

Pilpul Competence and International Law: Practicing With a Flawed Ethical  
Baseline and Understanding National Values in American Foreign Affairs  
Policymaking?

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# **Pilpul<sup>1</sup> Competence and International Law: Practicing with a Flawed Ethical Baseline and Understanding National Values in American Foreign Affairs Policymaking?**

*by Billy Don Perritt, Jr.*

*“When we act according to our duty, we commit the event to him by whose laws our actions are governed and who will suffer none to be finally punished for obedience. When, in prospect of some good, whether natural or moral, we break the rules prescribed us, we withdraw from the direction of superior wisdom, and take all consequences upon ourselves. Man cannot so far know the connection of causes and events as that he may venture to do wrong in order to do right. When we pursue our end by lawful means, we may always console our miscarriage by the hope of future recompense. When we consult only our own policy and attempt to find a nearer way to good, by overleaping the settled boundaries of right and wrong, we cannot be happy even by success, because we cannot escape the consciousness of our fault; but, if we miscarry, the disappointment is irremediably embittered.”<sup>2</sup>*

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<sup>1</sup> “Pilpul,” is an ancient study technique of the Talmud. The technique involves developing legal arguments by making clever and insightful distinctions regarding every nuance of the talmudic language. This theoretical process, designed to resolve or explain apparent contradictions, can be tremendously convoluted and can even change the meaning and the intention of the text. David E. Lipman, *Pilpul and Baalei Shem* (Dec. 30, 1999) <<http://www.jewishgates.org/history/jewish/pilpul.stm>>. Joseph R. Fletcher, *Situation Ethics: The New Morality*, in HAROLD H. TITUS, MAYLON H. HEPP, MARILYN S. SMITH, *THE RANGE OF PHILOSOPHY* 126 (D. Van Nostrand, New York 3ed. 1975), explains that statutory and code law inevitably creates rulings upon rulings, because the combined complications of life, inequities, misapplications, unperceived consequences and compassion results in an elaborate system of exceptions and compromises. These “rules for breaking the rules, leads to that tricky and tortuous business of interpretation that the rabbis called ‘pilpul’ - a hairsplitting and logic-chopping study of the letter of the law.” *Id.*

<sup>2</sup> SAMUEL JOHNSON, *RASSELAS* 129 (Barron’s, New York 1962) 1759, (adopted from the consoling instruction of the wise Imlac to Princess Nekayah of Abyssinia after the abduction of her handmaiden, Pekuah). Few topics are as serious and yet uniformly unresolved as “ethics,” primarily because the purpose of the rules is tied to interpretations of law that do not necessarily correlate to a universal morality. The rules abound, but their interpretation and application are still considered practically on a case-by-case analysis with factual circumstances driving the resolution, not as clear guidelines by which to direct the expected behavior of the practitioner. In an attempt to give a broader perspective of the foreign affairs policymaking, I combine the legal and political aspects throughout the thesis that shows, as usual, application of the ethical rules is far more complicated than just their recitation.

There is a saying that “the past itself might be a foreign country, but if we visit it often enough, make some of its corners our regular haunts, then over time we ought to be able to understand some of its more curious customs and mores, and even a bit of the argot in which the natives banter with each other.” Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *FORDHAM L. REV.* 1587, 1607 (1997). While an awareness of different customs and cultural practices is essential to full appreciate international legal distinctions, one method to understanding the legal, historical and social development of states is reflected by the current emphasis by many law schools to incorporate “law and literature” studies to complement or leaven the legal curriculum. See James Seaton, *Law and Literature: Works, Criticism, and Theory*, 11 *YALE J.L. & HUMAN.* 479, 507 (1999),

## Introduction

I will concede from the outset that most legal theses do not lead with a quote from *Rasselas*, but given the nature of American foreign affairs policymaking, wisdom from any source helps us to gain perspective. As attorneys, we inevitably recognize that “cutting corners” in the law to accomplish an immediate result might create an acceptance of the practice, allowing procedural and discretionary actions to become increasingly arbitrary, and thereby making abuses and mistakes more common throughout society.<sup>3</sup> Of course, I used the caveat “inevitably recognize,” because only few of us have not observed rounded corners in the legal practice.

Generally speaking, discussions of ethics and policy making have a tendency to immediately sink into debates over individual opinions and values. That tendency is magnified in the international spectrum, where each additional world community member that competes for international equality expands the underlying range of inequalities, and differing values and beliefs at stake. With only an occasional lapse,

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“If law has nothing to do with justice, if legal discussion is simply a struggle to gain power with words (for the moment) rather than arms, then literature has no particular relevance for the law. If on the other hand, the law has something to do with justice, and if legal studies involve reflection on human life as well as the manipulation of symbols for rhetorical effect, then those concerned with law have something to learn from literature.”

See generally RICHARD A. POSNER, *LAW AND LITERATURE* (Harvard University Press, Cambridge, Mass 1998).

<sup>3</sup> SISSELA BOK, *LYING* 120 (2nd Ed. Vintage Books, New York 1999). Attorneys opposed to the idea of enforcing a particular law generally have four options: “(1) act formally and disregard moral misgivings; (2) act morally and disregard the law; (3) resign; or (4) cheat, which is described as interpreting the law in accordance with his or her values.” David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990) n. 186, (explaining the late Professor Robert Cover’s comments). The inherent allegation raised within the last three options is that some legal practitioners are “loathe to act morally while opposed to flouting the law,” and justify their interpretation according to a lawyer’s functional responsibility to “do what’s right,” as being distinct from “cheating.” *Id.*

attempt to evade the task of harmonizing the underlying value disputes in an effort to focus on functional role for the government attorney when approaching a comparison of these national and international concerns.

Though I avoid advocating an isolationists approach to international law, this thesis takes the position that attorneys must carefully articulate the distinction between international law and international morality, before we can even begin to evaluate whether America's foreign policy is bound by international responsibilities. The problem is exacerbated to a large degree by the fact that the ethical rules of professional responsibility attempt to harness the attorney in both a legal and moral capacity, without an apparent appreciation for the practical realities created under the Constitution and the international practice of law. Ultimately, I suggest that the unsupported moral precipice being built as international law lacks the necessary binding legal mortar. How the government attorney sees his or her ethical duty in this analysis can ultimately make the difference in whether the law is followed or flaunted.

### **Comparisons Without Criteria**

Not long ago, President Clinton introduced the new millennium with a quote from President William McKinley, who had welcomed in the previous millennium:

“The world's products are exchanged as never before, and with increasing transportation comes increasing knowledge and larger trade. We travel greater distances in a shorter space of time, and with more ease, than was ever dreamed of. The same important news is read, though in different languages, the same day, in all the world. Isolation is no longer possible. No nation can longer be indifferent to an nation.”<sup>4</sup>

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<sup>4</sup> President Clinton's Remarks on Foreign Policy in San Francisco, California, Feb. 26, 1999, (June 3, 2000) <[http://www.state.gov/www/global/general\\_foreign\\_policy/990226\\_clinton.html](http://www.state.gov/www/global/general_foreign_policy/990226_clinton.html)>

Despite one hundred years of warning, attorneys practicing in the international arena are still being quickly introduced to differences that were traditionally presumed to be obvious in the U.S. legal practice. For example, after a visit to the International Criminal Tribunal for the former Yugoslavia, one attorney related an ethical argument that arose between the trial lawyers from different countries while preparing witnesses for cross-examination.<sup>5</sup> “An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer’s view was that not to prepare a witness would be malpractice.”<sup>6</sup>

Considerable confusion has been created in the practice with the much used term of “international law,” which has been abused through synonymous moral and legal contexts as though the each respective sovereign has in Caesarean fashion crossed the Rubicon and is thereby committed to an international formality.<sup>7</sup> It would be heretical to minimize the role and importance of international and comparative legal studies in developing an appreciation and understanding of the differences in the legal systems throughout the world, but contrary to our collective rhetorical proficiency, a closer analysis will establish that while “international law and

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<sup>5</sup> Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by US and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117 (Oct 1999), n. 184. Pagination unavailable.

To formalize a set of ethics rules, the Council of the Bars and Law Societies of the European Community (CCBE), adopted the Code of Conduct for Lawyers in the European Community (CCBE Code) in 1988. *Id.* The code was intended to supersede national codes of conduct governing lawyers’ cross-border practice within the European Union. *Id.* Although the text itself lacks the force of law, the CCBE code has been formally adopted in the member states. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See generally, WEBSTER’S (G&C Merriam Co., Springfield 1977) (“rubicon,” an irrevocable crossing of a boundary; derived from Julius Caesar’s 49 B.C. crossing of the Rubico River in northern Italy, that

international relations are inextricably intertwined, they are still two separate sciences.”<sup>8</sup>

Logic and semantics are the means by which we define the application of law and govern human behavior. But, our limited understanding of human behavior accounts for much of the deficiencies and ineffectiveness of our laws.<sup>9</sup> If we recognize that it is impossible to eliminate references to human concepts such as beliefs and behavior in international activities, and that beliefs and behavior can be illogical (i.e. that we do not have a complete understanding of these human characteristics), then we will never accurately define the logical application of law to these human aspects in scientific terms.<sup>10</sup>

While law generally functions to protect the “stability of the society it serves,” it typically resists societal disruption, “especially when opinion is divided over the necessity or direction of a change.”<sup>11</sup> In some cases, and particularly in the international arena, the stability of law may resist even legitimate changes in societal

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formed the boundary between Cisalpine Gaul and Italy, which the Senate regarded as an act of War). Ironically, the term was not found in BLACK'S LAW DICTIONARY.

<sup>8</sup> Josef L. Kuntz, *Theory And Reality In Public International Law*, 70 HARV. L. REV. 1331, 1335 (1957) (book review of Charles de Visscher's 1957 English translation of THEORIES ET REALITES EN DROIT INTERNATIONAL PUBLIC).

<sup>9</sup> Lynton K. Caldwell, *Is World Law An Emerging Reality? Environmental Law In A Transnational World*, 10 COLO. J. INT'L ENV'T . L. & POL'Y 227, 229 (1999).

<sup>10</sup> Dow, *see supra* note 3, at 19.

<sup>11</sup> Caldwell, *supra* note 9, at 228. Lawyers have traditionally accepted and internalized “order and stability” in society as basic moral values, and typically oppose violent and uncontrolled techniques of accomplishing change in society. Timothy P. Terrell and Benard L. McNamee, *Transovereignty: Separating Human Rights From Traditional Sovereignty And The Implication For The Ethics Of International Law Practice*, 17 FORDHAM INT'L L.J. 459, 487 (1984).

values and temporarily defeat the purpose it serves in society.<sup>12</sup> The government attorneys involved in these international matters are forced to separate their individual concerns from the U.S.' foreign policy approach to international obligations.<sup>13</sup> In these circumstances, making decisions or providing opinions that adhere to the law, while recognizing that considerable public dissention and political opposition exist to the law, create hard choices for attorneys.

While the occasional practice is not limited solely to attorneys, some commentators attempt to wedge their concept of international morality into U.S. law through a comparative application of international legal principles. But, as Justice Scalia has cautioned us “we must never forget that it is the Constitution for the United States of America that we are expounding” and that “comparative analysis [is] inappropriate to the task of interpreting our constitution.”<sup>14</sup> Several years ago, considerable publicity was generated over the inspection of product labels to determine if the item was indeed “made in the USA,” - a practice that I suggest is now applicable to international obligations and essential to dispelling some of the mythical moral obligations that are referenced as law.

### **The Constitutional - Ethical Conflict**

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<sup>12</sup> Caldwell, *supra* note 9, at 228. In some measure, lawyers may even act as a “subversive internal counterweight” in society, “tempering” even legitimate change. Terrell and McNamee, *see supra* note 11, at 487.

<sup>13</sup> Attorneys are inherently consumed in assumptions, laws, and institutions that tend to be inflexible; they adhere to precedent and resist change, which sometimes results in “a gulf between legal doctrine and reality.” Caldwell, *supra* note 9, at 228. It is the nature of lawyers to “oppose and resist instabilit in favor of stability, to reform disorganization into structure, and to squeeze order out of chaos.” Terrell and McNamee, *see supra* note 11, at 486.

Combine the two statements that, “politics has always been persuading others of what is possible,”<sup>15</sup> and “a lawyer can rationalize and promote anything through rhetoric, however morally intolerable,”<sup>16</sup> and the potential for confusion and deception is evident. In other words, “[u]ncertainty and imprecision beset hard moral choices, and the more the intervening steps are multiplied and the more we are told that one thing can be explained in terms of another or derived from another, the more room is left for bias, self-deception, even sleight of hand.”<sup>17</sup> Of course, putting a spin on “meaning” is what we do - depending on whose side we represent - we argue that a statement means what it says, or it does not mean what it says for given reasons. Prominent among all of our rhetorical successes is the unresolved extent to which our U.S. foreign policy is impacted or bound by international obligations.<sup>18</sup>

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<sup>14</sup> Sujit Choudhry *Globalization In Search Of Justification: Toward A Theory Of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 833 (1999).

<sup>15</sup> JIM WRIGHT, *BALANCE OF POWER* 30 (Turner Publishing, Atlanta 1996).

<sup>16</sup> W. Bradley Wendel, *Public Values and Professional Responsibility*, 71 NOTRE DAME L. REV. 1, (Oct 1999), n. 402, citing Richard H. Weisberg, *Law and Rhetoric*, 85 MICH. L. REV. 920, 929 (1987).

<sup>17</sup> Wendel, *supra* note 16, at 116.

<sup>18</sup> While the Vienna Convention on the Law of Treaties has some bearing on the interpreting the obligations, compliance under the “good faith” standard is still a factual interpretation. See Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, *entered into force*, January 17, 1980, Art. 26, U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 8 INT’L LEG. MATS. 679 (1969). See generally John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997). As discussed later in this thesis, this Convention is arguably being interpreted in a different manner, but still in a fashion that retains the Convention’s validity. See also Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Interventionism*, 154 MIL. L. REV. 27 (1997)(a brief historical analysis of the original purpose and obligations under the U.N. Charter).

Casuistry is a case-by-case method of making ethical choices involving plural values, through reasoning based on paradigms and analogies, resulting in opinions emphasizing the importance and priority of particular moral obligations, “framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action.” Wendel, *supra* note 16, at 107-108. Casuistic reasoning involves “abstract ethical principles like consequences, duties, justice, care,” and interprets the “conflicting values not as rivals, but as complementary theories for resolving practical problems.” *Id.* The early Christian casuists used moral principles in the Bible to resolve conflicts of duty between secular

Often quoted in government practice is the statement that “no superior wants a servant who lacks the capacity to read between the lines,” but for attorneys, the ethical rules of professional responsibility create a question of allegiance in identifying the appropriate “superior.”<sup>19</sup> Kant created an inflexible theory that “an individual with many duties can have only one real obligation,” but divining the priority or hierarchy of those duties in the international legal arena requires considerable attention.<sup>20</sup> For the government attorney, focusing on the premier duty (which includes allegiance to a particular superior), especially given the comparative value analysis involved in an international activity, is a threshold consideration.

Most government attorneys have duties created pursuant to an official oath to their respective state constitution in the jurisdiction(s) where they are licensed to

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institutions and the Church, and the Catholic Church used casuistry after the Reformation to resolve questions of conflicting obligations between the faiths. *Id.* at 113.

This concept of resolving plural values is well-suited or has appeal for international law matters, in the sense that almost any international issue will have multiple underlying or competing values. The problem presented in this thesis, and as a typical scenario in international matters, is that no one supranational authority can speak for the entire community. In turn, resort to common law, civil codes or Islamic principles may involve entirely different duties or obligations by the states.

For another defect (i.e. a lack of defined and weighted values) in the casuistry approach, investigate the practices of the seventeenth century Jesuit casuistical theologians, who taught others how to circumvent their moral obligations, for example by “condemning lying but suggesting alternative means to circumvent the statement.” LEO KATZ, *ILL-GOTTEN GAINS* 24-30 (The University of Chicago Press, Chicago 1996)(e.g. a Shabbes Goy or Sabbath Gentile; a Gentile who performed work for the Jew on the Sabbath, that was forbidden by Judaism for the Jew to perform).

<sup>19</sup> John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L.REV. 685 (1999)(quoting from Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L.REV. 616, 625-26 (1949), in reference to correcting legislative ambiguities). Pagination unavailable on Westlaw.

<sup>20</sup> BOK, *supra* note 3, at 39, (quoting Kant’s philosophy that “a conflict of duties and obligations is inconceivable,” because if one does one’s duty, one will turn out to have had no conflicting obligations. Bok adds the caveats to Kant’s philosophy that most modern theorists consider that compromises or breaches of those duties are clearly justifiable in order to avoid a great harm in our society.) In his essay, *Thoughts on Eternal Peace*, Kant effectively rejects the concept of a world republic as being “impracticable and morally wrong”...because “States do not want to accept public and enforceable laws.” EUGENE V. ROSTOW, *A BREAKFAST FOR BONAPARTE: US NATIONAL SECURITY INTERESTS FROM THE HEIGHTS OF ABRAHAM TO THE NUCLEAR AGE* 468 (National Defense University Press, Washington, D.C. 1993).

practice, as well as an oath to the United States' Constitution as a federal employee, and duties created under the professional responsibility rules and other similar regulations.<sup>21</sup> Inherent within these legal duties is a conflict in approaches between the U.S. Constitution that separates our government into three branches or potential clients, and the ethical rules that separate the government into four branches, where potential "clients" would also include federal agencies.<sup>22</sup>

While the ethical rules designate the agency in the executive branch as the government attorney's client, there is no denying that the President's executive power still "waxes directly proportional to any crisis at hand."<sup>23</sup> Approaching an issue within the particular government agency, with the ethical allegiance properly focused on that agency client, but without an appreciation for the executive leverage involved at a given moment can have dire consequences. The government attorney's duties could require the attorney to determine at some point whether his or her oath to the U.S. Constitution preempts the ethical rules' designation of the agency as the client in interpreting international law obligations.<sup>24</sup>

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<sup>21</sup> See generally U.S. DEP'T OF DEFENSE, REG. 5500.7-R JOINT ETHICS REGULATION, (Aug. 30, 1993).

