



2013

## National Security Pedagogy: The Role of Simulations

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Georgetown Public Law and Legal Theory Research Paper No. 13-004

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6 J. Nat'l Sec. L. & Pol'y 489-547 (2012)

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# NATIONAL SECURITY PEDAGOGY: THE ROLE OF SIMULATIONS

Laura K. Donohue \*

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## I. INTRODUCTION

Much has been made as of late about the impact of the retracting economy on law students.<sup>1</sup> The loss of big firm jobs and the breakdown of the traditional apprenticeship

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\* Associate Professor of Law, Georgetown Law. This article is still in draft version. It will be coming out in December 2012 in the *J. OF NAT'L SCT'Y L. & POL'Y*. Special thanks in advance of publication to Judge Jamie Baker, Bill Banks, Carrie Cordero, Dakota Rudesill, and Robin West for their thoughtful comments on earlier drafts of this article. My appreciation also goes to John Benton, who has been central in developing the concept behind NSL Sim 2.0, as well as Alan Cohn, Dakota Rudesill, and Mitt Regan, fellow control team members and teachers in *National Security Crisis Law* in Spring 2012. Dean Bill Treanor has been unfailingly supportive, including serving as President of the United States during the simulation. Kathleen Sullivan kindly supported the first iteration of the course at Stanford Law in 2009, at which time Corey Gruber, Kevin O'Prey, and J.P Schnapper-Casteras helped to develop the tabletop design. Peter Bing generously provided a grant to support the project. I thank my students for their dedication, as well as those who have returned to help run the simulation on the control team—particularly Marc Sorel, Amanda Wall, Andrew Christy, Alaric Piette, Rebecca Givner-Forbes, and Logan Perel. Thanks also to Nadia Asanchevay and Carrie Cordero for their assistance in assembling materials related to national security programs at various law schools. A short clip of the simulation can be found at: <http://www.law.georgetown.edu/about/academic-excellence/index.cfm>.

structure has reverberated in law schools, as they struggle to address the consequences, not least of which has been a renewed public debate about the value of legal education.<sup>2</sup> The uneasy compromise forged in the 1870s by Harvard President Eliot and law school Dean Christopher Columbus Langdell now stands in question.<sup>3</sup>

On the one hand, the practice of law itself, for which judgment, public responsibility, and exercise of legal doctrine prove paramount, define the profession—skills taught in some form through the Socratic and case-based method. On the other hand, the research strand of the modern university emphasizes critical thought and scholarly independence, essentially driving the engine of normative debate. The public discourse of late has eschewed the latter as unnecessary, superfluous in the context of the making of lawyers, suggesting that law schools should instead narrowly emphasize lawyering skills in new,

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<sup>1</sup> See, e.g., THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010); Catherine Ho, ABA faces Scrutiny as Job Prospects, debt Levels for law school grads worsen, Wash. Post, Jul. 24, 2011, available at [http://www.washingtonpost.com/business/capitalbusiness/aba-faces-scrutiny-as-job-prospects-debt-levels-for-law-school-grads-worsen/2011/07/21/gIQAjDJ3WI\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/aba-faces-scrutiny-as-job-prospects-debt-levels-for-law-school-grads-worsen/2011/07/21/gIQAjDJ3WI_story.html); Alan Scher Zagier, *Law Schools Lure Fewer Students as Jobs Dry Up*, HUFFINGTON POST, Sept. 1, 2011, available at [http://www.huffingtonpost.com/2011/09/01/law-schools-lure-fewer-st\\_0\\_n\\_944662.html](http://www.huffingtonpost.com/2011/09/01/law-schools-lure-fewer-st_0_n_944662.html); Libby Sander, *Despite Dismal Job Market, many Law Students Forgo Key Opportunities on Campus*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 6, 2012, available at <http://chronicle.com/article/Despite-Dismal-Job-Market/130229/>; Michele Goodwin, *Law Schools' Failure to Prepare Students...It's complicated*, THE CHRONICLE OF HIGHER EDUCATION, Dec. 13, 2011, available at <http://chronicle.com/blogs/brainstorm/law-schools'-failure-to-prepare-students...it's-complicated/42163/>; Frank Pasquale, *New York Times Financial Advice: Be an Unpaid Intern Through your 20s (Then Work till You're 100)*, CONCURRING OPINIONS, available at <http://www.concurringopinions.com/archives/2011/11/new-york-times-financial-advice-be-an-unpaid-intern-through-your-20s-then-work-till-youre-100.html> (considering the roots of rising un- and underemployment in the legal industry);

<sup>2</sup> See, e.g., David Segal, *For Law Schools, a Price to Play the A.B.A.'s Way*, NEW YORK TIMES, Dec. 17, 2011, available at <http://www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way.html?ref=business>; David Segal, *Law School Economics: Ka-Ching!*, NEW YORK TIMES, July 16, 2011, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?ref=business>; Katherine Mangan, *Legal Educators Grapple with How to Meet a Changing Profession's Needs*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 6, 2012, available at <http://chronicle.com/article/Legal-Educators-Grapple-With/130231/>; Katherine Mangan, *Law Schools on the Defensive Over Job-Placement Data: Other professional schools wonder if they'll be next to hear demands about career prospects*, THE CHRONICLE OF HIGHER EDUCATION, Oct. 16, 2011, available at <http://chronicle.com/article/Crisis-of-Confidence-in-Law/129425/>; Katherine Mangan, *Law Schools Revamp Their Curricula to Teach Practical Skills*, The Chronicle of Higher Education, Feb. 27, 2011, available at <http://chronicle.com/article/Law-Schools-Revamp-Their/126512/>. Also note that the January 2012 meeting of the Association of American Law Schools in Washington, D.C., an event attended by more than 3,000 educators, included a daylong session on changes in the profession and the consequent impact on legal education.

<sup>3</sup> See, e.g., David Segal, *What They Don't Teach Law Students: Lawyering*, NEW YORK TIMES, Nov. 19, 2011, available at [http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?\\_r=1&ref=davidsegal](http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=1&ref=davidsegal); David Segal, *Is Law School a Losing Game?*, NEW YORK TIMES, Jan. 8, 2011, available at <http://www.nytimes.com/2011/01/09/business/09law.html?ref=business>; Katherine Mangan, *Law Schools Resist Proposal to Assess Them Based on What Students Learn*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 10, 2010 (noting the emphasis at the 2010 AALS on potential revisions to the accreditation standards proposed by the ABA's Section of Legal Education and Admissions to the Bar); AALS Workshop on the Future of the Legal Profession and Legal Education – Changes in Law and Practice: Implications for Legal Education, Washington, D.C., Conference Program, p. 6, Jan. 5, 2012 (considering new and different kinds of trainings that law schools will in the future need to provide, changes in the legal academy, and how “projected changes in the economics of the legal profession affect law students’ priorities”, as well as what the legal academy should be doing to prepare for the changes); Remarks prepared by Richard A. Matasar, New York Law School, Financing and Organizing Law Schools of the Future, AALS Annual Conference, Jan. 5, 2012 (calling for quicker legal education focused on practice).

more efficient ways, so as to reduce the costs of legal education and more adequately prepare students to become members of the trade.<sup>4</sup>

There is much to lament about the current state of affairs. Perhaps the most unfortunate aspect of the current debate is the anti-intellectual nature of the Sirens' song, which calls for the academy to abandon the pursuit of scholarship in favor of the assembly line model. But equally regrettable is the assumption that one size fits all when it comes to different areas of the law. The demands placed on lawyers in specialized fields cry out for more careful consideration.

Three points here with respect to national security law deserve notice. First, the generalizations made about diminishing job prospects for students following graduation generally do not apply.<sup>5</sup> To the contrary, job opportunities in the field are expanding. There is a demand for talented and well-trained national security lawyers in the federal government, law firms, private industry, consultancies, think tanks, advocacy groups, special interest organizations, journalism, international organizations, state and local government, and the legal academy.

Second, while an important part of the picture, economic considerations may be only partially relevant to understanding what is driving this debate. It is remarkable how frequently, throughout U.S. history, major conflicts have been followed by legal reform movements. The present may be no different. Perhaps the reason that war gives rise to such debate stems in part from the deeply political and policy-oriented role that lawyers serve. Law is a public function and lawyering not merely a service rendered, but an action that at once both reflects and shapes government power. It is thus sensitive to the political environment and forced to conform to the changing conditions occasioned by war. It is worth noting here that the War of 1812 and the U.S. Civil War were both followed by periods of innovation in legal education.<sup>6</sup> World War I gave birth to new ideas, as a generation of soldiers returned. Little disposed to blindly accept inherited formulas, they critically scrutinized legal education, adjusting it to suit an altered worldview.<sup>7</sup> It was with this in mind that the 1921 Reed Report issued—an effort to consider the function of lawyers, in light of rapidly changing circumstances. Jerome Frank's widely cited article on the importance of clinical education came in the wake of World War II,<sup>8</sup> while the ABA at the close of the conflict in Vietnam commissioned a report to consider the appropriate role of law schools.<sup>9</sup> This point is not to be over-emphasized, as numerous other factors contribute to the need for the legal profession to re-evaluate its position. But it is worth recognizing that the end of the Cold War saw a

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<sup>4</sup> See, e.g., *supra* notes 2 and 3, and Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. Rev. \_\_\_\_ (Nov. 2010).

<sup>5</sup> I use the term "National Security Law" here broadly, cognizant that its contours continue to be subject to much debate. (See discussion, *infra*). At a minimum, it applies to the instruments related to the United States' geopolitical concerns as well as weaponized threats to the territorial integrity and well-being of the population, such as insurrection, aggression from other countries, the potential use of weapons of mass destruction (chemical, biological, radiological, or nuclear) within U.S. bounds, instability in regions central to U.S. security, catastrophic terrorist attack, and intelligence gathering. Broader understandings might include pandemic disease, climate change, international organized crime, energy supply, and economic concerns. For a more detailed discussion of the rapidly expanding nature of the field, see Laura K. Donohue, *The Limits of National Security*, AM. CRIM. L. REV. (2012). See also JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES (2007), pp. 13-22.

<sup>6</sup> ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921), p. 6.

<sup>7</sup> *Id.*, at 3.

<sup>8</sup> Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303 (1947).

<sup>9</sup> AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS ON THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979) [hereinafter Cramton Report].

similar phenomenon, with the release of the ABA's now famous MacCrate Report.<sup>10</sup> And since 9/11 the country has been engaged in military conflict. Domestic and international threats faced by the country have morphed and federal institutions and powers have radically altered.

The question that now faces law schools is how to conform legal education to changing realities. Economic downturn thus may be an important consideration, but it is not the only driving force. With this in mind, it is particularly important to look carefully at national security law, which is playing such a pivotal role in the formation of new institutions, new social arrangements, and the evolution of U.S. Constitutional, statutory, and regulatory law.

Third, looking more carefully at national security law in the contemporary context, there are features unique to its practice that sit uneasily in the traditional pedagogical approach. It is one thing to question the function of legal education writ large, within society, in light of swiftly changing social, political, and economic conditions. It is another thing entirely to look specifically at one sub-field—indeed, an area that has profound influence on the broader dialogue—and to question how this particular area should adapt. New and innovative thinking is required. This does not mean that law schools should abandon the enterprise embraced by Eliot and Langdell in the wake of the Civil War—that of critical distance and thoughtful scholarly debate.<sup>11</sup> If ever such a conversation were needed, it is now. Yet it does raise the question of whether law schools could do a better job of preparing students for the types of challenges they will be facing in the years to come, specifically in relation to national security.

This Article challenges the dominant pedagogical assumptions in the legal academy. It begins by briefly considering the state of the field of national security, noting the rapid expansion in employment and the breadth of related positions that have been created post-9/11. It considers, in the process, how the legal academy has, as an institutional matter, responded to the demand.

Part III examines traditional legal pedagogy, grounding the discussion in studies initiated by the American Bar Association, the Carnegie Foundation, and others. It suggests that using the law-writ-large as a starting point for those interested in national security law is a mistake. Instead, it makes more sense to work backwards from the skills most essential in this area of the law.

The Article then proposes six pedagogical goals that serve to distinguish national security law: (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance—including, *inter alia*, when not to give legal advice, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. Equally important to the exercise of each of these skills is the ability to *integrate* them in the course of performance.

These goals, and the subsidiary points they cover, are neither conclusive nor exclusive. Many of them incorporate skills that all lawyers should have—such as the ability to handle pressure, knowing how to modulate the mode and content of communications depending upon the circumstances, and managing ego, personality, and subordination. To the extent that they are overlooked by mainstream legal education,

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<sup>10</sup> AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter, MacCrate Report].

<sup>11</sup> BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826-1906 (2009), pp. 84-165.

however, and present in a unique manner in national security law, they underscore the importance of more careful consideration of the skills required in this particular field.

Having proposed a pedagogical approach, the Article turns in Part IV to the question of how effective traditional law school teaching is in helping to students reach these goals. Doctrinal and experiential courses both prove important. The problem is that in national security law, the way in which these have become manifest often falls short of accomplishing the six pedagogical aims. Gaps left in doctrinal course are not adequately covered by devices typically adopted in the experiential realm, even as clinics, externships, and moot court competitions are in many ways ill-suited to national security.

The Article thus proposes in Part V a new model for national security legal education, based on innovations currently underway at Georgetown Law. NSL Sim 2.0 adapts a doctrinal course to the special needs of national security. Course design is preceded by careful regulatory, statutory, and Constitutional analysis, paired with policy considerations. The course takes advantage of new and emerging technologies to immerse students in a multi-day, real-world exercise, which forces students to deal with an information-rich environment, rapidly changing facts, and abbreviated timelines. It points to a new model of legal education that advances students in the pedagogical goals identified above, while complementing, rather than supplanting, the critical intellectual discourse that underlies the value of higher legal education.

## II. STATE OF THE FIELD

National security law hiring does not follow the same pattern as other fields. It was never the mainstay of big law, and it is thus relatively insulated from the rapid consolidation currently underway at law firms across the country. The number of jobs available in this area, for better or worse, is increasing in response to the growing demand for national security lawyers. The Executive branch, the federal legislature, contractors, commercial entities, law firms, advocacy organizations, non-profit organizations, think tanks, journalism, international organizations, state and local government, the legal academy, and other realms need more, not fewer, national security lawyers, and particularly lawyers well-trained in established and emerging areas. Law schools, in turn, are responding to the growing demand. New degree programs, centers, institutes, student organizations, law reviews, clinics, and courses are beginning to proliferate. For the most part, however, these initiatives have evolved within traditional structures, adopting the prevalent legal pedagogy that marks the academy.

### A. Growing Demand for National Security Lawyers

The government drives the growth of national security law, and since mid-20<sup>th</sup> century, federal emphasis on this area has grown. Indeed, many scholars credit the 1947 National Security Act as marking the creation of the so-called “national security state”—one that continued to expand following the Cold War.<sup>12</sup> The post-9/11 era has, if anything, witnessed even greater acceleration in the construction and reach of national security institutions and authorities. This growth owes as much to ever-broader

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<sup>12</sup> National Security Act of 1947, ch. 15, 61 Stat. 496. For discussion of impact of the 1947 National Security Act and the evolution of associated authorities, see DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* (2008); AMY ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* (1999). *But see* Laura K. Donohue, *The Limits of National Security*, 48(4) *AM. CRIM. L. REV.*, 1573-1756 (2011) (contending that the rise of totalitarianism in the 1930s marked the advent of the national security state).

understandings of what constitutes a threat to U.S. national security as to military engagement overseas.<sup>13</sup> An increased demand for legal expertise has emerged, resulting, at a federal level, in both more national security lawyers and more lawyers practicing national security law. Private industry has kept pace.

## 1. More Federal National Security Lawyers

Consider first the institutional growth that has created new jobs for attorneys who work in the field. The demand for national security-savvy attorneys within the Executive Branch has soared, as virtually every department has become swept up in the intense focus on U.S. national security. The formation of the Department of Homeland Security provides perhaps the most dramatic example: in January 2003 it consolidated 22 agencies under one, new organizational structure.<sup>14</sup> It has since has grown to more than 200,000 employees, making it the third largest Cabinet department. The Office of the General Counsel alone comprises more than 1,750 attorneys located at headquarters and the department's operating components.<sup>15</sup> To facilitate its strength in this area, DHS created an Honors Attorney Program, in the course of which national security attorneys are provided with two years' employment in six-month rotations throughout DHS—with the aim of eventually working for the department.<sup>16</sup>

DHS is not alone in the creation of new positions. In March 2006 the USA PATRIOT Reauthorization and Improvement Act gave birth to DOJ's National Security Division ("NSD").<sup>17</sup> NSD houses a Counterterrorism Section, a Counterespionage Section, an Office of Intelligence, an Office of Justice for Victims of Overseas Terrorism, a Law and Policy Office, and an Executive Office. From FY 2008 through FY 2013, the division allocated funding for 236 attorneys per year.<sup>18</sup> Other components of DOJ have

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<sup>13</sup> See, e.g., Laura K. Donohue, *The Limits of National Security*, 48(4) AM. CRIM. L. REV., 1573-1756 (2011) (arguing that U.S. national security interests are no longer limited to the geostrategic goal of containing the spread of Communism and the influence of, particularly, the U.S.S.R., as they were from the rise of totalitarianism in the 1930s until the fall of the Berlin Wall. To the contrary, since the late 1980s, national security has become a trump card played by myriad special interests to try to attract attention, resources, and power in areas ranging from public health and climate change to organized crime, counter-narcotics, terrorism, and natural disasters).

<sup>14</sup> Homeland Security Act of 2002, Pub. L. No. 107-296. See also National Academy of Public Administration, Department of Homeland Security Executive Staffing Project, available at [http://www.napawash.org/pc\\_management\\_studies/dhs.html](http://www.napawash.org/pc_management_studies/dhs.html).

<sup>15</sup> Department of Homeland Security, Office of the General Counsel, *Overview*, available at <http://www.dhs.gov/office-general-counsel>.

<sup>16</sup> Department of Homeland Security, Office of the General Counsel Honors Attorney Program, available at <http://www.dhs.gov/office-general-counsel-honors-attorney-program>.

<sup>17</sup> USA PATRIOT Reauthorization and Improvement Act (Pub. L. No. 109-177). NSD consolidated operations from the former Office of Intelligence Policy and Review and the Counterterrorism and Counterespionage Sections of the Criminal Division. *Id.* See also U.S. Department of Justice—Agencies—NSD—About the Division, available at <http://www.justice.gov/nsd/about-nsd.html>.

