

Symposium

Lawyers' Roles and the War on Terror

Foreword: Risk, Deliberation, and Professional Responsibility

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If, as de Tocqueville observed, everything in America eventually becomes the province of lawyers,¹ it should not be surprising that the conduct of lawyers has become a salient aspect of the war on terror. While terrorists typically express contempt for the rule of law,² lawyers in a democracy should know better. Unfortunately, crises sometimes push lawyers from their traditional roles as advocates and counselors into less auspicious roles as enablers of overreaching.³ The legal response to the attacks of September 11 has highlighted the ethical pressures imposed on lawyers in crisis situations.

The contributors to this symposium focus on two important subjects: (1) the ethical issues triggered by the recommendations of government lawyers on treatment of detainees (the so-called "torture memos"),⁴ and (2) the debate over the ethics of the government's placement of restrictions on civilian defense lawyers representing alleged terrorists in government-dominated fora such as military commissions. The torture memos represent a conflict between

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1. Alexis de Tocqueville, *Excerpts from American Notebooks: Tocqueville's Conversations with his American Informants; Travel Impressions on the Road*, in THE TOCQUEVILLE READER 51, 55 (Olivier Zunz & Alan S. Kahan eds., 2002) ("The United States are ruled by lawyers. It is they who hold almost all the offices.").

2. See JOHN ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 20, 32 (2002) (noting Islamic strictures against killing noncombatants and Osama bin Laden's disregard of these rules).

3. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (discussing the importance of lawyers' detachment from client objectives).

4. See, e.g., Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Attorney General, *Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A*, Aug. 1, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>, reprinted in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 115 (2004).

the lawyer's role as advocate for a client's position and the attorney's role as advisor offering an accurate account of the law as it exists. Symposium contributors argue that lawyers in the Office of Legal Counsel of the Department of Justice are advisors charged with the latter role. They argue further that these attorneys failed in that obligation.

The second subject – the ethics of restrictions on defense attorneys – raises two related issues. The first issue is whether defense lawyers have an obligation to defend the accused, even in situations where restrictions make effective representation exceedingly difficult, if not impossible. The second issue – the flip-side of the first – is whether lawyers have an ethical duty to *decline* such work, on the theory that tacitly agreeing to provide sub-standard representation at the insistence of the government compromises the lawyer's ethical principles, and that it legitimates proceedings that the public and profession should regard as illegitimate.

On the government lawyer side, much of this symposium addresses issues related to the attorney's role as advisor. However, certain government lawyers, particularly prosecutors, also have special duties in litigation that stem from constitutional guarantees. Understanding the strains imposed on government lawyers in crises requires an appreciation of the full spectrum of excesses for which government lawyers as both advisors and litigators should accept responsibility. Four abuses predominate: (1) minimizing constitutional and international law that requires the government to show a particularized need for coercion or restraint, and that requires the government to reject absolutely certain kinds of coercion, such as torture; (2) ignoring the duty to share exculpatory evidence with the defense; (3) diluting the obligation to refrain from prejudicial pretrial publicity; and (4) failing to respect the relationship between persons accused of terrorist activity and their attorneys. Each of these excesses has historical roots, and each has manifested itself since September 11.

Congress, courts, commentators, and government lawyers should aim to replace such excesses with an institutional culture that embodies both respect for civil liberties and a more nearly comprehensive approach to national security. This culture, which I call dynamic deliberation,⁵ has four attributes,

5. One aspect of dynamic deliberation is attorney-client deliberation. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 133-134 (1993) (discussing the dialectic between "sympathy" and "detachment" in legal representation); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998) (discussing ethical deliberation); Angela O. Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 *CLINICAL L. REV.* 15, 41-43 (2004) (discussing the need for a lawyer to be flexible in identifying and analyzing categories); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical*

drawn in part from the superb contributions to this Symposium: cultivating dialogue, honoring reciprocity, incorporating long-term perspective, and transforming categories. Cultivating dialogue would, as George Harris explains, have resulted in far greater participation by State Department and career military lawyers in formulating the government's policy regarding torture and adherence to international law.⁶ Honoring reciprocity would have recognized, as Mary Cheh notes, the importance of defense counsel in the legal system, and the price in legitimacy that a system pays by discounting the defense lawyer's role.⁷ Incorporating long-term perspective would, as Kathleen Clark argues,⁸ have led to questioning the hasty and superficial trade-off made by the government, which valued short-term latitude in questioning detainees over the resultant abiding injury to legal institutions.