<sup>22</sup> As a government attorney, the direction to follow the law is as helpful as the religious direction to avoid sin, and if the interpretation of the conduct can have different meanings depending on the context, the nexus or root of the duties must link to some comprehensive source. From that point, "the issue about the nature, role, and identity of the future international lawyer is inextricably tied to threshold question of whether matters of national security—are political and hence beyond the cognizance of the institutional constraints of juridical elaboration and normative guidance." Winston P. Nagan, *Nuclear Arsenals, International Lawyers, And The Challenge Of The Millennium*, 24 YALE J. INT'L L. 485, 488-89 (1999).

<sup>23</sup> JOHN LEHMAN, *MAKING WAR* 80 (Charles Scribner's Sons: New York 1992).

<sup>24</sup> To the extent a formal theory is necessary for this thesis, it would state that the "ethical rules" provide an inadequate ethical baseline for international lawyers in evaluating foreign policy matters. Attorneys, in turn, become the wedge of uninvited morality in an unsettled political arena. The attorney potentially errs either in favor of a democratically sound national result that is morally inconsistent with international law or in favor of a morally sound international result that compromises national concerns. See Stanley Fish, *Response: Interpretation is not a Theoretical Issue*, 11 YALE J.L. &

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HUMAN 509 (1999), (defining “theory” as a general description of a process by which “anyone persuaded of it would have some notion of what to do--how to proceed, how to make decisions or evaluate evidence--the next time a task of interpretation was called for”).

While in theory the people of the United States are the beneficiaries of the policy decisions, the attorney’s loyalty is not directly to the people. Instead, that loyalty extends to the institutions and organizations created by them, such as the Executive, Congress, their agency employers, or the federal courts. Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I Ask for is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1297 (1993). Of the four possible “client” candidates initially considered: (1) the government agency for which the lawyer works; (2) the head of the specific agency; (3) the government as a whole; and (4) the “public interest,” the legal ethics authorities typically designate the government agency as the client. Keith W. Donohoe, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, 2 GEO. J. OF LEGAL ETHICS 988 (1989)(The Federal Bar Association and the DC Bar’s special Committee favor the position that the client of the government lawyer is the agency for which he works. The authors of the MODEL RULES OF PROFESSIONAL CONDUCT (Model Rules) appear to support the government as client approach.)

Designating the agency as the client is intended to fulfill three purposes: (1) to allow the government lawyer to clearly determine his duties and obligations, (2) to give agency employees a measure of assurance that their discussions with the agency attorney would remain confidential, and (3) to give external ethical regulatory organizations authority to discipline its members regardless of their form of employment. Donohoe, *supra* at 991. Some opponents to the designation of the agency as the client suggest that “notions of loyalty and confidentiality...simply do not exist in the government context,” and emphasize that prior authority is tied to the public interest as the client. Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B. ASS’N 61, 66, 69 (1978). Without debating the alternative client possibilities, the point is that identifying and influencing the “agency’s” values for purposes of foreign policy development creates an open door for the legal advisor.

Unless otherwise stated, the Model Rules substantially reflect the rule number, wording and position taken by these other authorities: WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT, (hereinafter DC Rules); MISSISSIPPI RULES OF PROFESSIONAL CONDUCT (hereinafter MS Rules); and U.S. DEP’T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) (hereinafter Army Rules). Army Rule 2.1 appends the language, “but not in conflict with the law,” to Model Rule 2.1.

What might initially be presented as a casual hypothetical, is actually the result of a review of ethical authorities bearing on this thesis. The comparisons of these four ethics regulations have direct application to the author, and in some circumstances would potentially direct different outcomes. For example, to identify the client, both Comment 6 to Model Rule 1.13 and the Comment on “Government Agency” following MS Rule 1.13 state, “Although in some circumstances the client may be the specific agency, it is generally the government as a whole.” Comment 7 to DC Rule 1.13 states, “Because the government agency that employs the government lawyer is the lawyer’s client, the lawyer represents the agency acting through its duly authorized constituents. Any application of Rule 1.13 to government lawyers must, however, take into account the differences between government agencies and other organizations.”

In contrast to the previous three rules, the general comment to Army Rule 1.13, entitled “Army as Client,” states, “For purposes of these Rules, an Army lawyer normally represents the Army acting through its officers, employees or members in their official capacities. It is to that client when acting as a representative of the organization that a lawyer’s immediate professional obligation and responsibility exists....” Additionally, Army Rule 8.5 “Jurisdiction” is unique, not only because it differs entirely from comparable provisions in the other rules, but also it attempts to resolve conflicts among multiple jurisdictions. The general comment to Army Rule 8.5 states,

For example, in November 1999, the U.S. Senate rejected the latest version of the Nuclear Testing and the Comprehensive Test Ban Treaty, due in part to skepticism that other countries would not unilaterally comply absent verification inspections.<sup>25</sup> Since international legal principles recognize disarmament as “an important strategic way to promote peace and security,” the Senate’s reluctance to accept the Executive’s desire to formally agree to these binding international conditions seems inconsiderate of international values.<sup>26</sup> Secondly, Congress seems

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“Every lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities. This raises the possibility of conflict in the governing rules, albeit a conflict likely more theoretical than practical...In most cases, the conflict can be resolved by a change of assignment or withdrawal from the matter that gives rise to it. If such assistance is not effective in resolving the conflict, then the subparagraphs (1) and (2) of Rule 8.5 (f) provide clear guidance.”

Army Rule 8.5(f) concludes, “Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities. In case of a conflict between these Rules and the rules of the lawyer’s licensing authority, the lawyer should attempt to resolve the conflict with assistance of the lawyer exercising technical supervision over him or her. If the conflict is not resolved-

- (1) these Rules will govern the conduct of the lawyer in the performance of the lawyer’s official responsibilities;
- (2) the rules of the appropriate licensing authority will govern the conduct of the lawyer in the private practice of law unrelated to the lawyer’s official responsibilities.”

Finally, effective 19 April 1999, Congress codified the Citizens Protection Act of 1998, when it passed the Omnibus Appropriations Act, adding Section 530B, “Ethical Standards for Attorneys for the Government,” to Chapter 31, Title 28. The law states, “An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” The aim of the statute is to overturn the Department of Justice (DOJ) rule allowing federal prosecutors to communicate with represented persons in pre-indictment situations. See previous DOJ rule at 28 C.F.R. 77.1 et seq.

<sup>25</sup> *Votes of Senators on Nuclear Testing and the Comprehensive Test Ban Treaty: 106th Congress* (Nov. 14, 1999), <<http://www.clw.org/pub/clw/coalition/ctbtvote99.htm>>. In 1995, Moscow refused to be audited by the Government Accounting Office concerning \$1.25 billion in U.S. disarmament aid, while allegedly using the grants to conduct nuclear weapons testing and nerve agent research. BILL GERTZ, *BETRAYAL 41* (Regnery Publishing, Washington, DC 1999)(the GAO complained again in February 1999, that Russians were “using U.S. funds earmarked for weapons dismantling to develop weapons of mass destruction.”)

<sup>26</sup> Nagan, *supra* note 22, at 490-91. The International Court of Justice considers Article VI of the 1968 Non-Proliferation Treaty to require states to “pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international

to be acting inconsistent with the sixty-years old landmark Curtiss-Wright decision that effectively defers foreign affairs matters to the Executive.<sup>27</sup>

Several questions come to mind in these types of circumstances, where attempts are made to gel American foreign affairs policy making and a theory of world utilitarianism into law. Specifically, what is the "law" that dictates how the government attorney evaluates U.S. international obligations? Has Congress created "negative law" by rejecting international disarmament and the President's Test Ban Treaty, or is there some international legal principle that by default becomes obligatory? Absent Congressional legislation, as a government attorney can ethically support an agency client's decision to embark on a path wholly independent of the now undefined national policy, assuming it is justifiable under international legal principles?

Today, there is a growing tendency to challenge whether the original justifications for deference to Executive control over foreign policy-making and

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control." *Id.* at 524-25. A clear majority of international sovereigns supports the nuclear Test Ban Treaty, despite the fact that "it locks in U.S. superiority in nuclear weapons." Samuel R. Berger, *American Power; Hegemony, Isolationism or Engagement* (Dec. 12, 1999) <[http://www.state.gov/www/global/arms/speeches/berger/berger\\_19991021.html](http://www.state.gov/www/global/arms/speeches/berger/berger_19991021.html)> (The Assistant to the President for National Security Affairs discussing the perception and use of American power.) But many U.S. political opponents of the Treaty reject any notion of the U.N. being in a position to dictate our policy. *Id.* Even as North Korea signed the Nuclear Nonproliferation Treaty (NPT), international inspectors were documenting that the North Koreans were secretly escalated their nuclear-weapons development program. JAMES A. BAKER, III, *THE POLITICS OF DIPLOMACY* 594-95 (G.P. Putnam's Sons, New York 1995).

<sup>27</sup> Sarah H. Cleveland, *The Plenary Power Background Of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1130 (1999). See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). The real question is whether treaties without an enforceable penalty can "raise standards of international behavior," or in other words, is having a treaty an option where "the alternative is a world with no rules, no verification, and no constraints at all." Samuel R. Berger, *see supra* note 26. Many of the new isolationists in Congress argue that some of these local conflicts, regardless of the global consequences, "should just be allowed to run its course." *Id.*

national security still exist.<sup>28</sup> The government attorney, who attempts to promote a respect for international legal obligations in these circumstances, which is unquestionably constrained by our constitutional political philosophy, as well as value disputes over the preferred policy outcome, has a precarious responsibility.<sup>29</sup> This thesis argues that the resolution of the conflict involving questions of American foreign policy and international law must be interpreted in favor of the oath to the Constitution, and not always in favor of the client according to the ethical rules.<sup>30</sup> The resulting problem, though, is who then speaks for the Constitution<sup>31</sup>

### **The Practitioner-Academician Debate**

The formulation and implementation of American foreign policy is a fascinating endeavor for attorneys. Flexibility, and a comprehensive grasp of the

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<sup>28</sup> Joel R. Paul, *The Geopolitical Constitution: Executive Expediency And Executive Agreements*, 86 CALIF. L. REV. 671, 684 (1998).

<sup>29</sup> Tamara L. Tompkins, *A Theory Of Ethical Conduct For The Legal Advisor To The State Department: Applied For A Fresh Look At Abraham Sofaer And The ABM Treaty Reinterpretation Debacle*, 7 GEO. J. LEGAL ETHICS 523, 551 (1993).

<sup>30</sup> At least any analysis of interpretation must begin with the U.S. Constitution. Manning, *supra* note 19.

<sup>31</sup> Can we analyze or “de-politicize” the international law without delving into politics and values, especially when we have ethical considerations impacting our interpretation? My position is that we cannot, because any accurate comparison must involve criteria, which are weighted in importance. The prioritizing of the weighted criteria is a valuation, a methodology of some political, public or individual ordering. Compare the statement that “constitutional law is simply politics conducted in another sphere.” Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, Or What?* 66 U. CHI. L. REV. 1061 (1999).

One point of divergence in interpretation might be called “morality,” but the ethical practice of law is tied to competently and zealously representing our respective client’s position, within the bounds of the “law.” Morality, which I characterize as “values,” certainly has an application to law, but it is not synonymous with the ethics - which is a different standard. A recent commentar characterizes “constitutional interpretation” as “an exercise in applied political philosophy.” Choudhry, *supra* note 14, at 843 (citing Ronald Dworkin’s theory that the nature of law involves legal principles that “invoke moral principles about political decency and justice,” and that adjudication “brings political morality into the heart of constitutional law.”). The point raised in this thesis is that to the extent that our ethical obligations become entangled with our interpretation of the U.S. Constitution, the interference should be untangled in favor of our oath to the Constitution.

international law and politics are critical skills for the role.<sup>32</sup> Defining the foreign relations interests of the United States and the appropriate method of accommodating those interests is an enormously complex endeavor, and requires concessions from occasionally uncooperative participants.<sup>33</sup> “Diplomatic idioms are intentionally designed to obfuscate conflict,” and for any proposal, we must consider whether we can build a domestic consensus in support of it, the political reaction it will create in the capitals of our adversaries and allies, and how it might change the nature of our political relations internationally.<sup>34</sup>

Trying to resolve the national legal concerns are complicated enough for government attorneys, without involving the international element of responsibility. Competing national and international concerns have to be balanced in a constitutional democracy where we still seem to find occasions to debate a definition for even “federalism,” which for the international community means our national endorsement of an international legal concept on a given day and a concession of it on the next

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<sup>32</sup> John M. Raymond and Barbara J. Frischholz, *Lawyers Who Established International Law In The United States, 1776-1914*, 76 A.J.I.L. 802 (1982).

<sup>33</sup> Jack L. Goldsmith, *The New Formalism In United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1416 (1999). The nature and types of service now being asked of lawyers dealing with international affairs are so disparate and so involved in technicalities that no single lawyer could presume to give advice about all aspects of it; “the complete international lawyer, if he or she ever existed, is definitely extinct now, those engaged in the field like to say. . . .” Detlev F. Vagts, *Comment: Are There No International Lawyers Anymore?* 75 A.J.I.L. 134 1981 quoting Pryor & Couric, *International Law Practice Thrives in Washington*, LEGAL TIMES OF WASH., Aug. 11, 1980, at 32.

<sup>34</sup> BAKER, *see supra* note 26, at 38-39. “No foreign policy is stronger than its domestic base.” HENRY KISSINGER, *YEARS OF RENEWAL* 470 (Simon & Schuster, New York 1999) For example, the Paris Agreement to end the Vietnam War implied a right of enforcement, although there was no legal “obligation” to assist Vietnam, only “secret” presidential letters expressing U.S. intent. *Id.* Presidential letters are not legal commitments, even though they impose a moral obligation on successors. *Id.* In June 1973, Congress prohibited the use of military force “in or over Indochina,” effectively precluding enforcement of the agreement, while simultaneously weaning Vietnam from an U.S. financial support. *Id.* The result was that Hanoi began infiltrating South Vietnam with troops and

day.<sup>35</sup> The expectation or attempt to attribute a national “voice” for foreign affairs policies under these conditions creates a perplexing and entirely misleading perception within the international community.<sup>36</sup>

Additionally, many “new foreign policy thinkers” reject the basic assumption that every international political disturbance must be seen as a potentially mortal threat to America.<sup>37</sup> Whether this situation is a reflection of the traditional

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constructed a network of roads to maneuver troops throughout the country in flagrant violation of the agreement. *Id.*

<sup>35</sup> Foreign affairs has largely been immune from the federalism debate. Goldsmith, *supra* note 33. In April 1998, however, the Commonwealth of Virginia executed Angel Breard, a Paraguayan citizen, despite having failed to notify him of his Vienna Convention right to consult a Paraguayan consul, prompting academic commentators to resurrect the “federalism” debate over whether the treaty power is in fact immune from federalism restrictions. *Id.* at 1415. Although the International Court of Justice (“ICJ”) issued a provisional order requesting a temporary stay of the execution, both the Justice Department and the State Department took the position that even if the ICJ’s order were binding on the United States, the federal government lacked the constitutional power to compel Virginia’s compliance, because “our federal system imposes limits on the federal government’s ability to interfere with the criminal justice system of the states.” Curtis A. Bradley, *A New American Foreign Affairs Law?* 70 U. COLO. L. REV. 1089, 1101-1102 (1999).

<sup>36</sup> American politicians have always tried to devise ways to influence foreign public opinion overseas as a way of helping foreign policy initiatives, a concept advanced by Benjamin Franklin beginning in 1757, when as envoy to England. ALVIN A. SNYDER, *WARRIORS OF DISINFORMATION* 14, 38 (Arcade Publishing, New York 1995). The executive branch dominates the conduct of foreign relations because of “the unity of the office, its capacity for secrecy and dispatch, and its superior sources of information; to which it should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time.” Goldsmith, *supra* note 33, at 1397. Congress plays a largely “reactive role” in U.S. foreign policy matters, primarily concerning itself with the deliberative and legislative functions, not international relations. *Id.*

The metaphor of the President as “sole organ,” however, is a misleading constitutional premise and its ambiguity might have been redefined after World War II, but subsequent judicial opinions throughout the Cold War adopted the “sole organ” concept and “transformed it into a watchword in the discourse of expediency.” Paul, *supra* note 28, at 690, 694 (explaining that Justice Sutherland lifted the metaphor out of context from then Congressman John Marshall, during a floor debate of the House of Representatives.) During Marshall’s argument in support of President Adams’ request for extradition of a British subject pursuant to the Jay Treaty, Marshall stated that “the President ‘is the sole organ of the nation in its external relations’ in the sense that the demand of a foreign nation can only be made on him.” *Id.* Although out of context to Marshall’s argument, Justice Sutherland created the “sole organ” metaphor from the statement to support the constitutional interpretation that “the President’s foreign relations powers were plenary and neither derived from, nor were limited by, Congress.” *Id.*

<sup>37</sup> Jonathan A. Bush, *The Binding Of Gulliver: Congress And Courts In An Era Of Presidential Warmaking*, 80 VA. L. REV. 1723, 1747 (1994)

isolationists' attitudes toward American values, disrespect of international law and customs, or a genuine skepticism over other sovereign's commitment remains to be settled. In a time where Cold War posturing has slumped, this potential "jurisprudential turning" might well expose serious conflicts within America's conscience regarding its international obligations.<sup>38</sup>

Balancing these national values and responsibilities with international concerns is a precarious operation, and sometimes the lawyer's role in justifying a policy is "to put the best legal face on it they can."<sup>39</sup> But government attorneys creating interpretations are also caught in an undercurrent of ethical responsibility, because "we make a particular, non-generalizable moral appeal when we remind someone that he or she is an attorney."<sup>40</sup> Each attorney's duties are grounded not in his or her personal moral or religious beliefs, but in the "function" he or she performs

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<sup>38</sup> G. Edward White, *Observations On The Turning Of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1111 (1999)(defining "jurisprudential turning" as "one of those moments in which an academic field's core presuppositions shift from being beyond dispute to being up for grabs").

<sup>39</sup> Abram Chayes, *Living History Interview*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 459, 469 (1997). America's foreign policy and diplomacy is a constant negotiation over a host of interests, involving some interests that are inversely proportional to others, which does not result in a uniformly positive result.

