicable law, and on the policy principle that legal authority to detain should be exercised in a prudent manner;

IX. *The Copenhagen Process Principles and Guidelines* are intended to apply to international military operations in the context of non-international armed conflicts and peace operations; they are not intended to address international armed conflicts;

X. Participants took note of the decision from the 31st international Conference of the Red Cross and Red Crescent to initiate a discussion on strengthening the protection for persons deprived of their liberty in relation to armed conflict;

XI. *The Copenhagen Process Principles and Guidelines* do not affect the applicability of international law to military operations conducted by States or international organisations; the obligations of their personnel to respect such law, or the applicability of international and national law to non-State actors;

XII. Participants at the concluding Copenhagen Process Conference held in Copenhagen on 18 – 19 October 2012 welcomed the *Copenhagen Process Principles and Guidelines* below;

XIII. Participants took note of the annexed commentary on these Principles and Guidelines which is the sole responsibility of the Chairman of the Process.
THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES

1. The Copenhagen Process Principles and Guidelines apply to the detention of persons who are being deprived of their liberty for reasons related to an international military operation.

2. All persons detained or whose liberty is being restricted will in all circumstances be treated humanely and with respect for their dignity without any adverse distinction founded on race, colour, religion or faith, political or other opinion, national or social origin, sex, birth, wealth or other similar status. Torture, and other cruel, inhuman, or degrading treatment or punishment is prohibited.

3. Persons not detained will be released.

4. Detention of persons must be conducted in accordance with applicable international law.

   When circumstances justifying detention have ceased to exist a detainee will be released.

5. Detaining authorities should develop and implement standard operating procedures and other relevant guidance regarding the handling of detainees.

6. Physical force is not to be used against a detained person except in circumstances where such force is necessary and proportionate.

7. Persons detained are to be promptly informed of the reasons for their detention in a language that they understand.

8. Persons detained are to be promptly registered by the detaining authority.

9. Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene, and protection against the rigours of the climate and the dangers of military activities. Wounded and sick detainees are to receive the medical care and attention required by their condition.

10. Persons detained are to be permitted to have appropriate contact with the outside world including family members as soon as reasonably practicable. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.

   Persons detained are to be held in a designated place of detention.
11. In non-international armed conflict and where warranted in other situations, the detaining authority is to notify the ICRC or other impartial humanitarian organisation of the deprivation of liberty, release or transfer of a detainee. Where practicable, the detainee's family is to be notified of the deprivation of liberty, release or transfer of a detainee.

Detaining authorities are to provide the ICRC or other relevant impartial international or national organisations with access to detainees.

12. A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.

13. A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to, as soon as circumstances permit, be transferred to or have proceedings initiated against him or her by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law.

14. Detainees or their representatives are to be permitted to submit, without reprisal, oral or written complaints regarding their treatment or conditions of detention. All complaints are to be reviewed and, if based on credible information, be investigated by the detaining authority.

15. A State or international organisation will only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.

16. Nothing in The Copenhagen Process Principles and Guidelines affects the applicability of international law to international military operations conducted by the States or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors.
THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINES IN INTERNATIONAL MILITARY OPERATIONS

CHAIRMAN'S COMMENTARY

TO

THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES

1. The Copenhagen Process Principles and Guidelines apply to the detention of persons who are being deprived of their liberty for reasons related to an international military operation.

Commentary

1.1. *The Copenhagen Process Principles and Guidelines* apply to detainees who have been deprived of their liberty for reasons related to an international military operation. Evidence that a person has been detained may include substantial limitations on the freedom to move, or involuntarily confinement within a bounded or restricted area such as a military camp or detention facility. In most cases the person detained will be removed from the area where his or her liberty was initially restricted for security reasons.

1.2. *The Copenhagen Process Principles and Guidelines* apply to international military operations in the context of non-international armed conflict, and peace operations. For example, several States may be assisting a host State against non-State armed groups. In some cases, these operations may have the character of “armed conflict.” In peace operations, military operations may be conducted to restore or maintain order pursuant to a mandate by the UN Security Council (UNSC) or on the basis of international law by other competent international organisations.

1.3. A person may be detained for a number of different reasons, including, posing a threat to the security of the military operation, for participating in hostilities, for belonging to an enemy organised armed group, for his or her own protection, or if the person is accused of committing a serious criminal offence. The reasons for detention must be linked to the international military operation (see Principle 4).

1.4. States have differing views as to when and under what circumstances a ‘restriction on liberty’ amounts to detention. Either detention or restriction of liberty may be considered to occur in such places as roadblocks, check points, or when searching houses or property. A person who has been made subject to restriction of liberty may not necessarily be considered to have been detained. Although the person may have his liberty restricted the procedural protections referred to in Principles 7 through 15 may not be applicable to that individual. Operational uncertainties may make it difficult to distinguish a restriction of liberty from a deprivation of liberty.
2. All persons detained or whose liberty is being restricted will in all circumstances be treated
humanely and with respect for their dignity without any adverse distinction founded on race,
colour, religion or faith, political or other opinion, national or social origin, sex, birth, wealth or
other similar status. Torture, and other cruel, inhuman, or degrading treatment or punishment is
prohibited.

Commentary

2.1. This Principle incorporates the general international law principles concerning respect for the
person and the prohibition against discrimination. It also incorporates the prohibition against
torture and other forms of cruel, inhuman or degrading treatment or punishment, the prohibition
against corporal and collective punishment and medical experiments; and includes threats to
commit the foregoing acts.

2.2. There is no exception to the prohibition against torture and other forms of cruel, inhuman or
degrading treatment. Such acts cannot be justified for interrogation, punishment or any other
purpose. Sensory deprivation of persons who are detained may in some circumstances amount to
ill-treatment if used as a form of punishment or to inflict suffering. However, sensory deprivation
may not in itself amount to ill-treatment as such if the purpose is to ensure the safety of the
detainee or of others. For example, using earmuffs during transportation to protect a detainee’s
hearing will not amount to ill-treatment. Similarly, sensory deprivation undertaken as a reasonable
security measure such as blindfolding temporarily a detainee to protect the identity of another
detainee or for reasons of operational safety will not amount to ill-treatment.

2.3. Humane treatment requires the detaining authority to respect both the physical and psychological
needs of the detainee. The physical needs of detainees include adequate conditions of detention
such as food, drinking water, accommodation, and protection from the dangers of military
operations (see Principle 9). The psychological needs of detainees include respect for a detainee’s
dignity, convictions and religious practices. A detainee’s personal convictions and religious practices
must be respected subject to reasonable regulation related to order, discipline and security.
Furthermore, humane treatment implies that detainees will be protected from insults and public
curiosity.

2.4. The principle of humane treatment of all persons requires that special consideration be given to the
treatment of detainees who may be vulnerable in this context, such as women, children, the aged
and those with disabilities. Such special consideration is consistent with the requirement that
detainees should be humanely treated without adverse distinction.
3. Persons not detained will be released.

**Commentary:**

3.1. A person who has been subjected to restriction of liberty may be considered not to be a detainee within the meaning of *The Copenhagen Process Principles and Guidelines*, ref. 1.4. above. Regardless, such persons are entitled to be treated humanely and have their dignity respected (see Principle 2).

3.2. When the justification for restricting a person's liberty no longer exists the person will be released unless the person is subsequently detained.
4. Detention of persons must be conducted in accordance with applicable international law.

When circumstances justifying detention have ceased to exist a detainee will be released.

Commentary:

4.1. Every case of detention must be conducted in accordance with applicable international law. Therefore, detention must be justified on the basis of the applicable law. Similarly, the treatment of detainees must also be in accordance with applicable law. The applicable law may vary depending on whether there is a situation of armed conflict or not. As stated by the International Court of Justice ‘some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.’

4.2. In situations of detention that are not based in armed conflict justification for detention may be founded on the application of national law principles, such as self-defence and the protection of property. In such cases applicable international human rights law will be the appropriate body of international law.

4.3. Detention in some international military operations may also be justified as a matter of law pursuant to authorizations by the UN, or on the basis of international law by other competent international organisations such as the NATO, AU or the EU, or arrangements between a host State and State contributing military forces or international organisations. In such operations both international humanitarian law and human rights law may be relevant, depending upon factual circumstances and any specific parameters provided in the particular authorisations.

4.4. As an important component of lawfulness detentions must not be arbitrary. For the purposes of The Copenhagen Process Principles and Guidelines the term ‘arbitrary’ refers to the need to ensure that each detention continues to be legally justified, so that it can be demonstrated that the detention remains reasonable and lawful in all the circumstances. Justifying detention requires that the decision to detain is based in law on valid reasons that are reasonable and necessary in light of all the circumstances. Furthermore, detention cannot be a collective punishment. Detention therefore must serve a lawful and continuingly legitimate objective, such as a security objective or criminal justice.

4.5. Not only must detention be justified as a matter of law, but detainees must be treated in accordance with the applicable law. The applicable law for treatment may vary depending on the type of military operation in which the person is being detained. Where a person is detained in situations of armed conflict the lex specialis will be international humanitarian law. That law may be supplemented or informed by human rights law depending on the detaining authority’s legal obligations. In non-armed conflict situations applicable international human rights establishes rules and standards for the treatment of detainees. At the very least, regardless of the type of conflict or the applicable legal regime, detainees must be treated humanely in all circumstances (see Principle 2).
4.6. Ensuring that detentions are carried out in accordance with applicable law requires the detaining authority to ensure that all detentions are regulated by procedures safeguarding against unlawful and arbitrary detention (see Principle 5).

4.7. The second paragraph of this Principle reinforces the point that if there is no justification to detain, the detainee must be released. This paragraph implies that the detaining authority is to identify and assess the reasons for detention periodically from the moment that a person is detained until release or transfer.

4.8. It is difficult to provide a precise time limit to indicate how soon a detainee should be released after the circumstances justifying detention have ceased to exist. Operational necessities, such as force protection, the safety of a detainee, or the limited availability of transport sometimes make it difficult to release a detainee at the precise moment that the circumstances justifying detention cease.

4.9. This Principle does not prejudice the development of special arrangements being made for the release or conditional release of detainees due to injury, illness, pregnancy, age or other circumstances where such arrangements might be appropriate.

4.10. Detaining authorities are to ensure that necessary measures are taken to ensure the safety of released detainees. For example, a detainee is not to be released in a location where the conditions are such that the detainee may be threatened or attacked by hostile or malign elements upon release.
5. Detaining authorities should develop and implement standard operating procedures and other relevant guidance regarding the handling of detainees.

Commentary:

5.1. When developing standard operating procedures for planners, commanders and military personnel who handle detainees, detaining authorities should address such issues as the legal framework within which detention is to occur, standards of treatment, and the effect of operations with forces of other States or organisations.

5.2. The standard operating procedures must comply with international law obligations and, where applicable, obligations arising from the national legal regimes of the host and contributing States. Although these obligations vary from operation to operation, and in some cases even among States and international organisations, the fact remains that standard operating procedures must comply with applicable law.

5.3. The standard operating procedures should also recognise that some of the factual considerations for dealing with detainees vary from operation to operation. Issues such as local conditions, including local cultural norms and traditions; operational practicalities, such as the use of interpreters and adequate facilities for holding detainees; and best practices concerning the handling of detainees from the point of capture until their release or transfer may need to be addressed differently depending on the nature of the operation. The standard operating procedures also need to consider the realities of international military operations that are conducted together with other States and organisations while always conforming to the relevant international law obligations.

5.4. It is important to implement standard operating procedures. To help ensure that the standard operating procedures are applied during international military operations, military personnel should be trained with regard to the established procedures, supervised during the conduct of detention operations and periodically inspected by military authorities. Such training may occur in a variety of environments, including military command post and field exercises, and classroom discussions during military courses, as well as on-the-job training.

5.5. Standard operating procedures and military training on those procedures may need to be appropriately updated as detaining authorities learn from their experiences and develop greater understanding as to internationally accepted practices.

5.6. When planning for international military operations, States should ensure that they have the necessary resources to undertake detention operations in accordance with these principles. States conducting military operations should anticipate and prepare for detention as a regular and normal incident of those operations.
6. Physical force is not to be used against a detained person except in circumstances where such force is necessary and proportionate.

**Commentary:**

6.1. The use of force to facilitate a detention should be governed by regulations and instructions such as rules of engagement, rules for the use of force, or other relevant laws and orders that deal with the use of force during international military operations.

6.2. Physical force against detainees is not to be used unless necessary. Examples of situations when physical force may be necessary include where the detaining personnel is acting in self-defence or in defence of others, where the potential detainee is resisting detention, or where strictly necessary to maintain security and order in the detention facility. In circumstances where physical force is necessary it must be proportional to the threat or other legitimate military necessity and, where circumstances permit, graduated.

6.3. In compliance with the general principle of treating detainees humanely, the use of physical force is not to be used as a form of punishment. See also Principle 2.

6.4. Use of physical force against detainees should be reported and any reasonable suspicion of inhuman treatment should be investigated appropriately. Where a detainee is injured because of the physical force used against him or her, the detainee must receive adequate medical assistance and care.
7. Persons detained are to be promptly informed of the reasons for their detention in a language that they understand.

Commentary:

7.1. Informing the detainee of the reasons for detention seeks to ensure that the detainee adequately understands the basis of detention, and enables the detainee’s participation in subsequent review procedures from an informed position. To the fullest extent feasible the reasons for detention should provide the detainee with information regarding the circumstances that form the basis for detention. Operational necessities or resource constraints, such as force protection or the availability of interpreters, may sometimes make it difficult to advise the detainee of the specific reasons for the detention at the precise moment of detention. The term ‘promptly’ is used to suggest that detainees should be advised of the reasons for detention in a reasonable time, taking into account other essential tasks and resource limitations that may affect the detaining authority’s ability to inform the detainee. When feasible, more specific information should be provided to the detainee so that he or she may participate in subsequent review procedures from an informed position.

7.2. A detainee is also to be told of the reasons for detention in a language that the detainee understands so as to ensure that the detainee actually understand why he or she is being detained. The detaining personnel should when feasible be accompanied by interpreters when taking detainees into custody in order to avoid miscommunication among the parties. Making use of interpreters will also assist the detention authority in reviewing a detainee’s case. Interpreters should have appropriate qualifications and training.
8. Persons detained are to be promptly registered by the detaining authority.

Commentary:

8.1. Registering a detainee ensures primarily that detainees are accounted for, as well that the detention is not secret or concealed. This can be essential to protect the life and well-being of the detainee and is also in the best interest of the detaining authorities. Registration of detainees assists in ensuring that all detainees can be accounted for and that allegations of (illegal) detention can be addressed.

8.2. The detaining authority’s records of registration are to be as accurate as possible. The amount of information that can be considered adequate when registering a detainee varies from operation to operation, but at a minimum the registration record for each detainee should provide as much information as is necessary to precisely identify and track the detainee and the authority responsible for the detainee.

8.3. It is difficult to provide a precise time limit to indicate when a detainee should be registered. Operational necessities or resource constraints, such as force protection, or the limited availability of interpreters sometimes make it difficult to register a detainee at the precise moment of detention. The term ‘promptly’ is used to suggest that detainees should be registered within a reasonable time, taking into account other essential tasks and resource limitations that may affect the detaining authority’s ability to register detainees.

8.4. Information about a detainee is to be protected. Without prejudice to Principle 11, this is to ensure that the privacy of the detainee is protected in accordance with Principle 2, and that the processing of information does not adversely affect the safety of the detainee or any other person.
9. Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene, and protection against the rigours of the climate and the dangers of military activities. Wounded and sick detainees are to receive the medical care and attention required by their condition.

Commentary:

9.1. Detainees are vulnerable by the very nature of their detention because they have to rely on the detaining authority for their well-being and survival. Consequently, detaining authorities are responsible for providing adequate conditions of detention to maintain a detainee’s health at all times. These essential requirements include adequate drinking water, food, medical and hygiene care, and shelter. It is not possible to draw up a definitive list of what would constitute adequate conditions of detention in all cases. What is adequate may, for example, depend on the local cultural context. At a minimum, the detaining authority is to provide a response to a detainee’s physical and psychological needs. Relevant religious considerations should be taken into account wherever possible.

9.2. The standard of living conditions for which detaining authorities are responsible may depend on a number of factors including the resources available in the area and the living conditions of the local population.

9.3. Health and hygiene factors that need to be addressed include minimising the number of detainees held in each room, ensuring that detainees are permitted to engage in exercise regimes, including in the open air, and maintaining the cleanliness and proper condition of clothing worn by detainees. Providing safeguards concerning health and hygiene ensures that the physical and mental health of the detainee is maintained and that the risks of infectious diseases are kept to a minimum.

9.4. To protect detainees from the rigours of the climate they are not to be placed in situations that may endanger their health or lives, e.g., through exposure to intemperate conditions. The detaining authority must also accept its responsibility to protect detainees from the dangers of any military activities that may put their lives or health at risk. Upholding these responsibilities constitutes recognition of the general principle that the detaining authority is responsible for protecting the detainees.

9.5. When providing wounded and sick detainees with medical attention required by their medical condition, any treatment for that condition must be provided in accordance with medical requirements. There must be no distinction among wounded and sick detainees on any grounds other than medical ones. Such distinctions must be based on generally accepted medical ethical standards. One way to assess the level of medical attention required is with reference to the detaining authority’s capacity to provide such care to its own personnel. Medical assistance should, wherever possible, be undertaken with the consent of the wounded or sick detainee. However,
medical actions to preserve the health of the detainee may be justified even where the detainee refuses to provide consent. It is prohibited to conduct medical experiments on detainees.

9.6. Except where women and men of a family are accommodated together, women must be held in quarters separated from those of men and under the immediate supervision of women. Every effort should be made to accommodate families together. Consistent with Principle 2, children and vulnerable persons are to be provided with special care and aid, with due consideration for their age or special needs.
10. Persons detained are to be permitted to have appropriate contact with the outside world including family members as soon as reasonably practicable. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.

Persons detained are to be held in a designated place of detention.

Commentary:

10.1. A detainee’s contact with the outside world such as family members and, as appropriate, those impartial humanitarian organisations with a legitimate interest in the detainee’s welfare assists to ensure that the detainee is treated humanely and is not held incommunicado. The principle of contact indicates that the detainee be permitted to have visits from family and is able to send and receive letters, cards, and relief parcels to the extent feasible. In appropriate circumstances, the principle may also extend to the detainee’s ability to have contact with those with a legitimate interest in a detainee’s welfare such as legal advisers, individuals performing religious functions, community representatives, and representatives of organisations like the ICRC, the UN, and national relief or human rights agencies.

10.2. Providing access to relatives and those with a legitimate interest in a detainee’s welfare adds to safeguarding a detainee’s links to his or her family and community. It is also an important component of accountability mechanisms for the detaining authority because it assists in ensuring that the treatment and conditions in which the detainee is held are as transparent as possible.

10.3. Restrictions concerning contact with the outside world are not to be imposed for disciplinary purposes, unless granted contacts with the outside world are misused by the detainee. However, contact with the outside world is subject to practical limitations such as those that may be required by force protection, operational exigencies, reasonable resource restraints, and the maintenance of good order of the detention facility. Contact, in other words, may be subject to precautionary measures such as limiting the timing of visits; enforcing procedures for searching visitors, and outlining how many visitors a detainee may have in any given period.

10.4. A place designated for detention for the purposes of The Copenhagen Process Principles and Guidelines is a place where detainees are held for an extended period of time, including, in some circumstances, on board ships. Such places do not include places, such as vehicles or a compound, where a detainee may be kept briefly as he or she is being processed for further transit, release or transfer. However, while a vehicle or a compound may fall outside the definition of “designated place of detention”, detainees may still be deprived of their liberty in those places for the purposes of the Copenhagen Principles and Guidelines.

10.5. Places of detention must be officially recognised by the detaining authority and records are to be kept of each facility’s existence and use. There must be appropriate official acknowledgement of
each facility's existence. There might be situations, however, such as operations at sea, where it may not be possible to provide the specific location of military vessels at certain times.

10.6. A component of recognising a place of detention is that it also be officially supervised by the detaining authority. Official supervision by the detaining authority is an indicator that a facility is a place of detention. Official supervision also requires the detaining authority to ensure that the detention facility and those working in the detention facility are subject to appropriate accountability and disciplinary standards.
11. In non-international armed conflict and where warranted in other situations, the detaining authority is to notify the ICRC or other impartial humanitarian organisation of the deprivation of liberty, release or transfer of a detainee. Where practicable, the detainee’s family is to be notified of the deprivation of liberty, release or transfer of a detainee.

Detaining authorities are to provide the ICRC or other relevant impartial international or national organisations with access to detainees.

Commentary:

11.1. Notifications permit the ICRC, as a neutral, independent and impartial humanitarian organisation to track detainees for the period they are held in detention regardless of who the detaining authority is. Notification serves to ensure that detainees will be visited by the ICRC to, among other things, assess their treatment and conditions of detention, and that recommendations for improvement can be made where necessary. Notifying the ICRC of a person’s detention, release or transfer is also in the best interest of the detaining authority as it helps such authority to ensure that the applicable standards of detention operations are upheld. Notifications to the ICRC or other impartial organisation are to occur regardless of the detainee’s wishes.

11.2. Notification to family members permits them to track a detainee for the period that the detainee is held in detention. Notification to relatives is also important because it ensures respect for the person being detained and reduces family’s fear and stress about the fate of the detainee. Notification to relatives should be at the request of the detainee so as to ensure that the privacy and safety of the detainee and in a manner consistent with Principle 2 and with Principle 9’s requirement to protect the detainee from danger from military operations. It may not always be possible to notify relatives of a detention. For example, in cases where the detainee does not disclose contact details of family members or where it is not possible to locate relatives notification may not be possible. Where it is not possible to notify relatives of a detention the ICRC or other appropriate organisation should be notified so as to facilitate the notification to relatives.

11.3. The information given to the ICRC and relatives should, at the very least, include sufficient details for the family to positively identify the detainee, locate where the detainee is being held, and become aware of how to make contact with the detainee.

11.4. The ICRC’s unique role in the context of armed conflict and the importance of providing ICRC access to detainees held during armed conflict are widely recognised. ICRC access to a detainee is a mechanism to ensure that detainees are treated humanely and are not held incommunicado.

11.5. ICRC visits also serve to support the material and non-material needs of detainees, as may be appropriate. ICRC visits are carried out in accordance with its working modalities and its principles of neutrality, independence and impartiality and the ICRC’s observations and recommendations are generally shared bilaterally and confidentially with the detaining authority.
11.6. Certain human rights treaties and the mandates of some international and regional bodies provide for access to persons deprived of their liberty. For example, the Subcommittee on the Prevention of Torture as well as the National Preventive Mechanism established under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the European Committee for the Prevention of Torture created by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provide for such access.
12. A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.

Commentary:

12.1. As soon as practicable after initial capture or apprehension a commancer is to promptly make a decision as to whether to hold, release or transfer the detainee. If a decision is made to hold the detainee because, for example, there is reasonable belief that he or she is a ‘security threat’ a further review should be undertaken to determine whether on-going detention is justified. This principle addresses that further review.

12.2. The ‘authority’ conducting the review must be objective and impartial but not necessarily outside the military. Although there is no requirement for the authority to be a judge or lawyer, he or she should be supported by a legal adviser. The authority must have sufficient information available to make an assessment of the legality and propriety of continued detention; and must consider both the legal and factual basis for detention. The authority must also be able to evaluate the relevant information and make relevant conclusions such as whether the detainee continues to constitute a threat to security. Furthermore, the authority must make decisions based on the circumstances of each specific case; and each decision must be taken with respect to the individual involved. The authority must have sufficient freedom to make a good faith judgment without any outside interference. In order for the review to be effective it is necessary that the reviewing authority has the power to determine the lawfulness and appropriateness of continued detention of the detainee.

12.3. Security detainees are to have their continued detention reviewed periodically or, where practicable, when new information becomes available. It is, however, difficult to provide a precise time limit to indicate when the decision to detain should be reconsidered or further reviewed. Operational necessities or resource constraints, such as force protection, the limited availability of interpreters or large case-loads of review sometimes make it difficult to reconsider the decision to detain frequently or at short intervals. Reviews should, however, occur as often as necessary, generally every six months. The length of time between reviews may also depend on the thoroughness of the review process and on whether there is a true prospect that the legal or factual predicates justifying detention have changed. More thorough reviews may require more resources and take place over longer intervals.

12.4. Where feasible, security detainees should be assigned a personal representative to assist them in the review process, and be provided with an interpreter where necessary. The detainee should – when practically possible – be allowed to attend all sessions of the review hearing, subject to security concerns. Detainees are always to be informed promptly of the outcome of the process.
13. A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to as soon as circumstances permit be transferred to or have proceedings initiated against him or her by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law.

Commentary:

13.1. As soon as reasonably practicable, after the initial decision to detain, a review to decide whether to hold, release or transfer the detainee should be conducted by the detainer, or that person's immediate superior. If a decision is made to hold the detainee on reasonable suspicion that he or she is a 'criminal detainee' and the detainee is not transferred to an entity that has lawful authority to process the person through its criminal justice system within a reasonable period of time a further review must be undertaken to determine whether continued detention is justified. Similarly, if criminal proceedings have not been initiated against the detainee a further review is to be undertaken to determine whether continued detention is justified. This principle addresses that further review.

13.2. The review of on-going criminal detention is an essential component of the general principle of providing due process for those suspected or accused of crimes under national jurisdictions. Where a transfer or initiation of further review is not possible within a reasonable period of time it is the practice of many States to have the decision to detain reconsidered by a judicial or other competent authority. For the purposes of this principle 'judicial or other competent authority' is any authority recognised as such in accordance with applicable law. The authority must be objective and impartial so as to guarantee due process to which an alleged criminal detainee is entitled. The authority must be able to assess the legality and propriety of continued detention, by reference to all the relevant facts arguing for or against continued detention pending trial, including the suspected commission of the crime, the seriousness of the crime, and the propensity to commit further crimes to evade judicial process if released pending trial. The authority must also have due regard to the principle of the presumption of innocence. Furthermore, the authority must make decisions based on every specific case, and each decision must be taken with respect to the specific circumstances of each individual involved. The authority must be able to make a good faith judgment about the determination that the detainee should be held in custody before trial without any outside interference. Members of such an authority are to be persons with sufficient experience or knowledge of the law to make such decisions. In order for the review to be effective it is necessary that the judicial or other competent authority has the power to determine the appropriateness of continued detention of the detainee and it may be appropriate that he or she has the authority to authorise the release of the detainee including conditional release.

13.3. On-going reviews may be necessary where criminal detainees have not been tried but are being held in custody pending trial. Such situations may arise when evidence is still being gathered or analysed;
or where the detainee is accused of a serious crime such as murder or sexual assault and some additional time is required to identify a lawful authority and arrange the transfer. It is difficult to provide precise time limits to indicate when the decision to detain should be reconsidered or reviewed. Operational necessities and resource constraints, such as force protection, the limited availability of interpreters or investigators, or large case-loads of review sometimes make it difficult to reconsider the decision to detain frequently or at short intervals. Reviews should however occur as often as necessary, as close as practicable to every six months.

13.4. Where feasible, detainees should be assigned a personal representative to assist them in the review process, be provided with an interpreter where necessary, and when legal counsel is required the detaining authority should provide or facilitate access to such counsel. The detainee should be allowed to attend all sessions of the review hearing, subject to security concerns. Detainees are to be informed promptly of the outcome of the review process.
14. Detainees or their representatives are to be permitted to submit, without reprisal, oral or written complaints regarding their treatment or conditions of detention. All complaints are to be reviewed and, if based on credible information, investigated by the detaining authority.

Commentary:

14.1. The opportunity for detainees or their representatives to make oral or written complaints is related to their treatment and/or conditions of detention. The opportunity to make such complaints facilitates respect for international standards and assists in ensuring the accountability of those responsible for the treatment of detainees, as well as the detention facility in general. The prohibition of any type of reprisals against detainees or their representatives for making complaints is necessary to ensure that this mechanism is actually utilised and to encourage detainees to express their complaints freely.

14.2. The investigation of complaints permits the detaining authority to verify the validity of the complaint and, if verified, to rectify the situation giving rise to the complaint. Investigatory procedures and a practice of timely and effective investigations of credible complaints also helps ensure that allegations regarding treatment or conditions of detention that may arise years after the detention can be addressed. An independent and impartial authority should carry out such investigations, and the results of an investigation should be reported back to the complainant and the detaining authority. The investigator may be members of the military and should make recommendations based on the investigation it has carried out.

14.3. A component of seeking to rectify the situation giving rise to the complaint is the need for the investigation to be conducted, and reported on, promptly.

14.4. Regardless of whether a complaint is submitted any death or serious injury of a detainee is to be immediately followed by an official enquiry by the detaining authority.
15. A State or international organisation is to only transfer a detainee to another State or authority in compliance with the transferring State’s or international organisation’s international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.

Commentary:

15.1. For the purposes of The Copenhagen Process Principles and Guidelines the term ‘transfer’ refers to situations where a detainee is physically handed over from the custody of one State or international organisation to the custody of another State or authority. The term ‘authority’ here refers to an entity that is recognised as a matter of international law or national law as an entity that may lawfully hold detainees.

15.2. The transfer of a detainee from one State or international organisation to another State or entity may occur for a variety of reasons including: an obligation founded in international law to transfer, such as in cases where a detainee is transferred pursuant to a UN resolution, or pursuant to a treaty or other agreement; or pursuant to the host State claiming jurisdiction based on, for example, the nationality of the detainee.

15.3. States or international organisation must abide by applicable international law when transferring a detainee to another State or entity, including international obligations that relate to the receiving State’s sovereignty. In each case a transferring State or international organisation should assess the conditions in the receiving country to determine whether a transfer would be consistent with the transferring State’s or international organisation’s obligations under applicable international law.

15.4. In transfer situations, it is important to ensure that the detainee who is to be transferred is not subject to a real risk of violations that breach international law obligations concerning humane treatment and due process. For example, a State or international organisation must take steps to ensure that a detainee is not transferred where there are substantial grounds for believing that the detainee would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Where possible and appropriate, impartial international organisations such as the ICRC should be permitted to monitor the treatment of the transferred detainee. To preserve the ICRC’s independence and neutrality and the perception thereof, its agreement should be obtained in order for it to possibly serve as a post-transfer monitoring mechanism.

15.5. Some States currently undertake monitoring of detainees that they have transferred. Such monitoring is often dealt with in bilateral agreements or arrangements. Current practice suggests that monitoring may last at least until the detainee has been released or convicted of a crime in accordance with applicable law.
16. Nothing in *The Copenhagen Process Principles and Guidelines* affects the applicability of international law to international military operations conducted by the States or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors.

**Commentary:**

16.1. Interpreting and applying *The Copenhagen Process Principles and Guidelines* is always subject to the obligations that States and other entities, including individuals, have in international law. *The Copenhagen Process Principles and Guidelines* should be interpreted and applied in a manner that fully complies with obligations found in applicable international legal regimes.

16.2. This savings clause also recognises that *The Copenhagen Process Principles and Guidelines* is not a text of a legally binding nature and thus, does not create new obligations or commitments. Furthermore, *The Copenhagen Process Principles and Guidelines* cannot constitute a legal basis for detention. Although some language, e.g., Principle 2, may reflect legal obligations in customary and treaty law, *The Copenhagen Process Principles and Guidelines* are intended to reflect generally accepted standards. In such instances, the applicability and binding nature of those obligations is established by treaty law or customary international law, as applicable, and not by *The Copenhagen Process Principles and Guidelines*. Since *The Copenhagen Process Principles and Guidelines* were not written as a restatement of customary international law, the mere inclusion of a practice in *The Copenhagen Process Principles and Guidelines* should not be taken as evidence that States regard the practice as required out of a sense of legal obligation.

16.3. In addition, nothing in *The Copenhagen Process Principles and Guidelines* is intended to justify a departure by non-State actors from applicable international or national law.
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI,
as personal representative of the estates of
ANWAR AL-AULAQI and
ABDULRAHMAN AL-AULAQI
c/o American Civil Liberties Union
of the Nation’s Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, D.C. 20008,

SARAH KHAN,
as personal representative of the estate of
SAMIR KHAN
c/o American Civil Liberties Union
of the Nation’s Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, D.C. 20008,

Plaintiffs,

v.

LEON C. PANETTA,
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000,

WILLIAM H. MCRAVEN,
Commander, Special Operations Command
7701 Tampa Point Boulevard
MacDill Air Force Base, FL 33621-5323,

JOSEPH VOTEL,
Commander, Joint Special Operations Command
P.O. Box 70239
Fort Bragg, N.C. 28307,

DAVID H. PETRAEUS,
Director, Central Intelligence Agency
Central Intelligence Agency
Washington, D.C. 20505,

All in their individual capacities,

Defendants.
COMPLAINT
(Violation of Fourth and Fifth Amendments and Bill of Attainder Clause – targeted killing)

INTRODUCTION

1. Since 2001, and routinely since 2009, the United States has carried out deliberate and premeditated killings of suspected terrorists overseas. The U.S. practice of "targeted killing" has resulted in the deaths of thousands of people, including many hundreds of civilian bystanders. While some targeted killings have been carried out in the context of the wars in Afghanistan and Iraq, many have taken place outside the context of armed conflict, in countries including Yemen, Somalia, Pakistan, Sudan, and the Philippines. These killings rely on vague legal standards, a closed executive process, and evidence never presented to the courts. This case concerns the role of Defendants Leon C. Panetta, William H. McRaven, Joseph Votel, and David H. Petraeus (collectively, "Defendants") in authorizing and directing the killing of three American citizens in Yemen last year. The killings violated fundamental rights afforded to all U.S. citizens, including the right not to be deprived of life without due process of law.

2. In late 2009 or early 2010, Anwar Al-Aulaqi, an American citizen, was added to "kill lists" maintained by the Central Intelligence Agency ("CIA") and the Joint Special Operations Command ("JSOC"), a component of the Department of Defense ("DOD"). On September 30, 2011, unmanned CIA and JSOC drones fired missiles at Anwar Al-Aulaqi and his vehicle, killing him and at least three other people, including Samir Khan, another American citizen. Defendants authorized and directed their subordinates to carry out the strike.
3. On October 14, 2011, Defendants authorized and directed another drone strike in Yemen, this one approximately 200 miles away from the strike that had killed Anwar Al-Aulaqi and Samir Khan two weeks earlier. The October 14 strike killed at least seven people at an open-air restaurant, including two children. One of the children was 16-year-old Abdulrahman Al-Aulaqi, who was Anwar Al-Aulaqi’s son and also an American citizen.

4. Defendants’ killing of Anwar Al-Aulaqi was unlawful. At the time of the killing, the United States was not engaged in an armed conflict with or within Yemen. Outside the context of armed conflict, both the United States Constitution and international human rights law prohibit the use of lethal force unless, at the time it is applied, lethal force is a last resort to protect against a concrete, specific, and imminent threat of death or serious physical injury. Upon information and belief, Anwar Al-Aulaqi was not engaged in activities that presented such a threat, and the use of lethal force against him was not a last resort. Even in the context of an armed conflict, the law of war cabins the government’s authority to use lethal force and prohibits killing civilians who are not directly participating in hostilities. The concept of “direct participation” requires both a causal and temporal nexus to hostilities. Upon information and belief, Defendants directed and authorized the killing of Anwar Al-Aulaqi even though he was not then directly participating in hostilities within the meaning of the law of war.

5. Defendants’ killing of Samir Khan and Abdulrahman Al-Aulaqi was also unlawful. Upon information and belief, neither Samir Khan nor Abdulrahman Al-Aulaqi was engaged in any activity that presented a concrete, specific, and imminent threat to life; nor was either of them directly participating in hostilities. The news media have
reported, based on statements attributed to anonymous U.S. government officials, that Samir Khan was not the target of the September 30 strike and that Abdulrahman Al-Aulaqi was not the target of the October 14 strike. If the Defendants were targeting others, they had an obligation under the Constitution and international human rights law to take measures to prevent harm to Samir Khan, Abdulrahman Al-Aulaqi, and other bystanders. Even in the context of an armed conflict, government officials must comply with the requirements of distinction and proportionality and take all feasible measures to protect bystanders. Upon information and belief, Samir Khan and Abdulrahman Al-Aulaqi were killed because Defendants failed to take such measures.

6. Plaintiffs are the personal representatives of the estates of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi. They seek damages from Defendants for their role in authorizing and directing the killings of Plaintiffs’ sons and grandson in violation of the Fourth and Fifth Amendments and the Bill of Attainder Clause.

JURISDICTION AND VENUE

7. This complaint is for compensatory damages resulting from the conduct of Defendants, all of them U.S. government officials, in violation of the Fourth and Fifth Amendments and the Bill of Attainder Clause.

8. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) and the U.S. Constitution.


PARTIES

10. Plaintiff Nasser Al-Aulaqi is the father of Anwar Al-Aulaqi and the grandfather of Abdulrahman Al-Aulaqi. He is a citizen and resident of Yemen. He
brings this suit as the personal representative of the estates of his son and grandson, American citizens who were killed by missile strikes authorized and directed by Defendants.

11. Plaintiff Sarah Khan, an American citizen, is the mother of Samir Khan. She brings this suit as the personal representative of the estate of her son, an American citizen who was killed by missile strikes authorized and directed by Defendants.

12. Defendant Leon C. Panetta is the Secretary of Defense, a post he has held since July 2011. As Defense Secretary, he has ultimate authority over U.S. armed forces worldwide, including over JSOC. He authorized Anwar Al-Aulaqi’s continued placement on JSOC’s kill list after July 2011 and authorized and directed the missile strikes that killed Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi. Between February 2009 and June 2011, Defendant Panetta was the Director of the CIA. As CIA Director, he authorized the addition of Anwar Al-Aulaqi to the CIA’s kill list. He is sued in his individual capacity.

13. Defendant William H. McRaven is Commander of the U.S. Special Operations Command (“USSOCOM”), a post he has held since August 2011. As Commander of USSOCOM, Defendant McRaven has authority over JSOC, a subordinate unified command within USSOCOM. He authorized and directed the missile strikes that killed Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi. Between June 2008 and June 2011, he was the Commander of JSOC. In that capacity, he authorized the addition of Anwar Al-Aulaqi to JSOC’s kill list. He is sued in his individual capacity.

14. Defendant Joseph Votel is the Commander of JSOC, a post he has held since June 2011. As Commander of JSOC, he has authority over JSOC operations. He
authorized and directed the missile strikes that killed Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi. He is sued in his individual capacity.

15. Defendant David H. Petraeus is the Director of the CIA, a post he has held since September 2011. As CIA Director, he has ultimate authority over the CIA’s operations worldwide. He authorized and directed the missile strikes that killed Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi. He is sued in his individual capacity.

FACTUAL ALLEGATIONS

“Targeted Killings” by the United States

16. The first reported post-2001 targeted killing by the U.S. government outside Afghanistan occurred in Yemen in November 2002, when a CIA-operated Predator drone fired a missile at a terrorism suspect traveling in a car with other passengers. The strike killed all passengers in the vehicle, including an American citizen. The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions later stated that the strike constituted “a clear case of extrajudicial killing” and set an “alarming precedent.”

17. Since 2002, the United States has continued to carry out targeted killings outside the context of armed conflict. The pace of these killings has increased dramatically since 2009. In the course of carrying out these killings, the government has killed many hundreds of civilian bystanders. In December 2009, a U.S. missile strike in the village of al-Majalah, Yemen, killed 41 people, including 21 children.

18. In April 2012, Deputy National Security Advisor John Brennan acknowledged publicly that the United States carries out targeted killings of suspected terrorists “beyond
hot battlefields like Afghanistan,” often using “remotely piloted aircraft” known as “drones.” Both the CIA and JSOC are involved in authorizing, planning, and carrying out these killings; both the CIA and JSOC have carried out such killings in Yemen; and, according to a December 2011 report in the Washington Post and other news sources, the CIA and JSOC “share intelligence and coordinate attacks.” Greg Miller, Under Obama, an Emerging Global Apparatus for Drone Killing, Wash. Post, Dec. 27, 2011.

19. Both the CIA and JSOC maintain “kill lists” setting out the names of the individuals they intend to kill. See Jo Becker & Scott Shane, Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will, N.Y. Times, May 29, 2012. Upon information and belief, the inclusion of an individual on one or both of the lists represents a standing order authorizing and directing certain government personnel to kill that individual. In a February 2011 interview with Newsweek, the CIA’s former acting general counsel John Rizzo described the CIA’s list as “basically a hit list.” He stated that there are approximately 30 individuals on the list “at any given time,” and that “[t]he Predator [drone] is the weapon of choice, but it could also be someone putting a bullet in your head.” Tara McKelvey, Inside the Killing Machine, Newsweek, Feb. 13, 2011.

20. Senior government officials, including then-Director of National Intelligence Dennis Blair and Deputy National Security Advisor John Brennan, have made clear that the government’s claimed authority to carry out the targeted killing of suspected terrorists, including killings executed outside the context of armed conflict, extends to American citizens. However, government officials have offered incomplete and inconsistent explanations of the legal standards that govern the placement of U.S. citizens on the kill lists. Some officials have suggested that the U.S. government targets its
citizens only if they present “imminent” threats, but they have defined the term “imminent” so broadly as to negate its meaning.

Defendants’ Decision to Authorize the Killing of Anwar Al-Aulaqi

21. Plaintiff Nasser Al-Aulaqi is a Yemeni citizen who moved to the United States in 1966 to study as a Fulbright scholar at New Mexico State University. He and his wife lived in the United States until 1978, when they moved back to Yemen. In Yemen, he served as Minister of Agriculture and Fisheries and president of Sana’a University, and founded and served as president of Ibb University. He currently resides in Yemen with his wife, who is an American citizen, and their family.

22. Plaintiff Nasser Al-Aulaqi’s son, Anwar, was born in 1971 in New Mexico. He moved to Yemen with his parents in 1978. In 1991, he returned to the United States to attend college at Colorado State University. He obtained his master’s degree from San Diego State University and then enrolled in a Ph.D. program at George Washington University, which he attended through December 2001. While living in the United States, he married and had children, including Abdulrahman. He left the United States in 2003, first for the United Kingdom and then for Yemen.

23. In January 2010, the Washington Post reported that JSOC had added Anwar Al-Aulaqi to its kill list and had tried unsuccessfully to kill him in December 2009. Dana Priest, U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes, Wash. Post, Jan. 27, 2010. Other media organizations reported the same information. In March 2010, the Wall Street Journal reported that then-CIA Director Defendant Panetta stated that Anwar Al-Aulaqi was “someone that we’re looking for” and that “there isn’t any question that he’s one of the individuals that we’re focusing on.” Keith Johnson,

24. The decision to add Anwar Al-Aulaqi to government kill lists was made after a closed executive process. Defendant Panetta participated in this process, and upon information and belief Defendant McRaven participated in this process as well. Upon information and belief, Defendants authorized and directed Anwar Al-Aulaqi’s killing even though, at the time lethal force was used, Anwar Al-Aulaqi was not engaged in activities that presented a concrete, specific, and imminent threat to life, and even though there were means short of lethal force that could reasonably have been used to address any such threat. Upon information and belief, Defendants authorized and directed Anwar Al-Aulaqi’s killing even though he was not then directly participating in hostilities within the meaning of the law of war.

25. In or around June 2010, the Department of Justice’s Office of Legal Counsel completed a memorandum providing legal justifications for the killing of Anwar Al-Aulaqi. Substantial portions of the memorandum were summarized in October 2011 by the New York Times, which reported, based on conversations with individuals who had read the document, that the memorandum “provided the justification for acting [against Anwar Al-Aulaqi] despite an executive order banning assassinations, a federal law against murder, protections in the Bill of Rights and various strictures of the international laws of war.” Charlie Savage, Secret U.S. Memo Made Legal Case to Kill a Citizen, N.Y. Times, Oct. 8, 2011.
26. Between the time Anwar Al-Aulaqi was added to the JSOC and CIA kill lists and the time he was killed, government officials told reporters that Al-Aulaqi had “cast his lot” with terrorist groups and encouraged others to engage in terrorist activity. Later, they claimed he had played “a key role in setting the strategic direction” for “Al Qaeda in the Arabian Peninsula (AQAP).” The government never publicly indicted Anwar Al-Aulaqi for any crime.

Nasser Al-Aulaqi’s Lawsuit to Enjoin the Government from Killing His Son

27. On August 30, 2010, Nasser Al-Aulaqi filed suit in this Court as next friend of his son, Anwar, asking that the Court enter an injunction barring the President, the CIA, and DOD (including JSOC) from carrying out the targeted killing of his son unless the executive concluded that he presented a concrete, specific, and imminent threat to life, and that there were no reasonably available measures short of lethal force that could be expected to address that threat. After hearing argument on November 8, 2010, the Court dismissed the Complaint on December 7, 2010, holding that Nasser Al-Aulaqi lacked standing to assert his son’s constitutional rights and that at least some of the issues raised by the Complaint were non-justiciable political questions. No appeal was taken.

Samir Khan


29. Samir Khan attended elementary school in Queens, New York, and high school on Long Island, New York. After graduating from high school in 2003, he moved
to North Carolina, where he attended a community college and worked part-time. He left for Yemen in October 2009.

30. Anonymous government officials have told reporters that Samir Khan was a “propagandist” for AQAP. The government never publicly indicted him for any crime.

The September 30, 2011 Killing of Anwar Al-Aulaqi and Samir Khan

31. On the morning of September 30, 2011, Anwar Al-Aulaqi and Samir Khan were in the Yemeni province of al-Jawf, some 90 miles northeast of Sana’a. Upon information and belief, Defendants Panetta, McRaven, Votel, and Petraeus authorized and directed personnel under their command to fire missiles at Anwar Al-Aulaqi and his vehicle from unmanned U.S. drones. The missiles destroyed the vehicle and killed Anwar Al-Aulaqi, Samir Khan, and at least two others. Witnesses reported that the missile strike left the vehicle a “charred husk” and “tore the [victims’] bodies to pieces.” Dominic Rushe, et al., Anwar al-Awlaki Death: US Keeps Role Under Wraps to Manage Yemen Fallout, Guardian, Sept. 30, 2011; Sudarsan Raghavan, Awlaki Hit Misses al-Qaeda Bombmaker, Yemen Says, Wash. Post, Sept 30, 2011. According to a September 30, 2011 article in the Washington Post and a June 2012 book by journalist Daniel Klaidman, personnel under Defendants’ command had been surveilling Anwar Al-Aulaqi for a period as long as three weeks leading up to the strike. Greg Miller, Strike on Aulaqi Demonstrates Collaboration Between CIA and Military, Wash. Post, Sept. 30, 2011; Daniel Klaidman, Kill or Capture (2012). Defendants’ lengthy surveillance suggests that the use of lethal force was not a last resort and that additional measures could have been taken to protect bystanders from harm.
32. The surveillance and the strike were carried out by the CIA and JSOC. Upon information and belief, Defendant Petraeus was personally responsible for authorizing and directing the CIA’s involvement in the September 30 strike, and Defendants Panetta, McRaven, and Votel were personally responsible for authorizing and directing JSOC’s involvement in it. Defendants coordinated with each other in planning the attack and carrying it out.

33. Senior government officials, including Defendant Panetta and President Barack Obama, have acknowledged the responsibility of the United States for killing Anwar Al-Aulaqi. On the same day the strike was carried out, DOD published a news article stating that “[a] U.S. airstrike . . . killed . . . Anwar [Al-Aulaqi] early this morning” and that he had been “high on the military-intelligence list of terrorist targets.” Lisa Daniel, Panetta: Awlaki Airstrike Shows U.S.-Yemeni Cooperation, Am. Forces Press Service, Sept. 30, 2011. The following day, Defendant Panetta stated in a public speech that “it is because of th[e] teamwork between our intelligence and our military communities that we were successful in . . . taking down al-Awlaki.” Three weeks later, President Obama stated on national television that “working with the Yemenis, we were able to remove [Anwar Al-Aulaqi] from the field.” Tonight Show with Jay Leno (NBC television broadcast Oct. 25, 2011).

34. Defendants’ killing of Anwar Al-Aulaqi was unlawful. Upon information and belief, Defendants authorized and directed the strike even though, at the time the strike was carried out, Anwar Al-Aulaqi was not engaged in activities that presented a concrete, specific, and imminent threat of death or serious physical injury. Upon information and belief, Defendants authorized and directed the strike even though there were means short
of lethal force that could reasonably have been used to neutralize any threat that Anwar Al-Aulaqi’s activities may have presented. The killing of Anwar Al-Aulaqi was unlawful even if analyzed under the law of war because, upon information and belief, Defendants authorized and directed the strike even though Anwar Al-Aulaqi was not then directly participating in hostilities within the meaning of the law of war.

35. Defendants’ killing of Samir Khan was also unlawful. Samir Khan was not engaged in any activity that presented a concrete, specific, and imminent threat of death or serious physical injury; nor was he directly participating in hostilities. If he was killed because of the government’s targeting of Anwar al-Aulaqi, his killing was unlawful because Al-Aulaqi’s killing was unlawful and because, upon information and belief, Defendants authorized and directed the strike without taking legally required measures to avoid harm to bystanders. Even in the context of an armed conflict, government officials must comply with the requirements of distinction and proportionality and take all feasible measures to protect bystanders. Upon information and belief, Samir Khan was killed because Defendants failed to take such measures.

The October 14, 2011 Killing of Abdulrahman Al-Aulaqi

36. Plaintiff Nasser Al-Aulaqi’s grandson, Abdulrahman Al-Aulaqi, was born in Denver, Colorado, on August 26, 1995. He was raised in the United States until 2002, when he moved with his family to Yemen. At the time of his death, he was a student in his first year of high school and resided in Sana’a, Yemen, with his mother, siblings, grandmother, and grandfather.

37. On October 14, 2011, Abdulrahman was at an open-air restaurant near the town of Azzan, in the southern Yemeni province of Shabwa. Upon information and
belief, Defendants Panetta, McRaven, Votel, and Petraeus authorized and directed
personnel under their command to fire missiles from unmanned U.S. drones at a person at
or near the restaurant. According to media sources, the intended target was Ibrahaim Al-
Banna, an Egyptian national, but it was later reported that he was not among those killed
by the strike. See Gregory Johnsen, Signature Strikes in Yemen, Waq al-Waq, Apr. 19,
2012. The strike killed at least seven people, including Abdulrahman and one of his
cousins, another minor. Abdulrahman himself was 16 years old.

38. After the strike, a senior Obama administration official described
Abdulrahman to the Los Angeles Times as a “military-aged male.” Ken Dilanian,
news sources described Abdulrahman as a militant in his twenties. To correct these
erroneous descriptions, Abdulrahman’s family provided his birth certificate to the
acknowledged in anonymous statements to the press that Abdulrahman had been a minor.

