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The National Security Process and a Lawyer's Duty: Remarks to the Senior Judge Advocate Symposium

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NATIONAL SECURITY PROCESS AND A LAWYER'S
DUTY: REMARKS TO THE SENIOR JUDGE ADVOCATE
SYMPOSIUM

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Introduction

One of my favorite judicial comments, in one of my favorite cases, is Justice Frankfurter's comment about government in *Youngstown*.² This is what he wrote:

Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is true. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully.

When I was asked to speak to you about national security process, I immediately thought of Fairyland, or more precisely I thought of Justice Frankfurter's comment as a place to start. First, it captures the plain truth, already known to this audience, that good government is difficult work.

1. Judge Baker has been a judge on the United States Court of Appeals for the Armed Forces since September 2000. He previously served as Special Assistant to the President and Legal Adviser (1997-2000) as well as Deputy Legal Adviser (1994-1997) to the National Security Council (NSC). Judge Baker has also served as Counsel to the President's Foreign Intelligence Advisory Board and Intelligence Oversight Board, as an attorney adviser in the Office of the Legal Adviser, Department of State, as a legislative aide and acting Chief of Staff to Senator Daniel Patrick Moynihan, and as a Marine Corps infantry officer. He is the author, with Michael Reisman, of *Regulating Covert Action* (Yale University Press: 1992). Judge Baker was born in New Haven, Connecticut, and raised in Cambridge, Massachusetts. He is a graduate of Yale College (1982) and Yale Law School (1990), where he is currently a visiting lecturer. Judge Baker is married to Lori Neal Baker of Springfield, Virginia. They live with their daughter, Jamie, and son, Grant, in Virginia.

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952).

This was true in 1952, and it is certainly true today, at a time when some look back to the 1950s as a time of danger, but relative simplicity.

September 11 changed so much about our lives and how we perceive national security. Harold Lasswell, in an earlier context, described the sharing of danger throughout society as the “socialization of danger,”³ which he wrote was a permanent characteristic of modern violence; but not for America until September 11. The socialization of danger has made ordinary citizens participants in the national security process in a way not previously experienced. In addition, it has brought relatively unknown federal agencies, like the Federal Emergency Management Agency and the Centers for Disease Control, to the forefront of national security planning and response. And both of these occurrences have emphasized the importance of viewing terrorism and cyber security as problems requiring effective vertical and not just horizontal process.

Where most national security problems require coordination amongst federal agencies, homeland security is equally about coordination between federal, state, and local actors down to the level of first responder and the technician who spots the first medical anomaly. This vertical process will test the manner in which information is shared, resources allocated, and perhaps the level at which decisions of life and death, heretofore made by the President, are taken.

Second, Justice Frankfurter’s comment suggests that government is particularly complex in a constitutional democracy. Frankfurter had in mind the interplay between constitutional branches. But constitutional democracy also means that all decisions are made according to law. And that means that sound Executive process must incorporate timely and competent legal advice. In some cases, legal review is dictated by statute, as in the case of the Foreign Intelligence Surveillance Act (FISA),⁴ which requires the attorney general, or his designee, to approve requests for electronic surveillance or physical search before they are submitted to the FISA court. In other cases, the President has directed a specific process to ensure legal review in areas historically prone to peril, including certain intelligence activities. However, the majority of legal advice within the national security process is not directed, but is the product of practice, custom, and personal interchange between lawyer and client. That means that good process requires personal persuasion, presence, and value added, or

3. Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 459 (Jan. 1941).

4. Pub. L. No. 95-511 (1978) (codified at 50 U.S.C. §§ 1801-1829 (2000)).

the lawyer will find he or she is only contributing to decisions where legal review is mandated and then only as the last stop on the bus route. Constitutional democracy does not rest on such process.