The importance to the dynamic deliberation model of transforming categories warrants special elaboration. The best government lawyers will respect civil liberties and absolute prohibitions such as the ban on torture, while finding innovative ways of tailoring necessary force to the imminence, probability, and gravity of harm. For example, in the Fourth Amendment area, government attorneys seeking warrants should consider both the probability and gravity of wrongdoing in justifying a search.⁹ Similarly, government lawyers working within other constitutional, as well as international, law contexts will develop innovative justifications for calibrated responses to clear threats, just as Franklin D. Roosevelt's Attorney General (and future Supreme Court Justice) Robert Jackson did when he fashioned legal arguments for the United States' Lend-Lease agreement with Great Britain.¹⁰ In addition, and perhaps most importantly, lawyers should help to reframe visions of the entire

Obligation, 37 IND. L. REV. 21, 46-56 (2003) (discussing deliberation with clients as an ethical responsibility of lawyers); Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990); cf. Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1995) (review essay) (arguing that Kronman's praise of detachment perpetuates the status quo).

6. See George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409 (2005).

7. See Mary Cheh, *Should Lawyers Participate in Rigged Systems?: The Case of the Military Commissions*, 1 J. NAT'L SECURITY L. & POL'Y 375 (2005).

8. See Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455 (2005).

9. Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1020-1022 (2003).

10. See ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 93-103 (John Q. Barrett ed., 2003).

war on terror, counseling their clients about the need to eliminate sources of injustice and resentment that fuel anti-American feeling.¹¹

An institutional culture without these elements will allow repetition of the mistakes of the past. A culture steeped in these attributes can protect both liberty and security, meeting the challenges of the future.

This Foreword is in two Parts. Part I identifies the core abuses committed by government lawyers in crises. Part II briefly sketches a model of dynamic deliberation that safeguards liberty and security.

I. OVERREACHING BY GOVERNMENT LAWYERS IN TIMES OF CRISIS: A CRITICAL TAXONOMY

Times of crisis often lead to overwrought government responses. Lawyers for the government who should serve the rule of law often lead the charge. This is true for lawyers acting as advocates and for lawyers acting as advisors. The result is the erosion of four crucial safeguards: (1) the requirement that the government show a particularized need for coercion or restraint; (2) the obligation to share exculpatory evidence with the defense; (3) the obligation to refrain from prejudicial public comments about defendants pending or during trial; and (4) the mandate to avoid interference with the attorney-client relationships of persons targeted by the government.¹² I discuss each development in turn.

A. *The Erosion of Particularity*

A core principle of American constitutionalism is that the government must make a particularized showing of the need to detain or confine individuals. This ensures that the government will not single out people on invidious grounds such as race, religion, nationality, or ethnicity. It also provides institutions such as the courts with a basis for evaluating the government's evidence in an atmosphere removed from the innuendo and hysteria that can drive government action, particularly in crises. Unfor-

11. See Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT'L L. & POL'Y 389, 404-408 (2004).

12. Much of the following discussion tracks my discussion in Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Prosecutions*, 34 SW. U.L. REV. 449 (2005).

unately, government lawyers have not always recognized the importance of this concept of particularity, nor fully adhered to it.¹³

In the past, government lawyers have sometimes stoked the flames of hysteria, instead of acting as more reflective gate-keepers. During World War I, the Attorney General encouraged the prosecution of dissidents, who often included disproportionately large numbers of immigrants readily targeted as “un-American.”¹⁴ This trend continued during the “Red Scare” after World War I.¹⁵ The McCarthy¹⁶ and Vietnam War eras¹⁷ saw comparable attempts to stifle dissent, often aided or authorized by lawyers.

The retreat from particularity is similarly evident in the executive branch’s actions after September 11. Michael Chertoff, the new chief of the Department of Homeland Security, who helped devise the Bush administration’s post-September 11 legal strategy, has acknowledged to Congress that the Administration targeted immigrants and persons of Muslim, Middle Eastern, and South Asian backgrounds with modest or nonexistent evidence of terrorist ties.¹⁸ More recently, the government has held people at

13. See generally Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 439-441 (2002) (discussing the formal and informal regulation of prosecutors by courts); see also Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2236-2260 (2003) (discussing factors that broaden criminal liability under federal statutes); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004) (criticizing a Justice Department policy on working in tandem with Congress to intimidate federal judges who reject prosecutors’ sometimes harsh sentencing recommendations).

14. See Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH. 4; Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411 (discussing the Espionage Act).

15. See William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 387.

16. See DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 148-153 (2003).

17. *Id.* at 154-158; see Linda E. Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004) (discussing the surveillance of groups during Vietnam Era and after September 11).

