

Ethical Issues of the Practice of National Security Law:Some Observations

Charles J. Dunlap JR.

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review



Part of the [Law Commons](#)

Recommended Citation

Dunlap, Charles J. JR. () "Ethical Issues of the Practice of National Security Law:Some Observations," *Ohio Northern University Law Review*: Vol. 38: Iss. 3, Article 9.

Available at: https://digitalcommons.onu.edu/onu_law_review/vol38/iss3/9

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

Ethical Issues of the Practice of National Security Law: Some Observations

CHARLES J. DUNLAP, JR.*

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."²

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.³ This has significantly impacted the law because the dramatic

* Major General, U.S. Air Force (Ret.), J.D., Villanova University School of Law, 1975; B.A., St. Joseph's University, 1972. Deputy Judge Advocate General, U.S. Air Force, 2006–2010. Professor of the Practice of Law and Executive Director, Center on Law, Ethics and National Security, Duke University School of Law. This Article is based on a lecture presented as part of Ohio Northern University's Pettit College of 2012 Carhart Lecture Series on Legal Ethics, and some matters were previously discussed by the author in *The Ethical Dimension of National Security Law*, 50 S. TEX. L. REV. 789 (2009).

1. 453 U.S. 280 (1981).
2. *Id.* at 307 (quoting *Aptheker 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.

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”⁴

The globalization of law, aroused by the globalization of commerce, has helped revolutionize the practice of international law,⁵ 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*.”⁶ 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.”⁷

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

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.

IMF Staff, *Globalization: A Brief Overview*, INT’L MONETARY FUND (May 2008), <http://www.imf.org/external/np/exr/ib/2008/053008.htm>.

4. *Not entirely free, your honour*, *ECONOMIST*, July 10, 2010, <http://www.economist.com/node/16693882>.

5. See, e.g., Sabino Cassese, *The Globalization of Law*, 37 INT’L L. & POLITICS 973, 981–86 (2005), <http://iilj.org/GAL/documents/THEGLOBALIZATIONOFLAW.pdf>.

6. Sarah Kellogg, *Toward an International Legal System*, DC BAR, http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/september_2006/international.cfm (last visited Aug. 29, 2012) (quoting Sandra Day O’Connor, Associate Justice, Supreme Court of the United States).

7. Dan Gilgoff, *Law Schools Go International*, U.S. NEWS & WORLD REP. (Apr. 12, 2004), available at <http://www.utopiapolitics.com/forums/index.php?showtopic=22570&mode=threaded&pid=304791>.

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.”⁸ 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.”⁹

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.”¹⁰ 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.”¹¹

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.¹² He did so even though he found that there were “some significant flaws” in the memos,¹³ and that “Yoo and Bybee

8. Lyric Wallwork Winik, *A Marine’s Toughest Mission*, *PARADE*, Jan. 19, 2003, available at <http://www.network54.com/Forum/135069/message/1043158278/A+Marine%27s+Toughest+Mission>.

9. William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 *CHI. J. INT’L L.* 431, 434 (2003).

10. See, e.g., Michael Barone, *The Overlawyered War*, *U.S. NEWS & WORLD REP.* (Sep. 16, 2007), <http://www.usnews.com/opinion/mbarone/articles/2007/09/16/the-criminalizing-of-warfare-has-brought-the-overlawyered-war>.

11. Memorandum from David Margolis, Associate Deputy Attorney Gen., U.S. Dep’t of Justice, to the Attorney Gen., the Deputy Attorney Gen., U.S. Dep’t of Justice 68 (Jan. 5, 2010) [hereinafter Memorandum from David Margolis], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf> (internal quotation marks omitted).

12. See *id.* at 64–65.

13. *Id.* at 67.

exercised poor judgment by overstating the certainty of their conclusions and understating countervailing arguments.”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.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.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.¹⁷ Captain Stone was alleged to have *failed to properly report and investigate the deadly incident*.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.”¹⁹ Interestingly, Lieutenant General

14. *Id.* at 68.

15. David Luban, *David Margolis Is Wrong*, SLATE (Feb. 22, 2010, 11:49 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/david_margolis_is_wrong.html.