39. Upon information and belief, Defendant Panetta was personally responsible
for authorizing and directing the CIA’s involvement in the October 14 strike, and
Defendants Petraeus, McRaven, and Votel were personally responsible for authorizing
and directing JSOC’s involvement in the October 14 strike. Defendants coordinated with
each other in planning the attack and carrying it out.

40. The killing of Abdulrahman Al-Aulaqi was unlawful. Abdulrahman was not
engaged in any activity that presented a concrete, specific, and imminent threat of death
or serious physical injury; nor was he directly participating in hostilities. If he was killed
because the government was targeting another individual, his killing was unlawful
because, upon information and belief, Defendants authorized and directed the strike
without taking legally required measures to avoid harm to him. Even in the context of an
armed conflict, the government must comply with the requirements of distinction and
proportionality and take all feasible measures to protect bystanders. Upon information
and belief, Abdulrahman Al-Aulaqi was killed because Defendants failed to take such
measures.

CAUSES OF ACTION

First Claim for Relief
Fifth Amendment: Due Process

41. Defendants’ actions described herein violated the substantive and procedural
due process rights of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi under
the Fifth Amendment to the Constitution. Defendants Panetta, McRaven, Votel, and
Petraeus violated the Fifth Amendment due process rights of Anwar al-Aulaqi, Samir
Khan, and Abdulrahman Al-Aulaqi by authorizing and directing their subordinates to use
lethal force against them in the circumstances described above. The deaths of Anwar al-
Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi were a foreseeable result of
Defendants’ actions and omissions.

Second Claim for Relief
Fourth Amendment: Unreasonable Seizure

42. Defendants’ actions described herein violated the rights of Anwar Al-Aulaqi,
Samir Khan, and Abdulrahman Al-Aulaqi to be free from unreasonable seizures under
the Fourth Amendment to the Constitution. Defendants Panetta, McRaven, Votel, and
Petraeus violated the Fourth Amendment rights of Anwar al-Aulaqi, Samir Khan, and
Abdulrahman Al-Aulaqi by authorizing and directing their subordinates to use lethal
force against them in the circumstances described above. The deaths of Anwar al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi were a foreseeable result of Defendants’ actions and omissions.

Third Claim for Relief
Bill of Attainder

43. Defendants’ actions described herein with respect to Anwar Al-Aulaqi violated the Constitution’s Bill of Attainder Clause. Defendants’ actions constituted an unconstitutional act of attainder because Defendants designated Anwar Al-Aulaqi for death without the protections of a judicial trial in the circumstances described above. The death of Anwar al-Aulaqi was a foreseeable result of Defendants’ actions and omissions.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court enter judgment awarding them:

A. Damages in an amount to be determined at trial; and

B. Such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Arthur B. Spitzer

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July 18, 2012
UNIVERSITY OF WATERLOO

MEMORANDUM OPINION

Before the Court are respondents' motions to dismiss petitioners' three amended petitions for habeas corpus. The petitioners are all third party nationals who have been held in various facilities at Bagram Airfield in Afghanistan for nine years or more. Three years ago, the Court concluded that section 7(a) of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, was unconstitutional as applied to these petitioners and that they were therefore entitled to challenge their detentions through habeas corpus petitions.  Al Maqaleh v.
Gates, 604 F. Supp. 2d 205, 208-09 (D.D.C. 2009) ("Al Maqaleh I"). A year later, the D.C. Circuit reversed that decision, holding that "the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war." Al Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010) ("Al Maqaleh II").

Following the court of appeals' decision, petitioners filed a Joint Petition for Panel Rehearing, which the court of appeals denied in a brief per curiam order. 7/23/2011 Per Curiam Order, Al Maqaleh II, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-cv-5265, 09-cv-5266, 09-cv-5267).

The court of appeals wrote:

In support of their petition for panel rehearing, appellees, citing evidence not in the record, argue that the government's decision to transfer the Bagram prison facility to Afghan control undermines the rationale of our May 21, 2010, decision. Our denial of this petition is without prejudice to appellees' ability to present this evidence to the district court in the first instance.

Id. at 1. Petitioners have now returned to this Court to file amended habeas petitions citing that evidence, along with other evidence that they claim "undermines the rationale" of the court of appeals' decision. See Al Maqaleh's Second Am. Pet. for Writ of Habeas Corpus [ECF 63] ("Habeas Pet."). Respondents have moved to dismiss the amended petitions. Mot. to Dismiss Am. Pets. for Writs of Habeas Corpus [ECF 64] ("Resp. MTD"). A hearing was held on the motions on July 16, 2012. Subsequently, petitioners filed additional factual materials with the Court on September 24, 2012. Ptrs.' Decls. Filed in Resp. to Court's Order [ECF 83] ("Ptrs.'

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1 The other two petitioners make the same claims in their petitions. See Al Bakri's Am. Pet. for a Writ of Habeas Corpus & Compl. for Decl. & Inj. Relief [08-cv-1307, ECF 58]; Al-Najar's First Am. Petition for Writ of Habeas Corpus [08-cv-2143, ECF 52]. The petitions and the motions to dismiss in the three cases are substantively identical, so the Court will cite only to the documents in Al Maqaleh's case, 06-cv-1669.

After carefully considering petitioners' filings and the evidence cited therein, the Court concludes that the petitions must be dismissed. As the many lengthy opinions previously written on this issue attest, determining the scope of a federal court's habeas jurisdiction can be enormously complicated. But given the D.C. Circuit's opinion in this case, the issue now before this Court is quite narrow: whether petitioners' new evidence undermines the rationale of the court of appeals' decision. Consistent with the one other district court that has faced this issue, this Court concludes that the answer to that question is no. See Wahid v. Gates, — F. Supp. 2d —, 2012 WL 2389984 (D.D.C. 2012).

BACKGROUND

This Court's prior opinion fully laid out the facts of these cases, and the Court will not repeat most of those facts here. See Al Maqaleh I, 604 F. Supp. 2d at 209-10. Briefly, the United States has designated all three petitioners as enemy combatants and detained them at Bagram Airfield in Afghanistan ("Bagram"). Fadi al Maqaleh is a citizen of Yemen who claims to have been captured at an unspecified location outside of Afghanistan, although respondents dispute this. Id. at 209-10. Amin al Bakri is also a citizen of Yemen and was captured in Thailand. Id. at 209. Redha-al-Najar is a citizen of Tunisia who was captured in Pakistan. Id. Each petitioner contests his designation as an enemy combatant and seeks to challenge his detention through a habeas corpus petition. Id.

The legal framework governing the scope of habeas corpus jurisdiction is set forth in Boumediene v. Bush, 553 U.S. 723 (2008). There, the Supreme Court first determined that
section 7 of the MCA, 28 U.S.C. § 2241(e), denied federal courts jurisdiction over the habeas petitions of enemy combatant aliens detained abroad. Id. at 736. The Court then turned to the question whether MCA § 7 unconstitutionally suspended the writ of habeas corpus as applied to detainees at Guantanamo Bay. Id. at 733, 739. The Court explained that "at least three factors are relevant in determining the reach of the Suspension Clause":

(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Id. at 766. After weighing these factors, the Supreme Court concluded that detainees held at Guantanamo were entitled to bring habeas corpus petitions in the federal courts. Id. at 798.

This Court and the D.C. Circuit both recognized that Boumediene's three-part test applies to this case. In applying the test to the facts here, the D.C. Circuit reached the following conclusions. First, the court held that the "citizenship and status" factor supported petitioners' argument that they were entitled to bring habeas petitions, because the petitioners were similarly situated to the detainees at Guantanamo. Al Maqaleh II, 605 F.3d at 95-96. With respect to the "adequacy of process" factor, the court of appeals found that the petitioners actually had a stronger claim for entitlement to the writ than did the Guantanamo detainees, because the procedural protections then afforded to detainees at Bagram were even weaker than those at Guantanamo. Id. at 96.

But the court of appeals found that the second factor, "the nature of the sites where apprehension and then detention took place," weighed "heavily in favor" of the respondents. Id. In the court's view, there was a vast difference between Guantanamo — "a territory that, while
technically not part of the United States, is under the complete and total control of our
Government," id. (citations omitted) – and Bagram Airfield, where "there is no indication of any
intent to occupy the base with permanence, nor is there hostility on the part of the 'host' country."
Id. at 97. Given those differences, the D.C. Circuit found that "the United States [may have] de
facto sovereignty over Guantanamo" but that "the same simply is not true with respect to
Bagram." Id. Hence, the court concluded that the Suspension Clause was far less likely to apply
at Bagram. Id.

The court of appeals then found that the third factor, "the practical obstacles inherent in
resolving the petitioner's entitlement to the writ," weighed "overwhelmingly" against the
petitioners. Id. The court stressed that Bagram was located in a "theater of war" where "active
hostilities" were still being conducted. Id. The court saw three critical problems with allowing
detainees at such a site to bring habeas petitions. First, the court worried that habeas litigation
would "divert . . . efforts and attention from the military offensive abroad to the legal defensive
at home." Id. at 98 (quoting Johnson v. Eisentrager, 339 U.S. 763, 779 (1950)). The court was
also wary of "judicial interference with the military's efforts to contain enemy elements, guerilla
fighters, and were-wolves." Al Maqaleh, 605 F.3d at 97 (quoting Boumediene, 128 S. Ct. at
2261). In addition, the court observed that "the result of such enemy litigiousness would be a
conflict between judicial and military opinion highly comforting to enemies of the United
States." Id. at 98 (quoting Eisentrager, 339 U.S. at 779). The court of appeals emphasized that
the Supreme Court in Boumediene had expressly noted that the outcome in that case might have
been different "if the detention facility were located in an active theater of war," id. at 97-98
(quoting Boumediene, 553 U.S. at 770), and indicated that Bagram's location was a critical factor
in its decision.

Finally, the D.C. Circuit wrote that it did "not ignore the arguments of the detainees that the United States chose the place of detention and might be able to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will." Id. at 98 (internal quotation marks and citations omitted); see Boumediene, 553 U.S. at 765. But, the court of appeals concluded, "that is not what happened here." Al Maqaleh II, 605 F.3d at 99. Explaining its view that manipulation had not occurred, the court wrote:

[T]he notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only unsupported by the evidence, it is not supported by reason. To have made such a deliberate decision to "turn off the Constitution" would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the Boumediene decision long before it came down.

Id. at 99. The court expressed some doubt that such purposeful evasion would even be relevant to the Boumediene test, but concluded that it "need[ed] [to] make no determination on the importance of this possibility, given that it remains only a possibility." Id. at 98.

STANDARD


Although a court must accept as true all of petitioners' factual allegations when reviewing a motion to dismiss pursuant to Rule 12(b)(1), see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993), "'factual allegations . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." Grand Lodge, 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1990)). At the stage of litigation when dismissal is sought, a petitioner's habeas petition must be construed liberally, and the petitioner should receive the benefit of all favorable inferences that can be drawn from the
alleged facts. See EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). A court may consider material other than the allegations in the habeas petition in determining whether it has jurisdiction to hear the case, so long as it still accepts the factual allegations in the habeas petition as true. See Jerome Stevens Pharmaceuticals, Inc. v. FDA, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005); St. Francis Xavier Parochial Sch., 117 F.3d at 624-25 n.3; Herbert v. Nat'l Acad. of Sci., 974 F.2d 192, 197 (D.C. Cir. 1992).

ANALYSIS

Petitioners argue here, as they did in their petition for rehearing in the D.C. Circuit, that their habeas petitions should be reassessed for several reasons. See Ptrs.' Opp. to Resp. MTD ("Ptrs.' Opp") at 6-9. They contend first that new evidence shows that the United States does intend to remain indefinitely at Bagram; second, that the United States has "facilitat[ed]" recent criminal trials run by the Afghan government at Bagram, and that the Afghan government desires foreign detainees to be removed and provided fair judicial process elsewhere, which shows that the practical obstacles to conducting litigation at Bagram are far less serious than the court of appeals believed; third, that the evidence shows that the United States was attempting to avoid habeas jurisdiction by detaining petitioners at Bagram; and fourth, that the procedures used to determine petitioners' status are unacceptable. Each of these arguments will be addressed in turn.

I. Intent to remain at Bagram

One of the key factors behind the Supreme Court's opinion in Boumediene was "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over" Guantanamo Bay and had done so since 1898. Boumediene, 553 U.S. at 755, 765. Moreover, Cuba "effectively ha[d] no rights as a
sovereign" at Guantanamo Bay unless and until the United States agreed to change the terms of its lease agreement or chose to abandon the base. Id. at 753. In this case, the D.C. Circuit placed great weight on the fact that the United States's control over the base at Bagram Airfield was less absolute than its control over Guantanamo Bay.

Petitioners offer the following new evidence that they argue shows that the D.C. Circuit's decision was incorrect. Since late 2001 or early 2002, the United States has held both Afghan and non-Afghan detainees at Bagram. The United States has recently begun transferring custody of Afghan detainees to the Afghan government. See Resp. MTD, Decl. of William K. Lietzau ("Lietzau Decl.") ¶ 3. Although respondents aver that they intend eventually to transfer custody of non-Afghan detainees to either the Afghan government, the detainee's home country, or a third country, they have no specific plans in place to do so. See id. ¶¶ 3, 5, 9. Petitioners conclude that the lack of specific plans to transfer non-Afghan detainees shows that the United States has the same sort of permanent control over non-Afghan detainees at Bagram that it has over detainees at Guantanamo Bay. Ptrs.' Opp. at 6-7, 22-26.

To determine whether the information about the recent transfers of Afghan detainees undermines the rationale of the D.C. Circuit's decision, it is necessary to consider the information on which that court relied. If, for example, the court of appeals based its opinion on specific representations about plans to cede custody of non-Afghan detainees within a certain time frame, or to transfer custody of non-Afghan detainees before transferring custody of Afghan detainees, this new information could be quite important. But if the court's opinion rested on different grounds, the new information might be less important.

An examination of the parties' appellate briefs and the D.C. Circuit's opinion leads to the
conclusion that the court's information about future plans at Bagram was, in fact, quite limited. Respondents offered only vague assertions that the United States did not intend to maintain control over Bagram indefinitely. See Appellants' Br., Al Maqaleh II, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-cv-5265, 09-cv-5266, 09-cv-5267) at 34 ("In contrast to Guantanamo, the United States does not have any plans, or even a desire, to establish a permanent military base at Bagram. . . . [T]he United States intends to relinquish control of the Bagram Airfield after completing its mission in Afghanistan."); Appellants' Reply Br., Al Maqaleh II, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-cv-5265, 09-cv-5266, 09-cv-5267) at 10 ("As the district court correctly found, the United States has no plans to establish a permanent military base at Bagram."). The only factual material referenced in support of these claims was the lease for the base at Bagram Airfield, which "obligate[s] [the United States] to leave [Bagram] when it determines that the facility is no longer needed for military purposes." Appellants' Br. at 34. Respondents alluded to the possibility of transferring detainees to the Afghan government, but provided absolutely no specifics. Appellants' Reply Br. at 10 ("Indeed, the Commander of the U.S. military mission has directed that the goal of the United States is to transfer all detention operations in Afghanistan, to include the BTIF, to the Afghan government.") (internal quotation marks and citation omitted).\(^2\)

Despite the lack of concrete evidence supporting respondents' claim that the United States would not remain at Bagram indefinitely, the D.C. Circuit concluded that the nature of the detention site "weigh[ed] heavily in favor of the United States" and specifically found that "there

\(^2\) The BTIF is the Bagram Theater Internment Facility, where detainees at Bagram Airfield were previously held. In late 2009, all detainees were transferred to the Detention Facility in Parwan ("DFIP"), also located at Bagram Airfield. Lietzau Decl. ¶ 2.
is no indication of any intent to occupy the base with permanence." \textit{Al Magaleh II}, 605 F.3d at 96-97. Given the evidence before the court of appeals and its conclusion, this Court does not believe that the recent transfers of Afghan detainees would have changed the court of appeals' decision. Respondents make the same general statements of intent to eventually leave Bagram that they made before the D.C. Circuit; indeed, the first section of their brief is entitled "The United States has no intention to remain at Bagram permanently." Resp. MTD at 8; \textit{see also id.} at 9 (each representation made before the court of appeals about the United States's intention to leave Bagram "remain[s] accurate today"). And as far as the record reveals, there has been no change to the terms of the lease that obligates the United States to leave Bagram "when it determines that the facility is no longer needed for military purposes." Appellants' Br. at 34.

In addition, respondents continue to stress that their ultimate goal is still to transfer custody of all detainees to the Afghan government, the detainee's home country, or a third country. William Lietzau, the Deputy Assistant Secretary of Defense for Detainee Policy, explains in his declaration that the Combined Joint Interagency Task Force 435 ("Task Force") has already begun transferring some detention facilities to the Afghan government and will continue doing so based on "operational conditions, Afghan judicial capacity, and [whether the Afghan government is] fully trained, equipped, and able to detain insurgents securely and to perform its detention, prosecution, and incarceration responsibilities in accordance with international obligations and Afghan law." Lietzau Decl. ¶ 3. Lietzau further explains that the Task Force is planning construction of "additional detainee housing capacity adjacent to DFIP," \textit{id.} ¶ 5, which will house non-Afghan detainees "pending the transfer of non-Afghan detainees to their home countries or to third countries." \textit{Id.} But, critically, Lietzau declares that "U.S. Forces
will eventually transition this additional detention capacity to the [Afghan government], consistent with the conditions-based approach discussed above." Id. And at the end of his declaration, Lietzau broadly reaffirms the United States's goal of transferring custody of the detainees:

As discussed above . . . the DFIP is not intended to serve as a permanent U.S. facility. The United States does not intend to continue to use the DFIP to detain any person pursuant to the Authorization for the Use of Military Force, as informed by the law of war, beyond the cessation of hostilities with the Taliban, al Qaida, and associated forces. The United States has no interest in holding detainees longer than necessary.

Id. ¶ 9.

In sum, nothing has changed about respondents' stated position with respect to detainees since this case was litigated before the D.C. Circuit: respondents still intend to transfer custody of all detainees to the Afghan government or elsewhere (but not to the United States). Hence, petitioners must resort to the argument that the transfer of some detainees to the Afghan government makes it less likely that other detainees will someday be transferred, even though the United States continues to reaffirm its goal of transferring custody of all detainees. But as a matter of logic, petitioners' argument makes little sense. Indeed, one could convincingly argue that the opposite is true. At the time this case was argued in the court of appeals, it would have been reasonable to wonder how committed the United States was to its amorphous goal of eventually ceding custody of detainees to another government. That the United States has now transferred custody of numerous detainees to the Afghan government, however, demonstrates the sincerity of those representations. In addition, the capacity the Afghan government is building to house and prosecute Afghan detainees may make it more likely that non-Afghan detainees can
eventually be transferred to the Afghan government, if not to other countries. Hence, respondents' position on this point is no weaker than it was before the D.C. Circuit; indeed, if anything, it may be stronger.

II. Practical obstacles

In the court of appeals' view, the single most important factor in the Boumediene analysis was the "overwhelming[]" nature of the "practical obstacles" to conducting habeas litigation at Bagram. Al Maqaleh II, 605 F.3d at 97. After the D.C. Circuit's decision, the Afghan government began conducting criminal trials of detainees at Bagram. Pts.' Opp. at 26. The parties dispute how involved the United States is in these trials. The United States describes them as "purely Afghan-run," Resp. MTD at 17, but petitioners disagree. In their habeas petitions, they state that "the U.S. Military . . . allowed thirty-six full-blown trials of Afghan prisoners in its custody." Id. Quoting a Boston Globe article, petitioners explain that courts are composed of Afghan "judges, prosecutors, and forensic experts," but that Americans "mentor[]" them. Id. (internal quotation marks and citations omitted). In their briefing, petitioners adopt the formulation that the United States "facilitat[es]" trials run by the Afghan government. Pts.' Opp. at 26. Given the evidence petitioners have offered, the Court concludes that "facilitating" the trials -- by allowing detainees to appear for trial and mentoring the Afghan participants -- is an appropriate characterization of the United States's role.3

Petitioners argue that these trials -- which involve "civilian lawyers and witnesses, along with journalists and observers from all over the world" -- have been carried out without incident,

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3 Petitioners also describe "jointly-run U.S.-Afghan proceeding[s] similar to an arraignment" that apparently precede the trials, but they say nothing more about these proceedings, how common they are, or what the United States's role actually is. Habeas Pet. ¶ 121.
which shows that the "practical obstacles" to adjudicating Bagram detainees' habeas petitions are much less than the D.C. Circuit feared. Ptrs.' Opp. at 26. The Court disagrees. That the Afghan government has chosen to conduct criminal trials of detainees does not indicate that there are no practical obstacles to the United States doing so. Again, it is helpful to recall the specific concerns expressed by the D.C. Circuit. First, the court thought that ordering military commanders to participate in habeas adjudications would "divert . . . efforts and attention" from the battlefield to the courtroom. Al Maqaleh II, 605 F.3d at 98 (internal quotation marks and citations omitted). A trial system run primarily by the Afghan government obviously requires many fewer U.S. military resources than would habeas adjudications conducted solely by the United States. The Afghan government, not the United States, is providing the "judges, prosecutors, and forensic experts" who conduct the criminal trials; the United States provides only "mentor[ing]," which surely "divert[s]" less "effort[] and attention" from the battlefield than would full-blown habeas litigation conducted here.

The court of appeals also expressed concerns about the difficulties of litigating the petitions of detainees held in a "theater of war." Al Maqaleh II, 605 F.3d at 98. Again, the fact that the Afghan government has decided that it can conduct criminal trials on its own soil does not necessarily prove that a court in the United States could oversee litigation centered at Bagram or in the United States. The security concerns may be different depending on which government is in charge of the litigation; it is quite plausible, for instance, that trials run by the Afghan government would produce less hostility and fewer security issues than litigation in Afghanistan orchestrated by the United States. Finally, the court of appeals worried that conducting habeas adjudications of detainees held at Bagram would result in "a conflict between judicial and
military opinion highly comforting to enemies of the United States." Id. at 98 (internal quotation marks and citations omitted). That issue is not present, however, when the Afghan government tries its own citizens with United States consent. In sum, the fact that the Afghan government can try its own citizens simply does not provide much information about the United States's ability to adjudicate habeas petitions of Bagram detainees.

Petitioners have also submitted a letter to their counsel from Abdul Karim Khurram, Chief of Staff to the President of Afghanistan. See Ptrs.' Supp. Decl., Letter from Abdul Karim Khurram to Ramzi Kassem and Tina Foster (Sept. 19, 2012) ("Khurram Letter"). Petitioners claim that the letter "confirms the Afghan government's position regarding this Court's possible exercise of jurisdiction" and "directly informs this Court's assessment of any 'practical obstacles' related to the Bagram prison's location" in Afghanistan. Ptrs.' Supp. Decl., Declaration of Ramzi Kassem ("Kassem Decl.") ¶ 3. The Court disagrees. The letter states: "We have no desire for [non-Afghan detainees] to remain on our territory. . . . [T]he government of Afghanistan favors these individual[s] having access to a fair judicial process and adjudication of their case by a competent court." As respondents point out, the Khurram Letter is a private letter to petitioners' counsel, does not indicate that Khurram is authorized to speak for the Afghan government, and arguably conflicts with contemporaneous public statements made by other Afghan officials.\(^4\) But even assuming that the Khurram Letter in fact represents the position of the Afghan government, the Afghan government's support for giving detainees habeas rights would not require a lesser diversion of military resources, change the fact that Afghanistan

"remains a theater of war," or avert a potential conflict between the U.S. military and our courts. See Al Maqaleh II, 605 F.3d at 97-98. The D.C. Circuit clearly found that these practical obstacles weighed "overwhelmingly" against the petitioners, and petitioners have not undermined the rationale for that conclusion.

III. Executive manipulation

Petitioners also offer evidence that the United States has chosen to keep detainees at Bagram specifically in order to avoid habeas jurisdiction. Even if this is true, it is unclear whether such purposeful evasion of habeas jurisdiction would affect the jurisdictional analysis. Executive manipulation is not an explicit factor in three-part Boumediene test; on the other hand, the Supreme Court's concern that "the political branches [could] switch the Constitution on or off at will" by strategically choosing detention sites clearly influenced its decision. Boumediene, 553 U.S. at 765.

The D.C. Circuit wrote that it "doubt[ed]" that evasion would go to "either the second or the third of the Supreme Court's enumerated factors," but then added that such purposeful manipulation might constitute an "additional factor" in the Boumediene analysis. Al Maqaleh II, 605 F.3d at 98-99. The court of appeals also found, however, that executive manipulation "is not what happened here." Id. at 98. It therefore declined to decide how purposeful evasion of jurisdiction might affect the Boumediene test, if at all. Id. Petitioners now argue that purposeful evasion is exactly what happened here, and that the D.C. Circuit's decision on that issue would have been different if that court had seen the evidence now presented to this Court. In support of their argument, petitioners cite newspaper articles, government memoranda, two declarations from former government officials, and other materials.
The first problem with petitioners' argument is that most of the cited material is not new at all. Much of it, including the most convincing pieces of evidence, was publicly available even before this Court issued its initial opinion in this case. Petitioners did raise the issue of purposeful evasion of jurisdiction before the court of appeals, Appellees' Br. at 34, but they chose not to focus on the issue or to rely on any of the evidence presented here. Not until the petition for rehearing did petitioners offer any evidence on the manipulation question, and even then they focused primarily on other issues. Joint Pet. for Rehearing, Al Maqaleh II, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-cv-5265, 09-cv-5266, 09-cv-5267) ("Pet. Rehearing") at 12-14. This Court doubts that the D.C. Circuit's order denying panel rehearing, which by its terms only allowed appellees to present to the district court new evidence on "the government's decision to transfer the Bagram prison facility to Afghan control," see supra at 2, was meant to allow petitioners to litigate anew an issue they could have litigated earlier.

Even setting aside waiver issues, however, the Court finds that the evidence amassed by petitioners does not call into doubt the court of appeals' decision. Petitioners' evidence runs as follows. They explain, citing government memoranda, that Bagram was initially a "collection site" where U.S. officials decided which detainees should be sent to Guantanamo, but that the "linkage between" Bagram and Guantanamo was "severed over time."5 They then cite newspaper articles stating that transfers from Bagram to Guantanamo dropped sharply after the Supreme Court found in June 2004 in Rasul v. Bush, 542 U.S. 466 (2004), that detainees at Guantanamo

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could bring habeas petitions.\textsuperscript{6} In addition, they cite two articles stating directly that detainees were transferred to Bagram "in part" to avoid habeas jurisdiction; one quotes anonymous "military figures" and another appears simply to be drawing an inference from transfer statistics.\textsuperscript{7} Finally, petitioners argue that there was in fact a "reverse" flow of detainees from Guantanamo in the wake of \textit{Rasul}. They cite a 2010 newspaper article stating that four high-value detainees were transferred away from Guantanamo (but not to Bagram) in the months before \textit{Rasul} was issued, because U.S. officials predicted the outcome of \textit{Rasul} and wanted to ensure that those detainees could not bring habeas petitions.\textsuperscript{8} They also state (in a point vigorously contested by respondents) that more than 30 detainees were transferred from Guantanamo to Bagram and other sites between 2007 and 2009.\textsuperscript{9} Finally, petitioners have submitted the declarations of Colonel Lawrence B. Wilkerson (Ret.), former Chief of Staff to Secretary of State Colin Powell, and Glenn Carle, a former CIA employee, stating that petitioners "likely" were transferred to and/or kept at Bagram to "evade judicial review of their detention." Ptrs.' Supp. Decls., Declaration of Colonel Lawrence B. Wilkerson (Ret.) ("Wilkerson Decl.") ¶ 14; Declaration of Glenn Carle ("Carle Decl.") ¶ 14. From this evidence, petitioners conclude that the Executive chose to house detainees at Bagram to ensure that they would not be able to file habeas petitions.


\textsuperscript{7} \textit{Id.} (citing Tim Golden & Eric Schmitt, \textit{A Growing Afghan Prison Rivals Bleak Guantánamo}, \textit{N.Y. Times}, Feb. 26, 2006); Habeas Pet. ¶ 74 (citing Jeff A. Bovarnick, \textit{Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy}, \textit{The Army Lawyer} 9, 18 (June 2010)).

\textsuperscript{8} Ptrs.' Opp. at 28 (citing Matt Apuzzo & Adam Goldman, \textit{CIA Flight Carried Secret from Gitmo}, \textit{AP}, Aug. 6, 2010).

\textsuperscript{9} Ptrs.' Opp. at 29; Resp. MTD at 15.
There are several reasons that the Court finds this evidence less persuasive than petitioners make it out to be. First, as respondents point out, the facts are not as one-sided as petitioners represent. It is undisputed that detainees were transferred from Bagram to Guantanamo in September 2004, undermining the theory that Rasul was a bright dividing line or that the government was instituting a "reverse flow" of detainees.\(^\text{10}\) In addition, the four high-value detainees moved away from Guantanamo before Rasul was issued were actually moved back to Guantanamo in 2006.\(^\text{11}\) Moreover, there are logical reasons unrelated to habeas petitions that the United States might have decided to house detainees at Bagram rather than Guantanamo. Most obviously, the majority of detainees are presumably captured in the middle east, half a world away from Guantanamo, and can more conveniently be detained closer, at least for some time. In addition, the international publicity and criticism surrounding Guantanamo had moved the Bush administration to make public statements that it "would like to close" Guantanamo as early as 2006.\(^\text{12}\)

More important than these arguments, however, is the fact that the Court simply sees no way to accept petitioners' argument under the framework laid out by the D.C. Circuit. This is true for two reasons. First, the court of appeals was intimately familiar with the Supreme Court's habeas jurisprudence, including both the issuance of Rasul in 2004 and Boumediene's discussion about potential executive manipulation of habeas jurisdiction. See Al-Maqlah II, 605 F.3d at

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\(^{11}\) Resp. MTD at 16; Matt Apuzzo & Adam Goldman, CIA Flight Carried Secret from Gitmo, AP, Aug. 6, 2010.

90-92, 98. Nonetheless, the court rejected petitioners' contention that the United States might have made a strategic decision to house petitioners at Bagram rather than Guantanamo. The D.C. Circuit wrote that purposefully manipulating these petitioners' detention sites "would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the Boumediene decision long before it came down [in 2008]," 605 F.3d at 99, an idea the court evidently found wholly unconvincing. If the D.C. Circuit rejected the argument that pre-Boumediene litigation could have prompted strategic maneuvering on the part of the military and the executive branch, this Court cannot find otherwise on the basis of evidence that, while perhaps new, is really no different than what existed before.13

The second reason the Court cannot accept petitioners' argument is that it has no limiting principle. Petitioners are really arguing that a decision to hold detainees at any site other than Guantanamo is suspect. See, e.g., Tr. of 1/7/2010 Oral Arg., Al-Maqaleh II, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-cv-5265, 09-cv-5266, 09-cv-5267) at 55-57. But that would create universal

13 The Wilkerson and Carle Declarations, though executed recently, do not raise a new argument and are largely cumulative of evidence previously submitted. In fact, in their petition for rehearing in the D.C. Circuit, petitioners cited a prior declaration given by Colonel Wilkerson in another case, and they cited both that declaration and Glenn Carle's book in support of their opposition to respondents' motion to dismiss in this Court. See Pet. Rehearing at 13 n.15; Ptrs.' Opp. at 32 n.20; Ptrs.' Supp. Mem. to Ptrs.' Opp. [ECF 71] ¶¶ 7-9. While the new declarations, unlike Colonel Wilkerson's prior declaration and Mr. Carle's book, refer specifically to the petitioners in this case, they are really just conjecture. Neither Colonel Wilkerson nor Mr. Carle professes to have personal knowledge of petitioners' detentions, and both merely speculate about the "likely" motivations for detaining petitioners at Bagram. See Wilkerson Decl. ¶ 14; Carle Decl. ¶ 14. Such speculation is not new to this case. Petitioners' argument based on the assertion that the United States intentionally kept detainees away from Guantanamo to evade judicial review was already considered and rejected by the D.C. Circuit. See Al Maqaleh II, 605 F.3d at 99. Because the Wilkerson and Carle Declarations do not add materially to the evidence that was before the D.C. Circuit, this Court will not rely on them to reach a different conclusion here.
habeas jurisdiction, a result far beyond what Boumediene contemplated. Most importantly for present purposes, that result would be clearly at odds with the D.C. Circuit's conclusions. The panel members spent much of the oral argument searching for a limiting principle that would distinguish Bagram from any other military installation, and the panel specifically focused on the fact that petitioners' manipulation theory would create worldwide habeas jurisdiction. Tr. of 1/7/2010 Oral Arg., Al-Maqaleh II, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-cv-5265, 09-cv-5266, 09-cv-5267) at 13 n.15. The concern about the lack of a limiting principle was repeated in the opinion itself. See Al-Maqaleh II, 605 F.3d at 95. Given these clear indications that the court of appeals was skeptical of any theory that would create universal jurisdiction, this Court cannot adopt petitioners' theory and its far-reaching implications.

Petitioners have requested that they be allowed to take jurisdictional discovery, which they believe will uncover facts establishing purposeful executive manipulation. Petitioners cite civil cases from this circuit to argue that "a party must be given 'ample opportunity' to take discovery on jurisdictional matters. Ptrs.' Opp. at 34 (quoting Sledge v. United States, 723 F. Supp. 2d 87, 103 (D.D.C. 2010)). But the Supreme Court held long ago that "the broad discovery provisions" of the Federal Rules of Civil Procedure do not apply in habeas cases. Harris v. Nelson, 394 U.S. 286, 295 (1969). Rather, courts may "'fashion appropriate modes of procedure' . . . to dispose of habeas petitions 'as law and justice require.'" Bracy v. Gramley, 520 U.S. 899, 904 (1997) (quoting Harris, 394 U.S. at 299). In the § 2254 context, Harris has been codified as a rule that habeas petitioners must show good cause for taking discovery. Bracy, 520 U.S. at 901.

It appears that no court has yet specified what standard applies to a detainee habeas
petitioner seeking *jurisdictional* discovery. But given that habeas petitioners are not entitled to jurisdictional discovery as of right, the Court concludes that sufficient cause for discovery has not been shown here. Petitioners' best argument for their evasion theory is simple logic: many detainees were once sent to Guantanamo, the Supreme Court has determined that detainees at Guantanamo have some habeas rights, and most detainees are no longer sent to Guantanamo. But that logic was as well known to the court of appeals over two years ago as it is to this Court now, and yet the court of appeals emphatically declared that evasion "is not what happened here." *Al Maqaleh II*, 605 F.3d at 98. To undermine the D.C. Circuit's decision, petitioners would need very solid evidence of evasion - essentially a smoking gun. But it is difficult to imagine that petitioners would have any chance of finding such a smoking gun - if one exists - without delving deeply into highly confidential government documents involving "the conduct of foreign relations [and] the war power," which "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976). This Court cannot permit what would essentially be a fishing expedition into such sensitive areas, particularly given the court of appeals' skepticism that manipulation occurred or that it would ultimately affect the *Boumediene* test. Petitioners' request for discovery is accordingly denied.

IV. DRB procedures and determinations

Petitioners spend a substantial portion of their filings discussing the revised procedures (known as the "Detainee Review Board" or "DRB" procedures) used to determine whether detainees should be classified as enemy combatants, as well as whether and where they should be held. Ptrs.' Opp. at 12-21. The Court need address this topic only briefly. The D.C. Circuit
found that the procedural protections available to Bagram detainees were much weaker than the procedural protections available to either the Guantanamo detainees or the detainees at issue in *Eisentrager*, and that the "adequacy of process" factor in the *Boumediene* test therefore "strongly favor[ed]" the petitioners. *Al Maqaleh II*, 605 F.3d at 96 (internal quotation marks and citations omitted). The DRB procedures have now been significantly revised. See Resp. MTD at 18-24 (describing new procedures). Petitioners devote much energy to arguing that the new procedures are still weaker than those available to the Guantanamo detainees, but the critical point—which petitioners concede, Ptrs.' Opp. at 14—is that the revised procedures are at least marginally better and more detainee-protective than the old procedures at Bagram were. Hence, even if the new procedural protections are still limited, this factor actually weighs more in favor of respondents than it did at the time of the D.C. Circuit's decision.

Petitioners also argue that the fact that the DRB has allegedly cleared some of them for release undermines the court of appeals' decision. See Habeas Pet. ¶¶ 109-110; Ptrs.' Opp. at 12-13. But the D.C. Circuit has previously explained that "whether a detainee has been cleared for release is irrelevant to whether a petitioner may be detained lawfully." *Almerfedi v. Obama*, 654 F.3d 1, 4 n.3 (D.C. Cir. 2011); see also *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) ("the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities"). Petitioners offer no argument as to how these alleged DRB determinations would undermine the decision of the D.C. Circuit here, and this Court finds that they would not.

Finally, petitioners' argument based on events at their most recent DRB proceedings does not advance their position. As further support for their argument that the DRB procedures are
arbitrary and inadequate, petitioners have submitted a declaration complaining that their attorneys "were not permitted to appear as witnesses in person or by telephone" at petitioners' September 20, 2012 DRB proceedings. Ptrs.' Supp. Decl., Declaration of Tina M. Foster ¶ 23. But as respondents note, the Department of Defense told petitioners' attorneys that they could testify by phone; petitioners' attorneys did not participate by phone because once petitioners learned that their attorneys could not testify in person, they chose not to participate in the DRB proceedings and not to call their attorneys as witnesses. Supp. Resp. at 11-12; id., Declaration of Robert F. Huard ¶¶ 3-4. Hence, petitioners' DRB process has not been as arbitrary as they allege. Given this, and considering the procedural improvements discussed above, petitioners' recent submissions do not tip the "adequacy of process" factor more strongly in their favor. See AlMaqaleh II, 605 F.3d at 96.

CONCLUSION

For the reasons given, the Court will grant respondents' motions to dismiss petitioners' amended petitions for habeas corpus. A separate order accompanies this opinion.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: October 19, 2012
THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN SITUATIONS OF ARMED CONFLICT

Cordula Droege*

International human rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Yet, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice. The most frequent examples are situations of occupation or non-international armed conflicts where human rights law complements the protection provided by humanitarian law.

This article provides an overview of the historical developments that led to the increasing overlap between human rights law and humanitarian law. It then seeks to analyse the ways in which the interplay between human rights law and humanitarian law can work in practice. It argues that two main concepts inform their interaction: The first is complementarity between their norms in the sense that in most cases, especially for the protection of persons in the power of a party to the conflict, they mutually reinforce each other. The second is the principle of lex specialis in the cases of conflict between the norms.

I. Introduction

International human rights law and international humanitarian law are traditionally two distinct bodies of law. While the first deals with the inherent rights of the person to be protected at all times against abusive power, the other regulates the conduct of parties to an armed conflict. And yet, there are an infinite number of points of contact between the two bodies of law, raising increasingly complicated and detailed

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questions. There is no lack of examples of situations triggering questions about their concurrent application and the relationship between them. Issues keep arising in situations of occupation, be it in Northern Cyprus,\(^1\) the Palestinian territories\(^2\) or Iraq.\(^3\) Also, situations of non-international armed conflict pose a number of problems, as is illustrated, for instance, by the judgments of the European Court of Human Rights on the conflict in Chechnya.\(^4\)

In short, these regimes overlap, but as they were not necessarily meant to do so originally, it is necessary to apply them concurrently and to reconcile them. As M. Bothe writes:

[Thus,] triggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes.\(^5\)

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2 See, e.g., Final Act of the International Conference on Human Rights, 22 April-13 May 1968, UN Doc. A/Conf.32/41 (1968); HCJ 3239/02 Marab v. the IDF Commander in the West Bank [2002] IsrSC 52(2) 349.
3 Al-Skeini v. Sec. of State for Defence [2005] EWCA (Civ) 1609, para. 48 (hereinafter Al-Skeini (CA)).
This article provides a brief overview of the historical developments that led to the increasing overlap between human rights law and humanitarian law. In general, one can say that the expansion of the scope of application of human rights law, combined with the monitoring machinery and individual complaints procedures existing in the human rights system have lead to the recognition that human rights, by their nature, protect that person at all times and are therefore relevant to and apply in situations of armed conflict. Further, human rights and humanitarian law share a common ideal, protection of the dignity and integrity of the person, and many of their guarantees are identical, such as the protection of the right to life, freedom from torture and ill-treatment, the protection of family rights, economic, and/or social rights.

The article then seeks to analyse the possible ways in which the interplay between human rights law and humanitarian law can work in practice. Two main concepts inform their interaction: complementarity between their norms in most cases and prevailing of the more specific norm when there is contradiction between the two. The question is in which situations either body of law is the more specific. Lastly, the article reviews a number of procedural rights such as the right to a remedy and to reparation, which are more strongly enshrined in human rights law but have an increasing influence on international humanitarian law.

II. Overlap of International Human Rights Law and International Humanitarian Law in Situations of Armed Conflict

A. Converging Development of Human Rights Law and Humanitarian Law

Beyond their common humanist ideal, international human rights law and international humanitarian law had little in common at their origin. However, the theoretical foundations and motivations of the two bodies of law differ.

Modern human rights can be traced back to the visionaries of the Enlightenment who sought a more just relationship between the state and its citizens.\(^6\) Human rights


The complete paper can be downloaded free of charge from: www.ssrn.com/abstractid=1032149
Panel VII:

Ethical Dilemmas Facing Lawyers Practicing National Security Law (Government and Private Practice)

Moderator:
Major General Charles J. Dunlap, Jr.
GOVERNMENT LAWYERS AND CONFIDENTIALITY NORMS

KATHLEEN CLARK

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INTRODUCTION

Alberto Mora served as General Counsel of the Department of the Navy from 2001 to 2005. Mora was concerned about the government’s treatment of prisoners at Guantanamo Bay. He had led an internal Defense Department effort to ensure that the government would begin to treat those prisoners humanely. But he had met powerful opposition—including Secretary of Defense Donald Rumsfeld and Defense Department General Counsel William Haynes—who wanted the government to have a free hand to treat the Guantanamo Bay prisoners more harshly during interrogations. Mora fought an internal, bureaucratic battle on this issue, marshalling allies from within the uniformed services, but he never revealed to anyone outside the government this internal struggle over prisoner treatment. Eventually, after the Abu Ghraib scandal, he wrote a lengthy memorandum to the Navy Inspector General describing how he and Judge Advocate General lawyers argued for humane treatment, and how Haynes and other Defense Department officials responded.1

Mora left the Defense Department in December of 2005 and was approached by a journalist, Jane Mayer of the New Yorker, who had obtained a copy of his memorandum. Mayer wanted to speak with Mora to better understand the policy battle that had taken place within the Defense Department. Mora agreed to speak with her, and Mayer wrote about the internal Defense Department battle and profiled Mora in the New Yorker.2


When asked why he agreed to speak with a journalist about this issue after remaining publicly silent for so long, Mora noted that his memorandum to the Inspector General was unclassified, and thus the government had deemed that release of the information could not cause damage to national security. Someone had provided Mayer with a copy of the memorandum, and so Mora thought that he could legitimately amplify and give her additional background on the memorandum. When asked whether his duty of confidentiality as a lawyer prevented him from revealing further information, Mora responded that because Mayer already had some information, it seemed that the duty of confidentiality had been waived.3

A lawyer’s duty of confidentiality is not subject to the kind of waiver that Alberto Mora posited. A client’s revelation of some information about a topic does not give her lawyer the option of revealing additional information about that same topic.4 In most states, a lawyer’s duty of confidentiality is defined very broadly and applies to all information relating to the representation of the client. The lawyer is required to be discreet with such information whether or not it could harm or embarrass a client, and whether or not the client has revealed the information to others. In most states, the professional confidentiality rule does not distinguish between government and private sector lawyers.5 Thus, government lawyers appear to be bound by the same broad confidentiality obligation as lawyers for private sector clients.6


4. See discussion of confidentiality exceptions infra notes 27–32 and accompanying text. Attorney-client privilege, by contrast, is subject to client waiver. If a client reveals information about a conversation with a lawyer, then the client has waived the privilege for that conversation and can be forced to reveal more information about that otherwise privileged conversation. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 79 (2000) (“The attorney-client privilege is waived if the client . . . voluntarily discloses the communication in a non-privileged communication.”).

5. The exception is Hawaii, which has adopted different confidentiality standards for government lawyers. See HAWAI I RULES OF PROF’L CONDUCT R. 1.6(c)(4)–(5) (2007) (discussed infra Part III.A).

6. This Article uses the term “government lawyers” to refer to lawyers who are either employed or retained by the government. Most government-retained lawyers generally have traditional lawyer-client relationships with their government clients, while some lawyers employed by governments have the authority to make decisions that are usually in the hands of the client. This difference in the structure of authority can have implications for the lawyer’s confidentiality duty. See infra Part II.C. For a discussion of how several legal ethics rules (but not the duty of confidentiality) apply to lawyers retained by governments, see Ronald D. Rotunda, Ethical Problems in Federal Agency Hiring of Private Attorneys, I GEO. J. LEGAL ETHICS 85 (1987).
This broad confidentiality obligation would seem to prohibit a former government lawyer like Mora from giving any information about his work. Although there are exceptions to this duty of confidentiality (the professional confidentiality rule identifies eight in particular), it is not clear that any of these exceptions would permit Mora’s disclosure.\(^8\)

Was Mora permitted to discuss these internal Defense Department debates about prisoner treatment? This Article is an attempt to answer that question for Mora and for the more than 100,000 federal, state, and local government lawyers who need to determine which information they can ethically reveal.\(^9\)

Surprisingly little has been written on the question of government-lawyer confidentiality.\(^10\) A spate of law review articles and student notes has attempted to address the practical issues that arise when lawyers are asked to balance the interests of their clients with the public interest.\(^11\) A comprehensive examination of the Model Rules of Professional Conduct and related cases would show that the rules are designed to ensure an attorney’s ability to fulfill his duties to the client while still providing a controlled disclosure of information about the client.\(^12\)

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7. ABA Model Rule of Professional Conduct (hereinafter “Model Rule”) 1.6(a) identifies two exceptions. The lawyer may disclose information if:
- the client gives informed consent to the disclosure; or
- the lawyer is impliedly authorized to make the disclosure “in order to carry out the representation.”

MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2007). The remaining exceptions are found in Model Rule 1.6(b)(1)-(6). See infra notes 27–32 and accompanying text.

8. It appears that Mora’s conduct would be governed by the D.C. Rules of Professional Conduct because he is licensed to practice by the District of Columbia. D.C. Bar, Find a Member, http://www.dcab.org/find_a_member/index.cfm (last visited Mar. 21, 2008) (indicating that Alberto Mora was admitted to practice in D.C. in 1994).

The information that Mora disclosed would constitute “secret” information “the disclosure of which would be embarrassing . . . to the client.” D.C. RULES OF PROF’L CONDUCT R. 1.6(b) (2006). Mora might be able to justify his disclosure by arguing that his client consented to disclosures related to government wrongdoing. See id. 1.6(d)(1) (“A lawyer may . . . reveal client . . . secrets . . . with the consent of the client affected, but only after full disclosure to the client.”). See also infra Part III.A.1 (arguing that the whistleblower protection laws constitute government consent to lawyer disclosure of wrongdoing).


about the government's attorney-client privilege were published after the high-profile legal battle on this issue between Independent Counsel Kenneth Starr and President Bill Clinton. But outside the context of Freedom of Information requests, the issue of attorney-client privilege arises relatively rarely for government lawyers. On the other hand, government lawyers face the confidentiality issue every day when they decide which information they can share with friends and colleagues both inside and outside of government.

This Article makes several significant contributions to the literature on government lawyers. First, it provides a theoretical basis for identifying the client of a government lawyer. There is no single answer to the question of client identity for government lawyers. Instead, one must


examine the structure of authority within government to identify which of several possible entities is actually the client.

Second, the Article explains how government and private sector lawyers’ confidentiality duties differ even though the ethics rules do not differentiate between them. Government lawyers’ confidentiality duties are not based solely on the broad mandate of confidentiality found in the legal ethics rules, but also on the complex regime for control of government information. While lawyers are normally bound by a broad duty of confidentiality (applying to all “information relating to representation”) under the legal ethics rules, a client can consent to disclosure of otherwise confidential information.\(^\text{12}\) One of the insights of this Article is that government clients have consented to large amounts of disclosure by their lawyers through enactment of open government laws.

In other words, to determine whether the client of a government lawyer has consented to a specific disclosure, the lawyer need not rely solely on a particular government official’s ad hoc decision about whether to consent. Instead, that official is bound to respect the legal regime controlling government information. If that legal regime requires that information be disclosed, then the institutional client has consented to its disclosure. If that legal regime prohibits the information from being disclosed, then the institutional client has withheld consent to disclosure.

The third significant contribution of this Article is that it identifies for the first time the need to revise the confidentiality rule to clarify that government lawyers have the discretion to disclose government wrongdoing. Examination of case law and statutes suggests a norm that governments—unlike private sector clients—do not have a legitimate interest in keeping secret information about their own wrongdoing. Other scholars have not previously recognized that the implication of this norm is that government lawyers may be able to disclose government wrongdoing.

Part I of this Article outlines the lawyer’s confidentiality obligation, which is both strict and broad. One of the exceptions to that obligation, however, is that clients can consent to disclosure. Thus, Part II examines in some depth the identity of the government lawyer’s client, and concludes that no single definition of a client applies to all government lawyers. Instead, one must examine the structure of authority within the particular government context where the lawyer works. Only with such a contextualized and structural analysis can one properly identify the

\(^{12}\) \text{\textit{Model Rules of Prof’l Conduct R. 1.6(a) (2007)}}.
government lawyer's client and the extent of the lawyer's authority to make decisions on behalf of that client. In addition, Part II notes that certain government lawyers are authorized to make decisions that are normally in the hands of clients.

Part III explains the specific ways in which government lawyers' confidentiality obligations differ from those of private sector lawyers. First, policy concerns and specific whistleblowing protection laws suggest that government lawyers may disclose government wrongdoing. Second, as a substantive matter, government lawyers must be permitted to disclose information that is subject to mandatory disclosure under open government laws. Since this could result in a chaotic situation with each government lawyer applying her own conception of open government laws, this Article recommends that governments adopt a set of procedures that lawyers can use to get approval of such disclosures. To that end, Part III sets out the substantive standard for the government lawyer's confidentiality obligation. Part IV recommends the adoption of specific procedures so that government lawyers can make these disclosures in an orderly fashion, providing their clients with advance notice and protecting legitimate government interests.