18. See Sheryl Gay Stolberg, *Senate Unanimously Confirms Chertoff as Homeland Security Chief*, N.Y. TIMES, Feb. 16, 2005, at A16; cf. Office of the Inspector General, U.S. Dep’t of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, June 2003 (discussing problems with government policy), available at <http://www.usdoj.gov/oig/special/0306/index.htm>; Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 495-499 (same); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing the marginalization of particular communities after September 11); Susan M. Akram & Kevin R. Johnson, *Race, Civil*

the Guantánamo Bay Naval Base and in Iraq, Afghanistan, and other countries without conceding that any showing of particularized wrongdoing was necessary.¹⁹ Some of these detainees evidently have been tortured.²⁰ Government lawyers helped devise a legal justification for the strategy's repudiation of Geneva Convention III and other international agreements.²¹

B. Prejudicial Pre-Trial Publicity

A related aspect of the overreaching engaged in by government lawyers, including some in very senior positions, is prejudicial pre-trial publicity. Statements by government attorneys that characterize evidence or that presume a defendant or detainee's culpability in advance of trial undermine the integrity of the trial process.²² Such statements impede the selection of a jury that can act independently to assess the strength of the government's evidence. As with the erosion of the principle of particularity, they allow the government to substitute its say-so for the jury's particularized judgment on the evidence that the legal system requires. Rules of professional responsibility prohibit prosecutors from making remarks that may prejudice potential jurors, but such rules unfortunately tend to go by the board in crises.

History offers many examples of prosecutors engaging in prejudicial publicity in high-profile national security cases. In the *Rosenberg* case, for example, the Assistant U.S. Attorney trying the case held press conferences every day to cast the defendants as atom spies, and he indicted a key witness during the trial for the clear purpose of discrediting that witness's testimony for the defendants.²³ The United States Court of Appeals for the Second

Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (same); see also Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004) (arguing that the government's racial profiling has legitimized private acts of violence against Muslims, Arabs, and South Asians in the United States).

19. See COLE, *supra* note 16, at 39.

20. See Harris, *supra* note 6, at 414-416.

21. See, e.g., Memorandum for William J. Haynes II, General Counsel, Dept. of Defense, from John Yoo, Deputy Asst. Atty. General, and Robert J. Delahunty, Spec. Counsel, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

22. See Lonnie T. Brown Jr., "May It Please the Camera, . . . I Mean the Court" – An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83 (2004) (discussing the problem of prejudicial pretrial publicity, and proposing greater accountability and transparency as remedies).

23. See Attossa M. Alavi, Comment, *The Government Against Two: Ethel and Julius Rosenberg's Trial*, 53 CASE W. RES. L. REV. 1057, 1067-1068 (2003).

Circuit criticized the prosecutor's conduct, but it did not overturn the convictions.²⁴

In the post-9/11 cases, the same pattern emerges. Consider, for example, the *Koubriti* case from Detroit, in which Attorney General Ashcroft twice violated a judicial gag order, first by stating that the defendants were suspected of having knowledge of the 9/11 attacks, and later by commenting publicly, in the middle of the trial, on the testimony of a key government witness.²⁵ The defendants were convicted, and Ashcroft was formally admonished by the judge.²⁶ However, the judge declined to pursue contempt charges against the Attorney General. Subsequently, Deputy Attorney General James B. Comey made public comments about the case of José Padilla, whom the government has detained without process as an alleged enemy combatant. Comey issued a detailed public statement outlining Padilla's alleged wrongdoing, asserting that he had conspired with al Qaeda to import a "dirty bomb" to explode in the United States, and that he had plotted to blow up an apartment building.²⁷ While no criminal charges had been filed, the Deputy Attorney General's comments clearly violated the spirit, if not the letter, of the rules of professional conduct.

C. *The Failure To Disclose Exculpatory Evidence*

The failure to disclose exculpatory evidence is an even more serious breach of both the rules of ethics and constitutional constraints. Prosecutors, with their great power and their role as representatives of "the people," must go beyond the positional gamesplaying that sometimes passes for acceptable lawyering in other settings. In order to do justice and ensure a fair trial for the accused, they must turn over to the defense evidence tending to show that the accused is innocent. Unfortunately, prosecutorial misconduct in this area also tends to increase in national security matters.

History is not encouraging. In the World War I prosecutions, for example, the government systematically failed to reveal evidence that the dissidents

24. *United States v. Rosenberg*, 200 F.2d 666, 670 (2d Cir. 1952) ("such . . . tactics cannot be too severely condemned").

25. *United States v. Koubriti*, 305 F. Supp. 2d 723, 726, 757-765 (E.D. Mich. 2003).

26. *Id.* at 726, 765. Ultimately, the government moved to vacate the convictions because it had not turned over exculpatory evidence to the defense. See *infra* notes 33-34 and accompanying text; see also Government's Consolidated Response Concurring in the Defendants' Motions for a New Trial and Government's Motion to Dismiss Count One Without Prejudice and Memorandum of Law in Support Thereof, *United States v. Koubriti*, Crim. No. 01-80778 (E.D. Mich. Aug. 31, 2004).