Any success for the opponent might have an inverse impact or work as an immediate detriment to the U.S., so "issues of long-term trust and binding relationships" are unfortunately compromised. Karen F. Copenhaver, *Negotiation Of Strategic Alliances: Evidence Of A Paradigm Shift* 1132 PLI/CORP 41 (1999). Ultimately, "there are no rules by which the game is played, except the rules you make or the ones your adversary makes." XAVIER M. FRASCOGNA AND H. LEE HETHERINGTON, *NEGOTIATING STRATEGY FOR LAWYERS* 7 (Prentice-Hall, Inc., New Jersey 1984)(immediately following this comment, Frascogna and Hetherington emphasize that in addition to avoiding illegal conduct, lawyers must maintain a professional standard of conduct). "The essence of negotiating is managing the other side's perceptions and expectations." ALAN N. SCHOONMAKER, *NEGOTIATE TO WIN* 39 (Prentice-Hall, New Jersey 1989).

<sup>40</sup> Wendel, *supra* note 16, at 37.

within society.<sup>41</sup> That function is emphasized in the following canon of professional ethics:

“No client, corporate or individual, however powerful, nor an cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation.

Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.”<sup>42</sup>

The function of the attorney and the ethical guidance of this canon seem to create an inflexible posture for the government attorney. The attorney is to provide a Pavlovian response after a review of the law by advising the client to conform their conduct to both the letter and spirit of the law. In the international practice of law, however, the government attorney’s role is somewhat more complex and the ethical guy wires seem perilously slack. There are two imminent sets of formal authority guiding the attorney’s analysis, the ethical rules of professional responsibility guides the conduct of the attorney, and naturally the second authority guiding the conduct of

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<sup>41</sup> *Id.*

<sup>42</sup> ABA CANONS OF PROFESSIONAL ETHICS, Art. 32, *The Lawyer’s Duty in Its Last Analysis*.

both the client and attorney is the applicable law.<sup>43</sup> A third, but informal guide is those moral duties inherent within the functional role of an attorney.

Both, political and legal institutions can be stressed in the dichotomy between adhering to conventional arrangements and adapting to seemingly unprecedented international developments.<sup>44</sup> The proliferation of bilateral and multilateral treaties has all but scuttled the old weathered boat law<sup>45</sup> as the primary source of international law,<sup>46</sup> leaving the government attorney practicing international law faced with duties to uphold the laws of the United States, the law between the United States and treaty parties, and the law of the international community established as customary practice.

Points at which the United State's actions deviate from one or more these laws must, of course, be defended in some internationally acceptable fashion in order to avoid or defeat the unsavory allegation of a "breach." As an advisor, the government

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<sup>43</sup> Both the ethical rules and the law require an interpretation by the attorney. From one ethical perspective, the attorney satisfies the requirements of professional responsibility if he or she adheres to the "client's values and objectives," not in violation of the law. Wendell, *supra* note 16, at 21. From another ethical perspective, an attorney's compliance with the rules of professional responsibility must be interpreted in accordance with the purpose of the rules. *Id.* at 23. The ultimate question is whether an attorney's interpretation of the professional responsibility rules could include nullifying the "law." *Id.* at 24. Do we treat the purpose of our law solely as a means for lawyers and the courts to resolve disputes, or do we include a preeminent role for the law to guide parties' conduct? The purpose of our ethical rules could also envision two purposes, (1) to govern the attorney's advice to clients on compliance with the law, and (2) to govern the attorney's conduct during litigation and interaction with the courts.

<sup>44</sup> Caldwell, *supra* note 9, at 229. Should we ever presume a "good faith" consistency in interpreting the "law," when a common law jurisdiction adheres to precedent and a civil code jurisdiction may give no considerations to prior decisions? See Vienna Convention on the Law of Treaties, adopted May 22, 1969, entered into force, January 17, 1980, Art. 26, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 8 INT'L LEG. MATS. 679 (1969).

<sup>45</sup> An endearing reference to the litigation involving the early shipping vessels that greatly contributed to the adoption of customary international law as part of U.S. law. See generally *Cook v. United States*, 288 U.S. 102 (1933); *The Paquete Habana*, 175 U.S. 677 (1900); *The Amiable Isabella*, 10 U.S. (6 Wheat) 1(1821); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

attorney is constantly at the heart of the debate over whether the United State's practice could be characterized as an expression of the sovereign's inherent values or whether it is perceived as a violation of international law.<sup>47</sup> Can we ethically, legal and functionally reconcile the priority of national values involved in these activities consistent with our responsibilities under international law

A brief excursion is in order to appreciate that how the attorney defines "law" quickly distinguishes the nature of the interpretation or advice the government attorney provides. While the desires of our government clients can vary with "popular opinion, the vote of the electorate, or the whims of their superiors, the law to

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<sup>46</sup> Steven Lee, *A Puzzle Of Sovereignty: Sovereignty Either Is Or Is Not*, 27 CAL. W. INT'L L.J. 241, 260 (1991)(stating that treaty law has superceded customary international law as "international legislation").

<sup>47</sup> Situations typically involve competing national and international values as well as politics, law and national security concerns. For example, while campaigning, John Kennedy challenged the Eisenhower administration's lapse in national security precautions allowing the missile gap with Russia close. GARRY WILLS, *A NECESSARY EVIL* 315 (Simon & Schuster, New York 1999). Eisenhower could not debate the matter, even though U-2 flights over Russia revealed that there was no Russian missile superiority, because the existence of the U-2 was a secret. *Id.* While the U-2 flew above the Russian surface-to-air missiles, the Russians could track it on their radar and knew it existed, but the U.S. population was not told of the flights to avoid having a discussion of air rights. *Id.*

What about a proposal to kidnap foreign nationals involved in nuclear weapons research? The U.S. Congressional Research Service (CRS), who was concerned with nuclear proliferation and possibility that terrorists might obtain one of the nuclear weapons drafted a report, "Nuclear, Biological, Chemical Weapons Proliferation: Potential Military Countermeasures," proposing "bribing, rehiring, or kidnapping scientists and engineers involved in nuclear weapons programs." Barry L. Rothberg, *Averting Armageddon: Preventing Nuclear Terrorism In The United States*, 8 DUKE J. COMP. & INT'L L. 79 (1997).

Also, during World War II, President Roosevelt, operating from an assumption that the Japanese were afraid of bats, directed Bill Donovan, the Office of Strategic Services and the Army Air Corps to cooperate in a program "to catapult and parachute bats out of bombers flying over Japan." JOHN RANELAGH, *THE AGENCY* 57-58 (Simon and Schuster, New York 1986). The program was terminated several years later, "only because the bats persisted in freezing to death at the high altitudes flown by bombers." *Id.*

which both officials and the attorneys owe their allegiance should remain unaltered.”<sup>48</sup>

“Law” is a logical extension of principles that reflect our beliefs, and those principles are logical only in the sense that they define those beliefs.<sup>49</sup> The general distinction between the beliefs and the logical extensions we call “law,” is that the beliefs are attributable to the individual and the “law” is attributable some form of government. Lawyers, much of the time, “earn the appellation ‘creative’ by reading old texts in new ways,” vesting the texts with meanings in an attempt to reconcile or harmonize these various principles or activities within the legal system.<sup>50</sup>

As a result, numerous legal principles can exist, but a lack of commitment (on the part of the government) or a lack of consistent behavior (in the case of an individual’s beliefs) can compromise, alter or discard a legal principle, but only within that particular legal system.<sup>51</sup> In any number of areas, and with religious and political matters most often, we confront the reality that legal principles based on simply logic and theory must inevitably yield at the point of irreconcilable origins or ideas.<sup>52</sup>

Much of the concerns surrounding international law involve qualities of human existence, such as cooperation, respect for life, the sense of reciprocity,

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<sup>48</sup> Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 270 (1999) (quoting Eric Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. A.B.N.Y. 649 (1977)).

<sup>49</sup> Dow, *see supra* note 3, at 1.

<sup>50</sup> *Id.* The analysis is further complicated by understanding that the Constitution does not provide a basis to distinguish between the “domains of law and politics.” Tushnet, *see supra* note 31, 1061.

<sup>51</sup> *Id.*

compassion, and sacrifice for others, which have developed through custom anterior to all law.<sup>53</sup> Law made its appearance under “the sanction of priests and chiefs,” who succeeded in perpetuating these customs that were essential to society, along with other cleverly intermingled conditions that gave permanence and respect to their self-serving interests.<sup>54</sup>

Philosophers joined the arena, questioning our laws and existence using techniques of logic and semantics, which to some extent blinded the vision of understanding.<sup>55</sup> Napoleon contemptuously labeled those philosophers who challenged his ambitions as “ideologists,” as a derogatory reference to doctrinal meaning or approaches to understanding that he regarded as impractical or unrealistic.<sup>56</sup> During the nineteenth century, the term “ideology” came to reflect a political reality and displaced the purely scholastic or contemplative modes of thought.<sup>57</sup> Its importance today denotes that, “common speech” or the use of language often contains more philosophy and is of greater significance for the analysis of legal issues than solely academic disputes.<sup>58</sup>

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<sup>52</sup> *Id.* at 6.

<sup>53</sup> JAMES A. GOULD AND WILLIS H. TRUIT, *POLITICAL IDEOLOGIES* 448 (Macmillan Publishing, New York 1973)(reprinting PETER KROPOTKIN, *LAW AND AUTHORITY* (Freedom Press, London 1886).

<sup>54</sup> *Id.* at 449.

<sup>55</sup> WILLIAM BARRETT, *THE ILLUSION OF TECHNIQUE* xv (Doubleday, Anchor, Garden City 1978).

<sup>56</sup> GOULD AND TRUIT, *supra* note 53, at 22, (discussing Karl Mannheim’s differing conceptions in *IDEOLOGY*).

<sup>57</sup> *Id.* at 23.

<sup>58</sup> *Id.* This point raises a collateral issue referred to as the “two cultures phenomenon, or the radical disjunction between academic discourse and practical law, which sees the legal world as being divided between the academic and the practical, and these divisions have distinctive methodology as well as distinctive modes of discourse.” Dow, *see supra* note 3, n. 186 (noting Wellington, *Challenges to Legal Education: The Two Cultures Phenomenon*, 37 *J. LEGAL EDUC.* 327 (1987)(the assertion made is that legal scholarship often has “no relevance whatsoever to do with Law - and hence nothing to do with the real world...populated by men and women who hold competing beliefs.”).

The two traditional academic approaches to international law are: (1) positivism, which assumes that international law exists independent of context and can be objectively determined; and (2) aspirational idealism, which is a system of rules and principles that serves to influence policy preferences deemed appropriate by the author.<sup>59</sup> Both of these academic approaches ignore real world contexts, involving politics, government, society and culture, and consider the law as being “objectively determinable.”<sup>60</sup> The obvious fundamental objection to comparisons of academic commentary with the real world commentaries is the synonymous use of the term “international law” in aggregating these distinctly opposing legal philosophies.

But, the objection is based on more than a semantic distraction. The inherent flaw of the academic or objectively determinable international law concept is that its existence is primarily based on examples of international cooperation, which might reflect either coincidences of interest or coercion, but are void of “normative import.”<sup>61</sup> Law may be “shaped by both the persistence of custom and the perception

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I referenced this particular commentary primarily because it emphasizes that we collectively have specific beliefs and that our identity as a nation is defined by those beliefs. Dow states that, “We shall believe these things forever, because when we stop believing them, we will no longer be who we are. When we stop believing them, we will be preparing to undergo, or we will have undergone, another Revolution.” *Id.* The distinction in methodology contrasted in the “two cultures phenomenon,” creates an entirely separate debate, because all education arguably occurs in a vacuum of some context. Understanding, steeped in experience, naturally has practical advantages, but in any context “narrowness of focus, whether you are trying to explain the utterances of a single individual or the actions of the members of a practice, is not a barrier to understanding; it is indispensable to understanding.” Fish, *see supra* note 24, at 509.

<sup>59</sup> Phillip R. Trimble, *The Plight Of Academic International Law*, 1 CHI. J. INT'L L. 117, 119 (2000).

<sup>60</sup> *Id.* at 119-20.

<sup>61</sup> Jack L. Goldsmith and Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000)(excerpted from *Forty Years Of Scholarship: Excerpts From Articles In The Virginia Journal Of International Law That Charted New Paths And Captured Historic Moments*, 40 VA. J. INT'L L. 849, 965 (2000).

of change,” but characterizing a generally accepted principle as world law requires a considerable leap in formality.<sup>62</sup>

The academic approach also excludes the impact of the ethical rules in the analysis or alternatively presumes an immediate adoption of the preferred legal principles after a comparative analysis. For example, consider that a government client, dissatisfied with restrictions on their conduct, seeks to have the government attorney develop a fresh or current interpretation to defend the client’s conduct, in such a manner to distinguish their conduct from a breach of international legal concepts. If the attorney defines international principles as obligatory, or “law,” within the courts of the United States, the government client’s inconsistent conduct would constitute a breach or violation of law. Alternatively, if the government attorney considers these principles non-obligatory, at least until Congress has promulgated a statute or the President formally binds the country through a treaty,

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<sup>62</sup> Caldwell, *supra* note 9, at 228. “Propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.” Wendel, *supra* note 16, at 21. But, note we cannot assume that we are comparing values of our “national” community with the same ordering of values that exist independently within every other sovereign in the international community. “The characteristics of legal ordering (external prominence, generality, regularity) and legal technique (dominated by the search for effectiveness and therefore inclined towards simplicity, precision, and security) explain why a certain tension must exist between reality and the law as a precept, why a certain formalism in the law is indispensable.” Kuntz, *supra* note 8, at 1335.

In one sense, “law” refers generically to a type of “systematic, institutionalized social control.” Terrell and McNamee, *see supra* note 11, at 486. “Law” is a system of defined, generally accepted norms of morality, which allow for exceptions or qualifications or where actions can be evaluated as acceptable or unacceptable in a variety of situations. Wendel, *supra* note 16, at 39.

“Law is, for him, neither exclusively a knowable series of rules available for application to any given case, nor a governmental power base, nor a mechanism designed to fulfill particular ends, such as economic efficiency or even the betterment of the general welfare. Law is, largely, rhetoric.” Richard H. Weisberg, *Law And Rhetoric*, 85 MICH. L. REV. 920 (1987)(quoting from JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

then the government client's inconsistent conduct might provoke criticism, but it is not a violation of "law."<sup>63</sup>

The immediate reaction from the legal scholar would be that customary international law is part of the law of the land, binding on the attorneys, parties and the courts to uphold.<sup>64</sup> Still, that customary international "law" is not of such legal or logical binding strength that it would invalidate an agreement or treaty between two sovereigns to conduct their affairs contrary to that law, especially when considered in the light of the court's approach is that "a mere violation of law not embodied in a treaty is not binding on the United States."<sup>65</sup> If customary international law is not truly definitive until the President, Congress or the courts comment on it, then the government attorney is legally and ethically allowed to "create" an interpretation on

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<sup>63</sup> Consider that under the U.S. interpretation, the President has the authority to override customary international law. *United States v. Alvarez-Machain*, 504 U.S. 655, 678 (1992) n. 20. At 686, n. 34, noting that the Executive's view has changed over time, because the Office of Legal Counsel had previously advised the administration that "such seizures were contrary to international law because they compromised the territorial integrity of the other nation and were only to be undertaken with the consent of that nation." *Id.* citing 4B Op. Off. Legal Counsel 549, 556 (1980). Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101<sup>st</sup> Cong. 1<sup>st</sup> Sess., 4-5 (1989)(statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice). Despite protests by the Government of Mexico, the U.S. Supreme Court held that the existence of an extradition treaty could not be interpreted to imply a prohibition against abductions. *Id.* at 669-670.

<sup>64</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). But, the courts are unlikely to ever treat an act of Congress or of the President that violates customary international law as an act in violation of the United States Constitution. Stefan A. Riesenfeld, *The Powers Of Congress And The President In International Relations: Revisited*, 87 CALIF. L. REV. 817, 824 (1999)(Congress has even exercised the power to appropriate funds for activities in violation of customary international law). A treaty must be interpreted in conformity with the U.S. Constitution. *Barr v. U.S. Dept. of Justice*, 819 F.2d 25, 27 (2d Cir. 1987); (the U.S. Constitution is supreme over a particular treaty) *Reid v. Covert*, 354 U.S. 1, 16-18 (1957); (international law is subject to the U.S. Constitution) Restatement (Third), Foreign Relations Law of the United States, Chap.2, §111, at 40.

<sup>65</sup> *United States v. Postal*, 589 F.2d 862, 873 (5th Cir. 1979)(in rejecting defendant's complaint for illegal abduction to U.S. jurisdiction, and citing *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); also stating the Ker-Frisbie doctrine that due process is limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant. *Id.*, citing *United States v. Cadena*, 585 F.2d 1252, 1259-60 (5th Cir. 1978).

behalf of his or her government client, provided that the interpretation is consistent with any treaties between the States.<sup>66</sup>

Even the aspects governing treaty formulation can quickly expose confusion over a treaty's true status as "law," which can be determinative as to whether the treaty is binding on the attorneys, States and the courts to uphold.<sup>67</sup> With treaties, the initial inquiry begins with whether the agreement has been ratified by the United States Senate, whether it was intended to be self-executing or requires complimentary legislation, and finally whether rights or remedies are created and for whom.<sup>68</sup>

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<sup>66</sup> The President has increasingly developed the practice of entering Executive agreements of various types, such as reciprocal trade agreements upon authorization of the Congress, which the Department of State formerly published in the "Treaty Series," before the current "Executive Agreement Series" was created. Stefan A. Riesenfeld, *The Power Of Congress And The President In International Relations: Three Recent Supreme Court Decisions*, 87 CALIF. L. REV. 786, 813-14 (1999)(noting that these Executive agreements do not have the force of treaties). These Executive agreements would undoubtedly displace contrary customary international law.