Third, because I was asked to comment on the Kosovo air campaign as illustration, Justice Frankfurter's comment is also interesting in that it notes some skepticism as to whether President Harding actually said what he is understood to have said. After serving at the National Security Council (NSC) for seven years, I am not surprised at how often misperceptions emerge and how long they linger. With Kosovo, there remains a misperception that the President, as Commander-in-Chief, insisted upon approving all air targets. The reality was far different. Of the approximately ten thousand strike sorties against some two thousand targets during the campaign, the national security advisor and I reviewed two or three hundred individual targets, of which the president examined a subset. The President's review of targets was crisp; he would hear the descriptions, review the briefing materials, and at times raise questions. He expected issues to have been addressed before they reached him and that any still requiring resolution—perhaps those involving an ally—be quickly and clearly presented. This was not a ponderous process, but the kind of decision-making that one might expect, and that I expected, of a commander-in-chief. What made the process complicated, and sometimes dysfunctional, was not the U.S. chain of command, but the idiosyncrasies of a Northern Atlantic Treaty Organization (NATO) campaign within a framework of consensus decision-making involving nineteen democracies.

Now, while some of my NSC staff colleagues might put their version of a process talk on a single, yellow sticky, my version comes in an encyclopedic set. But you can thank Colonel [Richard] Rosen⁵ that you are not getting that edition. I accept my temporal limitation in trying to describe a process, which depending on how you define national security, might include all aspects of our national life. Therefore, I intend to make a few comments about my prior role at the NSC, not out of any desire to tell my story to an audience too familiar with real war stories. Rather, I want to give you the context from which I draw three enduring duties of the

5. Colonel Richard D. Rosen is currently the Commandant of the U.S. Army Judge Advocate General's School, Charlottesville, Virginia.

national security lawyer: to uphold process, to educate, and to support and defend the Constitution.

My hope is that I will prompt you to think about what you do, how you do it, and how your work relates to the bigger picture of constitutional government, which after all is *not* “a very simple thing.”

A. The Role of the Lawyer

Each President, agency head, and commander will adopt his or her own approach to legal advice, ranging from avoidance to active engagement. As a result, the manner in which lawyers provide their advice and at what stage of the process will vary; however, at the national level the essential participants will remain the same: the Attorney General, the Office of Legal Counsel, agency general counsel, and in areas of concern to us, the Joint Chiefs of Staff (JCS)/Legal, and the President’s national security lawyers.

Traditionally, lawyers for the President have included the Counsel to the President and the NSC Legal Adviser. Practice has varied as to the relative role and weight of each and the extent to which other White House lawyers, such as the Deputy White House Counsel, are involved in national security decision-making, if at all. During my tour, the Legal Adviser reported to the National Security Adviser, and operated independent from, but in appropriate coordination with, the Counsel to the President, the President’s senior legal adviser.

As NSC Legal Adviser, I performed three basic functions. First, I provided independent advice to the President, National Security Adviser, and NSC staff on all matters coming to the NSC or going to the President. Second, I served in effect as general counsel, reviewing personnel actions, responding to discovery requests, and administering the NSC’s ethics program. I might note here that this program included application of the Hatch Act⁶ prohibitions on partisan political activities by NSC staff. National security law is not all constitutional questions about use of force, but rather a relentless opportunity to apply principles of triage. One must appreciate that there is a difference between the “urgent” ethics question

6. Hatch Act Reform Amendments of 1993, 5 U.S.C. §§ 7321-7326 (2000).

about receipt of a gift and the urgent operational law question, unless the question comes from the President or National Security Advisor.

Finally, I coordinated the interagency legal process, ensuring that presidential decisions had appropriate interagency legal review and that the Principals and Deputies Committees had timely legal input. Where necessary, this was accomplished by generating interagency legal papers as background or by attending Principals and Deputies meetings to spot issues and answer questions, always with a view to honestly conveying agency positions of law, while at the same time ensuring that those positions were generated and tested on the President's timetable for decision. I learned early that if you wanted to know if the Defense Department (DOD) had authority to do something, to ask the State Department and vice versa.