27. See Eric Lichtblau, *U.S. Spells Out Dangers Posed By Plot Suspect*, N.Y. TIMES, June 2, 2004, at A1.

charged had no knowledge of any treasonable plots against the government.²⁸ In the World War II Japanese-American internment cases, while the government conceded that one petitioner was a loyal citizen,²⁹ it deliberately misled the courts by failing to acknowledge that it had virtually no information to indicate any disloyalty on the part of any of the more than 100,000 other people detained.³⁰ In the *Rosenberg* case the government concealed evidence that would have at least partially exculpated Ethel Rosenberg, revealing her as at best a tacit ally in the espionage conspiracy charged, not an active or even fully knowing participant.³¹ In the more recent case of alleged rogue CIA agents Edwin Wilson and Frank Terpil, who were charged with conspiring to sell arms to Libya, the government failed to disclose evidence that the defendants may have been acting at the CIA's behest and thus were not "rogue agents" at all.³²

Similar excesses have come to light since September 11. In the Detroit terrorism case, for example, after pressure from defense counsel and the judge presiding over the matter, the government eventually moved to vacate the convictions, admitting a pattern of failures to disclose.³³ In one instance prosecutors introduced what they said was a "casing sketch" prepared for an attack on an American military base in Turkey, even though government experts had told them it was probably not a drawing of the base, but merely a crude map of the Middle East.³⁴ A similar conjunction of media hype and failure to disclose afflicted the recent prosecution of a Muslim translator at Guantánamo Bay Naval Base. In that case prosecutors initially claimed that the defendant had e-mailed letters on behalf of detainees. Only months later was it revealed that a computer expert had informed prosecution lawyers early

28. See PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 107 (1979).

29. See *Ex parte Endo*, 323 U.S. 283, 294 (1944); see also Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003) (analyzing the continuing significance of *Endo*).

30. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

31. See Michael E. Parrish, *Revisited: The Rosenberg "Atom Spy" Case*, 68 UMKC L. REV. 601 (2000).

32. See *United States v. Wilson*, 289 F. Supp. 2d 801 (S.D. Tex. 2003).

33. See Government's Consolidated Response, *supra* note 26; see also Danny Hakim & Eric Lichtblau, *Trial and Errors: The Detroit Terror Case; After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. TIMES, Oct. 7, 2004, at A1 (detailing numerous failures to disclose exculpatory evidence and opinions of government experts that contradicted the prosecution's theories).

34. See Hakim & Lichtblau, *supra* note 33.

on that it was unclear that the documents had been emailed.³⁵ Also not disclosed in the Guantánamo case was the fact that the entire prosecution may have been fomented by an officer who resented the relationships between Muslim servicemen and the detainees.³⁶ In the case of Zacarias Moussaoui, the alleged “twentieth hijacker,” the court determined that other detainees in government custody could provide exculpatory evidence regarding Moussaoui’s involvement in the September 11 conspiracy, but it declined to make those detainees available to the defense.³⁷

D. Interference with Defense Counsel

As Mary Cheh argues in her article in this symposium,³⁸ since September 11 the government has shown a troubling inclination to interfere with attorney-client relationships in cases involving alleged terrorists. The most prominent example is the government’s claim of unilateral authority to monitor attorney-client conversations of some federal prisoners, as well as those of persons scheduled for trial before military commissions at the Guantánamo Bay Naval Base.³⁹ In order to prevent interference with the attorney-client relationships of adverse parties, lawyers are not permitted to communicate with those represented by counsel without that counsel’s approval. These rules generally apply to prosecutors just as they do to other attorneys. Indeed, courts have used their inherent power or supervisory authority to police federal prosecutors’ compliance.⁴⁰ In addition, once a suspect is arrested, the Sixth Amendment bars government attempts to communicate with the suspect after he has asserted his right to counsel, unless the requested counsel is present.

Since September 11, the government has hindered access to attorneys for at least some of the more than 1,000 aliens detained on immigration charges.⁴¹ The government also disregarded an opinion from one of its own lawyers in

35. See Tim Golden, *Loyalties and Suspicions: The Muslim Servicemen; How Dubious Evidence Spurred Relentless Guantanamo Spy Hunt*, N.Y. TIMES, Dec. 19, 2004, §1, at 1 (also noting that another charge was based on erroneous translation of Islamic calligraphy).

36. *Id.*

37. See *United States v. Moussaoui*, 382 F.3d 453, 473-474 (4th Cir. 2004).

38. See Cheh, *supra* note 7.

39. See Teri Dobbins, *Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons*, 53 CATH. U. L. REV. 295 (2004); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003); Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, 17 GEO. J. LEGAL ETHICS 145 (2004).