<sup>18</sup> National Security Division, FY 2009 Budget Request at a Glance, p. 52, available at <http://www.justice.gov/jmd/2010summary/pdf/nsd-bud-summary.pdf>; National Security Division, FY 2013 Budget Request at a Glance, available at <http://www.justice.gov/jmd/2013summary/pdf/fy13-nsd-bud-summary.pdf>. The division also participates in the Attorney General's Honors Program, hiring more entry-level attorneys than the Office of the Solicitor General, the Civil Rights Division, or even the Tax Division, and the same number as awarded to the Civil Division, the Drug Enforcement Administration, and the Federal Bureau of Prisons. Department of Justice, Entry-Level Attorneys, Honors Program Participating Components, available at <http://www.justice.gov/careers/legal/entry-participants.html>. But note the relatively small number of entry-level hires through this program (4). Nevertheless, it exceeds the number of attorneys allocated to, e.g., the Office of the Solicitor General (1), the Civil Rights Division (3), and the Tax Division (3); and it is on a par with the number of billets awarded to, e.g., the Civil Division (4), the Drug Enforcement Administration (4), and the Federal Bureau of Prisons (4).

similarly created new positions for national security lawyers. In FY 2013 the department requested a total of \$4 billion to support its national security program, whose contours includes critical counterterrorism and counterintelligence programs, as well as increases related to DOJ's intelligence gathering and surveillance capabilities (such as the Comprehensive National Cybersecurity Initiative, the High-Value Detainee Interrogation Group, the Joint Terrorism Task Forces, and the Weapons of Mass Destruction/Render Safe Program).<sup>19</sup> A significant amount of this total is funneled to attorney functions. Since FY 2001, for instance, the FBI has expanded the Legal Attaché Program by more than 40%.<sup>20</sup> DOJ has budgeted for the number of national security agents and attorneys (combined) at the FBI for FY 2013 to exceed 4,800, with nearly 1,800 more positions lodged in other DOJ components.<sup>21</sup> (These positions are in addition to the 236 dedicated attorneys at NSD.<sup>22</sup>)

DoD as a whole boasts more than 10,000 full and part-time military and civilian attorneys.<sup>23</sup> Further breakdown of the military and civilian sectors shows a steady expansion. The number of Active Army (AA) JAG Corps (JAGC) attorneys, for instance, has steadily increased. In 1999, the AA JAGCs numbered 1,426. By 2005, this number had increased to 1,603, with TJAG reporting a total of 1,897 by the end of FY2011.<sup>24</sup> In addition to the more than 400 new positions that marked the previous decade, TJAG reported a total of 98 warrant officers, 561 civilian attorneys, and 1,942 enlisted paralegals supporting operations worldwide in 2011, with the RC Judge Advocate General's Corps at the close of FY2011 numbering 1849 and the attorney strength of the Army National Guard at the end of FY2010 at 822.<sup>25</sup>

Reorganization of the Intelligence Community has brought further demand. The Intelligence Reform and Terrorism Prevention Act of 2004 created the Director of National Intelligence.<sup>26</sup> ODNI conducts oversight of the Intelligence Community's ("IC") programs and operations.<sup>27</sup> As noted by ODNI's Office of the Inspector General, resolving major legal issues presents one of the five most critical management challenges

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<sup>19</sup> US Department of Justice FY 2013 Budget Request, National Security, \$4.0- billion DOJ National Security Programs, *available at* <http://www.justice.gov/jmd/2013factsheets/national-security.pdf>.

<sup>20</sup> *Id.*, at 1.

<sup>21</sup> *Id.*, at 2.

<sup>22</sup> *Id.*, at 2.

<sup>23</sup> Department of Defense, Office of the General Counsel, Office of the Secretary of Defense Honors Legal Internship Program, *available at* <http://www.dod.mil/dodgc/contact.html>. *But note* that some percentage of these attorneys focus not on national security law, per se, but on the plethora of other legal specialties required to operate the Department of Defense.

<sup>24</sup> The numbers for each year are as follows: 1,426 for 1999; 1427 for 2000; 1462 for 2001; 1474 for 2002; 1506 for 2003, 1547 for 2004; 1603 for 2005; 1638 for 2006; 1643 for 2007; 1647 for 2008; 1730 for 2009; 1858 for 2010; and 1897 for 2011. For 1999-2001, see Major General Thomas J. Romig, TJAG, Annual Report Submitted to the committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Transportation, and the Secretaries of the Army, Navy, and Air Force, Pursuant to the Uniform Code of Military Justice for the Period Oct. 1, 2000 to Sept. 30, 2001, p. 11-12. For 2001 through 2011, see Lieutenant General Dana K. Chipman, TJAG, Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security and the Secretaries of the Army, Navy, and Air Force, pursuant to the Uniform Code of Military Justice, for the Period Oct. 1, 2010 to Sept. 30, 2010, pp. 19-20.

<sup>25</sup> *Id.*

<sup>26</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638, Dec. 17, 2004. *See also* Exec. Order 13470, July 30, 2008, amending Exec. Order 12333 and strengthening the position of DNI.

<sup>27</sup> Edward Maguire, Inspector General, Office of the Director of National Intelligence Office of the Inspector General, (u) Critical Intelligence Community Management Challenges, Nov. 12, 2008, at 1, *available at* <http://www.fas.org/irp/news/2009/04/odni-ig-1108.pdf>.



for the agency.<sup>28</sup> The WMD Commission Report similarly recognized the legal challenges faced by the IC and called for more lawyers to address the problem.<sup>29</sup> Indeed, all IC members have an increased need to address the myriad legal issues that arise. The CIA's office of General Counsel, for instance, regularly interacts with the other IC agencies, the White House, the National Security Council, and the Departments of Defense, State, Justice, Treasury, Commerce, and Homeland Security. The types of legal issues addressed involve, *inter alia*, civil and criminal litigation, foreign intelligence and counterintelligence activities, counterterrorism, counternarcotics, nonproliferation and arms control, personnel and security matters, and the like.<sup>30</sup>

Further institutional changes, such as the 2001 creation of the Homeland Security Council, have increased the number of positions available, even as a number of departments, such as State, Treasury, and Health and Human Services, have increasingly built up their national security components.<sup>31</sup> These changes mean two things: first, as discussed above, there are more national security attorney positions available at the federal level. Second, as addressed below, those attorneys who are already working in these agencies are practicing more national security law.

## 2. More Federal Lawyers Practicing National Security Law

Let us turn first to the military component. Two wars over the past decade have resulted in the expansion of the armed forces, the creation of a new legal system in Guantánamo Bay, the detention of thousands of individuals overseas, revisions to the Uniform Code of Military Justice, the use of new technologies to support intelligence-gathering efforts, and the initiation of covert action implicating both domestic and international law.<sup>32</sup> These and other changes have led to an increased demand for talented and well-trained lawyers.

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<sup>28</sup> *Id.*, at 1, 11.

<sup>29</sup> The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President of the United States, Mar. 31, 2005, at 335, available at [http://www.fas.org/irp/offdocs/wmd\\_report.pdf](http://www.fas.org/irp/offdocs/wmd_report.pdf). (“Throughout our work we came across Intelligence Community leaders, operators, and analysts who claimed that they couldn’t do their jobs because of a ‘legal issue.’ These ‘legal issues’ arose in a variety of contexts, ranging from the Intelligence Community’s dealing with U.S. persons to the legality of certain covert actions. . . . [A]lthough there are, of course, very real (and necessary) legal restrictions on the Intelligence community, quite often the cited legal impediments ended up being either myths that overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications. Needless to say, such confusion about what the law actually requires can seriously hinder the Intelligence Community’s ability to be proactive and innovative. Moreover, over time, it can breed uncertainty about *real* legal prohibitions. We believe this problem is the result of several factors, but for present purposes we note two. First, in the past there has not been a sizable legal staff that focused on Community issues. . . . Second, many rules and regulations governing the Intelligence Community have existed for decades with little thought given to the legal basis for the rules, or whether circumstances have changed the rules’ applicability. . . . The recent creation of a DNI General Counsel’s office will increase the probability that Community legal issues are addressed more seriously. But the existence of the office alone does not guarantee an ongoing and systematic examination of the rules and regulations that govern the Intelligence Community. We therefore recommend that the DNI General Counsel establish an internal office consisting of a small group of lawyers expressly charged with taking a forward-leaning look at legal issues that affect the Intelligence Community as a whole.”) (emphasis in the original)

<sup>30</sup> Central Intelligence Agency, General Counsel, Attorney Positions (Honors and Lateral), available at <https://www.cia.gov/offices-of-cia/general-counsel/careers/honors-attorneys-program.html>.

<sup>31</sup> Exec. Order 13228, Oct. 29, 2001, subsequently codified in the Homeland Security Act of 2002. Note that in 2009 the Obama Administration merged the NSC and HSC staff. *See, e.g.*, Helene Cooper, In Security Shuffle, White House Merges Staffs, *New York Times*, May 26, 2009, available at [http://www.nytimes.com/2009/05/27/us/27homeland.html?\\_r=1&ref=us](http://www.nytimes.com/2009/05/27/us/27homeland.html?_r=1&ref=us).

<sup>32</sup> It could be argued that the tide of federal activity in national security may have reached its height. For instance, specifically in regard to the military, the 2011 Budget Control Act, passed as a condition for

Looking more carefully at the roles of these attorneys, however, it is important to note that the *nature* of practicing law in the military appears to be changing. Specifically, the presence of active hostilities has increased the number of JAG lawyers deployed in operational billets, even as there has been a corresponding shift to DoD's civilian lawyers to practice what could be considered "garrison" law. The first shift reflects, *inter alia*, in the deployment of JAGs down to the Battalion level in the Marine Corps, and to the Brigade level in the Army—a situation almost unheard of before. It is also a direct result of the type of national security challenges faced by the military. Counterintelligence and counterterrorism place particular emphasis on more traditional laws of war/law of armed conflict, as well as critical thinking.<sup>33</sup> In April 2011 General Mark Martins, Commander of the Rule of Law Field Force – Afghanistan, explained the resultant need to deploy JAGs:

[I]n all of the examples, we had lawyers deployed with us who could help. I have not come close to exhausting all that operational lawyers must be, know, and do in modern U.S. military operations. They must be soldiers – physically fit to endure the rigors and stresses of combat while keeping a clear head, as well as able to navigate the area of operations, communicate using radios and field systems, and, when necessary, fire their assigned weapons. They must also be prepared, when called upon to foster cooperation between local national judges and police, to plan and supervise the security and renovation of courthouses, to support the training of judges and clerks on case docketing and tracking, to establish public defenders' offices, to set up anti-corruption commissions to mentor local political leaders and their staffs, to explain governmental happenings on local radio and television, to develop mechanisms for vehicle registration. Because of their work ethic, creativity, intelligence, and common sense; because of their ability to think and write quickly, persuasively, and coherently; and because of their talent for helping leaders set the proper tone for disciplined and successful operations—I and other commanders tend to deploy as many field-capable lawyers as we can. The number of judge advocates in the 101<sup>st</sup> Airborne Division reached 29 under General Petraeus's command. At the Multi-National Force-Iraq, a force of about 16,000, we had 670 uniformed legal personnel, including 330 operational lawyers. . . and 340 paralegal

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Republican support for increasing the debt ceiling, heralded a 10 percent across-the-board cut in defense spending. Budget Control Act of 2011, Pub. L. 112-25, S. 365, Aug. 2, 2011. Such reductions would, presumably, hit across DoD, including the number of attorney positions. The reductions hinged on the success (or failure) of the so-called "Supercommittee" to agree on a deficit reduction plan of \$1.5 trillion. The committee's subsequent failure to reach agreement, if one looks to the letter of the law, will result in 2013 witnessing some \$30 billion in cuts, with another \$510 billion reduction over the next decade. Dylan Matthews, *Republicans Hate Obama's Defense Cuts. The trouble is, they voted for them*, WASH. POST, Aug. 29, 2012, available at <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/29/republicans-hate-obamas-defense-cuts-the-trouble-is-they-voted-for-them/>. It is too early, however, to consider such reductions as a *fait accompli*. Republicans, for instance, are already trying to reverse the statute's provisions on the grounds that some 44,000 jobs stand to be lost. House Speaker John Boehner, Majority Leader Eric Cantor, Armed Services Ranking Member Buck McKeon, Senate minority leader Mitch McConnell, minority whip Jon Kyl, and others are calling for the cuts to be repealed. *Id.* Mitt Romney and Paul Ryan, the Republican ticket for November's elections, have also stated that a Republican Administration would not allow the cuts to proceed. Mitt Romney Press, Press Release, *President Obama's Defense Cuts will Devastate North Carolina*, Aug. 23, 2012, available at <http://www.mittromney.com/news/press/2012/08/president-obamas-defense-cuts-will-devastate-north-carolina>; and Amanda Weber, *Paul Ryan: Military cuts would cost NC 50,000 jobs*, News 14 Carolina, Aug. 23, 2012, available at [http://charlotte.news14.com/content/top\\_stories/662712/paul-ryan--military-cuts-would-cost-nc-50-000-jobs](http://charlotte.news14.com/content/top_stories/662712/paul-ryan--military-cuts-would-cost-nc-50-000-jobs).<sup>33</sup> See, e.g., Major Winston S. Williams, *Training the Rules of Engagement for the Counterinsurgency Fight*, THE ARMY LAWYER, Jan. 2012, 41-48, available at [https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/5596a10a4f7576e2852579e2005ba0ac/\\$FILE/By%20Major%20Winston%20S.%20Williams.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/5596a10a4f7576e2852579e2005ba0ac/$FILE/By%20Major%20Winston%20S.%20Williams.pdf).

specialists and sergeants. In Afghanistan, we have nearly 500 judge advocates and paralegal specialists. . .<sup>34</sup>

According to TJAG, by the end of FY11, over 612 Army JAGC personnel (officer and enlisted, AA and RC) were deployed in operations in Afghanistan, Africa, Bosnia, Cuba, Kosovo, Egypt, Honduras, Iraq, Kuwait, and Qatar.<sup>35</sup>

The increased demand for lawyers to be present in the field has prompted a change in the type of law practiced by JAGs—from what could be considered “garrison” law to national security law. This shift has been accompanied by a corresponding transfer of the more traditional functions to civilian attorneys. General Counsel Offices must address intellectual property law, employment law, environmental concerns, ethics, personal and real property law, tax questions, bankruptcy, copyright and trademark, and a variety of other areas.<sup>36</sup> Civilian attorneys may also practice more national security law—creating new positions in this area as well. This, too, relates to the shift in the JAG Corp to deployment in the field. In either event, the type of law being practiced has shifted.

This phenomenon is not unique to the military. Myriad executive agencies have had to implement new statutory authorities, in the process drafting, finalizing, and publishing directives, guidelines, memoranda of understanding, and other documents.<sup>37</sup> These changes do not necessarily entail the creation of new positions in national security law, but they do suggest a shift in the type of lawyering required of government attorneys to address matters related to national security.

Paralleling changes in the executive branch, the number of Congressional committees handling some aspect of national security law has also expanded. Hundreds of bills have been introduced and dozens of new laws with national security implications have been passed over the past decade.<sup>38</sup> Congressional Staff Members (and Members of Congress) have thus had to quickly become informed about changes in national security law. Of the 21 permanent committees in the U.S. House of Representatives, since 9/11, all but two have held hearings and/or originated and passed new bills related to national security.<sup>39</sup> In the Senate, all but one of the standing committees has conducted the same.<sup>40</sup> Many of

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<sup>34</sup> Mark Martins, *Remarks at Harvard Law School*, Apr. 18, 2011, quoted and reprinted by Jack Goldsmith, Mark Martins Speech at Harvard, Apr. 21, 2011, Lawfare, *available at* <http://www.lawfareblog.com/2011/04/mark-martins-speech-at-harvard/>.

<sup>35</sup> Lieutenant General Dana K. Chipman, TJAG, Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security and the Secretaries of the Army, Navy, and Air Force, pursuant to the Uniform Code of Military Justice, for the Period Oct. 1, 2010 to Sept. 30, 2010, p. 20

<sup>36</sup> *See, e.g.*, Department of the Navy Legal Community, *What Makes OGC Practice Different*, *available at* <http://ogc.navy.mil/careers/practice.aspx>.

<sup>37</sup> Much of ODNI’s work, for instance, centers on legal concerns—such as finalizing and publishing critical intelligence community directives on MASINT, GEOINT, Access to and Dissemination of Intelligence, and the like. Edward Maguire, Inspector General, Office of the Director of National Intelligence Office of the Inspector General, (u) Critical Intelligence Community Management Challenges, Nov. 12, 2008, at 4, *available at* <http://www.fas.org/irp/news/2009/04/odni-ig-1108.pdf>.

<sup>38</sup> *See, e.g.*, DAAs, USA PATRIOT ACT, FISAAA, IRTPA, HSA, etc.

<sup>39</sup> The permanent House committees include: Agriculture; Appropriations; Armed Services; Budget; Education and the Workforce; Energy and Commerce; Ethics, Financial Services; Foreign Affairs; Homeland Security; House Administration; Intelligence (permanent Select); Judiciary; Natural Resources; Oversight and Government Reform; Rules; Science, Space, and Technology; Small Business; Transportation and Infrastructure; Veterans’ Affairs; Ways and Means (Whole).

<sup>40</sup> The permanent Senate committees include Aging (Special); Agriculture; Nutrition and Forestry; Appropriations; Armed Services; Banking, Housing, and Urban Affairs; Budget; Commerce, Science and Transportation; Energy and Natural Resources; Ethics (Select); Environment and Public Works; Finance; Foreign Relations; Health, Education, Labor, and Pensions; Homeland Security and Governmental Affairs; Indian Affairs; Intelligence (Select); Judiciary; Rules and Administration; Small Business and Entrepreneurship; and Veterans’ Affairs.

these committees have overlapping authorities with regard to executive branch agencies. The Department of Homeland Security alone is overseen by 108 committees, subcommittees, and commissions.<sup>41</sup> It is thus both the creation of new positions that creates a demand in national security law, as well as a shift in the type of authorities attorneys are expected to know, that fuels the engine of growth.

### 3. Private Sector Growth

The private sector has kept pace with the federal expansion. For along with these new positions come a host of potential career paths for students interested in national security law.

Consider industry—specifically, government contractors. By 2010, the Department of Homeland Security had more contractors working for it than full-time employees.<sup>42</sup> Similarly, the number and strength of defense contractors has rapidly grown, with more contractors than military personnel in Iraq and Afghanistan.<sup>43</sup> These companies require lawyers to negotiate government contracts, consider employment issues, oversee security clearances and classification matters, handle civil suits arising out of their activities, address patent and copyright issues in sensitive technology areas, respond to calls to appear in Congressional hearings, and at times consider criminal defense strategies.<sup>44</sup>

In-house lawyers at non-traditional defense contractors, such as Internet firms or telecommunications companies, have had to become savvy in a range of national security provisions. Microsoft, for instance, has a Regulatory Affairs team, which supports Microsoft's Trustworthy Computing (TwC) security business and provides company-wide expertise on various cyber security and national security areas.<sup>45</sup> Not only must lawyers in these contexts deal with regulatory and technology-specific concerns, but they must be familiar with information-gathering authorities. A broad range of Internet Service Providers and companies providing email access, such as Yahoo! Groups, libraries, schools, and companies now fall within Section 505 of the USA PATRIOT Act, making them subject to the issuance of National Security Letters.<sup>46</sup> By November 2005, some 30,000 NSLs were being issued per year – more than one hundred times the annual number prior to 9/11.<sup>47</sup> These NSLs impacted numerous institutions, all of whom had to be familiar with new areas of the law. A similar expansion marks financial reporting and other areas that have been given increased attention over the past decade.