I. SECRECY AND TRANSPARENCY IN LAWYER-CLIENT RELATIONS AND IN GOVERNMENT

In the early 1970s, Mark Felt, a law school graduate and licensed lawyer, was the Associate Director of the Federal Bureau of Investigation (FBI). On several occasions, Felt had provided information to Bob Woodward, an acquaintance of his who was a reporter for the Washington Post. When Woodward was assigned to cover the Watergate break-in in June 1972 he asked for Felt's assistance, and Felt provided it. As the number two official at the FBI, Felt had "full responsibility for the day-to-day Watergate investigation."13 Felt surreptitiously provided Woodward with leads and confirmed information that Woodward learned from other sources.14 In the book chronicling the Watergate investigation, Woodward referred to Felt as "Deep Throat" and credited this

14. Id. at 213 ("Only two days after the [Watergate] burglary, [Felt] helped Woodward on the Washington Post's first big story, confirming that [Howard] Hunt was connected to the White House and a prime suspect in the break-in.").
source with a critical role in the Post's investigation.15 While there was much speculation about the identity of this anonymous source, Woodward indicated he would not reveal Deep Throat's identity until after the source died. But in 2005, Felt came out as Deep Throat in a Vanity Fair profile written by a Felt family friend, and Felt later published a revised memoir acknowledging his role in the Watergate investigation.16 Felt's memoir asserts that he was motivated by a desire to protect the FBI from interference by the White House.17 Frustrated that the White House had prevented the FBI from fully investigating the ties between the Watergate burglars and the Nixon White House, Felt used Woodward to instigate public and congressional pressure for a more thorough investigation.18

When Felt leaked information about the FBI's investigation to Bob Woodward, he was apparently trying to protect the FBI's institutional interest in its independence from the White House.19 Yet by providing information to Woodward, he violated the FBI's own rules for protection of confidential information. If Felt had been acting as a lawyer rather than as an administrator, would this leak have violated his professional duty of confidentiality?20 If Felt's role as Deep Throat had been revealed while his law license was current, could he have been disciplined for revealing this information to Woodward, or was he legally justified in making these disclosures?21

17. FELT & O'CONNOR, supra note 13, at xiii.
18. Id. at 216–21.
19. Id. at xiii (asserting that Felt "stood alone to guard the FBI's integrity" and that "when the Nixon administration tried to subvert the Bureau as it had other government agencies, Mark met with Woodward to shed light on the abundant misuses of power").
20. Felt was in a government job that routinely required legal judgments about compliance with constitutional and statutory standards as well as court rules, but it appears that he was not acting as a lawyer. Lawyers advise and advocate on behalf of clients. Felt was an administrator who was advised by lawyers.
21. Felt actually did face bar discipline for other actions he took at the FBI. He had authorized warrantless searches of the homes and apartments of people associated with the Weather Underground. W. MARK FELT, THE FBI PYRAMID FROM THE INSIDE 327 (1979). After his retirement, Felt acknowledged his role in these warrantless searches, id. at 330, and was eventually convicted for criminal violations of the constitutional rights of those subjected to these illegal searches. Robert Pear, 2 Ex-F.B.I. Officials Are Found Guilty in Break-In Case, N.Y. TIMES, Nov. 7, 1980, at A1. After his felony conviction, the District of Columbia Bar suspended Felt's bar license. In re W. Mark Felt, No.
To understand the legal status of any government lawyer's disclosure, one must consider two distinct legal regimes: that which applies to all lawyers and that which applies to all government employees. This Article explains how these two legal regimes intersect. In the lawyer-client setting, there is an overriding expectation of confidentiality, with only limited exceptions to confidentiality. In the government setting, by contrast, there is an expectation of transparency, with important but limited exceptions to that transparency. This part of the Article examines the theoretical underpinnings for confidentiality and transparency in the lawyer-client and government settings, respectively.

A. Secrecy in Lawyer-Client Relationships

The secrecy of lawyer-client information is protected by two distinct legal doctrines that are sometimes conflated: the lawyer's confidentiality duty and the attorney-client privilege. The lawyer's confidentiality duty prevents a lawyer from voluntarily disclosing a client's information. Under the professional rules, lawyers owe clients a confidentiality obligation that is both strict and broad. Most states require lawyers to keep confidential all "information relating to representation" unless a client consents to disclosure or unless another specific exception applies. The confidentiality obligation applies not just to information that the client has told the lawyer in confidence, but to all other factual information that the lawyer learns in connection with the representation. The confidentiality

M 68-81 (D.C. Cir. Mar. 27, 1981) (on file with author). Later, President Ronald Reagan pardoned Pelt and his law license was restored. In re W. Mark Pelt, No. M 68-81 (D.C. Cir. June 21, 1982) (on file with author). Years later, the D.C. Court of Appeals decided that it could still discipline a lawyer for conduct that was subject to a presidential pardon. In re Abrams, 689 A.2d 6, 2325 (D.C. 1997) (censuring former Assistant Secretary of State Elliott Abrams for giving false testimony to Congress in connection with the Iran-Contra scandal).

22. The confidentiality duty also prohibits a lawyer from using client information for the lawyer's or someone else's benefit to the disadvantage of the client. This prohibition is in a distinct professional rule. See MODEL RULES OF PROF'L CONDUCT R. 1.8(b) & cmt. 5 (2007).

23. Model Rule 1.6(a) states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Id. R. 1.6(a). Model Rule 1.6(b) sets out exceptions.

A few states use an older, narrower formulation of the confidentiality obligation, requiring lawyers to keep confidential only information that the client has told the lawyer in confidence and information that could be detrimental to the client if disclosed. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.6; ILL. RULES OF PROF'L CONDUCT R. 1.6. This formulation comes from the ABA Model Code Disciplinary Rule 4-101, which states that "a lawyer shall not knowingly . . . reveal a confidence or secret of his client." MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980).

24. The confidentiality obligation applies to the factual information that the lawyer learns about a client's situation (and any other factual information), but does not apply to the legal expertise that a
duty continues even after the representation has ended. Lawyers who violate the duty of confidentiality can be disciplined by bar authorities or held liable to their clients for breach of fiduciary duty.

The principle underlying the confidentiality duty is the lawyer's status as a fiduciary and the client's status as a beneficiary. The client entrusts the lawyer with information so that the lawyer can provide a service to the client. The information belongs to the client, and it would be misappropriation for a lawyer to disclose or use the information, just as it would be misappropriation for a lawyer to use a client's financial asset for the lawyer's benefit.

A lawyer's confidentiality duty is subject to several exceptions, and these exceptions reflect a policy judgment that a client's interest in confidentiality may give way to a societal interest (such as the prevention of crime, fraud, bodily harm, and death) or even the lawyer's interest (such as the lawyer's need to obtain legal advice or defend herself). Two
other exceptions actually further client interests. First, a lawyer may reveal otherwise confidential information if the client gives informed consent. This consent exception recognizes that clients have autonomy and can consent to conduct that would otherwise constitute a violation of fiduciary duty if done without consent. Second, a lawyer representing an entity client may under certain circumstances disclose otherwise confidential information in order to protect the entity from a disloyal employee. If an entity’s lawyer learns that an entity employee has engaged in serious wrongdoing that could harm the entity or that could be attributed to it, the lawyer is required to refer the matter to a higher authority within the entity and ensure that the entity adequately addresses the issue. If the higher authority fails to adequately address the issue, then the lawyer may reveal the information outside the entity in order to prevent substantial injury to the entity. This exception recognizes that entity clients sometimes need to be protected from their agents and that outside disclosure may be necessary to effect that protection.

The attorney-client privilege, by contrast, is an evidentiary privilege. In court and other official proceedings, the state can compel individuals and entities to provide information unless a privilege prevents such mandatory disclosure. The attorney-client privilege prevents the state from requiring the disclosure of certain communications between a lawyer and client regarding legal representation. The privilege is narrow in scope and covers only those communications between a lawyer and client that were made in confidence and for the purposes of providing or obtaining legal advice. If the client reveals the contents of the lawyer-client communication to anyone, then the client waives the privilege.

LAWYER CODES 112–19 Ch. (2006) ("State Lawyer Code Exceptions to Client Confidentiality That Permit (May) or Require (Must) Disclosure").

29. MODEL RULES OF PROF'L CONDUCT R. 1.6(a). This Article argues that open government laws should be construed as client consent to disclosure. See infra Part III.B


32. Id. R. 1.13(e). This rule and its confidentiality exception is relevant to a government lawyer if that lawyer's client is an entity (such as a government agency) rather than a particular government official. See infra Part II (discussing government client identity).


34. Id. § 79.
The principle underlying the attorney-client privilege is the recognition that the public interest in the availability of evidence sometimes must give way to the countervailing interest of individuals and entities in obtaining legal advice to guide their actions. The privilege is based on two assumptions: first, that a lawyer can adequately advise a client only if the client provides complete information about the circumstances relevant to the legal issue, and second, that a client will communicate that information only if assured that the communication is protected by the attorney-client privilege.35

The confidentiality duty is robust. Even if a client recounts to a third party the client’s conversation with his lawyer, the lawyer must still keep that information confidential. The attorney-client privilege, by contrast, is easily lost through waiver. If the client has shared the information with a third party, then the client can no longer claim the protection of the privilege to prevent mandatory disclosure in a state proceeding.

The professional rules seem to require lawyers to keep client information confidential in perpetuity.36 Some commentators have argued for a “historical interest” exception to confidentiality that would allow disclosure long after the representation has ended.37 At present there is no formal recognition of a “historical interest” exception to lawyer confidentiality.

In the government setting, by contrast, one can find support for the idea that the government’s interest in confidentiality diminishes after time. In

35. Id. § 68 cmt. c (identifying also a third assumption that clients need to consult lawyers in order to vindicate rights and comply with legal obligations). For an excellent critique of the second empirical assumption, see Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351 (1989).


37. Hobbs, supra note 25, at 202 (proposing amendment to confidentiality rule so that a lawyer may donate his papers to a library twenty-five years after the client’s death).
Attorney-General v. Jonathan Cape Ltd., a British court was asked to enjoin publication of a former cabinet minister’s memoir because it revealed confidential cabinet deliberations. The court acknowledged that cabinet discussions are confidential in character, but noted that there was no single rule regarding how long such discussions must be kept confidential and observed that different types of information require different lengths of confidentiality. The court explained that at some point the government’s interest in the confidentiality of these discussions would lapse, but noted the difficulty in determining exactly when that would occur. The court ruled that it should enjoin publication only if the continuing confidentiality of the material could be clearly demonstrated and concluded that this was not that case.

In the national security field there is a presumption that confidential national security–related information can be released ten years after its creation, unless the sensitivity of the information requires that automatic declassification occur in twenty-five years. One also finds some support for the concept of diminishing confidentiality over time with respect to the secrecy of criminal investigations. Courts have noted that the need for secrecy may end when the investigation ends. On occasion, courts have

38. (1975) 3 All E.R. 484 (Q.B.).
39. Id. at 495. The court wrote that
[j]ome secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over... Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations... It is evident that there cannot be a single rule governing the publication of such a variety of matters.
Id. at 492, 495.
40. Id. at 496.
41. Id. ("In less clear cases—and this, in my view, is certainly one—reliance must be placed on the good sense and good taste of the minister or ex-minister concerned.").
42. Exec. Order No. 13,292 §§ 1.5(b), 3.3(a), 3 C.F.R. 196, 198–99, 203 (2003); see id. § 3.3(b), 3 C.F.R. at 203 (identifying factors that can rebut the presumption of declassification); id. § 4.4(a), 3 C.F.R. at 209–10 (permitting access to classified information by historians as well as former high-level government officials, presumably to assist them in the writing of their memoirs; see also President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (2000). Some previous executive orders have included automatic declassification after varying lengths of time. See, e.g., Exec. Order No. 11,652 § 5.A (1972).
43. See, e.g., Butterworth v. Smith, 494 U.S. 624, 632–33 (1990). In Butterworth, the Supreme Court struck down a Florida statute that imposed a permanent ban on grand jury witnesses’ disclosing their own testimony because

[when an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape—that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on
noted that some government interests in secrecy diminish over time, and have ruled that the historical significance of particular events combined with "the long passage of time"—measured in decades—may justify disclosure of secret grand jury proceedings.

B. Secrecy and Transparency in Government

While the overriding norm regarding lawyer-client information is secrecy unless there is a good reason for disclosure, the overriding norm regarding government information in the modern era is disclosure unless there is a good reason for secrecy. One finds this principle not in the U.S. Constitution, but in constitutive statutes that determine how governments will operate. The federal open government laws include the Freedom of Information Act (FOIA), Privacy Act of 1974, Government in the Sunshine Act, Federal Advisory Committee Act, and the Presidential Records Act of 1978. These statutes establish a baseline of providing the public with access to government information, both in terms of government documents and government meetings. Under the FOIA, executive-branch agencies are required to publish their rules, regulations,
and policies; final opinions made in the adjudication of cases; and information about how the agencies are organized.\textsuperscript{51} The statute makes all other government documents public upon request, unless there is a good reason for the government to keep the document secret.\textsuperscript{52} The FOIA sets out nine specific exceptions to this mandated disclosure upon request.\textsuperscript{53} When someone seeks disclosure of government information, there is a presumption that the information will be made available. Where the government refuses to disclose it, the burden is on the government to justify the refusal.\textsuperscript{54} This presumption in favor of disclosure is consistent with principles of robust democratic government.

Our government is based on the premise that the government is of, for, and by the people.\textsuperscript{55} But if the people do not have access to information about what the government is doing, then this premise is little more than an empty promise.\textsuperscript{56} One can find a constitutional basis for the right to know only indirectly in the U.S. Constitution.\textsuperscript{57} The First Amendment prohibits the government from restricting the freedom of press, but does not directly give the press access to government information. On the other hand, the First Amendment does ensure that government employees may speak about their work unless there is a compelling reason to restrict their speech.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{51} 5 U.S.C. § 552(a)(1)-(a)(2) (2000).
\item \textsuperscript{52} Id. § 552(a)(3), (b).
\item \textsuperscript{53} Id. § 552(b).
\item \textsuperscript{54} Id. § 552(a)(4)(B) (where a requestor appeals an agency’s denial of information “the burden is on the agency to sustain its action”).
\item \textsuperscript{56} Letter from James Madison to William T. Barry (Aug. 4, 1822), available at http://leteram.umn.edu/main/historic/Madison_letter_1822.htm (“A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”).
\item \textsuperscript{58} United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir. 1972) (“[T]he First Amendment limits the extent to which the United States . . . may impose secrecy requirements upon its employees . . . . It precludes such restraints with respect to information which is unclassified . . . .”)
\end{itemize}
C. Harmonizing the Lawyer-Client Secrecy Norm with the Governmental Openness Norm

Returning to the story that began this section, how would one evaluate Mark Felt's disclosure of the details of the FBI's Watergate investigation if Felt had been acting as a lawyer? This analysis requires several counterfactual assumptions. First, one must identify Felt's client. Felt believed that his primary loyalty was to the FBI.59 When the White House attempted to thwart the FBI's Watergate investigation, Felt was severely limited in what he could do through official government channels. The FBI could investigate the connections between the Watergate burglars and other activities of the Nixon reelection campaign only with the permission of the Justice Department, which was under the control of the White House. So Felt went outside of official government channels and used his leaks of information to Woodward to spur congressional and public pressure for a more complete investigation of the Watergate-White House ties.

Applying today's legal ethics standards to this situation, could Felt legally justify his disclosures to Woodward? The exception that comes closest is the entity exception to confidentiality.60 While Felt had primary loyalty to the FBI, it would be more accurate to identify his putative client as the executive branch of the federal government.61 Under the current ethics rule for entity clients, if Felt knew that executive-branch officials had engaged in "a violation of law that reasonably might be imputed to" the executive branch and that was "likely to result in substantial injury to" the branch, then he had an obligation to "refer the matter to higher authority."62 In this situation, higher authority would be the Director of the FBI, the Attorney General, and the President. There is no indication that Felt ever confronted any of these officials over the alleged transgressions. So even under the current more lax confidentiality rules now in place, Felt would not be able to legally justify his leaking this information to Woodward.

60. See MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2007).
61. See infra Part II.
II. IDENTIFYING THE CLIENT OF A GOVERNMENT LAWYER

In 2000, Cindy Ossias was a lawyer in the California Insurance Department, where she investigated California insurance companies. Ossias had investigated the companies' practices in settling cases arising out of the 1994 Northridge earthquake, concluded that the companies had violated state law, and recommended that the companies be fined. Instead, California Insurance Commissioner Chuck Quackenbush, the head of the Insurance Department and an elected official, authorized secret settlements under which the companies would donate to private foundations formed by Quackenbush. When Ossias learned of these secret settlements, she believed they were improper and disclosed them to state legislators who were investigating the Insurance Department. When Quackenbush discovered that Ossias had disclosed this information to the legislators, he placed her on administrative leave, and state bar authorities investigated whether Ossias had violated her professional duty of confidentiality.63 Ossias argued that her disclosure was authorized by state whistleblower protection laws, and bar authorities ultimately decided not to discipline her.64 The state bar proposed a rule allowing government lawyers to disclose government misconduct, but the state supreme court rejected the proposed rule.65 The California legislature passed legislation that would have clarified that a government lawyer does not violate confidentiality by

63. As a California lawyer, Ossias was bound by the California Business and Professions Code § 6068(e)(1), which states that a lawyer must "maintain inviolate the confidence . . . and . . . preserve the secrets . . . of his or her client." CAL. BUS. & PROF. CODE § 6068(e)(1) (West Supp. 2007). The statutory duty of confidentiality has an exception for disclosure that "is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Id. § 6068(e)(2); see also CAL. RULES OF PROF'LL CONDUCT R. 3-100(A), (B) (2008) (providing a similar exception and an additional exception when the client gives informed consent). For an extensive discussion of Ossias's case, see Dowkow, supra note 10, at 24-26; see also Ruback, supra note 10, at 126, 138-40.

64. Letter from Donald R. Steedman, Deputy Trial Counsel, State Bar of Cal., to Richard Alan Zitrin, Attorney for Cindy Ossias (Oct. 11, 2000), available at Response by Respondent to Bar Ass'n's Counter Statement at 21-22 app., In re Schafer, No. 00031 (Wash. State Bar Ass'n Dec. 7, 2000), http://www.dougschafer.com/Response2Bar.pdf. One might argue that the decision of the California bar authorities not to discipline Ossias indicates that government lawyers in California may disclose otherwise confidential information about government wrongdoing. But a decision not to discipline has no precedential value and would provide little comfort for a lawyer seeking definitive guidance on her ethical obligations.

65. Dowkow, supra note 10, at 23. The proposal can be found at http://www.calbar.ca.gov/calbar/pdfs/rule3-600request.pdf.
disclosing government wrongdoing, but the Governor vetoed the legislation.66

To whom did Ossias owe a duty of confidentiality? Was it to the California Insurance Department, or its head, Chuck Quackenbush? The government of California? The people of California?

A. A Wide Range of Possible Clients

Government officials, courts, and commentators have identified a wide variety of possible clients that the government lawyer might represent.67 One can find some support for the following as clients: the “public interest,”68 the public at large,69 the entire government,70 the branch of


67. For other discussions of the range of possible clients of government lawyers, see Cramton, supra note 10, at 296 (identifying five possible clients of government attorney: public interest, government as a whole, branch of government, agency, and particular officer who makes decisions for agency); Bruce A. Green, Must Government Lawyers “Seek Justice” In Civil Litigation?, 9 WIDENER J. PUB. L. 255, 266–69 (2000); Joshua Panas, The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer, 17 GEO. J. LEGAL ETHICS 541 (2004).

Two types of lawyers employed by the government have no client at all because they are not acting as lawyers in a representative capacity: judges, see infra text accompanying note 121, and administrators, such as former Secretary of State Warren Christopher and former Director of Central Intelligence William Webster.

68. Fenney v. Commonwealth, 366 N.E.2d 1262, 1266 (Mass. 1977) ("[The Attorney General] also has a common law duty to represent the public interest" in his representation of the Commonwealth and specific Commonwealth officers being sued (citing MASS. GEN. LAWS ch. 12 § 3 (2002)); Sec'y of Admin. & Fin. v. Att'y Gen., 326 N.E.2d 334, 338–39 (Mass. 1975) (same); Barbara Allen Babcock, Defending the Government: Justice and the Civil Division, 23 J. MARSHALL L. REV. 181, 185, 190 (1990) (asserting that the government lawyer must serve the public interest as well as a specific agency and the government as a whole); Keith W. Donahue, Note, The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct, 2 GEO. J. LEGAL ETHICS 987, 1000 (1989) ("The client of the government lawyer should be the public interest."); see also In re Lindsey, 158 F.3d 1263, 1273 (D.C. Cir. 1998) ("Unlike a private practitioner, the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency."); Superintendent of Ins. v. Att'y Gen., 558 A.2d 1197, 1199–1200, 1202 (Me. 1989) (referring to government lawyers' representation of "both the public interest and public agencies" in ruling that the state attorney general is not obligated to represent the superintendent of insurance in an action seeking review of a rate order issued by the superintendent).

69. In re Witness Before Special Grand Jury 2000–2, 288 F.3d 289, 294 (7th Cir. 2002) (refusing to recognize former state secretary of state’s assertion of attorney-client privilege regarding his conversations with lawyers because, inter alia, a government attorney owes "ultimate allegiance" to "public citizens . . . as represented by the grand jury"); Conn. Comm’n on Special Revenue v. Conn.
government employing the lawyer,\textsuperscript{71} the particular agency employing the lawyer,\textsuperscript{72} and a particular government official (such as the head of a

\textsuperscript{71} Freedom of Info. Comm'n, 387 A.2d. 533, 538 (Conn. 1978) ("[T]he real client of the attorney general is the people of the state."); Levitt v. Att'y Gen., 151 A. 171, 174 (Conn. 1938) (state attorney general has no duty to represent the interest of his client, the people of the state"); Times Pub'g Co. v. Williams, 222 So. 2d 470, 475 (Fla. Dist. Ct. App. 1969) (referring to "the public" as the government lawyer's "real client" in a case examining the effect of state open meeting laws on confidential government lawyer-client consultations); Humphrey v. McLaren, 402 N.W.2d 535, 540-41, 543 (Minn. 1987) (stating that a government attorney "has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies" and ruling that the state attorney general is not disqualified from using the former employer意为"government lawyer's client is "the people as a whole"); Patricia M. Wald, "For the United States": Government Lawyers in Court, 61 LAW & CONTEMP. PROBS., Winter 1998, at 107, 110 ("[T]he government lawyer's client is seen as being . . . the U.S. citizenry at large, a client whose ultimate objective is that justice be done."); but see In re Grand Jury Investigation, 399 F.3d 527, 533-34 (2d Cir. 2005) (rejecting federal government's assertion that the court should not recognize Connecticut governor's assertion of attorney-client privilege because a lawyer's "loyalty to the Governor . . . must yield to her loyalty to the public, to whom she owes ultimate allegiance when violations of the criminal law are at stake").

Some have asserted that while the government lawyer may have a more immediate client (such as a government agency), she also represents the public. Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) (asserting in dicta that "government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large"); Griffin B. Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 FORDHAM L. REV. 1049, 1069 (1978) ("Although our client is the government, in the end we serve a more important constituency: the American people."); Jack B. Weinstein & Gay A. Crovitz, Some Reflections on Conflicts Between Government Attorneys and Clients, 1 Touro L. REV. 1, 4-5 (1985) ("Government lawyers represent not only the government entity, but also the public."); Justin G. Davila, Note, State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers, 38 COLUM. J. L. & SOC. PROBS. 365, 412 (2005) ("State attorneys general . . . owe allegiances to two clients—the 'people' and the executive officers and agencies.").

70. Lawry, Wrong Question, supra note 10, at 66 ("[T]he client of the federal government lawyer is the federal government"); see also James R. Harvey III, Note, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 WM. & MARY L. REV. 1569, 1575-76, 1594 (1996) (noting that "the Solicitor General[s] . . . client is most often the government as a whole, or the executive branch in particular, rather than an individual agency"); for example, the executive branch generally rather than to the agency only . . . . [T]he attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head."); cf. Babcock, supra note 68, at 185 (asserting that the Justice Department's client is sometimes "the Congress whose legislation is under attack").

71. Geoffrey P. Miller, Government Lawyers' Ethics in a System of Checks and Balances, 54 U. CHI. L. REV. 1293, 1298 (1987) ("[T]he duties of an [executive branch] agency attorney run to the executive branch generally rather than to the agency only . . . . [T]he attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head."); cf. Babcock, supra note 68, at 185 (asserting that the Justice Department's client is sometimes "the Congress whose legislation is under attack").

72. D.C. RULES OF PROF'L CONDUCT R. 1.6(b) (2007) (stating that "[T]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order"); see In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915-21 (8th Cir. 1997) (asserting that "the White House is the real party in interest in this case" and refusing to recognize attorney-client privilege for a lawyer's notes of a conversation with then First Lady when they were sought by a federal grand jury); Prof'l Ethics Comm'n., Fed. Bar Ass'n Op. 73-1
government organization) in his official or individual capacity.\footnote{73}

In some situations a government lawyer is assigned to defend an individual government employee rather than represent a government entity. Such is routinely the case for Judge Advocate General military defense lawyers, who take on a traditional lawyer-client relationship with their individual clients.\footnote{74} Justice Department lawyers representing government officials who have been sued in their individual capacity face a more complex situation. Federal government lawyers represent individual government officials only if the Attorney General has determined that it is "in the interest of the United States" to provide such representation.\footnote{75} Under Justice Department regulations, the government lawyer's confidentiality duty toward her individual client is more limited than in a traditional lawyer-client relationship. The lawyer must keep confidential only that information that is covered by the attorney-client

\footnote{73} (1973) ("The Government Client and Confidentiality"), in 32 FED. B.J., 71, 72 (1973) ("The client of the federally employed lawyer... is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business."); FED. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (1990) ("A government lawyer represents the Federal Agency that employs the Government lawyer."); D.C. BAR, REPORT BY THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON GOVERNMENT LAWYERS AND THE MODEL RULES OF PROFESSIONAL CONDUCT, reprinted in WASH. L. W., Sept.-Oct. 1988, at 53, 54 (hereinafter D.C. BAR REPORT) ("The employing agency should in normal circumstances be considered the client of the government lawyer."); Cranston, supra note 10, at 298 ("For day-to-day operating purposes, the government lawyer may properly view as his or her client the particular agency by which the lawyer is employed.").

\footnote{74} See D.C. RULES OF PROF'L CONDUCT R. 1.6 cnt. 39 (2007) (noting that government lawyers may "be assigned to provide an individual with counsel or representation," such as "a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant's government employment, and a military lawyer representing a court-martial defendant"); Legal Ethics Comm., D.C. Bar, Op. 313, available at http://www.dcbar.org/lawyers/ethics/legal_ethics/opinions/opinion313.htm (explaining that a JAG lawyer's client is an individual defendant rather than the government).

\footnote{75} 28 C.F.R. § 50.15(a) (2007).
privilege.\footnote{Id. § 50.15(a)(3) ("Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege.").} Any nonprivileged information need not be held confidential, and Justice Department attorneys have been required to disclose information adverse to their individual client where the lawyer learned it from a source other than a client communication.\footnote{Memorandum from Ralph W. Tarr, Acting Assistant Att’y Gen., Office of Legal Counsel, to Ralph K. Willard, Acting Assistant Att’y Gen., Civil Div. 6 (Mar. 29, 1985) (on file with author).}

In most situations, the government lawyer represents a government entity rather than an individual government employee.\footnote{This approach—providing only limited confidentiality to a government employee client—may no longer be sustainable. The Tarr memorandum asserts that the United States Constitution’s Supremacy Clause will prevent state bar authorities from disciplining a government lawyer who reveals (nonprivileged) information in violation of state legal ethics rules. Id. at 9 n.7. But in 1998, Congress passed the McDade Amendment, which prohibits the Justice Department from using the Supremacy Clause to opt out of state ethics rules. Act of Oct. 21, 1998, Pub. L. No. 105-277, sec. 101(b), §§ 801(a), 112 Stat. 2681, 2681–118 (codified at 28 U.S.C. § 530B(a) (2000)) (“An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”).} While the professional rules provide guidance for entity representation,\footnote{E.g., Ward v. Superior Court, 138 Cal. Rptr. 532, 538 (Cal. Ct. App. 1977) (holding that county counsel represented county rather than former assessor, so there was no conflict of interest in counsel’s defending county in assessor’s defamation action against county); Humphrey v. McLaren, 402 N.W.2d 535, 540–41 (Minn. 1987) (holding that state attorney general represented state agency rather than agency’s executive director, so there was no conflict of interest when attorney general sued executive director for misuse of public funds).} they generally leave open the key question for government lawyers: which government entity does the lawyer represent?\footnote{Model Rules of Prof’l Conduct R. 1.13 (2007) (organization as client).}

The identity of the client has important implications for lawyer confidentiality. If a government lawyer represents “the people,” then presumably she could disclose information to anyone who is one of “the people.”\footnote{But see D.C. RULES OF PROF’L CONDUCT R. 1.6(c) (2007) (asserting that the government lawyer’s client is the agency that employs the lawyer).} If a government lawyer represents an agency, then the entity exception to confidentiality will apply,\footnote{Cf. Roberts v. City of Palmdale, 5 Cal. 4th 363, 380 n.5 (1993) (rejecting resident’s assertion that “because the city attorney has a duty to serve the public, she is the client of the city attorney as a member of the public and has the authority to waive the privilege”).} but if she is representing the agency head, then it will not.\footnote{Model Rules of Prof’l Conduct R. 1.13(c) (2007); see discussion supra notes 30–32 and accompanying text.}

As a practical matter, the key difference between conceiving of the client as a government agency rather than as the head of the government agency in his official capacity is the Model Rule 1.13 duty to protect entity clients from disloyal agents. See Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005). In Rose, a city was being sued for alleged civil rights violations by its police force. The
the entire government, then she can reveal information to a member of Congress, but if she represents the executive branch, she cannot. If a state natural resources department lawyer represents her agency, then she cannot reveal information about wrongdoing at the department to anyone outside of the department, including the state attorney general.84 If a lawyer in the California Insurance Department (such as Cindy Ossias) represents the entire government of California, then she can reveal information to state legislators. But if she represents only the Insurance Department, then she cannot—unless an exception to confidentiality applies.

Writing years before the American Bar Association adopted its Model Rules of Professional Conduct—including its rule specifically dealing with entity clients—Robert Lawry argued that client identity was the wrong question for government lawyers to ask.85 Lawry correctly noted that identifying the client does not end the inquiry regarding a government lawyer’s confidentiality duty.86 But client identity is an appropriate starting point for an inquiry about confidentiality. Correctly identifying the government lawyer’s client will help the lawyer determine the set of individuals to whom she can reveal information.

Some have attempted to provide a universal answer to the question of the identity of the government lawyer’s client. Politicians often claim that the government lawyer’s client is “the public,”87 and a few commentators

court ruled that the city could assert attorney-client privilege even though the former police director (a co-defendant) purported to waive the privilege by defending on the basis of the legal advice he received. Id. at 603. As long as the city rather than the police director was the client, the city could maintain the privilege. Id. at 605–06.

84. But see HAW. RULES OF PROF’L CONDUCT R. 1.6(c)(4)–(5) (2007) (permitting government lawyers licensed in Hawaii to make such disclosures).

Steven Berenson has also argued that identifying the government lawyer’s client is unnecessary. Steven K. Berenson, Hard Bargaining on Behalf of the Government Torfsecor: A Study in Governmental Lawyer Ethics, 56 CASE W. RES. L. REV. 345, 364 (2005) ("[C]hoosing a single client from among the many possibilities mentioned above would be arbitrary . . . . "). He suggests that government lawyers should instead “seek guidance from a wide range of the sources . . . [and] serve a mediating function in considering how to incorporate those views in the representation.” Id. But this approach would often result in indeterminacy.

86. Lawry, Confidences, supra note 10, at 631 ("The primary reason this is the wrong question is that the answer to it does not automatically answer other, separate questions of immense practical importance, not least of which is the question of confidentiality.").

87. Senator Patrick Leahy asserted that the memoranda John Roberts wrote when he was at the Solicitor General’s office were not subject to attorney-client privilege because “[t]hose working in the solicitor general’s office are not working for the president. They’re working for you and me, and all the American people.” Interview by George Stephanopoulos with Sen. Patrick Leahy (July 24, 2005)
assert that government lawyers should pursue "the public interest."88 But these formulations fail to identify who can give direction to the lawyer on behalf of the client.90 Some assert that the government lawyer represents the government as a whole,91 but Geoffrey Miller persuasively rebuts that notion as it pertains to a government with separated powers.92 Miller notes that lawyers in the executive branch do not generally represent Congress or the judiciary.93 Many assert that the client is the particular agency that employs the lawyer,94 but this approach is singularly inappropriate for the hundreds of Justice Department lawyers who represent other government agencies and departments in court.


89. See Prof'l Ethics Comm., Fed Bar Ass'n, Op 73-1 (1973) ("The Government Client and Confidentiality"); in 52 Fed. B.J. 71, 72 (1973) ("We do not suggest that the public is the client as the client concept is usually understood."); see also D.C. BAR REPORT, supra note 72, at 54 (concluding that ‘the public interest’ was an unworkable ethical guideline’ and that ‘the public interest’ is too amorphous a standard to have practical utility in regulating lawyer conduct’); Cramton, supra note 10, at 298 (noting that ‘conceptions of the “public interest” vary significantly from one person to the next’ and that ‘defining the government lawyer’s client as the public interest would fail to provide any real guidance in regulating lawyers’ conduct’); Harvey, supra note 70, at 1601 ("The public interest model . . . allows unselected officials to substitute their judgment for that of an agency."); Miller, supra note 10, at 1294-95 ("The notion that government attorneys represent some transcendent ‘public interest’ is, I believe, incoherent. . . . [T]here are as many ideas of the ‘public interest’ as there are people who think about the subject.").

On the other hand, certain government lawyers have client-like decision-making authority, such as whether to bring or settle a lawsuit and whether to appeal an adverse court decision. If a lawyer does have this client-like authority, she can appropriately consider the public interest in making such decisions. See discussion infra Part II.C.

90. See Lawry, Wrong Question, supra note 10, at 66 ("[T]he client of the federal government lawyer is the federal government."); see also Harvey, supra note 70, at 1575-76 (regarding the Solicitor General in particular). But in a longer article published just a year later, Lawry asserts that "'[t]he client for the federal government lawyer is the head of the agency or department or the head of the public or quasi-public body to which the lawyer is currently attached . . .' Lawry, Confidences, supra note 10, at 644.

91. Miller, supra note 10, at 1296 ("The notion . . . that an agency attorney serves the government as a whole is misplaced.").

92. Id. ("In a system of checks and balances it is not the responsibility of an [executive branch] attorney to represent the interests of Congress or the Court. Those [branches] have their own ‘constitutional means and personal motives’ to protect their prerogatives." (footnote call number omitted)); see also D.C. BAR REPORT, supra note 72, at 55 ("The identification of one’s client as the entire government would raise serious questions regarding client control and confidentiality. For example, without some focus of responsibility, each government lawyer would be free to perform as he or she saw fit, subject only to the practical constraint of internal agency discipline.").

There are problems with each of these formulations. Given the wide variety of roles that government lawyers play, it is no wonder that a universal definition of the government lawyer's client evades us. The next section develops an alternative approach. It identifies the government lawyer's client by examining the specific context in which the government lawyer works, paying particular attention to the structure of government authority.

B. Client Identity Depends on Context and Structure of Governmental Power

While there is no universal answer to the question of identifying a government lawyer's client, one can determine a particular government lawyer's client by examining the particular context and the precise structure of governmental authority. This section describes the process for identifying a government lawyer's client and gives examples of that analysis. It does not purport to provide a comprehensive list of clients for all government lawyers. Instead, it explains how one can identify a particular lawyer's client and provides some examples of this method.

To determine the identity of the client, one must examine the range of possible clients of the government lawyer and consider the relationships among those putative clients. Is one of those entities subordinate to another or do they act independently? One must then consider the relationship between the lawyer and those entities. A few concrete examples will show how complex and contextual the issue of client identity can be in the government context.

The issue of client identity often comes up in cases involving claims of attorney-client privilege or conflicts of interest. For example, an attorney-client privilege case arose when a federal grand jury subpoenaed the

94. See Restatement Third of the Law Governing Lawyers § 97 cmt. c ("No universal definition of the client of a governmental lawyer is possible."); Harvey, supra note 70, at 1615-16 ("[N]o one model completely describes Department loyalty. . . . The varied facts and forces that operate in each case of representation make a single model inappropriate for describing the loyalty relationship."); see also Lawry, Wrong Question, supra note 10, at 62-63; Lawry, Confidentiality, supra note 10, at 631-32 (noting that the question of client identity also depends on the particular question being asked: confidentiality, conflict of interest, or whether the government lawyer must do what the particular government official has instructed).

95. See Gray v. R.I. Dep't of Children, Youth and Families, 937 F. Supp. 153, 157 (D.R.I. 1996) ("[A]scertain who the client really is can be a complex affair when a governmental entity is involved."); United States v. Am. Tel. & Tel. Co., 86 F.R.D. 603, 617 (D.D.C. 1979) (adopting a contextualized approach to identifying the government lawyer's client, indicating that the client can be more than one government agency "if the two agencies have a substantial identity of legal interest in a particular matter").
minutes from the Detroit City Council's closed sessions. The Detroit corporation counsel had attended those sessions and the federal prosecutor argued that the corporation counsel represented only the executive arm of city government, not the Detroit City Council. Under this theory, the presence of corporation counsel would waive the City Council's attorney-client privilege. The Sixth Circuit closely examined the particular legal context of these closed sessions, which dealt with condemnation proceedings. The Detroit city government is normally bifurcated, with the corporation counsel representing the city administration rather than the City Council. But in condemnation proceedings, the City Council actually instructs the corporation counsel whether to proceed. So, the City Council was able to assert attorney-client privilege for its meetings with corporation counsel.

The Sixth Circuit used a similar structural, contextual approach to come to a different conclusion in a case involving Murfreesboro, Tennessee city council members, the city manager, and a lawyer for the city. The issue was again application of the attorney-client privilege. The court found that the city-council members were investigating an executive decision and had interests adverse to those of the city manager. Thus, the city council members were not clients of the city attorney and the city could not assert attorney-client privilege because the meeting with the lawyer occurred with non-clients (i.e., city council members) present.

In a California case, the issue was a possible conflict of interest by a county counsel who had given legal advice to the county's civil service commission. The court ruled that ordinarily a county counsel's client is the entire county rather than a constituent agency of the county, even when the lawyer is giving specific legal advice to such an agency. But the court identified an exception to this general rule where the agency has the authority to act independently of the county. In this particular case the

97. Id. at 138–39.
99. Id. at 357–58.
100. Civil Serv. Comm'n v. Superior Court, 209 Cal. Rptr. 159, 164 (Cal. Ct. App. 1985) ("We . . . accept the general proposition that a public attorney's advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney's relationship to the overall governmental entity of which the agency is a part.").
101. Id. The court further states that an exception must be recognized when the agency lawfully functions independently of the overall entity. Where an attorney advises or represents a public agency with respect to a matter as to which the agency possesses independent authority, such that a dispute over the
court found that the civil service commission had independent authority because when the county opposed a commission decision, the county had to take the commission to court rather than simply overrule it. Since the county counsel had given legal advice to a commission with independent authority, the commission itself was a direct client of the county counsel.

In another conflicts of interest case, employees of the Rhode Island Department of Children, Youth and Families sued the department for alleged civil rights violations. The employees’ lawyer also did legal work for two Rhode Island state boards, and the state’s attorney general argued that representation of the employees constituted an improper conflict of interest. The issue was whether the lawyer represented just the two specific state boards, or instead represented the entire state government. The court noted that governmental agencies sometimes oppose each other in litigation, and thus the agency, rather than the government as a whole, is the client. It examined Rhode Island’s restrictions on its employees and found that state employees are prohibited from serving as lawyers for a party suing the particular agency where they are employed. By contrast, federal law prohibits executive branch employees from serving as lawyers for a party suing the executive branch. Thus, the court found that the clients of this lawyer were the particular boards he represented, rather than the entire state government.

While this kind of structural analysis is the most satisfying way to identify a government lawyer’s client, not all courts that have decided the issue of client identity use the structural approach. In a case involving the possible disqualification of a private law firm that arguably represented the

matters may result in litigation between the agency and the overall entity, a distinct attorney-client relationship with the agency is created.

Id. The court states:
Here, ... the conflict between the Department of Social Services and the Commission cannot be resolved in the usual manner because the County Charter gives the Commission authority independent of the County’s normal hierarchical structure. The Board of Supervisors has been forced to sue the Commission in an attempt to overturn its rulings.

Id.

Id. at 164, 167 (disqualifying county counsel from representing county in litigation against commission). For further discussion of this case, see Solomon, supra note 10, at 274–75.


105. Id. at 160 (noting that government agencies’ “interests are quite often conflicting or divergent”).

106. See id. at 156–58 (applying the Rhode Island Code of Ethics (1990) and citing R.I. GEN. LAWS § 36-14-S(e)(2)).

107. Id. (citing 18 U.S.C. § 205(a)(2) (2000)).
State of New York but was now representing a tobacco company being sued by the state, the court concluded that the firm represented only specific agencies rather than the state as a whole, analogizing in a rather strained fashion to the situation of a firm that represents an association's members but not the entire association. In a case involving a county's claim of attorney-client privilege for communications between the county attorney and a county employee, where those communications had also been shared with "the county personnel office, the county auditor's office, and the county judge's office," a Texas state court found that those other offices constituted third parties outside the lawyer-client relationship, thus waiving the attorney-client privilege. But the court failed to consider whether those offices were all part of the county attorney's client.

The identity of the client is determined by examining the structure of authority within the government. Applying this structural analysis to the federal government's executive branch, client identity depends on one's theory about the structure of executive-branch authority. Proponents of the unitary-executive view have asserted that all executive-branch lawyers have as their client the entire executive branch, with the President ultimately responsible for defining client interests. But this unitary-executive view is not universally held. Some commentators note that individual departments have some independent authority based on congressional enactments, even though the President can put political pressure on a department secretary, or even fire the secretary. These commentators would likely conclude that the client of a department lawyer is the department itself rather than the entire executive branch.


111. See, e.g., Miller, supra note 10, at 1298 (asserting that "the [executive branch] attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head"); Paulsen, supra note 11, at 487 ("[A]s a matter of the constitutive law of the legal entity in question . . . an attorney working for an agency within the executive branch represents . . . the executive branch.").


113. But cf. Lawry, Wrong Question, supra note 10, at 67. Lawry states: [C]alling the agency the "client" only confuses . . . sound policy, for it is never the case that the matter cannot be pursued by the individual lawyer at least to the Attorney General or
many of the lawyers employed by independent agencies, such as the Securities and Exchange Commission (SEC) or the Federal Communications Commission, their client is the agency itself.\textsuperscript{114} Such an agency is even more insulated from presidential control and thus can take positions that will displease the President. An SEC lawyer who disagrees with an agency decision can appeal that decision up to the Commission itself, but not beyond the Commission. A Justice Department lawyer who is defending a lawsuit against the Agriculture Department may in common parlance refer to that department as her client. But by statute the Justice Department controls the litigation and is concerned with the effect of any rulings on the rest of the executive branch.\textsuperscript{115} Even if the Secretary of Agriculture would prefer a particular position, the Attorney General can overrule that position if he deems it in the interest of the executive branch. So it would be more accurate to say that the client of the Justice Department lawyer is the entire executive branch.\textsuperscript{116} Federal prosecutors have as their clients the executive branch, and they have significant independence in how they go about their duties.\textsuperscript{117}

Most congressional lawyers have as their clients individual legislators, while a few represent entities within the legislative branch.\textsuperscript{118} The former work either on the personal office staff or the committee staff of a particular member of the House of Representatives or Senate. They owe duties of loyalty and confidentiality to the individual legislator. Similarly,

\textsuperscript{114} In a few cases, lawyers work for individual commissioners rather than the commission as a whole. In those cases, the client is the individual commissioner in his official capacity.

\textsuperscript{115} 28 U.S.C. § 516 (2000) ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice . . . .")

\textsuperscript{116} By contrast, the D.C. Rules of Professional Conduct assert that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order." D.C. RULES OF PROF'L CONDUCT R. 1.6(k) (2007). This would make the Justice Department lawyer's client the Justice Department.

\textsuperscript{117} See infra Part I.C (discussing lawyers with client-like authority to make decisions). Under the former Independent Counsel statute, Independent Counsels had the same authority as the U.S. Attorney General. 28 U.S.C. § 594(a) (2000). The statute provides that an independent counsel appointed . . . shall have, with respect to all matters in which independent counsel's prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice . . . .

lawyers in the Office of the Legislative Counsel have transitory lawyer-client relationships with the individual legislators to whom they give legal advice on the drafting of legislation.119 By contrast, there are a few lawyers on Capitol Hill whose clients are legislative entities rather than individual legislators. For example, the Senate Legal Counsel represents the Senate as an institution, regularly defending the Senate in lawsuits and pursuing subpoena enforcement actions in connection with Senate Committee investigations.120

In the judicial branch, although judges are lawyers, they do not act in a representative capacity and therefore do not have any clients. Judicial clerks give legal advice to the judges for whom they work, so one might classify the judge as the clerk's client. But many judicial clerks are not yet licensed as lawyers when they begin their clerkships. So it is unclear that judicial clerks are lawyers at all, let alone whether their judges are their clients.121 For example, Edward Lazarus clerked for Justice Blackmun during the 1988–89 Term and ten years later published a book that critiqued the Supreme Court's handling of certain highly charged cases.122 Lazarus's book was met with a chorus of criticism.123 Lazarus was accused of violating the confidentiality inherent in the clerk-Judge relationship and of violating the confidentiality provision in the Supreme Court's rules for clerks.124 But there was little discussion of whether he violated the confidentiality rule for lawyers.125

With regard to local governments, normally the client is the local government itself rather than the local officials who run the government.126

119. See MATTHEW ERIC GLASEMAN, CONG. RESEARCH SERV., OFFICE OF LEGISLATIVE COUNSEL: SENATE (2007), available at http://www.senate.gov/reference/resources/pdf/R520856.pdf. These lawyers are required "to maintain the attorney-client relationship with respect to any communications with Senators or staff." Id. at 2.


126. Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005) ("[G]enerally in conversations between municipal officials and the municipality's counsel, the municipality, not any individual

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One would need to look closely at the structure of the particular local government to determine whether the client is the entire local government, the local legislature, the local government's executive branch, or some other subset of the government.

C. Some Government Lawyers Have Authority to Make Decisions That Are Normally in the Hands of the Client

The previous section showed how complicated it can be to determine the identity of a particular government lawyer's client. This section addresses two related issues: the fact that the lawyer-client relationship in government is sometimes—but not always—fundamentally different from the lawyer-client relationship in the private sector and the fact that some government lawyers may, and indeed should, consider the public interest in making decisions about the representation.127

1. "Runaway" Lawyers128

Some government lawyers have a traditional lawyer-client relationship with their government client. The client decides on the objectives of the representation and the lawyer pursues those objectives.129 Other government lawyers serve both as the lawyer and essentially as a trustee, entrusted to make decisions that clients normally make.130 The professional rules require a lawyer to abide by a client's decision on whether to settle a case or whether to appeal an adverse decision.131 Yet some government lawyers routinely decide whether to litigate or settle

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127. See Humphrey v. McLaren, 402 N.W.2d 555, 543 (Minn. 1987) ("In the public attorney-public client relationship, there is a quality of disinterested interest not usually found in the private sector.").


129. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

130. For an example of a state rejecting this type of trustee-like power for an attorney general, see State ex rel. Amerland v. Hagan, 175 N.W. 372, 374 (N.D. 1919) ("[T]he Attorney General . . . [does not] step] into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned."), overruled on other grounds by Benson v. N.D. Workmen's Comp. Burea, 283 N.W.2d 96, 107 (N.D. 1979).

cases on behalf of their clients. Prosecutors decide themselves whether to seek indictments and whether to allow plea agreements and cannot allow other officials in the government to make these decisions. In addition, many state attorneys general have this client-like authority in civil cases. For example, in a case where the South Carolina Attorney General was representing the state tax commission, the Attorney General was permitted to settle a tax dispute even though two of the three members of the commission objected to the settlement. In Massachusetts, after the Attorney General unsuccessfully defended the civil service commission in a sex discrimination lawsuit, the commission voted not to appeal the decision. But the Attorney General took the appeal anyway against the wishes of his client. The Massachusetts Supreme Court found that the Attorney General's "relationship with the State officers he represents . . . is not constrained by the parameters of the traditional attorney-client relationship." In another case, the Massachusetts Attorney General refused to appeal an adverse judgment even though the state officer was sued wanted to appeal.

At the federal level, Congress has set out by statute that the Department of Justice controls most litigation decisions. Justice Department lawyers represent executive-branch agencies in court, but it is the Justice Department—not the agencies—that decides whether to bring litigation.

132. Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 Mich. L. Rev. 675, 709 (2005) (noting that the U.S. Solicitor General files petitions for certiorari in "less than ten to twenty percent" of cases in which federal agencies and department want Supreme Court review of lower court decisions and "turns down . . . the overwhelming majority of [agency] requests for authorization to seek rehearing en banc" and "two to three times per year" confesses error, "abandoning the government's victory in a lower court . . . [if his] own analysis disagrees with the judgment of the lower court that sustained the government's position"). In some cases where the government has confessed error, the court has appointed amicus curiae to argue in favor of the judgment below. See id. at 719 n.130.

133. Nancy V. Baker, The Attorney General as a Legal Policy-Maker: Conflicting Loyalties, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 44 (Cornell W. Clayton ed., 1995). After a Dallas policeman received a light sentence from a state court jury for killing a 12-year-old Hispanic boy, President Carter wanted his Justice Department to bring a federal civil rights prosecution against the policeman. Attorney General Griffin Bell refused and told the President, "You can't tell me who to prosecute. You delegated the prosecutorial discretion to me. I have to exercise it. But you can get rid of me." Id. See also Green, supra note 67, at 238 ("Unlike most other lawyers, prosecutors cannot look to a client, or the client's representative, to decide how to carry out this objective [to seek justice].").


136. Id. at 1266.

137. See'y of Admin. & Finance v. Att'y Gen., 326 N.E.2d 334, 336 (Mass. 1975) (rejecting the secretary's argument that he had a traditional attorney-client relationship with the attorney general, which would allow the secretary to decide whether to appeal).

and whether to settle it. The Solicitor General "is not bound by the views of his 'clients.' He may confess error when he believes they are in error... He may refuse to approve their requests to petition the Court for writs of certiorari."