<sup>67</sup> The Charter of the United Nations, although adopted by the United States, is not a self-executing international obligation. *United States v. Noriega*, 746 F.Supp. 1506 (S.D. Fla. 1990) at 1534, at n. 33, *aff'd* 117 F.3d 1206 (1997), citing *People of Saipan v. U.S. Dept. of Interior*, 502 F.2d 90, 100 (9th Cir. 1974). Courts have historically enforced federal statutes enacted subsequent to a treaty, even if the statute violates a prior treaty. Riesenfeld, *see supra* note 64, at 824, (and commenting that the Constitution is superior to all treaties, as it is superior to other laws, and the courts may examine the constitutionality of treaties as they do in regard to statutes).

<sup>68</sup> "The self-execution question is perhaps one of the most confounding in treaty law. Theoretically a self-executing and an executory provision should be readily distinguishable. In practice it is difficult." *United States v. Postal*, *supra* note 65, at 876, quoting Reiff, *The Enforcement of Multipartite Administrative Treaties in the United States*, 34 AM.J.INT'L L. 661, 669 (1940). To determine if a treaty provision is self-executing, the court considers: "the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range consequences of self-or non-self-execution." *United States v. Postal*, *supra* at 877, citing *People of Saipan v. U.S. Dept. of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).

As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved. *United States v. Noriega*, *supra* note 67, at 1533, citing *United States v. Hensel*, 699 F.2d 18, 30 (1st Cir.), cert den. 461 U.S. 958 (1983). It is the contracting state that has the right to complain, because treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress. *United States v. Noriega*, *supra* at 1533, citing *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988). The U.N. Charter,

The practical challenge for the government attorney's is to reconcile the functional duty to uphold the international "law" with the ethical duty to simultaneously, zealously represent the government client's attempt to justify or redefine their conduct. These various approaches result in numerous potential interpretations.

Accepting a supranational definition of international law, the government attorney faces an ethical conflict in each case in which the client desires to act inconsistent with the concept of world law, but consistent with national law. The government client arguably has a binding commitment according to this approach to act consistent with international law, including interpreting their responsibilities consistent with the purpose of illusory worldly moral obligations.

Accepting the alternative "national" method of defining international "law," the government attorney has no ethical conflict, because each of the government client's actions can now be interpreted consistent with their national responsibilities. Of course, the client is free to perform any additional international activities, moral or

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O.A.S. Charter, and Hague Convention do not provide for individual rights of standing. The Protocol Additional to the Geneva conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed conflicts (Protocol I), U.N. Doc a/32/144 Annex I (1977). Also note, that the U.S. Congress has expressly declined to ratify Protocol I. S. Treaty Doc. 2, 100th Cong., 1st Sess. iii-iv (1987). *United State v. Noriega, supra* at 1533, n. 32.

International covenants, including those like Protocol I, often represent a developing consensus about substantive and procedural due process. *Ahmad v. Wigen*, 726 F.Supp. 389, 406 (E.D.N.Y 1989). American courts may take into account this consensus in interpreting their own Constitution and other laws. *Id.*, noting M. FRANKEL WITH E. SAIDEMAN, *OUT OF THE SHADOWS O NIGHT: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS* 37 (1989) ("Law, especially international law, is not made only by treaties and statutes; it is also generated by the customary usage and beliefs of the civilized people of the world." On appeal, *Ahmad v. Wigen*, 910 F.2d 1063, 1066, the Second Circuit affirmed the extradition of Ahmad, but criticized the lower courts discussion of matters not limited or related to the probable cause to extradite.

otherwise. Organizing and ordering a client's obligations consistent with the law and concurrently abiding by the professional ethical requirements are fully accomplished using the "national" method of defining international law. This analysis reflects a competent resolution of multiple agreements and competing authorities - it is the function for which attorneys are educated and the type of representation the ethical authorities practically mandate.

Do States to international agreements violate those agreements and presumably customary international law, only when another party substantiates a violation according to their national order of defining international law <sup>69</sup> Recall that the responsibility for competence, zealous representation and confidentiality of the government client is no different than representing an individual and maybe in some cases even more important. My argument is that while the principles of international law envision the orderly conduct of international relations, a sovereign's acceptance

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<sup>69</sup> While customary international law is "part of the law of the land," it has only the binding force of statutes. Riesenfeld, *see supra* note 66, at 786. This extension of customary international law or treat law arguably has such binding force only upon individuals, but is a matter of moral compliance for the State, who can take the extreme approach to declare war.

The role of the courts is to evaluate whether a particular congressional or executive act is consistent with the constitutional delegations of authority, which would clearly include determining whether the Executive has usurped Congress' exclusive authority to declare war. *United States v. Noriega*, *supra* note 67, at 1539, citing *Ailee v. Laird*, 347 F.Supp. 689, 702 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973). But, the court noted that, the morality of war is a "political question in its most paradigmatic and pristine form." Such an analysis,

raises the specter of judicial management and control of foreign policy and challenges in a most sweeping fashion the wisdom, propriety, and morality of sending armed forces into combat - a decision which is constitutionally committed to the executive and legislative branches and hence beyond judicial review. Questions such as under what circumstances armed conflict is immoral, or whether it is always so, are not ones for the courts, but must be resolved by the political branches entrusted by the constitution with the awesome responsibility of committing this country to battle.

of those principles and the associated international responsibilities concerns an ordering of internal national values - not external legal ones.<sup>70</sup>

### **Developing a National Approach**

We typically turn to the nation's courts to define or interpret Constitutional responsibilities or examine legal compliance with a given standard. But the courts when faced with the hard question of how to approach international concerns and American foreign policy objectives have emphasized that defining American values and creating policy is a responsibility of the Executive branch and Congress. For example,

“In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. But the basic and important corollary is that the people may remove their elected representatives as they cannot dismiss United States judges. This elementary fact about the nature of our system, which seems to have escaped notice occasionally, must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the

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United States v. Noriega, *supra* at 1539.

<sup>70</sup> Kuntz, *supra* note 8, at 1335. While adopting this position as the theory of the thesis, two underlying premises are intertwined that support this position. First, the U.S. Constitution should be the gyroscope for evaluating our international activities and responsibilities - it serves as our nation's primary value. This premise is not, admittedly, a novel concept for legal analysis developed by this author, but the concept is on occasion forgotten during the analysis of international law issues. National security, individual rights, humanitarian principles, economic and environmental issues, as well as our international activities must be construed to support this primary national value or be subordinated to it. Secondly, modern ethics in all professional fields has gradually moved from the authoritative principles of “tradition or culture” to “rationally grounded moral and procedural principles.” Darryl Reed, *The Realms of Corporate Responsibility: Distinguishing Legitimacy, Morality and Ethics*, 21 J. BUS. ETHICS 23 (1999). This development or movement to a “procedural” activity effectively creates a forum - an environment for legal advocacy, and ultimately an opportunity for the government attorney to influence the selection of morality or values and policy.

congress and President, even were we so bold as to assume that we can make a better decision on such issues.”<sup>71</sup>

Today, the world is now more interdependent than ever, with the line between domestic and foreign policy practically erased, we have inseparable security and economic interests.<sup>72</sup> Transnational threats such as international crime, drug trafficking, terrorism, proliferation and environmental damage respect no borders and the failure to confront and resolve them diplomatically will inevitably shift the burden to America’s military.<sup>73</sup> It is important, given the American tendency to protect its boundaries and also lead in international activities, that our foreign policy projects our interests in a manner that does not isolate the United States from the international community in the future.<sup>74</sup>

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<sup>71</sup> *United States v. Noriega*, *supra* note 67, at 1540, citing *Pauling v. McNamara*, 331 F.2d 796, 799 (D.C.Cir. 1963), *cert.denied*, 377 US 933 (1964).

<sup>72</sup> WARREN CHRISTOPHER, *IN THE STREAM OF HISTORY* 493-94 (Stanford University Press, Stanford 1998). America’s approach, though not necessarily unique to us, is to generally treat foreign affairs cases, not as an “international geopolitical” legal matters, but rather as a domestic or international economic issue with a nominal “foreign” component. G. Edward White, *supra* note 38, at 1116.

<sup>73</sup> *Id.* at 489-96, (remarks to U.S. Military Academy, West Point, New York, Oct 25, 1996 on combining diplomacy and force to advance America’s interests and ideals). “American leaders have traditionally viewed diplomacy and military strategy as being separate activities.” HENRY KISSINGER, *DIPLOMACY*, 479-80 (Simon & Schuster, New York 1994). In the conventional scenario, the militar achieves an outcome and then the diplomats negotiate the conduct of future relations, with each activit being conducted sequentially and independent of the other. *Id.* These activities are conducted concurrently in today’s limited war, and a failure to synchronized the military and political goals at the before initiating force risks escalation into conventional war or a sacrifice of leverage which results in a stalemate. *Id.*

<sup>74</sup> KISSINGER, *YEARS OF RENEWAL*, *see supra* note 34, at 1076. Limiting ourselves to accepting either the value of pragmatism or morality in developing U.S. foreign policy is a misleading choice. *Id.* “Pragmatism without a moral element leads to random activism, brutality, or stagnation; moral conviction not tempered by a sense of reality leads to self-righteousness, fanaticism, and the erosion of all restraint.” *Id.* “The Iran-Contra Affair represents the foreseeable product of Constitutional interpretation that values pragmatism over principle and flexibility over clarity.” Anthony Simones, *The Iran-Contra Affair: Ten Years Later* 67 *UMKC L. REV.* 61, 76 (1998).

Government attorneys must recognize that “[o]ther than national defense, there is no internationally shared understanding of justifications for the use of military force,” and use of force does not necessarily correlate to “law” in every other State’s interpretation. ROBERT S. MCNAMARA, JAMES BLIGHT, ROBERT BRIGHAM, THOMAS BIERSTEKER AND COL HERBERT SCHANDLER, *ARGUMENT WITHOUT END* 389 (Public Affairs, New York 1999). There is a temptation, by American and some

America's foreign policy should be reflective of our democratic values, which in turn should determine our diplomatic posture as well as the purposes for which America uses its power.<sup>75</sup> Instead of creative values, though, America's foreign policy reflects political concerns derived from our formative experiences.<sup>76</sup> These formative experiences sometimes "inhibit our capacity to understand the vulnerabilities of other societies or international orders," and characteristically cause

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members of the international community, to view U.S. power as a dispensation and to use it to impose our preferences. KISSINGER, *YEARS OF RENEWAL*, *supra* at 1076 (warning that excessive reliance on power and excessive inconsistency on our virtue may wind up corroding the very values in the name of which our policy is being conducted). Still, before we can commit military forces there must have clearly stated objectives that are realistically attainable, with "a clear understanding of who the enemy is and what constitutes success." DAVID CALLAHAN, *UNWINNABLE WARS 191-92* (Hill & Wang, New York 1997)(quoting Assistant Secretary of Defense Stephen Hadley in August 1992. Callahan also quotes then Chairman of the Joint Chiefs of Staff Colin Powell's comment, "As soon as they tell me it's limited, it means they don't care whether you achieve a result or not."). Kissinger emphasizes the same three essential considerations for consideration before committing U.S. forces in the future: (1) a clear military strategy, including an unambiguous definition for realistic political success, (2) total commitment - no alternative to victory, and (3) an understanding that "a democracy cannot conduct a serious foreign policy if the contending factions within it do not exercise a minimum of restraint toward each other." KISSINGER, *DIPLOMACY*, *supra* at 667.

These statements reflect an ongoing concern the military's expanding use over, at least, the last two decades. During the late "80's," the Dept. of Defense strenuously opposed the militarization of the war against drugs. Peter M. Sanchez, *The "Drug War": The U.S. Military and National Security*, 34 A.F.L. REV. 109, 142 (1991)(Air Force General Robert Herres, Vice-Chairman, Joint Chiefs of Staff, urged Congress not to involve the military too deeply in the drug war.) Secretary of Defense Carlucci told Congress in June 1988, "The Armed Forces should not become a police force, nor can we afford to degrade readiness by diverting badly needed resources from their assigned missions." *Id.* "There is a growing tendency in American society today to accept the size, power, and resources of the military as a given and to look to it as a remedy source for meeting non-military needs." *Id.* at 152. With each instance that we resort to force to influence a non-defense related objective, we need to appreciate the same force has negative affects which potentially alienates another group within the international community. *Id.*

<sup>75</sup> *Id.* The art of developing foreign policy is to "discern from the swirl of tactical decisions the true long-term interests of an adversary country" and then "create a calculation of the risks and rewards that affect the adversary's calculations." KISSINGER, *DIPLOMACY*, *supra* at 481.

A nation's foreign policy should be based upon the nation's value system. John Yoo, *Federal Courts As Weapons Of Foreign Policy: The Case Of The Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 774 (1997). If we do not have a consistency between American foreign affairs policy and the nation's values, we inevitably favor or weigh national concerns more heavily and at the expense of the international concerns. As a result, "the less exceptionally we treat the sphere of foreign affairs law, the more the lines between domestic and foreign affairs law blur," and doctrines of American constitutional and common law become more important in defining how we interpret international law. White, *supra* note 38, at 1121.

<sup>76</sup> Rakove, *see supra* note 2, at 1600.

the U.S. to assume that every other new nation has the identical experiences in development.<sup>77</sup>

Foreign affairs development was originally based on the philosophy that the “internal” and “external” affairs of the United States, as “parceled out” in the Constitution’s text were essentially different.<sup>78</sup> But, “[t]here is no longer a bright line separating America’s foreign and domestic policy interests.”<sup>79</sup> America’s current foreign policy is founded on the premise that foreign and domestic policies are inseparable, although driven by three goals: (1) building American prosperity; (2) modernizing America’s armed services; and (3) promoting democracy and human rights abroad.<sup>80</sup> But, the “bedrock” of all U.S. policy is still our national security.<sup>81</sup>

In the national community, the President’s ability to shape and implement foreign policy is to some degree tied to his success in convincing Congress and the public of the importance of his initiatives.<sup>82</sup> But, “bipartisanship has not always been

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<sup>77</sup> KISSINGER, *YEARS OF RENEWAL*, see *supra* note 34, at 1076, (noting that the U.S. has historically enjoyed natural protective borders, friendly neighbors, and a population that has developed around a constitutional government).

<sup>78</sup> White, *supra* note 38, at 1114.

<sup>79</sup> CHRISTOPHER, *supra* note 72, at 109-100, (addressing the Los Angeles World Affairs Council, November 2, 1993, and emphasizing that the North American Free Trade Agreement clearly illustrates the links between foreign and domestic policy).

<sup>80</sup> *Id.* at 246-249, (He emphasizes that America’s responsibilities under this foreign policy are to avoid shortsighted indifference in maintaining the post Cold War momentum toward greater freedom and prosperity; maintain and strengthen our cooperative relationships, specifically with Japan, China and Russia; develop institutions that will promote economic and security cooperation, namely NATO, U.N., the IMF and the World Bank and the O.A.S.; and finally to support democracy and human rights worldwide.).

<sup>81</sup> KISSINGER, *YEARS OF RENEWAL*, see *supra* note 34, at 1076.

<sup>82</sup> Bruce E. Fein, *Promoting the President’s Policies Through Legal Advocacy*, FED. B. NEWS & J. 406 (1983). Competing against the Executive’s policy is the legislative branch lawyer, whose role is to promote the substantive agenda of a particular elected official and protect that representative’s political interests. Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 SPG-LAW & CONTEMP. PROBS. 31, 39 (1998). “The typical political lawyer on Capitol Hill act as though they have no particular obligation to the committee, to the legislative branch, to the Senate, to the United States,

the guiding star of American foreign policy.”<sup>83</sup> At the same time, one of the enduring characteristics of Congress, especially on foreign affairs, is “its eagerness to avoid clear-cut actions that will leave them unambiguously responsible if something goes wrong,” especially if they have acted contrary to the President’s objectives.<sup>84</sup>

An attorney in the executive branch “generally” has an ethical obligation to pursue the success of these initiatives, which includes the duty to develop plausible arguments to modify, distinguish or reverse any adverse precedent in order to

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and certainly not to the public in general.” *Id.* at 37-38. The lawyer working for the Senate Judiciary Committee could have several possible clients, but as a matter of practice, the Judiciary Committee lawyer’s client is a specific Member of Congress to whom the attorney’s professional loyalty is owed. *Id.* at 36-37. Foreign policy initiatives might be insufficiently sensitive to political issues in the elected representative’s home state, it may propose commitment or the clarification of language that the representative prefers to remain ambiguous, or it might be an initiative that is legally permissible but morally repugnant. *Id.* at 34, 40-41.

<sup>83</sup> WRIGHT, *supra* note 15, at 181. Of course, bipartisanship is not the issue where there is genuine Congressional disagreement with the President. In March 1999, Congress overrode President Clinton’s stance on missile defense with so much bipartisan support in both the House and Senate that President Clinton could not veto it. GERTZ, *see supra* note 25, at 5. The bill declared “that it is the policy of the United States to deploy a national missile defense.” *Id.*

The bipartisan consensus and support for American leadership has recently resulted in numerous successes, including a revitalized Middle East peace process, a WTO agreement with China, stopping the ethnic cleansing in Kosovo and raising the Balkan integration to near the top of the international agenda. Berger, *supra* note 26. But the real test of America’s foreign policy success in the future will depend in part on how our former adversaries, Russia and China, emerge as stable and prosperous democratic regimes. *Id.* The U.S. has warned Russia that its indiscriminate use of force in Chechnya is inviting more serious problems for itself, but the U.S. cannot stop supporting Russia’s effort to strengthen the rule of law and faith in democratic institutions. *Id.* Reluctance to entering the WTO agreement with China was overcome when the U.S. adopted the position that “there is simply no better way right now to encourage China to choose deeper economic reform and respect for the law. *Id.*

More generic issues are seemingly unapproachable due to their magnitude and the underlying cause is sometimes hard to distinguish from the condition. In Seattle, the protestors to the WTO complained that the WTO is too powerful and yet they argued for the creation of additional powers to impose and enforce worldwide labor and environmental standards. *Id.* Everyone, however, realizes that with 1.3 billion people around the world living on a dollar a day, there will be no future economic improvements if we do not open our markets to them. *Id.* (He notes, however, that concerns over forced labor and child labor cannot be forgotten while developing improved working conditions in these countries.)

<sup>84</sup> ROBERT M. GATES, *FROM THE SHADOWS* 311, 314 (Simon & Schuster, New York 1996).

effectuate the President's policy.<sup>85</sup> The caveat "generally" is conditioned on the fact that the government attorney's ethical responsibility is not directly to the President.