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<sup>41</sup> Homeland Security, Issues 2012, The Heritage Foundation, available at <http://www.candidatebriefing.com/homeland-security/#facts>.

<sup>42</sup> Jeanne Meserve, Contractors Outnumber Full-Time Workers at DHS; Lawmakers 'astounded', CNN Politics, Feb. 24, 2010, available at [http://articles.cnn.com/2010-02-24/politics/dhs.contractor\\_1\\_federal-employees-and-contractors-secretary-janet-napolitano-senate-homeland-security?\\_s=PM:POLITICS](http://articles.cnn.com/2010-02-24/politics/dhs.contractor_1_federal-employees-and-contractors-secretary-janet-napolitano-senate-homeland-security?_s=PM:POLITICS)

<sup>43</sup> Some of the major defense contractors include BAE Systems, Bechtel, Boeing Company, Booz Allen Hamilton, General Dynamics Corporation, Haliburton, ITT Defense Electronics and Services, Science Applications International Corporation, Lockheed Martin, L-3 Communications, Northrop Grumman Corporation, Raytheon, SRI International, and United Technologies Corporation. For a complete list of the top 100 U.S. Defense Contractors see [www.govexec.com/features/0807-15/0807-15s3s1.htm](http://www.govexec.com/features/0807-15/0807-15s3s1.htm).

<sup>44</sup> See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77-216 (2010) (discussing the role of contractors in lawsuits asserting state secrets as a defense to alleged violations of patent law, environmental law, criminal law, personal injury and wrongful death, intellectual property disputes, and violations of international law).

<sup>45</sup> Microsoft Careers, Global, Job Opening Announcement, at <https://careers.microsoft.com/jobdetails.aspx?ss=&pg=0&so=&rw=1&jid=72048&jlang=EN>.

<sup>46</sup> USA PATRIOT Act § 210 (codified as amended at 18 U.S.C. § 2703(c)(2) (2000 & Supp. 2001)). See also LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM*, (2008).

<sup>47</sup> This number was first published by Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1. It was later supported by the Inspector General's Report of 2007.

To service the increase in the need for lawyers trained in national security matters, boutique law firms have been created, which serve in these functions. Increasingly, so, too, do big law firms. Inside the beltway, for instance, more than a dozen major firms now bill themselves as having national security law as one of their major areas of practice.<sup>48</sup> Simultaneously, consulting companies with a heavy concentration of lawyers who specialize in national security law have begun to appear.<sup>49</sup> Various other firms offer strategic advice, with varying degrees of emphasis on law and policy.<sup>50</sup>

While some of the growing business in this area supports government initiatives, other sectors challenge the application of the laws. Law firms—large and small—have thus also taken on *pro bono* activities with regard to individuals caught up in new national security initiatives, representing individuals held as material witnesses, immigrants detained in the United States pending hearings or deportation, and individuals detained in the United States on criminal charges. The Guantánamo Bar has rapidly grown, even as some of the country’s largest and most prominent firms—such as Wilmer,

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<sup>48</sup> See, e.g., Arnold & Porter LLP, National and Homeland Security, Cybersecurity, and Homeland Defense, at [www.arnoldporter.com/industries.cfm?action=related\\_industries&id=302&parent\\_id=302](http://www.arnoldporter.com/industries.cfm?action=related_industries&id=302&parent_id=302); Buchanan Ingersoll & Rooney: Government Relations - National Security, at [www.bipc.com/services.php?ServiceID=101](http://www.bipc.com/services.php?ServiceID=101); Covington & Burling: LLP Homeland and National Security, [www.cov.com/industry/homeland\\_and\\_national\\_security/](http://www.cov.com/industry/homeland_and_national_security/); GreenburgTraurig: Defense & Homeland Security, at [www.gtlaw.com/Experience/Practices/DefenseHomelandSecurity](http://www.gtlaw.com/Experience/Practices/DefenseHomelandSecurity); Kaye Scholer LLP: National Security, at [www.kayescholer.com/web.nsf/openDocument?OpenAgent&ID=37C8F3230029F2AC85256CE1000B86B2](http://www.kayescholer.com/web.nsf/openDocument?OpenAgent&ID=37C8F3230029F2AC85256CE1000B86B2); Latham & Watkins: Homeland Security, at [www.lw.com/practices.aspx?page=practicedetail&practice=172](http://www.lw.com/practices.aspx?page=practicedetail&practice=172); Nixon Peabody: Government Contracts: Defense and Homeland Security, at [www.nixonpeabody.com/services\\_overview.asp?SID=198](http://www.nixonpeabody.com/services_overview.asp?SID=198); Patton Boggs LLP: Homeland Defense, Security, and Technology Transfer, at [www.pattonboggs.com/services/ServiceDetail.aspx?firmService=42](http://www.pattonboggs.com/services/ServiceDetail.aspx?firmService=42); Kirkpatrick and Lockhart Preston Gates Ellis LLP (K&L Gates): Homeland Security & Public Policy and Law, at [www.klgates.com/practices/ServiceDetail.aspx?service=58](http://www.klgates.com/practices/ServiceDetail.aspx?service=58); Steptoe & Johnson: Government Affairs and Public Policy / Privacy and Data Security, at [www.stepto.com/practices-174.html](http://www.stepto.com/practices-174.html); Venable LLP: Government and Regulatory Practices / Homeland Security, at [www.venable.com/practice.cfm / www.venable.com/practice.cfm?action=view&practice\\_id=503](http://www.venable.com/practice.cfm/www.venable.com/practice.cfm?action=view&practice_id=503); Williams & Connolly LLP: Federal Programs and National Defense, at [www.wc.com/practice.cfm?practice\\_id=72](http://www.wc.com/practice.cfm?practice_id=72); Wilmer Hale: Defense and National Security, at [http://www.wilmerhale.com/defense\\_national\\_security/](http://www.wilmerhale.com/defense_national_security/).

<sup>49</sup> The Ashcroft Group, for instance, founded by former Attorney General John Ashcroft, provides strategic consulting for crisis management, homeland security, and regulatory measures. The Ashcroft Group, at <http://www.ashcroftgroupllc.com/>. The firm was founded in 2005 by former Attorney General John Ashcroft, his former Chief of Staff David Ayers and Juleanna Glover, who served on the senior staffs of then President-elect George W. Bush, Mayor Rudy Giuliani, Vice President Dick Cheney, Senator John McCain, and then Senator John Ashcroft. DC Thought Expertise Consulting Groups Think Tank: Resources for the GovConExecutive, GovConExec, Jul. 22, 2010, available at <http://www.govconexec.com/2010/07/22/d-c-thought-expertise-consulting-groups-think-tank-resources-for-the-govconexecutive/>. The Chertoff Group, founded by former DHS Secretary Michael Chertoff, similarly provides strategic advice and risk management strategies for commercial and government clients in a broad range of homeland and national security matters. The Chertoff Group, at <http://chertoffgroup.com/cgroup/>. The company employs attorneys with ties to the Department of Defense, the Department of Homeland Security, the Department of Justice, the National Security Agency, and the CIA. The Chertoff Group, Team, at <http://chertoffgroup.com/cgroup/about/team/>. The Cohen Group, in turn, founded by former Secretary William S. Cohen, provides business and political intelligence on trends that could affect its clients, while helping them to shape their “political, legal, regulatory, and media environments.” The Cohen Group, Expertise, at <http://www.cohengroup.net/expertise/index.cfm>. Its Principals are linked to the State Department, DoD, and Congress. *Id.*

<sup>50</sup> Ridge Global, for instance, founded by former DHS Secretary Tom Ridge, similarly focuses on risk management, crisis management, and event and campus security. Ridge Global, Our Practice Areas, at <http://www.ridgeglobal.com/expertise/index.php>. Renaissance Strategic Advisors LLC, in turn, focuses on global defense, space, government services, homeland security and commercial aerospace. A lesser concentration of JDs, however, marks the Senior Staff and Senior Advisors of the firm. Renaissance Strategic Advisors LLC, at <http://www.rsadvisors.net/>.

Cutler, Pickering, Hale, & Dorr; Clifford Chance; Covington & Burling; Dorsey & Whitney; and Allen & Overy—have directed significant resources to the issue.<sup>51</sup>

These attorneys are not alone in their concern about the impact of government activity on individual rights or the U.S. Constitution. Private non-profit organizations have moved into this area, increasing the demand for attorneys highly-trained in current and emerging national security fields. The American Civil Liberties Union, for instance, now has a dedicated National Security Project.<sup>52</sup> It has lodged several lawsuits challenging the Bush and Obama Administrations' actions as well as new legislation.<sup>53</sup> The Electronic Frontier Foundation (EFF) focuses on rights in the digital world. It is engaged in litigation related to, *inter alia*, border security provisions, intelligence gathering, wiretapping, material support, the use of GPS devices for tracking, and gag orders related to National Security Letters.<sup>54</sup> The Electronic Privacy Information Center (EPIC), in turn, has considered the legal and policy implications of the FBI watch list, fusion centers, the use of body scanners, cybersecurity, social network privacy, surveillance, facial recognition, intelligence oversight, the USA PATRIOT Act, and the treatment of personal information.<sup>55</sup> The organization pairs FOIA litigation with suits directed at challenging legislation both on its face and as applied.<sup>56</sup> Human Rights First, formerly the Lawyer's Committee for Human Rights, has been sharply critical of Guantánamo Bay, focusing on detainee issues and advancing the aim of closing the facility.<sup>57</sup>

Think tanks focused on the Constitutional, legal, and policy implications of new initiatives also have an increased demand for well-trained national security lawyers. The Constitution Project, for example, has formed a Liberty and Security Committee and a Coalition to Defend Checks and Balances.<sup>58</sup> The left-leaning Center for American Progress, founded in 2003 in response to the growing dominance of the Heritage Foundation and the American Enterprise Institute, lists national security as one of its major emphases. The organization focuses on matters related to terrorism, homeland security, human rights, nuclear and biological weapons, the U.S. military, the war in Iraq, and various regions and countries.<sup>59</sup> The Center for a New American Security, founded in 2007, provides further analysis.<sup>60</sup> It concentrates on numerous national security areas, including Iraq, Afghanistan, and natural resources.<sup>61</sup>

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<sup>51</sup> See Neil A. Lewis, In Rising Numbers, Lawyers Head for Guantánamo Bay, *New York Times*, May 30, 2005, available at [http://www.nytimes.com/2005/05/30/politics/30detain.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2005/05/30/politics/30detain.html?pagewanted=print&_r=0).

<sup>52</sup> American Civil Liberties Union, *National Security Project*, available at <http://www.aclu.org/national-security>.

<sup>53</sup> See, e.g., Mohamed et al. v. Jeppesen Dataplan, Inc., Complaint filed May 30, 2005, available at <http://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc-complaint>; Padilla v. Rumsfeld (ACLU joining the case as co-counsel for Padilla in August 2008); El Masri v. Tenet, Complaint filed Dec. 6, 2005, available at [http://www.aclu.org/files/safefree/rendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/files/safefree/rendition/asset_upload_file829_22211.pdf); ACLU v. DOJ (FOIA suit for information about use of 2008 FISA Amendments Act); Amnesty et al v. McConnell, Complaint filed July 10, 2008, available at [http://www.aclu.org/files/pdfs/safefree/faa\\_complaint\\_20080710.pdf](http://www.aclu.org/files/pdfs/safefree/faa_complaint_20080710.pdf)

<sup>54</sup> See, e.g., Al Haramain v. Bush, at CCR v. Bush, Doe v. Mukasey, Hepting v. AT&T, Jewel v. NSA, NSA Multi-District Litigation, NSA State Administrator Cases, US v. Jones, at <https://www.eff.org/cases>.

<sup>55</sup> Electronic Privacy Information Center, at <http://epic.org/>.

<sup>56</sup> *Id.*

<sup>57</sup> Human Rights First, at <http://www.humanrightsfirst.org/>.

<sup>58</sup> The Constitution Project, A Critique of “National Security Courts”, A Report by the Constitution Project’s Liberty and Security Committee and Coalition to Defend Checks and Balances, June 23, 2008, available at [http://www.constitutionproject.org/pdf/Critique\\_of\\_the\\_National\\_Security\\_Courts.pdf](http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf).

<sup>59</sup> Center for American Progress, National Security, at <http://www.americanprogress.org/issues>.

<sup>60</sup> Center for a New American Security, About CNAS, at <http://www.cnas.org/about>.

<sup>61</sup> Center for New American Security, topics, at <http://www.cnas.org/topics>.



It is not just new think tanks that are expanding in this area, in the process raising the demand for national security lawyers. Long-standing institutions have begun to focus on national security law. The Center for Strategic and International Studies, for instance, an entity that is more than fifty years old, employs 220 full-time staff linked to an extensive network of scholars.<sup>62</sup> CSIS places a significant amount of emphasis on Defense and Security, which translates into government acquisition and resources, homeland security, international security, military strategy, nuclear weapons, and terrorism.<sup>63</sup> The right-learning Heritage Foundation, another 501(c)(3) entity, has issued a range of pertinent legal analyses related to national security and homeland defense.<sup>64</sup> The American Enterprise Institute, founded in 1943, employs lawyers who comment at length on foreign and defense policy matters, as well as legal and constitutional concerns.<sup>65</sup> The Brookings Institute and the Lexington Institute emphasize current and emerging national security laws.<sup>66</sup> These entities represent just the tip of the iceberg: the American Bar Association lists some fifty-four think tanks that provide potential career paths for J.D. students interested in National Security Law.<sup>67</sup>

Special interest groups, in turn, have seen an increased need for legal representation in this area. The Council on American-Islamic Relations, for instance, the largest Islamic civil rights organization in the country, has begun to concentrate more on this area. The

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<sup>62</sup> CSIS, About Us, at <http://csis.org/about-us>.

<sup>63</sup> CSIS, Topics, available at <http://csis.org/topics>.

<sup>64</sup> See, e.g., Issues 2012: The Candidate's Briefing Book, at <http://www.candidatebriefing.com/homeland-security/> (outlining the key national security issues and recommending reform of congressional oversight, a transformation in the homeland security grant process, elimination of the unworkable elements of the USA PATRIOT Act, modification of the Stafford Act, and new protections for the critical information infrastructure). See also Paul Rosenzweig, *Ten conservative Principles for Cybersecurity Policy*, Background #2513, Jan. 31, 2011, The Heritage Foundation, at <http://www.heritage.org/research/reports/2011/01/10-conservative-principles-for-cybersecurity-policy>. (Rosenzweig, a senior editor of the *Journal of National Security Law & Policy* is also a lecturer at George Washington School of Law).

<sup>65</sup> NB: For some reason, [www.aei.org](http://www.aei.org) is not currently allowing public access to its web site. Numerous other sites, however, discuss the growth of AEI and its emphasis. See, e.g., DC Thought Expertise Consulting Groups Think Tank: Resources for the GovConExecutive, Jul. 22, 2010, available at <http://www.govconexec.com/2010/07/22/d-c-thought-expertise-consulting-groups-think-tank-resources-for-the-govconexecutive/>.

<sup>66</sup> See, e.g., Joint Brookings-Harvard Law Project on National Security Law, discussed, *infra*; Daniel Goure, *The contribution of the Jones Act to U.S. Security*, Oct. 20, 2011, Lexington Institute, available at <http://www.lexingtoninstitute.org/defense>.

<sup>67</sup> Careers in National Security Law, [www.abanet.org/natsecurity](http://www.abanet.org/natsecurity). The think tanks and research centers listed include American Enterprise Institute for Public Policy Research, Center for Democracy and Technology, American Foreign Policy Council, Century Foundation, Anser Institute for Homeland Security, Center for International Policy, Aspen Institute, Center for National Policy, Atlantic Council of the United States, Center for National Security Studies, Brookings, Center for Naval Warfare Studies, Business Executives for National Security, Center for Security Policy, Carnegie Endowment for International Peace, Center for Strategic and Budgetary Assessments, The CATO Institute, Center for Strategic and International Studies, Center for Defense Information, Center for Technology and National Security Policy (National Defense University), Center for Defense Information, Center for Technology and National Security Policy, Chicago Council on Global Affairs, Hudson Institute, Claremont Institute, Institute for Advanced Study of Information Warfare, Council on Foreign Relations, Institute for the Analysis of Global Security, Electronic Privacy Information Center, Institute for Defense Analyses, Federation of American Scientists, Institute for Foreign Policy Analysis, Foreign Policy Association, Institute for Policy Studies, Foreign Policy Research Institute, Institute for Science and International Security, GlobalSecurity.org, Investigative Project, Henry L. Stimson Center, The Jamestown Foundation, Heritage Foundation, Lexington Institute, National Academies, National Academy of Sciences, Strategic Studies Institute, National Institute for Public Policy, the United States Institute of Peace, National Institute of Military Justice, Washington Institute for Near East Policy, National Strategy Forum, Woodrow Wilson International Center for Scholars, Nautilus Institute, World Policy Institute, Manhattan Institute for Policy Research, The Middle East Institute, Potomac Institute for Policy Studies, Project on national Security Reform, RAND Corporation, and Site Institute. Id.

San Francisco chapter focuses on the Joint Terrorism Task Forces, documenting FBI surveillance practices, filing *amici* briefs, and suing the federal government for rights violations.<sup>68</sup>

Myriad other potential career paths for JD students interested in national security law present themselves. National security law journalism, for instance, a route taken by prominent writers such as Chisun Lee of *Pro Publica*, provides further opportunities. Other students may have a strong interest in going into international law and serving at the Hague, the United Nations, or other bodies that have been active in this area. Conversely, students may be interested in going local, as state and local governments have moved into this area—often at the behest of the federal government. According to the *Washington Post*, the Department of Homeland Security has given some \$31 billion to state and local governments since 2003, with the express aim of enhancing homeland security and improving their ability to defend against terrorism—this includes some \$3.8 billion in 2010 alone.<sup>69</sup>

Far from reflecting, then, the dire predictions of those focused on the shrinking economy, there are significant opportunities for students interested in the practice of national security law. Here it is important to reiterate that not only is the demand for national security-trained lawyers growing, but the range of matters incorporated into this realm is expanding, calling for a broader understanding of national security law within the legal academy. As a substantive matter, lawyers practicing in this area therefore must be familiar with areas that have traditionally constituted the field—such as the law of armed conflict, law of the sea, intelligence law, military law, diplomatic and foreign relations, and law enforcement, as well as new and emerging areas such as homeland security, domestic preparedness, immigration, cyber law, and public health.<sup>70</sup>

## **B. Law Schools' Expansion into National Security Law**

For decades, there has been an effort by legal scholars and, indeed, the American Bar Association's Standing Committee on Law and National Security, to draw attention to the field.<sup>71</sup> These efforts gained ground in the 1970s, 80s, and 90s, but it is only recently that interest in national security law—at least in the civilian sector—has surged.<sup>72</sup> In 1974, for instance, only one accredited law school offered courses or seminars in national security law.<sup>73</sup> This number increased to seven in 1984 and 83 in 1994.<sup>74</sup> By 1990, just three law school casebooks had been written on national security law.<sup>75</sup> Currently, however, approximately half of the 202 accredited law schools in the United States offer one or more courses in the field, and myriad treatises, text books and source books now mark the field.<sup>76</sup> As an institutional matter, U.S. law schools are also responding to the

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<sup>68</sup> See, e.g., *amicus* brief in *U.S. v. Jones*, etc.