The role of the Legal Adviser in this latter function has varied from administration to administration, depending on, among other factors, the personality of participants and the extent to which the office is perceived by agencies as facilitating national security process, as John Norton Moore has argued for a long time, or as a source of potential rival legal advice. I am squarely in the camp that sees the office as an important avenue by which agency counsel can provide meaningful input into presidential decision-making. In my view, NSC/Legal is the interagency legal community's best opportunity to have "eyes on" the presidential memo or meaningful input into a Principals or Deputies Committee meeting, because this is the office most likely to see all the paper flowing to the President and all the meeting agendas. It also has the focus and mission to staff problems from the ground up rather than in finished form. But whether these tasks are performed by NSC/Legal or elsewhere, it is essential that they be performed within the Executive Office of the President.

The essential skill of the national security lawyer at the NSC is the ability to spot issues, generate timely advice through consultation with the appropriate experts, and succinctly convey results to senior policy-makers without losing nuance. How to balance the inherent tension between substantive input and speed in each context is the art of performance. Knowing above all else how much you don't know is a keystone to success.

As an illustration of this process, during Kosovo, I attended Deputies and Principals meetings, often one or two a day. Afterwards, I would follow up with analysis alerting the National Security Advisor in more detail to legal rocks and shoals ahead. I would also ensure that agency general

counsel were aware of the issues raised relevant to their principals. On targets coming to the President for review, my critical process link was with the legal counsel to the Chairman of the Joint Chiefs, Mike Lohr, who worked in concert with the DOD general counsel. Having determined the process I thought would work best, I made sure that the National Security Advisor and the Chairman of the Joint Chiefs agreed, which ensured the full backing of the chain of command.

As the national-level military lawyer closest to the operational line, Admiral Lohr served as my primary contact, through whom I could track and review target briefs as they came to the White House from the CJCS and Secretary of Defense. This communications channel kept me ahead of, or at least even with, the operational time line, and ensured that the President, and not just the Pentagon, had the benefit of military and DOD legal expertise. It also provided for a single chain of legal communication, thereby avoiding confusion. Working together on hundreds of targets, we came to understand each other's vocabulary, tone, and expressions.

I should also point out that my earlier exposure in 1994 to Mike Lohr and Rick Rosen contributed to my judgment that a Judge Advocate should always serve in the NSC legal office. My experience was that judge advocates are terrific generalists, who are as willing to work outside their expertise as they are within it. Moreover, there was no need to explain to a judge advocate general (JAG) that work came first, every day, seven days a week. Judge advocates general understood the importance of being present when the question is asked. Decision-makers at the NSC were prepared to engage the lawyer, so long as the response was immediate. The JAGs I worked with also readily understood the importance of leaving ego at the door when coordinating (and sometimes coaxing out) agency views. At the same time, I found that military lawyers, particularly those outside of Washington, initially needed coaching on how to engage the bureaucracy both within the White House and through the interagency process. Where was the appropriate point of entry? Who could speak for an agency's legal view and when were they doing so? I sensed that the hardest adjustment was learning how much nuance to provide with advice and in what manner to provide it.

In my own case, I came to realize that perhaps my most relevant legal training had been as a Marine Corps infantry officer. Infantry officers, like other military officers, have many opportunities to make rapid decisions with incomplete information, and then be held accountable for those decisions. So, while there are lots of extremely bright lawyers, not all law-

yers are capable of making a decision on operational timelines. The Marine Corps also gives one the opportunity to practice endurance, an essential trait when the legal advice rendered at midnight must be as fresh and solid as that offered at 0800 in the morning.

B. Duties of the National Security Lawyer

It is axiomatic that the national security lawyer's duty is to guide decision-makers toward legally available options. In performing this function in a timely and meaningful manner, the lawyer provides for our physical security. In doing it faithfully, based on honest belief on the application of law, they provide for the security of our way of life, which is founded on the rule of law. The daily grind of national security legal advice, however, should not overshadow three additional and enduring responsibilities of the lawyer.