The encompassing predicament for the attorney is whether to treat the sovereign practice as a breach of law requiring opposition by the attorney, or an expression of values necessitating a balancing test or simply deference to the ethically designated decision-maker (client). The measure of an attorney's success or influence in affecting the determination is typically related to how well he or she recognizes the magnitude of the interests at stake and the priority of values involved in the process.

But a few words of caution are aptly stated as follows:

No lawyer is wise enough to decide that his concept of legal principle can never give way to the course of action which a responsible [official] charged with a legal duty and clothed with a Constitutional responsibility, thinks is wise. Let the [advising] lawyer who stakes his reputation on disagreeing beware: time and history have a way of vindicating the rightness of actions responsible officers have found necessary.<sup>86</sup>

Even if the President has the formal prerogative of establishing the "direction" of policies, the task of interpreting and implementing the policy falls to the

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<sup>85</sup> Fein, *supra* note 82, at 408. Recognize that the conflict between the Executive and Congress includes several levels of political players. Bell successfully kept the theater high-altitude air defense system (THAAD) from being field-tested or deployed by getting the Clinton administration to adopt a "traditional or narrow interpretation" of the Anti-Ballistic Missile Treaty, even though the issue was never raised by the Russians. GERTZ, *see supra* note 25, at 58. The Anti-Ballistic Treaty language between the US and Russia was ambiguous regarding the prohibition that "neither country can give missiles, launchers, or radar 'capabilities to counter strategic ballistic missiles.'" *Id.* Since the treaty provided no guidance for defining "capabilities to counter," the US and Soviet Union for decades had been free to determine the meaning of the language. *Id.* The Clinton administration wanted to avoid even theoretical or potential violations of the Anti-Ballistic Missile Treaty and requested a clarification at the "standing consultative commission" in Geneva. *Id.* Pentagon officials objected to the theoretical analysis that the possibility THAAD had "interception capability was arbitrary, self-imposed, and fashioned largely by a group of inter-agency lawyers with no expertise in weapons development..." *Id.*

government bureaucracies.<sup>87</sup> Typically, neither the President nor the appointed heads of these bureaucracies have the time or ability to monitor the implementation of their directives or policies.<sup>88</sup> It is equally important to note, from a practical standpoint, that the executive-branch bureaucracy has virtually no direct subordination to the elected president's appointees, because their career, pay, and promotions are only controlled by civil service rules and military regulations.<sup>89</sup>

Additionally, unaccountable congressional staff members conduct the vast majority of day-to-day decisions and policy determinations in concert directly with the unaccountable executive-branch career personnel.<sup>90</sup> These two career staffs effectively constitute "a fourth branch of government" impacting, if not actually deciding, key policy-making procedures.<sup>91</sup> Under these circumstances, it might be more likely to assume that the bureaucracy is working independently of the policy approach of the President. While some commentators might determine that "disclosure of the agency's position to the White House is appropriate,"<sup>92</sup> disclosure

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<sup>86</sup> Lawry, *see supra* note 24, at 70, quoting John Carlock, *The Lawyer in Government*, in *Listen to Leaders in Law* 255, 269 (1963).

<sup>87</sup> KISSINGER, *DIPLOMACY*, *see supra* note 73, at 789.

<sup>88</sup> *Id.*

<sup>89</sup> LEHMAN, *supra* note 23, at 271.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Richard Holbrooke expressed his frustration in attempting to create momentum within the federal bureaucracy for a common effort during his negotiations for a peace settlement in Bosnia. RICHARD HOLBROOKE, *TO END A WAR* 81-82 (The Modern Library, New York 1999)(relief came about only as the President began "imparting to everyone his own sense of urgency. Not for the first time, I observed the value of - indeed, the necessity for - direct, personal presidential involvement to overcome bureaucratic stalemates or inertia and give policy direction and strategic purpose."). "It's not the law that has to be changed but the culture of non-cooperation among the bureaucrats." DANIEL PATRICK MOYNIHAN, *SECRECY* 246 (Yale University Press, New Haven 1998) n. 37.

<sup>92</sup> Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality And Government Lawyer*, 5 *GEO. J. LEGAL ETHICS* 291, 305 (1991) n. 79.

of the client's confidences when not in violation of the "law" would not be appropriate under the ethical rules of professional responsibility.

Keep in mind, that the ethical rules require that the government attorney to zealously represent the "agency" client, with the general assumption that the agency follows the direction of the executive.<sup>93</sup> The (client) agency's goals might require that the attorney attempt to justify a policy that is inconsistent with the Executive's goals, and from an ethical perspective, the Executive does not necessarily drive the legal interpretations of the federal agencies.<sup>94</sup> The ethical rules require that the attorney advise the client regarding the international "law," which could be inconsistent with the policy of the President. Thus, our actions are consistent with the ethical rules and the law, but they defeat the constitutional objectives of Presidential control over the executive branch.

Another key factor in our interpretation of the law concerning American foreign affairs policy is that we are not all necessarily working from the same standards. The ethical rules require the attorney to follow the (agency) client's direction, which may be inconsistent with the President. Without Congressional legislation or a court interpretation, the agency approach or position becomes the

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<sup>93</sup> See *supra* note 24.

<sup>94</sup> While the Executive branch develops policies for the entire executive branch, whether those policies are treated as policy or "law" is determined by each agency. For example, "contrary to policy and contrary to law is a big difference at the CIA." BOB WOODWARD, VEIL: THE SECRET WARS OF THE CIA 503 (Simon and Schuster, New York 1987) ("It [is] a lawyer's game, divining 'purpose,' it ha[s] to do with state of mind, something elusive, an unavoidable, perhaps even useful ambiguity.") *Id.* at 227. In December 1982, President Reagan signed the Boland amendment, which prohibited the use of an US funds for the purpose of attempting an overthrow of the Nicaraguan government. The CIA decided that it could continue its activities to support the Contras by asserting that "nothing was done for the ostensible 'purpose' of overthrowing the Sandinista government." WRIGHT, *supra* note 15, at 421-22.

international "law," at least for that agency, and that agency's interpretation or approach might not be entirely consistent with the national interpretation of international "law." A conflict exists, for instance, in how far the concept of the activity can be expanded if the Presidential interpretation of the "law" is driven by a political standard, instead of a legal-ethical standard. The attorney for the agency clearly has a different approach when his or her interpretation of some conduct is regulated by an ethical standard, while the President's interpretation is driven by whether the activity might be an "impeachable offense."<sup>95</sup>

While the Constitution gives both the President and the Congress key roles in formulating national security policies and in marshalling the resources to carry them out, it is the President that directs the nation's foreign affairs activities through

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<sup>95</sup> In 1984, the CIA's William Casey pushed for third-country funding for the Contras, despite Secretary Shultz's admonishment that White House Chief of Staff James Baker had already stated that such solicitations might constitute "an impeachable offense." GATES, *supra* note 84, at 312, (Casey got an opinion from the Attorney General that "determined third country funding of the contras was legal permissible as long as no US funds were used for the purpose, and as long as there was not an expectation on the part of the third country that the US would repay the aid.")

Impeachment serves as the only direct means of stopping the President's unconstitutional conduct, especially where he may have the constitutional authority to act for national security purposes, but he is without legal authority (congressional approval) to spend federal funds in pursuit of the activity. Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 148-149 (1998)(noting that, "while a lawyer's natural tendency is to turn to the judiciary in the event of such unconstitutional behavior, the courts represent little more than 'speedbumps' to a President determined to ignore the law.") See also Lori Fidler Damrosch, *Impeachment as a Technique of Parliamentary Control Over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525 (1999).

Consider these observations after the publication of the Pentagon Papers: "The Pentagon Papers show that we have created, in the last quarter century, a new culture, a national security culture, protected from the influences of American life by the shield of secrecy... This world has a set of values, a dynamic, a language, and a perspective quite distinct from the public world of the ordinary citizen and of the other branches of the Republic - Congress and the judiciary." MOYNIHAN, *see supra* note 91, at 31, (taken from Richard Gid Powers' introduction).

military personnel, diplomats, and intelligence gathering.<sup>96</sup> The rationale for the Executive as the sole decisionmaker in this capacity is evidenced by the need for flexibility, not only in calculating national interest in formulating the policy, but specifically in order to make adjustments during the policy's implementation as circumstances dictate.<sup>97</sup> Innovations in military technology and the proliferation of nuclear weapons during the Cold War drastically reduced the time available for executive decision-making, leading to a "transformed relationship" between the President and Congress as a "necessary expedient for survival in an increasingly complex and threatening world."<sup>98</sup>

This transformed relationship and the "discourse of executive expediency" undermines the important roles the Executive and Congress perform under the Constitution.<sup>99</sup> Specifically, the expansion of executive power allows Congress to avoid public accountability for U.S. foreign policy, facilitates more frequent foreign interventions, undermines the coherence of our foreign policy, and exposes foreign policy-making to "capture" by foreign governments.<sup>100</sup> This Congressional deferral is compounded by the dichotomy between secrecy and accountability by the Executive, given that Congress is otherwise the only practical limit on the executive's

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<sup>96</sup> Riesenfeld, *see supra* note 64, at 819. The Courts presumed both the President and the Congress to act constitutionally unless demonstrated otherwise. Martin S. Flaherty, *Are We To Be A Nation? Federal Power Vs. "States' Rights" In Foreign Affairs*, 70 U. Colo. L. Rev. 1305 (1999).

<sup>97</sup> Yoo, *see supra* note 75, at 774.

<sup>98</sup> Paul, *supra* note 28, at 684.

<sup>99</sup> *Id.* at 671. "One important question to be asked is to what extent did the lack of a clear-cut policy by Congress contribute to the events we will be exploring in the weeks ahead." WILLIAM S. COHEN AND GEORGE J. MITCHELL, *MEN OF ZEAL* 57-58 (Viking, New York 1988)(then Representative Dick Cheney and the ranking Republican of the House Committee putting Congress on notice during the Iran-Contra investigations that it also had a measure of blame to accept.)

constitutional power to formulate and conduct national security, and inevitably works to produce constitutional crises.<sup>101</sup>

A statutory approach to making foreign policy is not necessarily a “healthy” alternative, even with both branches of government seeking bipartisanship.<sup>102</sup> The Constitution, in its allocation of foreign relations power, does not “purport to limit activity that affects foreign affairs to a single person or voice,” instead it creates an “invitation to struggle” for control of that authority.<sup>103</sup> Congress in the past has imposed its will and preferences in foreign policy by enacting laws, which the

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<sup>100</sup> Paul, *supra* note 28, at 678.

<sup>101</sup> Simones, *see supra* note 74, at 75.

<sup>102</sup> GATES, *supra* note 84, at 558-559.

<sup>103</sup> Jack L. Goldsmith, *Federal Courts, Foreign Affairs, And Federalism*, 83 VA. L. REV. 1617, 1689 (1997)(noting Edwin S. Corwin’s phrase). “What the Constitution actually says, is an invitation to struggle for the privilege of directing American foreign policy.” *See* COHEN AND MITCHELL, *supra* note 99, at 292-93, (citing THEODORE DRAPER, *AN AUTOPSY*, and quoting Edward S. Corwin). Presidents have historically used and abused their constitutional role of commander in chief to conduct activities “on the very fringes of their constitutional authority. *Id.*

The federal courts and the states, which are also players in foreign relations, lack the “information, expertise, unity, and national political accountability to make foreign relations judgments for the nation,” and the fear is that states would fail to “reliably take national (as opposed to state) interests into account.” Goldsmith, *supra* note 33, at 1395. State and local governments are becoming increasingly involved in foreign affairs, especially where there is no “specific indications of congressional intent to bar the state action.” Bradley, *see supra* note 35, at 1089. Although, the Senate has checked this broad executive power through reservations to the treaties, especially in the area of human rights, in order to preserve “national and state authority over certain traditionally ‘internal’ affairs.” Flaherty, *see supra* note 96, at 1277. The President and Senate have consistently attached reservations, understandings, and declarations to treaties, protecting state interests over foreign relations interests, to ensure that they do not preempt or affect inconsistent state law. Goldsmith, *Federal Courts, Foreign Affairs, And Federalism, supra* at 1674-1675.

Absent the Senate’s reservations, there is skepticism that the Supreme Court would do little to intervene in the affairs. Flaherty, *supra* at 1277. The Supreme Court has been increasingly willing to interpret and executive agreements despite foreign relations effects. Goldsmith, *supra* note 33, at 1427-28. The Supreme Court has never invalidated a treaty for exceeding federal authority or an executive agreement for reaching matters not within the treaty power. Flaherty, *supra* at 1277. But, the court has show a clear reluctance to preempt state law because of foreign relations effects, especially where the offending state activity has been thoroughly considered by Congress. Goldsmith, *supra* note 33, at 1433. When the courts branch into interpretations that involve foreign affairs matters, they are doing precisely what everyone thinks is illegitimate when done by the executive branch, which has more competence and arguably more constitutional authority. *Id.*

President arguably too often signed for political considerations.<sup>104</sup> This type of “shortsighted” approach to making foreign policy, can complicate decision-making and has the effect of “criminalizing” political differences between Congress and the Executive branch.<sup>105</sup>

### **Function vs. Flaunting**

Government attorneys, just as other individuals, enter government service with their own values and beliefs, much of the time with the desire to turn these ideals into enduring realities.<sup>106</sup> This desire inevitably leads to conflicts with other individuals, who hold different values and beliefs, especially when these competing ideals are compromised or rejected to create policy.<sup>107</sup> Before government attorney wholeheartedly adopts or facilitates an interpretation, for example, “with an emphasis on the policy of the world community, as opposed the subservience of humanitarian considerations for national security reasons,” there is a need to understand the impact of adopting another State’s interpretation (priority of values).<sup>108</sup> Reprioritizing or

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<sup>104</sup> GATES, *supra* note 84, at 558-559.

<sup>105</sup> *Id.* For example, Congress was started tampering with President Ford’s foreign policy options during 1975 and 1976, when the House prohibited the president from any further negotiations with Panama or the use of any funds to conduct any official discussions regarding “any U.S. rights in the Panama Canal Zone.” WRIGHT, *supra* note 15, at 257-58. Discrete discussions between Treasurer Secretary Robert B. Anderson and Panamanian leaders were terminated, and President Ford was statutorily precluded from conducting friendly relations with an important neighbor. *Id.* President Ford was again embarrassed by Congress’ subsequent meddling in the Greece-Turkey dispute, which jeopardized NATO security, the existence of vital U.S. installations in Turkey, and disrupted an important intelligence network along the southern border of Russia. *Id.*

<sup>106</sup> BAKER, *supra* note 26, at 40.

<sup>107</sup> *Id.*

<sup>108</sup> Tompkins, *supra* note 29, at 563. The Soviets made a historic miscalculation by agreeing to the human rights provisions in the 1975 Helsinki Final Act. GATES, *supra* note 84, at 88-89. The Soviets effectively “legitimized the efforts of their citizens and the West to implement the document’s principles concerning human rights and freedom of movement.” *Id.* Along with the Helsinki Act, the Jackson-Vanik amendment linked the U.S. grant of Most Favored Nation trade status to the allowance

weighing human rights closely to the value of national security can effectively change the political philosophy or ideology of a government.

The concern here is that by interpreting American foreign policy obligations using the supranational approach, an attorney with a personal affinity toward a particular international principle such as humanitarian treatment, economic parity, or environmental protection, might treat national "concern" over those principles as a national "commitment." Government attorneys asserting the supranational method of defining international law are arguably engaged in "transformative diplomacy," the

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of free emigration, and created a fundamental new value system within the Soviet Union involving human rights and trade. *Id.* By internalizing the values of democratic freedoms and peace, "the Soviet regime had essentially been converted into a form of democracy." PATRICK GLYNN, CLOSING PANDOR 'S BOX 264-67 (Basic Books, New York 1992).

Mikhail Gorbachev's policies are the "embodiment of the law of unintended consequences," because instead of reforming the economic and political mistakes of his predecessors, he sealed the fate of the Soviet Union and accelerated its doom. GATES, *supra* at 554. The human rights advancements were still at a cost. In January 1991, a peaceful demonstration in Vilnius resulted in the massacre of fifteen citizens in one night. VLADIMIR SOLOVYOV AND ELENA KLEPIKOV , BORIS YELTSIN 220 (G.P. Putnam's Sons, New York 1992)(Boris Yeltsin was shattered and reflected after his calls to Gorbachev, "It was Gorbachev who was removed from reality, because society had become even more politicized, but on the democratic side...My impression was that the leadership had decided that the democratic path was too hard, so they decided to turn to the hand of iron.")

Attempting to maintain inconsistent national values will cause "China to face its own rendezvous with this reality" in the future. GATES, *supra* at 554-55. China unquestionably holds a pivotal position in the world community, with "the world's largest army, including a nuclear arsenal, the third largest economy, and a veto in the U.N. Security Council." CHRISTOPHER, *supra* note 72, at 160. The U.S. and China have an interest in maintaining a stable and secure Asia, and China can make significant contributions toward resolving global issues such as environmental protection and drug trafficking. *Id.* But, linking human rights to Most Favored Nation status in China has had limited success and removing the status is unlikely to improve their human rights record. *Id.* China's focus on creating economic change and modernization without revising their political philosophy, will at some time reveal a clash within their ideology because "a market economy and communist rule are fundamentally incompatible." GATES, *supra* at 554-55.

concept that in the context of international relations, a formerly constant factor, such as the interpretative philosophy is treated as a variable.<sup>109</sup>

There are limits to what underlying conditions the attorney can change, although they can be effective in “identifying pressure points in a doctrinal structure,” and thereby persuade clients to accept the logic of a particular policy.<sup>110</sup> But, until we focus government attorneys on a consistent national process of interpreting international law, the ethical rules and functional responsibility of a government lawyer could easily justify using a logical supranational approach.<sup>111</sup> The statement that an attorney in a “constitutional democracy, ... must make moral decisions in accordance with public moral values” is unhelpful until we define both “public moral values” and the functional duties in making “moral decisions.”<sup>112</sup>

A government attorney’s concept of fairness or justice in formulating public policy might be considerably different from the conceptions held by the President or the attorney’s other superiors in the Executive Branch.<sup>113</sup> These concerns over the

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<sup>109</sup> Elizabeth Kopelman, *The Modern Machiavelli: Legitimacy, Conflict And Power In The International Legal Order*, 43 UCLA L. REV. 139, 144-145 (1995)(using Henry Kissinger’s terminology and definition).