<sup>69</sup> Dana Priest and William Arkin, *Monitoring America*, WASH. POST, Dec. 2010.

<sup>70</sup> In addition to knowing these areas, they must be familiar with the arc of history: to address covert action, for instance, as a matter of law, lawyers have to be familiar with the past—because the law expressly incorporates history into the law.

<sup>71</sup> ABA Standing Committee on Law and National Security, History, available at [http://www.americanbar.org/groups/public\\_services/law\\_national\\_security/about\\_us.html](http://www.americanbar.org/groups/public_services/law_national_security/about_us.html).

<sup>72</sup> The military has long recognized the importance of the study of national security law; the following sections thus largely focus on the growing attention paid to the field in the civilian sector.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; and American Bar Association, ABA-Approved Law Schools, available at [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html). For examples of case books, treatises, and sourcebooks, see, e.g., THOMAS M. FRANCK, MICHAEL GLENNON, SEAN D. MURPHY & EDWARD T. SWAINE, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS,



growing demand. The number of academic programs, centers and institutes dedicated to national security law, is increasing, as are the number of student organizations and journals.

### 1. Academic Programs, Centers, and Institutes

Academic programs focused on national security law tend to take the form of Master's degrees and emphases in the course of the J.D. Georgetown Law, for instance, offers a National Security Law LL.M. Degree and J.D./LL.M. Joint Degree.<sup>77</sup> George Washington University Law School runs a National Security and Foreign Relations Law LL.M.<sup>78</sup> Columbia Law has an LL.M. for JAGs.<sup>79</sup> The Judge Advocate General's Legal Center and School similarly offers an LL.M. in military law.<sup>80</sup> The Center for National Security Law at the University of Virginia School of Law provides an annual two-week institute focused on national security law.<sup>81</sup> Syracuse University College of Law gives students the opportunity to earn a Certificate in National Security and Counterterrorism Law, as well as a certificate of Advanced Study in Security Studies and a Certificate of Advanced Study in Post Conflict Reconstruction, with the latter two certificates available to both law and non-law graduate students.<sup>82</sup> George Mason Law, in turn, offers a concentration in the course of the J.D. on homeland defense and national security.<sup>83</sup>

Complementing such formal programs, more than a dozen law schools have a center or institute dedicated to national security law. The most visible perhaps are Duke's Center on Law, Ethics, and National Security; Georgetown Law's Center on National Security and the Law, New York University's Center on Law and Security; Syracuse University College of Law's Institute for National Security and Counterterrorism; and

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AND SIMULATIONS (4<sup>th</sup> Ed., 2012); DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS (2d ed., 2012); STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW, (5<sup>th</sup> ed., 2011); JOHN NORTON MOORE & ROBERT F. TURNER, EDS, NATIONAL SECURITY LAW (2d ed. 2005); RON SIEVERT, CASES AND MATERIALS ON U.S. LAW AND NATIONAL SECURITY (2d ed. 2006), CHARLES A. SHANOR & L. LYNN HOGUE, NATIONAL SECURITY AND MILITARY LAW IN A NUTSHELL (3d ed. 2003), GUIDE TO HOMELAND SECURITY (2003--); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (7<sup>th</sup> Ed. 2008); Venable LLP, HOMELAND SECURITY DESKBOOK: PRIVATE SECTOR IMPACTS OF THE DEFENSE AGAINST TERRORISM (2004); ALAN D. COHN, DOMESTIC PREPAREDNESS: LAW, POLICY, AND NATIONAL SECURITY (2012); JOHN NORTON MOORE ET AL, EDS., NATIONAL SECURITY LAW DOCUMENTS (2006); ROBERT A. FRIEDLANDER, HOWARD S. LEVIE, DONALD J. MUSCH, YONAH ALEXANDER, EDS., TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL (1979 - ); STUART S. MALAWER, U.S. NATIONAL SECURITY LAW: SOURCEBOOK OF CASES, LAWS, TREATIES & DOCUMENTS (2009); CYNTHIA ANN WATSON, U.S. NATIONAL SECURITY: A REFERENCE HANDBOOK (2008); ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, THE 2012 U.S. INTELLIGENCE COMMUNITY LAW SOURCEBOOK (2012).

<sup>77</sup> Georgetown Law, National Security Law LL.M. Degree and J.D./LL.M. Joint Degree, at <http://www.law.georgetown.edu/graduate/NationalSecurityLawLLMandJDLLM.htm>.

<sup>78</sup> GW Law, LL.M. Program, at <http://www.law.gwu.edu/Academics/FocusAreas/natsec/Pages/LLM.aspx>.

<sup>79</sup> <http://www.law.columbia.edu/hertog-national-security/scholars-fellows>.

<sup>80</sup> Judge Advocate General's Legal Center and School, available at <https://www.jagcnet.army.mil/8525736A005BC8F9/0/CE89C60813E53611852573550051C3D8?opendocument>. See also LLM Guide, Master of Laws Programs Worldwide, University of Virginia – Judge Advocate General's Legal Center and School, available at <http://www.llm-guide.com/university/642/university-of-virginia-judge-advocate-generals-legal-center-and-school>; and Judge Advocate General's School Annual Bulletin 2005-2006, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/AB\\_2005-2006.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/AB_2005-2006.pdf).

<sup>81</sup> Center for National Security Law, at <http://www.virginia.edu/cnsl/>.

<sup>82</sup> Certificate in National Security and Counterterrorism Law; <http://insct.syr.edu/academicprograms/lawcertificate/>; Certificate of Advanced Study in Security Studies (<http://insct.syr.edu/academicprograms/graduatecertificate/>) AND Certificate of Advanced Study in Post Conflict Reconstruction (<http://insct.syr.edu/academicprograms/pcr-certificate/>).

<sup>83</sup> Homeland and National Security Law Concentration, available as of May 2009, at ([http://www.law.gmu.edu/academics/concentrations/homeland\\_natl\\_security\\_law](http://www.law.gmu.edu/academics/concentrations/homeland_natl_security_law)).

University of Virginia's Center for National Security Law.<sup>84</sup> Other schools have more recently established centers.<sup>85</sup> In addition, there are numerous multi-disciplinary centers that focus on some aspect of national security law, such as Maryland's Center for Health and Homeland Security and George Mason's Critical Infrastructure Protection Program.<sup>86</sup>

Some law schools have looked outside their bounds to create joint initiatives with the hope of having a more direct impact on policy. The recently-created Harvard Law School-Brookings Project on Law and Security, for instance, seeks "to bring serious-minded legal scholarship to bear on vexing and persistent questions of policy."<sup>87</sup> Many schools have seen centers whose subject areas may overlap with national security interests focus on this area. Georgetown Law's Human Rights Institute, for example, has over the past five years held events related to, *inter alia*, military commissions, challenges in India and Pakistan, the use of immigration authority in the realm of counterterrorism, and the use of torture and coercive interrogation.<sup>88</sup>

In addition to the creation of formal degrees and the establishment of centers and institutes, many schools now have clinics focused on this area. Georgetown Law's Federal Legislation and Administrative Clinic, for example, emphasizes textual drafting, policy developments, and administrative solutions in the national security realm. Senate ratification of the New START nuclear arms control treaty with Russia, cyber-defense, intelligence reform, and nuclear non-proliferation mark just some of its initiatives. The Guantánamo Defense Clinic at the University of Duke School of Law has focused on legislative and judicial challenges to the Military Commissions Act of 2006 as well as other laws applying to Guantánamo Bay.<sup>89</sup> The University of Texas School of Law's National Security Clinic has considered material support provisions, habeas corpus applications related to Guantánamo Bay, civil damages related to the treatment of individuals held in detention, and military commission cases against unprivileged enemy belligerents.<sup>90</sup> UCLA's International Justice Clinic emphasizes International Humanitarian Law.<sup>91</sup> Emory's International Humanitarian Law Clinic offers both *amici* briefs and commentary on the tribunals at Guantánamo and the ECHR.<sup>92</sup> And the Bluhm

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<sup>84</sup> Duke University School of Law, Center on Law, Ethics and National Security (<http://www.law.duke.edu/lens/index>); Georgetown Law, Center on National Security and the Law (<http://www.law.georgetown.edu/cnsl/>); NYU Law, Center on Law and Security (<http://www.lawandsecurity.org/>); University of Virginia School of Law, Center for National Security Law (<http://www.virginia.edu/cnsl/>); Syracuse University School of Law, Institute for National Security and Counterterrorism (<http://www.insct.syr.edu/>). See also Fordham Law's Center on National Security. <http://www.law.fordham.edu/nationalsecurity.htm>.

<sup>85</sup> Fordham University School of Law, for instance, established its Center on National Security in autumn 2011. For more information see Center on National Security at Fordham Law, *available at* <http://law.fordham.edu/nationalsecurity.htm>.

<sup>86</sup> Maryland Center for Health and Homeland Security, at <http://www.mdchhs.com/>; and George Mason Critical Infrastructure Protection Program, at <http://cip.gmu.edu/>.

<sup>87</sup> Brookings, Law and Security, at <http://www.brookings.edu/topics/law-and-security.aspx>; and Colleen Walsh, *Widening National Security Concerns: New program points way to a post-9/11 understanding of concerns beyond terrorism*, HARVARD GAZETTE, JAN. 9, 2012, at <http://news.harvard.edu/gazette/story/2011/10/widening-national-security-concerns/>.

<sup>88</sup> Georgetown Law, Human Rights Institute, at <http://www.law.georgetown.edu/humanrightsinstitute/>.

<sup>89</sup> University of Duke School of Law, Guantánamo Defense Clinic, at <http://www.law.duke.edu/guantanamo>.

<sup>90</sup> UT Law, National Security Clinic, at <http://www.utexas.edu/law/clinics/nationalsecurity/>.

<sup>91</sup> University of California at Los Angeles School of Law, International Justice Clinic, at <http://www.law.ucla.edu/centers-programs/clinical-program/in-house-clinics/Pages/International-Justice-Clinic.aspx>.

<sup>92</sup> For more information on Emory Law's International Humanitarian Law Clinic, see <http://www.law.emory.edu/?id=5093>.

Legal Clinic Roderick MacArthur Justice Center at Northwestern Law represents Guantánamo prisoners *pro-bono*.<sup>93</sup>

## 2. Student Organizations and Journals

Mirroring law schools' growing institutional focus on national security law is increased student interest in the field, manifest through student organizations and student-run journals. Of the top 100 ranked law schools, nearly three dozen have student organizations relating to national security law.<sup>94</sup> Sixteen of these have military law

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<sup>93</sup> MacArthur Justice Center attorney Joseph Margulies, for instance, represents Zayn al-Abidin Muhammad Husayn (abu Zubaydah). For more information on his role in this case as well as the Center, see <http://www.law.northwestern.edu/legalclinic/macarthur/projects/guantanamo/>.

<sup>94</sup> See, e.g., Georgetown Law has a National Security Law Society; Columbia Law National Security Law Society; Yale Law Veterans Association, at <http://www.law.yale.edu/studentlife/StudentOrganizations.htm>; Harvard Law, National Security and Law Association, at <http://www.law.harvard.edu/students/orgs/nsla/>; Stanford National Security & the Law Society, at <http://www.law.stanford.edu/experience/studentlife/organizations/nsls/>; Columbia Law School Military Association, at [http://www.law.columbia.edu/current\\_student/student\\_service/studentorgs\\_abc/alphabet\\_orgs/](http://www.law.columbia.edu/current_student/student_service/studentorgs_abc/alphabet_orgs/); Berkeley Law, Boalt Association of Military Veterans; University of Michigan Law, National Security Law Society, at <http://www.law.umich.edu/JOURNALSANDORGS/Pages/orgs.aspx>; Duke Law, National Security Law Society, at <http://www.law.duke.edu/students/orgs/#security>; Cornell Law, National Security Law Society, at <http://sao.cornell.edu/SO/org/09-10/589>; Georgetown law, Military Law Society, at <http://www.law.georgetown.edu/studentlife/orgs.cfm>; Vanderbilt University Law School, National Security and Law Society, at <http://law.vanderbilt.edu/student-resources/student-organizations/national-security-and-law-society/index.aspx>; new in 2009; Washington University Law, National Security Law Society, at <http://law.wustl.edu/students/pages.aspx?id=7616>; George Washington University Law, National Security Law Association, at <http://www.law.gwu.edu/Students/Organizations/Pages/NSLA.aspx>; GW also has a Military Law Society, and International Law Society; Boston University School of Law, National Security Law Society, at <http://www.bu.edu/law/prospective/experience/life/studentorganizations.html#nsls>; Emory Law, National Security & Law Society, at <http://www.law.emory.edu/student-life/studentorganizations.html>; University of Notre Dame, Military Law Students Assoc. (<http://law.nd.edu/student-life/student-organizations/all-student-organizations/#military>); William and Mary, Military Law Society; University of Georgia, Military Justice Society, at <http://www.law.uga.edu/georgia-law-student-organizations>; University of Washington, National Security and Law Society; Military Law Students' Association, at <http://www.law.washington.edu/Students/Orgs/>; Ohio State University, Military Law Students Association, at <http://moritzlaw.osu.edu/students/groups.php?ID=33>; University of Alabama, Military Law Society, at <http://www.law.ua.edu/students/student-organizations/>; George Mason Law, National Security Law Society, at <http://www.law.gmu.edu/students/orgs/nsls>; University of California-Hastings, Military Law Students Association, at <http://www.uchastings.edu/student-services/student-orgs/military-law-assoc.html>; University of Florida Levin College of Law, Military Law Student Association, at <http://www.law.ufl.edu/students/organizations/extracurricularj-r.shtml>; American University, Washington College of Law, National Security and Law Society, at <http://www.wcl.american>; Tulane University, Military Law Society, at <http://www.law.tulane.edu/tlsstudentlife>; University of Connecticut, Military Law Society, at <http://www.law.uconn.edu/student-bar-association/student-organizations/military-law-society-mls>; Case Western Reserve, Student National Security and Law Society, at <http://law.case.edu/centers/igsllp/>; University of Houston School of Law, Military Law Society, at <http://www.law.uh.edu/organizations/homepage.html>; University of Miami School of Law, Military Law Society, at [http://www.law.miami.edu/studentorg/military\\_law\\_society/index.php](http://www.law.miami.edu/studentorg/military_law_society/index.php); St. John's University School of Law, Armed Forces Society, at <http://www.stjohns.edu/academics/graduate/law/journals>; Chicago Kent College of Law, National Security and Law Society, at [http://www.kentlaw.edu/student\\_orgs/nsls/](http://www.kentlaw.edu/student_orgs/nsls/); Chicago Kent College of Law, Military Law Society, <http://www.kentlaw.edu/students/organizations.html>; Northeastern University School of Law, National Security and Law Society, at <http://northeastern.edu/law/campuslife/studentorganizations.html>; University of the Pacific, McGeorge Law, Military Law Society, at [http://www.mcgeorge.edu/About\\_McGeorge/Campus\\_Offices\\_and\\_Services/Student\\_Organizations.htm](http://www.mcgeorge.edu/About_McGeorge/Campus_Offices_and_Services/Student_Organizations.htm); Catholic University of America Law School, Military and National Security Law Student Association, at <http://www.law.edu/Students/Orgs/militarylaw.cfm>; William Mitchell Law School, National Security and Law Society, at <http://www.wmitchell.edu/law-school/organizations/basics.asp?org=37>.

societies.<sup>95</sup> In the law review realm, not only have mainstream journals increasingly published articles in this area, but eight journals have adopted a strong focus on this area, with three solely dedicated to national security law: the Georgetown Law-Syracuse Law *Journal of National Security Law and Policy*, the annual William Mitchell College of Law *Journal of the National Security Forum*, and the Harvard Law's *National Security Journal* (initiated in Spring 2010).<sup>96</sup>

These institutional developments suggest that law schools, as a structural matter, are responding to the growing demand for well-trained students. Thus far, the approach has been an organic process of responding on a case-by-case basis. The problem is that, for the most part, these programs and institutions are situated within traditional models, thus reflecting the dominant divisions and pedagogical aims of the broader institutions. Yet many of these approaches were adopted with a view towards the practice of law generally, and not with specific focus on the challenges facing lawyers that want to move into national security law.

### III. LEGAL PEDAGOGY

The practice of law, as suggested above, is deeply political in nature, with lawyers not merely providing a service to the community, but exercising government power and seeking to limit the same. This makes the profession susceptible to political shifts.

It is thus perhaps unsurprising that the compromise forged between conflicting aims (the practical realities of the practice of law, paired with the aspirations of critical distance and debate) repeatedly surfaces in the wake of military conflict. It was, after all, following the Civil War that Harvard confronted the outmoded, receptive nature of legal education. Subjected to recitation of treatises prepared years in advance, students had little to no agency in the classroom.<sup>97</sup> Harvard Law Dean Christopher Columbus Langdell sent shock waves through the system when he introduced three fundamental innovations, the aim of which was to inculcate academic achievement in students: he began sequencing courses, he created the case method of teaching, and he invented the (now infamous) issue-spotter examination, requiring students to respond in writing to complex hypothetical problems.<sup>98</sup> At the time, Oxford and Cambridge considered a liberal education to be sufficient preparation for the professions; the study of common law and other professional education was left to the apprenticeship process. Langdell's

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<sup>95</sup> See *Id.* Note that three schools (George Washington Law, University of Florida Law, and Chicago Kent Law) have mixed national security law and military law groups.

<sup>96</sup> Harvard Law, *National Security Journal*, available at <http://www.harvardnsj.com/>.