C. Process

Lawyers are not always readily accepted into the decision-making room. This reluctance reflects concerns about secrecy, delay, and "lawyer creep" (the legal version of "mission creep," whereby one legal question becomes seventeen, requiring not one lawyer but forty-three to answer). Of course, decision-makers may also fear that the lawyer may flatly say "no" to something the policy maker wants to do.

Nonetheless, lawyers are indispensable to good process and should feel a duty to uphold good process and participate in decision-making. In any given context, the pressure of the moment may encourage short-term thinking and the adoption of process shortcuts. The lawyer alone may be sufficiently detached from the policy outcome to identify the enduring institutional consequences of a particular course of action. So too, the lawyer alone may be familiar, and may feel an obligation to be familiar, with applicable written procedures. Process is substance if it means critical actors and perspectives are omitted from the discussion table.

In my experience, good process results in better decisions. As I noted, it ensures that the correct actors are in the room, with the best information as is available at that time. It avoids oversights. In a constitutional democracy, it also helps to ensure that decisions are made in accordance with law and by those actors the people elected to make those national security deci-

sions most important to our well being. Good process also establishes accountability, which in turn improves result.

Second, process is not antithetical to timely decisions, operational timelines, or to secrecy. Process must find the right balance between speed and strength, secrecy, and input. But process can always meet deadlines. There is no excuse for shortcuts. Process can be made to work faster and smarter. By example, if legal review is warranted, the attorney general alone can review a matter and, if need be, do so while sitting next to the President in the Oval Office. The problem some policy-makers have with process is not the time it takes for good process, but the prospect of disagreement, and that can take real time to resolve.

Third, process should be contextual. The legal and policy parameters for responding to terrorism are different than those for responding to a Balkan crisis. Clandestine and remote military operations against a hidden enemy will dictate different decision processes than NATO air operations against fixed targets, as will the different political and policy parameters of both situations. One has to maintain situational awareness to find the measure of process and approval that ensures law is applied in a manner that is faithful to constitutional, statutory, and executive dictates, *and* that meets operational timelines. Therefore, there will always be some tension as to whom should see what when. But, if there is no right way to lawyer, there is a "worst way," which is to exclude lawyers from the process or for the lawyer to wait to be asked.

Finally, good process is also dependent on culture, personality, and style. The President can direct legal review of his decisions, but if a National Security Adviser is not committed to such a review, it will not occur in a meaningful manner, if at all. In short, it is not just the presence of a Legal Advisor at the NSC that will prevent an Iran/Contra, it is the presence of an [Assistant to the President for] NSA who insists on legal input in the decision-making process. And, where there is a seam in the process, the lawyer must identify it.

I was fortunate to work for national security advisors and with Chairmen of the Joint Chiefs of Staff and Secretaries of Defense that understood

this. In Mr. [Samuel R.] Berger's⁷ words, my duty was to ensure that in doing the right thing, the United States was doing it in the right way.

D. Educate

National security lawyers also have a duty to educate. Absent groundwork, the policy-maker may respond at the moment of crisis by seeing the law only as something that allows or does not allow the policy-maker to do what he wants. Contextual advice built on a foundation already laid will be more readily absorbed and accepted. Policy-makers will internalize the parameters of the law and better understand why the law applies the way it does. A three a.m. conference call is no time to explain for the first time the overriding principles of proportionality, necessity, and discrimination in targeting. Nor will all policy makers immediately understand the sometime incongruous application of the law of armed conflict (LOAC) without some background on the Geneva Conventions and their overriding commitment to a legal and moral imperative of ensuring that force is used in the most humane and economical manner possible. Therefore, I made a point of educating on the law of armed conflict *before* (as well as during and after) the air campaign.

Advance guidance on the law of armed conflict also helps establish lines of communication and a common vocabulary of nuance between lawyer and client before the crisis. In a larger, more layered bureaucracy than the President's national security staff, where the lawyer may be less proximate to the decision-maker at time of crisis, I imagine that the teaching process is even more important. Any policy maker who hears a good LOAC brief will be sure his or her lawyer fully participates in the targeting process. In addition, the policy maker will understand in a live situation that the lawyer is applying "hard law"—specific, well established, and sanctioned—and not kibitzing on operational matters.