<sup>110</sup> Tushnet, *supra* note 31, at 1061, (giving an example that the attorney cannot change the employment rate).

<sup>111</sup> Specific reference is made to Model Rule 2.1 *Advisor*: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

<sup>112</sup> Wendel, *supra* note 16, at 27.

<sup>113</sup> Fein, *supra* note 82, at 408. As a concept of orderliness fairness and justice have some relevance, but I contend these terms are unhelpful in defining the underlying values to be weighed. For example, one concept of justice involves “a component of public-mindedness” requiring the attorney to balance client’s good with “the duty to acknowledge and take seriously the good of society as a whole. Wendel, *supra* note 16, at 65. A similar concept adopts the philosophy of “legal merit,” that suggests we consider “general norms of political morality which undergird and lend legitimacy to the legal system.” *Id.* at 67.

United States' activities and policymaking justifiably lead many attorneys to question the practical limits on their advisory role. Here, distinguishing between differences in opinion between the attorney and agency representatives on "the best way to effectuate the agency's mission" and differences "arising when the lawyer's reasoned view of international law is at odds with that of the agency" is a fundamental consideration.<sup>114</sup>

But, as attorneys, we seem to lose our moral function in sacrificing the law in order to accomplish some temporary logical or political, face-saving advantage. As government lawyers facilitating these interpretations, we risk the "blinding" effect that this practice can have on the integrity of our profession and our self-respect, and the unpredictable impact it can have on the international community.<sup>115</sup> One recent commentary asserts that,

"[i]n practice there may be no 'safety net' other than the [government attorney's] own care, integrity and good faith against advice or advocacy which might undermine the national interest in respect for law or subvert or erode the international legal order. In other words, if the President tends to be unaware of the particulars of international legal obligations, while the Secretary of State is uninformed, Congress is deferential, national courts lack jurisdiction, international bodies lack the power of enforcement, and the American public is oblivious,

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Assuming that we accept any of these definitions, a different problem arises in its application. Consider, that "[justice] is legitimate if and only if the parties and others see it as a competent and sincere attempt to decide according to values, and only according to values, that have approval or acceptance from institutions that are accountable, on a fair basis, to everyone..." Michael J. Perry, *Response: The Law Professor as Moral Philosopher?* 11 YALE J.L. & HUMAN. 415 (1999).

<sup>114</sup> Ugarte, *supra* note 48, at 273. The Federal Bar committee report divided the possible wrongful conduct of government officials into four categories: corruption, clear illegalities with scienter, illegalities clear to the lawyer but subject to reasonable differences of opinion, and gross negligence. Donohoe, *see supra* note 24, at 991. It found that corruption and clear illegalities with scienter could always be disclosed, at least to the Attorney General, whereas illegal or grossly negligent conduct need not be disclosed beyond the agency. *Id.*

<sup>115</sup> BOK, *supra* note 3, at xix.

then the last word of the [government lawyer]...may become the first line of a policy rationale and the only voice speaking for international law.”<sup>116</sup>

As a government lawyer attempting to persuade other of the importance of international law, there might be an opportunity or even an obligation to weigh international values that extend beyond the confines of the organization,<sup>117</sup> especially if the government attorney’s ethical responsibilities have a broader context in an a system of separation of powers.<sup>118</sup> The danger most often associated with weighing values in this context is that lawyers will substitute their personal values for public values in advising the agency.<sup>119</sup> Attempting to “smuggle common morality through the back door,” is a complicated functional and ethical task, especially when we have not defined the “common morality” in terms of an ordering of national and international values.<sup>120</sup>

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<sup>116</sup> Tompkins, *supra* note 29, at 551, (quoting the ASIL/ABILA Joint Committee report regarding the (Dept. of State) Legal Advisor’s role and responsibility, but used synonymously for purposes of this thesis as a responsibility of a government attorney providing legal advice to his or her client within a particular agency. Advise pertaining to the international law should be interpreted consistentl throughout, at least the executive branch, but the attorney arguably has the ability to persuade his or her agency client to treat moral duties as obligations. ) But, there is again a distinction between arguing policy and law. *See generally* note 94. The debate concerns the limitations of an attorney’s duty to facilitate the administration’s foreign policy goals with “good lawyering and creative thinking,” when those goals are not “(1) clearly defensible under prevailing international legal norms; or (2) defensible through a good faith argument for the extension, modification, or reversal of prevailing international legal norms.” Tompkins, *supra* at 556.

<sup>117</sup> “There is at least a colorable inquiry into the ethical status of lawyers’ behavior must take into account more than simply whether or not rules are followed.” Wendel, *supra* note 16, at 14. *See also* Ugarte, *supra* note 48, at 269, (she argues definitively that “all lawyers have a duty to promote justice” as a higher obligation).

<sup>118</sup> Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, GOVERNMENT LAWYERS ETHICS 1293, 1299 (1987).

<sup>119</sup> Ugarte, *supra* note 48, at 272.

<sup>120</sup> Wendel, *supra* note 16, at 22. A collateral question raised in this thesis is how far we can take the meaning of Model Rule 2.1 in advocating moral responsibilities in international law, where there is an absence of U.S. law. This question begs the point of the thesis, that there is no supranational or international law, only national law that governs international activities. The synonymous or

There is a great deal of support in both primary and secondary legal ethics sources, as well as case law, for the proposition that government attorneys, as public or civil servants, owe special duties to society, including a “heightened obligation of fairness,” or a responsibility to represent the public interest.<sup>121</sup> Other lawyers completely disagree with the concept “that by virtue of being a lawyer we have an specialized knowledge that allows us to exert control over the political decision-making process.”<sup>122</sup>

Envisioning legal duties in this manner might be considered deceptive or a usurpation of an elected or appointed officials’ prerogatives in a democratic society, but the functional duty of an attorney arguably mandates it. The government as a whole, as opposed to an individual attorney, has the responsibility to create institutions to analyze and define public interests and values, but these international concerns are arguably of overwhelming importance and necessitate a departure from the attorney’s traditional conception of their advisory duties.<sup>123</sup> As attorneys, we face the concern that “a science which is either not observant enough to keep the norms of international law in contact with realities or lacks moral inspiration strong enough to raise them gradually above their positive and contingent forms can only lead to a

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comprehensive reference to international legal principles and the U.S. law governing international activities has caused confusion between legal and moral obligations.

<sup>121</sup> Tompkins, *supra* note 29, at 548-49.

<sup>122</sup> Nancy D. Polikoff, *Am I My Client?; The Role Confusion Of A Lawyer Activist* 31 HARV. CIVIL RIGHTS - CIVIL LIBERTIES L.REV. 443, 459 (1996).

<sup>123</sup> Ugarte, *supra* note 48, at 272, (citing *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L.REV. 1244, 1414).

devitalized law, just as a science which ignores the essentially normative character of law can only lead to confusion.”<sup>124</sup>

In a democracy, the “public-values version of avoiding unjustified paternalism” mandates that lawyers should defer to their clients’ direction on contestable moral matters absent their intention to violate the law.<sup>125</sup> But, is not the disregard of international legal principles and international values the point at which we should exercise our functional role? There is no ultimate resolution for attorneys, except that attorneys in their individual capacity, can be “activists,” but they should they should make a clear distinction between their activist and advisory activities.<sup>126</sup> In which case, we have circled back to attempting to define the law.

### **The “International” Flaw**

The complication within the legal community is not limited to the fractured ethical approach that creates policy inconsistencies, but also the real frustration over how to even approach “the fact that international law has never proven itself as law.”<sup>127</sup> Absent each sovereign’s consent to international obligations, no theory or

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<sup>124</sup> Kuntz, *supra* note 8, at 1335.

<sup>125</sup> Wendel, *supra* note 16, at 52-53.

<sup>126</sup> Polikoff, *supra* note 122, at 459. The attorney-activist distinction can occur in unusual contexts. In the 1979 book, *THE BROTHEREN* (written by Woodward and Armstrong, not to be confused with John Grisham’s 2000 fictional book by the same title), Supreme Court Chief Justice Warren Burger is portrayed as engaging in “quite a bit of quasi-parliamentary maneuvering” by assigning the responsibility for drafting opinions in a fashion to control the ideology of the law. KATZ, *see supra* note 18, at 63. His goal was “to make sure that important cases in criminal law, racial discrimination, and free speech were kept away from Douglas, Brennan and Marshall, his ideological ‘enemies,’” and he would even switch his vote from minority to the majority in order to retain the assignment power. *Id.*

<sup>127</sup> Diane P. Wood, *Diffusion And Focus In International Law Scholarship*, 1 *CHI. J. INT’L L.* 141, 142 (2000). “We do nothing to advance our position by apologizing for international law’s failures or coddling the weaker doctrines and ideas of the field.” David J. Bederman, *What’s Wrong With International Law Scholarship? I Hate International Law Scholarship (Sort Of)*, 1 *CHI. J. INT’L L.* 75,

approach is consistent with the concept of binding “world law.”<sup>128</sup> No supranational or world authority exists to define and implement international obligations.

While most of the underdeveloped countries prefer that an international body or organization control decisions about international legal obligations, the larger powers, and specifically the U.S., only concede that these organizations can be helpful fact finders, but reject the notion that they can exist as a sovereign and make political decisions about guilt or innocence of nations.<sup>129</sup> The key to appreciating at least the U.S. philosophy in foreign affairs policy making is that while “neither law nor world opinion can compel nations to act against their own best interests, most countries find it in their interests to operate within the law and be perceived as doing so.”<sup>130</sup>

Additionally, as a legal community, our careless references to “authority” and “control” as though they are interchangeable concepts, to some degree, prevents us from actually exploring whether there is international “law,” in another’s words, “patterns of authoritative expectation and control which in fact transcend nation-state

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83-84 (2000). Some legal commentaries go into excruciating analysis of discussing international comparisons, which is of little value when interpreting the U.S. Constitution, except to appreciate where the diversity exists. *See, for example*, Hiram E. Chodosh, *Comparing Comparisons: In Search Of Methodology*, 84 IOWA L. REV. 1025 (1999).

<sup>128</sup> Lee, *supra* note 46, at 261.

<sup>129</sup> Statement of Ambassador Steven Ledogar, (Ret.) at the New York City Bar’s Council on International Affairs forum, Sept. 23, 1999. (Dec. 15, 1999) <<http://www.state.gov/www/global/arms/speeches/other/ctbtstat.html>> (Ambassador Ledogar served seven and one-half years in Geneva as the U.S. representative to the Conference on Disarmament, including successfully negotiating the Chemical Weapons Convention in 1992 and the Comprehensive Test Ban Treaty in 1996.)

<sup>130</sup> Madeleine Albright, *A Call For American Consensus: Why Our Arms-Control Leadership is Too Important To Risk In Partisan Political Fights* (Dec. 15, 1999) <[http://www.state.gov/www/global/arms/ctbtpage/test\\_ban\\_news/tbn44.html](http://www.state.gov/www/global/arms/ctbtpage/test_ban_news/tbn44.html)> (Secretary of State Albright’s Comprehensive Test Ban Treaty News publication #44, Nov. 22, 1999.)

boundaries.”<sup>131</sup> The main international problems today, concern the desire to control sovereign intra-state matters, not state-to-state problems for which sovereigns originally sought international acceptance.<sup>132</sup> The core legal problem is that governments are reluctant to create or commit to a body of law, which binds their freedom of action in dealing with internal rebellion.<sup>133</sup> In some cases, sovereigns create coalitions under an international legal theory in order to justify intervening in another sovereign’s political events, although an equal number of opposing sovereigns have interpreted or characterized those same actions as a violation of sovereign integrity and void of any international legal authority.<sup>134</sup>

This type of international intervention or mediation has increasingly used the justification that war crimes and massive human rights violations are the world’s concern, regardless whether they occur within sovereign borders.<sup>135</sup> NATO’s curtailment of the Milosovic’s Serbia regime in 1999, for example, arguably stands for the proposition that there are now practical limits to a sovereign’s inviolable legal

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<sup>131</sup> Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT’L L. 191 (1968)(excerpted from *Forty Years Of Scholarship: Excerpts From Articles In The Virginia Journal Of International Law That Charted New Paths And Captured Historic Moments*, 40 VA. J. INT’L L. 849, 860 (2000).

<sup>132</sup> Michael J. Glennon, *A Madisonian Perspective On International Institutions: Overcommitment, Undercommitment, And Getting It Right*, 70 U. COLO. L. REV. 1589 (1999). Throughout the 1990s, the majority of conflicts were predominantly civil wars and in countries including Afghanistan, Algeria, Azerbaijan, Bosnia, Burundi, Cambodia, Congo, Guatemala, Indonesia, Liberia, Nicaragua, Russia, Rwanda, Sierra Leone, South Africa, Sri Lanka, Tajikistan, Turkey and Yugoslavia. Mary Ellen O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334 (1999).

<sup>133</sup> O’Connell, *see supra* note 132, at 339. The treaty-based rules are inadequate, because “civil wars are notoriously bitter... [and] each side is likely to deny the legitimacy of the other; training in the laws of war may be limited; the neat distinction between soldier and civilian frequently breaks down; and the scope for a compromise settlement of the war is usually slight.” *Id.* at 340.

<sup>134</sup> *Id.*

<sup>135</sup> Sandy R. Berger, *American Leadership in the 21st Century* (June 3, 2000) <[http://www.state.gov/policy\\_remarks/2000/000106\\_berger.html](http://www.state.gov/policy_remarks/2000/000106_berger.html)>

territorial integrity.<sup>136</sup> In that case, a coalition from the international community intervened in the “internal affairs” of a sovereign, where “civil conflict, abuse of human rights, crimes against humanity, and massive migration of refugees threatened the stability of adjacent states, and created unacceptable international tensions.”<sup>137</sup> While there is considerable doubt that a coalition could currently exert control over the U.S.’s internal activities, it would be a farce to think the U.S. would ever even acknowledge an external legal authority for a coalition to intervene.

Our involvement in these otherwise internal matters, leads us to question the plain meaning of the non-intervention declaration within the United Nations’ Charter.<sup>138</sup> What really happened to all of that international law? One argument is

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<sup>136</sup> Caldwell, *supra* note 9, at 232. There have also been three multinational Maritime Intercept Operations (MIO) conducted thus far. Two of the MOI’s are still in effect, the one beginning in August 1990 against Iraq in the Persian Gulf and Red Sea, and the MOI beginning in the Adriatic, off the coast of the former Yugoslavia. The third MOI occurred in the Caribbean Sea off the coast of Haiti, but it was terminated after President Aristide returned to power in Haiti in October 1994. Richard Zeigler, *Ubi Sumus? Quo Vadimus?: Charting The Course Of Maritime Interception Operations*, 43 NAVAL L. REV. 1, 38 (1996).

<sup>137</sup> *Id.*

<sup>138</sup> The non-intervention declaration states,

No State or group of States has the right to intervene, directly or indirectly, for an reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State. Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

U.S. DEP’T. OF ARMY PAM. 27-24, SELECTED INTERNATIONAL AGREEMENTS, VOL. II, (1 Dec. 1976). The Principle concerning the duty not to intervene in matters within the domestic jurisdiction of an

that the language within the U.N. Charter is simply “a vain attempt to dissolve a dilemma by denying the social facts of international life - or all life, for that matter,” and “would eliminate all international politics because by their nature they always involve a measure of pressure or influence.”<sup>139</sup> More to the point, any argument over whether a sovereign should commit or adhere to a particular international legal principle is ultimately a moral argument - a value judgment, meaning that what we generically call international “law” is inaccurate.<sup>140</sup>

Understanding the mechanics of how international legal principles can help the development of the international legal order is essential for the government attorney, but we have to also appreciate that only the sovereigns’ commitment to a principle can produce “law.”<sup>141</sup> A government’s commitment to a particular international legal principle is determined by a political philosophy, based upon national values.<sup>142</sup> Absent an adoption of the value(s), the agreement has importance

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State, in accordance with the *Charter; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Oct. 24, 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970). See also, Lee, *supra* note 46, at 252.

<sup>139</sup> Lee, *supra* note 46, at 252, (quoting Werner Levi).

<sup>140</sup> JAMES G. WATT AND DOU WEAD, *THE COURAGE OF A CONSERVATIVE* 31 (Simon & Schuster, New York 1985).

<sup>141</sup> Kuntz, *supra* note 8, at 1335.

<sup>142</sup> WATT AND WEAD, *supra* note 140, at 31. Consider that the U.S. has concluded over 270 different trade agreements in an attempt to develop the global trading system, which seeks to promote competition, also improve other nations’ economic growth, protect the environment, and ban abusive child labor conditions. President Clinton’s Remarks on Foreign Policy in San Francisco, California, Feb. 26, 1999, (June 3, 2000)

<[http://www.state.gov/www/global/general\\_foreign\\_policy/990226\\_clinton.html](http://www.state.gov/www/global/general_foreign_policy/990226_clinton.html)> (noting that problems still exist over basic issues of even currency exchange, where \$1.5 trillion of currency exchange occurs on any given day and causing dramatic cycles and even collapses within markets.) Supranational law or “international” law creates binding obligations for all sovereigns, as opposed to solely the signatories. Instead, the agreements are binding on the U.S., not because of customary law, but because the President has for the moment directed compliance to maintain international relationships.

only as a principle, because the moral acceptance or rejection of the terms is inconsistent with binding law.<sup>143</sup> Only by appreciating a sovereign's values can we define whether there is a commitment to the legal principle.<sup>144</sup>

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<sup>143</sup> On June 21, 1991, as the atrocities in former Yugoslavia began to filter throughout the world, Secretary of State Baker went to the Federation Palace in Belgrade to ask each faction's representative, "personally and as a political leader," to reaffirm their adherence to the Helsinki Conference principles, specifically that "all disputes must be resolved peacefully, borders must not be changed except by consent, and human rights must be protected, particularly minority rights." BAKER, *see supra* note 26, at 479-80. After returning from the visit, he reflected that, "obstinacy seemed to be a trait that cut right across ethnic lines - reason was the last thing they wanted to hear." *Id.* Diplomatic success in resolving these "internal" conflicts typically reflects the actual balance of forces on the ground. HOLBROOKE, *see supra* note 91, at 73, (explaining that absent external influences, the diplomats in Bosnia had no leverage with the Serbs, and an expectation conciliation was futile as long as the Serbs were "winning" or gaining more territory on the battlefield).