16. Compare Memorandum from David Margolis, *supra* note 11, with MODEL RULES OF PROFESSIONAL CONDUCT (2012) [hereinafter MODEL RULES], available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

17. John McChesney, *Haditha Proceedings Begin with Marine Lawyer*, NPR (May 7, 2007), <http://www.npr.org/templates/story/story.php?storyId=10069336>.

18. *See id.*

19. Press Release, U.S. Marine Corps, Camp Pendleton Media Center, Charges Dismissed Against Marine in Haditha, Iraq Investigation, #07-016 (Aug. 9, 2007) [hereinafter Press Release], available at <http://www.marines.mil/unit/marforcent/Haditha%20Documents/2007/Haditha%20Rel%20016%20070809.htm>.

Mattis also observed that the lawyer and his fellow Marines “served in the most ethically challenging combat environment in the world.”²⁰

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.²¹ The Model Rules do not, however, make many special accommodations for a national security practice,²² and that has caused some to question their utility in resolving the ethical issues that arise in a national security law practice.²³ 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

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. § 530B (2011).

23. See, e.g., Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Ethical Legal Process*, 4 UTAH L. REV. 1563, 1564, 1566 (2011), <http://epubs.utah.edu/index.php/ulr/article/view/680/521>.

*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.*²⁴

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

24. MODEL RULES, *supra* note 16, Preamble and Scope, ¶ 6.

25. 130 S. Ct. 2705 (2010).

26. *Compare id.*, with MODEL RULES, *supra* note 16, Preamble and Scope.

27. 18 U.S.C. § 2339B (2011).

28. *Holder v. Humanitarian Law Project*, 130 S. Ct. at 2713.

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.”³²

Many scholars find the decision perplexing and wrong. For example, one First Amendment expert, David Goldberger, calls *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.”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.”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.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 *Humanitarian Law Project* largely precludes that, at least for certain groups.

Although *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

32. *Id.* at 2729.

33. Jonathan Peters, *Ten questions on free speech with David Goldberger, the First Amendment lawyer who won Skokie, McIntyre and other SCOTUS cases*, HARV. L. & POLICY REV. (July 20, 2012), <http://hlpronline.com/2012/07/ten-questions-on-free-speech-with-david-goldberger-the-first-amendment-lawyer-who-won-skokie-mcintyre-and-other-scotus-cases/>.

34. *Humanitarian Law Project*, 130 S. Ct. at 2729.

35. See generally Kathryn Gregory, *Provisional Irish Republican Army (IRA)*, COUNCIL ON FOREIGN REL. (Mar. 16, 2010), <http://www.cfr.org/terrorist-organizations/provisional-irish-republican-army-ira-aka-pira-provos-glaigh-na-hireann-uk-separatists/p9240>.

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. Morgan*³⁸ that:

[I]t 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 10.

40. See STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 123 (5th ed. 2011).

41. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 851 (2010).

42. *U.S. v. Reynolds*, 345 U.S. 1, 7–8 (1953); see generally TODD GARVEY & EDWARD C. LIU, CONG. RESEARCH SERV., R41741, THE STATE SECRETS PRIVILEGE: PREVENTING DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION 4 (2011), available at <http://www.fas.org/sgp/crs/secretcy/R41741.pdf>.

43. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 5 (D.D.C. 2010).

examined.⁴⁴ 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.”⁴⁵ 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.⁴⁶

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.”⁴⁷ 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*,⁴⁸ which has become accepted as the seminal case for the state secrets doctrine.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² Even the trial judge was denied access to it.⁵³

44. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1361–62 (2009) <http://www.virginialawreview.org/content/pdfs/95/1361.pdf>.

45. Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1296 (2012), <http://aulawreview.org/pdfs/61/61-5/Vladeck.website.pdf>.

46. *Id.*

47. Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 196 (2010).

48. 345 U.S. 1.

49. *See id.*

50. *Id.* at 2–3.

51. *Id.* at 3.

52. *Id.* at 3–4.

53. *Reynolds*, 345 U.S. at 5–6.