As part of the Congressional Accountability Act of 1995, Congress made itself subject to employment discrimination laws and set up a mechanism allowing congressional employees to seek redress despite the Constitution's Speech or Debate Clause immunity. When a Senate employee alleges discrimination, he can file suit against the office where he was employed (rather than against the particular senator or the Senate itself). The Senate Chief Counsel for Employment represents the defendant office, and any monetary judgment is paid out of general Senate coffers rather than a particular senator's allotment. Under this arrangement, Senate employees can obtain compensation for wrongful discrimination, but individual senators are not subject to liability. The Senate as an institution has determined that it has an interest in assuring that its employees are able to seek compensation for discrimination, while individual Senate offices presumably have an interest in avoiding any finding of wrongful discrimination. The Senate Chief Counsel for Employment apparently takes direction from the particular offices that she represents and has vigorously defended offices accused of discrimination, repeatedly arguing for broad immunity under the Constitution's Speech or Debate Clause. This situation finally came to a head in a discrimination case when the senator whose office the plaintiff was suing retired before

139. Harvey, supra note 70, at 1573. The division of responsibility between the Justice Department lawyer and the "client" agency deserves a closer empirical look. See Wald, supra note 69, at 118 (describing a court-initiated mediation program under which the mediator can "request that agency representatives attend the mediation sessions if it appeared that it was the lawyer—and not the agency—who was resistant to settlement and to communicate offers directly to those representatives (with prior notice to government counsel)").

140. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 230 (1977). It is significant that this opinion uses "client" within quotation marks. See id. The opinion appears to be referring to individual agencies' officeholders who have preferences regarding particular legal disputes. It is more accurate to assert that the Solicitor General's client is the entire executive branch, and that these individual agencies or officeholders may have parochial interests that must be subjugated to the more wide-ranging interests of the executive branch, both laterally across the branch and across time. See Pillard, supra note 132, at 729 (noting that "the SG considers the impact of any given litigation position both across the government as a whole and over time").


the case had been adjudicated. The Senate Chief Counsel for Employment argued for broad speech or debate immunity, while the Senate itself filed an amicus brief disclaiming immunity applied in the case. Perhaps even more remarkable, the Senate Chief Counsel for Employment argued that her client, the Office of Senator Dayton, no longer existed and that the case was moot because the senator's term had expired and he had not sought a new term. But if her client no longer existed, one wonders from whom she was taking direction in the case. Congress needs to clarify whether the Senate itself—rather than a particular senator whose office is being sued—controls the defense of these lawsuits, just as the Senate itself is ultimately responsible for any monetary judgment. Under the current arrangement, the Senate Chief Counsel for Employment appears to be untethered to any client and has made arguments that undermine the institutional interests of the Senate.

At the state level, the situations vary considerably. Many states allocate to a state attorney general decisions on whether to bring and settle lawsuits. The Illinois Attorney General, for example, has the authority to "direct the legal affairs of the State and its agencies." In such a situation, the relationship between the state attorney general and the agency is not "precisely akin" to that between a private sector lawyer and client. Because the lawyer-client relationship is different, the state

148. Brief for the United States Senate as Amicus Curiae Supporting the Appellee, supra note 146, at 17 (noting that "[t]he employing office is nothing more than an administrative unit of the Senate; it is the Senate that provides the resources for the vigorous defense of suits and for the payment of judgments" (footnote omitted)).
149. Transcript of Oral Argument at 4, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (No. 06-618), 2007 WL 1198567 (Senate Chief Counsel for Employment arguing that the Supreme Court does not defer to Congress's own interpretation of the speech and debate clause because "Congress of course is a political body . . . that . . . will make decisions that are politically expedient . . ., which means that over time their decisions can change").
152. Id. at 52-53 ("[a]lthough an attorney-client relationship exists between a State agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a State agency is precisely akin to the traditional role of private counsel apropos of a client."); see also Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d 533, 537-38 (Conn. 1978).
attorney general is permitted to do things that conflict-of-interest standards would normally prohibit. Thus, a state attorney general's office has been permitted to represent opposing parties in a lawsuit—two separate state commissions that disagreed about application of state law.153 State attorneys general routinely file lawsuits against state agencies and officials that they normally represent.154

In other states, attorneys general have a more traditional lawyer-client relationship with client agencies.155 The agencies make legal policy

153. See, e.g., Conn. Comm'n, 387 A.2d at 537 (finding that the state attorney general was not "guilty of malice or gross negligence" when his office represented both plaintiff and defendant in a lawsuit); Pollution Control Bd., 372 N.E.2d at 53 ("[T]he Attorney General may represent opposing State agencies in a dispute" when the Attorney General is not an actual party to the dispute); see also Scott v. Cadagio, 358 N.E.2d 1125, 1128-29 (Ill. 1976) (permitting attorney general to withdraw from representation of state commission and represent government department that was intervening and opposing commission); State ex rel. Altain v Miss. Pub. Serv. Comm'n, 418 So. 2d 779, 782, 784 (Miss. 1982) (permitting attorney general to intervene in lawsuit and challenge rate increase approved by public service commission, even though a member of his office represented commission and acknowledging that attorney general "will be confronted with many instances where he must, through his office, furnish legal counsel to two or more agencies with conflicting interest or views").

154. See, e.g., People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1129-31 (Colo. 2003) (attorney general can sue secretary of state regarding constitutionality of congressional redistricting); People ex rel. Scott v. Ill. Racing Bd., 301 N.E.2d 285, 288-89 (Ill. 1973) (attorney general could sue Racing Board seeking review of its decision to grant licenses); Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 665, 668 (Ky. Ct. App. 1975) (attorney general's "constitutional, statutory and common law powers include the power to initiate a suit" against a state agency challenging the constitutionality of a statute); Superintendent Of Ins. v. Att'y Gen., 558 A.2d 1197, 1204 (Me. 1989) ("[W]hen the Attorney General disagrees with a state agency, he is not disqualified from participating in a suit affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceedings."); State ex rel. Olsen v. Pub. Serv. Comm'n, 283 P.2d 594, 600 (Mont. 1955) (attorney general can sue public service commission challenging its approval of a telephone rate hike, even though he is the attorney for the commission."); But see People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1207-11 (Cal. 1981) (attorney general cannot sue State Personnel Board where lawyers in his office had previously advised Board on same issue); Reiter v. Wallgreen, 184 P.2d 571, 575 (Wash. 1947). The Reiter court stated:

[The Attorney General's] paramount duty is . . . the protection of the interest of the people of the state, and, where he is cognizant of violations of the Constitution or the statutes by a state officer, his duty is to obstruct and not to assist, and, where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.

Id. (quoting State ex rel. Dunbar v. State Bd. of Equalization, 249 P. 996, 999 (Wash. 1926)).

155. See Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 862 (W. Va. 1995) (citing Machining v. Browning, 296 S.E.2d 909, 920 (W. Va. 1982)) ("[T]here is a traditional attorney-client relationship between the Attorney General and the state officer he represents."); State ex rel. Caryl v. MacQueen, 385 S.E.2d 646, 649 (W. Va. 1989) ("[T]he relationship between the Attorney General and the Tax Commissioner is clearly one of an attorney to his client and shall be treated as such by the Attorney General with regard to the confidentiality of the information."); footnote call number omitted); Machining v. Browning, 296 S.E.2d 909, 920 (W. Va. 1982) ("The Legislature has thus created a traditional attorney-client relationship between the Attorney General and the state officers he is required to represent."); see also Deukmejian, 624 P.2d at 1207-11.
decisions and the attorney general defends those decisions in court.\footnote{156 See, e.g., McGraw, 461 S.E.2d at 862 ("[T]he role of the Attorney General is not to make public policy in his own right on behalf of the state[], but rather 'to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation' ") (quoting Manchin, 296 S.E.2d at 920)); see also York v. Penn. Pub. Util. Comm'n, 295 A.2d 825, 832 (Pa. 1972) (prohibiting attorney general from arguing against decision made by state agency and stating that "boards and commissions are given authority to make decisions which involve conclusions of law... The legislature provided for the review of these decisions by courts... Appeals from these decisions are not to the attorney general."") (internal quotation marks omitted)).}

These government lawyers must defer to their clients' decisions, even when the lawyers believe that the clients are acting against the public interest.\footnote{157 See, e.g., Deshounjian, 624 P.2d at 1209 (rejecting the attorney general's contention that he "may determine, contrary to the views of the Governor, wherein lies the public interest"); Motor Club of Iowa v. Dep't of Transp., 251 N.W.2d 510, 514 (Iowa 1977) (attorney general's role is "to defend the department, not to assert his vision of state interest"); see Solomon, supra note 10, at 323 (extensively discussing Deshounjian, 624 P.2d at 1206); see also Miller, supra note 10, at 54 (arguing against consideration of public interest). But cf. Davids, supra note 69, at 373–74 (asserting that some lawyers have as a client the public interest).} For example, in a Texas case, the Attorney General asked a court to overturn a state agency's water regulation because of alleged violations of equal protection.\footnote{158 Yes on Measure A v. City of Lake Forest, 70 Cal. Rptr. 2d 517, 518 n.2 (Cal. Ct. App. 1997) (noting that the brief of the Fair Political Practices Commission states that the "position taken in this brief is that of the General Counsel and the Legal Division of the agency" and that the issue "is not presented to the Commission for a formal discussion and vote").} The court ruled that the Attorney General could not sue a state agency.\footnote{159 United States v. Providence Journal Co., 485 U.S. 693 (1988) (special prosecutor did not have authority to seek contempt against wishes of Solicitor General).}

Occasionally, government lawyers who do not have this trustee-like power will nonetheless make decisions as though they did have the power. The results can be rather strange. For example, in a 1997 case involving a voter initiative, the "Legal Division" of the California Fair Political Practices Commission filed an amicus brief in a case on behalf of the Legal Division itself, even though the Commission had not taken a position on the case.\footnote{160 Hill v. Tex. Water Quality Bd., 568 S.W.2d 728, 739 (Tex. Civ. App. 1978). The court ruled that a state statute required the attorney general to represent the agency and to supervise any lawyer working for the agency. Thus, allowing the attorney general to sue the agency "would put him on both sides of the lawsuit." Id. at 741. This and other cases concerning the Texas Attorney General's authority are discussed extensively in Bill Aleshire, Note, The Texas Attorney General: Attorney or General?, 20 REV. LITIG. 187 (2000).} The West Virginia Attorney General was called upon to defend the Secretary of State in a federal case challenging the state's apportionment plan for
congressional districts.162 But rather than pursuing the wishes of the Secretary of State and conceding the unconstitutionality of the plan, the Attorney General sought to defend the apportionment plan. So, the Secretary of State obtained a mandamus from the state’s supreme court, directing the Attorney General to pursue the Secretary of State’s objectives in the apportionment litigation.163

2. Basing Decisions on the Public Interest

Although one finds some support for consideration of the public interest, most commentators have criticized this approach. Geoffrey Miller, in particular, wrote a convincing critique of government lawyers’ considering the public interest, pointing out that this approach would lead to chaos since different lawyers have different conceptions of the public interest.164 This is a valuable insight, but it is limited in its application. For there is a set of government lawyers who should consider the public interest: those who can make client-like decisions.

Government lawyers who have this client-like decision-making authority essentially serve as trustees for the client.165 When making those client-like decisions in their role as trustees, it is appropriate for government lawyers to consider the public interest.166 For example, the California Attorney General has the authority to bring lawsuits on behalf of the State and has a “paramount duty to represent and protect the public interest.”167

162. Manchin v. Browning, 296 S.E.2d 909, 912–13 (W. Va. 1982). The West Virginia Supreme Court acknowledged that when the attorney general pursues litigation in his own name (rather than on behalf of a particular state official), he is free to pursue the public interest as he sees it. Id. at 918.

163. Id. at 912–13, 923.

164. Miller, supra note 10, at 1294–95. Bruce Green has characterized the “public interest” approach this way: “In this conception, . . . as a practical matter, the lawyer has no client and is not in an attorney-client relationship. . . . [T]he lawyer essentially has a roving commission to do what, in the exercise of professional judgment, seems best to serve the public.” Green, supra note 67, at 267–68.

165. Former Attorney General Francis Biddle asserted that the Solicitor General “stands in his client’s shoes,” and that “the client has no say in the matter.” FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1952), quoted in Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 236 (1977).

166. In re Witness Before Special Grand Jury 2000–2, 288 F.3d 289, 294 (7th Cir. 2002) (“Public officials . . . exercise the power of the state . . . [and have] the responsibility to act in the public interest.”); Comm’n on Special Revenue v. Comm. Freedom of Info. Comm’n, 387 A.2d 533, 538 (Conn. 1978); EPA v. Pollution Control Bd., 372 N.E.2d 50, 53 (Ill. 1977) (noting that the state attorney general represents not only “the particular interests of State agencies,” but also “the broader interests of the State”); Humphrey v. McLaren, 402 N.W.2d 535, 543 (Mich. 1987) (“[A] government litigator must take positions with the common public good in mind, unlike the private practitioner who seeks vindication of a particular result for a particular client.”).

167. D’Amico v. Bd. of Med. Examiners, 11 Cal. 3d 1, 16, (Cal. 1974) (rejecting idea that the public interest is unrepresented when state attorney general makes concession in litigation).
While some have asserted that, for these lawyers, the "public interest" is their client, it makes more sense to conceive of these lawyers as trustees of the client (such as the state government) who can consider the public interest in making their decisions. So, it is not that the public interest is the client, but rather the state is the client, and the state attorney general is entrusted to make decisions about what is in the best interest of the State, and then to implement those decisions through her legal work.168 The attorney general is both the lawyer and the trustee of the client. The attorney general has the power as trustee to make the determination of what is in the interest of the State.

If a government lawyer has the authority to make client-like decisions (such as whether to bring or settle cases), then she also has the responsibility to act not just like any client, but in a way this particular client—a sovereign—should act. In our legal tradition, the sovereign is not free to act in the same way as any private litigant but is expected to act fairly and impartially.169 This obligation of fairness is seen most prominently in criminal prosecutions. As the United States Supreme Court declared in Berger v. United States,

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.170

This requirement that government lawyers be fair is reflected in prosecutors’ obligations to provide criminal defendants with information that can help the defense, a deviation from the normal adversary process.171 This obligation to act fairly is so central to the government

168. For a rather prescient prediction of how the role of a state attorney general would expand to include protection of the public interest, see William J. Baxley, The State’s Attorney, 25 Ala. L. Rev. 19, 21 (1972) (predicting that the state attorney general “in the year 2000 will find himself more the ‘people’s lawyer’ than the state’s lawyer . . . . He will be somewhat of an ‘ombudsman’—a person who is a buffer between the citizen and his government and whose ultimate allegiance is to the people—at-large.”).
171. Brady v. Maryland, 373 U.S. 83, 87–88 (1963). Model Rule 3.8(d) requires prosecutors to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
lawyer's mission that the Justice Department building has this quotation inscribed near the entrance to the Attorney General's office: "The United States wins its point whenever justice is done its citizens in the courts." 172

As the Supreme Court explained in Berger, the obligation to do justice is based on the government's obligation as a sovereign "to govern impartially." 173 As such, the obligation to govern impartially and do justice would seem to apply with equal force to the government's civil litigation. 174 One finds strong support for this principle in civil condemnation cases, where courts have found that government lawyers have an obligation to develop a full and fair record to arrive at just compensation, not just to minimize the financial payout by the government. 175 Judge Jack Weinstein has explained that when he was a county attorney handling a condemnation action against an unsophisticated elderly couple, he rejected a proposed settlement because it did not adequately compensate the couple for their valuable land. 176

MODEL RULES OF PROF'L CONDUCT R. 3.8(6) (2007). Some scholars have argued that prosecutors can best seek justice by scrupulously following the specific procedures required of them rather than by attempting to implement a more inclusive notion of "justice" in particular cases. Fred C. Zacharias & Bruce A. Greer, The Uniqueness of Federal Prosecutors, 88 Geo. L.J. 207 (2000).

172. This quotation from former Solicitor General Lehmann is inscribed in the Rotunda of the Justice Department building. See Janet Reno, Indigent Defense: Legal Service for Poor Needs Vigilance, CHAMPION, May 1998, at 32, available at http://www.nacdl.org/CHAMPION/ARTICLES/98may05.htm; see also Pillard, supra note 132, at 723 (identifying the quote's author as former Solicitor General Frederick W. Lehmann).


174. See Green, supra note 67, at 277 (persuasively arguing that government civil litigators—particularly those who "act as surrogate[s] of the client"—should seek justice); see also People ex rel. Clancy v. Superior Court, 705 P.2d 347, 350-53 (Cal. 1985) (disqualifying lawyer hired by a city to handle abatement action on contingent fee basis). In Clancy, the California Supreme Court declared that a prosecutor

is a representative of the sovereign; he must act with the impartiality required of those who govern. . . . [This duty is] not limited to criminal prosecutors: A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record . . . .

Id. at 350 (internal quotation marks omitted).

175. City of Los Angeles v. Decker, 558 P.2d 545, 551 (Cal. 1977) (holding that the duty of a government attorney in an eminent domain action includes developing full and fair record to arrive at just compensation and reversing compensation award because city attorney withheld from jury information about land's commercial use and its value); see also MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980) ("A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record . . . .").

176. Jack B. Weinstein, Some Ethical and Political Problems of a Government Attorney, 18 Me. L. Rev. 155 (1966) (describing his rejection of a proposed settlement compensating unrepresented elderly couple with consideration worth only a third of assessor's valuation of land and paying couple more than they requested); Weinstein & Crosthwait, supra note 69, at 6-7 (same).
Aside from civil condemnation cases, one finds only a few cases supporting the obligation to be fair. One academic commentator, Steven Berenson, has looked at these few civil cases and concluded that government civil litigators "should be much more concerned with pursuit of the public interest than their counterparts who represent private clients." But in each of the identified cases, the assertion that government civil litigators must do justice was merely dictum and had no impact on the outcome of the case. For example, in *Freeport-McMoran Oil & Gas Co. v. FERC*, Judge Abner Mikva noted that while "[t]he Supreme Court was speaking of government prosecutors in *Berger*, . . . no one, to our knowledge (at least prior to oral argument), has suggested that the principle does not apply with equal force to the government's civil lawyers." But Mikva's assertion had no impact on the outcome of this case, in which the court dismissed an appeal as moot. Instead, Judge Mikva was simply excoriating the FERC lawyer for pursuing an appeal after the case had clearly become moot and for "so unblushingly deny[ing] [at oral argument] that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission." Most of the academic commentary on this issue rejects the notion that government lawyers should consider the public interest, concluding that it is too vague a standard for government lawyers to apply in specific situations. While government lawyers who have client-like decision-making authority should consider the public interest, those who are acting


178. *Berenson, Public Lawyers*, supra note 88, at 794; see also *Berenson, supra note 10*.

179. *Freeport-McMoran Oil*, 962 F.2d at 47.

180. *Id.* at 48. In *Douglas v. Donovan*, while the court wrote that "government attorneys . . . have special responsibilities to both this court and the public at large," it admonished both the government and the private lawyer for failing to inform the court that the underlying dispute had been settled and therefore the case was moot. 704 F.2d 1276, 1279–80 (D.C. Cir. 1983).

In *Gray Panthers v. Schweiker*, while the court wrote that "[t]here is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large," it directed the district court to consider a form of written notice for entitlement to a hearing that the government had only recently submitted, even though it had "been circulating within the Department for many years." 716 F.2d 23, 23 (D.C. Cir. 1983).

181. *Miller, supra note 10*, at 1294 ("[T]he notion that government attorneys represent some transcendental 'public interest' is, I believe, incoherent."); see also William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 Hof. L. J. 539, 564 (1986) ("The government lawyer who uses the public interest approach . . . is not a lawyer representing a client but a lawyer representing herself."); *Lancot, supra note 10*, at 575 (criticizing the public interest approach as anti-democratic).
in more traditional lawyer roles vis-à-vis their government clients should defer to their clients’ decisions about what is in the public interest.

One can find some support for the position that government lawyers should take into account the public interest when making decisions about whether to disclose information. For example, the Hawaii Rules of Professional Conduct specifically empower government lawyers to assess “the public good” in deciding whether to disclose information about government wrongdoing.182

A more modest, alternative formulation of the public interest approach is that the public interest is embodied in a government’s duly enacted statutes, regulations, and rules. A government lawyer promotes the public interest by ensuring compliance with the law.183 This Article argues that those statutes and regulations that constitute the government’s information-control regime are the substantive standards that define a government lawyer’s confidentiality obligation.184

Usually, the government structure makes it clear that there is an elected or appointed government official who has the authority to make decisions on behalf of the public. Unless the government lawyer has been delegated the authority to make such a determination, she should defer to the appropriate government officials and their determination of what is in the public interest and should take direction from them, rather than implement her own concept of what “the people” desire.185

Returning to the factual scenario that began this Part, Ossias’s client would be the Department of Insurance, which has as its head an elected official, Charles Quackenbush. Even if Ossias believed that Quackenbush was violating the law, she was not permitted to disclose that information to anyone outside the client.186 Under California law, Ossias had the option

182. HAW. RULES OF PROF’L CONDUCT R. 1.6(c)(4)-(5) (2007).
183. Miller, supra note 10, at 1295. Miller writes:

Although the public interest as a refined concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation. Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes.

Id. Similarly, at least one Justice Department opinion has reduced the “do justice” command to requiring that a government lawyer act in accordance with the law. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 232 (1977) (asserting that Solicitor General “must ‘do justice’—that is, he must discharge his office in accordance with law and ensure that improper concerns do not influence the presentation of the Government’s case in the Supreme Court”).

184. See infra Part III.
185. Miller, supra note 10, at 1298.
186. California Rule of Professional Conduct 3-600(B) states that if a lawyer
of raising the issue with Qackenbush personally,\textsuperscript{187} but there is no indication that she did so. The following Part develops an approach to government-lawyer confidentiality that would have specific application to a situation like the one Ossias faced: where a government lawyer comes across information about government wrongdoing.

III. A GOVERNMENT LAWYER'S CONFIDENTIALITY OBLIGATION

This Part examines two characteristics of governments that bear on the question of confidentiality. The first characteristic concerns the legitimacy of the government's keeping secret its own wrongdoing. While the private sector may legitimately keep secret past wrongdoing, several sources—including statutes, court decisions, and commentators—suggest that a government has no such right. This Part will explore the support for the proposition that, as a substantive matter, government lawyers may disclose government wrongdoing.

The second characteristic concerns the way that the government controls its information. Private sector clients may make disclosure decisions on an ad hoc basis, but most governments have a complex legal regime for controlling their information.\textsuperscript{188} This regime includes statutes and regulations prohibiting the disclosure of certain information (such as

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acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the [lawyer] shall not violate his or her duty of protecting all confidential information . . . .

\textsc{Cal. Rules of Prof'l Conduct R. 3-600(B) (2008).} In contrast, Model Rule 1.13(c) permits an entity lawyer to disclose otherwise confidential information if "the highest authority that can act on behalf of the [entity] insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law." MODEL RULES OF PROF'L CONDUCT R. 1.13(C) (2007).

\textsuperscript{187} California Rule of Professional Conduct 3-600(B) states that the entity lawyer who knows of wrongdoing may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

\textsc{Cal. Rules of Prof'l Conduct R. 3-600(B) (2007).} In contrast, Model Rule 1.13(b) requires an entity lawyer in such circumstances to "refer the matter to higher authority in the organization." MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

\textsuperscript{188} Cramton, supra note 10, at 294 (referring to the "pervasive regulations [that] govern much of the information with which a government lawyer must necessarily deal").
\end{verbatim}
private information about a particular taxpayer),\textsuperscript{189} rules requiring disclosure of other types of information (such as an agency’s organizational structure and its final decisions),\textsuperscript{190} rules requiring disclosure of certain information upon request (such as unclassified, unprivileged information that must be disclosed under the Freedom of Information Act (FOIA));\textsuperscript{191} and additional rules allowing the government to withhold some of the requested information (such as documents subject to FOIA exceptions).\textsuperscript{192} This Part asserts that, as a substantive matter, government lawyers may disclose information that the government is required to disclose—either in general or in response to a FOIA request.

A. Norm of Openness Regarding Government Wrongdoing

One state has adopted a specific exception to confidentiality for government wrongdoing. Hawaii’s confidentiality rule explicitly permits government lawyers to disclose information about both future and past wrongdoing by government officials. Government lawyers licensed by Hawaii may disclose information in order to prevent a government official or agency “from committing a criminal or illegal act” that the lawyer believes would “result in harm to the public good”\textsuperscript{193} or to rectify the consequences of a government official’s or agency’s “criminal or illegal” act that the lawyer reasonably believes was “harmful to the public good.”\textsuperscript{194}

But are lawyers licensed outside of Hawaii free to disclose government wrongdoing even though there is no explicit exception?\textsuperscript{195} This section argues that many governments have consented to the disclosure of past misconduct by government employees—including lawyers. One finds such consent in laws encouraging all government employees to come forward with information about misconduct and in whistleblower protection statutes. This section discusses whistleblower protection statutes and how they interact with the lawyer’s ethical obligation of confidentiality.

\textsuperscript{190} Id. § 552(a)(1)–(2).
\textsuperscript{191} Id. § 552(a)(3).
\textsuperscript{192} Id. § 552(b).
\textsuperscript{193} HAW. RULES OF PROF’L CONDUCT R. 1.6(e)(4) (2007).
\textsuperscript{194} Id. R. 1.6(c)(3).
\textsuperscript{195} One finds in the scholarly literature an undertheorized intuition that government lawyers should be able to disclose government wrongdoing. See, e.g., Comment, supra note 121, at 1260–61 (proposing a confidentiality rule for judicial clerks, with an exception for “specific wrongdoing”).
1. Statutes Encouraging Government Employees to Disclose Government Wrongdoing

Jesselyn Radack was working at the Justice Department’s Professional Responsibility Advisory Office in December 2001 when she received a phone call from an FBI lawyer who wanted to find out whether the FBI could legally interrogate John Walker Lindh, an American in Afghanistan who was being held by American forces. CNN had broadcast an interview with Lindh, and the Attorney General had announced that the government would prosecute Lindh to the full extent of the law. In response, Lindh’s father hired a lawyer to represent him. Lindh’s lawyer faxed a letter to the Attorney General and the FBI Director informing them that Lindh was represented by counsel. The FBI lawyer wanted to know whether the government could legally interrogate Lindh, since a legal ethics rule prohibits a lawyer from speaking to another lawyer’s client without that other lawyer’s permission. Radack told the FBI lawyer that the ethics rule prohibited such an interrogation. A couple of days later, the FBI lawyer informed Radack that the interrogation had occurred and together they strategized about how the government should handle the situation. The FBI lawyer and Radack exchanged numerous emails, which Radack printed out and put into the case file.

About a month later, Radack was given a poor performance evaluation and told that unless she left the Justice Department, the evaluation would become part of her personnel file. Radack began looking for a different job. A few weeks later, the FBI lawyer contacted Radack again because the district court in the Lindh prosecution had ordered the Justice Department to disclose all documents related to the legality of the Lindh interrogation. Radack looked through the case file for the emails on this issue and could find only two of them. After consulting a more experienced colleague, Radack concluded that someone had cleansed the file. Radack asked the information technology specialists to recover the e-mails electronically, and they were able to recover some of them. When Radack informed her supervisor of the action she had taken in recovering the missing e-mails, the supervisor was not pleased.

Radack eventually left the Justice Department and started her new job. One morning, Radack heard Newsweek’s David Isikoff report that the Attorney General said the Justice Department had never taken the position that its interrogation of Lindh had been illegal. Radack thought that this meant that Justice Department did not disclose her e-mails to the district court judge. She had retained copies of those e-mails and faxed them to Isikoff, who put them on the Newsweek website. After an Inspector General investigation pointed to Radack as the likely source for the leak of these e-mails, the Justice Department opened a criminal investigation of Radack and filed ethics charges against her in the two jurisdictions where she was licensed as a lawyer, Maryland and the District of Columbia. The Maryland bar authorities decided not to pursue a case against Radack. The District of Columbia has not yet made a decision on the Justice Department complaint.\textsuperscript{197}

A variety of statutes indicate that the government does not claim to have a legitimate interest in keeping secret information about government wrongdoing. In 1958, Congress adopted a resolution calling upon all government employees to “[e]xpose corruption wherever discovered.”\textsuperscript{198} More concretely, federal, state, and local governments have passed dozens of whistleblower statutes prohibiting retaliation against government employees who disclose government wrongdoing.\textsuperscript{199}

At the federal level, federal law prohibits retaliation against certain executive-branch employees who disclose information that they

\textsuperscript{197} See generally Jane Mayer, Lost in the Jihad, NEW YORKER, Mar. 10, 2003, at 50. For an excellent analysis of Radack’s situation using insights from rational-choice theory and psychology, see David McGowan, Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment, 20 GUS. J. LEGAL ETHICS 1057, 1058–70 (2007) (asserting that a rational actor in Radack’s position would not conclude that the Justice Department failed to disclose the emails to the federal district court).

\textsuperscript{198} H.R. Con. Res. 175, 85th Cong. July 11, 1958, 72 Stat. B12 (1958) (“[T]he sense of the Congress that the following Code of Ethics should be adhered to by all Government employees . . . . Expose corruption wherever discovered.”). But cf. Kenneth W. Dam, The Special Responsibilities of Lawyers in the Executive Branch, 55 CHI. BAR REC. 4, 8 (1974) (asserting that this Concurrent Procedure should not “be regarded as having the force of law [because] the legislative history itself states that it ‘creates no new law’.”).

"reasonably believe[] evidences . . . a violation of any law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

The statute applies to many but not all executive-branch employees. In general, it applies to civil service employees, to career appointees in the Senior Executive Service, and to employees in the "excepted service" unless their positions have been "excepted from the competitive service because of [their] confidential, policy-determining, policy-making, or policy-advocating character." It does not apply to military service members or to employees of the FBI, CIA, NSA, or any other agency or unit of an agency that the President determines has as its "principal function . . . foreign intelligence or counterintelligence." Employees of the judicial and legislative branches are also excluded from its coverage.

Employees can blow the whistle internally by disclosing the information to another government official, such as an inspector general, or externally by disclosing it to someone outside government, such as a member of the press. Where disclosure of the information is not "specifically prohibited by law," the employee may choose either internal or external disclosure. But if disclosure of the information is


204. If the employee is disclosing information the disclosure of which is "specifically prohibited by law," including information that is "specifically required by Executive order to be kept secret," then the employee will be protected from retaliation only if he discloses the information to an agency Inspector General, to the Special Counsel, or to another official designated by the agency head. Otherwise, the employee is not protected against retaliation. 5 U.S.C. § 2302(b)(8)(A)–(B) (2000); see H.R. REP. NO. 103-769, at 18 (1994), quoted in L. PAIGE WHITAKER, CONG. RESEARCH SERV., THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW 4 (2007), available at http://www.fss.org/gsp/crs/raise/RL33918.pdf.

205. While the Whistleblower Protection Act purports to protect any disclosure, the Court of
"specifically prohibited by law," then in order to be protected from reprisal, the government employee must disclose the information internally to one of several identified government officials.\textsuperscript{206}

Many government lawyers are within the class of employees protected by the statute.\textsuperscript{207} For these lawyers, what effect does the Federal statute have on their professional obligation of confidentiality under state ethics rules? Several commentators have attempted to answer this question.

The first to examine this question was Roger Cramton, who in 1991 concluded that the whistleblower statute supersedes state ethics rules because of the Constitution's Supremacy Clause.\textsuperscript{208} But Cramton was writing before Congress's 1998 enactment of the McDade Amendment, which requires that federal government lawyers comply with state legal ethics rules.\textsuperscript{209} In the post-McDade Amendment era, one can no longer rely on the Supremacy Clause to privilege federal whistleblower protection over state confidentiality rules.

A second commentator, Jesselyn Radack (who blew the whistle on alleged government misconduct as described at the beginning of this

Appeals for the Federal Circuit—the only appellate court with jurisdiction over whistleblower lawsuits—has construed the statute narrowly, and has excluded from protection disclosures to supervisors within the chain of command, to co-workers, and to suspected wrongdoers. Radack, \textit{supra} note 10, at 136 n.76 (citing Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1344, 1351 (Fed. Cir. 2001)).


\textsuperscript{207} Government lawyers have filed whistleblower claims, primarily for internal whistleblowing. See, e.g., Kall v Dept. of Agric., 479 F.3d 821 (Fed. Cir. 2007) (rejecting whistleblower claim by government employee who was licensed as a lawyer and allegedly disclosed government misconduct to Justice Department officials and federal district court clerk); Buckley v. Social Sec. Admin., 125 Fed. Appx. 988, 989–90 (Fed. Cir. 2005) (rejecting government lawyer's whistleblower claim after he allegedly made an internal disclosure); DelLeonardo, 2006 M.S.P.B. 269 (2006) (remanding for further consideration of government lawyer's claim that she was retaliated against for internal whistleblowing).

\textsuperscript{208} Cramton writes:

Although the whistleblower provisions deal expressly only with retaliatory actions of the employing agency, the application of professional discipline by a state disciplinary board is likely to be precluded. If that were not the case, the federal goal of assuring disclosure of official wrongdoing would be reweighted by state law, which expresses a contrary policy of protecting confidences. The supremacy clause assures that the federal policy of disclosure prevails over the inconsistent state policy of confidentiality.

Cramton, \textit{supra} note 10, at 312. Cramton noted that no lawyer had attempted to defend disclosure using the Whistleblower Protection Act and acknowledged that there was uncertainty about the interaction of whistleblower protection with the confidentiality duty. \textit{Id.} at 314–15.

section), has argued that government lawyers are permitted to make whistleblowing disclosures because the confidentiality rule has an exception permitting disclosure of information in order "to comply with other law." But Radack's argument would be persuasive only if the federal whistleblowing law actually required government employees to blow the whistle on government wrongdoing. A third commentator, James Moliterno, recently asserted that the federal whistleblowing statute functions as the government's consent to lawyers' disclosure of wrongdoing. But Moliterno never addresses whether the statute's provision restricting disclosures that are "specifically prohibited by law" prevents government lawyers from blowing the whistle externally.

What is the proper application of the whistleblowing statute to government lawyers? For purposes of blowing the whistle on wrongdoing, are lawyers no different from other government employees? Does their professional duty of confidentiality simply melt away in the face of information evidencing "a violation of any law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety"? Does the restriction on disclosures "specifically prohibited by law" apply to information that is covered by a lawyer's ethical duty of confidentiality? If so, then a government lawyer may blow the whistle only through internal disclosure to the specified government officials.

The Merit Systems Protection Board, the administrative agency that adjudicates whistleblower claims, has ruled that when the statute specifies

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210. Radack, supra note 10, at 133–35 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2007)).
211. Moliterno, supra note 10, at 644–47.
212. In addition, Moliterno incorrectly asserts that another statute, 28 U.S.C. § 535(b), allows government employees—including lawyers—to disclose criminal misconduct to those outside the government. Id. at 644 ("Statutes such as 28 U.S.C. § 535(b) . . . are express waivers of confidentiality . . . ."). But § 535(b) requires government employees to make such disclosures to the Attorney General, not outside the government. 28 U.S.C. § 535(b) (2000 & Supp. 2005) states:

Any information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate . . . .

Moliterno is not the only commentator to misconstrue this statute. Steven Berenson also asserts that "to the extent that [28 U.S.C. § 535(b)] trumps the broader duty of confidentiality owed by an attorney to their clients, it . . . represents a narrowing of the scope of confidentiality that government attorneys can offer to their clients." Berenson, supra note 10, at 40 (footnote call number omitted). But this statute does not trump confidentiality at all because it requires reporting of wrongdoing within the client to the Attorney General, not reporting outside of the client.

disclosures that are "specifically prohibited by law," it refers only to disclosures that are prohibited by statute or by executive orders dealing with classified information. 214 Legislative history supports a narrow reading of this provision, as Congress was concerned that agencies would restrict the ability of employees to blow the whistle on wrongdoing by issuing regulations mandating confidentiality. 215

Congress did not differentiate between government lawyers and other government employees in its whistleblower protection. One may question whether it is appropriate to allow government lawyers to be as free to publicly disclose alleged government misconduct as are other government employees. 216 As Roger Cramton has noted, government lawyers should be able to reveal an alleged "cover-up of corrupt conduct," but the federal whistleblowing statute may go "too far in eroding the loyalty and confidentiality that government lawyers owe to the governmental client." 217 In light of a lawyer's obligation to communicate with her client, 218 should not a lawyer be required to attempt to solve the problem internally, and go outside only if internal measures are ineffective? 219

As a policy matter, the federal government's whistleblower protection seems to go too far in allowing government lawyers to blow the whistle externally without first requiring them to try internal whistleblowing. Until Congress does differentiate between government lawyers and other government employees in its whistleblower protection, the federal statute signals the government's consent to its lawyers' disclosure of government wrongdoing.

This Part has discussed in detail how the federal government's Whistleblower Protection Act applies to executive-branch lawyers. State

214. Kent, 56 M.S.P.R. 536, 542-43 (1993) (disclosure prohibited by Federal Acquisition Regulation was not "specifically prohibited by law" under whistleblower statute).
215. Id. (discussing legislative history); Cramton, supra note 10, at 311-12 (same).
216. Courts are split on whether corporate in-house counsel should be treated the same as other corporate employees for the purpose of retaliatory discharge claims, which are the common law analog to statutory whistleblowing claims. Compare Gen. Dynamics Corp. v. Superior Court, 876 F.2d 487, 495-96, 504-05 (Cal. 1989) (permitting corporate in-house counsel to pursue retaliatory discharge claim as long as the claim can be established without breaching attorney-client privilege), with Balla v. Gambro, Inc., 584 N.E.2d 104, 105-09 (Ill. 1991) (prohibiting corporate in-house counsel from bringing retaliatory discharge claim).
217. Cramton, supra note 10, at 309, 213 ("If those are permitted disclosures, the confidentiality duties of lawyers employed by the federal government have been significantly eroded.").
219. See id. 1.13 (requiring an entity lawyer to disclose wrongdoing up the chain of command within the entity, and permitting the lawyer to make external disclosure if the entity's leadership fails to adequately address the wrongdoing); see also Orly Lobel, Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations, CAL. L. REV. (forthcoming 2008).
and local government lawyers may receive similar protections, depending on the scope of the applicable whistleblower laws and their state ethics rules. A similar analysis of particular state and local whistleblower protection laws would be required to determine whether those laws serve as the government's consent to disclosure by government lawyers.


The coverage of whistleblower statutes is broad, but not comprehensive. But even government lawyers who fall outside the protection of whistleblower statutes may be able to disclose past government wrongdoing. Two lines of common-law decisions support the government lawyer's ability to disclose past government wrongdoing. First, in construing the government's evidentiary privileges, courts have found exceptions to those privileges for government wrongdoing. Second, courts have permitted lawyers for a fiduciary to disclose the fiduciary's wrongdoing to the beneficiaries. The following section addresses these common-law doctrines.

The norm of exposing government wrongdoing surfaces not just in whistleblower protection statutes, but also in court decisions construing the government's evidentiary privileges to allow the exposure of government wrongdoing. These courts have found that a government's very legitimacy depends on its abiding by its own laws. They have found a "strong public interest in honest government and in exposing wrongdoing by public officials" and have concluded that concealing government wrongdoing "would represent a gross misuse of public assets." One long-time observer put it this way: "If there is wrongdoing in government, it must be exposed. . . . [The government

220. Westman & Modisett, supra note 199, at 66-76.
221. In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007) ("Public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority . . . .").
222. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997).
223. Id. at 915-21 (denying White House claim of attorney-client privilege in Independent Counsel's investigation); see also In re A Witness Before Special Grand Jury 2000-2, 288 F.3d 289, 293 (7th Cir. 2002) (denying former Illinois Secretary of State George Ryan's assertion of attorney-client privilege in federal criminal investigation ("It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power.").
lawyer’s] duty to the people, the law, and his own conscience requires disclosure..."224

One finds these statements in cases dealing with the government's evidentiary privileges.225 Across a range of different evidentiary privileges, courts have limited the government's ability to keep secret information about government officials' wrongdoing. This Part examines governmental attorney-client, deliberative-process, state-secrets, and presidential-communications privileges. In each of these areas, courts have rejected governmental privilege where the privilege would prevent disclosure of government wrongdoing.

In the last decade, four federal appellate courts have examined whether governments can assert attorney-client privilege in the face of federal grand jury investigations of alleged corruption.226 The first two of these decisions arose out of Independent Counsel Kenneth Starr's investigation of the Clinton White House227 and involved a federal executive-branch lawyer disclosing information about alleged wrongdoing to another federal executive-branch lawyer, the Independent Counsel, through the mechanism of a grand jury subpoena. Since most executive-branch employees have a statutory obligation to disclose evidence of wrongdoing to the Attorney General228 and the Independent Counsel stood in the role of the Attorney General for matters under its jurisdiction,229 these cases might be seen as simple applications of the mandatory-reporting statute in the Independent Counsel context. Alternatively, one might argue that there was no breach of lawyer confidentiality in these cases at all, as long as one conceives of the lawyer's client as the entire executive branch.230 But the courts in these cases did not base their decisions on these theories. Instead,

225. See, e.g., In re Sealed Case, 121 F.3d 728 (D.C. Cir. 1997).
226. In addition, the Sixth Circuit ruled that the City of Detroit could assert attorney-client privilege to prevent disclosure in a grand jury investigation, but remanded for further determination of whether the city council's private meeting with its lawyer was legal under state open government laws. In re Grand Jury Subpoena, 886 F.2d 133, 138–39 (6th Cir. 1989). Similarly, New Jersey appellate court allowed a locality to assert attorney-client privilege in a state grand jury investigation. In re Grand Jury Subpoenas Ducos Tecum by Sussex County on Farber, 574 A.2d 449, 454–55 (N.J. Ct. App. Div. 1989) [hereinafter In re Farber].
227. In re Grand Jury Subpoena Ducos Tecum, 112 F.3d at 913–14, 915–21 (rejecting President Clinton's claim of the privilege); see also In re Lindsey, 158 F.3d at 1263 (same).
228. 28 U.S.C. § 535(b) (2000 & Supp. V 2005). But see Dam, supra note 198, at 7 (asserting that although this statute requires agency heads to report criminal violations to the Attorney General, it does not require government employees to report them to the agency head).
230. Cf: Paulsen, supra note 11, at 487.
the courts seemed to assume that the client was a particular government agency, and that disclosing the information would breach the lawyer's confidentiality obligation to that agency. The courts justified allowing this breach of confidentiality with general statements about the repugnance of keeping government wrongdoing secret.

The remaining two appellate cases involved federal criminal investigations of corrupt state governments. In a case arising out of a federal investigation of former Illinois Secretary of State George Ryan, the Seventh Circuit ruled that the state's interest in lawyer confidentiality must give way to the federal government's interest in rooting out government wrongdoing. In a case involving former Connecticut Governor John Rowland, the Second Circuit ruled that the state's interest in lawyer confidentiality prevailed over the federal government's law enforcement interest, relying in part on a Connecticut statute indicating that the state government can assert attorney-client privilege in any governmental proceeding.

With respect to all three types of executive privilege (presidential communications, deliberative process, and state secrets), courts have rejected government claims of privilege where application of the privilege would conceal government wrongdoing. The Supreme Court ruled in United States v. Nixon that President Nixon’s claim of the presidential-communications privilege had to give way to the governmental interest in uncovering evidence of wrongdoing. In a case rejecting a claim of the deliberative-process privilege, a federal district court noted that while there is a public interest in the deliberative-process privilege, there is also a competing public interest in ensuring “the basic right of the citizen to petition his government for the redress of grievances.”

231. In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 915–21 (referring to “the White House” as the client).
232. In re Lindsey, 158 F.3d at 1263 (referring to “the public's interest in uncovering illegality among its elected and appointed officials”).
234. In re Grand Jury Investigation, 399 F.3d 527, 533–36 (2d Cir. 2005). The argument for limiting government attorney-client privilege would seem to apply with equal force in civil litigation where there are allegations of wrongdoing by government officials, but courts have not accepted these arguments. See, e.g., In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007) (“[I]n civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity.”).
236. Roez v. Bd. of Trade, 36 F.R.D. 684, 689, 690 (N.D. Ill. 1965) (permitting disclosure of otherwise privileged government documents because plaintiff alleged official misconduct and “has shown (1) that there is a reasonable basis for his request and (2) that the defendant government agents
both the presidential-communications and deliberative-process privilege, the executive branch itself has publicly disclaimed any desire to withhold information that would disclose government wrongdoing.\textsuperscript{237} Similarly, in a case arising out of the government’s unlawful, warrantless surveillance of a private citizen in 1963, the government admitted that its conduct had been illegal but nonetheless claimed the state-secrets privilege shielded documents regarding the surveillance.\textsuperscript{238} The district court refused to recognize this claim of executive privilege because it would prevent discovery of government conduct that was admittedly illegal.\textsuperscript{239}

The cases described above all deal with a government’s evidentiary privileges and exceptions to those privileges allowing one arm of the government to compel disclosure of information related to government officials’ misconduct. Such exceptions to evidentiary privileges do not necessarily imply an analogous exception to a confidentiality duty.\textsuperscript{240} But these exceptions do suggest that the government has a lessened interest in keeping confidential information about its own misconduct.

Additional support for the government lawyer’s ability to reveal wrongdoing can be found in cases dealing with the obligations of lawyers who represent fiduciaries. A lawyer who represents a fiduciary may reveal

\begin{itemize}
  \item played some part in the operative events\textsuperscript{6}); see In re Sealed Case, 121 F.3d at 746 (stating that the “[d]eliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred”).

\textsuperscript{237} See, e.g., Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Department and Agency General Counsel 1 (Sept. 28, 1994) (“In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.”); MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 13 (2007), available at http://www.fas.org/sgp/crs/secrecy/RL30319.pdf; see also Exec. Order No. 13,222, § 1.7 3 C.F.R. 196, 200 (2003) (prohibiting government officials from using security classification to “conceal violations of law, inefficiency, or administrative error” or “prevent embarrassment to a person, organization, or agency”). Elsewhere in the national security sphere, the executive orders authorizing the classification of national security–related information explicitly forbid government officials from using the classification system for the purpose of keeping secret government wrongdoing or other embarrassing information.


\textsuperscript{239} Id. at 101 (rejecting government’s claim of state-secrets privilege regarding FBI’s warrantless surveillance because government “[sought] to shelter improper, unauthorized acts from disclosure”). On the other hand, the government has often succeeded in asserting the state-secrets privilege as a shield against civil litigation challenging unlawful government conduct. See, e.g., ACLU v. Nat’l Sec. Agency, 693 F.3d 644 (6th Cir. 2007); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978).

\textsuperscript{240} While there is widespread recognition of a crime fraud exception to attorney-client privilege, some states still do not recognize an exception to lawyers’ confidentiality obligation for client fraud. See, e.g., Mo. RULES OF PROF’L CONDUCT R. 4-1.6(b) (2007).
the fiduciary’s wrongdoing to the beneficiary. Since government officials are fiduciaries of the public, these court decisions suggest that government lawyers may disclose government officials’ wrongdoing to the public.

This Part has argued that both whistleblowing statutes and common-law doctrines support government lawyers' ability to disclose government wrongdoing. Applying this analysis to Jesselyn Radack’s disclosure discussed at the beginning of this Part, she may have believed that the government made an incomplete disclosure to the federal court hearing John Walker Lindh’s criminal case. But, as discussed later in this Article, she should have pursued her concerns within the Justice Department prior to breaching confidentiality. The following Part asserts that government lawyers may disclose information that would be subject to mandatory disclosure under freedom of information laws.

B. Open Government Laws Should Be Construed as Client Consent to Disclosure

Jeffrey Toobin, a federal prosecutor, wrote a memoir about his experiences working on the Iran-Contra investigation. While working on that case, Toobin was subject to two separate confidentiality regimes: the legal ethics obligation of confidentiality and the secrecy and prepublication-review requirements for government officials who have access to highly classified national security information. In connection with the latter obligations, Toobin submitted his manuscript to the Central


242. See Kathleen Clark, Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory, 1996 U. ILL. L. REV. 577, 73-77 (government officials owe fiduciary duties); Green, supra note 81, at 269 (“Whether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public. It may then be suggested that the government lawyer owes some derivative duties to the public ....”).


244. Toobin was licensed in New York and thus subject to the N.Y. CODE OF PROF’L RESPONSIBILITY DR 4-101 (2007) (requiring lawyers to maintain the confidentiality of client confidences and secrets).

245. See discussion of these obligations in McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983), and Snepp v. United States, 444 U.S. 507 (1980).
Intelligence Agency, which reviewed it to ensure that it did not contain any confidential national security–related information, and it passed that review.246 His former supervisor, Iran-Contra
Independent Counsel Lawrence Walsh, was concerned about the disclosure of information about the Independent Counsel’s office. Walsh threatened to file a bar disciplinary complaint if Toobin went forward with publication. Toobin and his publisher filed suit preemptively, seeking a declaratory judgment that publication would not violate his ethical obligation of confidentiality. Walsh countersued, claiming that publication would breach lawyer confidentiality, grand-jury secrecy, and the federal regulation barring employees from disclosing nonpublic government information. While the district court refused to rule on the legal ethics claim, it rejected Walsh’s argument that grand-jury secrecy was so broad that it prohibited the manuscript’s physical descriptions of the prosecutors and rejected Walsh’s regulatory claim because it found that the only nonpublic government information revealed was trivial.247 This district court decision has no precedential value, however, because the appellate court eventually vacated it in response to the publisher’s decision to publish the book before the appellate court had an opportunity to hear the oral arguments in the case.248 Although Walsh sent a draft ethics complaint to Toobin’s then-current employer (the federal prosecutor for the Eastern District of New York), he never did file a complaint with bar authorities.

One difference between governments and private clients is the way they control their information. This difference is significant because lawyers are permitted to disclose client information if the client consents. Private individual clients generally have an ad hoc approach to controlling their information. A lawyer who represents a private client and wants to disclose particular information can seek that client’s consent. Even in the case of an entity client, the lawyer could go to the appropriate representative of the entity and ask for consent to make the disclosure.249 That individual can make the decision of whether to grant or withhold the entity’s consent on an ad hoc basis.

247. Id. at 783–84.
249. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) & cmt. 1, 1.6(a) (2007).
Governments, on the other hand, generally have a complex legal regime for the control and disclosure of their information. A government official cannot consent to a lawyer’s disclosure of this information without first considering that complex legal regime. This regime can be divided into four categories: laws that prohibit the government from disclosing information, laws that require the government to disclose information, laws that require the government to disclose certain information upon specific request, and laws that exempt some information from mandatory disclosure upon that request.

Some statutes and regulations prohibit the government from disclosing information. These include laws that protect information about individuals’ privacy, such as the Privacy Act, statutes that prevent the government from revealing information from individuals’ tax returns, and statutes, executive orders, and regulations that prevent the government from revealing security-related information, such as the requirements that the Director of National Intelligence protect intelligence sources and methods and that atomic and cryptographic information be safeguarded. In addition, executive-branch regulations prohibit employees from disclosing “nonpublic” information for their own or a third party’s benefit. The difficulty comes in determining which government information is considered to be “nonpublic.”