I say that in part because I found that some policy makers treat international law as "soft law," and domestic, particularly criminal, law as "hard law." The law of armed conflict is, of course, both. Under 18 U.S. Code § 2441, specified war crimes committed by or against Americans violate U.S. criminal law. Moreover, whether we like it or not, the law of

7. Mr. Berger was the National Security Advisor during the Clinton Administration from 1997- 2001.

armed conflict will continue to serve as one international measure by which the United States is judged.

Today, an understanding of the legal framework of homeland security is as important as understanding the law of armed conflict. And like that law, issues involving *posse comitatus* are hard to explain in a “yes” or “no” sentence at three in the morning.

E. Constitution

Most importantly, lawyers must be advocates for the Constitution and not just for their clients. National security lawyers have a responsibility to teach, explain, and apply the Constitution, and turn it over to the next watch in as strong a position as they found it.

There are hard questions ahead in a time of homeland insecurity from which lawyers should not shy. Alexander Hamilton wrote in *Federalist 8*:

Safety from external danger is the most powerful director of national conduct. . . . The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civilian and political rights. To be more safe, they at length become willing to run the risk of being less free.⁸

It is the national security lawyer’s task to alert policymakers to this tension. To show both sides of every coin. As Justice Jackson observed of his own government service in *Youngstown*, “the tendency is strong to emphasize transient results upon policies and lose sight of enduring consequences upon the balanced structure of our Republic.”⁹ This means not only advising the client on what legally can be done, but also on the institutional consequences of taking those actions.

This is hardest to do when lives are at stake. But, the Constitution was not designed to fail, to safeguard our security at the expense of our freedom, or celebrate freedom at the expense of security. It is designed to

8. THE FEDERALIST NO. 8 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

underpin and protect us *and* our way of life. National security lawyers must let it do both.

It takes moral courage to participate fully and objectively as a lawyer: to say "yes," to say "no," and more often, something in between that guides. But, you cannot have law without courage. We may be a government of laws, but "laws are made by men, interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself."¹⁰ Therefore, law depends on the morality of those who apply it. It depends on the moral courage of lawyers like you, who will raise tough questions, who dare to argue both sides of every issue, and who will insist upon being heard at the highest levels of decision-making, and ultimately, call the legal questions as they believe the Constitution dictates and not necessarily as we may want at a moment in time.

This duty should have particular resonance with military and government lawyers who have sworn to "support and defend the Constitution of the United States . . . , [and to] bear true faith and allegiance to the same."¹¹

In 1916, President Woodrow Wilson was asked to speak to the graduating Naval Academy class on the eve of United States entry into World War I. Remarkably, he arrived without a prepared speech, which adds to the beauty and sincerity of his words. This is how he closed.

I congratulate you that you are going to live your lives under the most stimulating compulsion that any man can feel, the sense, not of private duty merely, but of public duty also. And then if you perform that duty, there is a reward awaiting you which is superior to any other reward in the world. That is the affectionate remembrance of your fellow men—their honor, their affection.¹²

I can think of no more important time to be a lawyer, and in particular, a national security lawyer, like you. Every day you come to work, you provide for our physical security by clearly and quickly advising the decision-maker. And, you help to secure our way of life by upholding the rule of

10. A. WHITNEY GRISWOLD, *THE BASIS OF A RULE OF LAW, LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL* (Yale University Press 1959).

11. U.S. Dep't of Army, Form 71, Oath of Office—Military Personnel (July 1999).

12. Woodrow Wilson, Address to Naval Academy Graduating Class (1916), reprinted in *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* (William Safire ed., 1997).

law with good process, spotting the enduring consequences of what we do, and facing squarely the sometime tension between security and liberty raised in *Federalist Number 8*. The national security lawyers who are true to this duty should never doubt their role or their worth, and while they may not always garner affection, they will always have the honor of having borne true faith and allegiance to the Constitution. There is no higher calling.