Law is the internalized or national commitment to the value. Recall that on March 16, 1988, the Iraqis field-tested chemical (nerve gas, mustard gas, typhoid and anthrax) bombs on whole villages of Kurdish men, women, and children. HUSSEIN SUMAIDA, *CIRCLE OF FEAR* 238-39 (Stoddart Publishing Co., Toronto 1991). The entire village of Halabja was wiped out in seconds and long-range Howitzers with special binary chemical warheads were used on other villages. *Id.* The world was unaware until after the ceasefire between Iran and Iraq in July 1988. *Id.*

Few occasions present the acid test of values in international order, or "conflict between law and power (national security)," in a legal forum more starkly than the question of whether humanitarian principles and environmental law concerns should preclude use of nuclear weapons, especially when we recognize that a State generally cannot limit the effects of a nuclear weapons to only combatants. Nagan, *supra* note 22, at 495, 498. In May 1993, the World Health Organization (WHO) requested an advisory opinion from the International Court of Justice asking whether "the use of nuclear weapons by a state in war or other armed conflict [would] be a breach of its obligations under international law, including the WHO Constitution?" *Id.* at 504. In December 1994, the U.N. General Assembly asked an additional, but all-encompassing question as to whether "the threat or use of nuclear weapons in an circumstance [is] permitted under international law?" *Id.*

On July 8, 1996, the ICJ rendered its advisory opinion stating, in general terms, that neither conventional nor customary international law specifically provides for the threat or use of nuclear weapons, nor specifically prohibits it. *Id.* at 518. The ICJ noted that while Article 2(4) of the U.N. Charter requires "all members refrain from the threat or use of force against any state," Article 51 does allow for proportional "self-defense in the event of an armed attack." *Id.* The ICJ wavered in its ultimate conclusion that "the threat or use of nuclear weapons would 'be contrary to the rules of international law applicable in armed conflict,'" by adding the caveat that there might exist an exception "in an extreme circumstance of self-defense, in which the very survival of a State would be at stake." *Id.* at 523.

(Note that the United States no longer consents to the compulsory jurisdiction of the ICJ. *Id.* at 495. The International Court of Justice (ICJ) held in *Nicaragua v. U.S.*, that Nicaragua's assistance to the Salvadorian rebels by supplying arms did not rise to the level of an armed attack, so the U.S. intervention could not be justified on the ground of collective self-defense. John-Alex Romano, *Combating Terrorism And Weapons Of Mass Destruction: Reviving The Doctrine Of A State Of Necessity*, 87 GEO. L.J. 1023, 1036 (1999). *See generally*, Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ Rep. 14 (Judgment of June 27). By setting a high

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threshold for imputing an armed attack to a state and thereby limiting large state's national security justification to intervene, the ICJ opinion implies that only the State actually imposed upon ma perpetrate an armed attack for purposes of Article 51. Romano, *supra* at 1036-1037. The Court's analysis proceeded from the unstated premise that "a State cannot be invaded under principles of self-defense unless that State had responsibility for the armed attack precipitating the defense." *Id.* at 1037. The U.S.' quick resort to the self-defense justification has drawn criticism on more than one occasion. On August 20, 1998, less than two weeks after the simultaneous bombings of the U.S. embassies in Nairobi and Dar es Salaam, the United States launched missile attacks against terrorist targets in Sudan and Afghanistan, although the targets of the strikes and statements of some American officials cast doubt on the validity of the United States' self-defense claim. *Id.* at 1041.

While the ICJ did not find "any specific prohibition," there are only a "few national groups exist that do not believe that their survival is a constant political problem." Nagan, *supra* at 530. Taiwan, Sweden, South Korea, South Africa, Brazil and Argentina have at least temporarily abandoned the nuclear option, and the hope is that Operation Desert Storm crippled Iraq's ongoing project, despite Iraq's success in evading the International Atomic Energy Agency. Rothberg, *see supra* note 47, at 97-98. India has had nuclear capability since 1974, and is now thought to have up to 100 nuclear weapons. *Id.* at 98. Since 1960, Israel's has had nuclear capability and is believed to have anywhere from one hundred to three hundred weapons. *Id.* Pakistan is suspected of having at least ten air-deliverable bombs. *Id.* at 99. Algeria, Egypt, Libya, Iran and Syria are all seriously pursuing nuclear weapon projects. *Id.* at 100. Another constant concern are groups such as the Russian Mafia and others operating a nuclear black market. *Id.* at 101. These unsettled figures could fluctuate overnight in the event that South Korea considers the current "vastly reduced U.S. military presence" should be leveraged to "create a state of detente in the face of a North Korean invasion," or Taiwan, "upset by Beijing's handling of Hong Kong after 1997," seeks to deter encroachment by China. *Id.* at 129-130. Even though both Brazil and Argentina both gave up their nuclear projects, if Argentina discovers that Brazil is again pursuing its nuclear program, Argentina will undoubtedly follow suit. *Id.*

<sup>144</sup> Kuntz, *supra* note 8, at 1335. International lawyers, political scientists, diplomats and other practitioners continuously debate the meaning of "sovereignty," which "has suffered all too much from a failure to appreciate the confusion that flows from treating a word as though it were a fact." Antonio F. Perez, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty In International Law*, 14 WIS. INT'L L.J. 463 (1996). A State is generally an "indivisible" entity having a specific territory, a permanent population, its own government, and the capacity to engage in formal relations with other such entities. William C. Plouffe, Jr., *Sovereignty In The "New World Order": The Once And Future Position Of The United States, A Merlinesque Task Of Quasi-Legal Definition*, 4 TULSA J. COMP. & INT'L L. 49, 53 (1996). The notion of sovereignty, as a basic principle of customary international law, is the freedom from authority of other states. *Id.* But inherent within the notion of sovereignty are the following corollaries: "(1) a prima facie exclusive jurisdiction over a territory and a permanent population; (2) the duty of non-intervention in the jurisdictions of other sovereign nations; and (3) the duties imposed by treaties and customary international law." *Id.* See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES §206, comment (b) (1986)(defining sovereignty as "a state's lawful control over its territory generally to the exclusion of other states"). See also, *Kadic v. Karadzic*, 70 F.3d 232, 245 (2nd Cir. 1995)(a state under international law regime must control a defined territory and population, with a government and the capacity to engage in formal relations with other states); *Wilson v. Girard*, 354 U.S. 524, 529 (1957) (finding that a sovereign nation has "exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or implicitly consents to surrender its jurisdiction"); *Schooner Exchange v. McFaddon*, 7 Cranch (1812)("The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself.") William K. Lietzan, *Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan*, THE ARMY LAWYER 3, 9 (Dec. 1996) at n. 49. See generally, SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW

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(A.W. Sijthoff, Leyden 1971) and Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, A.F. L. REV. 137 (1994).

The United Nations Convention on the Law of the Sea (1982), (UNCLOS III), effectively recognizes the territorial jurisdiction of a sovereign to include its territorial borders, the airspace above the territorial borders, and a twelve-nautical-mile territorial sea extending from its coastline, a twenty-four-nautical-mile contiguous zone, the 200-nautical-mile exclusive economic zone (EEZ), the greatly expanded continental shelf, and archipelagic waters, and a new regime for transit passage. See Naval Warfare Publication 9 (Rev. A)(1989); (FMFM) 1-10 (1989). See generally, J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 66 INTERNATIONAL LAW STUDIES (1994); INT'L & OP. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK (updated annually).

While a breach of these corollaries by another state constitutes a violation of sovereignty, the unsettled question is to what degree there violation was actually a breach of international "law." Plouffe, *supra* at 54-55. Apart from the territorial analysis, the enormous "political and economic inequalities" between the developed states and the newer dependent states makes the traditional sovereign or formal legal independence inconsequential. Lee, *supra* note 46, at 255, (ultimately, though, a state's responses to factors such as economic interdependence and global environmental degradation are still exercises or a demonstration of legal sovereignty.)

The classical 17th century Westphalian or European feudal conception of sovereign reflected the absolute internal authority of the king in the political and property relations with his subjects. Perez, *supra* at 466. States later discovered that recognition by other sovereign states is akin to "joining an exclusive club," making the international community's acceptance a practical element in whether a particular entity qualifies as a sovereign state. *Id.* at 471. Inherent in this recognition concept is a combination of both legal and political principles. See for example, in a 1926 commentary, Justice Cardozo discussed the complications of attempting to resolve legal questions solely by logic:

Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. In those litigations acts or decrees of the rebellious governments, which, of course, had not been recognized as governments de facto, were held to be nullities when the worked injustice to citizens of the Union, or were in conflict with its public policy . . . On the other hand, acts or decrees that were just in operation and consistent with public policy, were sustained not infrequently to the same extent as if the governments were lawful....

Raymond and Frischholz, *see supra* note 32, at 815, n. 90. Generally, see the civil war history concerning "The Free State of Jones County," (also known as the "Republic of Jones"), men of Jones County, Mississippi, who refused to fight for the Confederacy (or for the Union) and elected a President (Newton Knight), a Vice-President, Cabinet members and created a military force. ETHEL KNIGHT, THE ECHO OF THE BLACK HORN 115-122 (1951); CHESTER SULLIVAN, SULLIVAN'S HOLLOW 28-30 (University Press of Mississippi, 1978); MINNIE MAE DAVIS, CONFEDERATE PATRIOTS OF JONES COUNTY 14-20 (The Progress-Item, Ellisville, MS 1977)(reprinting the article by Jack D.L. Holmes, *The Mississippi County That Seceded*).

Secretary of State Baker raised several concerns over the Commonwealth of Independent State's (CIS) initial request for recognition.

I explained that serious issues needed to be sorted out before the U.S. would grant recognition. There are several different interpretations of the Commonwealth, and these need to be resolved. Will you have a common foreign policy? Are you

A key factor to remember at this point in the discussion is that an international law or principle must embody pre-existing values; "it cannot create values...or morality where none exists."<sup>145</sup> The deficiency of any international

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asking for recognition of the Commonwealth as a single entity? [Who will] speak for the other Commonwealth republics? Will there be a common defense policy? What states make up the Commonwealth?

BAKER, *see supra* note 26, at 566. Ultimately, on December 19, 1991 at the Alma-Ata meeting, the eleven republics of Russia, Belarus, Ukraine, Armenia, Moldova, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan formed a Commonwealth of Independent States. Russia took over all of the Soviet embassies and foreign trade missions; assumed the Soviet Union's seat on the UN Security Council; absorbed the Soviet Foreign Ministry, Interior ministry, and at least part of the KGB; and agreed to "respect" all international agreements and treaties of the former USSR. *Id.* at 570-71.

The desire for membership and acceptance within the international community caused Boris Yeltsin to seek a merger of the CIS with NATO. Yeltsin provided Secretary of State Baker with an unprecedented outline of how their current nuclear launch system operated and how he envisioned the CIS system would operate. Yeltsin explained, "The leaders of Ukraine, Kazakhstan, and Belorussia do not understand how these things work, that's why I'm telling only you. They'll be satisfied with telephones." *Id.* at 572. (Now consider whether Yeltsin's actions and statements should be attributable to a partial relinquishment or an enhancement of the new CIS' sovereignty.)

Ultimately, States recognized that the necessities of international peace and stability required the "partial relinquishment of sovereignty" to some international control. Plouffe, *supra* at 53. Henry Kissinger described the two models for balance-of-power systems as (1) the British approach, which was to wait for the balance of power to be threatened directly before intervening, and then almost always on the weaker side, and (2) the Bismarck approach, which favored the creation of "overlapping alliance systems" that used the resulting influence to pressure the outcome with contenders. KISSINGER, *DIPLOMACY*, *see supra* note 73, at 167, (noting that America's challenge is "to generate objectives growing out of American values that can hold together these various groupings of shared objectives with various groups of countries.")

These international organizations run the risk of inadvertently creating diversity through memberships, instead of cohesion. Consider the risk the Partnership for Peace runs by attempting to integrate Russia into the same international program from whom it provides security guarantees to the rest of eastern Europe. HENRY KISSINGER, *DIPLOMACY*, *supra* at 825, (alternatively, the stronger Europe could be perceived as an "ethnic club" directed against China and Japan).

<sup>145</sup> Kopelman, *supra* note 109, at 152. Kissinger observed that "whenever peace - conceived as the avoidance of war - has been the primary objective of a power or a group of powers, the international system has been at the mercy of the most ruthless member of the international community." *Id.* at 152. Over a hundred years ago a British diplomat, Robert Burton, referred to Arab governments as "despotism tempered by assassination," with few changes occurring in the Middle East since then. MOSHE ARENS, *BROKEN COVENANT* 217 (Simon & Schuster, New York 1995). For example, consider the following:

"Simple things like honesty will take a long while to develop. It was easy for me to be an agent for the Mossad and then the Mukhabarat, because living in Iraq, or anywhere in the Arab Mideast, meant learning from the cradle how to dissemble, cheat and cut corners. I learned how to present on face to one man, and another face to the next...Indeed, the attitudes I have described are all part of the religious cloak

control concept is the inability to identify and weigh differing “fundamental value conflicts.”<sup>146</sup> Agreements must be based on common values, which create equilibrium of power and inhibits the desire to deviate from the international order.<sup>147</sup>

Reliance on force or the ability to enforce agreements is not the definitive characteristic of “law,” because force might be used in violation of law or withheld

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that shape the personality. It is called taqiya. Ali himself, son-in-law of the prophet, gave lessons in the art of the strategic lie to protect believers from imminent danger. Taqiya has been extended to cover almost any contingency, sacred or profane.”

SUMAIDA, *see supra* note 143, at 294. “The essence of the Islamic fundamentalist movement is not religion, but rather power through hatred. Hatred of the West in general, America in particular and, beyond all else, Israel.” *Id.* at 291. As explained by an Arab and Jew, Meron Benvenisti, a Sabra:

“My inner contradictions...captivate me. The go deeper than my emotions, touch upon my most basic layers of consciousness: who I am, where I come from, the people to whom I belong.... As my city is composed of symbols and contrasts, so is my internal landscape....I am not afraid of contradictions. It is like being in a powerful magnetic field. As long as you recognize it and are prepared to pay the price, you have in a certain manner come to terms with yourself. My world consists of demons and angels, symbols and contexts. I am not concerned with facts in themselves, but in the way in which these facts integrate into broader frameworks. I am obsessed with conflicts, yet I am aware at the same time that many conflicts may be insoluble. I am not looking for answers; I am looking for questions. People are generally only prepared to define a problem if they have a solution for it; then it is manageable. I tend to go beyond the problems to the conditions that created them. Conditions have no solutions. They are insoluble givens. If you accept the fact that the world is composed of opposites, of legitimate contradictions, claims, and counterclaims, and that if one claim is satisfied others will remain unsatisfied, then in a sense you solve nothing. But, you do learn an important lesson: how to differentiate between understanding and acceptance.

Dow, *see supra* note 3, n. 40, (quoting MERON BENVENISTI, *CONFLICTS AND CONTRADICTIONS* 3-4 (1986).

<sup>146</sup> Perez, *see supra* note 142, at 474, (noting the “destabilizing effect that fundamental value conflicts” have on international law, and that the players are resigned to “keep the game going.”)

<sup>147</sup> HENRY KISSINGER, *DIPLOMACY*, *see supra* note 73, at 77, (explaining that power is an unreliable guide of international order, because it attempts to maintain the equilibrium without common values: it tempts tests of strength and empty posturing). A sovereign’s compliance within any international organization or with an international agreement is the result of moral coercion and ultimately power, not legal authority. Perez, *see supra* note 144, at 463.

despite a law establishing authority to the contrary.<sup>148</sup> Still, as states inevitably act to advance their own national interest through international organizations, according to their own national values, there is no binding quality to create “law” until there is an internalized commitment.<sup>149</sup>

An “emperor’s clothes phenomenon” occurred with the international control concept or enforcement philosophy.<sup>150</sup> The old *pacta sunt servanda* approach looked at a material breach of an agreement as a right of the nonbreaching party to terminate the agreement.<sup>151</sup> The “managerial legal theory” of compliance, emphasizes the nature of functional relationships to facilitate cooperation, and de-emphasizes coercive, punitive enforcement.<sup>152</sup> This management approach evaluates violations of

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<sup>148</sup> ANTHONY D’AMATO, INTERNATIONAL LAW ANTHOLOGY 37-48 (1994)(excerpted from *Is International Law Really Law?* 79 NORTHWESTERN L.REV. 103 (1984). Of course, Machiavellian power posturing exercises have historically been utilized. For a lark, recall Lady Macbeth’s reminder to her husband that his superior forces offer ample protection. “Fie, my lord, fie, a soldier and afeard What need we fear who knows it when none can call our power to account?” Theodor Meron, *Crimes And Accountability In Shakespeare*, 92 AM. J. INT’L L. 1, 2 (1998), n. 3 (quoting Macbeth, V.i.34-36).

<sup>149</sup> Glennon, *supra* note 132, at 1590.

<sup>150</sup> *Id.* at 1592. Much of the confusion in international law is attributable to the concept of a “relinquishment of authority” - which might more appropriately be characterized as an “avilment” - the idea that an agreement is a forum that provides an opportunity to compare values, and to accept them or reject them as each State determines appropriate. International agreements may be interpreted to mean that parties adopt of a method of communicating, not a waiver of authority over the State’s inherent values. These agreements are “expressions” of a state’s sovereignty or power. Lee, *supra* note 46, at 258. The State does not become subject to a supranational authority and no legal obligation is created, only a self-imposed moral duty. *Id.* at 259.

<sup>151</sup> Perez, *see supra* note 144, at 472-73. While the Vienna Convention on the Law of Treaties still exists, the international relationships have developed, through practice, a new interpretation of the Convention language on how to interpret treaties.