A second category of information-related laws actually requires the government to disclose certain information. For example, at the federal level each executive-branch agency is required to disclose a description of how it is organized, statements of its functions and procedures, descriptions of forms, “statements of general policy or interpretations of general applicability,” statements of policy and interpretations, final opinions and orders made in the adjudication of cases, and manuals and

250. See, e.g., Hollywood v. Superior Court, 49 Cal. Rptr. 3d 598, 607 (Cal. Ct. App. 2006) (disqualifying prosecutor who “virtually gave the entire [prosecution] file, owned by the public, to the filmmakers” who were considering making a film about a case against a capital defendant, perhaps in violation of laws restricting dissemination of documents to third persons), cert. granted, 149 P.3d 737 (Cal. 2006).
254. 5 C.F.R. § 2655.703 (2007); see OFFICE OF INSPECTOR GEN., DEP’T OF INTERIOR REPORT OF INVESTIGATION: JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS, 21–22 (2007) (concluding that government official violated 5 C.F.R. § 2655.703 when she shared with industry lobbyist draft policies that were not subject to disclosure under FOIA).
instructions that affect members of the public. Similar to the federal government and the states have myriad open meeting laws requiring much of the government’s business to occur in public.

A third category of information-related law requires the government to disclose information upon request. The Federal Freedom of Information Act (FOIA) imposes this obligation on all executive-branch agencies, but exempts the legislative and judicial branches. But some of what the government giveth with one hand, it taketh away with the other. The Federal FOIA has nine exceptions, the most important of which are the following: where a statute prohibits the government from disclosing the information, where an executive order authorizes the government to keep the information secret, where an evidentiary privilege would protect that document from disclosure in litigation, certain law enforcement documents, and personnel or medical files that, if released, would constitute a violation of personal privacy.

It is by no means obvious how open government laws should mesh with the law of attorney-client confidentiality. But courts and commentators have tackled this type of issue scores of times in an attempt to harmonize open meeting laws with the law on attorney-client privilege. Courts generally acknowledge the conflicting principles behind these two areas of law and attempt to find an accommodation between these two principles.

256. Id. § 552(a)(2).
257. Id. § 552(b). A list of state open meeting laws can be found at the National Freedom of Information Coalition, http://www.nfoic.org/foi-center/state-foi-laws.html.
264. See, e.g., State v. U.S. Dep’t of Interior, 298 F.3d 60, 63 (1st Cir. 2002) (discussing “the tension between the substantive provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the application of the attorney-client and work-product privileges”); Dunn v. Ala. State Univ. Bd. of Trs., 628 So. 2d 519, 529–30 ( Ala. 1993) (despite state open meeting law, state university board of trustees can meet in secret with its attorney in order to obtain attorney’s legal advice on pending litigation), overruled on other grounds by Proctor v. Riley, 503 So. 2d 786, 791 (Ala. 2004); Leman v. McCord, 432 S.W.2d 753, 756 (Ark. 1968) (attorney-client privilege, which is codified in the state’s civil code, did not create an exemption to the state’s open meeting law); Roberta v. City of Palmdale, 853 P.2d 496 (Cal. 1993) (applying attorney-client privilege exception to California Public Records Act, Cal. Gov’t Code, § 6250 (West 2007), and the Ralph M. Brown Act, CAL. GOVT’ CODE § 54950 (West 2007)); Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 492 (Cal. Dist. Ct. App. 1968) (open meeting law “did not abolish the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly
Government employees who make unauthorized disclosures of government information can be disciplined administratively or by bar authorities if they are lawyers, and they can even be subjected to criminal prosecution under limited circumstances. The government has criminally prosecuted leaks of national security and other information as thefts of government property.\textsuperscript{265}

This Article argues that to determine the scope of a government lawyer’s confidentiality duty, one must look not just at legal ethics doctrine but also at the government’s information-control regime. Dozens of courts have taken a similar approach in a related legal context: determining the scope of the government attorney-client privilege. State courts across the country have determined what information state and local governments can claim to be privileged by looking closely at state open meeting laws and coming to an accommodation between these open government laws and the traditions of confidential lawyer-client relations.\textsuperscript{266}

As discussed above, the government, like any client, can consent to disclosure of information that would otherwise be protected by lawyer confidentiality. But, unlike other clients, the government’s decision about consent is constrained by its legal regime for the control of its information. To determine the scope of the government’s consent to lawyer disclosure,

\textsuperscript{265} Requiring confidentiality?); Neu v. Miami Herald Publ’g Co., 462 So. 2d 821, 824–26 (Fla. 1985) (state sunshine law applied even to city council meetings with city attorney, preventing application of attorney-client privilege to those meetings); Harris v. Balt. Sun Co., 625 A.2d 941, 947 (Md. 1993) (construing lawyer confidentiality obligation to prohibit only disclosures that could harm client in case involving FOIA request to state public defender’s office); Prior Lake Am. v. Mader, 642 N.W.2d 729, 737 (Minn. 2002) (open meetings law has exception for meetings with attorney, but “only when there is a need for absolute confidentiality”); McKay v. Bd. of County Comm’rs, 746 P.2d 124, 128 (Nev. 1987) (state open meeting law prohibits county board from meeting with its attorney in private); Okla. Ass’n of Mun. Att’ys v. State, 577 P.2d 1310, 1314–15 (Okla. 1978) (local government could meet in secret with attorney despite state sunshine law); see also Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861, 863–64 (W. Va. 1995) (reprimanding state attorney general for revealing information in violation of lawyer confidentiality even though the information would be subject to mandatory disclosure under state freedom of information law).


\textsuperscript{266.} Roberts, 853 P.2d 496, Sacramento Newspaper, 69 Cal. Rptr. at 492; Maxwell v. Freedom of Info. Comm’n, 794 A.2d 535, 538 (Conn. 2002); Neu, 462 So. 2d 821 at 824–25; Prior Lake Am., 642 N.W.2d at 731; In re Parvin, 574 A.2d 445, 453 (N.J. Ct. App. Div. 1990) (harmonizing open meeting law with attorney-client privilege); McKay, 746 P.2d 124; Okla. Ass’n, 577 P.2d at 1314–15; Markowski v. City of Marlin, 940 S.W.2d 720, 725–27 (Tex. App. 1997); see also Harris, 625 A.2d at 947–48 (harmonizing state public defender’s confidentiality duty and his disclosure obligation under state FOIA).
one must examine the government's information-control regime. Government consent occurs as follows: If the information-control regime requires the government to disclose particular information (such as an agency's final decision in an adjudication), then the government has consented to disclosure of that information. If the government is prohibited from disclosing particular information, then the government has withheld its consent. But a great deal of government information will fall between these two extremes and the government will have the discretion to disclose or withhold the information. If the information is subject to mandatory disclosure upon request, then, as a substantive matter, the government has consented to disclosure. But as a procedural matter, the government lawyer should seek the assent of a disinterested government official.

In addition, unlike private sector clients, governments generally have policies favoring disclosure of information unless there is a specific reason not to disclose. Demonstrative of this policy are freedom of information laws, which set out a general right of access to government records and then specify exceptions to that right of access. In other words, when someone seeks disclosure of government information, there is a presumption that the government will make the information available. Where the government refuses to disclose it, the burden is on the government to justify the refusal. This presumption in favor of disclosure is consistent with principles of robust democratic government. It also has a constitutional basis, in that the First Amendment requires that government employees be permitted to discuss their work unless there is a good reason that such disclosures cannot be allowed.

One jurisdiction has already made explicit this type of exception to confidentiality in the government context. Lawyers licensed by the District of Columbia are permitted to disclose "when . . . required by law or court

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268. Creighton, supra note 10, at 294 ("[A] government lawyer's duty of confidentiality does not extend to information that the government has made available upon request to the public. In terms of the professionalism ethics rules, the government in effect has consented to disclosure.").
269. Glavin, supra note 10; see Snepp v. United States, 444 U.S. 507, 510–13 (1980) (former CIA employee breached his fiduciary obligation by failing to comply with agency's prepublication review procedure even though his disclosure contained only information that would be subject to mandatory disclosure under FOIA).
270. 5 U.S.C. § 552(g)(4)(B) (2000) (where a requester appeals an agency's denial of information, "the burden is on the agency to sustain its action").
but a government lawyer may also disclose when "permitted or authorized by law." This language seems to suggest that a government lawyer may disclose information whenever disclosure would be permitted under open government laws, such as the FOIA.

Applying this analysis to Jeff Toobin's memoir (discussed at the beginning of this Part), Toobin's disclosure appears to be consistent with the types of information that are subject to disclosure under the FOIA. Also, Toobin followed a disclosure-approval procedure similar to the procedure that the next Part recommends be adopted for all government lawyers.

IV. THE NEED FOR AN ORDERLY PROCEDURE FOR DISCLOSURES

The previous Part identified two ways in which a government lawyer's duty of confidentiality is different from that of a private sector lawyer: government lawyers may reveal information about past government wrongdoing and may reveal information that the government client must reveal under freedom of information (FOI) laws. But the substantive standard is only part of the story. There also needs to be a procedure for making such disclosures. With regard to misconduct, state supreme courts need to set up a procedure requiring the lawyer to give the government advance notice of her plan to disclose, similar to the current procedure for entity lawyers disclosing misconduct. With regard to information

272. D.C. RULES OF PROF'L CONDUCT R. 1.6(c)(2)(A) (2006) (emphasis added). The D.C. Court of Appeals adopted a revised set of professional rules effective Feb. 1, 2007. Alberto Mora's disclosure of information occurred prior to the effective date of the new rules, and so this Article analyzes his conduct using the version of the D.C. Rules that were effective in 2005. All other discussion of the D.C. Rules in this article will refer to the 2007 version.

273. Id. R. 1.6(c)(2)(B) (emphasis added).

274. A comment accompanying the rule suggests a narrower interpretation. The comment states that this provision "is designed to permit disclosures... which the government authorizes its attorneys to make in connection with their professional services to the government." Id. R. 1.6 cmt. 37, suggesting that this provision is aimed only at disclosures that are necessary for the government lawyer to carry out her responsibilities. On the other hand, the D.C. confidentiality rule already has another exception for disclosures that are "implicitly authorized... in order to carry out the representation." Id. R. 1.6(e)(4). In light of the existence of this "implicitly authorized" exception, the government-lawyer exception should be read as permitting government lawyers to disclose information that may be disclosed under the open government laws.

275. Model Rule 1.13(b) states:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not
covered by FOI laws, governments need to set up a procedure so that someone other than the lawyer wishing to disclose makes the determination whether this information must be disclosed under the law. Otherwise, lawyers attempting to apply the FOI laws themselves are likely to have a bias favoring disclosure.276 This Part sketches out a few ideas about the appropriate procedures for government lawyers’ disclosing government wrongdoing and other government information.

A. Procedures for Disclosing Government Wrongdoing

Lieutenant Commander Matt Diaz had spent eighteen years in the Navy when he was assigned to be a legal advisor at Guantanamo in 2004. While there, he became concerned that the U.S. government was treating prisoners inhumanely and violating their rights under the Geneva Conventions and the U.S. Constitution. Earlier, a human rights organization had filed a lawsuit on behalf of the prisoners, requesting a list of all those being held at Guantanamo. The government had resisted that demand. Just before his Guantanamo assignment was to end, Diaz anonymously sent a list of the Guantanamo prisoners to a lawyer at the human rights organization. The lawyer turned the list over to the judge in the case, who gave it to court security personnel. Fingerprint analysis pointed to Diaz, who was eventually convicted after a court martial. Diaz said, “Obviously I chose the wrong path . . . [M]y career is in . . . much more serious jeopardy than it would have been if I had raised the issue to my chain of command.”277

There are better and worse ways for government lawyers to blow the whistle on misconduct. Contrast the approach of Navy JAG Matt Diaz, who, without consulting other government officials, secretly and anonymously sent a list of Guantanamo detainees to a human rights organization, with that of Navy General Counsel Alberto Mora, who joined with other government employees who also opposed mistreatment

necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2007).

276. See Glavin, supra note 10, at 1836–43.

of prisoners and argued internally for a change in policy. 278 Diaz was prosecuted and sentenced to six months in prison for the unauthorized release of defense information. 279 Mora received a “Profile in Courage” award from the JFK Library. 280 Diaz’s situation points out the need for an orderly procedure for disclosures.

This Article has argued that, as a substantive matter, government lawyers are permitted to disclose government wrongdoing. But even if a government lawyer’s confidentiality duty has an exception for wrongdoing, the lawyer still must communicate adequately with and be loyal to her client. 281 Because of these other duties, the lawyer needs to take certain steps prior to disclosing government wrongdoing. Responsible officials may not even be aware of the wrongdoing, and the lawyer should alert such officials to the problem prior to disclosing the wrongdoing to the public. 282 If the wrongdoing is ongoing, the government needs to make changes so that it does not continue the misconduct. If the wrongdoing has already occurred, the government may need to rectify the harm that the past wrongdoing has caused. In either case, the client deserves the opportunity to plan for the forthcoming disclosure of the wrongdoing.

In light of these considerations, the lawyer needs to bring the wrongdoing to the attention of a responsible party within the government client prior to disclosing the wrongdoing outside the client. The responsible party should be given the opportunity to make the appropriate changes to prevent future wrongdoing or remedy the harm caused by the past wrongdoing. Only after ensuring that a responsible party has received notice would it be appropriate for the government lawyer to disclose the wrongdoing outside the client.

Outside disclosure should proceed first to another government official or entity that properly has the authority to respond to the specific allegations of wrongdoing. For example, if Cindy Ossias had attempted to convince the California Insurance Commissioner of the need to change his

278. Egerton, supra note 277.
281. MODEL RULES OF PROF’L CONDUCT R. 1.4 (b) (2007) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); Id. R. 1.7 cmt. 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).
282. Id. R. 1.4 cmt. 6 (“When the client is an organization or group, . . . the lawyer should address communications to the appropriate officials of the organization.”).
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policies and had been unsuccessful, then she could have appropriately approached either the state attorney general, state auditor, or state legislature, all of which would have had authority to investigate the alleged misconduct. Only if other government agencies are unwilling or unable to take action may the lawyer then disclose the misconduct to the public or the press. This step-wise disclosure approach is more moderate and nuanced than that present in most state and federal whistleblower protection statutes, which permit disclosure to anyone.

This proposed procedure is similar to—but not exactly the same as—the procedure prescribed for entity lawyers in the new legal ethics rule for entities that the American Bar Association adopted after Sarbanes-Oxley. Under the rule, an entity lawyer must attempt to remedy the illegal conduct within the entity client. Only if the entity client fails to take appropriate action may the lawyer disclose information outside the client. Under this proposed procedure for government lawyers, the lawyer must first bring the information to the attention of an appropriate actor within the government client. That official may happen to agree with the lawyer's legal assessment and therefore begin taking corrective action. On the other hand, the official may convince the lawyer that the alleged wrongdoing was not actually illegal. One lawyer who could have benefited from this approach was Joyce Crandon, who was general counsel of the Kansas Office of the State Banking Commissioner, a bank regulatory agency. Another agency employee told Crandon that a deputy commissioner had obtained loans from two of the regulated banks and Crandon believed that the loans were illegal under federal and state banking laws. But she did not raise this concern with the deputy commissioner or the commissioner. Instead, she reported it to the Federal Deposit Insurance Corporation (FDIC). The Commissioner learned that Crandon reported this situation to the FDIC while he was meeting with the

283. For an example of partial step-wise disclosure, see Carol D. Leonnig & Josh White, An Ex-Member Calls Detainee Panels Unfair Lawyer Tells of Flawed 'Combatant' Rulings, WASH. POST, June 23, 2007, at A3 (describing how naval reserve lawyer Stephen E. Abraham repeatedly complained to his commander about problems with the Combatant Status Review Commissions at Guantanamo before providing an affidavit about those problems for a habeas proceeding on behalf of one of the Guantanamo prisoners). Abraham's approach was not completely step-wise; he could have gone outside the client to Congress before going to court.


285. Id. R. 1.13(c).


FDIC, and he proceeded to fire Crandon. A state court rejected her wrongful discharge claim, finding that she had improperly disclosed confidential information.288

Under this proposed procedure, if the lawyer has given internal notice, then, after a reasonable time has passed, the lawyer may publicly disclose the wrongdoing even if the government has taken remedial action. This different result reflects the different values at stake in entity and government representation. The entity procedure is aimed at having the lawyer take action to ensure that the entity protects itself from disloyal servants.289 If the entity succeeds in remedying the situation, there is no need for the lawyer to make a public disclosure. This proposed government procedure is simply aimed at giving the government a heads-up prior to the disclosure of wrongdoing.

The substantive standard—permitting lawyers to disclose government wrongdoing—reflects the fact that governments do not have a legitimate interest in keeping wrongdoing secret. This procedural requirement—requiring lawyers to notify responsible government officials prior to public disclosure—will both help the government plan for disclosure and help prevent the government lawyer from making the kind of mistake that Joyce Crandon and Matt Diaz made. The substantive standard serves to protect the public from government wrongdoing. The procedure serves to protect governments from overzealous government lawyers.

In light of the statutory and common-law support for the government lawyer’s ability to disclose government wrongdoing, state supreme courts should amend their professional rules to clarify that government lawyers may disclose past government wrongdoing and to create an appropriate procedure for such disclosure. The rule should clarify that a government lawyer must first exhaust the internal process before disclosing the wrongdoing outside the government.

An explicit exception would assist lawyers in clarifying their legal obligations. Setting out a specific and orderly procedure for these lawyers to follow is necessary because the government ought to be given the benefit of notice of forthcoming disclosure.

288. Id. at 94–100. The Kansas Supreme Court affirmed the trial court’s rejection of Crandon’s wrongful discharge claim, but did not find that Crandon had violated the professional ethics rules. It found that Crandon acted with "reckless disregard for the truth or falsity of the disclosure" when she reported the allegations to the FDIC before investigating the truth of her suspicions. Id. at 102–04.
B. Procedures for Disclosing Information that Must Be Released Under Freedom of Information Laws

Darrell McGraw was the elected Attorney General of West Virginia and representing the Division of Environmental Protection (DEP) in litigation to enforce state landfill laws. During a meeting with the landfill owner, a representative of the DEP indicated that its position on landfill requirements might change. Attorney General McGraw later revealed this possible DEP change in position to a member of the public who was part of an environmental group. That revelation could have undermined the political ability of DEP to make the change, so DEP filed ethics charges against McGraw based on this unauthorized disclosure.290 McGraw argued that DEP had already revealed this information to the opposing party in a case and that this information would have had to be disclosed under the state FOIA. But the West Virginia Supreme Court ruled that the information was still subject to confidentiality under Rule 1.6 of West Virginia’s Rules of Professional Conduct and that the duty of confidentiality under that rule was not subject to waiver through disclosure to third parties as was the attorney-client privilege.291 The court publicly reprimanded Attorney General McGraw for the unauthorized disclosure.292

If one accepts the assertion that the government lawyer’s confidentiality obligation does not, as a substantive matter, cover information that must be disclosed under FOI laws, then it would seem that Darrell McGraw did not violate his duty of confidentiality. But this


The inability of the West Virginia Attorney General to authorize his own disclosures may reflect the fact that the West Virginia Attorney General does not have the same kind of decision-making authority that the U.S. Justice Department has. The McGraw court explained that in West Virginia, there is “a traditional attorney-client relationship between the Attorney General and the state officer he represents.” McGraw, 461 S.E.2d at 862. The court also noted that “the role of the Attorney General is not to make public policy in his own right on behalf of the state[,] but rather to exercise his skill as the state’s chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation . . . .” Id. (internal quotations omitted) (quoting Manchin v. Browning, 295 S.E.2d 909, 920 (W. Va. 1982)). Lawyers who by statute are given more decision-making authority may also have the ability to consent to disclosures on behalf of their clients.
Article asserts that there is also a procedural component to the duty of confidentiality in order to ensure that the lawyer is not making a biased judgment about application of the FOI laws. The Supreme Court has recognized a similar procedural component to a confidentiality duty imposed on government employees who have had access to classified information. In *Snepp v. United States*, the Court imposed a constructive trust on book royalties earned by a former CIA employee who published his book without first submitting it to the agency for prepublication review.\footnote{444 U.S. 507, 510 (1980).} Even though the book did not contain any confidential information,\footnote{Id. at 509–10 (government stipulated that Snepp’s book did not reveal any classified information).} the Court nonetheless found that Snepp violated his fiduciary duty to safeguard confidential information by refusing to submit to the designated prepublication-review procedure.\footnote{Id. at 508 (finding that his “promise [to submit the manuscript for prepublication review] was an integral part of Snepp’s concurrent undertaking ‘not to disclose any classified information’”).} Similarly, government lawyers need to deal with both a substantive confidentiality standard as well as procedures for protecting confidential information.

In order to implement this FOI exception in an orderly fashion, governments need to adopt a procedure for reviewing requests for disclosure. The federal government does not have such a procedure in place for government lawyers.\footnote{But cf. Pillard, supra note 132, at 712 (noting that the Justice Department’s Office of Legal Counsel publishes the opinions it issues only after “seek[ing] permission from the requestors”).} But two federal agencies do have similar procedures in place: the Securities and Exchange Commission (SEC) has a screening procedure for its employees who have had access to confidential investigations and the CIA has a prepublication-review procedure for employees with security clearances. The SEC regulation prohibits its employees from using “confidential or nonpublic information” when writing, lecturing, or teaching, and implements that prohibition by requiring employees to submit all publications and prepared speeches to the SEC General Counsel’s office for review.\footnote{17 C.F.R. § 220.735-4(c)(1)–(2) (2007). See also 5 C.F.R. § 2635.703(a) (2007), which prohibits all executive branch employees from “the improper use [by any executive-branch employee] of nonpublic information to further his own private interest or that of another.” The regulation further states that nonpublic information includes information that is
* routinely exempt from disclosure under the FOIA, 
* otherwise protected from disclosure by statute, Executive order or regulation, 
* is designated as confidential by an agency, or 
* has not actually been disseminated to the general public and is not authorized to be made available to the public on request.
5 C.F.R. § 2635.703(b).} Similarly, the CIA
requires its employees to submit all writings related to the CIA to its Publications Review Board, which vets the documents to ensure that they do not contain any confidential national security information.\textsuperscript{298} While these review procedures are not without problems,\textsuperscript{299} they do provide an authoritative answer to the question of whether the government employee can disclose particular information.

\textbf{CONCLUSION}

It is not uncommon for current and former government lawyers to disclose information that appears to be covered by their professional obligation of confidentiality. In their memoirs, these lawyers generally do not acknowledge their professional confidentiality obligation.\textsuperscript{300} The actual practice of current and former government lawyers and the degree to which they acknowledge and comply with their professional duty of confidentiality are issues that deserve further attention.

This Article has examined the content of the government lawyer's professional duty of confidentiality, and in particular how that duty interacts with whistleblower protection and open government laws. It examined the complex question of the identity of a government lawyer's client, noted that many government lawyers make decisions that are normally reserved for clients, and found that those lawyers can appropriately consider the public interest in making those decisions.

The Article began with the story of Alberto Mora, who told a reporter about the internal Defense Department legal debates over the treatment of prisoners at Guantanamo. This information about the content of a lawyer's advice to his client would be subject to the attorney-client privilege, and thus is not subject to mandatory disclosure under the Freedom of Information Act.\textsuperscript{301} But Mora was describing what he saw as misconduct on the part of other government officials. Under the analysis in this

\textsuperscript{298} See McGeehne v. Casey, 718 F.2d 1137, 1139 (D.C. Cir. 1983); United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) (upholding requirement that former CIA employees submit manuscripts for prepublication review for classified information).


\textsuperscript{300} See, e.g., Jack Goldsmith, The Terror Presidency: Law & Judgment Inside the Bush Administration (2007). Goldsmith acknowledges his confidentiality duty based on national security classification, id. at 12, 219, but not his duty of confidentiality as a lawyer. While Goldsmith does not analyze his professional duty of confidentiality, he does point out that his memoir continues a long tradition of memoirs by former government lawyers. Id. at 221–23 (citing twenty-nine memoirs as well as law review articles, interviews, and testimony).

Article, as a substantive matter, Mora would be able to disclose government misconduct. As a procedural matter, Mora attempted to address the problem within the government, going all the way up to the Defense Department's General Counsel. 302

As a substantive matter, government lawyers may disclose government wrongdoing and may reveal information that is subject to disclosure under freedom of information laws. But as a procedural matter, state supreme courts and governments need to establish procedures for government lawyers to follow when disclosing wrongdoing or other information that would be subject to disclosure under freedom of information laws.

302. Mayer, supra note 1, at 35.
learned from the long and somewhat eventful history of intelligence oversight may be fruitful. What has worked well? What has proved redundant or unduly subject to politicization?

The intelligence experience offers a fourth additional lesson. Homeland security is arguably the most legally intensive of the national security law fields. There are complex questions of constitutional law involving federalism, the military, privacy, and federal regulation of the private sector. It is no surprise that Northern Command has the largest staff judge advocate's office. What's more, many of these issues are new issues, for which there is no practice or precedent on which to call. That means that lawyers should not just advise on the substance and process of law. They should actively and aggressively appraise the implementation of law for unintended consequences and efficacy. As the DNI is required to report to the president and the Congress each year on the state of intelligence law, homeland security lawyers should identify any statute, regulation, or practice that impedes the ability of their agency to fully and effectively secure the nation. Likewise, policymakers and lawyers should take note from the intelligence experience - law can facilitate response, but legislation marks a beginning of the process, not its conclusion. Homeland security like intelligence ultimately depends on the human factor - leadership and the moral courage to face hard risks and make hard choices.

10 The National Security Lawyer

This book has considered national security law and process in the context of four security threats. First is the threat of attack by nonstate and state-sponsored or supported actors using terrorist means. Overseas, this threat is realized on a daily basis. Within the United States the threat is continuous, but intermittent. The threat of high-explosive attack, like car and truck bombs, targeted suicide bombings, or the sabotage of aircraft, is most likely to materialize. The threat of catastrophic attack with nuclear weapons has the greatest potential impact on our way of life and in terms of human cost. It is in relation to this threat in particular that we need to evaluate and test national security law and process, both because of the potential consequence and because of the focus the enemy has placed on this means of attack.

Second, U.S. constitutional values may ebb and wane in an endless conflict against state and nonstate actors engaged in acts of terrorism or posing the threat of terrorism. In light of the interminable nature of this threat, assertions of presidential authority made in extremis may become embedded in U.S. practice and law without a corresponding application of checks and balances. Left outside the reach of effective and independent mechanisms of appraisal, broad assertions of executive authority may in time diminish both the principles of law that define American life as well as the physical security at which they are directed.

Third, sincere policy differences, as well as those that are politically inspired, regarding the nature of the terrorist threat and the corresponding measure of response may result in a zero-sum compromise; that is, a diminution of security or a diminution of law, rather than contextual formulas that advance both at once. If the executive needs broad and rapid authority to engage in intelligence collection - as it does - the better course is not to limit the authority, for fear of misuse, but to increase the opportunities for meaningful internal and external appraisal. Such appraisal will deter misuse, but as importantly, encourage effective use. In this enduring conflict we may exhaust our resources or our principles in a manner that leaves us unwilling
or unable to effectively address this century’s other certain crises, including the proliferation of weapons of mass destruction to unreliable state actors, the advent of pandemic disease, and environmental degradation and change. This book has focused on the threat of terrorist attack because this is the threat that today drives the legal debate about the president's constitutional authority. More generally, it drives the purpose and meaning of national security law. It will continue to do so. It is also the threat with the greatest potential to transform U.S. national security, in both a physical and a values sense. The importance of addressing other issues, such as conflict in the Middle East, totalitarian regimes, or pandemic disease, must not be overlooked. Each bears the potential to spiral beyond control resulting in catastrophe at home and overseas. Each of these issues warrants full consideration of the national security instruments and processes described in this book.

In each context, law and national security lawyers may contribute to national security in multiple ways. First, the law provides an array of positive or substantive instruments the president may wield to provide for security. Second, the law provides procedural mechanisms offering opportunities to consider, validate, appraise, and improve policy, as well as ensure its lawful execution. These mechanisms include the horizontal separation of constitutional powers at the federal level, and the vertical separation of powers between the federal government and state government. They are found as well in statute and in internal executive directive.

The most effective means of appraisal are often found through informal practice. Informal contact allows participants to speak with a freedom not permitted or not often found when hearing the institutional mantle of an office or branch of government. Consider the difference in reaction between the counsel that sits down with the policymaker for a discussion and the counsel who requests the policymaker to put down in a memorandum everything that occurred. With informal practice the role of personality and friendship can serve to facilitate information exchange and the frank exchange of views.

Third, in the international context, law provides mechanisms to achieve U.S. national security objectives. This is evident in the context of maritime security, where U.S. law is pegged to an international framework, and effective security requires international as well as domestic participation. In the area of intelligence integration, bilateral and multilateral agreements, like the PSI and bilateral aviation agreements, provide essential mechanisms for identifying intelligence, sharing intelligence, and acting on intelligence.

Fourth, the law reflects and projects American values of democracy and liberty. Values are silent force multipliers as well as positive national security tools. As Lawrence Wright, the author of The Looming Tower, and others argue, jihadists like Osama Bin Laden offer no programs or policies for governance, no alternative to Western democracy. They offer only the opportunity for revenge. Rule of law is the West's alternative to jihadist terrorism. Law, and respect for law, offers the structure of democracy, the opportunity for individual fulfillment regardless of sex, race, or creed, and a process for the impartial administration of justice. Sustained commitment to the rule of law in practice and perception will serve as a positive national security tool in curtailing recruitment of the next wave and generation of jihadists.

But law, like homeland security, is an incremental endeavor. It is dependent on sustained action, not rhetoric, and perceptions can be swept aside in a few ill-chosen moments. Law, like this conflict, requires sustained sacrifice and sustained support. Thus, divisive legal arguments should be eschewed, unless they are essential to security and there are no alternative means to accomplish the same necessary security end.

The law may contribute to national security in other ways as well. The law is a source of predictability. Through prediction, it becomes a source of deterrence. If the law is understood to permit the use of force, or the collection of intelligence, then allies and opponents alike may modulate their behavior accordingly.

Law can also be a source of calm and stability at times of crisis, guiding but not compelling decisionmakers to processes of decision that rapidly identify risks and benefits and fix accountability. Rapid decision can be obtained through secrecy and by truncating process; it can also be found through the expectation and practice that process provides. This is evident in the case of the military chain of command. This can be true with the president's national security processes as well.

The law is also a source of continuity. An enduring conflict requires enduring commitment, in values, funding, and sacrifice, and thus unity across party or factional transitions. Where essential policy is embedded in framework statutes, it is less subject to, but not immune from the vicissitudes of momentary political advantage or the policy pressures of immediacy. In a conflict marked by intermittent attacks over years, at least in the United States, law can insulate policy from the loss of public or even official attention. For example, where a tool is dependent on sustained funding and policy commitment, legal mandates can hold bureaucratic focus. And, where policy is embedded in law, intelligence and law enforcement operatives may take greater risks knowing the authority for their actions is documented in law and not dependent on classified authorities or recollections of approval.

At the same time, there is much the law cannot do. Law and process provide an opportunity for success, but do not guarantee result. Leadership, culture, personality, and sometimes good luck are as important as law. A well-crafted emergency response directive does not compel first responders to climb the stairs of a burning building - courage, leadership, and commitment do.

Law is a human endeavor that is dependent on the human factor. We are a nation of laws, but we are also a nation of men and women, or if you like a
nation of law and lawyers. It is men and women who write the law, interpret the law, and decide whether to uphold the law. Where national security is at stake, the human influence is manifest. "National security" necessarily involves the application of subjective values and not just security criteria. Further, as considered in Chapter 4, the law is as dependent on theory as it is on black-letter principle, and thus is dependent on human values and choice. Even where the law is clear, the facts rarely are, for the reasons articulated in Chapter 7. The application of fact to law, of intelligence to security, involves human judgment rather than the mechanical review of facts.

Law also involves moral courage. Field Marshal Slim, who served on the Western Front during the First World War and is considered one of the best commanders during World War II, compared physical and moral courage. He described moral courage as "a more reasoning attitude, which enables (a man) coolly to stake career, happiness, his whole future, on his judgment of what he thinks either right or worthwhile." Slim said,

I have known many men who had marked physical courage, but lacked moral courage. On the other hand I have seen men who undoubtedly possessed moral courage very cautious about taking physical risks. But I have never met a man with moral courage who would not, when it was really necessary, face bodily danger. Moral courage is a higher and a rarer virtue than physical courage.¹

Most lawyers will not have Field Marshal Slim's opportunity to test the comparative proposition. But they will have their moral courage tested. They will be tested sitting at a Principals Meeting when they have to decide whether, and how to speak up. They will be tested when they must step outside their personalities, loud, quiet, or in between, and step into a different role in order to apply the law more meaningfully. The quiet personality will be asked to make public presentations on behalf and in defense of the law. Sometimes the strong personality must sit down for the law, for example, at an interagency meeting where bureaucratic diplomacy may be the order of the day. But minutes later, in the face of the deputy secretary or national security advisor, the lawyer must have the courage to insist on attendance at a necessary meeting. In short, national security law is as contingent on the national security lawyer as it is on the law.

A. NATIONAL SECURITY LEGAL PRACTICE

In a constitutional democracy decisions are intended to be made according to law. That means that sound national security process must incorporate timely and competent legal advice. What form should that advice take?

In some cases, legal review is dictated by statute, as in the case of the Foreign Intelligence Surveillance Act, which requires designated officials, including lawyers, to certify requests for electronic surveillance or physical search before they are submitted to the FISA court. In other cases, the president has directed a specific process of legal review, for example, in areas historically prone to peril, such as covert action. However, the majority of legal advice within the national security process is not required by law or directive, but is the product of practice, custom, and the rapport, if any, between officials and their lawyers.

At the national level the daily participants are generally the same from administration to administration: the attorney general and deputy attorney general; the Office of Legal Counsel within the Department of Justice; and other agencies' general counsels, especially those at Defense, State, CIA, and DHS, as well as the chairman's legal advisor. Of course, in context, senior deputies and alters egos play an equivalent role.

Traditionally, lawyers for the president engaged in national security law have included the counsel to the president and the National Security Council's legal advisor. Practice varies as to the relative role and weight of each and the extent to which other White House lawyers, such as the deputy White House counsel, are involved in national security decision-making. If at all,² depending on administrations, and personalities, the role of the counsel to the vice president has ranged from a defining one to no role at all with respect to national security law.³

Other lawyers play central roles as well. The judge advocates general of the military services, for example, are central players in the development of military law and legal policy as well as the application of the law of armed conflict. Within the Department of Justice, the assistant attorney general for national security, the head of the Office of Intelligence Policy and Review, the Office of Legal Counsel, and the assistant attorney general for the criminal division are all central players on issues of intelligence and counterterrorism. Counsel at each of the intelligence community components and those engaged in issues of terrorism asset control and money laundering at Treasury also engage in daily national security practice. Each of these officials is supported by line attorneys who in many cases are the experts in their discipline and serve as the initial (and often) final point of contact for legal advice.

Each president, agency head, and commander will adopt his or her own approach to legal advice, ranging from active engagement with their lawyers and an understanding of the law to avoidance. Some officials do not seek legal advice unless the word "law" is mentioned and then only if it is mentioned four times in the subject line of a memo. Other officials view their lawyers as wide-ranging advisors, officials outside the policy process - non-stakeholders, and thus troubleshooters who may serve in capacity of counselor and not just legal advisors.

Officials and lawyers sometimes refer to lawyers "staying in their lane." But with national security there is rarely a street map. It is not always clear.
where the lane begins or ends, and whether the intended road is a goat path or an informational superhighway. Some lawyers will operate on a defined track—litigators litigate, Office of Intelligence Policy and Review (OIPR) attorneys process FISA requests (among other things), the AECB lawyer-reviews munitions list licenses. However, for more senior lawyers there are rarely set templates outside those dictated by law or directive for how to practice national security law. That means the individual lawyer will define the role as much as he or she will assume it. Moreover, policy officials will ultimately find those lawyers whose style and advice they trust regardless of individual assignments.

Application of national security law involves the rapid review and identification of legal issues embedded in policy options, policy decisions, and policy statements. At the NSC, for example, counsel traditionally coordinate the provision of advice to meetings of the Principals and Deputies Committees, among other tasks, and, where appropriate, attend such meetings to field questions and identify issues. However, this role appears to have varied in texture depending on whether the NSC staff are viewed as facilitators of interagency process or sources of rival legal advice to department general counsel. It also depends on the national security role assumed by the counsel to the president. In addition, NSC counsel provide internal legal advice to the president, national security advisor, and NSC staff as well as review and write memoranda to the president, issue spotting and discussing the legal issues raised. However, these roles are not defined in statute and are, outside the confines of certain narrow spheres, not defined in directive. Rather, these roles are defined by practice and the adoption or modification of past practice by successor officials.

Lawyers serving in defined billets are more likely to find continuity in the form and method of practice, but not necessarily in the substance of practice. For example, the assistant attorney general for the Office of Legal Counsel and his or her deputies generally provide constitutional advice to the executive branch and arbitrate interagency legal disputes, usually through promulgation of formal (often classified) legal memoranda. They are consulted, but are usually less active on daily issues of national security implementation and NSC policy development.

Likewise, line attorneys, as well as programmatic attorneys, are more likely to specialize in particular areas of law and find defined and generally accepted roles. This description might apply, for example, to a line attorney at the State Department who reviews export control licenses, or the attorney at the Treasury Department who reviews financial transactions with foreign states, or a Justice Department lawyer who reviews FISA applications. These lawyers play critical national security roles, but are less likely to address the breadth of national security issues identified in this book. Their lanes are relatively clear and defined.

The National Security Lawyer

In addition, lawyers serving as agency general counsel, or their equivalent, perform or oversee the performance of myriad tasks generally associated with lawyers, such as drafting legal documents, reviewing legislation, overseeing litigation, and addressing matters of budget, personnel, and contracting. Rule of law and respect for law are often defined by these tasks. Do the lawyers apply the ethics rules with reason, care, and rigor? Are legislative and public document searches conducted in earnest? These everyday tasks help to define constitutional government, involving as they do the interplay between branches of government and between the government and the public.

Harder to define is the role lawyers should take involving matters where there is discretion as to the style of practice, where the lawyer might have a choice between a proactive, active, or reactive role. In role-playing, personality can be as important as intellectual capacity and training. Not every attorney is suited to a process of decision-making that can be rapid and is conducted under stress and often involves the application of law to uncertain or emerging facts. In this context, lawyers must know when to render their best advice and let go of an issue or when to hold an issue and request time for further review, or to buck the issue up the legal line. There is rarely time to do double back for a second look. This may be difficult for lawyers who prefer the deliberative and careful speed of appellate work. It may also be difficult for lawyers who prefer practice areas oriented toward black-letter law and absolute answers. In short, national security practice requires a capacity to close on issues and make decisions, identifying nuance and caveats, if necessary.

National security practice also requires a capacity to compartmentalize work. This is true in a security sense. Lawyers operate under multiple constraints regarding what they can say and to whom based on the attorney-client, deliberative process, and state secrets privileges. (A sure way for a lawyer not to be in the right place at the right time is to garner a reputation for indiscretion.) However, by compartmentalization, I also mean an emotional and intellectual ability to move from one issue to another in rapid succession without getting stuck on just one issue. Policymakers must master this same skill. In contrast, subordinates assigned to specific issues are expected to devote their attention to a single policy issue and drive that issue up and down the chain of command.

As in other legal fields, national security lawyers should learn to subordinate matters of ego to the task of meaningfully applying the law. In doing so, they will have ample opportunity to learn the maxim that it is often the messenger who pays the price for the message. How common is the disapproving refrain, "Lawyers!" The refrain might be more aptly addressed "Legislators!" "Democracy!" or "Benjamin Franklin!"—unless, of course, it is the lawyer who has delayed decision or diluted decision out of undue
caution or concern. Lawyers must also appreciate that while steady and
careful application of the law is a hallmark of constitutional government,
in most bureaucratic and substantive contexts they are a supporting arm to
the policy process. Outside the Department of Justice, success is associated
with the policy and not the legal work that supports the policy.

Lawyers are also subject to having their advice tested, as they should.
That is part of the national security process and an essential part of internal
and external appraisal. Does the lawyer understand the facts? Does the
lawyer understand the law? Has the lawyer distinguished between law and
legal policy? However, style varies. Where the stakes are high the distinction
between understanding, testing, and bullying may be lost. Policymakers
have a duty to push. Policymakers do not become policy generals by
sitting back and waiting for events to unfold or opportunities to come their
way. Boot camp, it turns out, is sound training for national security lawyers.
National security lawyers will be tested and pushed, as they should be when
national security is at stake. The lawyers will know when a bad idea has
encountered a better idea and they must have the courage to adjust their
views; but they will also know when they have bent under pressure, knowing
the difference between a good faith argument and an inability to hold a
line.

The practice of national security law, like many areas of law, requires
endurance. However, in private practice the client has usually come to the
counsel and now expects hard and constant effort. National security law
requires comparable effort, but a different kind of endurance. Lawyers are
not always invited into the decision-making room. This reluctance reflects
concerns about secrecy, delay, and "lawyer creep" (the legal version of "mis-
creep," whereby one legal question becomes seventeen, requiring not
one lawyer but forty-three to answer). Of course, decisionmakers may also
feel that the lawyer may say no to something the policymaker wants to do.
Rule of law often depends on the lawyer being in the right place at the right
time to render advice. This is achieved by reading agendas, attending staff
meetings, and ensuring that they and not the policymaker or the secretariat
define what it is the lawyer needs to see.

National security process is never designed to convenience the lawyer.
Sometimes it is specifically designed to avoid the lawyer. Endurance means
having fresh legs in the middle of the night as well as first thing in the
morning. Some officials will wait until the late night or the weekend to
move their memos, noting "not available" for a legal clearance. The lawyer
avoids such traps by meeting deadlines, negating silent consent, and where
necessary by laying out tripwires, alerting the executive secretary of issues
they need to see, sending timely e-mail prompting inclusion in discussions,
and meeting each policy staff member one-on-one to establish expectations
and confidence.
can allow decisionmakers to focus on the policy issues at hand. Legal issues should be culled from policy agendas and intra- or inter-agency legal meetings held in advance to review options. This allows an opportunity to send issues up the legal chain rather than letting them fester, and possibly sidetrack deliberations. Moreover, just as policymakers forum shop for "can do" lawyers, or perhaps compliant lawyers, lawyers do the same, looking for lawyers who are problem solvers and do not shoot from the hip.

As in other areas of law, preparation is essential. This means reading agendas, consulting with relevant experts on an intra-agency and inter-agency basis, and taking issues up the legal chain of command in advance of meetings so that the lawyer can speak authoritatively when presented with the opportunity to do so. The opportunity may not come again.

Lawyers should also craft, and figuratively or actually, carry walk-about books to address national security issues as they arise. There is no excuse, for example, if the Northern Command staff judge advocate or counsel to the president does not have draft declarations "in the can" to address virtually every homeland security scenario. One purpose of tabletop exercises is to alert policymakers and lawyers to legal obstacles that lie ahead so that lawyers might find the means of circumnavigation before the crisis.

Preparation also entails educating the policymaker. Absent groundwork, the policymaker may respond at the moment of crisis by seeing the law only as something that allows or does not allow the policymaker to do what he wants. Contextual advice built on a foundation already laid is readily absorbed and accepted and will add greater value to the national security mission. A 3 AM conference call is no time to explain for the first time the principles of proportionality, necessity, and discrimination in targeting. Nor is the immediate aftermath of a natural disaster or terrorist attack the optimal time to explore for the first time the delicate legal policy issues raised by the deployment of U.S. military personnel in a civil context. In addition, the policymaker will understand in a live situation that the lawyer is applying "hard law"—specific, well-established, and sanctioned— and not kibitzing on policy or operational matters.

Advance education also helps establish lines of communication and a common vocabulary of nuance between lawyer and policymaker before the crisis. A policymaker who hears a good brief on civil-military deployment will be sure his or her lawyer fully participates in any subsequent decisional process. In a large and layered bureaucracy, where the lawyer may be less proximate to the decisionmaker, and cannot count on immediate access, the teaching process is equally important in defining roles as well as legal expectations; however, it is more likely to occur through submission of written memoranda.

National security law also entails the application of legal policy; however, lawyers must take care to distinguish between what is law and what is legal policy. The identification of a preferred course as between lawful options is legal policy. The identification of a better argument among available arguments is legal policy. Identification of the long-term and short-term impact of legal arguments is legal policy. For example, will other states assert the same right to act as the United States asserts, and if so, what are the long-term costs and benefits of the United States asserting such authority? If a constitutional argument is legally available to the president, will it nonetheless generate a congressional or public response disproportionate to the benefits of using the argument?

The reality is that many national security law questions are not yes or no questions. Just as many national security policy decisions represent 51-49 judgments, legal judgments may be close calls; legal policy helps to identify the pros and cons of taking alternative positions. This is particularly the case where legal policy is national security policy as well; for example, where foreign reaction to U.S. legal choices may help or hinder alliances, or where reciprocal applications of law may harm U.S. national security.

Finally, lawyers, like policymakers, must return to appraise their work. Has the ground truth shifted in a manner that alters the legal basis for an action in either a permissive or restrictive manner? Has the president's directive been implemented in the manner intended? Do the ROE provide adequate protection and flexibility for U.S. forces? Has process been implemented in a manner that facilitates or that impedes rapid decision or the identification of policy options?

In summary, the national security lawyer must consider not only the substance of the law but also the practice and process of law and the essential decisional skills that bear on the practice of national security law. In the end, however, the senior executive branch lawyers serve at the direction and sometimes discretion of the department counsel, department head, and ultimately the president. Chances are, if the policymaker is not satisfied with the manner, method, or substance of advice he will replace his counsel, seek his reassignment, or work around counsel to work with other lawyers. Whether he is satisfied will not only depend on the performance of the lawyer but also on whether they share common expectations of how to define the duties of the national security lawyer.

B. THE DUTY OF THE NATIONAL SECURITY LAWYER

Academics and practitioners sometimes define the roles and responsibilities of lawyers through identification of the client and the client's interests. Thus, in private context, the ABA Model Rules of Professional Conduct state:

A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.
It is the client who must decide critical questions of strategy and it is to the client to whom the attorney owes a duty of loyalty and confidentiality.

The client-based private model, however, is less apt in identifying and defining the responsibilities of the national security lawyer. To start, in government context, there are differing views on who (or perhaps what) is the "client." Scholars and practitioners have identified both animate and conceptual candidates, including the president, the agency, the agency head, the public interest, and the Constitution. Consider that there are at least five possible and distinct facets to the president as client alone. At any given time the president may function as chief executive, party leader, commander in chief, the embodiment of the institution of the office of the president, or the president in his personal capacity. Each facet potentially represents distinct interests and responsibilities. While the national security lawyer certainly owes the president dedication and commitment as commander in chief, he does not necessarily owe the president as party leader the same zeal. Indeed, he may be legally barred under the Hatch Act from exercising any zeal at all.

In a related manner, there are differing perspectives, or models, on how national security lawyers should practice law, which reflect but are not necessarily determined by the identification of the "client." In the judicial model, for example, the lawyer is expected to render neutral detached views on the law, as a judge might, ultimately rendering a decision as to what the law is. The advisory model posits that the attorney will render advice on legally available options. The advocacy model, perhaps, is closest in paralleling the private model, with the attorney serving to guide the client to the client's preferred outcomes and then defending the client's actions. It might be said that with the judicial model the attorney works with both hands, presenting both sides of each issue. In the client-based or advocate model, the attorney works with one hand, finding a legal basis for what the client wishes to accomplish.

Such models bring structure to consideration of the practice of national security law and may serve as a point of departure in describing the duties of the national security lawyer. However, in the daily mix of practice, most national security lawyers do not relate their conduct back to specific theories of ethical responsibility and conflict of interest analysis, as a government or private practitioner might do in criminal practice. This reflects the nature of most national security practice. The provision of advice regarding the Foreign Assistance Act, for example, does not require identification of the client, but rather the competent official who can authorize use of the authority. This may vary depending on the section of law and internal agency process. When the assistant secretary asks whether the United States can provide aid, the question is not, who is the client? — it is whether the Act authorizes such aid and, if so, subject to what substantive and procedural thresholds.

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Likewise, judge advocates in the field do not ask, who is the client? — they ask, which commander has the authority to issue the lawful order to attack?

Even where issues present what look like traditional private legal ethics questions, for example, in cases involving the waiver of a privilege, the question is not resolved through identification of the client — for example, the agency or agency head — but rather through knowledge of the substance of law and process. In the case of executive privilege the answer is the president. In the case of classified information the answer is found in some combination of the originating agency, the DNI, and the president. And in the litigation context, the answer may vary depending on who can ultimately speak for the government on the specific issue presented.

Moreover, attorneys need not resort to ethics or academic models to define their role, when so much of the role is already defined in law, and in particular in the Constitution. First, in Article II the president is charged with taking "Care that the Laws be faithfully executed." Second,

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Third, Article VI requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

As a matter of statute, government officials, including attorneys, also undertake an oath of office tied to the Constitution.

An individual, except the president, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath:

"I, — do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

This section does not affect other oaths required by law. As is clear from the statutory text, the oath is not exclusive, but is applied in conjunction with other ethical obligations. Thus, in context, attorneys may well have to consider questions pertaining to the identification of the client. A judge advocate, for example, must adhere to his constitutional oath and to applicable bar codes pertaining to the representation of criminal law clients.
The point is that in the private context where academics and practitioners might reasonably debate to whom the attorney owes loyalty, the government attorney takes one oath and that is to the Constitution and not to a client. Further, that oath and the Constitution require faithful application of the law. That starts with faithful application of the Constitution, its structure and its substance, in the common defense of security and liberty.

Finally, the "client," used here to identify the official with authority to decide an issue, as well as the role of the national security attorney, will vary in context. There are more than 40,000 lawyers in the government. Only a fraction of this number practice national security law. In each context, the "client" may be different. Moreover, within each setting the lawyer will (or should) play each role described above: advisor, counselor, advocate, and judge. The practice is also sufficiently contextual that the answer as to which role is appropriate is found not in identifying the client or a particular model of practice, but in the facts. The skill and art is in knowing when and how to play each role.

Consider the following hypothetical, presenting a preemption scenario likely to occur in the future. The president's attorney is asked in the middle of the night to review a prospective target for a missile strike. For reasons of operational security, a "hit list" is in place. It does not include the attorney general. The target is a suspected WMD weapons facility in a restricted country, but one with which the United States is nominally at peace. The facility is operating under cover as a legitimate commercial enterprise. The target is in play because of intelligence suggesting, but not confirming, that the plant is linked to an Al Qaeda affiliate.