Scholar Louis Fisher asserts that there “was a reason for the government to withhold the accident report from [the trial judge].”⁵⁴ 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.”⁵⁵ 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.”⁵⁶

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.⁵⁷ 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.⁵⁸ However, “[d]espite this showing of apparent government misconduct” the Supreme Court eventually denied a *coram nobis* petition for further review.⁵⁹ 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.”⁶⁰

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

54. Louis Fischer, *The State Secrets Privilege: Relying on Reynolds*, 122 POL. SCI. Q. 385, 399 (2007), <http://www.constitutionproject.org/pdf/452.pdf>.

55. *Id.*

56. *Reynolds*, 345 U.S. at 10–11.

57. See Michael Freedman, *Daughters of the Cold War*, LEGAL AFFAIRS (Jan./Feb. 2004), http://www.legalaffairs.org/issues/January-February-2004/story_freedman_janfeb04.msp. Cf. BARRY SEGEL, CLAIM OF PRIVILEGE (2008) (chronicling the decades-long search for the truth that took place after the plane crash).

58. *See id.*

59. DYCUS, *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.”

c. The Lawyer as a Zealous Advocate

*As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.*⁶⁶

61. Fisher, *supra* note 54, at 401.

62. David Kravets, *Much-Abused ‘State Secrets Privilege’ Under Fire in Congress*, WIRED (June 25, 2012), <http://www.wired.com/threatlevel/2012/06/state-secrets-revamp/>.

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 their 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.

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.*

68. Sandra Day O’Connor, *On Being Ethical Lawyers*, CLARK MEMORANDUM, Spring 2008, at 5, http://www.jrcls.org/publications/clark_memo/sections/s08/cmS08_oconnor.pdf.

69. *About*, JUSTICE FOR LYNNE STEWART (May 30, 2010), <http://lynnestewart.org/about-lynn/>.

70. Benjamin Weiser, *10-Year Sentence for Lawyer in Terrorism Case Is Upheld*, N. Y. TIMES, June 28, 2012, <http://www.nytimes.com/2012/06/29/nyregion/lynne-stewarts-10-year-prison-sentence-is-upheld.html>.

71. *U.S. v. Rahman*, 189 F.3d 88, 103-04 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000).

72. *U.S. v. Stewart*, 590 F.3d 93, 100 (2d Cir. 2009).

73. *Id.* at 100.

74. *U.S. v. Stewart*, 686 F.3d 156, 162 (2d Cir. 2012).

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 re-sentencing, 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.*

77. *Stewart*, 590 F.3d at 110 (quoting *U.S. v. Sattar*, 395 F. Supp.2d 79, 90 (S.D.N.Y. 2005)).

78. *Id.* at 99.

79. Scott Shifrel & James Fanelli, *Lynn Stewart, 70-year-old radical lawyer, sentenced to 10 years in prison for aiding bomb plotter*, N.Y. DAILY NEWS (July 15, 2010), http://articles.nydailynews.com/2010-07-15/local/27070085_1_koeltl-defense-lawyers-terrorism-case.

innocents, and the extent to which they constituted an abuse of her trust and privilege as a member of the bar.⁸⁰

In a pre-sentencing letter to the trial judge, Stewart gave an inkling of what may have been her key shortcomings.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.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.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.”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,”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.*⁸⁶

Competence for the national security law practitioner can be quite challenging. Almost by definition, national security matters are not the stuff

80. *Stewart*, 686 F.3d at 181 (emphasis added).

81. Letter from Lynne F. Stewart to the Honorable John G. Koeltl, U.S. Dist. Court Judge, Southern Dist. N.Y. (Jan. 26, 2006), available at [http://www.lynnestewart.org/Stewart%20Letter%20\(Ex%201\)%20scanned.pdf](http://www.lynnestewart.org/Stewart%20Letter%20(Ex%201)%20scanned.pdf).