40. See Green & Zacharias, *supra* note 13.

41. See Stolberg, *supra* note 18.

denying John Walker Lindh access to counsel retained by his family in the United States,⁴² even as it allegedly used harsh interrogation methods that later became familiar in the Abu Ghraib scandal.⁴³

At Guantánamo Bay, the government placed severe restrictions on defense lawyers' activities by permitting monitoring of their conversations with clients, and by barring those lawyers from discussing cases with others, even with those who might be able to offer expert advice or feedback. While a vigorous, public opposition from the organized criminal defense bar, including the National Association of Criminal Defense Lawyers (NACDL), has led to liberalization of some restrictions, others remain in place.⁴⁴

II. A MODEL OF DYNAMIC DELIBERATION

Since government attorneys are sometimes prone to excess in responding to crises, a different model may be helpful. Here, I suggest a model of dynamic deliberation, which would reinstate the Tocquevillian notion of the lawyer as intermediary between and among institutions, interests, and values. The premise of this model is that lawyers require both solidarity with and distance from their clients. Lawyers who buy into their clients' goals without reservation, or, worse, promote their own goals or agendas as their clients' own,⁴⁵ limit their own professional usefulness. Attorneys for entities bear a

42. See Eric Lichtblau, *Nomination May Revisit Case of Citizen Seized in Afghanistan*, N.Y. TIMES, Jan. 13, 2005, at A22 (discussing ethical issues regarding Lindh's access in Afghanistan to counsel hired by his family).

43. See David Lindorff, *Comment: Chertoff and Torture*, THE NATION, Feb. 14, 2005, at 6-7.

44. See Cheh, *supra* note 7, at 396-398. The government also successfully prosecuted attorney Lynne Stewart for acting as an intermediary between her client, Sheik Abdel Rahman (the "blind Sheik"), who is serving a life sentence in federal prison, and some of his followers regarding future acts of violence. The Sheik's group had previously claimed responsibility for an attack in Luxor, Egypt that resulted in sixty-two deaths. See Margulies, *supra* note 39, at 195 n.110. Opinions vary on whether the government was retaliating against Stewart for radical advocacy, or holding accountable a lawyer who had "crossed the line" from advocacy into accomplice status. Compare Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in Times of Crisis*, 32 HOFSTRA L. REV. 795, 834 (2004) ("Stewart was indicted because she was Abdel Rahman's attorney"), with Margulies, *supra* note 39, at 200-207 (arguing that the statute under which Stewart was charged reflects a valid, content-neutral, and narrowly tailored objective of reducing communications about ongoing transnational terrorist plans without impeding legal advocacy).

45. See Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487 (1999); cf. David Luban, *Selling*

special responsibility. Entities often tend to develop institutional cultures that accentuate dominant stories and marginalize arguments that are more nuanced, complex, or difficult to depict in graphic or narrative form.⁴⁶ The result is a polarization of perspectives. By the same token, lawyers who become too besotted with their own gate-keeper role can fall into a culture of risk aversion that impairs the organizational client's response to legitimate risks.

For government attorneys, a dynamic deliberation model can deal with these problems, appropriately balancing liberty and security in the lawyer's counseling and advocacy roles. The model has four overlapping elements: cultivating dialogue, honoring reciprocity, incorporating long-term perspective, and transforming categories. Cultivating dialogue requires government lawyers to show special regard for decisionmaking processes, while urging the participation of diverse voices and constituencies, including lawyers for other agencies, oppositional professional groups such as the NACDL, and leaders in international human rights organizations such as the International Committee of the Red Cross and Human Rights Watch. Honoring reciprocity requires making government officials aware that other actors and institutions can frustrate official plans and yield unintended consequences, unless their interests are taken into account. Incorporating long-term perspective checks the tendency of government officials in crises to discount unduly the effects over time of policies that short-change civil liberties and international law. Finally, a commitment to category transformation counsels government lawyers to avoid rigid analytical frameworks and false dichotomies. This commitment prevents government lawyers from getting stuck in a particular mind-set or mode of discourse, including either risk aversion (which may discourage the legitimate use of force) or an eagerness to exert executive power (which may unduly promote force as an instrument of policy).⁴⁷

Indulgences: The Unmistakable Parallel Between Lynne Stewart and the President's Torture Lawyers, SLATE, Feb. 14, 2005, available at www.slate.com/id/2113447 (discussing the perils for both government and defense lawyers of interposing ideological agendas when giving legal advice).

46. See Lauren Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 LAW & SOC'Y REV. 181, 186 (2004) ("Ideas, norms, and rituals evolve at the group or societal level and help to constitute individual identities, needs, preferences, and behavior.").