For sound operational reasons, an up or down decision on attacking is needed within two hours, or sooner, to avoid the risk that the enemy will disperse extant WMD weapons. However, it turns out that at the staff level there is disagreement on whether the intelligence linking the target to terrorist actors or even clandestine activities is credible and persuasive. There are also differences of view as to whether additional methods of intelligence gathering may improve U.S. knowledge, although there is general agreement that the target is a hard target and that any disclosure of U.S. interest in the facility could lead to the rapid dispersion of existing WMD stockpiles (if any).

What is the role and the duty of the attorney, and is that role defined by identification of the client or application of a judicial, advocacy, or advisory model of practice?

In the advocate model, the attorney might determine that he or she will defend the president's decision regardless of how the factual dispute is resolved, or for that matter whether it is resolved. Thus, the attorney might advise that so long as the president believes he is defending the country he has the legal authority to do so and counsel will support the decision under U.S. and international law.

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In a judicial model, the attorney might ask additional questions. What is the potential for collateral consequences? And, what is the basis for the difference in intelligence opinion? He would then apply the law to the facts as they are known to determine whether a strike is lawful under U.S. and international law. To the extent the attorney believes the target is "unlawful" under U.S. law he would indicate so, and if necessary, advise the president that he could not in good faith approve the target.

Under an advisory model, the attorney might advise the president as to the legal standard and defer to the president's judgment on the application of law to fact. Under the public interest model, the attorney might consider what is in the best interest of the United States or the public. Presumably this interest would revolve around getting the facts right, but also taking all measures necessary to defend the country, erring on the side of security.

The attorney should play all of these roles. First, under any rubric the attorney has a duty to resolve the factual ambiguity. Arguably, under an advocacy model, the attorney might sit back and defer to the president's view of the law and facts and then defend both. However, it is not clear how such inaction would represent zealous or diligent representation. The president would still require knowledge of the facts and the law to faithfully execute his security functions. Moreover, under the advocacy model, even if the attorney were poised to validate the president's judgment, he would still need to know the counterarguments to better represent the president's choice. Thus, the question is how best to do so in a manner that respects the role of the president as commander in chief and chief executive.

The hypothetical also illustrates the potential range of duties, functions, and choices the attorney might (and in my view should) address in a given scenario. The national security lawyer has a duty to guide decisionmakers toward legally available options. In performing this function in a timely and meaningful manner, the lawyer provides for our physical security. In doing it faithfully, based on honest belief on the application of law, he provides for the security of our way of life, which is to say, a process of decision founded on respect for the law and subject to law.

The hypothetical presents threshold questions of authority. Therefore, the attorney must consider whether the president has the constitutional authority to authorize the missile strike. As the president is also, in effect, approving a specific military target while authorizing the initial resort to force the attorney should run through a three-pronged substantive template:

(1) Does the president have the constitutional authority to use force, and is it subject to a statutory overlay? If so, must or should the president consult with the Congress, or notify the Congress in advance?
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(2) Is the use of force a lawful exercise in self-defense, anticipatory self-defense, or preemption? Will such an assertion be viewed as controversial? And, what are the legal policy ramifications of U.S. decision?

(3) Is the president's selection of targets and the means and methods of attack consistent with the law of armed conflict as reflected in U.S. and international law?

The attorney should also consider a procedural template:

(1) Who must authorize the use of force?
(2) Must the attorney general be informed? Should the attorney general be informed? If not, or if so, who must/should make that decision?
(3) Is the president aware of the factual dispute? If not, whose duty is it to inform him?
(4) Must the factual dispute be resolved before authorization may be given? If so, how can it be resolved in the timeline presented?

These questions present a mix of fact and law, law and legal policy, as well as substance and process. There are no textbook answers. There are clearly wrong answers. There are as well, as a matter of legal policy, preferred answers. One solution: the lawyer can identify the parameters of the factual dispute and ensure that they are framed and communicated within any decisional documents going to the president. But it is two in the morning The president has already made his decision, without knowing that the facts are sliding. One solution: the president's lawyer can call the national security advisor and identify the problem and a solution – a conference call with the DNI, national security advisor, and the secretary of defense to determine if the facts are sliding or whether analysts are rehashing judgments already made at the top, without their knowledge. Does the DNI stand by the intelligence and intelligence judgment or not? And if there is any shift in fact or analysis, is the president and the military chain of command aware?

The scenario continues. With the input and concurrence of the attorney general, the DNI, and the secretary of defense, the president decides to authorize the strike. The lawyer now becomes advocate. He clears talking points for use with the Congress, the media, and foreign governments, conscious that the talking points, as opposed to the advice rendered in advance of decision, will shape outside perspectives on the validity of U.S. assertions of authority. As a matter of legal policy, will this be cast in the language of preemption, anticipatory self-defense, self-defense, or under some other rubric? In doing so, he considers what information if any can be disclosed in support of the intelligence link between the target and terrorism. He adds bullets on the legal basis for the strike, not as judge or advisor, reflecting the best arguments on both sides, but as advocate, presenting the arguments in support of action. Bigot list permitting, the lawyer ensures the State Department is generating an Article 51 report to the United Nations identifying the U.S. legal position as one of self-defense.

The strike occurs. The lawyer now shifts to the role of advisor appraising the process. What worked well and what didn't work well? Could the factual dispute have been resolved through alternative process, or was it only identified and forced to the surface through the presentation of decision? Should the president retain case-specific decision authority over comparable strikes, or authorize such strikes in concept in the future and if so subject to what qualifications in policy, law, and legal policy? Is this a question of law, or of command preference that should be dictated by operational need and presidential style?

The hypothetical also illustrates the extent to which the application of national security law and process is dependent on culture, personality, and style. The president can direct legal review of his decisions, but if a national security advisor is not committed to such a review, it will not occur in a meaningful manner, if at all. The process would have failed if the lawyer did not make the call or if the national security advisor would not take the call. In short, it is not the presence of counsel at the NSC, the White House, or the Defense Department that upholds the law. It is the active presence of a president, a national security advisor, and department secretaries who insist on legal input in the decision-making process and lawyers who will place their integrity and careers on the line to provide it.

An indeterminate conflict, of indefinite duration, against unknown enemies and known enemies unseen will put uncommon strain on U.S. national security. It will also put uncommon strain on principles of liberty. If we meet this day's threats without destroying the fabric of our constitutional liberty it will be through the effective and meaningful application of national security law.

The sine qua non for broad national security authority is meaningful oversight. By oversight, I mean the considered application of constitutional structure, executive process, legal substance, and relevant review of decision-making - all of which depend on the integrity and judgment of lawyers. It is lawyers who will help us find the right combination of broad executive authority to defeat terrorism with the considered application of law before action and subsequent appraisal to protect our liberty. So whether one likes law or not, it is central to national security. Lawyers and not just generals will decide the outcome of this conflict.

Lawyers reside at the intersection where physical safety and liberty merge. In this role they are indispensable to good process and should feel a duty to advocate good process. Good process permits the faithful application
of the law and the accomplishment of the security objectives. In any given context, the pressure of the moment may encourage short-term thinking and the adoption of process shortcuts. The lawyer alone may be sufficiently detached from the policy outcome to identify the enduring institutional consequences of a particular course of action. So too, the lawyer alone may be familiar, and may feel an obligation to be familiar, with applicable written procedures. Process is substance if it means critical actors and perspectives are omitted from the discussion table.

Good process is not antithetical to timely decisions, operational timelines, or to secrecy. Process must find the right balance between speed and strength, secrecy and input. But process can always meet deadlines. There is no excuse for shortcuts. Process can be made to work faster and smarter. By example, if legal review is warranted, the attorney general alone can review a matter and, if need be, do so while sitting next to the president in the Oval Office.

Third, process should be contextual. The legal and policy parameters for responding to terrorism are different from those for responding to a Balkan crisis. Clandestine and remote military operations against a hidden enemy will dictate different decision processes than NATO air operations against fixed targets, as will the different political and policy parameters of both situations. One has to maintain situational awareness, to find the measure of process and approval that ensures law is applied in a manner that is faithful to constitutional, statutory, and executive dictates and that meets operational timelines. Therefore, there will always be some tension as to who should see what when.

Finally, lawyers support and defend the Constitution and not just the policies of their government. It is not clear how a president can faithfully apply the law without faithfully applying the constitutional principles identified in Chapters 3 and 4, including the separation of powers, and checks and balances. Constitutional faith recognizes that the Constitution is a national security document, which in the face of a WMD threat is appropriately read broadly and realistically. Constitutional faith also recognizes that liberty and the rule of law are national security values, which the Constitution is designed to preserve and to protect.

A definition of national security that includes constitutional values makes lawyers schooled in history, law, and ethics essential to the national security process. Being a lawyer in such a process is more than saying yes to a client's goals; it means guiding policymakers not just to lawful outcomes, but to outcomes addressing both aspects of national security by providing for security and preserving our sense of liberty. That is one reason this book places as much emphasis on the role of the lawyer as it does on the content of the law.

There are hard questions ahead in a time of homeland insecurity from which lawyers should not shy. Hamilton observed,

The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions that have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

It is the national security lawyer's duty to alert policymakers to these tensions. The lawyer's duty is to show all sides to every issue while guiding policymakers and above all the president to lawful decisions that protect our security and our liberty. This is hardest to do when lives are at stake. But the Constitution was not designed to fail, to safeguard our security at the expense of our freedom, nor to celebrate freedom at the expense of security. It is designed to underpin and protect us and our way of life. National security lawyers daily demonstrate how it can and must be done.

As a result, we should not begrudge democracy's adherence to law, but continue to find the best contextual process for its meaningful application. In war, and no more so than in addressing a threat where the terrorists' choice of weapons and targets may be unlimited, this means a substance, process, and practice of law that is both security effective and faithful to democratic values.

As Justice Brandeis reminded in Whitney,

Those who won independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

The law depends on the morality and courage of those who apply it. It depends on the moral courage of lawyers who raise tough questions, who dare to argue both sides of every issue, who insist upon being heard at the highest levels of decision-making, and who ultimately call the legal questions as they believe the Constitution dictates and not necessarily as policymakers may want at a moment in time. We do not live in a moment in time. We and our children live in perilous times.

NAME: James E. Baker *

BIO:

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TEXT:

[*407] I. INTRODUCTION

The moral imperative and relevance of the Law of Armed Conflict ("LOAC") is more apparent today than before September 11, 2001. Law distinguishes democratic societies from the terrorists who attack them; nowhere is this more apparent than in the methods and means of warfare. Indeed, part of our revulsion and contempt for terrorism lies in the terrorists' indiscriminate, disproportionate, and unnecessary violence against civilians. In contrast, the enduring strength of the LOAC is its reliance on the principles of proportionality, necessity, and discrimination, which protect civilians and minimize combatant suffering. For these reasons, we should not begrudge the LOAC's limitations but continue to find the best contextual process for its meaningful application. In war, and no more so than in a war against terrorism where the terrorists' choice of weapons and targets may be unlimited, this means a process that is both militarily effective and legally sound. This Article is about the role of the President, and the President's legal counsel, in US targeting decisions and in applying the LOAC. n1

Section II begins with three foundational judgments regarding the LOAC. First, the LOAC is hard law; that is, it is identifiable and subject to effective [*408] sanction in US criminal law and in international law. Second, the LOAC is realistic law that relies on contextual principles adaptable to changing circumstances. Third, the LOAC is good policy and usually consistent with military effectiveness. In many contexts there are good policy reasons to restrict the manner
in which a target is attacked that go beyond limitations required by the LOAC. As a result, a process of target decision entails the exercise of policy discretion as well as legal judgment and military command.

In constitutional design and practice, the President is given extraordinary authority over the methods and means of warfare. He is also constitutionally responsible for upholding the law. Because of prudential considerations involving the nature of combat and the necessity for secrecy and speed in military command, there is little opportunity, and often less desire, for civilian input into targeting decisions outside the military chain of command. Therefore, the President and the Secretary of Defense, as the senior members (and only civilians) within the chain of command, bear special responsibility to apply and oversee the application of the LOAC. This responsibility is reinforced by the separation of powers doctrine and correlated exercise of deference by the Congress to the President when he is acting as Commander in Chief, and by the judiciary under the non-justiciability doctrine. In short, it is with the President that law, policy, military command, and democratic legitimacy merge.

In light of the President's military and LOAC responsibilities, Section III of this Article emphasizes a contextual process for the exercise of presidential targeting decision. By contextual, I mean a process that is flexible to factual circumstance and need, but not to the application of law. By targeting, I mean presidential decisions regarding the focal application of coercion by forces in the air, on the ground, and at sea. The Article identifies legal, policy, and military factors that should determine when a target should be approved by the President, as a matter of law and as a matter of policy. These same factors should determine whether approval comes on a target-by-target basis, by category of target, by application of Rules of Engagement ("ROE"), or through general direction, known in military doctrine as the commander's intent. Presidential style will also appropriately influence presidential process. Perceptions of past presidential performance, however, in particular that of President Johnson during the Vietnam War, n2 should not determine the degree of presidential involvement today; current legal, policy, and military context should.

Lawyers may not like to admit it, but law, even in a constitutional democracy, will only sustain the capacity to guide if it is timely and realistic in application. Therefore, this Article concludes in Section IV by describing the role of the presidential lawyer and principles of practice that should facilitate the timely and meaningful application of law. For the presidential practitioner there is no primer on this subject. Military after-action reports and doctrine are, appropriately, written from the standpoint of military process and doctrine, not necessarily with presidential counsel in mind. I hope this Article and this symposium will serve as a useful point of departure for the consideration of presidential process in the future.

II. FOUNDATIONAL ARGUMENTS

Consideration of the President's role in wartime, and that of his legal counsel, should start with some foundational judgments about the LOAC. These judgments demonstrate the relationship among law, policy, and national values in applying the law, and therefore, the President's singular responsibility with respect to the LOAC.

A. THE LOAC IS OPERATIONAL LAW

Cicero may have said that laws are inoperative in war ("Silent enim leges inter arma"); n3 however, in contrast to some areas of international law that are "soft" in application, the law regarding the methods and means of warfare is "hard" operational law. It is reflected in international treaty text, n4 customary international law, and US domestic criminal statutes. It is also subject to effective United States sanction, and on a more episodic basis, international sanction. Adherence to the LOAC is also long-standing United States policy, regardless of military context. n5

Title 18 of the US Code establishes US criminal jurisdiction over war crimes committed by or against members of the US armed forces or US nationals. War crimes are defined as any conduct:

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

[*410] (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting
the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on
Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such
Protocol, willfully kills or causes serious injury to civilians. n6

Because 18 USC § 2441's substantive prohibitions derive meaning through cross-reference to the Geneva Conventions, among other international norms, US criminal law and international law are ineluctably tied.

United States jurisdiction to enforce the LOAC is also found in the Uniform Code of Military Justice ("UCMJ"). n7 Article 18 of the UCMJ includes within the jurisdiction of general courts-martial "jurisdiction to try any person who by the law of war is subject to trial by a military tribunal." n8 Jurisdiction to punish violations of the LOAC is also exercised through application of the punitive articles of the UCMJ, as in the case of William Calley, who was convicted after the My Lai massacre of 22 counts of murder under Article 118 of the UCMJ. n9 In addition, Article 21 contemplates the establishment of other jurisdictional vehicles historically used to address violations of the LOAC. n10 Article 21 states:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military
commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to
offenders or offenses that by statute or by the law of war may be tried by military commissions, provost
courts, or other military tribunals. n11

Congress, of course, may provide additional means of sanction using its authority under Article I of the Constitution to "constitute Tribunals inferior to the supreme Court...define and punish...Offences against the Law of Nations," and to "make Rules for the Government and Regulation of the land and naval Forces." n12

[*411] The LOAC is also subject to international enforcement and sanction through foreign courts, ad hoc
tribunals and, potentially, the International Criminal Court. Significantly, the International Criminal Tribunal for the
Former Yugoslav Republic ("ICTY") demonstrated the universal reach of the law by examining NATO's operations as
well as those of Serbia during the Kosovo air conflict. n13 Moreover, the Special Court for Sierra Leone has recently
moved from creation to indictment in less than one year. n14 In doing so, the Chief Prosecutor has argued that such ad
hoc mechanisms can be timely, cost effective, and precise in the exercise of jurisdiction. n15

In summary, the LOAC is operational law subject to effective sanction. As a result, the President as Commander in
Chief not only has a duty to wage war effectively in the interest of US national security, but to do so, under the LOAC,
in a manner that "take[s] Care that the Laws be faithfully executed." n16

B. THE LOAC IS GOOD POLICY

Good faith application of the LOAC is also good policy. Adherence to the law improves the prospects of, but of
course does not guarantee, reciprocal application of the same principles by one's opponent. More broadly, the moral
authority of the United States to espouse the rule of law is founded in part on its consistent and faithful adherence to the
law.

Adherence to the law helps to garner and then maintain international support (governmental, elite, and public) for
US military operations. This is particularly the case with respect to democracies. In the case of the 1999 NATO air
campaign against Serbia, application of the law was a sine qua non for the NATO political consensus necessary to
authorize NATO military operations. n17

[*412] Adherence to the LOAC is also essential to sustaining US public support for American conflict, not necessarily out of a societal sense of legal obligation but out of societal belief in the values of discrimination (distinguishing between civilians and combatants) and necessity, which are embodied in the LOAC. n18 In corollary fashion, actual and perceived US violations of the LOAC erode public support for conflict and may overshadow or undermine the purpose and legitimacy of particular operations. Indeed, real and perceived violations of the law by opponents have helped to cement and sustain public and military support for conflicts, as illustrated by the impact of the "Rape of Nanking," Saddam Hussein's use of human shields during the First Gulf War, and Iraq's mistreatment of POWs in both Gulf Wars. n19

The LOAC is also generally consistent with military effectiveness. For example, the use of ordnance against civilians is hardly economical and it is likely to reinforce an adversary's anger and willingness to sacrifice and persist in the fight. Put more directly, indiscriminate or disproportionate use of force may have short-term military advantage, for example, in clearing a village or conducting an urban "reconnaissance by fire." But in the long run, excessive or indiscriminate force does not generally break the enemy's will to resist and ultimately can demean and degrade military discipline and professionalism. Indeed, indiscriminate bombing during World War II, for all sides, appears to have strengthened civilian resolve. n20 Moreover, unlawful force makes the transition to peace operations more difficult because of the civilian hostility that remains. Commitment to the ideals embodied in the law in both rhetoric and [*413] reality also helps to buttress military morale, which is indelibly linked to the belief that the US cause and means of warfare are righteous. n21

Finally, good faith adherence to the LOAC is the right thing to do. The protection of innocent civilian life remains the fundamental principle behind the Geneva Conventions and, more broadly, the LOAC. n22 The rule of law, and not just of men, remains one of the foundational distinctions between terrorism and tyranny on the one hand, and democracy on the other.

III. CONTEXTUAL FACTORS FOR PRESIDENTIAL DECISION

In light of the fundamental judgments identified above, the effective and lawful exercise of military command requires a measure of process for each context that meaningfully addresses each parameter. The extent to which the President should participate in such a process and approve targets should depend in turn on a variety of legal, policy, military, and personal factors. To be clear, by "approve," I mean the use of mechanisms of formal approval, such as a memorandum box checked or direct verbal assent. I also mean less formal processes of review before action is taken, such as the Secretary of Defense and Chairman of the Joint Chiefs of Staff briefing the President on targets or battle plans, including target descriptions. In both cases, the President is rightly perceived as affirmatively assenting to the actions before they occur.

A. LEGAL CONTEXT

Clearly, the President should approve targets to the extent he is legally required to do so—a truism. This might be the case when a targeting decision itself constitutes the constitutional authorization to resort to force; for example, the 1986 aerial raid on Tripoli, or the 1998 strikes on a terrorist command meeting in Afghanistan and on the al-Shifa pharmaceutical plant in Sudan. Depending on one's theory of constitutional authority and one's view of the [*414] President's authority to delegate this authority, the nature of a target within an ongoing conflict (for example, across international boundaries) or method of engagement n23 may sufficiently alter the legal context so as to warrant specific presidential approval. In addition, the President alone has the legal authority to change a concept of operations or timeline he has previously approved (unless, of course, he has provided a subordinate commander discretion to adjust as military circumstances dictate). The former circumstance appears to have been the case, for example, with the initial strike targeting Saddam Hussein on March 19, which occurred outside the pre-planned sequence of military events. n24
Presidential authorization may also be limited in scope as a matter of policy discretion, with the President requiring the Secretary of Defense and combatant commanders to bring certain decisions to him not as a matter of law, but as a function of command. This was the case with respect to NATO's approval of a phased air campaign against Serbia. n25 In addition, some uses of force will statutorily require presidential approval, such as activities that fall within the definition of covert action. n26

Presidential decision can also take on added legal valence in close cases where, as a matter of domestic law, the exercise of constitutional authority may serve as a lawful "tie-breaker" for a presidential decision in a manner unavailable to the Secretary of Defense or military commanders when they act pursuant to statutory or general delegated presidential authority alone. That is, the operation of US domestic law may not ultimately constrain the President's specific exercise of a core constitutional authority, so long as it is exercised in good faith. Moreover, where there are differences in legal view between allies regarding the application of the law—for example, opposing views on the lawful use of land mines or cluster bombs—decisions taken by the President are likely to receive greater deference from allies and afford military commanders greater protection from allegations of misconduct or war crimes for decisions taken in the field.

B. POLICY CONTEXT

Policy context should also dictate the degree to which the process of command includes presidential decision. Whether legally required or not, the President may establish policy "redlines," or boundaries delimiting permissible action in the absence of subsequent presidential decision. Such decisions may [*415] include transitions from air to ground forces, increases in the risk of US or civilian casualties, trans-border operations, or operational matters that fall outside of what the President believes he has prepared the American public to expect and to sustain.

The plural-lateral context n27 may also warrant more rather than less presidential involvement. Where allies are hesitant or particularly cautious about targets, the President is more likely to review those targets that he may have to "sell" or defend to his counterparts. As became evident during the Kosovo campaign, a NATO joint operation in Europe will involve a different process of combined consideration than will unilateral operations or operations conducted by ad hoc coalitions of the willing. n28

Decisionmakers today often have an array of equally lawful and effective options that can accomplish the immediate and direct military objective, but that offer very different policy outcomes, repercussions, and risks depending on how they are employed. For example, where today's military commander may order an attack on an electric grid to disable an air defense system, broader policy implications arise where technology enables the military to "turn off the lights" momentarily, permanently, or for some time in-between. In contrast, the aerial destruction of a city's power supply during World War II presumptively entailed an exercise in area bombing. In short, precision targeting options today introduce a new array of legal and policy considerations that extend beyond the immediate military objective of the strike. Questions of proportionality and necessity in turn may depend on analytic judgments about the impact of such actions on the enemy and long term effect on civilian populations. Therefore, civilian issues for decision are also raised. Within the military chain of command such target considerations warrant the consideration of the President and the Secretary of Defense.

C. PRESIDENTIAL STYLE

Process will also reflect the style and personality of the President and his senior staff as well as their views regarding the proper role of the President as Commander in Chief. The degree of presidential involvement will also reflect the level of confidence a President has in his military subordinates, and perhaps, his own confidence in his substantive and moral command over military affairs. This in turn will be informed by past performance and perceptions of performance.

Presidential command is not new. President Lincoln hired and fired generals and read daily dispatches from the
front across West Executive Avenue [*416] in the War Department. n29 However, changes in technology have changed the nature of command and the opportunities for presidential involvement. Napoleon's Grenadier Guards may have had marshals' batons in their rucksacks, n30 but the US soldier today may have both a GPS indicator and a means of global communication. This increases the opportunities for national command and control over even the smallest maneuver elements or Special Forces spotter.

Stories abound regarding the direct involvement of Presidents in military operations. President Ford directed air operations during the Mayaguez crisis from the White House Situation Room, and at one point considered with his NSC principals whether a pilot on station in the Gulf of Cambodia should seek to disable the rudder of a fishing vessel carrying some of the Mayaguez crew. n31 President Kennedy is understood to have personally directed US destroyers enforcing the quarantine during the Cuban Missile Crisis. n32 Presidents Johnson and Carter were generally viewed as micro-managers, a term intended in both a descriptive and a pejorative sense. n33 Indeed, whenever questions about presidential command arise, commentators often invoke images of President Johnson in his pajamas, pacing the White House basement, apparently paralyzed by doubt and uncertain in decision. n34 That at least is the vision of Presidential command now ingrained in popular perception.

But caution: Presidential perception is not always reality. President Clinton is purported to have approved "every [Kosovo] target" personally at the White House, n35 a myth since repeated in wider circulation, notwithstanding the small number of persons who could actually know in what manner the President reviewed targets. In fact, President Clinton approved a subset of pre-planned targets. n36

[*417] Presidents and their staff may also seek to project a particular image of command at a time of national crisis for the benefit of public morale as well as for political consumption: hands-off to show confidence and calm (and perhaps hedge bets on outcome); or hands-on, to show presidential timber and authority. Presidential handlers, it seems, want to portray a President in command, but not meddling, someone less aloof perhaps than President Reagan, but above all not as engrossed as President Johnson, at least as these presidents are popularly perceived. n37

D. MILITARY CONTEXT

There is no more important factor in determining presidential process than military context. Pre-planned and fixed targets permit more time for review than mobile targets and targets of opportunity. At the national level, targets of opportunity must be addressed by Rules of Engagement ("ROE"), class, or delegation of authority, and only in extraordinary circumstances on a case-by-case basis. Likewise, for example, "dual use" targets in a city should entail a further degree of policy and legal review than military targets in the desert, not just because they often present more complex legal questions of proportionality, discrimination, and military objective, but because the policy consequences of US decisions are compounded.

Aerial and land warfare also present different contexts and generally very different opportunities for civilian policy and legal review of targets. Air power is more susceptible to legal and policy adjustment than ground combat, in light of the variations in means and method of attack available through variation in munitions, delivery azimuth, angle of attack, aim point, fuse, and explosive, all amplified with the assistance of computer simulation. Infantry officers, in contrast, have fewer attack options, limited as they are by geography, the nature of indirect infantry weapons, and the nature of maneuver warfare.

Ground operations are also inherently more fluid than aerial operations against pre-planned or fixed targets. Even when aerial targets are emergent, there is often some time for command consideration as aircraft or weapons platforms move into position. In ground combat there are fewer fixed targets and emerging targets usually require immediate response. Thus, there is rarely opportunity for senior commanders, including the President, to apply law to emerging targets other than through overall frameworks of lawful decision. Put [*418] sharply, the NATO command structure, which ultimately succeeded during the Kosovo air campaign, would not function in an infantry environment where ground truth (or perceptions) and "immediate action" training dictate tactical choice and the margin between victory and
defeat. Thus, vertical command structures where the President makes specific targeting decisions are most effective in a subset of military operations, including aerial operations and operations against pre-planned or fixed targets.

E. APPRAISAL

There is an apparent tension between security and speed, on the one hand, and a decision process requiring referral up the chain of command, on the other. In each context, decisionmakers must choose on a continuum between what is colloquially referred to as "horizontal" or "vertical" command. Where a vertical structure is adopted, decisionmakers must also specify those decisions capable of and intended for civilian command, which means the Secretary of Defense or the President. Where horizontal command is utilized, commanders must decide how far down the chain of command targeting decisions should be made.

There are a number of advantages and disadvantages to presidential command. Presidential decision can enhance public support for military operations. In what is known as the "war bounce," the American public tends to rally to support the President in times of conflict. Moreover, the public is more likely to rally behind the President than commanding general, unless of course such a general has assumed the popular stature of an Eisenhower or a Schwartzkopf. From a military perspective, the participation of the Commander in Chief can buffer the field commander from the spotlight of 24/7 media inspection by assuming or sharing the responsibility of decision in the same manner that athletic coaches may try to deflect unwanted attention from players. However, the corollary is also true. With presidential decision comes direct responsibility for result.

From a legal policy perspective, vertical command also adds to consistency in the application of the LOAC. Where difficult targeting decisions are taken at the national level, the influence of military service branch culture and a combat arms perspective in determining legal result are less important. Personality (other than the President's) will also play less of a role in how the LOAC is interpreted and applied. The influence of a cautious military lawyer or an aggressive commander becomes less determinative when legal policy is set at the top.

Most importantly, in a constitutional democracy, presidential decision and accountability should not be eschewed, but embraced as a fundamental tenet of what it means to have civilian command of the military instrument. Where Congress has not expressly authorized military action, the democratic legitimacy of US military operations arises from the President and ultimately his electoral [*419] accountability to the people. Moreover, as noted above, it is with the President, and the President alone, that constitutional responsibility over military command and adherence to the law rest.

Vertical command, in my view, also generally contributes to better decisions. First, as a bureaucratic observation, staff work tends to improve in rigor as it runs up the chain of decision. Second, a process culminating with the President is more likely to fuse multiple sources of information and perspective and do so in a timely manner. This is not important if the target is obvious (for example, a column of tanks). And it is less important in an ongoing conflict with military fronts and a Forward Edge of the Battle Area ("FEBA"). In such cases a commander's ROE should adequately set the intended policy, military, and legal parameters. But it is important if the target presents difficult factual, legal, or intelligence judgments like an al-Shifa. In these latter cases, additional perspective may distinguish the sound decision from the merely rapid decision.

Similarly, some targets that may appear on the ground as raising purely tactical military considerations will nonetheless warrant policy consideration when viewed with wider perspective. For example, a decision whether to risk US forces to "secure" the Iraqi National Museum of Antiquities might well hinge on principles of force protection; however, the company or battalion commander on the spot is not well situated to balance the risk to his forces from pushing forward against the national policy consequences of not doing so. n38 Such balancing requires broader considerations of policy intent and multi-dimensional risk assessment up the chain of command, preferably before the checkpoint is reached, but if necessary, afterwards.
Presidential command is the fastest method I have observed for fusing disparate interagency information and views into an analytic process of decision. This is particularly important in a war on terror where pop-up targets will emerge for moments and strike decisions must be taken in difficult geopolitical contexts with imperfect information. The President is best situated to rapidly gather facts, obtain cabinet-level views, and decide. Vertical civilian command is less important, indeed potentially disruptive, where the military objective is set and the concept of operations calls for traditional and rapid maneuver warfare.

Vertical command and fusion can also serve as a fail-safe where such process helps to channel target review into a routine and specialized process of review. Significantly, the erroneous bombing of the Chinese Embassy in Belgrade during the Kosovo campaign followed the identification and generation of a target outside the normal channel of target production. Although the presumptive target designated in briefs was indeed military in nature, human error placed the target at the wrong coordinates, even as the correct target was reviewed and approved by the chain of command. Although unusual, some targets that do not in fact pass a colorable test of military objective or discrimination, or in any event, do not conform with the President's view of such terms, may survive even a rigorous process of staff review.

For sure, there are risks to vertical command. First, as the Long Commission demonstrated in the context of the Beirut bombing, vertical command, in that case involving eleven different layers between the President and the Battalion Landing Team commander, can diffuse responsibility and accountability in dangerous ways. Vertical command can take time and delay critical decision. However, in an age of global communication, Presidential decision need not cause undue delay where decisions flow directly from the President to the Secretary of Defense and are communicated to the combatant command (often by the Chairman of the Joint Chiefs of Staff).

Second, where combat operations are fluid, vertical target decision is inherently dysfunctional unless it is exercised through a commander's intent or ROE. This might be illustrated with reference to weaponized Unmanned Aerial Vehicle ("UAV") platforms that can be deployed both as point-to-point weapons (that is, launched with a specific coordinate in mind) or used to patrol for targets of opportunity. In the initial mode, vertical commanders can appropriately participate in a target decision where the target is pre-planned or fixed. In the latter case, the tactical setting will dictate that command discretion and the LOAC be applied through ROE or target-class approval, rather than an assessment of specific target circumstances at the time of attack.

Third, for some observers, presidential command raises the specter that a civilian will make military decisions that they are not in fact trained to make. Again, the ghost of President Johnson selecting bombing targets in Vietnam lingers. Although some Presidents have had meaningful military and combat experience, few have had the necessary experience or training to determine how many divisions are required to secure supply lines for a three-division push to Baghdad. But this critique presumes that presidential decisions are made without military input. On the contrary, Presidential command, at least in modern times, appears to be uniformly the product of a military brief, and in targeting application, deferential to military input.

In short, if not exercised with contextual forethought, presidential command can negate significant US military advantages that are emphasized with horizontal command. Horizontal command is rapid, and if pressed to the lowest tactical level, immediate. It emphasizes military expertise and professionalism, including a US leadership corps unmatched in training, ability, and independent thought, from combatant commander to small unit leader. And it emphasizes ground truth, with decisions taken on the basis of the observations by those with "eyes-on-target."

Nonetheless, in my view, some pundits are too quick to disparage the value of vertical presidential command without acknowledging the possibility of its contextual and effective exercise in a manner that does not diminish US military advantage. The reality is that Presidents are briefed on military operations and that command decision at the level of the Commander in Chief can be taken, in the words of General Tommy Franks, on an "amazing time line." I have seen the most difficult and novel of military targets identified, briefed, considered, and decided by the President, with legal review by the Attorney General, in less than five minutes. It could be quicker if need be. Moreover, where it is not practicable to brief targets on a case-by-case basis, the President can, and should, exercise his constitutional
command function through the review of theater ROE and concepts of operation.

This view does not reflect a lack of faith in the fidelity and skill of the US military. Quite the opposite, it reflects the US military’s commitment to constitutional government, challenged at times, but exemplified at the beginning by General Washington surrendering his commission to Congress and in the oath members of the Armed Forces take to “uphold and defend the Constitution.” American citizen soldiers should act in combat with the confidence that their commander, and ultimately their interlocutor with the American public, stands behind their lawful actions. In a democracy, the buck should stop with the President and not with the lance corporal or even the Secretary of Defense. It is also at the level of the President and the Secretary of Defense, rather than at the level of the combatant commander, that the process of congressional consultation and briefing occurs. This, in turn, is an important element of constitutional process, democratic legitimacy, as well as a necessary step in building and sustaining public support for conflict.

[*422] Nor is this perspective, in the other direction, an expression of constitutional dogma or a sanguine faith in presidents and their lawyers. In my view, there are obvious decisions that are military in nature for military commanders alone to make. The majority of tactical and targeting decisions are in this category. However, there is also an obvious and smaller subset of decisions defined by the factors identified above that are Presidential in scope, and some that are contextually in-between, and we should not eschew a process that includes, and indeed encourages, presidential decision in these areas. A global war on terrorism, or a coalition war over Kosovo, will necessarily present a mix of different issues suggesting different processes of civilian command. The pilot must ultimately decide with the benefit of training and eyes on the target whether he can disable a rudder, but it is the President, not a unified commander like General Curtis LeMay or General Tommy Franks, who should ultimately determine whether and how a quarantine is enforced or a how a chemical attack with the potential consequence of nuclear confrontation may be deterred.

In summary, I am not arguing for a fixed template of presidential decision but a contextual approach that accounts for a range of legal, policy, and military factors in deciding when and how Presidents should exercise command and, in doing so, apply the law. Such an approach recognizes that in a constitutional democracy, it is entirely appropriate for military decisions to be made by the President, and we should not avoid or obfuscate such a process, but celebrate and encourage its presence. I am not troubled that President Johnson dwelled on a war that would, for America, last over ten years and cost 58,000 American lives. I would expect that all Presidents would care as much. The image is only alarming if the President stifles advice, ignores better ideas in doing so, or if Presidential indecision hampers military effectiveness. Where the President does decide on targets, he should do so with the benefit not only of military input but also legal input.

IV. THE PRESIDENT’S LEGAL COUNSEL

Generals are sometimes accused of fighting the last war. Similarly, lawyers are sometimes accused of asserting black letter rules that might seem outdated or inchoate in a gray world. For sure, textual legal expression is, by its nature, frozen in time and requires interpretation. But the application of the law is consistently updated by taking account of current context.

In the area of targeting, the LOAC regulates rather than prohibits force, seeks to minimize rather than preclude civilian casualties, and seeks to minimize human suffering. These critical legal policies are realized through the application of the principles of necessity, discrimination, proportionality, and military objective that are found in textual law and customary law. These are the principles to which commanders and lawyers return time and again. Clear [*423] prohibitions, such as those prohibiting deliberate attacks on civilians or denying quarter, offer essential benchmarks. But absolutes do not always control as a matter of law in a world where terrorists use civilian airliners as missiles, and tyrants use civilians as human shields to protect weapons of mass destruction ("WMD"). Contextual principles applied in good faith do work in accomplishing the military mission and in protecting civilian society. Such principles adapt to wars against terrorism as well as fixed military fronts. And, such principles are capable of application by corporals, specialists, and Presidents.
Michael Reisman has noted that if customary international law "has the advantage of applying to everyone," it also "has the disadvantage of often being hard to identify." n41 This is a source of frustration and sometime tension for commanders, policymakers, and lawyers, whether they are applying customary international law from an operational or human rights perspective. This is especially so when the law is applied asymmetrically (as in the terrorism context) and therefore is perceived as being inchoate, because it constrains only one side. Likewise, the application of necessity, proportionality, and military objective at times is subject to imperfect definition and differing interpretation. As a result, the cases that tend to drive debate with respect to US actions often entail judgments involving the application of agreed upon principles to difficult facts, or that involve unintended errors in intelligence, equipment, munitions, or execution, but not in the legal framework applied or the result intended. There is also room for honest differences of view where the law is evolving based on customary practice. One function of the presidential lawyer is to identify the critical legal policies at issue and to ensure that their objectives are likely to be realized in a new context: by an appropriate and lawful application of force. This requires a process of meaningful and timely legal input to decision. Discussion of legal process inevitably engages pre-existing notions of "lawyers," based on observation, experience, and myth. As issues of force deeply color perspectives on the validity and applicability of international law generally, specific experiences involving lawyers (or perhaps, accounts of lawyers) may unduly shape commanders' and policymakers' views as to whether lawyers should have a wartime role. "Process" to some is itself antithetical to the notion of military command. Throw in a lawyer to boot and you have a quagmire. As a result, not all commanders or policymakers welcome lawyers onto the military targeting team. This reluctance reflects innate and valid practices of secrecy, as well as concerns about delay and the possibility that the lawyer may say "no" to something the decisionmaker wants to do.

My position is clear—the participation of lawyers in a military targeting process is indispensable as a matter of law. It also offers significant policy advantages in how the US articulates target decisions and establishes the legal [*424] credibility of those decisions. This is true at the division level and it is true at the presidential level. If contextually designed to parallel the process of command, such legal input will be operationally effective, at least to the extent the exercise of operational command is itself effective. Intuitively, the answer is for lawyers to address concerns about speed by limiting participants to the essential few and meeting real world deadlines, not for commanders to omit lawyers from the decision cycle. This means a Judge Advocate in the field and/or a Unified Staff Judge Advocate, the DoD General Counsel (and/or Joint Chiefs of Staff/Legal Counsel), and a presidential lawyer, depending on the level of command decision.

The role of the military lawyer is well described elsewhere, including in this volume. The role of the President's legal counsel is less well understood and certainly not defined by acknowledged practice or doctrine. In my view, the President's legal counsel has three essential tasks: education, review, and appraisal.

A. EDUCATION

Lawyers and policymakers need to train for war, albeit intellectually, and not with the physical risk embedded in military training. When Daniel Webster transcribed his most famous statement about self-defense in the context of the Caroline incident, he did so four years after the precipitating event. n42 Today's national security lawyer does not have such time for deliberation. For a variety of reasons relating to the nature and multiplicity of transnational and state threats, combined with the devastating potential of WMD, questions of whether to resort to force and the methods and means of force will pop-up and require immediate decision. Decisionmakers may have to assess an option in a night, or in a tactical moment, and immediately explain the action to the American public and the world for all times' sake.

That means the President and his legal counsel will come to the decision table as they are. Therefore, they must already know the LOAC relevant to their level of command as well as the foundational judgments that underpin the LOAC. This puts a premium on furnishing necessary background in advance of crisis, a tall order for any president's legal counsel competing for the president's time and attention, but it must be done. A President is simply not going to stand by for a lecture on Grotius at a time of crisis. Instead, he will recall Cicero. Moreover, clients are more likely to absorb principles that constrain, as well as that permit, in the calm before crisis than they are in the heat of the decision moment. That means the framework for lawful decision must already be [*425] embedded in decisionmaking.
checklists, or at least that portion of the checklist that includes counsel in the decision cycle.

Advance guidance on the LOAC also helps establish lines of communication and a common vocabulary of nuance between lawyer and client. Any policymaker who receives such a brief will be sure his or her lawyer fully participates in the targeting process at that level of command. In addition, the policymaker will understand in a live situation that the lawyer is applying "operational law" and not kibitzing on operational matters.

At the same time, the presidential lawyer must understand the strengths and limitations of the intelligence process that informs command and legal judgments as well as the evolving nature of military operations, and thus the evolving application of law. By example, the advent and increasing prevalence of precision weapons in the US arsenal has led to unrealistic expectations that armed conflict, at least on the part of the United States, can be conducted with few or even no collateral casualties. n43 This is a worthy objective, and one that I am confident the United States Government embraces, not just because it reflects the intent of the LOAC and is morally sound, but, for hard realists, because it is also good policy. The aerial weapons of today's United States arsenal permit extraordinary and precise adjustments in aim point, angle of attack, and azimuth of attack as well as different variants in fuse and explosive. Combined with detailed and rapid computer models, which can project blast effects, and a professional cadre of "targeters," the US capability to maximize discrimination and minimize civilian casualties is remarkable, and easily unmatched in history. But a few words of caution are needed.

Precise weapons do not lift the fog of war, and lawyers should not confuse "precision weapon" with "precision decision." They do not address questions of perfidy and ruse, human and technical errors, or limitations in intelligence. And they do not address technical or logistical capabilities. Precision weapons are simply not the right choice for every strategic or tactical scenario and may not be "on station" in every tactical situation.

Further, because many precision weapons are either unmanned or capable of effective launch from afar, or both, some may perceive that the United States [*426] is not taking "all reasonable measures" n44 to prevent collateral casualties when its pilots do not break a certain ceiling or enter the airspace of the country affected in order to launch the weapon. Caution is warranted here as well. "Eyes on" can make the difference in distinguishing between a column of buses with refugees and one with combatants. But, pilot "eyes on" will not necessarily change the quality of intelligence, if, for example, the target is a building. Moreover, discrimination is not measured by the equivalence between civilian and military casualties, but by the minimization of civilian casualties. Precision aerial weapons accomplish that end. Further, increased pilot risk often means an increase in civilian risk as well. This is certainly the case where helicopters are employed in lieu of precision weapons and area suppression munitions are used to prep the area of helicopter operations. Further, regardless of platform, if pilots are shot down, ground troops will follow. And ground combat is usually more destructive and indiscriminate to civilians than aerial attack with precision weapons.

For these reasons, the law should encourage states to develop, invest in, and use precision weapons, and lawyers should consider with care the adoption of absolutes that might negate the advantages to the combatant from using precision weapons, the use of which upholds the fundamental tenets of the LOAC by improving the ability to discriminate between military and civilian targets.

B. TARGET REVIEW AND ARTICULATION

The president's legal counsel should perform at least two target functions for the President. First, he should provide independent guidance on the application of the law within the framework of an established client relationship. He does this by clearly and quickly concuring on memos, by e-mail, or orally. For that small subset of more difficult targets, he should explain how principles apply in context and document the analysis for the record. As a matter of legal policy, he should identify relevant precedent so that the President will understand where on a historical continuum of practice his decision will fall and how it may shape the law, reciprocal conduct, and perceptions of US views of the law.

Where necessary, legal counsel must be prepared to say no. However, in the American context there are few
targeting proposals that will reach the President that should prompt absolute LOAC prohibitions. Most decisions involve judgment calls regarding the application of law to facts, or intelligence and analytic judgments regarding facts and projected outcomes. Nonetheless, [*427] because targets will be added, dropped, and adjusted by the President (or in his presence) immediate legal consideration is required. So too, targets of opportunity will be brought directly to the President as time or secrecy dictate, as was the case with Saddam Hussein's command bunkers during Operation IRAQI FREEDOM. As a matter of timing and culture, it is hard enough for the military lawyer to advise commanders on the LOAC ahead of decision; it is entirely unrealistic for the military lawyer to take issue with a target already approved by the President. Therefore, the law must be weighed in conjunction with the President's decision and that requires a presidential lawyer.

Of course, with the President, the roles of client and lawyer merge. In his capacity as chief executive and with his duty to "take Care that the Laws be faithfully executed" n45 the President is not just Commander in Chief, but Counsel in Chief. However, the President who hopes to exercise both his command and legal role at once could find that "he has a fool for a client." Application of the LOAC requires role-playing. My own observation, and certainly the sense garnered from presidential papers and pronouncements, is that no burden weighs more heavily on the President than his responsibility to protect American lives. Such a duty should compel the President to press his advisors and his lawyers as far as he can to accomplish this end, now more than ever where the nuclear age walks parallel to the age of terrorism. With the President’s preeminent responsibility thus defined, a President who is also serious about the rule of law, including the application of the law of armed conflict, should seek dispassionate legal advice from a person dedicated to this role. At the level of the President, this has the added advantage of ensuring that the Commander in Chief’s view of the law is applied to national-level decisions. Moreover, in most contexts, this will be the only legal view expressed from outside the Department of Defense. Furthermore, decisions taken without such legal participation may be perceived as, and in fact be, less credible where legal issues are raised.

Role-playing, as in other substantive areas, also entails fact testing. Such a role is all the more critical where timelines are short and process may be truncated. Are all relevant facts and analytic conclusions on the table? Are there seams of factual disagreement between agencies that advocates for action or inaction have glossed over or omitted? Although these are not inherently legal questions, the dispassionate lawyer, trained to review fact and argument, can play a critical role in presidential process.

C. APPRAISAL

The President’s counsel must also consider the immediate and enduring legal consequences of the President’s decisions. How will the target be [*428] explained? What information is available to do so? Will other states, and non-state actors, assert a reciprocal right of action? If so, what impact will this have on US national security and to international public order?

Policy articulation is ultimately the business of policymakers and their speechwriters and press secretaries, not lawyers. The language of law does not always pack the punch or clarity of policy prose. Policymakers "retaliate," lawyers "respond." "Shock and awe" are not words lawyers would immediately use to describe necessary and proportionate action. Even where a sound presidential decision is taken, if it is not well explained, in terms of factual predicate or legal foundation, tactical and military victory can turn to political defeat. The President’s legal counsel can play an important role in influencing how US targeting decisions are explained and therefore perceived, particularly when so much policy articulation for US military action occurs at the presidential or cabinet level.

Al-Shifa illustrates the point. Contradictions in statements, as well as statements that seemed to inflate facts, distracted and obscured public focus from the essential national security underpinning of the President’s decision: Al-Shifa was a pharmaceutical plant that the Director of Central Intelligence determined was linked to both chemical weapons precursors and to Osama bin Laden. After the August 1998 embassy bombings the President had no doubt of al Qaeda’s intent to attack the United States by whatever means possible.
In my experience, the United States does a better job at incorporating intelligence into its targeting decisions than it does in using intelligence to explain those decisions after the fact. This in part reflects the inherent difficulty in articulating a basis for targets derived from ongoing intelligence sources and methods. Moreover, it is hard to pause during ongoing operations to work through issues of disclosure. Commanders should look forward and not behind. But articulation is an important part of the targeting process that must be incorporated into the decision cycle for that subset of targets raising the hardest issues, for example, where the purpose may not be apparent from information available to the public, or the civilian casualties are high in relation to the military advantage apparent to the public.

Whatever the role of the President's legal counsel generally, he or she bears a special responsibility to ensure that when the President speaks, or his immediate advisors speak, they do so conscious of the legal and legal policy implications of their words. Where the President speaks the message is magnified and the consequences usually irreversible.

As part of the appraisal function, the President's legal counsel also bears responsibility to ensure that ongoing operations are conducted in a manner consistent with presidential direction and that presidential orders do not have unintended or ill-founded effect. Do the ROE work? Has presidential process delayed decision, or put servicemen at risk? If so, is such process well founded? [*429] Second, where the President has provided limited or nuanced authorization, have circumstances changed? In the case of a campaign conducted with embedded journalists reporting 24/7, the answers may be self-evident without need for inquiry. But where clandestine counter-terrorist operations are involved, or serial conflicts outside the public eye—for example, the Iraq No Fly Zones (1991-2003) or Somalia—such questions become more relevant, if not urgent.

V. CONCLUSION

Targeting process is usually considered from the perspective of military efficiencies. In my view, such processes should also be evaluated from the perspective of constitutional imperatives and legal efficiencies. Neither perspective need be exclusive of the other.

The advantages of horizontal command are apparent. The advantages of presidential command are less apparent, but more enduring in a constitutional democracy founded on the principle of law. In context, there are good arguments for vertical civilian decision, and in particular presidential approval. Such approval may be required as a matter of law, for example, when the target itself requires the constitutional authorization to resort to force. As a matter of legal policy, the President should also approve targets (or classes of target, etc.) that cross new boundaries—in territory, weapon choice, collateral casualty, and risk.

Moreover, from presidential decision comes enhanced political and legal legitimacy. Presidential decision, on the close calls, results in consistency in application of targeting principles. For the military, this brings public recognition that in democracy the military implements rather than makes policy, and therefore should be supported for its professionalism and not on the basis of its policy choices.

Although decision in the field is generally faster, presidential decision can also create military efficiencies. This is the case where targets based on uncertain information emerge, requiring difficult and timely choices based on the immediate collection and review of national level intelligence judgments from multiple agencies. The President is best situated legally and bureaucratically to fuse this information and make a decision in a timely manner. As a matter of constitutional law and process, the President is also best situated to determine what information, if any, will be disclosed in order to articulate the basis for difficult decisions. These are problems that have arisen and will continue to arise in a global war on terrorism.

To be clear, the President may, and appropriately does, delegate his command and legal responsibilities in a majority of contexts. Presidential targeting decisions will be primarily focused on pre-planned or emerging aerial [*430] targets and less so on emerging infantry targets. Thus, presidential targeting approval should apply to only a
small subset of targets. Decisionmakers should ask: Is this something the President needs to approve? If not, what are the military and policy consequences of doing so? Military officers within the chain of command should ask not only if this is a target or decision that must go to the President, but also whether it should go to the President. The question is not can it be done, but should it be done based on the policy, legal, and military factors at play. Decision is rapid when it is framed contextually (that is, target, class, or ROE) and decisionmakers are trained in temperament and the substantive issues relative to the decision.