82. *Id.*

83. *Id.*

84. *Id.*

85. See *Haig v. Agee*, 453 U.S. at 307.

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.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.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.”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 Serbia⁹⁰ 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.⁹¹

87. See, e.g., Charles J. Dunlap, *Come the Revolution: A Legal Perspective on Air Operations in Iraq Since 2003*, in ISRAEL YEARBOOK ON HUMAN RIGHTS 141 (Yoram Dinstein ed., 2010), and reprinted in 86 THE WAR IN IRAQ: A LEGAL ANALYSIS 139–54 (Raul A “Pete” Pedroza & Naval War College Press eds., 2010), available at http://scholarship.law.duke.edu/faculty_scholarship/2182/.

88. See McChesney, *supra* note 17; Press Release, *supra* note 19.

89. Rick Rogers, *Marine tells why no Haditha-case probe*, SAN DIEGO UNION-TRIBUNE, May 16, 2007, http://www.utsandiego.com/uniontrib/20070516/news_1mi16haditha.html.

90. See generally U.S. Dep’t of Defense, Report to Congress: Kosovo/Operation Allied Force After-Action Report 20 (Jan. 31, 2000), available at <http://www.au.af.mil/au/awc/awcgate/kosovoaa/kaar02072000.pdf>.

91. Lieutenant General Michael Short, USAF (Ret.), *Operation Allied Force from the Perspective of the NATO Air Commander*, in 78 U.S. NAVAL WAR COLLEGE, LEGAL AND ETHICAL LESSONS OF NATO’S KOSOVO CAMPAIGN 19 (Andru E. Wall ed., 2002) [hereinafter *Operation Allied Force*], http://www.au.af.mil/AU/AWC/AWCGATE/navy/kosovo_legal.pdf. For another discussion of the role

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”⁹² 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.”⁹³

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.”

e. Special Conflicts of Interest for Former and Current Government Officers and Employees

*[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

of lawyers in that conflict from a commander’s perspective, *see generally* WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 175, 179, 461 (2001).

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 Military 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.⁹⁵

Sofaer was the Legal Advisor to the State Department from 1985 to 1990.⁹⁶ In 1988, a bomb exploded on Pan Am flight 103 over Lockerbie, Scotland, killing 270 people, including 189 Americans.⁹⁷ 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.⁹⁸ 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.”⁹⁹ 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.”¹⁰⁰

After he left government and entered private practice, Sofaer undertook the representation of “the government of Libya in connection with criminal

(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 governmental 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.

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/10685> (last visited Aug. 28, 2012).

96. *See id.*

97. Jeffrey Fleishman & Glen Johnson, *Lockerbie bomber dies in Libya*, LOS ANGELES TIMES, May 21, 2012, <http://articles.latimes.com/2012/may/21/world/la-fg-libya-lockerbie-bomber-20120521>.

98. *Id.*

99. Background Note: Libya, U.S. DEP’T ST. (Mar. 9, 2012), <http://www.state.gov/r/pa/ei/bgn/5425.htm>.

100. Kirit Radia, *Pan Am 103 Families Finally Compensated*, ABC NEWS (Oct. 31, 2008), <http://abcnews.go.com/Blotter/story?id=6158491&page=1>.

and civil disputes and litigation arising from the [Pan Am] bombing.”¹⁰¹ As a result, the Board on Professional Responsibility ordered Sofaer 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.¹⁰²

In his defense, Sofaer vigorously contested the precise meaning of the various terms in the rule, and offered several other explanations justifying his actions.¹⁰³ However, the District of Columbia Court of Appeals adopted the Board report.¹⁰⁴ In that report it was emphasized that it found a violation of the rules not because Sofaer “undertook to represent an unpopular client” or because of “the appearance of impropriety that caused public condemnation of Respondent’s private representation of Libya”,¹⁰⁵ 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.¹⁰⁶

The court also found Sofaer’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.”¹⁰⁷ 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.¹⁰⁸

101. *In re Sofaer*, 728 A.2d 625, 626 (D.C. 1999).

102. *Id.* at 630.

103. *See id.* at 627–28.

104. *See id.* at 626.

105. *Id.* at 651–52.

106. *Sofaer*, 728 A.2d at 651–52.

107. *Id.* at 627.

108. *Id.* at 628. *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 Sofaer case can be found in the court's observation that Sofaer 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 ones 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

http://www.dcb.org/for_lawyers/ethics/legal_ethics/opinions/opinion343.cfm (last visited Aug. 29, 2012).