47. I and other commentators taking this view have outlined a "third way" that will grant the government needed flexibility but also protect civil liberties. This view rejects both a highly deferential stance toward executive authority, and a rigid adherence to traditional doctrine that would bar the use of force in self-defense against the threat of catastrophic harm by nonstate actors. See Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004); Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101

A. Dialogue

A sound legal culture must be open to deliberation and to other voices.⁴⁸ Cultures that encourage other voices replenish themselves and develop flexibility to meet new challenges. Institutional cultures that discourage dissent lose the ability to adapt. Moreover, such cultures become echo chambers, hardening positions through endless repetition. The siege mentality of many of the lawyers in the Nixon White House produced this echo chamber effect. So did the comfortable enabling of corporate malfeasance among lawyers for Enron. The eerie scribbles of the authors of the torture memos in the Justice Department and the White House, with their narrow view of the operable legal definition of torture, cry out for encounters with opposing assumptions. As Kathleen Clark notes in her contribution to this Symposium, such tunnel vision is inappropriate for lawyers in a counseling role, where the client has an inalienable right to the full spectrum of views on legal issues, rather than to a monolithic account dominated by a marginal legal argument.⁴⁹ Evidence suggests that those with different views, including many military lawyers, were systematically frozen out of the decisionmaking process.⁵⁰ The work of those military lawyers in bringing the torture memos into the public eye later contributed materially to shifts in official policy. Recent changes in ethical rules that permit disclosure of otherwise confidential information in a broader range of circumstances give lawyers welcome leverage for insisting on dialogue.⁵¹

B. Reciprocity

A sound institutional culture also must understand the reciprocity of commitments among institutions. Institutions encourage concessions among interests within those institutions not only because those concessions are desirable for their own sake, but also because they promote reciprocal concessions. Our common sense understanding of a “workable government”⁵²

MICH. L. REV. 1408 (2003) (review essay) (offering a balanced appraisal of the virtues and risks of antiterror legislation).

48. See SIMON, *supra* note 5.

49. Clark, *supra* note 8, at 465-468.

50. See Harris, *supra* note 6, at 439. Similarly, in the Lynne Stewart case, defense attorney Stewart crossed the line from advocacy into accessorial conduct in part because she surrounded herself entirely with acolytes of her client, the imprisoned Sheik Abdel Rahman, and disdained moderating voices. See Margulies, *supra* note 39.

51. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2003); *cf. id.* R. 1.13(c).

52. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

and world order, as well as insights from game theory, encompasses reciprocity – “tit for tat” – as a fundamental guide to individual and group behavior.⁵³ Geneva Convention III, with its guarantees for all, is a classic example of reciprocity on an international scale.

The Bush administration’s stress on unilateral approaches to international issues is a rejection of reciprocity in principle and practice. As negotiation theorists have pointed out, reciprocity demands that a party who rejects cooperation with others will itself suffer rejection. Professor Cheh demonstrates that the National Association of Criminal Defense Lawyers took this “tit for tat” approach in its dealings with the government, announcing publicly that the government’s restrictions on defense counsel made it unethical for defense lawyers to participate in the Guantánamo military commissions.⁵⁴ Tellingly, the Administration eased some restrictions under pressure from the NACDL and other critics, although substantial restrictions remain.⁵⁵

C. Long-Term Perspective

A related concern is temporal perspective. Lawyers must assist their clients in considering long-term values, such as free debate and diversity, in addition to such short-term values as present security.⁵⁶ This concern with preserving long-term values is at the heart of constitutionalism. Lawyers at their best, including lawyers steeped in the venerable traditions of military justice, take this longer-term view. Lawyers interested in advancing an ideological agenda or responding to political expediency often seek short-term advantage, and they exhibit little patience for the interaction of values that should inform a longer-term perspective.

Thus, lawyers focused on the presumed short-term value of aggressive interrogation will miss the longer-term damage to institutional integrity and legitimacy that results from torture. They will also unduly discount the effectiveness of interrogation techniques designed to promote trust and rapport.⁵⁷

53. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and the Law*, 102 MICH. L. REV. 71, 73 (2003).

54. See Cheh, *supra* note 7, at 388-389.

55. *Id.* at 397-398.

56. See JED RUBENFELD, *FREEDOM AND TIME* (2001); *cf.* JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 150 (1989) (observing that the “parts of a constitution that make it more difficult to change the constitution than to enact ordinary legislation . . . force people to think twice before they change it”).

57. As George Harris and Kathleen Clark note in their articles, the authors of the torture memos seemed to lose sight of the importance of the rule of law, and of the way in which torture erodes legal institutions. Harris, *supra* note 6, at 450-453; Clark, *supra* note 8, at 469-472; *cf.*

D. Transforming Categories

Government lawyering in crises need not be stuck in stale categories. As lawyers meet the criteria of dialogue, reciprocity, and long-term perspective, they will discover many opportunities to refine and transform concepts that do not fit exigent circumstances. The pragmatic ability to transform categories is an essential attribute for the government lawyer.⁵⁸

Two important category transformations are worthy of extended analysis. First, government lawyers, along with courts and commentators, should develop a practical calculus for government action that integrates factors such as the imminence, probability, and gravity of a given risk, and the level of force contemplated in response. Second, government lawyers should help transform antiterrorism efforts to include not merely force, but also an array of measures to promote equality and transitions to democracy. This integration would be beneficial in a range of situations, including criminal procedure and the use of force under international law.