<sup>97</sup> BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION*: C. C. LANGDELL, 1826-1906 (2009), p. 130. Those subjects that did require student participation were limited to ensuring transfer of the basics. Civil procedure, for instance, was confined to pleading, as described by Blackstone in his *Commentaries* and explained in more depth by Chitty and Stephen. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, Book the Third, Part the Third, of Private Wrongs, Chapter the Twentieth, of Pleading, pp. 293-313; JOSEPH CHITTY, *TREATISE ON PLEADING AND PARTIES TO ACTIONS, WITH A SECOND VOLUME CONTAINING MODERN PRECEDENTS OF PLEADINGS, AND PRACTICAL NOTES*, (1879), available at [http://www.archive.org/stream/chittystreatiseo02chit/chittystreatiseo02chit\\_djvu.txt](http://www.archive.org/stream/chittystreatiseo02chit/chittystreatiseo02chit_djvu.txt); STEPHEN, *PLEADING*. Students would be asked merely to present clients' complaints in the appropriate legal form (i.e., the correct "writ" or "form of action", as appropriate to the facts of the case) to gain access to the courts. Students would be asked merely to present clients' complaints in the appropriate legal form (i.e., the correct "writ" or "form of action", as appropriate to the facts of the case) to gain access to the courts. Moskowitz explains, "Students listened to lectures (some by professors, but many by judges and practicing lawyers) and read textbooks that distilled the rules from the cases. Both activities were essentially passive: the student absorbed information but did not interact much with the teacher." Moskowitz, 1992, p. 242.

<sup>98</sup> BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION*: C. C. LANGDELL, 1826-1906 (2009), pp. 130-131.

innovations thus flew in the face of both U.S. norms and those adopted across the Atlantic.<sup>99</sup> They at once recognized the importance of the practice of law, while providing to the legal academy the distinction of critical scholarly analysis.

The decision to expand into the practice of law subsequently created divisions within the research university. Scholars saw their role as ensuring that students obtained a certain distance from the law and, as such, could subject it to more rigorous critique. The goal of practitioners in many ways proved the opposite: to immerse students so directly in the law as to give them fluency in the practice of the same.

In the ensuing years, new evaluations of legal pedagogy have accompanied the country's engagement in military hostilities. World War I, for instance, gave way to the Reed Report, which considered how those returning from war would seek to re-shape the existing institutions. Jerome Frank's work, calling for greater engagement of the academy in the practice of law, bookended World War II. The close of Vietnam witnessed the first ABA Task Force Report on the role of legal education. The Cramton Report was soon followed by the MacCrate Report—coincident with the ending of the Cold War.

A crucial weakness in many of these studies is that they have assumed the practice of law writ large to be the object of the inquiry—obfuscating, in the process, the practice of law in discreet contexts. Simultaneously, much of the discussion assumes as a given the division between doctrinal and clinical education, missing in the process the potential for developing a new framework for legal education. Perhaps most importantly, these inquiries, like many that mark the current pedagogical debate, have failed to appreciate the importance of the goals most appropriate to national security law.

### **A. Limitations of the Current Pedagogical Debate**

One problem with the current pedagogical debate in the legal academy is that it is almost entirely grounded in a general understanding of the practice of law. There is very little new about this approach. In 1978, for instance, the ABA's Task Force on *Lawyer Competency: The Role of Law Schools*, chaired by Dean Roger Cramton, identified three competencies required for the practice of law writ large: (1) knowledge about law and legal institutions; (2) fundamental skills; and (3) professional attributes and values.<sup>100</sup> Instead of considering any of the sub-fields in depth, the report focused on general legal education. It identified fundamental skills as legal analysis, legal research, fact investigation, written and oral communication, interviewing, counseling, negotiation, and organization.<sup>101</sup> Professional values, in turn, centered on discipline, integrity,

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<sup>99</sup> ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921), p. 23 (“In accordance with this tradition of the ultimate responsibility of lawyers for their own educational qualifications, the English universities have not only been denied any control over the admission of a law student to practice. They have not even been made directly responsible for providing any portion of his education, in which they participate only as volunteer agencies. In the field of general education they offer much more than the practitioners demand. [...]The conception...of institutional instruction in technical law as an essential part of a lawyer's education, whether given in a university or whether given elsewhere, has never thoroughly reestablished itself in England since the decay of the original Inns of Courts. The pedagogical doctrine that this should constitute a distinct intermediate phase of his preparation, to be entered upon after he had completed his general education but before his practical training begins, is still more foreign to English thought. As a rule, an English student, having secured such general education as he thinks worth while or can afford, proceeds directly into a lawyer's office.”) See also BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826-1906 (2009), p. 161.

<sup>100</sup> AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS ON THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979), at 9-10 [Hereinafter Cramton Report].

<sup>101</sup> Id.

conscientiousness, continued professional development, critical self-assessment, and hard work.<sup>102</sup>

The report was not uncritical of the current state of play: while legal education did a relatively good job of providing students with the knowledge of law, and legal analytical skills, as well as legal research and writing, it failed in three essential respects:

- (a) developing some of the fundamental skills underemphasized by traditional legal education; (b) shaping attitudes, values, and work habits critical to the individual's ability to translate knowledge and relevant skills into adequate professional performance; and (c) providing integrated learning experiences focused on particular fields of lawyer practice.<sup>103</sup>

The Report offered dozens of recommendations to address the gap.<sup>104</sup>

Ten years later, following the end of the Cold War, the American Bar Association's Section of Legal Education and Admissions to the Bar appointed yet another task force to look at the role of legal education in preparing attorneys for practice. Once again, it took a cookie-cutter approach to the subject, assuming legal education prepared students for a uniform field.

Chaired by Robert MacCrate, the resulting 414-page report included within it a "Statement of Fundamental Lawyering Skills and Professional Values", in which it highlighted ten fundamental skills and four values to guide those seeking to enter the profession.<sup>105</sup> The goal of legal education was and ought to be developing students' skills with regard to problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR, organization and management of legal work, and recognizing and resolving legal dilemmas.<sup>106</sup> With the aim of legal education thus defined, the report went on to note the fundamental values of the profession: the provision of competent representation, striving to promote justice, fairness, and morality, working to improve the profession, and professional development.<sup>107</sup>

Cognizant of the critiques that would inevitably follow, the Report noted that the skills and values thus presented was not definitive; instead, they provided a starting point for further discussion of different areas of the profession. The aim was not to lock schools into a specific curriculum, to create criteria for accreditation, or to cement bar examiners into one approach. In achieving these goals, the Report emphasized the importance of clinical education:

Clinics have made, and continue to make, an invaluable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession. . . . clinics provide students with the opportunity to integrate, in an actual practice setting, all of the fundamental lawyering skills. In clinic courses, students sharpen their understanding of professional responsibility and deepen their appreciation for their own values as well as those of the profession as a whole.<sup>108</sup>

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<sup>102</sup> *Id.*, at 10.

<sup>103</sup> *Id.*, at 14.

<sup>104</sup> *Id.*, at 3-7, recommendations 3-5.

<sup>105</sup> AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter, MacCrate Report].

<sup>106</sup> MacCrate Report, *supra*, at 121-22.

<sup>107</sup> MacCrate Report, *supra*, at 140-41.

<sup>108</sup> MacCrate Report, *supra*, at 238.

Clinicians, to be sure, played a central role in developing the Report.<sup>109</sup> Nevertheless, the authors argued to some effect that the clinical experience played a key role in obtaining the ends thus defined.

Opinion on the value of the report divided.<sup>110</sup> One commentator hailed it as “the greatest proposed paradigm shift in legal education since Langdell envisioned legal education as the pursuit of legal science through the case method in the late 19<sup>th</sup> century.”<sup>111</sup> Others found it unrealistic.<sup>112</sup> A number of conferences, some of which were dedicated to clinical teaching, subsequently used the MacCrate Report as grounds for discussion.<sup>113</sup> The ABA and AALS took note.<sup>114</sup>

Initially, much of the report’s effect was felt within the realm of clinical education.<sup>115</sup> But, notably, it did not focus on the relationship between clinical and doctrinal side of the house, instead implicitly accepting them as two separate pursuits. Reflecting this division, the report glossed over tensions in the legal academy, between that of the actual practice of law, and the research strand of the modern university, wherein critical thought and scholarly independence drive normative debate.

This tension was not lost on the Carnegie Foundation for the Advancement of Teaching, which in 1999 turned its gaze to sixteen law schools, to more carefully examine how such institutions actually develop legal understanding and form professional identity.<sup>116</sup> Under scrutiny was the model, forged by at Harvard in the 1870s, wherein the Socratic, case-based method was used to teach students, in short order, how to “think like a lawyer.” Carnegie found that the emphasis on legal analysis was not matched by a similarly strong skill in serving clients and a solid ethical grounding.<sup>117</sup> If the legal academy were serious about the importance of developing the latter skill set, it would have to adopt a more integrated approach to legal education.

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<sup>109</sup> Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying the Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 114-115 (2001).

<sup>110</sup> See, e.g., John J. Costonis, *The MacCrate Report: Of Loaves, Fishes and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993); Jack Stark, *Dean Costonis and the MacCrate Report*, 44 J. LEGAL EDUC. 126 (1994); Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89 (1994); Jonathan Rose, *The MacCrate Report’s Restatement of Legal Education: the Need for Horse Sense*, 44 J. LEGAL EDUC. 548 (1994); Brook K. Baker, *Beyond MacCrate: the Role of Context Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994). The report continues to be controversial. See, e.g., Russell G. Pearce, *MacCrate’s Missed Opportunity: The MacCrate Report’s Failure to Advance Professional Values*, Pace L. Rev. Paper 507, (2003). available at <http://digitalcommons.pace.edu/lawrev/507>.

<sup>111</sup> Wallace Loh, *The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 505 (1994).

<sup>112</sup> Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying the Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 114-115 (2001).

<sup>113</sup> The MacCrate Report: Building the Educational Continuum 145 (1994) (noting the joint ABA, University of Minnesota, and West Publishing Conference on the Report). 8 Clinical L. Rev. 116 (2002), fn. 33 (noting clinical conferences on the same in 1993, 1994, and 1995. AALS held a one-day workshop on the same during its 1995 annual meeting. Program Materials, AALS Mini-Workshop on Professors in the Profession, Jan. 5, 1995. (cited in Id., fn. 33).

<sup>114</sup> See, e.g., Resolution 8a, adopted by the ABA House of Delegates February 1994 (inviting the Section of Legal Education and Admissions to the Bar to recommend how to integrate skills and values into the accreditation process). See also Carl C. Monk, Notes from the Executive Director: the Law Schools and the Profession, AALS Newsletter, Nov. 1993, at 6-7; Statement of the Association of American Law Schools on the MacCrate Report, AALS Newsletter, Nov. 1993, at 8-9. Cited in 8 Clinical L. Rev. 116, fn. 34.

<sup>115</sup> See, e.g., 8 CLINICAL L. REV. 133 2001-02, highlighting the impact on New England School of Law.

<sup>116</sup> William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching: Preparation for the Professions. (Carnegie Report). This report itself followed from a line of studies sponsored by the Carnegie Foundation for the Advancement of Teaching, a body that stemmed from the 1910 Flexner Report on medical education.

<sup>117</sup> Carnegie Report, *supra*, at 4.



The Carnegie Report made five key observations: that law school rapidly socializes students into analytical legal thinking; that they heavily rely on one approach; that the case-dialogue method of teaching has both strengths and weaknesses—foremost amongst which is its tendency to drive considerations of justice and ethics out of the room; that the assessment tools used by law schools fall radically short; and that legal education has failed to take a comprehensive look at what needs to be done to evolve to the next level, instead proceeding in jerks and starts, in a piecemeal fashion.<sup>118</sup>

Carnegie found fault in particular with the lines between doctrinal courses and clinical education. Rivalries proved more than a passing distraction; they were undermining the value of legal education. Some schools therefore followed the Carnegie report with serious efforts to re-evaluate the structure of legal education, seeking to re-orient according to pedagogical goals.<sup>119</sup> Carnegie itself created a consortium on the future of legal education, naming Southwestern Law, Stanford Law, City University of New York School of Law, Georgetown University Law Center, Harvard Law School, Indiana University-Bloomington School of Law, New York University School of Law, University of Dayton School of Law, University of New Mexico School of Law, and Vanderbilt Law School to the group.<sup>120</sup> In 2009 the University of Denver Sturm College of Law sponsored *Legal Education at the Crossroads, v. 3.0*.<sup>121</sup> On the table were methods of assessment, clinical course models, case-based analyses, and curricular design.<sup>122</sup> The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver, led by the lead author of the 2007 Carnegie Report, subsequently launched *Educating Tomorrow's Lawyers*, a program dedicated to improving legal pedagogy and teaching.

These initiatives have been important efforts to try to understand the place of legal education in the profession. They suggest a significant shift in the legal academy away from the doctrine-centric approach, and towards a broader view of the skills, aptitudes, and types of intelligence necessary to be a successful lawyer. In this sense, they reflect the theory of multiple intelligences put forward by Howard Gardner, suggesting that intelligence is not limited to a discreet area, but instead is comprised of different faculties, each of which contains different sets of skills needed to solve real-world problems and conflicts.<sup>123</sup> Legal analytical skills thus represent just one type of ability required; for Gardner, broader logical, linguistic, interpersonal and intrapersonal abilities (the latter being distinguished by self-knowledge and insight into others' behavior), affect judgment and action.<sup>124</sup>

But many of these initiatives suffer from two flaws: first, they continue to adopt a one-size-fits-all type approach: i.e., they look at legal education as a whole, and not as a product of its sub-parts, which may significantly differ from each other, in laying out the overarching pedagogical goals. Second, with the exception of some of the consortia affiliated with Denver's IAALS, almost all of these initiatives continue to embrace the division in the academy that has evolved, between clinical education and doctrinal

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<sup>118</sup> Carnegie Report, *supra*, at 5-7.

<sup>119</sup> See also STUCKEY ET AL, BEST PRACTICES FOR LEGAL EDUCATION (2007).

<sup>120</sup> Southwestern Law School, News Release, Carnegie Foundation Selects Southwestern for Groundbreaking Legal Education Study, Nov. 29, 2007, available at <http://www.swlaw.edu/news/overview/newsr.7fsrlzawnk/>. See also Carnegie Foundation for the Advancement of Teaching, at <http://www.carnegiefoundation.org/>.

<sup>121</sup> University of Denver Sturm College of Law, Legal Education at the Crossroads, v. 3.0, available at <http://law.du.edu/index.php/assessment-conference>.

<sup>122</sup> Conference Schedule, available at <http://www.law.du.edu/index.php/assessment-conference/program>.

<sup>123</sup> HOWARD GARDNER, FRAMES OF MIND (1993), at 60.

<sup>124</sup> *Id.*, at 239.



courses. Both concerns, particularly in regard to national security law, deserve further scrutiny.

## **B. National Security Pedagogy**

In contrast to the traditional pedagogical approach, six goals in particular stand out in considering the role of legal education with regard to national security law: (1) understanding the law as *applied* (i.e., knowledge of relevant legal authorities and processes, understanding what can be termed “the Washington context”, and considering the broader policy environment), (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance despite significant pressure, (4) developing nontraditional written and oral communication skills, (5) demonstrating leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating opportunities for future learning. Students, moreover, must integrate these skills, performing on multiple levels at once.<sup>125</sup> These goals are not conclusive—nor are they necessarily exclusive to national security law. But calling attention to them suggests that more careful examination of the field, and not just legal education writ large, may yield a more effective method of developing the next generation of national security lawyers.

### **1. Law as Applied**

Law schools tend to do a relatively good job at conveying legal authorities. Doctrinal courses focus on this area, further developing students’ analytical reasoning skills. In national security, however, it is equally important for students to understand a number of other mechanisms at work. Perhaps most importantly, lawyers must understand the relevant legal *processes* – i.e., the bureaucratic and administrative emphases and mechanics that have a significant impact on the course of practice. Also critical is an understanding of the way in which relationships and frictions play into the exercise of law. That is to say, the focus on law, typical of the law school environment, may lead students to rely overmuch on legal authority and to fail to appreciate the importance of the broader contextual relationship between different actors in Washington, D.C. and beyond. Additionally, there is a strong policy component to national security lawyering. This means that law becomes one of many different considerations that is taken into account before decisions on what action to take are made. These areas—themselves in flux—constitute what can be considered the law *as applied*, an area equally important to understand for those serving in government as for those in the myriad national security positions outside of governmental structures.

#### ***a. Legal Authorities and Processes***

It is not sufficient for students to read and digest the 1947 National Security Act, or the many laws that followed this statute, to understand bodies such as the Central Intelligence Agency, the National Security Council, or the Department of Defense. The formal—and informal—processes that drive these organizations are equally important.

Perhaps the most prolific writer on this aspect of the practice of national security law is Judge Jamie Baker, Chief Judge of the Court of Appeals of the Armed Forces, who has considered the different types of processes that influence the life of a national security

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<sup>125</sup> While the following discussion centers at times on the experience of the executive branch or legislative national security lawyer, it is important for those working outside of government structures, to both understand and reflect the same skills in their practice of law.

lawyer. Not only must students understand these processes, Baker argues, but they must take into account the way in which processes unique to national security law influence lawyers' ability to engage in traditional legal analysis and recommendation. The opportunity, for instance, for lawyers to engage in considered debate about legal interpretations or to have their work cross-checked by other attorneys, perhaps even more steeped in these fields, may be limited. Baker explains,

Lawyers tend to focus on the formal aspects of constitutional government – legislation, the oversight hearing, the Justice Department opinion, and presidential statements. For sure, these legal events dominate constitutional history and precedent. However, much of constitutional practice within each branch, and between each branch, is informal in nature, outside public view, and without documentation.<sup>126</sup>

Beyond the informal nature of such processes is the classified context within which government attorneys operate.

Two salient points here stand out: first is the *difficulty of working collaboratively* in a classified context *when time is of the essence*. That is, even where a number of legal experts may be privy to the information, the abbreviated timeline under which national security attorneys must work limits the extent to which collaboration may occur. The second point centers on *limitations on the number of individuals* with whom a lawyer can discuss the specific matter in question. There may be very few legal experts with whom an attorney can consult. Nevertheless, decisions reached in these contexts may have significant implications: they may shift the U.S. legal posture on domestic and international instruments, with formidable consequences for operations, U.S. policy, and safety and security.

These characteristics of national security law mean that law schools must sharpen students' analytical skills, as well as their substantive knowledge. That is, schools must not just teach students how to think about the law, but they must convey a significant amount of what the law actually *is* so that students have some idea of the current authorities and the framing and the groundwork on which future initiatives are built. Simultaneously, they must make students aware of the way in which formal and informal process influences the quality of their legal analysis and understanding, and help them to develop different tools to manage such processes to ensure better performance.