109. *Sofaer*, 728 A.2d at 629. For a good discussion of the rules relating to potential conflicts for lawyers leaving government, see Stacy M. Ludwig, *The Revolving Door: Professional Responsibility Considerations for Attorneys Entering or Leaving the Department of Justice*, 57 U.S. ATTORNEYS' BULLETIN, Sept. 2009, at 4, available at http://www.justice.gov/usaoeoua/foia_reading_room/usab5704.pdf.

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.”¹¹²

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.¹¹³ “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.”¹¹⁴

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.”¹¹⁵

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.

112. U.S. Dep’t of Defense Regulation 5500.7-R, § 12-501d, *available at* <http://www.dtic.mil/whs/directives/corres/pdf/550007r.pdf> (emphasis added).

113. James E. Baker, *LBJ’s Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT’L L. 407, 424 (2003).

114. *Id.*

115. Human Rights Watch, “Troops in Contact”: Airstrikes and Civilian Deaths in Afghanistan 4 (Sept. 2008) (emphasis added), *available at* http://www.hrw.org/sites/default/files/reports/afghanistan0908web_0.pdf.

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 Barbara 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.

117. U.S. v. Diaz, 69 M.J. 127, 129 (C.A.A.F. 2010), <http://www.armfor.uscourts.gov/newcaaf/opinions/2009SepTerm/090535.pdf>.

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.”¹¹⁹ Consequently, Diaz printed off a listing of 550 detainees, and sent it anonymously in a Valentine’s card to Olshansky.¹²⁰ 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.¹²¹

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.”¹²² 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.”¹²³ 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.”¹²⁴ Still, Diaz was convicted and sentenced to six months confinement and dismissal from the Navy.¹²⁵

The Court of Appeals for the Armed Forces affirmed the conviction and sentence.¹²⁶ 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.’”¹²⁷ Of course, Diaz had made no attempt to resolve his concerns in this way.¹²⁸

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

119. Andrew Scutro, *JAG gets 6 months, dismissal in Gitmo case*, NAVY TIMES, May 18, 2007, http://www.navytimes.com/news/2007/05/navy_diaz_sentence_070518w/ (statement of Matthew Diaz, Lieutenant Commander).

120. *Diaz*, 69 M.J. at 130.

121. *See id.*

122. *Id.*

123. *Id.* at 136.

124. Scutro, *supra* note 119 (statement of Patrick McLain, Defense Attorney to Matthew Diaz).

125. *See Diaz*, 69 M.J. at 129.

126. *Id.* at 130.

127. *Id.* at 136 n.11 (quoting Dep’t 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 1.13(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.*¹²⁹

129. MODEL RULES, *supra* note 16, 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.¹³⁰ These include, for example, Secretary of State Hillary Clinton, and the President.¹³¹ 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.”¹³² Some agencies make this explicit.

Id.

130. Speech, Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, *The Obama Administration and International Law*, at the Annual Meeting of the American Society of International Law, Washington D.C. (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

131. See *id.*

132. D.C. RULES OF PROF’L CONDUCT R. 1.6(k) (2006), available at http://www.dcbart.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_one/rule01_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 (j) 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] . . . [u]nder 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 advisor 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,

defendant’s government employment, and a military lawyer representing a court-martial defendant.

Id.

133. AIR FORCE JUDGE ADVOCATE GENERAL CORPS, RULES OF PROF’L CONDUCT R. 1.13(a) (2005) [hereinafter AIR FORCE RULES], available at <http://www.caaflog.com/wp-content/uploads/AirForceRulesofProfessionalConduct.pdf>.

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 Diaz*, 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(b).

138. 10 U.S.C § 806 (2011).

139. U.S. v. Means, 10 M.J. 162, 165 (C.M.A. 1981).

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(c)(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.

143. John H. Richardson, *Alberto Gonzales: What I’ve Learned*, *ESQUIRE* (Dec. 9, 2009, 6:30 AM), <http://www.esquire.com/features/what-ive-learned/alberto-gonzales-torture-quotes-0110>.