In criminal procedure, government lawyers could appropriately counsel their official clients that an especially grave potential future harm might be balanced by a reduced requirement of evidence of the probability of harm. As an example of such a trade-off that was *not* made, to the detriment of the public interest, consider the hesitancy of government lawyers to seek a warrant to search the laptop computer of Zacarias Moussaoui, who now has confessed

Kim Lane Scheppelle, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 285 (2005); Sanford Levinson, *In Quest of a "Common Conscience": Reflections on the Current Debate About Torture,* 1 J. NAT'L SECURITY L. & POL'Y 231 (2005). Torture introduces evidence and information that is fundamentally unreliable, and it makes all actors in the legal system complicit in the willful infliction of pain and humiliation. Torture also encourages lying throughout the system, since participants will typically cover up their role, particularly when the torture has led, as it will at times, to death. Moreover, as Kim Scheppelle notes in her article elsewhere in this volume, torture will inevitably be used against innocents who cannot supply the information that the torture is designed to reveal. Scheppelle, *supra*, at 326-335. Covering up such incidents similarly erodes the integrity of the legal system. Finally, the experience of atrocities throughout the ages suggests that the average person in a group directed to mistreat others quickly comes to enjoy the work. Any lawyer asked to justify torture should inform her client about the possibility, indeed the likelihood, of these institutional ramifications. See generally Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change,* 72 FORDHAM L. REV. 261, 263 (2003) (discussing the institutional context of lawyers' integrity).

58. A transformative view of this kind should not be confused with the glib trumpeting of a "new paradigm" engaged in by then-White House Counsel Alberto Gonzales. Dynamic deliberation embraces, rather than rejects, dialogue, reciprocity, and long-term perspective as criteria for justifying and evaluating proposed changes. These values, properly understood, do not stand in the way of needed transformations.

to a range of terrorist crimes, including conspiracy related to the September 11 attacks.⁵⁹ These lawyers have since sought to justify their reticence by arguing that they could not demonstrate the likelihood of wrongdoing necessary to secure a warrant. However, they were armed with the knowledge that Moussaoui had enrolled in flight school in order to “take off and land” a Boeing 747 (although he had little knowledge of flying and no interest in becoming a commercial pilot),⁶⁰ that he could not explain the \$32,000 in his bank account, and that he had connections to a rebel leader in Chechnya. Given the gravity of the threat, the lawyers might have sought a warrant based on a lesser showing of probability that the threat would be carried out.⁶¹

Government lawyers also act appropriately when they devise innovative approaches in international affairs for tailoring the level of governmental response to the gravity of risk. For example, during the Cuban Missile Crisis, government lawyers fashioned an innovative justification for the blockade of Cuba that ultimately helped defuse the threat. A narrow interpretation of international law would have required an imminent threat of violence as a predicate for United States military action. However, government lawyers working with Robert F. Kennedy pushed the envelope with a “quarantine” rationale. This rationale would not have supported more aggressive military action, such as bombing, but it fit the blockade scenario.⁶²

59. In arguing that lawyers in the laptop search scenario should integrate probability and gravity, I do not condone the government’s stubborn refusal to provide Moussaoui’s lawyers with access to witnesses in United States custody who could provide exculpatory evidence. Nor do I condone the delay by government lawyers involved in the Moussaoui case in disclosing to the courts that the lawyers had some input into questions posed by interrogators to these witnesses, even as they continued to insist that Moussaoui’s lawyers had no right of access. *See United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

60. *See* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 273-274 (2004).

61. *See* Lerner, *supra* note 9 (arguing that the magnitude of possible harm in the *Moussaoui* case would have permitted a probable cause finding, despite a lesser showing of probability). Like most worthwhile innovations, this integration of gravity and probability of harm builds on existing doctrine. *See Florida v. J.L.*, 529 U.S. 266, 273-274 (2000) (suggesting that officers’ efforts to find a ticking bomb might justify a relaxed probable cause standard); *see also New York v. Quarles*, 467 U.S. 649 (1984) (holding that *Miranda* did not require suppression of a defendant’s statements made under interrogation in a situation posing an imminent danger to the officers’ safety).

62. *See* Richard N. Gardner, *Agora: Future Implications of the Iraq Conflict: Neither Bush nor the “Jurisprudes,”* 97 AM. J. INT’L L. 585, 587-588 (2003) (discussing the quarantine rationale).