With the black letter law in national security rapidly changing and growing, law schools must further look at what the emerging topics are and adjust existing courses and offer new topics accordingly. This is a different model than the relative stasis marking much of the 20<sup>th</sup> Century. Most schools have generally agreed over the course of decades that criminal law, criminal procedure, constitutional law, civil procedure, contracts, torts, and property, merit attention. Eventually schools began to offer courses in new areas, such as international law, and environmental law. But the sudden explosion in national security law here means two things: first, the re-evaluation of traditional classes to include new and emerging areas. Material support provisions, new surveillance authorities, and the difference between Title III orders and Foreign Intelligence Surveillance Court warrants may thus become an important part of Criminal Procedure. Regulatory courses, in turn, may need to expand to include new financial regulations unique to the national security world. Second, rapid changes suggest the construction of new courses, offering both novel combinations of subjects as well as new substantive areas, such as courses focused on international law and habeas corpus, pandemic disease and consequence management law, intelligence law, or cyber threats.

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<sup>126</sup> BAKER, *supra* note 5, at 63.

As a pedagogical matter then, examination of new and emerging areas must be incorporated into the doctrinal study of legal authorities, even as the processes at work in the national security realm are featured. Active review of courses across the board will further accomplish this aim—an approach somewhat antithetical to traditional approaches to teaching, where faculty members typically offer (relatively static) introductory courses, paired with upper level courses on matters of particular interest. New organization may therefore be required to bring national security law faculty and curriculum together, as an intellectual and structural enterprise, to consider the breadth and range of current course offerings.

### ***b. “Washington Context”***

While recognizing the importance of legal authorities and processes, in the field of national security law, both may be overridden by considerations unique to what may be called the “Washington context”. The inherent political friction between the branches of government, the institutional frictions between Departments and Agencies, and the interpersonal components that accompany the exercise of power all influence the manner in which national security law evolves. To the extent that law schools ignore this aspect of the practice, they do students a great disservice.

To take an example that arose in one of my courses, students may (correctly) read HSPD 5 and the Homeland Security Act of 2002 to mean that the Secretary of Homeland Security has the authority to order an evacuation. To *act* on this authority, however, without direct communication with (and permission from) the White House, would be inappropriate. This type of Washington-based, political authority is critical to the exercise of power.

Herein lies the rub: national security instruments often incorporate power that has significant domestic and international political ramifications. The stakes are high. It is thus imperative that students understand the broader authorities and processes at work. Such processes extend beyond the executive branch to dealings with Congress—a branch often sidelined in law school curricula. Lawyers working in the field, from the executive branch and legislative branches to private industry, must understand the political processes in Congress in order to be more effective. The relative strength of different committees, the contours of legislative oversight, the range of policy documents applicable to the field (and required by Congress via statute), the formal and informal mechanisms to obtain information relating to executive branch national security matters, the role of party politics—all of this proves relevant. Understanding political authority extends to chain of command, as well as inter-agency processes.

### ***c. Policy Environment***

The “Washington context” can be distinguished from a second way in which political considerations enter into national security law: namely, the broader policy environment. One way to understand this is in terms of the push and pull of policymaking. In the former realm, law constitutes just one of many competing demands that policymakers take into account before deciding which actions to pursue. In the latter area, the impact of the actions taken is felt in both the domestic and international arena. Each constitutes an *ex ante* consideration for lawyers operating in this domain.

Within government practice, in determining which course to set, the role that law plays may be just one of many competing demands on the policymaker’s decision-making strategy. In order to secure a place for legal considerations, lawyers must therefore be cognizant of the different pressures influencing the process. Part of this is

learning how to communicate clearly with those involved in making and implementing policy. It also entails developing a feel for when and how to initiate appropriate participation. That is, lawyers must insert themselves into the conversation, representing the interests of law itself.

In policy discussions, lawyers are often not seated at the table. They may be a “plus one” in the discussion, and, in this capacity, they must come to terms with the fact that the law is only one consideration at play. They may have to accept being relegated to a supporting role, with their recommendation overridden. In this context, they must grapple with not just personality management, but issues related to ego and subordination. They must then decide how to react to this situation, when and how to take the initiative, when to concede, and when to proceed through other channels. In brief, they must learn both how to insert legal considerations into what is essentially a policy debate, and how to treat the outcome of such efforts in the context of professional and personal goals.

At the back end, legal recommendations carry with them strong policy implications. It is worth noting at the outset that there is disagreement over whether national security lawyers need to take this into account. Professor John Yoo, for instance, argues that it is not the national security lawyer’s role to think about the policy impact of legal advice given—even when delivered at the highest levels of government.<sup>127</sup> The logic behind this is that separating law from policy is essential to good lawyering, and that to combine policy considerations with strict legal analysis undermines the strength of the intellectual endeavor, as well as the integrity of the advisory system itself. As an *ex ante* consideration, taking into account either competing interests or the resulting policy impact thus runs counter to the purpose of obtaining strict legal advice. Instead, it is for policymakers to balance competing concerns and to determine the most appropriate course of action.

There is much to commend this strict adherence to the distinction between law and policy. The problem with this approach, however, is that it results in a sort of false silo, where lawyers ostensibly operate in a manner completely insulated from policy concerns. In national security law, this is simply not the case. Law and policy—for reasons discussed in Part I of this Article—often overlap.

The result of attempting to ignore the policy side of the equation, moreover, may sideline law at the front end: i.e., when lawyers present not just a particular legal analysis, but act to insert considerations of law *qua* law into the policymaker’s decisionmaking process. Here, identifying and thinking about competing policy concerns provides lawyers with important knowledge about how and when to insert legal considerations.

Failure to take account of policy concerns may further entail a breach of professional responsibility and ethical obligations at the back end. It may be, for instance, that there is no legal bar to acting in a certain manner. (It is precisely for this reason that criminal law continues to evolve.) But absence of prohibition does not automatically translate into permission for action. A strict legal analysis may thus suggest legality, where the actual implications of such actions would run contrary to legal or ethical norms. The role of national security law is here of great importance: as an exercise of power—indeed, at one extreme, the most coercive powers available to the state—failure to take into account the implications of the legal analysis may suggest a failure of professional responsibility.

#### *d. Adaptation and Evolution*

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<sup>127</sup> John Yoo, *Remarks*, Debate on Guantanamo Bay Detainees, Oct. 12, 2005, Stanford Law School, Co-sponsored by the Federalist Society and the American Constitution Society.

Not only must students learn about legal and authorities and processes, the Washington context, and policy concerns, but they must learn how to adapt and evolve to deal with new and emerging bureaucratic and administrative structures. Innovation is the hallmark of this skill, and it is one that requires a different kind of learning than dominates in doctrinal settings.<sup>128</sup>

In the national security world, political leadership rapidly changes, with constant movement of personnel. Institutions themselves are in flux: the creation of the Department of Homeland Security, as aforementioned, placed twenty-two executive branch agencies—some of which were major and complex organs of the government, such as the U.S. Customs Service, the U.S. Coast Guard, the U.S. Secret Service, the Transportation Security Administration, and the Federal Emergency Management Agency—under one umbrella, growing by 2012 to some 216,000 people.<sup>129</sup> DHS agencies continue to evolve and morph as the mission of the Department steadily expands. The Department of Defense's creation of NORTHCOM similarly generated two new domestic intelligence institutions and a substantial infrastructure to support the command. Treasury, the Department of Health and Human Services, the Department of State, and others have had to adapt to the new environment, in the process shifting institutional structures.

Collectively, what these characteristics mean is that those who take up positions within these entities need to be able to quickly adapt to new and changing legal and political authorities and processes. So, too, must those outside of government, who need to respond to new initiatives and rapidly changing institutional arrangements. The sheer size of the infrastructure and the number of new initiatives requires the ability to work in a fluctuating environment and to quickly identify changing power structures.

## **2. Factual Chaos and Uncertainty**

One of the most important skills for students going into national security law is the ability to deal with factual chaos. This significantly differs from the traditional model of legal education, which tends to provide students with a set of facts, which they must then analyze. In contrast, lawyers working in national security law must figure out what information they need, integrate enormous amounts of data from numerous sources, determine which information is reliable and relevant, and proceed with analysis and recommendations. These recommendations, moreover, must be based on contingent conditions: facts may be classified and unavailable to the legal analyst, or facts may change as new information emerges. This is as true for government lawyers as it is for those outside of governmental structures. They must be aware of what is known, what is unsure, what is unknown, and the possibility of changing circumstances, and they must advise their clients, from the beginning, how the legal analysis might shift if the factual basis were to be altered.

### ***a. Chaos***

Concern about information overload in the national security environment is not new: in the 1970s scholars discussed and debated how to handle the sequential phases of

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<sup>128</sup> For related discussion of innovation in the context of self-learning for corporate law, see Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. OF LEGAL ED., 495 (1995).

<sup>129</sup> The Department of Homeland Security, the Executive Branch, available at <http://www.whitehouse.gov/our-government/executive-branch> (accessed Jan. 6, 2012).

intelligence gathering and analysis in a manner that yielded an optimal result.<sup>130</sup> But the digital revolution has exponentially transformed the quantitative terms of reference, the technical means of collection and analysis, and the volume of information available. At the same time, the number of sources of information—not least in the online world—is staggering. Added to this is the rapid expansion in national security law itself: myriad new Executive Orders, Presidential Directives, institutions, programs, statutes, regulations, lawsuits, and judicial decisions mean is that national security law itself is rapidly changing. What this means is that lawyers inside and outside of government must keep abreast of constantly evolving provisions.

The international arena too is in flux, as global entities, such as the United Nations, the European Court of Human Rights, the G7/G8, and other countries introduce new instruments whose reach includes U.S. interests. Rapid geopolitical changes relating to critical national security concerns, such as worldwide financial flows, the Middle East, the Arab Spring, South American drug Cartels, North Korea, the former Soviet Union, China, and other issues increase the importance of keeping up on what is happening globally, as a way of understanding domestic concerns. Further expanding the information overload is the changing nature of what constitutes national security itself.<sup>131</sup>

In sum, the sheer amount of information the national security lawyer needs to assimilate is significant. The basic skills required in the 1970s thus may be the same—such as the ability (a) to know where to look for relevant and reliable information; (b) to obtain the necessary information in the most efficient manner possible; (c) to quickly discern reliable from unreliable information; (d) to know what data is critical; and (e) to ascertain what is as yet unknown or contingent on other conditions. But the *volume* of information, the *diversity* of information sources, and the heavy reliance on *technology requires lawyers to develop new skills*. They must be able to obtain the right information and to ignore chaos to focus on the critical issues. These features point in opposite directions—i.e., to both a broadening of knowledge and a narrowing of focus.

A law school system built on the gradual and incremental advance of law, bolstered or defeated by judicial decisions and solidified through the adhesive nature of *stare decisis* appears particularly inapposite for this rapidly-changing environment. An important question that will thus confront students upon leaving the legal academy is how to keep abreast of rapidly changing national security and geopolitical concerns, in an information-rich world, in a manner that allows for capture of relevant information, while retaining the ability to focus on the immediate task at hand.

Part of staying ahead of the curve means developing a sense of timing—when to respond to important legal and factual shifts—and identifying the best means of doing so. Again, this applies to government and non-government employees. How should students prioritize certain information and then act upon it? This, too, is an aspect of information overload.

### ***b. Uncertainty***

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<sup>130</sup> See, e.g., Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, *The Intelligence Function and World Public Order*, 46(3) TEMPLE L. QUARTERLY 365 (1973), reprinted at Faculty Scholarship Series, Paper 2569, Yale Law School Legal Scholarship Repository, available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3607&context=fss\\_papers&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dreisman%2520and%2520mcdougal%25201970s%2520information%2520overload%26source%3Dweb%26cd%3D3%26ved%3D0CC8QFjAC%26url%3Dhttp%253A%252F%252Fdigitalcommons.law.yale.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D3607%2526context%253Dfss\\_papers%26ei%3DQMRDUMfABu-30QHS6YDYDg%26usg%3DAFQjCNEsnLtUR2pl9PXNTEIV-LPSNfDu4A#search=%22reisman%20mcdougal%201970s%20information%20overload%22](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3607&context=fss_papers&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dreisman%2520and%2520mcdougal%25201970s%2520information%2520overload%26source%3Dweb%26cd%3D3%26ved%3D0CC8QFjAC%26url%3Dhttp%253A%252F%252Fdigitalcommons.law.yale.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D3607%2526context%253Dfss_papers%26ei%3DQMRDUMfABu-30QHS6YDYDg%26usg%3DAFQjCNEsnLtUR2pl9PXNTEIV-LPSNfDu4A#search=%22reisman%20mcdougal%201970s%20information%20overload%22).

<sup>131</sup> See discussion, *infra*, and Laura K. Donohue, The Limits of National Security, Am. Crim. L. Rev. (2012).

National security law proves an information-rich, factually-driven environment. The ability to deal with such chaos, however, may be further hampered by gaps in the information available and the difficulty of engaging in complex fact-finding—a skill often under-taught in law school. Investigation of relevant information may need to reach far afield in order to generate more careful legal analysis. Uncertainty here plays a key role.

In determining, for instance, the contours of quarantine authority, lawyers may need to understand how the pandemic in question works, where there have been outbreaks, how it will spread, what treatments are available, which social distancing measures may prove most effective, what steps are being taken locally, at a state-level, and internationally, and the like. Lawyers in non-profit organizations, legal academics, in-house attorneys, and others, in turn, working in the field, must learn how to find out the relevant information before commenting on new programs and initiatives, agreeing to contractual terms, or advising clients on the best course of action. For both government and non-government lawyers, the secrecy inherent in the field here is of great consequence. The key here is learning to ask intelligent questions to accommodate for chaos and uncertainty to generate the best legal analysis possible.

It may be the case that national security lawyers are not aware of the facts they are missing—facts that would be central to legal analysis. This phenomenon front-loads the type of advice and discussions in which national security lawyers must engage. That is, it means that analysis must be given in a transparent manner, i.e., contingent on a set of facts as are then currently known, with indication given up front as to how that analysis might change, should the factual basis shift. This is particularly true of government attorneys, who may be advising policymakers—who may or may not have a background in the law and who may have access to more information than the attorney. Signaling the key facts on which the legal decision rests and indicating how such analysis might change if the facts change, provides for more robust consideration of critically important issues.

### *c. Creative Problem Solving*

Part of dealing with factual uncertainty in a rapidly changing environment is learning how to construct new ways to address emerging issues. Admittedly, much has been made in the academy about the importance of problem-based learning as a method in developing students' critical thinking skills.<sup>132</sup> Problem-solving, however, is not merely a method of teaching. It is itself a *goal* for the type of activities in which lawyers will be engaged. The means-ends distinction is an important one to make here, as problem-solving in a classroom environment may be merely a conduit for learning a specific area of the law or a limited set of skills. But problem-solving as an ends suggests the accumulation of a broader set of tools, such as familiarity with multidisciplinary

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<sup>132</sup> See, e.g., *Guide To Effective Teaching: A National Report on Eighty-One Outstanding College Teachers and How They Teach: Lectures, Computer, Case Studies, Peer Teaching, Simulations, Self-Pacing, Multimedia, Field Study, Problem Solving, and Research* (1978); *Bringing Problem-Based Learning to Higher Education: Theory and Practice* (LuAnn Wilkerson & Wim H. Gijsselaers eds. 1996); Mark Broida, *Creative Problem Solving*, *THE LAW TEACHER*, Spring 2001, at 9; Bruce Green, *Teaching Lawyers Ethics*, 51 *ST. LOUIS U. L. J.* 1091 (2007); Suzanne Kurtz, et al., *Problem-Based Learning: An Alternative Approach to Legal Education*, 13 *DALHOUSIE L. J.* 797, 801-03 (1990); Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 *L. LEGAL EDUC.* 241, 244 (1992); Steven Shapiro, *Teaching First-Year Civil Procedure and other Introductory Courses by the Problem Method*, 34 *CREIGHTON L. REV.* 245 (2000).

approaches, creativity and originality, sequencing, collaboration, identification of contributors' expertise and how to leverage each skill set.

This goal presents itself in the context of fact-finding, but it draws equally on strong understanding of legal authorities and practices, the Washington context, and policy considerations. Similarly, like the factors highlighted in the first pedagogical goal, adding to the tensions inherent in factual analysis is the abbreviated timeline in which national security attorneys must operate. Time may not be a commodity in surplus. This context means that legal education must not only develop students' complex fact-finding skills and the ability provide contingent analysis, but it must teach them how to swiftly and efficiently engage in these activities.

### 3. Critical Distance

As was recognized more than a century ago, analytical skills by themselves are insufficient training for individuals moving into the legal profession.<sup>133</sup> Critical thinking provides the necessary distance from the law that is required in order to move the legal system forward. Critical thought, influenced by the Ancient Greek tradition, finds itself bound up in the Socratic method of dialogue that continues to define the legal academy. But it goes beyond such constructs as well.

Scholars and educators disagree, of course, on what exactly critical thinking entails.<sup>134</sup> For purposes of our present discussion, I understand it as the meta-conversation in the law. Whereas legal analysis and substantive knowledge focus on the law as it is and how to work within the existing structures, critical thought provides distance and allows students to engage in purposeful discussion of theoretical constructs that deepen our understanding of both the actual and potential constructs of law. It is inherently reflective.

For the purpose of practicing national security law, critical thought is paramount. Part of the reason for this is because of the unique conditions that tend to accompany the introduction of national security provisions: often introduced in the midst of an emergency, new powers frequently have significant implications for distribution of authority at a federal level, a diminished role for state and local government in the federalism realm, and a direct impact on individual rights.<sup>135</sup> Constitutional implications demand careful scrutiny.

Yet at the time of an attack, enormous pressure is on officials and legislators to act and to be *seen* to act to respond.<sup>136</sup> With the impact on rights, in particular, foremost in legislators' minds, the first recourse often is to make such powers temporary. However, they rarely turn out to be so, instead becoming embedded in the legislative framework and providing a baseline on which further measures are built.<sup>137</sup> In order to be withdrawn, legislators must demonstrate either that the provisions are not effective or that by withdrawing them, no violence will ensue (either way, a demanding proof).

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<sup>133</sup> For continued emphasis on critical thinking skills in the context of law, see, e.g., Katherine A. Currier & Thomas E. Eimermann, *The Study of Law: A Critical Thinking Approach* (2d ed. 2009).

<sup>134</sup> See, e.g., R.W. Paul and L. Elder, *Defining Critical Thinking* (2007); S.A. Solomon, *Two Systems of Reasoning, in Heuristics and Biases: The Psychology of Intuitive Judgment* (2002); S.A. Solomon, *Thinking and Reasoning in Human Decision Making: the Method of Argument and Heuristic Analysis* (2007); S.D. Brookfield, *Contesting criticality: Epistemological and practical contradictions in critical reflection*, in *Proceedings of the 41st Annual Adult Education Research Conference* (2000); D. Fasko, *CRITICAL THINKING AND REASONING: CURRENT RESEARCH, THEORY, AND PRACTICE* (2003).