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.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."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 *recommendation* need not yield to simply giving "meaning to the words passed by Congress."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."¹⁴⁷ Similarly, Harold Koh said that his State Department

144. Richard C. Schragger, *Cooler Heads: The difference between the president's lawyers and the military's*, SLATE (Sept. 20, 2006, 5:10 PM), <http://www.slate.com/id/2150050/?nav/navoa>.

145. Randon H. Draper, *Interview with a JFACC: A Commander's Perspective on the Legal Advisor's Role*, THE JAG WARRIOR, Autumn 2002, at 21–22.

146. See Richardson, *supra* note 143.

147. Interview with Lindsey Graham, FRONTLINE (Oct. 26, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/pentagon/interviews/graham.html>.

attorneys serve as the “conscience for the U.S. Government with regard to international law.”¹⁴⁸

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.’”¹⁴⁹ 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.”¹⁵⁰ 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.”¹⁵¹

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*¹⁵²

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 16, 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.*¹⁵³ and *Hirabayashi v. U.S.*¹⁵⁴

After the Japanese attack on Pearl Harbor in 1941, war hysteria eventually turned on thousands of Japanese-Americans living on the West Coast.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.¹⁵⁶ Eventually, 100,000 were removed and sent to internment camps.¹⁵⁷ The Japanese Internment Cases challenged these actions, but in both instances the government’s authority was upheld.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 Fahy.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.”¹⁶⁰ Even though the Solicitor General knew of this very significant information, he withheld it from the Supreme Court.¹⁶¹

Instead, the Solicitor General “argued that it was impossible to segregate loyal Japanese Americans from disloyal ones.”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.”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.’”¹⁶⁴

153. 323 U.S. 214 (1944).

154. 320 U.S. 81 (1943).

155. See generally *id.* at 113-14.

156. *Executive Order 9066: The President Authorizes Japanese Relocation*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/5154/> (last visited Aug. 29, 2012). See also Exec. Order No. 9006, 7 Fed. Reg. 1407, p.2 (Feb. 19, 1942).

157. Tracey Russo, *Confession of Error: The Solicitor General’s Mistakes During the Japanese American Internment Cases*, THE JUSTICE BLOG (May 20, 2011), <http://blogs.justice.gov/main/archives/1346>.

158. *Korematsu v. U.S.*, 323 U.S. at 219; *Hirabayashi v. U.S.*, 320 U.S. at 105.

159. See Russo, *supra* note 157.

160. *Id.*

161. See *id.*

162. *Id.*

163. *Id.*

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-American treated 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

165. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

166. *See al-Kidd v. Aschcroft*, 580 F.3d 949, 952 (9th Cir. 2009).

167. *See id.*

168. 18 U.S.C. § 3144 (2011) (explaining the purpose and manner of procurement of a material witness warrant).

169. *See al-Kidd*, 580 F.3d at 953.

170. *See id.*

171. Hannah Robbins, *What’s at stake in Ashcroft v. al-Kidd*, ACLU BLOG OF RIGHTS (Mar. 4, 2011, 6:30 PM), <http://www.aclu.org/blog/national-security/whats-stake-ashcroft-v-al-kidd>.

172. *Id.*

173. *Id.*

years after Sept. 11” under the material witness statute.¹⁷⁴ 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.”¹⁷⁵ Like many others, al-Kidd was never called as a witness or charged with any crime (and al-Hussayen was tried but not convicted).¹⁷⁶

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.¹⁷⁷ 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.”¹⁷⁸

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.”¹⁷⁹ 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.¹⁸⁰ 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.”¹⁸¹ 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

174. *U.S. citizen recalls ‘humiliating’ post-9/11 arrest*, FOX NEWS (Feb. 27, 2011), <http://www.foxnews.com/us/2011/02/27/citizen-recalls-humiliating-post-11-arrest/>.

175. *Id.*

176. *Saudi grad student cleared of terror charges in Idaho*, BOSTON.COM (June 11, 2004), http://articles.boston.com/2004-06-11/news/29198763_1_visa-fraud-counts-counts-of-visa-fraud-sami-omar-al-hussayen.

177. *See al-Kidd*, 580 F.3d at 955–56.