When the President decides, he should do so with the benefit of counsel. Why? Because the President's primary role in national security is making policy decisions. His focus is rightly on the cost and benefits of the options presented. At the same time, the President bears direct and ultimate responsibility under the Constitution to uphold the law and, as Commander in Chief, this includes the LOAC. The President's counsel, then, guides by educating the commander, testing facts, and offering contextual applications of principles. During the articulation phase of a decision, the lawyer also serves as an advocate. Only rarely should the lawyer serve as judge, but the President's legal counsel must be prepared to assume all three roles.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Jurisdiction Subject Matter Jurisdiction General Overview Governments Federal Government Executive Offices International Law Sovereign States & Individuals Human Rights War Crimes

FOOTNOTES:

n1 While the "law of armed conflict" and "law of war" are used interchangeably by a majority of commentators, I prefer the law of armed conflict as descriptive nomenclature. Although burdensome as a prosaic term, the law of armed conflict more readily reflects the application of this body of law to "combat," and not just to what participants in domestic debates over the war power will recognize as an elusive subcategory of hostilities known as "war."


n6 18 USC § 2441(c) (2000).


n8 UCMJ art 18, 10 USC § 818 (2000).


n10 UCMJ art 21, 10 USC § 821 (2002); see In re Yamashita, 327 U.S. 1 (1946).


n12 US Const art I, § 8, cls 9-10, 14. This list is illustrative and not necessarily exhaustive. It is intended to demonstrate that the LOAC is subject to effective sanction in US law. This Article does not express a view on, nor address, the applicability of the LOAC to persons detained in the course of the war on terrorism. Nor does it seek to identify or validate all potential sources of war crimes jurisdiction nor address the substantive and procedural rules that might apply in a particular jurisdictional circumstance.


n15 David M. Crane, Promoting Accountability and Justice in Sierra Leone, Remarks at the 2003 Judicial Conference of the United States Court of Appeals for the Armed Forces 2-9 (May 13, 2003) (on file with CIL) (explaining the efficiency and cost-effectiveness of the court). The Special Prosecutor has also demonstrated that in the Sierra Leone context, such a judicial mechanism can work in a complementary way with a Truth and Reconciliation Commission, also intended through a different means to bring justice and healing to a war-torn land. Id at 15-16.

n16 US Const art II, § 3.

n17 Baker, 55 Naval War Coll Rev at 16 (cited in note 13).

n18 For illustrative definitions and discussion of these terms, as well as proportionality and military objective, see for example, W. Hays Parks, Air War and the Law of War, 32 AF L Rev 1 (1990); William J. Fenwick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 Milit L Rev 91 (1982). See also Protocol Additional to the Geneva Conventions (1949), and Relating to the Protection of Victims of International Armed Conflicts art 48-58 (1977), 16 ILM 1391 (1978) (hereinafter Additional Protocol I); "The Law of Targeting," Annotated Supplement to the Commander's Handbook on the Law of Naval Operations ch 8


n20 See C.B. Shotwell, Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War, 4 USAFA J Legal Stud 15, 17-20 (1993) (citing numerous sources supporting the view that contrary to the conventional wisdom of the time, bombing of civilian populations during World War II did not break the morale of civilian communities, but rather strengthened their resolve to fight against their enemies).


n22 See Geoffrey Best, War and Law Since 1945 at 115-23, 253-66 (Clarendon 1994) (explaining how the protection of civilian life was a major international concern during the Geneva Conventions and "has become the driving concern of contemporary IHL development"); W. Michael Reisman and Chris T. Antoniou, eds, The Laws of War 80-93 (Vintage 1994) (citing numerous international laws governing the protection of civilians during wartime); Department of the Army Field Manual: The Law of Land Warfare 3 (Department of the Army 1956) (noting that one of the three purposes of the "law of land warfare" is the protection of "both combatants and noncombatants from unnecessary suffering" and a second purpose is "safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians ... "); Maj. Lisa L. Turner and Maj. Lynn G. Norton, Civilians at the Tip of the Spear, 51 AF L Rev 1, 76-82 (2001) (explaining the provisions of the Geneva Conventions intended to protect civilians).

n23 Regardless of one's constitutional views, it is unthinkable in a democracy that, absent presidential incapacitation, someone other than the President would or could authorize the use of nuclear weapons.


n26 50 USC § 413(b) (2000).

n27 By which I mean, inter alia, bilateral arrangements, ad hoc coalitions of the willing, and more formal
multilateral arrangements such as NATO.


n29 See David Herbert Donald, Lincoln 361, 389-92, 439 (Simon & Schuster 1995).


n31 Ralph Wetterhahn, The Last Battle 97-99 (Carroll & Graf 2001).


n33 David L. Greene, With War under Way, Bush Leaving Details to Advisers: Officials Note President Will Stay in Touch during Weekend at Camp David, Baltimore Sun 7A (Mar 22, 2003) (noting that "some historians have written of how Johnson, under enormous political pressure, immersed himself in Vietnam War field operations, sometimes choosing bombing targets.").

n34 Id ("Johnson was also known to walk in the middle of the night to the White House Situation Room. There, in pajamas and slippers, he obtained the latest reports on bombing raids, casualties and missions in specific Vietnamese villages.").


n36 Baker, 55 Naval War Coll Rev at 18 (cited in note 13).

n37 A more empirical index of presidential process is found in the number of National Security Council meetings a President attends during a crisis (including the functional equivalents such as "small group" meetings in the Oval Office). Where the Secretary of Defense and Chairman of the Joint Chiefs attend, it would be unusual for the President not to review past military events as well as preview prospective operations, including pre-planned targets. Agendas and "summaries of conclusion" from these meetings would go even further in verifying the inclusion of military briefs and target package reviews.

n38 In the days following the fall of Baghdad to allied forces, the military's failure to protect the Iraqi National Museum of Antiquities from looting became an issue of domestic and international debate. See, for example, Christopher Knight, A Cultural Casualty of War: The U.S. Military's Failure to Stop the Looting of the Iraqi National Museum Was a Strategic Blunder, LA Times E1 (Apr 18, 2003). I offer this example because it illustrates well and in topical fashion the confluence of military and national policy considerations in tactical military decision; I do not offer the example in order to criticize or validate US decisions. I do note that the considerable loss of antiquities due to looting appears to have been initially exaggerated. See Christine Spolar, Most Museum Artifacts Found, Chi Trib 1 (May 5, 2003) ("The vast majority of antiquities feared stolen or
broken have been found inside the National Museum in Baghdad, according to American investigators who compiled an inventory over the weekend of the ransacked galleries. A total of thirty-eight pieces, not tens of thousands, are now believed to be missing.


n41 Reisman and Antoniou, The Laws of War at xx (cited in note 22).

n42 See letter from Daniel Webster to Mr. Fox April 24, 1841, reprinted in 1 The Papers of Daniel Webster, Diplomatic Paper 1841-43 (New England 1983).

n43 See, for example, Human Rights Watch, Civilian Deaths in NATO Air Campaign, Summary (Feb 2000), available online at <www.hrw.org/reports/2000/nato> (visited Sept 13, 2003) (implying that large numbers of civilian deaths resulted from questionable targeting and munition decisions); Human Rights Watch, New Figures on Civilian Death in Kosovo War (Feb 7, 2000), available online at <www.hrw.org/press/2000/02/nato207.htm> (visited Sept 13, 2003) (alleging that "all too often, NATO targeting subjected the civilian population to unacceptable risks" and suggesting that illegitimate targeting and munition decisions resulted in large numbers of civilian deaths).

n44 See Additional Protocol I art 57, § 4 (cited in note 18); see also Annotated Supplement to the Commander's Handbook on the Law of Naval Operations ch 8.1 (cited in note 18) (requiring "all reasonable precautions").

n45 US Const art II, § 3.
Ethical Issues of the Practice of National Security Law:
Some Observations

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I. INTRODUCTION

In the twenty-first century national security law has become among the most challenging of legal disciplines in which to practice. This development has several causes, not least that the field embraces the most fundamental of all governmental functions: the Nation’s security. As the Supreme Court insisted in Haig v. Agee,1 “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”

Before one examines the ethical conundrums occasioned by a national security law practice, the linkage of that discipline with developments in international law deserves comment. The tragedy of the 9/11 attacks and the resulting wars in Afghanistan and Iraq, not to mention the ongoing worldwide offensive against terrorists, have underlined not just the axiom of security being the most “compelling” of governmental interests, but also the reality that U.S. national security is inextricably intertwined with international events. In fact, one of the most important reasons for the rise of national security law has been the growing importance of law generally in international affairs.

That growth is, in large measure, a reflection of the phenomenon of globalization.2 This has significantly impacted the law because the dramatic

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2. Id. at 307 (quoting Apgar v. Secretary of State, 378 U.S. 500, 509 (1964)).
3. The International Monetary Fund defines globalization as follows:

Economic “globalization” is a historical process, the result of human innovation and technological progress. It refers to the increasing integration of economies around the world, particularly through the movement of goods, services, and capital across borders. The term sometimes also refers to the movement of people (labor) and knowledge (technology) across international borders. There are also broader cultural, political, and environmental dimensions of globalization.

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increase in world commerce demands internationally accepted legal norms, instruments, and adjudicatory forums in order to work effectively. The *Economist* notes that we now live in “a world where barriers to the transfer of goods, expertise and people are coming down” and further observes that in “history, whenever cross-border commerce has flourished . . . so too have trade lawyers with broad horizons . . .”

The globalization of law, aroused by the globalization of commerce, has helped revolutionize the practice of international law, with real implications for a national security law practice. It is no surprise that Justice Sandra Day O’Connor uses martial language when she says that “understanding international law is no longer just a legal specialty; it is becoming a duty.”

According to *U.S. News & World Report*: “Since the early 1990s, an explosion of international trade, the end of the Cold War, the rise of the Internet, and proliferation of international tribunals, and the new global war on terrorism have transformed the field of [international] law.”

The juxtaposition of the “new global war on terrorism” with “an explosion of international trade” is significant for the national security law practitioner because history repeatedly demonstrates that major developments in the economic sphere inevitably shape the conduct of war. Thus, everything from the development of agriculture (which permitted the rise of mass armies), to the industrial revolution (which enabled the mechanization of war), to the information age (whose technology permits

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The term “globalization” began to be used more commonly in the 1980s, reflecting technological advances that made it easier and quicker to complete international transactions—both trade and financial flows. It refers to an extension beyond national borders of the same market forces that have operated for centuries at all levels of human economic activity—village markets, urban industries, or financial centers.

There are countless indicators that illustrate how goods, capital, and people, have become more globalized.


precision weaponry) illustrates how developments in the commercial sphere profoundly influence the way humans have fought.

It should not be surprising that the prominence the law—and lawyers—has achieved in the realm of globalized commerce parallels a similar growth in influence in national security matters, including the conduct of war. Senior military leaders acknowledge the new environment. General James Jones, the former commander of NATO forces, conceded that twenty-first century warfare is now "very legalistic and very complex," requiring "a lawyer or a dozen." In part, this "legalistic" aspect of warfare results from efforts of today's adversaries to manipulate respect for the rule of law into something they can exploit. Professor William Eckhardt explains:

Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity." The evolving role of law—and lawyers—in national security matters post-9/11 has not been without controversy about the professional ethics of the discipline's practitioners. Cynics, for example, argue that war is becoming "overlawyered." More specifically, former Office of Legal Counsel ("OLC") attorneys John Yoo and Jay Bybee were accused by the Justice Department's Office of Professional Responsibility ("OPR") of professional misconduct by "failing to provide 'thorough, candid, and objective' analysis in memoranda regarding the interrogation of detained terror suspects." A review by David Margolis, the Associate Deputy Attorney General, rejected the OPR findings and concluded that no professional misconduct, per se, had taken place. He did so even though he found that there were "some significant flaws" in the memos, and that "Yoo and Bybee

12. See id. at 64–65.
13. Id. at 67.
exercised poor judgment by overstating the certainty of their conclusions and understating countervailing arguments."\textsuperscript{14}

As critics have pointed out, Margolis' conclusions are based on a standard employed by OPR that essentially requires proving more than what the American Bar Association ("ABA") Model Rules might require. David Luban maintains:

The OPR standard requires not just an ethics violation, but an ethics violation that the lawyer committed intentionally or in reckless disregard of the rules of conduct. In other words, OPR's framework requires proof of a guilty mental state over and above what the ethics rules themselves require.\textsuperscript{15}

Consequently, the cases of Yoo and Bybee, notwithstanding the exoneration of the two on ethics charges, do not provide much precedent useful to attorneys charged with ethics violations in the future, especially if they are judged on the more demanding standards of competence and candor expressed in the ABA Model Rules.\textsuperscript{16}

Beyond allegations of professional malfeasance, at least one national security law practitioner actually found himself criminally charged. Captain Randy Stone, U.S. Marine Corps ("USMC"), was one of the first persons criminally charged following the 2005 killing in Haditha, Iraq, of twenty-four unarmed civilians by U.S. Marines.\textsuperscript{17} Captain Stone was alleged to have failed to properly report and investigate the deadly incident.\textsuperscript{18} Although the court-martial convening authority (then Lieutenant General James Mattis, USMC) later dismissed the charges, he did so not because he concluded no professional errors occurred, but rather because he did not believe that "any mistakes Captain Stone made with respect to the incident [rose] to the level of criminal behavior."\textsuperscript{19} Interestingly, Lieutenant General

\textsuperscript{14} Id. at 68.


\textsuperscript{18} See id.

Mattis also observed that the lawyer and his fellow Marines “served in the most ethically challenging combat environment in the world.”

While the battlefields of Iraq unquestionably present an “ethically challenging” environment, they are not the only places where the practice of national security law presents ethical difficulties. This Article does not purport to catalogue—let alone definitively resolve—every issue of professional responsibility a national security practitioner might face. It does, however, aim to illustrate at least some of the problems that are uniquely complicated by a variety of imperatives intrinsic to the national security law discipline.

Generally, the ethical behavior of lawyers, to include national security law practitioners, is governed by their particular licensing jurisdiction’s code of professional responsibility. In most instances, these local codes draw upon the ABA Model Rules of Professional Conduct, which represent the legal profession’s archetypal standards. The Model Rules do not, however, make many special accommodations for a national security practice, and that has caused some to question their utility in resolving the ethical issues that arise in a national security law practice. Nevertheless, they provide an appropriate starting point for discussion of this very important topic. Accordingly, this Article will survey the Model Rules and select a few of them to try to illuminate (through the examination of actual cases where possible) how they might apply in the national security law realm. This effort starts with an examination of the Preamble of the Model Rules.

II. THE MODEL RULES

a. Furthering the Public’s Understanding, Confidence, and Participation in the Rule of Law

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the

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20. Id.
21. See MODEL RULES, supra note 16.
22. Many government lawyers are required to abide by the McDade Amendment, Ethical Standards for Federal Prosecutors Act and the Citizen’s Protection Act (also known as the “McDade Amendment”) as implemented by the Ethical Standards for Attorneys for the Government, 28 C.F.R. § 77.1 (2012). These standards generally make a government attorney “subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” 28 U.S.C. § 5308 (2011).
quality of service rendered by the legal profession . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.  

This excerpt from the Preamble to the Model Rules expresses what one might have thought, prior to 9/11, was a rather uncontroversial responsibility of a legal professional—to promote the rule of law whenever and wherever one could. However, in Holder v. Humanitarian Law Project, 25 the Supreme Court essentially endorsed the government's ability to prohibit the advancing of "the public's understanding of and confidence in the rule of law and the justice system[,]" at least insofar as specific groups are concerned. 26

Humanitarian Law Project involved a statute that criminalizes "material support" (to include "training," "services," and "expert advice or assistance") to certain designated terrorist organizations. 27 The Secretary of State had designated the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE") as terrorist organizations. 28

What the nongovernmental organizations who were parties to the case sought to provide appears to be exactly what the Model Rules seem to encourage, that is, "train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; "teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief;" "train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies"; and "offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government." 29

The Court concluded that such activities could be prohibited consistent with the First Amendment. 30 In rationalizing its view, it conjured up a variety of questionable theories. For example, it claimed that training to use law to peacefully resolve disputes might enable a "broader strategy to promote terrorism." 31 The Court hypothesized that the "PKK could, for example, pursue peaceful negotiation as a means of buying time to recover

25. 130 S. Ct. 2705 (2010).
29. Id. at 2716.
30. Id. at 2731.
31. Id. at 2711.
from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks.\textsuperscript{32}

Many scholars find the decision perplexing and wrong. For example, one First Amendment expert, David Goldberger, calls \textit{Humanitarian Law Project} "an incredibly broad ban on assistance to groups listed as terrorist groups, even where the assistance might have the effect of facilitating the abandonment of terrorism."\textsuperscript{33} Even more inexplicable is the Court's reasoning in justification of the ban introducing extremist organizations to the rule of law. According to the Court, a "foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote."\textsuperscript{34}

It is surprising that the Court would have so little confidence in the ability of various legal institutions to appropriately handle those that seek to "threaten, manipulate, and disrupt." Robust legal systems, such as that of the U.S., can deal with exactly that kind of person, and most develop rules and procedures to do so effectively. What is the alternative? History shows that extremist organizations can be pacified by integration into political and legal systems—the evolution of the Irish Republican Army being one example.\textsuperscript{35} Absent the incorporation of warring groups into the political process in accordance with the rule of law, it is difficult to conceive how some conflicts can be resolved. Training about the legal system and advice as to how to access it, along with efforts to further the understanding of and confidence in the rule of law and the justice system, as suggested by the Model Rules Preamble, would seem to be indispensable to such efforts; yet \textit{Humanitarian Law Project} largely precludes that, at least for certain groups.

Although \textit{Humanitarian Law Project} might be read as an unfortunate disparagement of the efficacy of the law to be an engine for dispute resolution, it is important for national security practitioners to keep in mind that the Court was not advocating a position, but rather merely ruling on the constitutionality of a statute. Still, the national security law practitioner should continue to try to advance—where permitted by the law—the use of legal means and institutions to resolve conflicts. However bitter and caustic

\textsuperscript{32} Id. at 2729.


\textsuperscript{34} \textit{Humanitarian Law Project}, 130 S. Ct. at 2729.

legal battles may be, they are always preferable to the ones marked by actual bullets and blood.

b. The Role of the Courts

The legal profession is largely self-governing . . . [U]ltimate authority over the legal profession is vested largely in the courts.36

The idea that the "legal profession is largely self-governing" and that the "ultimate authority over the legal profession is vested largely in the courts"37 can be troubling in the national security setting, as the courts very often take a hands-off approach to national security issues. For example, with respect to the military dimension of national security affairs, the Supreme Court declared in Gilligan v. Morgan38 that:

[It] is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.39

Courts very often seize upon an array of theories to avoid involvement in cases that raise national security matters.40 In many instances they halt the legal process by relying upon the "political question" doctrine,41 the "state secrets" theory,42 or standing.43 On other occasions, deference to the executive branch effectively ends litigation before the merits have been

36. MODEL RULES, supra note 16, Preamble and Scope, ¶ 10. The full paragraph reads:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

Id.

37. Id.
38. 413 U.S. 1 (1973).
39. Id. at 16.
examined. Indeed, Professor Stephen Vladeck contends that as of May 2012, there have not been any successful lawsuits "arising out of post-September 11 U.S. counterterrorism policies alleging violations of plaintiffs' individual rights." Professor Vladeck argues that a "national security canon" has arisen that effectively leaves those harmed by governmental action related to national security without legal recourse.

The judiciary's use of these doctrines can have the effect of shielding the activities of lawyers from the scrutiny the courts might otherwise give their behavior. As a Harvard professor and former government attorney, Professor Jack Goldsmith, has noted, "[o]ften when an Executive Branch lawyer advises a client on a national security matter, their advice takes place in secret without a dissenting opinion or appellate review. This is a situation fraught with the possibilities of mistakes." Thus, while the courts may well have "ultimate authority" over the professional conduct of attorneys, absent the transparency into their activities that litigation provides in other contexts, they simply cannot exercise that authority in a meaningful way.

A good example of the mischief that can result is found in the case of U.S. v. Reynolds, which has become accepted as the seminal case for the state secrets doctrine. This case arose out of a 1948 Waycross, Georgia, crash of a B-29 bomber carrying out tests on then advanced—and classified—electronic equipment. During discovery in a suit for damages by the relatives of the civilian victims (Radio Corporation of America employees who were aboard the ill-fated plane), the plaintiffs sought a copy of the Air Force's accident investigation. The Government, employing rather ambiguous affidavits, denied the request, implying that classified information would be compromised by the report's disclosure, and formally asserted that the report was privileged. Even the trial judge was denied access to it.

46. Id.
48. 345 U.S. 1.
49. See id.
50. Id. at 2–3.
51. Id. at 3.
52. Id. at 3–4.
Scholar Louis Fisher asserts that there "was a reason for the government to withhold the accident report from [the trial judge]." According to Fisher, it was not secrets that would be compromised; rather, the "report revealed clear negligence on the part of the Air Force, which had not installed heat shields and had failed to brief the civilian engineers before the flight on the use of parachutes and emergency aircraft evacuation." Not knowing what the report actually said, the Supreme Court upheld the government's position, finding that "when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents."

The story does not, however, end there. In the year 2000, a daughter of one of the civilians killed in the crash discovered the declassified accident report for sale on the Internet. Subsequent examination of it confirmed that no classified information or equipment had been involved in the crash, and the plaintiffs sought to reopen the case based on the apparent fraud on the court. However, "[d]espite this showing of apparent government misconduct" the Supreme Court eventually denied a coram nobis petition for further review. In subsequent litigation, the plaintiffs were "denied relief because they were unable to show that government officials in 1953 had committed intentional fraud on the court."

Nevertheless, the Reynolds opinion has been severely criticized. Fisher argues:

The Supreme Court in Reynolds accepted at face value the government's assertion that the accident report and survivors' statements contained state secrets. That assertion was false. By accepting the government's claim and by not examining the

55. Id.
56. Reynolds, 345 U.S. at 10–11.
58. See id.
59. DYCOS, supra note 40, at 158 (citing In re Herring, 539 U.S. 940 (2003)).
60. Id. (citing Herring v. United States, 424 F.3d 384 (3d Cir. 2005), cert. denied, 547 U.S. 1123 (2006)).
documents, the Court appeared to function as an arm of the executive branch and failed to exercise independent judgment.\(^61\)

As it happens, the state secrets privilege has recently come under scrutiny, as some in Congress believe the privilege is being abused.\(^62\) Accordingly, legislation is being introduced designed "to counter federal judges who routinely accept the government's privilege assertion on face value without any inquiry, sometimes without viewing any classified material to support the government's position."\(^63\)

It is impossible at this point in time to really understand the thinking of the government lawyers involved in the Reynolds case, and to rationalize—consistent with the Model Rules—how they justified their conduct, which suggests, at a minimum, a lack of "candor."\(^64\)

In any event, Reynolds underlines the importance, as the ABA Preamble says, of the self-governing character of the legal profession.\(^65\) Given the nature of national security issues, we cannot expect the courts to always exercise oversight and authority contemplated by the Model Rules, if for no other reason than the opaque character of much national security law litigation. In the end, for the national security law practitioner especially, compliance with ethical standards necessitates individual lawyers' "self-governing."

\(\text{c. The Lawyer as a Zealous Advocate} \)

\textit{As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.}\(^66\)

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61. Fisher, supra note 54, at 401.


63. Id.

64. See MODEL RULES, supra note 16, R. 3.3.

65. See id., Preamble and Scope, ¶ 10.

66. Id. ¶ 2. The full paragraph reads as follows:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains the practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

\textit{Id.}
The Preamble speaks to a cardinal—and indispensable—responsibility of lawyers: zealous representation.67 Importantly, the Model Rules juxtapose the lawyer’s function as an advocate among other functions that the lawyer may serve in the context of representation. Though sometime misunderstood, this requirement for zealous advocacy does not mean that a lawyer must, or even can, do anything, anytime, that the client desires. As Justice Sandra Day O’Connor maintains, “[t]he hardest thing you must accept as an ethical, moral lawyer is that it is not your job to win for your client at all costs.”68 The case of Lynne Stewart is an example of a national security case where the attorney in question lost sight of Justice O’Connor’s admonition, and suffered for it.

Ms. Stewart was a self-described “radical human rights attorney”69 with a “reputation for defending unpopular clients and causes.”70 One of those clients was Omar Abdel Rahman, the “blind Sheik” who was convicted of various terrorism-related offenses including plotting to blow up the World Trade Center.71 As part of her representation, Ms. Stewart was required to agree to “special administrative measures” (“SAMs”) in order to get access to her imprisoned client.72 Among other things, these SAMs prohibited her from using her “meetings, correspondence or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman.”73

In 2005, Ms. Stewart was tried for several offenses arising out her representation of Rahman, including violating the SAMs by smuggling messages from Rahman to an Egyptian militant group, al-Gama’a, mostly about a ceasefire that the group had declared with regard to its violent efforts to overthrow the Egyptian government.74 In her defense Stewart insisted that she was merely acting “zealously” for her client. Convicted and sentenced to twenty-eight months in prison, Stewart defiantly declared that she “can do that [prison term] standing on [her] head.”75 In addition, when asked if she would do anything differently, she replied, “I don’t—I’d like to think I would not do anything differently . . . . I made these decisions

67. See id.
72. U.S. v. Stewart, 590 F.3d 93, 100 (2d Cir. 2009).
73. Id. at 100.
75. Id. at 165.
based on my understanding of what the client needed, what a lawyer was expected to do . . . I would do it again. I might handle it a little differently, but I would do it again.”76

On appeal, Stewart reiterated her claim that she had been simply acting “zealously” to represent her client. However, the court rejected this contention, finding that

the jury had a reasonable basis on which to disbelieve this, and to “disbelieve that zealous representation included filing false affirmations, hiding from prison guards the delivery of messages to Abdel Rahman, and the dissemination of responses by him that were obtained through dishonesty.” Moreover, even if Stewart acted with an intent to represent her client zealously, a rational jury could nonetheless have concluded that Stewart simultaneously acted with an intent to defraud the government. A genuinely held intent to represent a client “zealously” is not necessarily inconsistent with criminal intent.77

In fact, the appeals court would not affirm the sentence, returning it to the trial court for further consideration because the appellate judges could not “conclude that the mitigating factors” were sufficient to justify the original twenty-eight-month sentence “in light of the seriousness of her criminal conduct, her responsibilities as a member of the bar, and her role as counsel for Abdel Rahman.”78

In a stunning turn of events, the trial court re-sentenced Stewart to ten years, the trial judge finding that the original sentence was not adequate because, among other things, she “abused her position as a lawyer.”79 That sentence was affirmed on appeal, as the judges ruled that not only was it lawful to consider Stewart’s post-conviction statements of bravado in the resentencing, but also that she

persisted in exhibiting what seems to be a stark inability to understand the seriousness of her crimes, the breadth and depth of the danger in which they placed the lives and safety of unknown

76. Id.
78. Id. at 99.
innocents, and the extent to which they constituted an abuse of her trust and privilege as a member of the bar.\textsuperscript{80}

In a pre-sentencing letter to the trial judge, Stewart gave an inkling of what may have been her key shortcomings.\textsuperscript{81} She spoke of seeing her job as a lawyer as that of “caring for the whole client,” to include “giving them money for food or their families,” and “visiting them on holidays”—activities beyond the usual professional responsibilities, and problematic ones in an era of sophisticated and exploitive international terrorists.\textsuperscript{82}

Stewart indicated that she believed that “her stature in the legal community[,]” along with what she implies was general acceptance by the government of her way of practice in prior cases, would somehow exempt her from being viewed as having broken the law in the Rahman case.\textsuperscript{83} Perhaps most importantly, she admitted that “representing this convicted terrorist was still uncharted territory in the years 1997–2001” and that “what might have been legitimately tolerated in 2000–2001, was after 9/11, interpreted differently and considered criminal.”\textsuperscript{84}

Clearly, the idea that terrorism and other national security cases are “different” and viewed with the utmost seriousness is a lesson that all lawyers would do well to internalize from the Lynne Stewart case. It is another manifestation of the precept that government has no more compelling interest “than the security of the Nation,”\textsuperscript{85} and that fact may well operate to diminish tolerance for behavior that might otherwise be excused.

d. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.\textsuperscript{86}

Competence for the national security law practitioner can be quite challenging. Almost by definition, national security matters are not the stuff

\textsuperscript{80} Stewart, 686 F.3d at 181 (emphasis added).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} See Haig v. Ager, 453 U.S. at 307.
\textsuperscript{86} MODEL RULES, supra note 16, R. 1.1.
of most civilian experience. A contracts lawyer may have personal experience in buying a home or car that may familiarize him or her with issues arising in a similar transaction by a client. Contrast that with the national security law practitioner who may find himself or herself deliberating over a decision to kill another human being, or hundreds. Furthermore, some tasks may require considerable technical knowledge in order to utilize complex equipment in command centers, or to understand the weapons, warfare, and warriors of the national security discipline. Accordingly, specialized training is indispensable in order to function effectively, especially where high-technology weaponry is involved.\footnote{87}

The consequences of a lack of training can be serious. The case of Captain Randy Stone, the Marine lawyer accused of failing to properly report and investigate the Haditha incident, is instructive.\footnote{88} Although he was "responsible for handling investigations and training Marines in the military’s laws of war," Stone said "he received almost zero training for his job before joining the battalion in Iraq in September 2005."\footnote{89}

National security law clients may have very high expectations about what they want a lawyer to understand about this "business." Lieutenant General Michael C. Short, USAF (Ret.), who commanded air operations against Serbia\footnote{90} in the 1990s, advised:

I would give an up-and-coming young operational lawyer wearing the uniform in defense of this country [the following advice:] Understand what your commander is up against. Understand and participate in the development of his rules of engagement. Understand what special instructions he is providing as supplemental to his rules of engagement, to his troops in field, or his men and women at sea, or his men and women in the air.\footnote{91}


88. See McChesney, supra note 17; Press Release, supra note 19.


A national security law practitioner must, in many instances, have a
deep enough level of understanding of the means and methods of national
security activities to be able to offer lawful alternatives when possible.
Offering timely alternatives is an indispensable aspect of this kind of
practice, and is a quality that can earn the trust of the client.

When national security law practitioners demonstrate authentic
competence, "client" commanders have greater faith in them, and will more
readily incorporate them into the decision-making process. When that
occurs, real dividends result. For example, when a Human Rights Watch
analyst told the New York Times, in 2008, that the Air Force had ""all but
eliminated civilian casualties in Afghanistan"" in strikes that are a product
of the deliberate planning process, the paper also pointed out that "Air Force
lawyers vet all the airstrikes approved by the operational air
commanders."

Again, few things are more important for a "competent" national
security law practitioner than a comprehensive and in-depth knowledge of
not just the law, but also the "client" and his or her very unique "business."

\[ A \] lawyer who has formerly served as a public officer or employee
of the government . . . shall not otherwise represent a client in
connection with a matter in which the lawyer participated
personally and substantially as a public officer or employee, unless
the appropriate government agency gives its informed consent,
confirmed in writing, to the representation.\[94\]

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of lawyers in that conflict from a commander's perspective, see generally WESLEY K. CLARK, WAGING
92. Thom Shanker, Civilian Risks Curbing Airstrikes in Afghan War, N.Y. TIMES, July 23, 2008,
http://www.nytimes.com/2008/07/23/world/asia/23military.html (quoting Marc Garlasco, Senior Mili-
tary Analyst, Human Rights Watch).
93. Id.
94. MODEL RULES, supra note 16, R. 1.11. The full paragraph (and the following paragraph)
states:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a
public officer or employee of the government:
(1) is subject to Rule 1.9(c); and
(2) shall not otherwise represent a client in connection with a matter in which the lawyer
participated personally and substantially as a public officer or employee, unless the
appropriate government agency gives its informed consent, confirmed in writing, to the
representation.
This is an area of the Model Rules that most involves the civilian sector, and particularly those who have previously served in government. It can ensnare even very highly respected and knowledgeable lawyers. An illustrative example with a national security law dimension is the case of Abraham D. Sofaer, a still much-admired and valued lawyer.55

Sofaer was the Legal Advisor to the State Department from 1985 to 1990.66 In 1988, a bomb exploded on Pan Am flight 103 over Lockerbie, Scotland, killing 270 people, including 189 Americans.57 A Libyan intelligence agent was later convicted for his part in what was determined to be one of the worst acts of state-sponsored terrorism in recent years.58 In 2003, Libya, as a result of pressure from international sanctions, accepted "responsibility for the actions of its officials and [agreed to] payment of appropriate compensation to the victims’ families."59 The compensation was reported to amount to $1.5 billion and its payment "clear[ed] the way for the full normalization of relations between Washington and Tripoli."60

After he left government and entered private practice, Sofaer undertook the representation of "the government of Libya in connection with criminal

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(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under government authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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Id.

95. Mr. Sofaer is currently the George P. Shultz Senior Fellow in Foreign Policy and National Security Affairs at Stanford University’s Hoover Institution. Abraham D. Sofaer, HOOVER INSTITUTION, http://www.hoover.org/fellows/10085 (last visited Aug. 28, 2012).

96. Id.


98. Id.


and civil disputes and litigation arising from the [Pan Am] bombing." As a result, the Board on Professional Responsibility ordered Sofar to receive an informal admonition for having violated Rule 1.11(a) of the District of Columbia Rules of Professional Conduct by accepting employment "substantially related" to a "matter" in which he participated personally and substantially as the Legal Advisor for the State Department.

In his defense, Sofar vigorously contested the precise meaning of the various terms in the rule, and offered several other explanations justifying his actions. However, the District of Colombia Court of Appeals adopted the Board report. In that report it was emphasized that it found a violation of the rules not because Sofar "undertook to represent an unpopular client" or because of "the appearance of impropriety that caused public condemnation of Respondent's private representation of Libya", rather, the Board

[D]id not believe that [the rule] allows a government lawyer to be briefed in the course of his official duties about a particular, sensitive investigation into a discrete event, so that he can provide legal advice, thereby learning important confidential information, provide substantial and personal legal assistance concerning the government's efforts, then leave the government and represent a suspect in the same investigation.

The court also found Sofar's activities "personal and substantial" and noted that they did not become "insubstantial" simply because "the legal judgment was easily arrived at or because the government subsequently concluded that Pan Am's theory of government complicity was unsupported." Finally, the court concluded that, while it may be possible for a former government lawyer to "limit the objectives of a representation with client consent" so as to avoid conflict (and emphasized that it did "not question the sincerity of respondent's belief that the representation could be insulated, factually and ethically, from the investigation and diplomatic efforts of which he had been part"), it nevertheless found the efforts to do so in this instance were inadequate.

102. Id. at 630.
103. See id. at 627-28.
104. See id. at 626.
105. Id. at 651-52.
106. Sofar, 728 A.2d at 651-52.
107. Id. at 627.
108. Id. at 638. See also Opinion 343: Application of the "Substantial Relationship" Test When Attorneys Participate in Only Discrete Aspects of a New Matter, DC BAR.
An important lesson of the Sofáer case can be found in the court's observation that Sofáer did not (as any lawyer could have) "solicit the views of his or her former agency concerning the proposed private legal undertaking" or "consult with ethics advisers in his or her law firm . . . or with the Legal Ethics Committee of the Bar." 109

f. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client. 110

Do the time-sensitive exigencies of national security law "matter" in ethical decision making? Perhaps the real issue for the national security law practitioner is to determine what is "reasonable" diligence under the circumstances of a national security crisis. Unfortunately, no database or treatise defines "reasonable" in the myriad of situations that national security law practitioners face. In fact, many issues may be cues of first impression, so there may well be a lack of historical precedent to rely upon.

Time pressure can be very real. In a statement submitted in connection with David Margolis' examination of the OPR conclusion that the two OLC attorneys, John Yoo and Jay Bybee, violated ethical rules in the opinions about enhanced interrogation techniques that many consider torture, Professor Jack Goldsmith contends:

OPR is not looking at the OLC opinions with the same time constraints as the lawyers who wrote the opinions; instead OPR has taken nearly five years and still has not rendered a judgment. The OLC layers did not have this luxury. Perhaps more important, OPR is looking at the OLC opinions not in the context of the threat and danger in which they were written, but rather in what former Deputy Attorney General James Comey once described as "the perfect, and brutally unfair, vision of hindsight." 111


110. MODEL RULES, supra note 16, R. 1.3.

111. Memorandum from David Margolis, supra note 11.
In its guidance on ethical decision making, the Department of Defense Joint Ethics Regulation advises: “The stress from the problem urges speedy solutions. However, hasty decisions usually create problems of their own. Take the time to gather all necessary information. Ask questions, demand proof when appropriate, check your assumptions.”

Taking “the time to gather all necessary information” may be fine as hortatory and aspirational statement, but is often impractical given the velocity of many if not most national security issues. Hard decisions often must be made on less than ideal information. Judge James Baker, a former National Security Council member, observes that today’s national security attorneys may not have much time for deliberation. “For a variety of reasons,” he says, “relating to the nature and multiplicity of transnational and state threats, combined with the devastating potential of WMD, questions of whether to resort to force and the methods and means of force will pop-up and require immediate decision.”

Of course, when time to study an issue is available, it can make a real difference. In a Human Rights Watch study about operations in Afghanistan, it was found that civilian casualties “rarely occur during planned airstrikes on suspected Taliban targets” but rather “almost always occurred during the fluid, rapid-response strikes, often carried out in support of ground troops.”

The “time crunch” of many national security issues highlights the importance of advance preparation. The ability to make quick decisions much depends not just upon an in-depth understanding of the law, but also upon thorough familiarity with the context in which it must be applied. As explained with relation to the ethical rule about competence, the ability to be diligent in a national security law practice requires the attorneys involved to make a study of the means and methods of national security operations.

As discussed elsewhere in this Article, diligence in the national security law context may impose a responsibility to conduct a careful after-action examination to ensure that decisions made in—literally—the heat of battle were the right ones.

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114. Id.
g. Confidentiality

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . . A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . to prevent reasonably certain death or substantial bodily harm . . . [or] (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another . . . . 116

The case of former Navy Lieutenant Matthew Diaz is instructive with respect to the complications of confidentiality in the national security context. Diaz was a Navy Judge Advocate assigned to Guantánamo, Cuba, not as part of the prosecution or defense teams involved in military commissions’ cases, but rather as part of the installation support legal office.117 In that capacity he served as the point of contact at Guantánamo for requests from Bárbara Olshansky, an attorney working for the Center for Constitutional Rights (“CCR”) in New York City, who was seeking names and information regarding detainees.118

116. Model Rules, supra note 16, R. 1.6. The full rule reads as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
(4) to secure legal advice about the lawyer’s compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
(6) to comply with other law or a court order.

Id.


118. See id.
After a decision was made to not provide the information to Olshansky, Diaz concluded that the "government was 'stonewalling' over the release of the names." Consequently, Diaz printed off a listing of 550 detainees, and sent it anonymously in a Valentine's card to Olshansky. Suspecting the list was classified, Olshansky contacted an attorney and eventually turned the list over to government authorities who launched an investigation, which nabbed Diaz.

According to his defense counsel, Diaz believed it was his "obligation as a lawyer and an American to abide by the Constitution when he felt the government did not." However, the military judge in the case concluded "that none of the evidence proffered by Appellant supported his argument that he was required to release classified information based on his duties as a commissioned officer, his ethical obligations as a judge advocate, or his ethical obligations as a licensed attorney." Although his attorney admitted that Diaz was "stupid, imprudent and sneaky, if you want, about the way he sent it off," he nevertheless insisted Diaz "didn't mean to harm his country." Still, Diaz was convicted and sentenced to six months confinement and dismissal from the Navy.

The Court of Appeals for the Armed Forces affirmed the conviction and sentence. A footnote in the court's opinion is telling. In it, the court described the process available to Navy lawyers who believe they are confronting an ethical conundrum. Referring to Navy instruction on professional responsibility, the court points out that it "recommends four specific steps a covered attorney might take, including 'referring the matter to, or seeking guidance from, higher authority in the chain of command.'"

Of course, Diaz had made no attempt to resolve his concerns in this way.

The lesson here may be that as important as it is for national security practitioners to be self-governing, it does not mean that "self-help" in the area of ethics is necessarily appropriate. Reaching out to experts as

120. Diaz, 69 M.J. at 130.
121. See id.
122. Id.
123. Id. at 136.
125. See Diaz, 69 M.J. at 129.
126. Id. at 130.
127. Id. at 136 n.11 (quoting Dept’ of the Navy, Judge Advocate Instr. 5803.1C, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, Enclosure (1): Rules of Professional Conduct Rule 1.15(b)(3) (Nov. 9, 2004)).
128. See generally id. at 127.
provided by ethics rules is especially important in the complex arena of
national security law. Here the facts did not support Diaz’s belief (however
earnestly held) that he was in an ethical conflict, which strongly suggests
that consultation with superiors and others qualified to offer advice might
have avoided the career implosion he underwent.

h. Client Relations

A lawyer employed or retained by an organization represents the
organization acting through its duly authorized constituents. 29

129. MODEL RULES, supra note 15, R. 1.6. The full rule reads as follows:

(a) A lawyer employed or retained by an organization represents the organization acting
through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated
with the organization is engaged in action, intends to act or refuses to act in a matter related
to the representation that is a violation of a legal obligation to the organization, or a violation
of law that reasonably might be imputed to the organization, and that is likely to result in
substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary
in the best interest of the organization. Unless the lawyer reasonably believes that it is not
necessary in the best interest of the organization to do so, the lawyer shall refer the matter to
higher authority in the organization, including, if warranted by the circumstances, to the
highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority
that can act on behalf of the organization insists upon or fails to address in a timely and
appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
(2) the lawyer reasonably believes that the violation is reasonably certain to result in
substantial injury to the organization, then the lawyer may reveal information relating to
the representation whether or not Rule 1.6 permits such disclosure, but only if and to the
extent the lawyer reasonably believes necessary to prevent substantial injury to the
organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s
representation of an organization to investigate an alleged violation of law, or to defend
the organization or an officer, employee or other constituent associated with the organization
against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the
lawyer’s actions taken pursuant to paragraphs (b) or (c), or who withdraws under
circumstances that require or permit the lawyer to take action under either of those
paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the
organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

(f) In dealing with an organization’s directors, officers, employees, members, shareholders or
other constituents, a lawyer shall explain the identity of the client when the lawyer knows or
reasonably should know that the organization’s interests are adverse to those of the
constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers,
employees, members, shareholders or other constituents, subject to the provisions of Rule
1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the
consent shall be given by an appropriate official of the organization other than the individual
who is to be represented, or by the shareholders.
In a national security law practice, the "who is the client" query can be a complicated question. Harold Koh, the legal advisor to the State Department, lists a number of individuals among those who he characterizes as his "extraordinary" clients. These include, for example, Secretary of State Hillary Clinton, and the President. Such individual representation is, however, the exception, not the rule for most governmental national security law practitioners.

The District of Columbia Rules of Professional Responsibility, for example, provide that the "client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order." Some agencies make this explicit.

Id.  
131. See id.  
132. D.C. RULES OF PROF'L CONDUCT R. 1.6(k) (2006), available at http://www.dobar.org/for_lawyers/ethics/legal_ethics/rule_of_professional_conduct/amended_rules/rule _1-6_k11_06.cfm. The commentary to the rule provides as follows:

Government Lawyers

[36] Subparagraph (e)(2) was revised, and paragraph (k) was added, to address the unique circumstances raised by attorney-client relationships within the government.  
[37] Subparagraph (e)(2)(A) applies to both private and government attorney-client relationships. Subparagraph (e)(2)(B) applies to government lawyers only. It is designed to permit disclosures that are not required by law or court order under Rule 1.6(e)(2)(A), but which the government authorizes its attorneys to make in connection with their professional services to the government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, subparagraph (e)(2)(B) governs.  
[38] The term "agency" in paragraph (i) includes, inter alia, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the Government Accountability Office, and the courts to the extent that they employ lawyers (e.g., staff counsel) to counsel them. The employing agency has been designated the client under this rule to provide a commonly understood and easily determinable point for identifying the government client.  
[39] Government lawyers may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to that individual and that subparagraph (e)(2)(A), not (e)(2)(B), applies. It is, of course, acceptable in this circumstance for a government lawyer to make disclosures about the individual representation to supervisors or others within the employing governmental agency so long as such disclosures are made in the context of, and consistent with, the agency's representation program. See, e.g., 28 C.F.R. § 50.15 and 50.16. The relevant circumstances, including the agreement to represent the individual, may also indicate whether the individual client to whom the government lawyer is assigned will be deemed to have granted or denied informed consent to disclosures to the lawyer's employing agency. Examples of such representation include representation by a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the
In the U.S. Air Force, the Rules of Professional Conduct state that "[e]xcept when authorized to represent an individual client or the government of the United States, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials."133 The explanatory notes point out that when "an Air Force official, member, or employee, acting within the scope of his or her official duties, communicates with an Air Force lawyer, the communication is confidential [and] . . . under these circumstances, the official, member or employee is, in essence, the Air Force."134

As both military officers and legal professionals, attorneys in the armed forces face practical challenges. It is easy in the military for a commander to assume that the uniformed lawyer assigned to his unit is also "his" personal counsel, notwithstanding circumstances where the Air Force's interests conflict with those of individuals, including commanders. Thus, it is especially important that this be made clear before there is any misunderstanding about client confidences.135

The "who is the client?" question can become even more complicated for military lawyers and others assigned to commands composed of international partners. Even though, for example, an attorney may be assigned as a legal adviser to a coalition operation, the client will remain the attorney’s sponsoring organization (e.g., the U.S. Air Force).

There is a practical issue as well—few lawyers would be competent to advise other national contingents on their national responsibilities, not to mention their international responsibilities under treaty law where the interpretation may be subject to particular reservations and other qualifications by a specific coalition partner. It is imperative, then, that a lawyer so assigned make clear the limits of the legal assistance he or she can provide.

Like the Navy,136 the Air Force has a process by which military attorneys can seek ethical and other guidance from senior lawyers,

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134. Id.
135. See, e.g., id., R. 1.13(d) ("In dealing with Air Force officials, members, employees, or other persons associated with the Air Force, a lawyer shall explain that the Air Force is the lawyer’s client when it is apparent that the Air Force's interests are adverse to those of the officials, members, or employees with whom the lawyer is dealing.")
136. See Ditan, 69 M.J. at 136 n.11.
especially when confronted with situations where the attorney believes that an Air Force official "is acting, intends to act, or refuses to act in an official matter in a way that is either a violation of the person's legal obligations to the Air Force or a violation of law which reasonably might be imputed to the Air Force."137

This access to advice and guidance from senior attorneys is protected by law. For example, the Uniform Code of Military Justice specifically states that military legal officers are "entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General."138 The ability to circumvent, if necessary, the normal chain of command is no small prerogative given that the "the Armed Services comprise a hierarchical society, which is based on military rank."139

The law also helps assure the organization gets candid, apolitical legal advice from military lawyers. In fact, the law prohibits any interference from any "officer or employee of the Department of Defense" with respect to the rendering of "independent legal advice."140 Furthermore, in order to reinforce the independence of the provision of legal advice from uniformed attorneys, the law also designates the Judge Advocate General, as opposed to any non-legal officer, as responsible for directing "the officers of the Air Force designated as judge advocates in the performance of their duties."141 All of these statutory provisions help ensure that a military lawyer can carry out his or her ethical responsibilities to the organizational client without running afoul of the duties and responsibilities of a commissioned officer. They are also invaluable in ensuring the delivery of independent and candid advice, as discussed below.

137. AIR FORCE RULES, supra note 133, R. 1.13(c).
140. 10 U.S.C § 8037(f) provides:

(f) No officer or employee of the Department of Defense may interfere with—

(1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Air Force or the Chief of Staff of the Air Force; or

(2) the ability of officers of the Air Force who are designated as judge advocates who are assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.

10 U.S.C § 8037(f) (2011).
141. Id. § 8037(e)(1).
i. Lawyer as Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.142

This section is one of the most important parts of the Model Rules for the national security law practitioner. The very nature of many national security issues is such that their proper resolution can only be had when a range of factors—such as those listed in the rule—are brought to bear on the client’s situation. Yet there are some national security lawyers who perceive their role rather narrowly. Judge Alberto Gonzales, the former Attorney General who has been soundly critiqued for his part in the rendering of suspect advice on coercive interrogation techniques, said in an interview for Esquire magazine, “Putting my lawyer hat aside, the notion that we’d have to get legalistic about torture, yeah, can be offensive to me. It’s inconsistent with American values. But as a lawyer—as a lawyer—you have to try to put meaning to the words passed by Congress.”143

Actually, if the law is truly inconsistent with “American values” then the law itself is suspect, and the national security lawyer needs to make this clear to the client. Perspective matters. In a 2006 essay entitled “Cooler Heads: The Difference between the President’s Lawyers and the Military’s,” Professor Richard Schragger illustrated this importance of perspective. In discussing the dispute at that time between military lawyers (who eschewed coercive interrogation techniques and other actions designed to eviscerate the Geneva Conventions and certain aspects of international and domestic law) and the then-Administration’s civilian attorneys who advocated just such approaches, Schragger concluded:

[M]ilitary lawyers understand that when you ask human beings to kill other human beings, rules of decency are required. War does not erase the line between legal and illegal killings, legal and illegal acts—war accentuates it. Establishing and policing that line becomes even more important when your client is the one likely to cross it.

142. MODEL RULES, supra note 16, R. 2.1.
Civilian lawyers may not appreciate this. Civilian lawyers are educated and socialized into a legal culture that takes the rule of law for granted. The stability of our legal system allows us to do what we do best: seek ways for our clients to avoid legal mishap. The law is something we need to strategize around because it often functions to limit our clients' options, not serve them.\textsuperscript{144}

It is just these kinds of subtleties that can be vitally important in national security matters, and is a clear reason why the broader scope of advice a lawyer can provide is so important. Moreover, it is vital for a national security practitioner not to underestimate the extreme pressure under which some clients must operate. Consider the observation of a former senior military commander:

When I go to my lawyers, I don’t ask, “okay, tell me how I can’t do this.” I go to my lawyers and say, “How can I do what I need to do and not go to jail? How can I do it legally? . . . The legal advisor has to understand that his job is to find a way through the interpretations and legal precedence for the things we have to do, so I can protect my people going out in harms’ way.”\textsuperscript{145}

Sensitivity to the often life-and-death nature of national security issues cannot be overemphasized, and it is one reason why the national security law practitioner needs to be prepared to bring to bear every relevant consideration to the decision-making process, legal and otherwise. At the same time, however, the practitioner needs to keep in mind that there must be a clear distinction between legal advice, and advice that incorporates considerations that fall short of a legal mandate. However, the lawyer’s \textit{recommendation} need not yield to simply giving “meaning to the words passed by Congress.”\textsuperscript{146}

National security clients need more from their lawyers than mere rote recitations of the meanings of statutes. Senator Lindsey Graham said in a 2004 interview that the “military lawyer [JAG] is really the conscience of the military.”\textsuperscript{147} Similarly, Harold Koh said that his State Department

\textsuperscript{146} See Richardson, supra note 143.
attorneys serve as the "conscience for the U.S. Government with regard to international law."