<sup>135</sup> For fuller exposition of this dynamic as exhibited by both the United States and the United Kingdom see LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* (2008).

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., USA PATRIOT Act. See also *Id.*



Alternatively, legislators would have to acknowledge that some level of violence may be tolerated—a step no politician is willing to take.

This steady ratcheting effect means that new powers, introduced in the heat of the moment, may become a permanent part of the statutory and regulatory regime. They may not operate the way in which they were intended. They may impact certain groups in a disparate manner. They may have unintended and detrimental consequences. For all of this, it is necessary for national security lawyers to be able to view such provisions, and related policy decisions, from a distance and to be able to think through such authorities outside of the contemporary regime.

There are many other reasons such critical analysis matters that reflect in other areas of the law. The ability to recognize problems, articulate underlying assumptions and values, understand how language is being used, assess whether argument is logical, test conclusions, and determine and analyze pertinent information depends on critical thinking skills. Indeed, one could draw argue that it is the goal of higher education to build the capacity to engage in critical thought. Deeply humanistic theories underlie this approach. The ability to develop discerning judgment—the very meaning of the Greek term, *κριτικος*, provides the basis for advancing the human condition through reason and intellectual engagement.

There is yet another way in which critical thought presents in national security law which may seem somewhat antithetical to the legal enterprise: particularly for government lawyers and consultants, there may be times in which *not* providing legal advice, when asked for it, may be as important as providing legal analysis. That is, it may be important *not* to put certain options on the table, with a legal justification behind them. Such concerns are bound up in considerations of policy, professional responsibility, and ethics. They may also relate to questions as to who one's client is in the world of national security law.<sup>138</sup> It may be unclear whether and at what point one's client is a supervisor, the legal (or political) head of an agency, a cross-agency organization, the White House, the Constitution, or the American public. Depending upon this determination, the national security lawyer may or may not want to provide legal advice to one of the potential clients. Alternatively, such a lawyer may want to call attention to certain analyses to other clients. Determining when and how to act in these circumstances requires critical distance.

#### **4. Nontraditional Written and Oral Communication Skills**

Law schools have long focused on written and oral communication skills that are central to the practice of law. Brief writing, scholarly analysis, criminal complaints, contractual agreements, trial advocacy, and appellate arguments constitute standard fare. What is perhaps unique about the way communication skills present in the national security world is the importance of modes of communication not traditionally recognized via formal models, such as concise (and precise) oral briefings, email exchanges, private and passing conversations, agenda setting, meeting injects, and communications built on swiftly evolving and uncertain information.

For many of these types of exchanges—and unlike the significant amounts of time that accompany preparation of lengthy legal documents (and the painstaking preparation for oral argument that marks moot court preparations)—speed may be of the essence. Much of the activity that goes on within the Executive Branch occurs within a hierarchical system, wherein those closest to the issues have exceedingly short amounts

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<sup>138</sup> For a thoughtful discussion of who constitutes the client in national security law, see BAKER, *supra* note 5, chapter 10.

of time to deliver the key points to those with the authority to exercise government power. Unexpected events, shifting conditions on the ground, and deadlines require immediate input, without the opportunity for lengthy consideration of the different facets of the issue presented. This is a different type of activity from the preparation of an appellate brief, for instance, involving a fuller exposition of the issues involved. It is closer to a blend of Supreme Court oral argument and witness cross-examination—although national security lawyers often may not have the luxury of the months, indeed, years, that cases take to evolve, to address the myriad legal questions involved.

Facts on which the legal analysis rests, moreover, as discussed above, may not be known. This has substantive implications for written and oral communications. Tension between the level of legal analysis possible and the national security process itself may lead to a different norm than in other areas of the law. Chief Judge Baker explains,

If lawyers insist on knowing all the facts all the time, before they are willing to render advice, or, if they insist on preparing a written legal opinion in response to every question, then national security process would become dysfunctional. The delay alone would cause the policymaker to avoid, and perhaps evade, legal review.<sup>139</sup>

Simultaneously, lawyers cannot function without some opportunity to look carefully at the questions presented and to consult authoritative sources. “The art of lawyering in such context,” Baker explains, “lies in spotting the issue, accurately identifying the timeline for decision, and applying a meaningful degree of formal or informal review in response.”<sup>140</sup> The lawyer providing advice must resist the pressure of the moment and yet still be responsive to the demand for swift action. The resulting written and oral communications thus may be shaped in different ways. Unwilling to bind clients’ hands, particularly in light of rapidly-changing facts and conditions, the potential for nuance to be lost is considerable.

The political and historical overlay of national security law here matters. In some circumstances, even where written advice is not formally required, it may be in the national security lawyer’s best interests to commit informal advice to paper in the form of an email, notation, or short memo. The process may serve to both provide an external check on the pressures that have been internalized, by allowing the lawyer to separate from the material and read it. It may give the lawyer the opportunity to have someone subject it to scrutiny. Baker suggests that “on issues of importance, even where the law is clear, as well as situations where novel positions are taken, lawyers should record their informal advice in a formal manner so that they may be held accountable for what they say, and what they don’t say.”<sup>141</sup>

Written and oral communication, may occur at highly irregular moments—yet it is at these moments (in the elevator, during an email exchange, at a meeting, in the course of a telephone call), that critical legal and constitutional decisions are made. This model departs from the formalized nature of legal writing and research. Yet it is important that students are prepared for these types of written and oral communication as an ends in and of themselves.

## **5. Leadership, Integrity and Good Judgment**

National security law often takes place in a high stakes environment. There is tremendous pressure on attorneys operating in the field—not least because of the coercive

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<sup>139</sup> BAKER, *supra* note 5, at 65.

<sup>140</sup> *Id.*

<sup>141</sup> BAKER, *supra* note 5, at 66.

nature of the authorities in question. The classified environment also plays a key role: many of the decisions made will never be known publicly; nor will they be examined outside of a small group of individuals—much less in a court of law. In this context, leadership, integrity, and good judgment stand paramount.

The types of powers at issue in national security law are among the most coercive authorities available to the government. Decisions may result in the death of one or many human beings, the abridgment of rights, and the bypassing of protections otherwise incorporated into the law. The amount of pressure under which attorneys are thus placed is of a different order of magnitude than many other areas of the law. Overlaying this pressure is the highly political nature of national security law and the necessity of understanding the broader Washington context, within which individual decision-making, power relations and institutional authorities compete. Policy concerns similarly dominate the landscape. It is not enough for national security attorneys to claim that they simply deal in legal advice. Their analyses carry consequences for those exercising power, for those who are the targets of such authorities, and for the public at large. The function of leadership in this context may be more about process than substantive authority. It may be a willingness to act on critical thought and to accept the impact of legal analysis. It is closely bound to integrity and professional responsibility and the ability to retain good judgment in extraordinary circumstances.

Equally important in considerations of leadership and good judgment is the classified nature of so much of what is done in national security law. All data, for instance, relating to the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of nuclear material in the production of energy is classified from birth.<sup>142</sup> National security information (NSI), the bread and butter of the practice of national security law, is similarly classified. U.S. law defines NSI as “.information which pertains to the national defense and foreign relations (National Security) of the United States and is classified in accordance with an Executive Order.” Nine primary Executive Orders and two subsidiary ones have been issued in this realm.<sup>143</sup>

The sheer amount of information incorporated within the classification scheme is here relevant. While original classification authorities have steadily decreased since 1980, and the number of original classification decisions is beginning to fall, the numbers are still high: in FY 2010, for instance, there were nearly 2,300 original classification authorities and almost 225,000 original classification decisions.<sup>144</sup>

The classification realm, moreover, in which national security lawyers are most active, is expanding. Namely, derivative classification decisions—i.e., classification resulting from the incorporation, paraphrasing, restating, or generation of classified information in some new form, is increasing. In FY 2010, there were more than 76 *million* such decisions made.<sup>145</sup> This number is tripple what it was in FY 2008. Legal decisions and advice tend to be based on information already classified relating to programs, initiatives, facts, intelligence, and previously classified legal opinions.

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<sup>142</sup> Atomic Energy Act of 1946, 1954 amendments 11(y).

<sup>143</sup> Exec. Order 8381 (Mar. 22, 1940) (Roosevelt); Exec. Order 10104 (Feb. 1, 1950) (Truman); Exec. Order 10290 (Sept. 24, 1951) (Truman); Exec. Order 10501 (Dec. 15, 1953) (Eisenhower); Exec. Order 10964 (1961) (Kennedy)(amending Exec. Order 10501); Exec. Order 11652 (Mar. 8, 1972) (Nixon); Exec. Order 12065 (June 28, 1978) (Carter); Exec. Order 12356 (Apr. 2, 1982) (Reagan); Exec. Order 12958 (Apr. 17, 1995) (Clinton); Exec. Order 13292 (Bush) (Amending Exec Order 12958); Exec. Order 13526 (Dec. 29, 2009) (Obama).

<sup>144</sup> Information Security Oversight Office, 2010 Report to the President, National Archives and Records Administration, p. 1, available at <http://www.archives.gov/isoo/reports/2010-annual-report.pdf>.

<sup>145</sup> *Id.*

The key issue here is that with so much of the essential information, decisionmaking, and executive branch jurisprudence necessarily secret, *lawyers are limited in their opportunity for outside appraisal and review.*

Even within the executive branch, stove-piping occurs. The use of secure compartmentalized information (SCI) further compounds this problem as only a limited number of individuals—much less lawyers—may be read into a program. This diminishes the opportunity to identify and correct errors or to engage in debate and discussion over the law. Once a legal opinion is drafted, the opportunity to expose it to other lawyers may be restricted. The effect may be felt for decades, as successive Administrations reference prior legal decisions within certain agencies. The Office of Legal Counsel, for instance, has an entire body of jurisprudence that has never been made public, which continues to inform the legal analysis provided to the President. Only a handful of people at OLC may be aware of the previous decisions. They are prevented by classification authorities from revealing these decisions, resulting in a sort of generational secret jurisprudence. Questions related to professional responsibility thus place the national security lawyer in a difficult position: not only may opportunities to check factual data or to consult with other attorneys be limited, but the impact of legal advice rendered may be felt for years to come.

The problem extends beyond the executive branch. There are limited opportunities, for instance, for external judicial review. Two elements are here at work: first, very few cases relating to the many national security concerns that arise make it into court. Much of what is happening is simply not known. Even when it is known, it may be impossible to demonstrate standing—a persistent problem with regard to challenging, for instance, surveillance programs underway. Second, courts have historically proved particularly reluctant to intervene on national security matters. Judicially-created devices such as political question doctrine and state secrets underscore the reluctance of the judiciary to second-guess the executive in this realm. The exercise of these doctrines is *increasing* in the post-9/11 environment. Consider state secrets. While much was made of some 5-7 state secrets cases that came to court during the Bush Administration, in more than 100 cases the executive branch formally invoked state secrets, which the courts accepted.<sup>146</sup> Many times judges did not even bother to look at the evidence in question, before blocking evidence and/or dismissing the suit. In numerous additional cases, the courts *treated* the claims as though state secrets had been asserted—even where it had not been formally invoked.<sup>147</sup>

In light of the pressure put on national security lawyers in the performance of their duties, the profound consequences of many national security decisions, the existence of stovepiping even within the executive branch, and limited opportunity for external review, the practice of national security law depends upon a particularly rigorous and committed adherence to ethical standards and professional responsibility. In other words, this is a unique world in which there are enormous pressures, with potentially few external consequences for not acting in accordance with high standards. It thus becomes particularly important, from a pedagogical perspective, to think through the types of situations that may present to national security attorneys, and to address the types of questions related to professional responsibility that will confront them in the course of their careers.

Closely related to this area is the necessity of exercising good judgment and leadership. This skill, like many of those discussed, may also be relevant to other areas of the law; however, the type of leadership called for in the world described above may

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<sup>146</sup> See Laura K. Donohue, *The Shadow of State Secrets*, U. PENN. L. REV. (2009).

<sup>147</sup> *Id.*

be different in important ways. Good judgment, for instance, may mean any number of things, depending upon the attorney's position within the political hierarchy. Policymaking positions, for instance, may be considerably different from the provision of legal advice to policymakers. Leadership, too, may mean something different in a field intimately tied to political circumstance. It may mean breaking ranks with the political hierarchy, visibly adopting unpopular public or private positions, creating new bureaucratic structures to more effectively respond to threats, resigning when faced by unethical situations, or holding off clients until the attorneys within one's group have the opportunity to look at issues while still being sensitive to the political needs of the institution. Recourse in such situations may be political, either through public statements and use of the media, or by going to different branches of government for a solution.

## **6. Creating Opportunities for Learning**

In addition to the above skills, national security lawyers must be able to engage in continuous self-learning in order to improve their performance. In other words, they must be able to generate frameworks for identifying new and emerging legal and political authorities and processes, systems for handling factual chaos and uncertainty, mechanisms to ensure critical distance, evaluating written and oral performance, and analyzing leadership skills. Law schools do not traditionally focus on how to teach students to continue their learning beyond the walls of academia. Yet it is vital for their future success to give students the wherewithal to create conditions of learning.

Some of this learning may be generated by interpersonal feedback. Supervisors, law partners, and formal and informal mentors have traditionally performed a similar function. But in a highly political environment, where personnel frequently change, individuals repeatedly cross agencies in the course of their career, and classification limits cross-pollination, such opportunities may be limited. Thus, while feedback and growth may involve students' ability to create and inculcate mentoring relationships, it may equally depend upon creating peer-to-peer learning opportunities, gaining feedback from colleagues, developing *ex ante* markers for reaching certain goals, and following through with *ex post* analysis of one's performance.

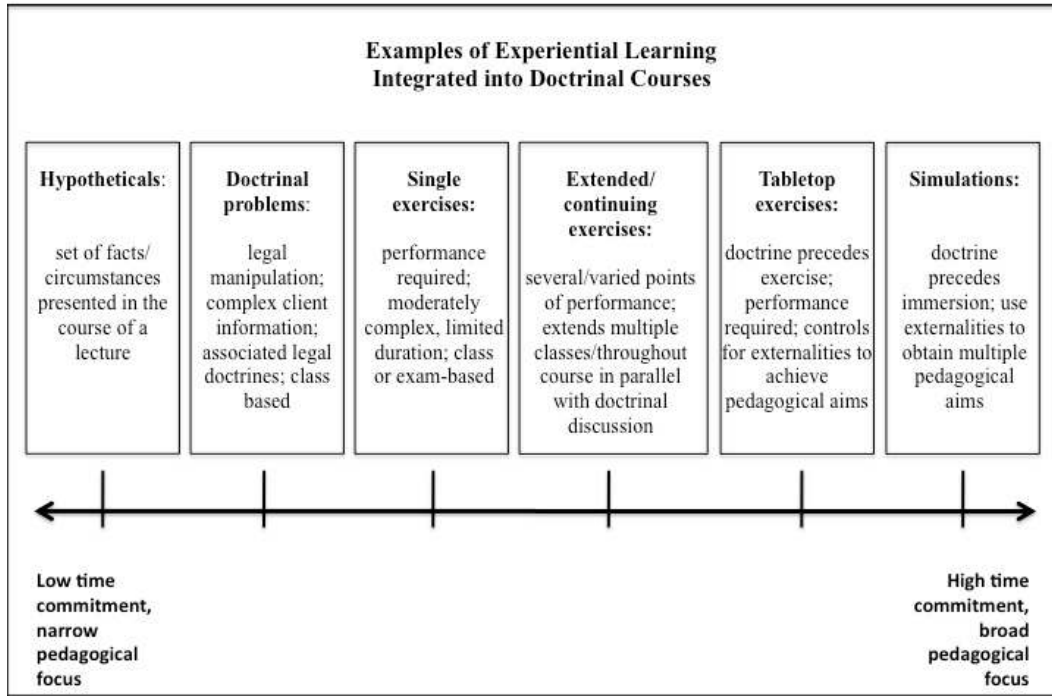
In addition to the foregoing, national security lawyers need to be able to perform the six goals in tandem. That is, they need to be able to *integrate* these different skills into one experience. It is thus incumbent on law schools not just to emphasize these skills, but to give students the opportunity to layer their experiences. Students must learn to perform on all these fronts at once. Recognizing the importance of integrative learning, of course, is not new; however, for reasons discussed below, the structures that have been more broadly adopted within the legal academy to accomplish this aim are, on the whole, ill-suited to the substantive nature of the skills students need to develop as well as the task of performing such skills in near-simultaneous manner.

## **IV. EXPERIENTIAL LEARNING IN THE DOMINANT LAW SCHOOL MODEL**

Much of the analysis shaping the contemporary pedagogical discourse turns to experiential learning as a way to accomplish the broader goals for legal education. Elements of the actual practice of law have thus been integrated into doctrinal courses, even as clinics focus primarily on experiential learning. Many of these initiatives offer important ways to address deficiencies in traditional legal pedagogy. There are, however, problems with how this plays out in both realms that influence how effective these devices are for students interested in national security law. Moot courts, moreover, another form of experiential learning, fail in important ways to address the gap.

## A. Doctrinal Courses

Structurally, the way experiential learning has become integrated into doctrinal courses has been in the form of hypotheticals, doctrinal problems, single-experience exercises, extended or continuing exercises, tabletop exercises, and simulations.<sup>148</sup> (See Figure 1)



*Figure 1*

One way to think about these different tools is as a continuum. At one end of the scale are hypotheticals, where a set of facts or circumstances may be presented to students in the course of a lecture, giving them an opportunity to respond to the information presented. The amount of time allocated to such scenarios is typically less than a full class, with the pedagogical aim being fairly narrow: e.g., driving home a particular doctrinal concept, addressing finer points of the Court's jurisprudence, discussing a particular issue of professional responsibility, or illuminating a theory of the case. A discussion of facts, for instance, invoking the Court's position in *Youngstown*, may thus give rise to a discussion of separation of powers in the conduct of foreign affairs.

Doctrinal problems, which tend to take longer to integrate into a class discussion, are more complex. Not only may they involve legal manipulation, but they may incorporate client information, the lawyer's role, and associated legal doctrines. They are often more drawn out than a simple hypothetical and result in multiple points of learning. An examination of war powers, for example, may involve the integration of the relevant Constitutional Provisions, the War Powers Resolution, Nixon's veto, the Prize Cases,

<sup>148</sup> Jay Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 470 (1995) (proposing the categories employed, *infra*, as a typology for simulations).

*Dellums v. Bush*, the 2001 AUMF, and the White House Libya Report. A specific scenario may then be posed, placing students in an OLC role, where they are confronting a series of options for overseas intervention. The contours of the discussion can be handled in a single class. This approach offers a more robust understanding of the many facets involved in the doctrine under discussion than that conveyed via the use of hypotheticals.