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.

183. Report and Recommendation on Cross Motions for Summary Judgment: Individual Defendants Michael Gneckow and Scott Mace at 2–3, *Abdullah al-Kidd v. Alberto Gonzales*, No. 1:05-cv-00093-EJL-MHW (Dist. Idaho June 18, 2012), <http://www.lawfareblog.com/wp-content/uploads/2012/06/al-Kidd-FBI-liable.pdf>.

184. Report and Recommendation on Cross Motions for Summary Judgment: United States at 2, *Abdullah al-Kidd v. Alberto Gonzales*, No. 1:05-cv-00093-EJL-MHW (Dist. Idaho June 18, 2012), <http://www.lawfareblog.com/wp-content/uploads/2012/06/al-kidd-fed-tort.pdf>.

185. *Compare Korematsu*, 323 U.S. 214, and *Hirabayashi*, 328 U.S. 81, with *al-Kidd*, 131 S. Ct. 2074.

k. Pro Bono

*Every lawyer has a professional responsibility to provide legal services to those unable to pay.*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 *Rasul v. Bush*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.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.”¹⁸⁹

186. 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 to:
 - (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
 - (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;
 - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
 - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Id.

187. 542 U.S. 466 (2004).

188. Jack Goldsmith, *The Great Legal Paradox of Our Time: How Civil Libertarians Strengthened the National Security State*, THE NEW REPUBLIC (Mar. 16, 2012), <http://www.tnr.com/article/politics/101561/guantanamo-bay-prison-obama?page=0,1>.

189. *Id.* For a discussion of *habeas corpus* actions, see generally *Habeas Corpus*, 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.”¹⁹⁰ According to these analysts, after several Supreme Court cases legitimated habeas litigation:

[L]arge firms *sought out* habeas clients—the legal market *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.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.’”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.”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 *Washington Post* wrote that the

190. Laurel E. Fletcher, Alexis Kelly & Zulaikha Aziz, *Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys*, 44 CONN. L. REV. 617, 648 (2012), <http://connecticutlawreview.org/files/2012/04/7-Fletcher-Kelly-Aziz.pdf>.

191. *Id.* at 650 (emphasis added).

192. Paul Shukovsky, *Firm’s Unlikely Client: Bin Laden’s Ex-Driver*, SEATTLE POST-INTELLIGENCER, May 27, 2008, at 1 (quoting statement from Harry Schneider).

193. Neil M. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, <http://www.nytimes.com/2007/01/13/washington/13gitmo.html>.

detainee lawyers were “upholding the highest ethical traditions of the bar by taking on the most unpopular of defendants.”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.”¹⁹⁵ Regardless, Stimson apologized and promptly resigned in an effort to quiet the furor.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.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:

194. *Unveiled Threats*, WASH. POST, Jan. 12, 2007, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/11/AR2007011101698.html>.

195. Charles Fried, *Mr. Stimson and the American Way*, WALL STREET J., Jan. 16, 2007, <http://online.wsj.com/article/SB116892102246577373-search.html>.

196. Ashby Jones, *Cully Stimson Resigns*, WALL STREET J., Feb. 2, 2007, <http://blogs.wsj.com/law/2007/02/02/cully-stimson-resigns/>.

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 INDISPENSABILITY 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

198. Speech, Eric Holder, Attorney General, at the American Bar Association's Summit on Indigent Defense, New Orleans, LA (Feb. 4, 2012), www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html.

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.”²⁰⁵ 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:

[D]o 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

200. David Jarmul, *Kind Words for Colleagues in Washington*, DUKE TODAY (July 14, 2012), <http://today.duke.edu/2012/07/powelldc> (statement of H. Jefferson Powell).

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 distaste . . . to decide an issue logically and dispassionately.

29 M.J. 999, 1002 (A.F.C.M.R. 1990).

204. MAX HASTINGS, *WARRIORS: PORTRAITS FROM THE BATTLEFIELD*, at xvii (2005).

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.²⁰⁶

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”²⁰⁷

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.

206. *Operation Allied Force*, *supra* note 91.

207. JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS ISSUES* 325 (2007).