For an earlier display of dynamic deliberation in international affairs, consider the example of Lend-Lease. Prior to the attack on Pearl Harbor and America’s entry into World War II, President Roosevelt wished to provide Great Britain with naval vessels to facilitate Britain’s resistance to Hitler’s forces without seeking prior approval from Congress. However, Roosevelt

The threat of catastrophic harm by nonstate actors such as al Qaeda provides a compelling case for challenging categorical judgments about the use of force under international law. President Clinton's decision to authorize attacks on Osama bin Laden, directing those attacks at a Sudanese pharmaceutical factory and at a camp in Afghanistan, seems to reflect legal advice that weighed the gravity of a threat against both imminence and probability.⁶³ Commentators have justified the United States military intervention in Afghanistan after September 11 either as self-defense against a state that had effectively merged with the non-state actor,⁶⁴ or as an

did not prod his legal staff to devise legal justifications. If anything, as Robert Jackson's memoir makes clear, Roosevelt demanded that his legal advisors convince *him* that sound arguments existed for claiming this power. See JACKSON, *supra* note 10, at 93-103 (discussing an exchange of legal opinions within the government regarding whether President Roosevelt had independent authority to negotiate and implement the "Lend-Lease" program).

Reflecting this combination of deliberation and innovation, the final agreement between the United States and Great Britain, which provided American vessels to Britain in exchange for Britain's agreement to lease bases to the United States, dealt with both constitutional and international law objections. On a constitutional level, Jackson, who was then Attorney General, argued that the net value of the transaction, including the bases leased, demonstrated that the American destroyers lent to Britain were not "essential" to the United States defense, *id.* at 97, and therefore complied with statutory requirements. Regarding international law, Jackson argued that Hitler's aggression violated a number of international agreements that Germany had signed, and that these treaties allowed countries such as the United States to assist victims of his aggression. *Id.* at 102-103; see also Jonathan A. Bush, "The Supreme . . . Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324, 2406-2409 (2002) (discussing a colloquy among experts during World War II on the crime of aggressive war under international law). The legal interpretations developed by Jackson reflected a continuing dialogue with Roosevelt and other government attorneys, focusing on principle (resistance to unlawful aggression and obtaining fair value in return for American aid) rather than mere expedience. Vindicating this principle, military aggression has since become one of the bases for subject matter jurisdiction of the new International Criminal Court. *Id.*

63. One court has recently held that the Clinton administration's level of certainty regarding bin Laden's presence at the Sudan site is a political question, beyond scrutiny by the judicial branch. The court seemed to share the presumed view of Clinton administration lawyers that the political branches need some flexibility in responding to grave threats. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1369-1370 (Fed. Cir. 2004); cf. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679-681 (2003) (discussing "customary constitutional authority" for exigent measures based on inferences drawn from legislative inaction or ambiguity).

64. See Richard Falk, *Ends and Means: Defining a Just War*, NATION, Oct. 29, 2001, at 11, 12.

internationally authorized use of force to prevent further grave harm.⁶⁵ A dynamic deliberation model would permit government lawyers to offer flexible advice on the use of lethal force against nonstate actors, even as it required lawyers to advise against certain kinds of force, such as torture, which are both prohibited under international law and especially damaging to institutional integrity.

In addition, government lawyers have an important role to play in counseling against overreliance on force and in support of measures designed to build good will for the United States around the world.⁶⁶ The ABA Model Rules of Professional Conduct recognize that lawyers can give advice about non-legal matters, including political, moral, and economic issues, that nonetheless have legal ramifications.⁶⁷ The resentment born of inequality helps breed violence,⁶⁸ so measures that reduce inequality impede the mobilization of terrorist groups by giving the political entrepreneurs behind such groups far less capital for their ventures. Conversely, measures that use force, particularly the pain and humiliation associated with torture, can have the opposite result of encouraging mobilization for violence, and the polarization of populations.⁶⁹ A conscientious government lawyer charged with providing advice about the use of torture or any other kind of force should find creative ways to present her client with a full repertoire of measures to encourage democratic transitions, instead of merely justifying force or remaining silent.

CONCLUSION

As the contributions to this Symposium suggest, a number of government lawyers in the period after September 11 fell into the same trap that government lawyers did in earlier crises. A lack of deliberation and an eagerness to act quickly in the service of narrow agendas marred these lawyers' discharge of their ethical obligations. Since September 11, however, institutional counterweights to such failures have developed among

65. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 4-7 (2004) (discussing a gap in traditional categories of international humanitarian law).

66. See Margulies, *supra* note 11, at 404-408 (arguing for the importance of an "institutional repertoire," including force as well as economic, social, and political initiatives, in the war against terror).

67. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

68. See Margulies, *supra* note 11.

69. *Id.*; see Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J.L. & PUB. POL'Y 429 (2002) (analyzing the role of polarization in promoting violence).

government attorneys, such as those in the Judge Advocate General corps, and among human rights groups, professional organizations such as the NACDL, and the press.

At the same time, the cavalier disregard for constitutional, statutory, and international law demonstrated by the authors of the torture memos should not obscure the inadequacy of the risk aversion often displayed by government lawyers before September 11. Just saying “No,” while it is frequently necessary, is rarely sufficient. The dynamic deliberation model, with its focus on dialogue, reciprocity, long-term perspective, and transforming categories, seeks to revise this risk-averse posture while respecting legal norms.