Single-experience exercises, in turn, add a performance quality to the students' manipulation of legal doctrine. They tend to be of moderate complexity and limited duration. They may be used either in the course of a class, or, following the doctrinal portion of the course, as part of an examination. An example from national security law might be placing students either singly or as a team into the role of the Department of Justice's National Security Division, presenting the individuals with factual data, and then requesting recommendations about the options available for national security investigation tools—in the process requiring the students to provide detail on which instruments (e.g., Title III warrants, Foreign Intelligence Surveillance Court orders, or National Security Letters) would be pursued, in conjunction with other responses. The active nature of the exercise allows the professor to continue to teach (and to test) multiple pedagogical aims.

Extended exercises last longer and involve several and varied points of performance. They are conducted in parallel with the doctrinal discussion that accompanies the course. During the term, students may thus need to meet with “clients”, negotiate, or argue before a “judge”. Continuing exercises are similar in that they extend throughout a term coinciding with the doctrinal discussion. Unlike the extended exercises, however, they stem from a similar set of facts to which the students return throughout the life of a course. The aim of a course on the Law of the Sea may therefore be the negotiation of a Treaty on the same, broken down into discreet units that progress through the legal steps necessary to reach a final agreement. These activities involve a greater time commitment than hypotheticals, doctrinal problems, and single-exercises, but they allow the instructor to broaden the learning in an experiential mode.

Tabletop exercises can be distinguished from extended exercise in that they tend to come *after* the doctrinal portions of the course. In these fora, students must demonstrate their ability to perform on multiple levels. Simultaneously, the instructor must control for externalities to achieve the pedagogical aims. Roles, assigned to the students, allow the class to approach a problem from multiple perspectives at once. They then meet in common discussion, as a facilitator presents them with a series of facts and legal questions that must be addressed. For instance, students may be assigned to represent different parties on the National Security Council. They then meet, as the NSC, to consider a series of concerns, which they then must analyze.

In some cases, experiential learning has been taken to the next level, which is that of a simulation, where the course culminates in an intensive lawyering experience, enriching didactic learning.<sup>149</sup> This approach can be found in a wide range of subject areas, such as administrative law,<sup>150</sup> bankruptcy,<sup>151</sup> civil procedure,<sup>152</sup> constitutional law,<sup>153</sup> contracts,<sup>154</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> Michael Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. LEGAL EDUC. 234 (1974).

<sup>151</sup> Patricia Brumfield Fry, *Simulating Dynamics: Using Role-Playing to Teach the Process of Bankruptcy Reorganization*, 37 J. Legal Educ. 253 (1987).

<sup>152</sup> Philip G. Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. LEGAL EDUC. 555 (1989); Lloyd C. Anderson & Charles E. Kirkwood, *Teaching Civil Procedure with the Aid of Local Tort Litigation*, 37 J. Legal Educ. 215 (1987).

<sup>153</sup> Robert P. Davidow, *Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing*, 34 J. Legal Educ. 527 (1984).

criminal law,<sup>155</sup> corporations,<sup>156</sup> and deals.<sup>157</sup> In some cases, simulations have entered the clinical field as well.<sup>158</sup> For it is here that overlap between the immersion indicative of clinical education merges with the doctrinal components of the research side of the house.

There has been no discussion in the secondary literature, however, about how simulations might work their way into the doctrinal side of national security law. What makes this remarkable is that it can be such a powerful tool to accomplish the pedagogical aims that mark the field. We will return to this point, below.

In sum, each of these tools brings an important value to legal education: namely, teaching from practical experience, while embracing the strengths of doctrinal approaches to the law. Which of the tools proves optimal heavily depends upon the specific goals of the professor. When time is short and the point to be conveyed bounded or discrete, a hypothetical provides a much more effective tool than, for instance, a Tabletop exercise. In looking to a more complete preparation for students for national security law, however, more attention needs to be paid to the role of simulations. The military and, indeed, government officials, have been made great use of simulations as a training device. But coverage of the same in the literature addressing civilian national security legal education has been found wanting.

## **B. Clinical Education**

Clinics, unlike doctrinal courses, are built on the premise that the best way to teach lawyers is to immerse them in the practice of law. Students are thus provided with a real world client, to whom they must be responsive and in regard to whom they must effectively perform. Under the guidance of faculty, students have the opportunity to then reflect on the experience to gain further insight into procedural, substantive, and professional concerns. Clinics may, of course, incorporate hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, tabletops, and simulations outside the real world experience. Thus, while drafting a bill on behalf of a Congressional client, a national security legislative law clinic may itself go through the process of committee mark-up, to help the students to understand the next stages that will occur in the legislature. But the traditional model in clinical education is for students to work with real-world clients outside the law school setting, under the supervision of a faculty member.

The difficulty with the traditional clinical model in national security law is twofold: for government entities working in this area, classification may well prevent student participation. It may be difficult, if not impossible, for students to obtain the security clearances necessary to be able to practice in this area. For non-government entities, classification may prove an equally formidable barrier. Contractors, for instance, who have access to classified materials, cannot employ students to assist in procurement, employment, technological, and other areas of the business.

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<sup>154</sup> Carol Chomsky and Maury Landsman, *Introducing Negotiation and Drafting into the Contracts Classroom*, 44 St. Louis U. L. J. 1545 (2000); Kennedy F. Hegland, *Fun and Games in the First Year: contracts by Roleplay*, 31 J. LEGAL EDUC. 534 (1981).

<sup>155</sup> Stacy Caplow, *Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law*, 19 N.M. L. Rev. 137 (1989).

<sup>156</sup> Professor Brian Quinn at Boston College School of Law, for instance, teaches a Corporations course in which he requires the students to file for incorporation, form firms, and then dissolve them at the end of the term.

<sup>157</sup> Professor Josh Tietelbaum at Georgetown Law, for instance, teaches a Deals course along these lines.

<sup>158</sup> Meltsner & Schrag, *Report From a CLEPR Colony*, 76 Colum. L. Rev. 581 (1976) (discussing the use of simulations as a supplement to clinical education at Columbia Law); Philip G. Schrag, *Teaching Legislative Process Through an Intensive Simulation*, 8 Seton Hall Legis. J. 19 (1984).



Classification and the special rules that mark national security law, moreover, may, in important ways, run contrary to the goals of legal education. Some law school clinics that have attempted to represent detainees have had to shut down in part because of concerns about the failure of such clinics to train students adequately even as they convey extraordinary conditions as a norm. In other words, if part of the value of clinics is client interaction, having one's client held, incommunicado, in Guantánamo Bay, inhibits students' ability to have that experience. Military detention given effect on the basis of information not provided to the attorneys, may be impossible to challenge. In the process, a norm is being conveyed to students that raises serious questions about the rule of law.

Yale Law, for instance, started a national security clinic in the wake of 9/11 specifically with the intent of taking the cases of those indefinitely detained by the United States. The clinic, however, has now closed, on the grounds that it is difficult for students to have a meaningful experience, when they can neither interview their clients nor see the information supporting their clients' detention.<sup>159</sup> Other clinics have attempted to get around these issues by ensuring that clinical faculty have the necessary security clearances; but this alters the students' experiences with regard to representing clients, relegating them to a subsidiary role.

These considerations do not mean that clinical education is impossible in the realm of national security law. To the contrary, there are numerous ways in which clinicians play a critical role in the field. But it is important to recognize that efforts to directly take part in Executive Branch action or in responding to such actions, may be limited.

There are, of course, other experiential learning opportunities for students within the clinical domain. These offer some opportunities for those interested in national security law. Externships, for instance, give students the opportunity to work in professional settings, with the idea of then conferring with academics outside the work environment, as a way to critically reflect on the experience.

Many of the difficulties that assail clinical work in national security law, however, similarly present in this setting. For work in the executive branch, for instance, positions in this area generally require security clearances. Applying for and obtaining these may take a significant amount of time, precluding students from having the opportunity to work in sensitive areas. Any work that students who are admitted to such externships do, moreover, may be prevented through classification from broader dissemination, limiting the extent to which professors can supplement the placement within an educational structure. This barrier, of course, is lower for students who may wish to practice national security law outside of the government or in conjunction with government contractors.

### **C. Moot Court**

A third model of experiential learning centers on Article III. Indeed, the use of Moot Courts in legal education has ancient and well-established roots. In the third century Aristotle referred to the use of rhetoric as the "ability in each particular case to see the available means of persuasion."<sup>160</sup> Starting in 1820, Harvard and other academic institutions in the United States began using the same. Gradually, however, the practice

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<sup>159</sup> Hope Metcalf, *Panel Remarks*, ABA Pedagogy Meeting, September 2012, Georgetown Law.

<sup>160</sup> From the Latin *moveo*, the move, agitate, or debate, British Inns of Court adopted the device in the 14<sup>th</sup> century as a way to more effectively teach students in preparation of practice at the bar. Nicholas Bacon subsequently wrote about the value of such moots in a report prepared for King Henry VIII, with Lord Justice Atkin following nearly three centuries later with his *Moot Book of Gray's Inns*. Yvonne Marie Daly and Noelle Higgins, *The Place and Efficacy of Simulations in Legal Education: a Preliminary Examination*, All Ireland Journal of Teaching and Learning in Higher Education, Vol. 3, No. 2, Autumn 2011, p. 58.

died out, leaving the delivery of treatises and passive student learning the norm. Langdell's more active form of teaching paved the way for the eventual re-introduction of moot court into an active learning environment.<sup>161</sup> It has again become entrenched in the American curriculum.

The basic structure of moot court allows students to simulate the work of a lawyer, in the process learning not just the principles and application of substantive law, but how to argue a case. One of the great advantages to this model is that students are required to engage in both written and oral advocacy, in the process developing analytical and problem-solving skills.

But while there are many important cases that have dealt with national security-related issues, Article III practice represents only a subset of national security law and often sidesteps the characteristic tensions associated with national security practice in Article I and Article II environments. As aforementioned, most national security legal decisions will never see light of day. They occur within classified constraints and often in informal settings. When cases do come to court, problems of standing often arise, paired with a broader judicial reluctance to become involved. Various doctrines that further sideline meaningful judicial participation, such as the political question doctrine, or state secrets considerations, further limit the judicial role.

Together, what the above considerations suggest is that perhaps there is a different model of legal education that might be more effective at accomplishing the pedagogical aims that mark national security law. One potential solution is total immersion simulations, in which doctrinal strengths are paired with experiential design, to deepen students' experiences. Technology, in this context, has an important role to play.

## V. TOTAL IMMERSION SIMULATIONS

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.<sup>162</sup> Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education, and integrating the experience through a multi-day simulation. In 2009 I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations.

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<sup>161</sup> See, e.g., McAninch 1986, Moskovitz 1992, and Maranville 2001, as well as Knerr et al (2001).

<sup>162</sup> See, e.g., Karen Barton, et al., *Authentic Fictions: Simulation, Professionalism, and Legal Learning*, 14 CLINICAL L. REV. 143 (2007); Paul S. Ferber, *Adult Learning Theory and Simulations – Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417 (2002); Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247 (2001); Philip G. Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. LEGAL EDUC. 555 (1989) (discussing legislative drafting simulation); Stacy Caplow, *Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law*, 19 N.M. L. REV. 137 (1989) (discussing simulations in the criminal law context); Jay Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469 (1995) (considering the attributes of simulations in the law school environment); *Use Of Simulation In the Law School Classroom & Seminar Teaching* [Sound Recording] (1985); Margaret Hazen & Thomas Lee Hazen, *Simulation of Legal Analysis and Instruction on the Computer*, 59 IND. L. J. 195 (1983); *Guide To Effective Teaching: A National Report on Eighty-One Outstanding College Teachers and How They Teach: Lectures, Computer, Case Studies, Peer Teaching, Simulations, Self-Pacing, Multimedia, Field Study, Problem Solving, and Research* (1978); Suzanne Schmidt, et al., *Developing the Perspective of the “Lawyer as Problem Solver” through Selected Classroom Exercises and Simulations*, Session F12, ABA ADR Section Conference (April 2002)(describing an ADR clause drafting, negotiation, preventative problem-solving and a cross-cultural communication simulations).

The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.<sup>163</sup> It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material.

The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos.

The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a one model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.<sup>164</sup>

## A. Course Design

The central idea in structuring the course, which I refer to as National Security Law Simulation 2.0 (“NSL Sim 2.0”) was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal concerns.<sup>165</sup> The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (i.e., directed and focused on certain areas of the law and legal education) and flexible (i.e., responsive to student input and decision-making).

Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple, and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry

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<sup>163</sup> TopOff (derived from “Top Officials”) is a rigorous, full-scale exercise designed initially by Department of Justice and the Department of State and then transferred to the Department of Homeland Security Office of Local and State Preparedness. Four such exercises have been held to date, each involving thousands of federal, state, territorial, and local officials. A week-long exercise, the simulation highlights policy and strategic issues related to prevention and response, as highlighted in the National Planning Scenarios. For more information on TopOff 4, see Department of Homeland Security, The TopOff 4 Full-Scale Exercise, available at [http://www.dhs.gov/files/training/gc\\_1179430526487.shtm](http://www.dhs.gov/files/training/gc_1179430526487.shtm).

<sup>164</sup> While NSL Sim 2.0 focuses on federal and state government, a similar design could address different aspects of the practice of national security law. Georgetown Law’s Federal Legislation and Administrative Law Clinic, for instance, conducts a national security legislative drafting exercise in which members of the Senate Foreign Relations Committee propose and attempt to enact legislation. This model differs in some important ways from NSL Sim 2.0: for example, it is limited to a 10-day module within a broader clinic that has real-world clients. The students do not spend the term on the doctrinal underpinnings of the areas of the law that apply. The alternative universe is more limited (no new facts are created, with students instead assuming only existing facts in the real world). Fewer students take part in the exercise. Various other differences, which make sense in light of the aims of the clinic, attend.

<sup>165</sup> See, e.g., Tansey & Unwin 1969, p. 31.

consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.<sup>166</sup>

Additionally, while authenticity matters, it is worth noting that at some level, the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes—without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting.

NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux.

A key part of the course design is in retaining both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. To be sure, a certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise.

In order to capture problems related to adaptation and evolution [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.<sup>167</sup> It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage in helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.<sup>168</sup> I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0.

The twin goals of adaptation and evolution require students to be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, two attorneys in practice, a media expert, six to eight former simulation students, and technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of the shifting authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional

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<sup>166</sup> A truly authentic experience can neither be predetermined nor pre-ordained; instead, it must be paired with a realistic depiction that enables students to suspend disbelief and engage in the process. Joseph Ptaglia, *Reality by Design: the Rhetoric and Technology of Authenticity in Education* (1998), p. 11. See also Karen Barton, et al., *Authentic Fictions: Simulation, Professionalism, and Legal Learning*, 14 CLINICAL L. REV. 143 (2007)(arguing that where simulations maintain a sense of professional authenticity, students can learn effectively and deeply and suggesting that simulations are essential for the future of legal education.)

<sup>167</sup> Karen Barton, et al., *Authentic Fictions: Simulation, Professionalism, and Legal Learning*, 14 CLINICAL L. REV. 143 (2007), p. 158.

<sup>168</sup> 14 Clinical L. Rev. 158 (internal quotation marks omitted).

responsibility. The two attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law.

Throughout the simulation, the Control Team is constantly reacting to student choices. Where unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media).

Unlike the more limited experiential tools of hypotheticals or doctrinal problems, a total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: i.e., factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple injects relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers.

The simulation itself is problem-based, giving players agency in driving the evolution of the experience—thus addressing goal [2(c)]. This requires a real-time response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to push on different areas of the law and the students' practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed.

The written and oral components of the simulation conform to the fourth pedagogical goal—i.e., the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication: e.g., legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. This is paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas such as National Security Letters. In addition, students are required to prepare a paper prior to the simulation, outlining their legal authorities – and following the session, to deliver a 90 second oral briefing.

To replicate the high-stakes, political environment at issue in goals (1) and (5), students are divided into political and legal roles, and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state officials, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of (many) different considerations that decisionmakers take into account in the national security domain.

Scenarios are then selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further injects into the simulation provide for the broader political context—for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student

players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component thus helps to emphasize the broader political context within which national security law is practiced.

Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous injects from both the Control Team and the participants in the simulation itself. As aforementioned, one professor on the Control Team, and a practicing attorney who has previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, directly impacting the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals.

Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection—for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient.

The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back and to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and issues that arose in the course of the simulation and with an aim towards developing frameworks for how to analyze uncertainty, tension with colleagues, mistakes, and successes in the future.

## **B. Substantive Areas: Interstices and Threats**

As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to press students on shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might push on the intersection of pandemic disease

and biological weapons. A third could turn to cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision.

For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out what authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and *posse comitatus*, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided into the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course.

The simulation itself is based on five to six storylines that push on the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student injects. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life.

For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying *yersinia pestis* at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual's actions overseas, etc. The scenario would be designed specifically to push on the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (e.g., by someone who has traveled from overseas), but then for the storyline to move into the second realm (i.e., awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of pushing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise—with the storyline designed to raise these questions. A third storyline might simply be (well developed) noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, with containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might prove the focus. The sixth storyline could be further noise in the system—loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like.

The five to six storylines, prepared by the Control Team in consultation with experts, becomes the basis for the preparation of scenario “injects”: i.e., newspaper articles, VNN

broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression.

### **C. How it Works**

As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often do not occur at convenient times and may well involve limited sleep and competing demands.<sup>169</sup> Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play.

Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material—both general and SCI—has been provided to the relevant student teams. The Control Team has access to the complete site.

For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis.

The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication.

As the storylines unfold, the Control Team takes on a variety of roles, such as that of POTUS, the Vice President, the President’s Chief of Staff, the Governor of a state, and public health officials. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player

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<sup>169</sup> This facet was adopted following Chief Judge Baker’s prescient remarks to the same at the ABA Standing Committee on National Securities first Pedagogy meeting, autumn 2010.



domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities.

At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players' divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges (and formal observers) then offer reflections on the simulation and determine which teams performed most effectively.

Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness or their—and other students'—performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then concludes.<sup>170</sup>

## VI. CONCLUDING REMARKS

The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same.

The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to this realm. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselves. This does not mean that the goals identified are exclusive to, for instance, national security law, but it does suggest a greater nuance with regard to how the pedagogical skills present.

With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified—i.e., (1) understanding the law as *applied*, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, ensuring that they will be most effective when they enter the field.

The problem with the current structures in legal education is that they fall short, in important ways, from helping students to obtain these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises.

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<sup>170</sup> As previously noted, a short video depicting the simulation can be found at: <http://www.law.georgetown.edu/about/academic-excellence/index.cfm>.

These are important devices to introduce into the classroom. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more wholistic approach to national security law, which allows for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, here may provide an important way forward. Such simulations also help to address shortcomings in other areas of experiential education, such as clinics and moot court.

It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within it. It makes use of technology and physical space to engage students in a multi-day exercise, in which they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.