Koh goes on to explain that "one of the most important roles of the Legal Adviser is to advise the Secretary when a policy option being proposed is 'lawful but awful.'" He then quotes one of his predecessors, Herman Pfleger, for the proposition that, "You should never say no to your client when the law and your conscience say yes; but you should never, ever say yes when your law and conscience say no." This is advice the national security practitioner might find useful to keep in mind if confronted with a situation that is, as Judge Gonzales puts it, "inconsistent with American values."

j. Conduct Before a Tribunal

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false . . .

As we have already seen, the importance of candor for the national security practitioners is critical as so many of the cases involve either matters that are properly classified, or issues in which the courts depend upon the integrity of the government representations. Unfortunately, history

148. Koh, supra note 130.
149. Id.
150. Id.
151. Richardson, supra note 143.
152. MODEL RULES, supra note 15, R. 3.3. The full paragraph (a) reads as follows:

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Id.
shows that reliance is not always justified. Classic examples are the World War II Japanese internment cases, Korematsu v. U.S. and Hirabayashi v. U.S.\textsuperscript{153} After the Japanese attack on Pearl Harbor in 1941, war hysteria eventually turned on thousands of Japanese-Americans living on the West Coast.\textsuperscript{155} Because they were suspected of being potential "fifth columnists" or spies, President Roosevelt issued an executive order authorizing military authorities to remove Japanese-Americans from areas near the coast.\textsuperscript{156} Eventually, 100,000 were removed and sent to internment camps.\textsuperscript{157} The Japanese Internment Cases challenged these actions, but in both instances the government's authority was upheld.\textsuperscript{158}

In 2011, however, Neal Katyal, the then Acting Solicitor General of the United States, made a series of disclosures that reflect poorly on the ethics of his World War II predecessor, Charles Fahey.\textsuperscript{159} Katyal reports that a critical intelligence document—the Ringle Report—"found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody."\textsuperscript{160} Even though the Solicitor General knew of this very significant information, he withheld it from the Supreme Court.\textsuperscript{161}

Instead, the Solicitor General "argued that it was impossible to segregate loyal Japanese Americans from disloyal ones."\textsuperscript{162} He also failed to tell the Court that allegations "that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC."\textsuperscript{163} According to Katyal, "to make matters worse, [he then] relied on gross generalizations about Japanese Americans, such as that they were disloyal and motivated by 'racial solidarity.'"\textsuperscript{164}

\textsuperscript{153} 323 U.S. 214 (1944).
\textsuperscript{154} 329 U.S. 81 (1943).
\textsuperscript{155} See generally id. at 113-14.
\textsuperscript{159} See Russo, supra note 157.
\textsuperscript{160} Id.
\textsuperscript{161} See id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} See Russo, supra note 157.
This ethically horrific behavior by a lawyer holding such an important public office is hard to fathom, but does represent how a wartime mania can warp the thinking of the very people whom democracies depend upon to be paragons of composure and rational behavior. Can we dismiss these cases as anomalies from more than half a century ago? Consider the case of *Ashcroft v. al-Kidd.*\(^{165}\)

*Al-Kidd* involved a Kansas-born, former University of Idaho football player named Lavni T. Kidd who converted to Islam while in college and changed his name to Abdullah al-Kidd.\(^{166}\) After 9/11, al-Kidd was questioned by authorities about an acquaintance, a Saudi graduate student named Sami Omar al-Hussayen, who was suspected of using his computer skills to aid terrorists.\(^{167}\) Although he cooperated with the FBI when asked about al-Hussayen, al-Kidd was arrested on a “material witness” warrant in 2003 as he boarded a plane to Saudi Arabia to take a course of study in Islam.\(^{168}\) The affidavits that the FBI used to obtain the warrant proved to be wildly inaccurate.\(^{169}\)

Al-Kidd was kept in jail for sixteen days and on supervised release until al-Hussayen’s trial concluded fourteen months later.\(^{170}\) According to the American Civil Liberties Union, while in federal custody, al-Kidd was “kept under extremely harsh conditions,” including being “kept awake for hours on end, with a bright light shining in his cell 24/7.”\(^{171}\) In addition, whenever he left his cell he was “shackled at the wrists, ankles, and waist” and at “one point, he was left naked for hours in plain view of other clothed prisoners and guards.”\(^{172}\) What is more, when released from jail, he was still “kept under restrictive conditions for months that forced him to abandon an educational scholarship and led to the breakdown of his marriage and career.”\(^{173}\)

Importantly, al-Kidd was not the only Muslim-Americanreated this way. According to the Associated Press, al-Kidd was one of “about 70 men, almost all Muslims, who were arrested and held in the months and

166. *See* al-Kidd v. Ashcroft, 580 F.3d 949, 952 (9th Cir. 2009).
167. *See id.*
170. *See id.*
172. *Id.*
173. *Id.*
years after Sept. 11" under the material witness statute. At the time, Attorney General John Ashcroft, like other officials, bragged that "aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks." Like many others, al-Kidd was never called as a witness or charged with any crime (and al-Hussayen was tried but not convicted).

After his release al-Kidd sued Ashcroft claiming, in essence, that the former U.S. Attorney General had had his subordinates use the Material Witness Statute as a pretext to detain terrorist suspects preventively, that is, persons suspected of terrorism but for whom evidence was lacking for an arrest and criminal charge. After extended litigation, the Supreme Court held that Ashcroft was entitled to qualified immunity because "at the time of [the detainee's] arrest . . . not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." Although she concurred in the outcome, Justice Ginsburg (with Justices Breyer and Sotomayor) nevertheless found the Court's assumption of the existence of a validly obtained material witness warrant to be "puzzling." She questioned whether an affidavit supporting a material witness warrant is valid where the affiant fails to tell the issuing magistrate that there is no intent to call the subject of the warrant as a witness in any trial. She also questioned the validity of the warrant where the affidavit "[did] not disclose that al-Kidd had cooperated with FBI agents each of the several times they had asked to interview him." In addition, she said:

[T]he Magistrate Judge was not told that al-Kidd’s parents, wife, and children were all citizens and residents of the United States. In addition, the affidavit misrepresented that al-Kidd was about to take a one-way flight to Saudi Arabia, with a first-class ticket costing

175. Id.
177. See id., 905–56.
178. Al-Kidd, 131 S. Ct. at 2074.
179. See id. at 2087 (Ginsburg, J., concurring).
180. See id.
181. See id.
approximately $5,000; in fact, al-Kidd had a round-trip, coach-class
ticket that cost $1,700.182

With this cacophony of misstatements and omissions in the material
used to justify the warrant, the case went back to the district court, where a
federal magistrate was appointed to do a report and recommendation on
cross-motions for summary judgment involving two individual defendants
(the FBI agents),183 and a report and recommendation on cross-motions for
summary judgment involving the United States.184 Both of these reports
generally favored al-Kidd, and may lead to his eventual compensation for
what he underwent.

What is, to use Justice Ginsburg’s word, “puzzling” is the role of the
lawyers in al-Kidd. Just because they may enjoy qualified immunity does
not explain how or why the affidavit misinformation that Justice Ginsburg
cited in her opinion failed to free al-Kidd from the restrictions earlier. Even
if the attorneys involved did not manufacture the misinformation, at some
point during al-Kidd’s ordeal someone from the government should have
stepped forward to correct the record. It would seem that, at a minimum, a
better exercise of due diligence in the case of an individual being detained
without charges would be the ethically proper approach.

Moreover, despite the Court’s finding that there were no cases finding a
pretextual use of a material witness warrant unconstitutional, it would also
seem ironic that more had not been learned from the Japanese internment
cases. They ought to stand for the proposition that preventive detention by
any other name is still preventive detention, and that is something Congress
has yet to authorize in terrorism cases for American citizens residing in the
United States. The national security practitioner, while remaining open to
innovative interpretations of the law, nonetheless must be extremely wary of
proposals which have atrocious parallels in history.185

182. See id. at 2088.
Michael Gneckow and Scott Mace at 2–3, Abdullah al-Kidd v. Alberto Gonzalez, No. 1:05-cv-
06/al-kidd-FBI-liable.pdf.
184. Report and Recommendation on Cross Motions for Summary Judgment: United States at 2,
k. Pro Bono

Every lawyer has a professional responsibility to provide legal services to those unable to pay.\textsuperscript{186}

One of the most interesting impacts on the legal profession of the post-9/11 era is the proliferation of pro bono legal support for the suspected terrorists detained at Guantánamo. Professor Jack Goldsmith of Harvard points out that after the Supreme Court's landmark 2004 decision in \textit{Rasul v. Bush}\textsuperscript{187} established that the detainees were entitled to challenge their detention in the courts, "pro bono offers from hundreds of attorneys, including many from America's most elite law firms[,]" came to the detainees.\textsuperscript{188} According to Goldsmith, these "lawyers—who came to be known as 'the GTMO Bar'—quickly flooded federal courts with habeas corpus petitions from detainees seeking release."\textsuperscript{189}

\textsuperscript{186} \textit{Model Rules, supra} note 16, R. 6.1. The full rule reads as follows:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee:

\begin{itemize}
\item (1) persons of limited means or
\item (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means;
\end{itemize}

and

(b) provide any additional services through:

\begin{itemize}
\item (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
\item (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
\item (3) participation in activities for improving the law, the legal system or the legal profession.
\end{itemize}

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

\textit{Id.}

\textsuperscript{187} 542 U.S. 466 (2004).


\textsuperscript{189} \textit{Id.} For a discussion of \textit{habeas corpus} actions, see generally \textit{Habeas Corpus}, \textit{LEGAL INFORMATION INSTITUTE} (Aug. 19, 2010, 5:17 PM), http://www.law.cornell.edu/wex/habeas_corpus.
Other experts recently noted that since "2002, over 900 attorneys have joined the network sponsored by [Center for Constitutional Rights] filing individual habeas petitions for approximately 430 detainees.\textsuperscript{190} According to these analysts, after several Supreme Court cases legitimated habeas litigation:

[L]arge firms \textit{sought out} habeas clients—the legal market \textit{favored} firm representation of detainees. In fact, representation of Guantánamo detainees became part of law firms’ recruitment efforts for new associates. Yet the cases did not only appeal to lawyers new to the practice. Detainee representation was high-profile legal work, and the firms staffed these matters with senior partners, signaling to attorneys within the firm, as well as to clients, the value the firm placed on the work.\textsuperscript{191}

A media report similarly reflected the popularity of detainee representation. As one lawyer involved in the process put it:

"I had always worried that we would get some input from clients that was less than supportive," [the defense counsel] said. "But we must have gotten 10 e-mails, phone calls, personal contacts from Fortune 500 companies that said the opposite. One big client said, 'That makes me want to send you more work—not less.'"\textsuperscript{192}

It was perhaps frustration over the enormous resources the civilian bar provided the terrorist suspects that led a former Deputy Assistant Secretary of Defense for Detainee Affairs, Cully Stimson, to make some profoundly ill-considered remarks. In a 2007 interview, he expressed dismay that "lawyers at many of the nation's top firms were representing prisoners at Guantánamo Bay, Cuba, and that the firms' corporate clients should consider ending their business ties."\textsuperscript{193}

Predictably, there was an explosion of criticism, with numerous commentators rebuking Stimson for attacking the honorable practice of providing vigorous, pro bono representation to even the most reviled accused. The obviously upset editors of the \textit{Washington Post} wrote that the


\textsuperscript{191} Id. at 650 (emphasis added).


detainee lawyers were "upholding the highest ethical traditions of the bar by
taking on the most unpopular of defendants."\textsuperscript{194} Though not offering a
defense for Stimson's remarks, Harvard law professor Charles Fried
speculated that perhaps Stimson was "annoyed that his overstretched staff
lawyers are opposed by highly trained and motivated elite lawyers working
in fancy offices with art work in the corridors and free lunch laid on in
sumptuous cafeterias."\textsuperscript{195} Regardless, Stimson apologized and promptly
resigned in an effort to quiet the furor.\textsuperscript{196}

Similar criticism arose in 2010 amid questions about the Justice
Department's hiring of a number of lawyers who had previously represented
Guantánamo detainees. In an open letter, a group of "attorneys, former
officials, and policy specialists who have worked on detention issues"
admirably stated the case:

The American tradition of zealous representation of unpopular
clients is at least as old as John Adams's representation of the
British soldiers charged in the Boston massacre. People come to
serve in the Justice Department with a diverse array of prior private
clients; that is one of the department's strengths . . . . To suggest
that the Justice Department should not employ talented lawyers who
have advocated on behalf of detainees maligns the patriotism of
people who have taken honorable positions on contested questions
and demands a uniformity of background and view in government
service from which no administration would benefit.\textsuperscript{197}

Yet even as one salutes the outpouring of pro bono support for the
terrorist detainees, support that no doubt can be traced to finest traditions of
the Bar to provide quality representation to all accused, concern must be
expressed by the paradox that foreign terrorists may be—proportionately—
greater beneficiaries of the legal profession's beneficence than are needy
U.S. citizens not accused of national security crimes.

This paradox is suggested by Attorney General Eric Holder's speech to
the ABA in February 2012. In it he lamented the "crisis" with respect to
indigents' access to legal talent:

\textsuperscript{195} Charles Fried, Mr. Stimson and the American Way, WALL STREET J., Jan. 16, 2007,
\textsuperscript{196} Ashley Jones, Cully Stimson Resigns, WALL STREET J., Feb. 2, 2007,
\textsuperscript{197} Benjamin Wittes et al., Statement on Justice Department Attorney Representation of Guantánamo Detainees, BROOKINGS INSTITUTION (Mar. 8, 2010), http://www.brookings.edu/research/opinions/
2010/03/07-guantanamo-statement.
Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it’s rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight.

As a result, too many defendants are left to languish in jail for weeks, or even months, before counsel is appointed. Too many children and adults enter the criminal justice system with nowhere to turn for guidance—and little understanding of their rights, the charges against them, or the potential sentences—and collateral consequences—that they face. Some are even encouraged to waive their right to counsel altogether.¹⁹⁸

It is not without irony then, that the legal profession, notwithstanding its outpouring of very healthy support for foreign terrorist detainees, nevertheless finds itself facing inadequate representation for needy Americans.¹⁹⁹ This is plainly an appropriate subject not only for national security practitioners but for the entire bar. Nevertheless, the real test of the national security bar’s ethics may come if (when?) there is another horrific event, and doing the right thing by defending accused terrorists is not as popular as it may be today. It is in times of crisis that the ethics of the legal profession are most tested, and practitioners need to steel themselves for those moments—which are sure to come to pass.

III. CONCLUDING OBSERVATION: THE INispensability of Moral Courage

Although this Article has sought to illustrate some of the ethical challenges national security law practitioners face, it would be a mistake to assume that national security practitioners are somehow more prone to ethical failings than others in the legal profession. Nothing could be further from the facts.

Professor H. Jefferson Powell, who until May 2012 served as the deputy assistant attorney general in the OLC at the Department of Justice, reflected upon his work with lawyers in a range of government agencies and commented that what struck him was “how dedicated the vast majority of those people are to doing responsible legal work, in good faith and for the


¹⁹⁹. Compare id. with Shukovsky, supra note 192.
highest of motives—*pro bono publico*, for the public good."\(^{200}\) He added that what impressed him "about the vast majority of the lawyers with whom [he] dealt is their conscientious commitment to the law and to providing responsible legal advice."\(^{201}\)

Powell also believed the "particular contribution of government lawyers" is to "enable the government to function and to pursue the policies that the policymakers prefer but to do so within the law [and] to tell the policymakers when necessary that a particular goal or policy cannot be pursued lawfully."\(^{202}\) In the national security context, this can be particularly difficult because the stakes are so high, time is so short, and the consequences of the proverbial path not taken so difficult to ascertain or predict.

Telling policymakers and other clients what they need to hear versus what they may want to hear requires courage; indeed, few legal disciplines require the practitioners to exhibit as much courage as does a national security law practice. Unlike most national security activities, the kind of courage required is not, however, the physical type, but *moral* courage.\(^{203}\) This can be hard to muster for anyone, even in the armed forces. British historian Max Hastings points out that "physical bravery is found [in the military] more often than the spiritual variety."\(^{204}\) "Moral courage," he says, "is rare."\(^{200}\) Yet it is especially important for those in the legal profession to demonstrate it. There is no doubt that in national security matters especially, there are times when legal advice is unwelcome, but that is when moral courage is most needed. General Short admonishes that in combat situations:

[Do not be afraid to tell [the commander] what he really does not want to hear—that he has put together this exquisite plan, but his targets indeed are not valid ones or his targets may in fact violate the law of armed conflict . . . . It will take enormous courage to do

201. *Id.*
202. *Id.*
203. In a 1990 case called *U.S. v. Stidman*, the Air Force Court of Criminal Appeals observed:

*[T]here are two kinds of courage involved in the profession of arms and the profession of law. On the one hand, many are called upon for physical courage. On the other hand, judges are called upon from time to time for moral courage—the courage to subordinate a personal philosophy of the law or private dictate . . . to decide an issue logically and dispassionately.*

205. *Id.*
that in particular circumstances because you're always going to be junior to your boss . . . . But you have got to be able to do that.266

Judge James E. Baker of the Court of Appeals for the Armed Forces argues in his book In the Common Defense that the law depends upon the "moral courage of lawyers who raise tough questions, who dare to argue both sides of every issue, who insist on being heard at the highest levels of decision-making, and who ultimately call the legal questions as they believe the Constitution dictates . . . ."267

Judge Baker is, of course, exactly right. No set of rules can substitute for the character of individuals who are ready to do the right thing, regardless of the personal consequences. Only those prepared to make whatever sacrifice is necessary to ensure that the nation conducts its national security affairs in a lawful—and authentically ethical—manner are truly worthy of the sobriquet of a national security law practitioner.

266. Operation Allied Force, supra note 91.
Congressional Access to Intelligence Information: The Appearance of a Check on Executive Power

by

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Congressional Access to Intelligence Information: The Appearance of a Check on Executive Power

Kathleen Clark

Introduction
I. Access for Members of Congress
II. Access for Congressional Staff
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(July 17, 2003)

Introduction

When the George W. Bush administration began engaging in warrantless surveillance in 2001, it disclosed the existence of its surveillance program to only eight members of Congress: the chairs and ranking members of the House and Senate Intelligence Committees and the Republican and Democratic leaders of the House and Senate. The executive branch instructed those members not to share this information with their staff members -- even staff members who had security clearances. One of these members, then-Senate Intelligence Committee Vice Chair Jay Rockefeller, recognized that this surveillance program "raised profound oversight issues." In a handwritten letter to Vice President Cheney, Senator Rockefeller wrote that in light of "the security restrictions

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1John S. Lehmann Research Professor of Law, Washington University in St. Louis. kathleen@wusl.edu. Some passages in this paper are based on my previous publications: Congress’s Right to Counsel in Intelligence Oversight, 2011 U. Ill. L. REV. 915 (hereinafter Congress’s Right to Counsel); The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program, 2010 B.Y.U. L. REV. 357.
associated with this information, and my inability to consult staff or counsel on my own," he was "unable to fully evaluate, much less endorse these activities." Despite this private letter of protest, it appears that Senator Rockefeller acquiesced in the executive branch’s demand that he not consult his staff.

This incident is emblematic of the way that the executive branch shares particularly sensitive information with Congress. While the executive provides information, it does so in a way that prevents Congress from providing effective oversight. And by providing some information, the executive inoculates itself from later political consequences should the program come to light and prove to be controversial.

This essay describes Congressional access to intelligence information, and how that access has evolved in the last four decades. Congress can access this intelligence information through three distinct channels: by the members themselves, by Congressional staff, and by Congressionally created agencies that assist Congress in oversight: the General Accounting Office (GAO) and agency Inspectors General (IGs). Access directly by members might seem to be the optimal approach. But Congress accomplishes most of its work through its direct and indirect agents: Congressional staffers who work directly for members or committees, and those who work for the GAO or agency IGs. While there are certain tasks that only a member of Congress can perform, such as introducing and voting on legislation or convening a hearing, members conduct most of their work through direct and indirect agents - their own staffers and the GAO and IGs. So a critical issue for Congressional oversight is whether Congress’s agents have access to the information they need to help Congress in that task. Even where the executive branch has permitted members to access information directly, its limits on access by staffers and the GAO have been particularly significant in preventing effective oversight.

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2 Letter from Senator John D. Rockefeller IV, Vice Chairman, U.S. Senate Select Comm. on Intelligence, to Vice President Dick Cheney, Vice President of the United States (July 17, 2003) (reproduced in Appendix).
I. Access for Members of Congress

Congress performs most of its work through its committees. Until the mid-1970s, congressional oversight of intelligence was handled by intelligence subcommittees of the House and Senate Armed Services and Appropriations Committees. Their oversight was quite lax, and intelligence agencies provided oral (rather than written) briefings. The members of Congress who chaired the intelligence subcommittees apparently saw themselves as allies (rather than adversaries) of the intelligence agencies, and saw no need for additional staff resources or more formal oversight mechanisms.

This arrangement changed in the mid-1970s, amid public revelations of intelligence agency abuses. In December 1974, Congress formalized the regulation of one particular type of intelligence activity: covert actions, which are intended “to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” Congress mandated that the President report “in a timely fashion, a description and scope of . . . [covert actions] to the appropriate committees of the Congress.”

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6. See Congress’s Right to Counsel, supra at 924.
That same month, Seymour Hersh started publishing a series of newspaper articles detailing extensive illegal activity by intelligence agencies.\textsuperscript{9} Hersh's articles led to the creation of ad hoc investigative committees in the Senate (colloquially known as the "Church Committee" for its chair, Senator Frank Church) and the House (known as the "Pike Committee" for its chair, Representative Otis Pike).\textsuperscript{10} These committees hired large staffs, held hearings and wrote lengthy reports revealing widespread illegal activities by the intelligence agencies.\textsuperscript{11} Both committees recommended enhanced congressional oversight of the intelligence community.

In May 1976, less than a month after the Church Committee issued its final report, the Senate created the Senate Select Committee on Intelligence and passed a nonbinding resolution that department heads should keep that committee "fully and currently informed" of the agency's intelligence activities.\textsuperscript{12} The following year, the House created its own intelligence committee.\textsuperscript{13} President Carter partially endorsed the Senate resolution by issuing an executive order requiring intelligence agencies to keep the intelligence committees "fully and currently informed" of their activities.\textsuperscript{14} But the executive order was fundamentally ambiguous because it included language about the protection of intelligence "sources and methods." The order stated that disclosures to Congress must be undertaken "consistent with applicable


\textsuperscript{10} Frank J. Smist, Jr., Congress Oversees the United States Intelligence Community 1947-1994, at 9-10 (2d ed. 1994).


\textsuperscript{12} S. Res. 400, 94th Cong. § 11(a) (1976) (as amended).

\textsuperscript{13} H.R. Res. 658, 95th Cong. (1977) (enacted).

\textsuperscript{14} Exec. Order No. 12,036, § 3-401, 3 C.F.R. 112, 132 (1979).
authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods." In 1980, Congress codified the requirement that the executive branch keep the intelligence committees "fully and currently informed" of intelligence activities (including covert actions), but it also included limiting language similar to that in Carter's executive order.

Ambiguity about the extent of Congress's right to intelligence information can be found not just in these early enactments, but also in later statutes in this field. When Congress re-codified the duties of the Director of Central Intelligence (DCI) in 1992, it set out in statute a requirement that the DCI "provid[e] national intelligence" to Congress. But it also stated that this requirement applied only "where appropriate," a term that Congress did not define. When Congress created the office of Director of National Intelligence (DNI) in 2003, it mandated that DNI "ensur[e] that national intelligence is provided" to Congress, and omitted the "where appropriate" language. Yet the effect of this statute is unclear, for it does not purport to mandate that the DNI share all national intelligence with Congress. Like the earlier version, this statutory mandate for disclosure leaves substantial discretion in the hands of the executive branch to determine which information to disclose. On the other hand, Congress passed legislation in 2010 requiring the executive branch to provide the

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15. Id. § 3-4, 3 C.F.R. at 132.
intelligence committees with "the legal basis under which . . . intelligence activity[ies] are] being . . . conducted," and specifically requires disclosure of the legal basis for intelligence interrogations, and cybersecurity programs.

With respect to covert actions, the 1980 statute implicitly required intelligence agency heads to provide prior notification of such actions to the full intelligence committees, but explicitly allowed prior notice to be limited to eight congressional intelligence leaders (the chairs and ranking members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate) "if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States." Where the President does not provide prior notice, the statute requires him to "fully inform the intelligence committees in a timely fashion" about these actions and to "provide a statement of the reasons for not giving prior notice."

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22. Id. § 333(a)(3), 124 Stat. at 2687.
23. Id. § 336(a)(2)(A), 124 Stat. at 2689. This legislation also requires the executive branch to report the legal basis for covert actions.
24. The statute does not explicitly require the executive branch to provide the intelligence committees with prior notification of covert actions, but refers to covert actions as "significant anticipated intelligence activity[ies]." Id. § 407(a)(2), 94 Stat. at 1981 (emphasis added). The statute's two mentions of "prior notice" seem to assume that prior notice is generally required. See 50 U.S.C. § 413(a)(1), (b) (1988) (amended 1991); see also S. Rep. No. 96-730, at 4 (1980) (repealing the earlier requirement that the executive branch report covert actions to Congress "in a timely fashion," and replacing it with a requirement that the intelligence committees be given prior notice of covert actions); L. Britt Snider, The Agency and the Hill: CIA's Relationship with Congress, 1946-2004, at 59–60.
The limits of this approach and the issue of timing are illustrated by one aspect of Iran-Contra controversy. In January 1986, President Reagan issued presidential findings in connection with the sale of arms to Iran, but did not notify any members of Congress until ten months later, after a Lebanese newspaper revealed those operations to the world.27 Eventually, the Justice Department’s Office of Legal Counsel (OLC) issued an opinion reviewing these events and asserting that this delay in notification was legal despite the statutory requirement that notice be given “in a timely fashion.”28 The opinion reasoned that the “‘timely fashion’ language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification.”29 In response to Congressional requests that to repudiate this OLC opinion, the first President Bush indicated that “in almost all instances,” he would provide prior notice; that “in those rare instances” when he did not provide prior notice, he “anticipate[d] that notice will be provided within a few days”; and if he withheld notice for longer than that, he would be doing so “based upon [his] assertion of authorities granted [his] office by the Constitution.”30 In effect, Bush asserted that the Constitution granted him authority to act contrary to the statutory requirement of “timely” notice.31

28. Memorandum from Charles J. Cooper, Assistant Attorney Gen., Office of Legal Counsel, Dept’ of Justice, to the Attorney Gen., The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act (Dec. 17, 1986) at 2, 24.
29. Id. at 24.
31. Under the analysis in Justice Jackson’s concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, this would fall into Jackson’s third category: executive power that exists after Congress has legislated a prohibition. 343 U.S. at 637–38 (1952) (Jackson, J., concurring).
In 1991, following recommendations of the joint committee responsible for investigating the Iran-Contra scandal, Congress enacted legislation stating that presidential findings in support of covert actions may not authorize covert actions that have already occurred, must be in writing, and must be provided to the chairs of the intelligence committees. In that legislation, Congress left the nonspecific "timely fashion" requirement, rather than replacing it with a more specific requirement. The conference report accompanying this legislation asserted that reenactment of "the phrase 'in a timely fashion' . . . should not in any way be taken to imply agreement or acquiescence in the" OLC memorandum's position, and that the phrase should properly be understood to mean "within a few days." The conference report, however, disclaimed any congressional ability to authoritatively interpret this law. It asserted that "[n]either the legislative [n]or executive branch authoritatively interpret the Constitution, which is the exclusive province of the judicial branch." Yet this assertion ignored the fact that the judicial branch never has the opportunity to interpret the Constitution with respect to many issues related to intelligence. Oftentimes in the national security sphere, the responsibility for interpreting the Constitution falls on the political branches, rather than the judicial branch. Faced with a President who asserted constitutional authority to ignore a statutory requirement, Congress blinked when given the opportunity to devise a statutory mandate for "timely notification."

While Congress has imposed statutory requirements that the executive branch provide it with information, these requirements are fundamentally ambiguous. In effect, they leave the executive

32. William E. Conner, Congressional Reform of Covert Action Oversight Following the Iran-Contra Affair, 2 Def. Intelligence J. 35 (1993)
34. Id.
35. H.R. Rep. No. 102-166, at 28 ("[T]he President's stated intention . . . to make a notification 'within a few days' . . . is consistent with what the conferees believe is its meaning and intent.").
36. Id.
branch with the discretion to disclose or not. The consequences of nondisclosure are merely political rather than legal. Although the executive branch shares a wide range of intelligence information with Congress, it also asserts its authority not to disclose to Congress some intelligence information. The intelligence committees have "been willing to limit access to particularly sensitive information to members and/or a few senior staff, [and] to limit the number of committee members with access to especially sensitive information." Some of these limits—such as notifying only congressional intelligence leaders of covert actions—are statutorily authorized, but other limits—such as restrictions on consulting staff—have no statutory basis.

II. Access for Congressional Staff

Members of Congress delegate to their staff members the initial fact-finding and analysis that result in hearings, reports, and ultimately, legislation. While members may provide the vision and goals for this work, their staff carry out essential functions in investigating the executive branch’s activities and enabling members to understand the legal framework in which those activities occur.

Just as members’ access to intelligence information increased in the mid-1970s, so too did access for their staffs. The subcommittees that conducted intelligence oversight until the mid-

37. In 2004, the CIA provided Congress with 1000 briefings and 4000 documents. ALFRED CUMMINS, CONG. RESEARCH SERV., R40136, CONGRESS AS A CONSUMER OF INTELLIGENCE INFORMATION 7-8 n.40 (2009).
38. The executive branch does not generally share intelligence sources or methods, raw intelligence, or the President’s Daily Brief with Congress. Id. at 4.
40. Intelligence committee leaders have also acquiesced in the executive branch’s desire to limit some information to the committee chairs and ranking members. There is no statute, committee rule, or chamber rule support for these limited notifications ALFRED CUMMINS, CONG. RESEARCH SERV., R40698, "GAN OF FOUR" CONGRESSIONAL INTELLIGENCE NOTIFICATIONS 6-7 (2010), at 6–7.
1970s had only minimal staff. In the Senate, only one staff member was allowed to attend briefings conducted by intelligence agencies. The subcommittees did not have secure facilities to store classified documents, so they did not keep written records of the executive branch’s briefings or of subcommittee meetings. Staff members who wanted to examine documents had to travel to Central Intelligence Agency (CIA) headquarters in Langley, Virginia, and were prohibited from removing any documents or even their own notes about the documents.

The Church and Pike Committees, on the other hand, had large staffs who underwent security background checks so that they could gain access to intelligence information. These security-cleared staff members enabled the Church and Pike Committees to conduct extensive hearings and produce lengthy reports about intelligence abuses. The National Security Agency (NSA) initially took the position that its information was so sensitive that it would be provided only to the chair and ranking member, rather than to staffers, but it eventually abandoned this position and provided information to committee staffers. Staffers were instrumental in uncovering the NSA’s program of warrantless surveillance of telegram traffic in and out of the country.

Since enactment of the congressional intelligence leader notification procedures in 1980, the executive branch has asserted that those leaders may not consult their staff members—even those with high-level security clearances—regarding the covert action

42 Crabb & Holt, supra, at 141.
43 Smist, supra, at 4–5, 7–8.
44 The Church Committee had 135 staff members, Loch K. Johnson, A Season of Inquiry: The Senate Intelligence Investigation 25 (1985), and the Pike Committee had 32 staff members. Smist, supra, at 136.
46 Id.
information that the executive branch provides them.\textsuperscript{47} Congressional intelligence leaders have also acquiesced to the executive branch position on this issue. The intelligence oversight statutes are silent on this question, as are the intelligence committee rules.

While intelligence committee members are able to consult their staff regarding many intelligence activities, they have not been able to do so with respect to some of the most sensitive intelligence programs. This hobbles Congress’s ability to understand and analyze key executive branch programs. Executive branch officials have asserted that these programs—such as warrantless surveillance—are legal, but they have not permitted Congress to review the executive branch’s own legal analysis.\textsuperscript{48} In addition, the executive branch asserts that these members may not consult their own security-cleared lawyers and other expert staff, which would enable these members to draw their own independent conclusions about the legality of these programs.\textsuperscript{49}

Executive branch insistence that Congress not consult its staff has occurred not just in connection with congressional oversight of intelligence activities, but also with respect to congressional authorization for war. In the fall of 2002, the Bush administration was seeking congressional authorization for its planned invasion of Iraq. The executive branch made available to all members of Congress—but not their staffs—a ninety-two page document assessing Iraq’s weapons of mass destruction.\textsuperscript{50} All members of Congress were free to go to a secure room and read the document,

\begin{itemize}
\item \textsuperscript{48} See, e.g., Letter from William E. Moschella, Assistant Attorney Gen., to Senator Patrick J. Leahy, Ranking Member, Comm. on the Judiciary (Apr. 4, 2005) (en file with author) ("[T]he Executive Branch has substantial confidentiality interests in OLC opinions, and our longstanding practice is not to disclose non-public OLC opinions outside the Executive Branch.").
\item \textsuperscript{49} See Kitrosser, supra, at 1059.
\item \textsuperscript{50} Dana Priest, \textit{Congressional Oversight of Intelligence Criticized: Committee Members, Others Cite Lack of Attention to Reports on Iraqi Arms, Al Qaeda Threat}, \textit{Wash. Post}, Apr. 27, 2004, at A1.
\end{itemize}
III. Access for Congress's Indirect Servants: GAO and IGs

In monitoring the activities of the executive branch, Congress relies not just on its own staffers, but also on other offices that it has created. These include the Government Accountability Office (GAO) and offices of Inspector General (IG) in dozens of executive branch agencies.

The GAO has over 3000 employees who audit and analyze the operation of the executive branch, responding to specific requests for such analysis from members of Congress. GAO employees engage in long-term—if often low-profile—investigations and analyses of executive branch programs, producing hundreds of detailed and often technical reports every year. The GAO helps Congress carry out its oversight functions by conducting long-term studies and developing expertise regarding executive branch programs. Despite -- or perhaps because of -- this record of robust, staff-enabled oversight, the executive branch has traditionally insisted that Congress not consult the GAO in connection with certain intelligence information. The executive branch asserts that the GAO does not have the authority to analyze intelligence activities. During the Reagan administration, the DOJ's OLC

51. Id.
52. Id.; see also Leslie Gielow Jacobs, Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force, 26 Const. Comment. 433, 450–51 (2010).
54. In Fiscal Year 2008, the GAO provided Congress with over 1200 reports (including written testimony) analyzing executive branch programs. Id. at 3.
asserted that while the GAO’s mandate is to evaluate executive branch programs that have been authorized by statute, intelligence activities are undertaken pursuant to the President’s constitutional foreign policy responsibilities rather than statute. In light of the statutory authorization for and regulation of intelligence operations, this OLC opinion is not particularly persuasive. Until recently, Congress has acquiesced in the executive branch’s insistence that intelligence oversight be conducted only by the intelligence committees and not by the GAO. But legislative developments in 2010 suggest that this may be changing, at least to a limited degree. The Intelligence Authorization Act for Fiscal Year 2010 required the DNI to “issue a written directive governing the access of the Comptroller General,” who is the leader of the GAO, to intelligence information, and required the Comptroller General to ensure the confidentiality of that information. Another less direct agent of Congress exists in the offices of Inspector General (IG) that Congress has created in dozens of agencies. Congress gave IGs the ability to directly access an agency’s records in order to investigate allegations of waste, fraud, and abuse. IGs’ direct access to agency documents gives them the ability to provide intensive oversight in response to specific allegations. While IGs are embedded within the executive branch and are appointed by the President or agency head, they

56. *Id.* at 172 ("[GAO's statutory mandate covers] only . . . activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities.").


58. *Id.* § 348(b)(1), 124 Stat. at 2700. The legislation also indicates that GAO employees will be subject to "the same statutory penalties for unauthorized disclosure or use of such information as" executive branch employees. § 348(b)(2), 124 Stat. at 2700.


60. See, e.g., *Unclassified Report on the President's Surveillance Program Prepared by the Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency and Director of National Intelligence* (2009).
may be thought of as servants of Congress, gathering information about alleged wrongdoing within the executive branch and providing that information to Congress on a regular basis.

Every six months, IGs issue detailed reports to the agency head and Congress. 61 IG reports have become a particularly important source of information for congressional committees investigating the executive branch. 62 The publicity that accompanies issuance of an IG report sometimes spurs political pressure for changes in such processes. For example, after concerns were raised about the FBI’s extensive use of National Security Letters (NSLs) to collect information, Congress required the Justice Department IG to audit the FBI’s use of NSLs. 63 Those audits revealed widespread problems in the FBI’s administration of NSLs, 64 and helped spur legislation cutting back the FBI’s authority to issue them. 65

IV. Critique of the Current System: Limited Access as Inoculation

The current system of Congressional oversight creates the appearance, but not the reality, that Congress checks executive power regarding the most sensitive intelligence programs. By notifying only a few members of Congress about these programs and then prohibiting those members from consulting their staffers,

61 Id. at ¶ 5.
the executive branch prevents Congress from rigorously scrutinizing these programs.\textsuperscript{66}

The current set-up for these sensitive programs, which I call "limited access as inoculation," may actually be worse than no access at all. The executive branch is able to inoculate itself against congressional backlash if the later exposure of an intelligence program results in public controversy. The executive branch can point to its earlier notifications to Congress and Congress's lack of action or response as endorsement of the executive action.\textsuperscript{67} This kind of access provides the executive branch with political cover, but does not enable Congress to effectively participate as a coequal branch of government.\textsuperscript{68}

When the warrantless surveillance program was eventually exposed and controversy about it erupted, the Bush administration was able to point to the silence of congressional intelligence leaders. Their silence came to be seen as endorsement. Congressional silence inoculated the administration against charges of overreaching. Representative Peter Hoekstra, then chair of the House Intelligence Committee, alluded to this inoculation effect when some Democratic congressional leaders expressed concern about the warrantless surveillance program after it was exposed:

The President shared this sensitive information with congressional leaders. These same leaders should now accept the responsibility for this program. If they now have second thoughts because it's made it into the press, so be it. But they should be held accountable for their participation in the process and they shouldn't run from their responsibility and

\textsuperscript{66} Congress's Right to Counsel, supra, at 935.
\textsuperscript{68} Loch K. Johnson, Accountability and America's Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency, 1 FOREIGN POL'Y ANALYSIS 99, 114 (2005).
accountability right now because it may just be a little bit uncomfortable for them. 59

As a matter of practical politics, Representative Hoekstra is correct. Members of Congress share some political responsibility for the intelligence programs about which they have received information. 70 In order for the members of Congress to actually take responsibility, however, they must ensure that information is shared not just with them but also their agents - staff members who work directly for members and committees, and those who work indirectly on Congress’s behalf in the Government Accountability Office and offices of Inspector General.

Conclusion

The United States is a government of divided powers. Our founders recognized that they could prevent inordinate concentration of power within a single branch if each branch’s ambition counteracts the ambitions of the other branches. 71 When Congressional intelligence leaders acquiesced to the executive branch demand that they not consult their staff members regarding the warrantless surveillance program, they allowed themselves to be stripped of the ability to protect the institutional role of Congress in intelligence oversight and to ensure that the executive branch acts in accordance with the law. These members of Congress lacked the institutional ambition to counteract an ambitious executive branch, and as a result the executive branch was able to pursue policies of dubious legality.

With regard to the most sensitive intelligence programs, we Congress limited access to information about these programs serves to inoculate the executive branch from future political accountability rather than to facilitate effective oversight. The

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71 See, e.g., THE FEDERALIST NO. 51 (James Madison).
executive branch provides limited information to only a few members of Congress, and instructs them not to consult other members or their staffs. Only if Congress acts institutionally to ensure meaningful access to intelligence information will it be able to pursue the checking function envisioned by the nation’s founders.

Appendix

Letter from Senator Rockefeller to Vice President Cheney (July 17, 2003)
July 17, 2003

Dear Mr. Vice President,

I am writing to reiterate my concern regarding the sensitive intelligence issues we discussed today with the D.C.I., DNI/NSA, Chairman Roberts and our House Intelligence Committee counterparts.

Clearly, the activities we discussed raise profound oversight issues. As you know, I am neither a technician nor an attorney. Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse, these activities.

As I reflected on the meeting today, and the future we face, John Poindexter's TIA project springs to mind, exacerbating my concern regarding the direction the Administration is moving with regard to security, technology, and surveillance.
Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received.

I am retaining a copy of this letter in a sealed envelope in the secure spaces of the Senate Intelligence Committee to ensure that I have a record of this communication.

I appreciate your consideration of my views.

Yours respectfully,

[Signature]
Congress's Right to Counsel
In Intelligence Oversight

by

Kathleen Clark
Professor of Law, and
Israel Treiman Faculty Fellow
CONGRESS'S RIGHT TO COUNSEL IN INTELLIGENCE OVERSIGHT

Kathleen Clark*

This Article examines Congress's ability to consult its lawyers and other expert staff in conducting oversight. For decades, congressional leaders have acquiesced in the executive branch’s insistence that certain intelligence information not be shared with congressional staffers, even those staffers who have high-level security clearances. As a result, Congress has been hobbled in its ability to understand and analyze key executive branch programs. This policy became particularly controversial in connection with the Bush administration's warrantless surveillance program. Senate Intelligence Committee Vice Chair Jay Rockefeller noted the "profound oversight issues" implicated by the surveillance program and lamented the fact that he felt constrained not to consult the committee's staff, including its counsel. This Article puts this issue into the larger context of Congress's right to access national security-related information and discusses congressional mechanisms for protecting the confidentiality of that information. The Article also provides a comprehensive history of congressional disclosures of national security-related information. History suggests that the foremost danger to confidentiality lies with disclosure to members of Congress, not to staff. The Article identifies several constitutional arguments for Congress's right to share information with its lawyers and other expert staff, and explores ways to achieve this reform.

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INTRODUCTION

The executive branch limits the distribution of information about its national security and intelligence-related activities. Holding such information closely is necessary because the efficacy of some of these activities depends on their secrecy. The more widely such information is distributed, the more likely it is to fall into the hands of people who will undermine such activities by engaging in countermeasures. But overly strict limits on distribution of information will prevent the government from accomplishing its programmatic goals.1 The information must be distributed to those within the executive branch who can use the information to help ensure our security,2 and to those in the legislative branch.

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who, in our system of separated powers, have the responsibility to monitor the executive branch.

When the Bush administration launched its program of warrantless surveillance in 2001, it held information about that program particularly closely. The administration disclosed the existence of the program to only eight members of Congress: the chairs and ranking members of the House and Senate Intelligence Committees and the Republican and Democratic leaders of the House and Senate. The administration instructed these congressional intelligence leaders that they must not share any information about the program with their staff members, including their staff lawyers. One of the leaders, then-Senate Intelligence Committee Vice Chair Jay Rockefeller, thought that the program "raise[d] profound oversight issues" and lamented the fact that "given the security restrictions associated with this information, and [his] inability to consult staff or counsel on [his] own, [he] fe[lt] unable to fully evaluate ... these activities." He noted these concerns in a handwritten letter to Vice President Cheney and kept a copy of the letter in a secure Senate Intelligence Committee facility. There is no indication that Senator Rockefeller complained to the other congressional intelligence leaders about the surveillance program or about these restrictions on consulting staff. It is unclear whether any other congressional intelligence leaders contested

3. The Bush administration took a similar — although not identical — approach in disclosing its torture policy to a limited number of members of Congress. See Office of the Dir. of Nat’l Intelligence, Member Briefings on Enhanced Interrogation Techniques (EITs) (2009), http://www.takoma.com/ipi/congress/2009_cia/eit-briefings.pdf (listing forty Central Intelligence Agency (CIA) briefings about the torture program from September 2002 to March 2009 for intelligence committee members and staff).

4. The full name of the House and Senate intelligence committees are the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.

5. The ranking member (i.e., minority member with the most seniority) of the Senate Intelligence Committee has the title of Vice Chair of the Committee. S. Res. 400, 94th Cong. § 2(b) (1976) (as amended).

This group of eight members of Congress is colloquially known as "the gang of eight." But as this Article will show, this common moniker overstates the coordination among these eight members of Congress. The term "gang" implies a collective identity, but the historical record shows that these eight members of Congress do not necessarily consult or coordinate with each other. Each of these eight members might be better thought of as an individual picket (as in a picket fence). To the degree that the pickets connect with each other, they can form a strong barrier. Without such coordination, they are easily knocked over. To avoid reinforcing this inaccurate implication, this Article refers to these members as "congressional intelligence leaders" rather than "the gang of eight.

6. Letter from Senator John D. Rockefeller IV, Vice Chairman, U.S. Senate Select Comm. on Intelligence, to Vice President Dick Cheney, Vice President of the United States (July 17, 2003), http://www.globalsecurity.org/intell/library/news/2003/07/051219-rockefeller01.pdf (noting that Senator Rockefeller is "neither a technician nor an attorney").

7. Id.

8. After Senator Rockefeller released his letter, Senator Roberts asserted that Senator Rockefeller "could have discussed his concerns with me or other Members of Congress who had been briefed on the program. He never asked me or the Committee to take any action consistent with the 'concerns' raised in his letter." News Release, Senator Pat Roberts, U.S. Senator, Kansas, Senator Roberts’ Response to Media Reports About Senator Rockefeller’s 2003 Letter (Dec. 20, 2005), http://mnsbmedia.msn.com/n/mnsbco/(sections/news/051220_roberts_rockefeller_statement.pdf.

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"A NEW ERA OF OPENNESS?"
DISCLOSING INTELLIGENCE TO CONGRESS UNDER OBAMA

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by

Kathleen Clark
Professor of Law
Symposium
Presidential Power in the Obama Administration:
Early Reflections

"A NEW ERA OF OPENNESS?":
DISCLOSING INTELLIGENCE TO
CONGRESS UNDER OBAMA

Kathleen Clark*

As a candidate, Barack Obama promised "a new era
of openness," and his administration has taken some
significant steps to increase transparency in the executive
branch. But it has also continued the Bush
administration's policy of invoking the state secrets
privilege to avoid judicial scrutiny of controversial
warrantless surveillance and torture programs. Many
commentators have noted the parallels between the Bush
and Obama policies on disclosing sensitive information
to courts, but they have paid little attention to whether the
Obama administration has continued Bush
administration policies regarding the disclosure of
sensitive information to Congress.

This Essay fills that gap, and looks in detail at the Bush
and Obama Administration responses to legislative
proposals for expanding intelligence disclosures to
Congress. It reviews the Bush and Obama
Administration positions on legislation that would
require intelligence disclosure to Congress, and finds that
there are substantial similarities—though not identity—
between the Bush and Obama Administration
approaches. Both Administrations have opposed
disclosure of covert actions to the full intelligence

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Article.

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committees and the disclosure of internal executive branch legal advice. On these most sensitive intelligence issues, we will see increased disclosure to Congress only over the objection of President Barack Obama.

I. INTRODUCTION

The Obama Administration came into office with great expectations for increased transparency. As a candidate, Barack Obama promised "a new era of openness," pledging that he would "restore the balance we've lost between the necessarily secret and the necessity of openness in a democratic society." On his first full day in office, he issued memoranda proclaiming that his "Administration is committed to creating an unprecedented level of openness in Government," directing the Attorney General to issue new guidelines to agency heads about the Freedom of Information Act ("FOIA"), "reaffirming the commitment to accountability and transparency," and an executive order on presidential records, reversing the George W. Bush executive order that permitted the heirs of deceased former Presidents to invoke constitutional privileges and prevent disclosure. Since then, Attorney General Eric Holder issued a memorandum reversing John Ashcroft's 2001 FOIA memorandum, and indicating that the Justice Department would defend nondisclosure only if disclosure will harm "an interest protected by one of the statutory exemptions...or [if] disclosure is prohibited by law." The Justice Department released long-sought legal memoranda about the CIA's torture program, and the Office of Management and Budget directed

6. See Mark Mazzetti & Scott Shane, Memos Spell Out Brutal C.I.A. Mode of
executive branch agencies to make high value data sets freely available on the web.\footnote{Exemplified by the Clinton Administration's efforts to make high value data sets freely available.}

But the Obama Administration has disappointed open government advocates by opposing efforts to hold accountable those involved in several controversial Bush Administration intelligence programs: warrantless surveillance, torture and extraordinary rendition. President Obama personally opposes a proposed truth commission to investigate the interrogation and warrantless surveillance programs,\footnote{See, e.g., Data.gov, www.data.gov/about (last visited Aug. 14, 2010) ("The purpose of Data.gov is to increase public access to high value, machine readable datasets generated by the Executive Branch of the Federal Government."); USA spending.gov, www.usaspending.gov (last visited Aug. 14, 2010) (providing information about government contracts).} preferring to look forward rather than backward.\footnote{President’s Remarks at the National Archives and Records Administration, 2009 DAILY COMP. PRES. DOC. 388 (May 21, 2009), available at http://www.gpoaccess.gov/pressdocs/2009/DCPD-200900388.pdf.} Obama personally intervened and reversed a Justice Department decision to abide by an appellate court decision that the FOIA requires the government to release photographs of U.S. military personnel abusing prisoners in Iraq and Afghanistan.\footnote{David Johnston, Charlie Savage, Obama Signals His Reluctance To Investigate Bush Programs, N.Y. TIMES, Jan. 12, 2009, at A1, available at http://www.nytimes.com/2009/01/12/us/politics/12inquire.html (quoting then-President-elect Obama as stating that “we need to look forward as opposed to looking backwards”).} Instead, the executive branch sought Supreme Court review of that decision, and while the case was pending, convinced Congress to revise FOIA in order to avoid disclosure.\footnote{Am. Civil Liberties Union v. Dep’t of Def., 543 F.3d 59 (2d Cir. 2008), vacated, 130 S. Ct. 777 (2009); Jeff Zeleny & Thom Shanker, Obama Reversal on Abuse Photos, N.Y. TIMES, May 14, 2009, at A1, available at http://www.nytimes.com/2009/05/14/us/politics/14photos.html.} In a move that has received much attention in the press and blogosphere, the Obama Administration has favored secrecy over transparency to avoid judicial scrutiny of the Bush Administration’s warrantless surveillance and torture policies.\footnote{Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 565, 123 Stat. 2142 (2009) (amending FOIA by granting the Secretary of Defense the discretion to withhold the release of photographs of prisoners being abused). In light of this Act, the Supreme Court reversed the appellate court decision. Dep’t of Def. v. ACLU, 130 S. Ct. 777 (2009).}