<sup>152</sup> Anne-Marie Slaughter, Andrew S. Tulumello, Stepan Wood, *International Law And International Relations Theory: A New Generation Of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 374 (1998)

agreements in terms of an “acceptable level of compliance” in order to maintain the relationships between states.<sup>153</sup>

Understanding this development and its international significance, becomes an important function for the government attorney practicing international law. The underlying philosophy is that “changing interests over the life of a treaty can be handled by changes in the acceptable level of compliance rather than by defection.”<sup>154</sup> The management approach is premised on the belief that the “principal source of noncompliance is not willful disobedience, but the lack of capability, clarity or priority.”<sup>155</sup>

Compliance with international agreements and within international organizations might be better understood as a “process of socialization,” instead of a power contest between sovereign States concerning the performance of legal obligations.<sup>156</sup> By making agreements, the states create a direct method to measure and balance their actions and the resulting interference between themselves.<sup>157</sup> In this fashion, the existence of the agreement creates a forum to promote an “iterative process of discourse among the parties, the treaty organization, and the wider public,”<sup>158</sup> as opposed to a legal right of control over the activities of the other State.

“International law” used in this context does not lose its dignity as important legal principles, but it has an incomplete notion without a traditional binding quality

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<sup>153</sup> Perez, *see supra* note 144, at 472-73.

<sup>154</sup> *Id.* at 473.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Lee, *supra* note 46, at 256.

<sup>158</sup> Perez, *see supra* note 144, at 473.

of “law.” We simply have to recognize that we cannot logically have both a relinquishment of authority and an insoluble concept of sovereignty with the interpretation of international law. From a policy drafting or justification perspective, we have to appreciate that numerous international interpretations exist and that conflict within the interpretations cannot be resolved without using pilpul techniques. Our choices are to commit to a unified legal approach or be content with the continuing chaos over approaches and interpretations.

The government attorney’s approach to these fundamental concepts of law, methods of interpretation and ethics greatly affect the evaluation of American foreign policies.<sup>159</sup> Whatever compromise we make in terms of lack of enforcement, lack of commitment, or redefining the language affects the adherence to the underlying policy values that should drive the interpretation.

### **Our One-Value Foreign Policy**

The primary deficiency in U.S. foreign policy is that the “U.S. decisionmaking apparatus is not organized to deal effectively with the extraordinary complex range of political and military issues involved.”<sup>160</sup> President Clinton made the point that “the true measure of our national interests lies not our distance from the various international conflicts, but the consequences to our national security of letting

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<sup>159</sup> From a practical standpoint, most of us will not speak directly for the entire U.S. on international matters, but generally speaking, each of us working in our designated areas will interpret a position or the U.S. foreign affairs policy regarding some aspect of international law.

<sup>160</sup> MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *supra* note 74, at 388.

conflicts fester and spread.”<sup>161</sup> What is not clear from his comment is specifically how these external activities jeopardize our national security - since national security is our only value, is every international activity a potential justification for the use of force

When national security is at a crisis, there is rarely enough time for the decisionmakers that are involved to adequately reflect and debate the underlying values in foreign policymaking.<sup>162</sup> Compounding the problem of a lack of time for reflection, America also faces a shrinking perspective of foreign affairs or a “lack of training in the significance of the seemingly infinite abundance of information available” and now instantly accessible worldwide through the electronic media.<sup>163</sup>

Policymakers still do not raise fundamental questions or basic issues about policy choices or appreciate the consequences of failing to do so.<sup>164</sup> In his most recent tome, Henry Kissinger said:

“[p]olicymakers are forever tempted to wait for a case to arise before dealing with it; manipulation replaces reflection as the principal policy tool. But the dilemmas of foreign policy are not only - or perhaps even primarily - the by-product of the historical process that shaped them. Modern decision-making is overwhelmed not only by contemporary facts, but by the immediate echo which overwhelms perspective. Instant punditry and the egalitarian conception that any view is as valid

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<sup>161</sup> President Clinton’s Remarks on Foreign Policy in San Francisco, California, Feb. 26, 1999, (June 3, 2000) <[http://www.state.gov/www/global/general\\_foreign\\_policy/990226\\_clinton.html](http://www.state.gov/www/global/general_foreign_policy/990226_clinton.html)>

<sup>162</sup> MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 388.

<sup>163</sup> KISSINGER, *YEARS OF RENEWAL*, *see supra* note 34, at 1077.

<sup>164</sup> MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 388. If American leaders had reexamined their fundamental beliefs in Vietnam, they would have realized that their beliefs were in error, which would be the first step toward correcting them. *Id.* at 95.

as any other combine with a cascade of immediate symptoms to crush a sense of perspective.”<sup>165</sup>

Policymakers continue to fail to adequately consider the actual severity of the threat to U.S. security, the requirement for consistency in values within any particular political structure, and the potential effectiveness of using U.S. military intervention to achieve a diplomatic or political victory.<sup>166</sup> In the international practice, a policy based on national values that have utility and consequently virtue in one country may, at the same time, be considered vicious in another State that exists under different

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<sup>165</sup> KISSINGER, YEARS OF RENEWAL, *see supra* note 34, at 1077. Characteristic of the problem, Kissinger explained that during the Vietnam War, decisionmaking reflected “a nearly incomprehensible misconception about the nature of the military problem” that existed, primarily because, “lacking criteria for judgment, officials often misunderstood, and therefore often misstated, the issues...” KISSINGER, DIPLOMACY, *see supra* note 73, at 699-700. The recurring tendency for new officeholders is to reject the insights of those individuals with institutional memory within the government in favor of pursuing new ventures and initiatives resulting in a lack insight and experience in evaluating the potential impact of those decisions. *Id.*

As an example, after six months in office, President Nixon felt that they had only learned how to run the place and wanted to avoid “dry rot of just managing chaos better.” H.R. HALDEMAN, THE HALDEMAN DIARIES 73 (G.P. Putnam’s Sons, New York 1994)(meeting on Monday, July 21, 1969 between President Nixon, Henry Kissinger, H.R. Haldeman and John Ehrlichman.) The failure to effectively use the influence of the White House would cause the U.S. to go down the drain as a great power. *Id.* Ironically, at the beginning of his second term in office, Nixon was still developing a philosophy of leadership:

“We need to make the point that the FDR coalition was made up because they wanted to win, but they did not belong together, they were drawn together by their fears. First the economy and then the war. Our new coalition will be held together, not by fears but by common hopes and a shared philosophy. Not total agreement, but a recognition for the need for civility, different ways to approach government goals. In other words, we will form a national coalition that shares common views regarding what the country ought to be, at home and abroad. We have to find coherent policies, not to suit the new left or the new liberals, but closer to the 19th century liberals. Internationalism without imperialism. Change that works. Constructive. We’ll build, not destroy, based on the old values. We have to find a way to get the pragmatists and the idealist together.”

*Id.* at 493, (Monday, August 14, 1972, noting President Nixon’s philosophy for his second term with Watergate looming).

<sup>166</sup> MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 388.

circumstances, especially where the two States political ideologies differ.<sup>167</sup> One of the most reoccurring aspects of blundering in international affairs is “the profundity of mutual ignorance and its dangerous consequences.”<sup>168</sup>

In diplomacy, there is no substitution for conducting negotiations in person and working together to resolve difficulties, and current technologies greatly aid communications to both foster cooperation and mitigate tensions.<sup>169</sup> Throughout the Cold War, Soviet defectors repeatedly warned the U.S. that we “had no real understanding of the narrow backgrounds and worldview of Kremlin leaders; how pedestrian, isolated, and self-absorbed they really were, how paranoid, fearful the were both of their own people and of a world they believed relentlessly hostile and threatening.”<sup>170</sup> In Vietnam, there was no standard for political success or an understanding of how it could be accomplished by military force.<sup>171</sup> Similar to our

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<sup>167</sup> Dow, *see supra* note 3, at 25.

<sup>168</sup> MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 377, (explaining that “[t]here is a natural tendency for a party to a conflict to focus disproportionately on its own problems and therefore to mistakenly attribute the actions and motivations of others to factors affecting one’s own situation - but not the adversary’s.”) Assistant Secretary of Defense Paul Warnke stated in 1969, “... we guessed wrong with respect to what the North Vietnamese reaction would be.” GLYNN, *see supra* note 107, at 217.

<sup>169</sup> Thomas Pickering, *Managing Information Chaos* (June 3, 2000) <[http://www.state.gov/www/policy\\_remarks/1999/990313\\_pickering.html](http://www.state.gov/www/policy_remarks/1999/990313_pickering.html)> (Under Secretary for Political Affairs addressing the U.S. Institute for Peace on Mar. 12, 1999).

<sup>170</sup> GATES, *supra* note 84, at 258-59.

<sup>171</sup> From the Vietnamese perspective, U.S. motivation was irrelevant - it was simply war:

In the resistance was against the French, we lived in the jungles for nearly ten years and eventually defeated them without having much information about their policies and strategies. And our knowledge about the U.S. relationship with the rest of the world, ...the geopolitical factor, was quite limited. We therefore formulated our strategies and policies principally on the basis of our assessment of the actual situation on the battlefield. In these circumstances, what more could we do to make the U.S. understand us? Truly, we did not know how to do it.

miscalculations during the Cuban Missile Crisis, American policymakers during the Vietnam War were “immensely ignorant of the history, language, and culture of Vietnam,” but readily assumed a role abandoned by the French.<sup>172</sup>

In the aftermath of these crises, we are able to discern how flawed our fear-based, single-value foreign policy jeopardizes our international effectiveness. Some historians consider the 1962 Cuban Missile Crisis as “John F. Kennedy’s finest hour,”<sup>173</sup> because he both avoided a nuclear holocaust and forced the Khrushchev to remove the Soviet missiles from Cuba.<sup>174</sup> Other historians saw Kennedy as unnecessarily jeopardizing the U.S., and consider that Khrushchev was far more successful as a result of the confrontation than Kennedy.<sup>175</sup> It is obvious from Khrushchev’s memoirs that he wanted to see what promises he could get in addition

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MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 55, (quoting Nguyen Khac Huynh, Senior Researcher, Institute for International Relations, Ministry of Foreign Affairs, Hanoi, from the initial dialogues between the U.S. and Vietnamese participants).

<sup>172</sup> *Id.* at 377.

<sup>173</sup> *Id.* Robert McNamara publicly called the crisis a perfect illustration of the application of this [that is, mutual deterrence/limited war] strategy and this force structure. GLYNN, *see supra* note 107, at 187. *But see*, President Kennedy’s National Security Advisor, McGeorge Bundy called the Cuban Missile Crisis a “battle of blunders,” and a “mistake that need never have happened.” Mimi Whitefield and John Dorschner *Cuban Missile Crisis Taught Key Lesson, Khrushchev's Son Says Other Experts Call Standoff Unnecessary*, DALLAS MORNING NEWS, November 20, 1992, at 44A; Ted Sorensen, another Kennedy adviser, called the crisis “unwise, unwarranted and unnecessary.” *Id.*

<sup>174</sup> *JFK Bungled Cuban Missile Crisis*, SAN DIEGO UNION-TRIBUNE, March 7, 1985, at B10.

<sup>175</sup> *Id.* President Kennedy has also been strongly criticized for concealing the removal of the missiles in Turkey and giving the appearance that American firmness, as opposed to the major U.S. concession to Khrushchev, led to the Soviet’s withdrawal from Cuba. Kennedy Was the Right Man To Lead During Missile Crisis, OMAHA WORLD-HERALD, October 22, 1997, at 14. Despite the good intention of saving NATO’s confidence in the U.S.’ resolve to defend them - “the fact remains that there was massive deception.” *Id.* U.S. public confidence was lost in the compromise and breaches of integrity were condoned as the end result justifying the means. For example, McGeorge Bundy alleged “praised” Robert McNamara for lying to Congress, calling McNamara’s denial that President Kennedy agreed to withdraw American missiles from Turkey in exchange for Soviet withdrawal of missiles from Cuba “a most justified deception.” LEHMAN, *supra* note 23, at 221.

to the U.S. guarantee not to invade Cuba.<sup>176</sup> In balance, Khrushchev agreed to remove from Cuba missiles it did not need, while the U.S. agreed to remove missiles from Turkey missiles it did need and promised not to support an overthrow of Castro.<sup>177</sup>

The incremental nature of decision-making within the government and seemingly almost inconsequential decisions must follow and be consistent with a comprehensive goal based on American values, other than just national security, to include how they might be perceived, if we are to be a world leader without reliance on force.<sup>178</sup> While the Government's rationale for exercises of foreign policy may still be subsequently questioned within our courts, those questionable practices are examined for consistency with the rationale, not the morality or the motivation for the rationale.<sup>179</sup> One of the greatest changes in international relations is the emergence of

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<sup>176</sup> Abram Chayes, *supra* note 39, at 478.

<sup>177</sup> *JFK Bungled Cuban Missile Crisis*, *supra* note 174.

<sup>178</sup> MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 388.

<sup>179</sup> *See United States v. Noriega*, *supra* note 67, at 1537, n. 40 stating,

The court therefore does not face the task of resolving the exact motives behind the invasion, a question which may well be beyond its expertise and resources. *See, e.g.* *Crockett v. Reagan*, 558 F.Supp. 893, 898 (D.DC 1982)(court lacked resources and expertise to resolve disputed questions of fact concerning present of imminent hostilities in El Savador, which existence would implicate War Powers Resolution), *aff'd*, 720 F.2d 1355 (DC Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Lowry v. Reagan*, 676 F.Supp. 333, 340 n.53 (D. DC 1987)(court unable to determine whether hostile situation existed in Persian Gulf); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973)(court lacked expertise to determine whether or not President's bombing of Cambodia constituted a "tactical decision" within his discretion), *cert denied* 416 US 936 (1974); *see also* *Greenham Women Against Cruise Missiles v. Reagan*, 591 F.Supp. 1332, 1338 (S.D.N.Y. 1984): "Questions like how to ensure peace, how to promote prosperity, what is a fair utilization and distribution of economic resources are examples of questions that must be decided by the fair, sound, seasoned and mature judgment of men and women responsive to the common good. The power to make these determinations is therefore appropriately allocated to the political branches." *Aff'd*, 755 F.2d 34 (2d Cir. 1985).

“soft power,” or “the ability to achieve desired outcomes in international affairs through attraction rather than coercion.”<sup>180</sup> The U.S. cannot enter this type of international negotiation using force as a stimulus.

Policymakers today need to identify and debate fundamental issues involved in regional conflicts that will lead to a public investment and commitment to the outcome, as opposed to a sacrifice of national confidence to Executive secrecy.<sup>181</sup> As long as fundamental issues remain unresolved, deep-seated disagreements will be inconsistently resolved, and more importantly, it will degrade both the “law” and legal principles to solely arbitrariness.<sup>182</sup>

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<sup>180</sup> Joseph S. Nye, Jr., *U.S. Security Policy: Challenges for the 21st Century* (Dec. 12, 1999) <<http://www.usia.gov/journals/itps/0798/ijpe/pj38nye.htm>> (Dean, John F. Kennedy School of Government, Harvard, cautioning that the U.S. alone has not replaced the bipolar balance of power since the Cold War. He explains that power currently exists in a complex, three-dimensional context, with the U.S. as a unipolar military power on one level; the second level of U.S., Europe and Japan as tripolar economic powers (and China soon making it a quadripolar power); and a third level of diverse transnational power external to governments, including bankers to terrorists.)

But, are the terms “power,” “national security,” and “foreign policy” being used as synonymous concepts? The national security of the U.S. is being tied to political stability and peace in other regions, where “soft” international threats such as population changes with dim economic opportunities, the spread of epidemic disease, environmental degradation, or the impact of natural disasters, pose new challenges. Assistant Secretary for Intelligence and Research J. Stapleton Roy’s statement before the Senate Select Committee on Intelligence, Feb. 2, 2000 (June 3, 2000) <[http://www.state.gov/www/policy\\_remarks/2000/000202\\_roy\\_security.html](http://www.state.gov/www/policy_remarks/2000/000202_roy_security.html)>. “Trafficking in women and children is one of the fastest growing and most lucrative criminal enterprises in the world; ... it is now considered the third largest source of profit for organized crime, behind only drugs and guns.” Theresa Loar, Director of the President’s Interagency Council on Women, *U.S. Pressing forward to Stop Trafficking in Women and Children*, March 1, 2000 (June 3, 2000) <<http://secretary.state.gov/www/picw/trafficking/artpress.htm>>.

The danger of this capsulated foreign policy is that the U.S. is further concealing its foreign policy analysis. As we define more of our international concerns under the “national security value” umbrella, we avoid open debates over the priority of values and allow the Executive to arbitrarily select or reject international obligations. Legal compliance is dwarfed by political activities - government attorneys are not in a position to affirm the “law” and emphasize that agencies and the President must comply with it. My assertion is that the Executive actions are further evidence that the international agreements represent relationship theories, not legal obligations.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

As attorneys, there is little we can do other than identifying the flaw(s) in the procedures. Only the decisionmakers can direct the activities that will correct these problems. For the host of partisan or personal reasons mentioned throughout the thesis, it will be hard to get all of the players to work as a "team" in resolving these issues. In closing with the limitations hampering progress, one remaining practical issue exists that complicates, if not precludes, the attorney from resolving the procedural problems - Secrecy.

### Diffusing Secrecy

There is no question that secrecy is a form of regulation, but what we might should consider, as attorneys, is whether the practice is effective.<sup>183</sup> Although President Roosevelt considered the survival of the United States and its values were at stake in manipulating the American public at the outset of World War II, "subsequent generations of Americans have placed a greater premium on total candor by the chief executive."<sup>184</sup>

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<sup>183</sup> MOYNIHAN, *see supra* note 91, at 59. Secrecy can have an independent purpose as a tool to "deligitimize" opponents. *Id.* at 18-19. For example, Secretary of State James Baker denied Admiral William Crowe, the former chairman of the Joint Chiefs of Staff, access to classified cables after Crowe expressed doubt about President Bush's initiation of the Gulf War activities to a Senate committee. WILLS, *see supra* note 47, at 314, (but implying that it was ridiculous to attempt to disqualify Admiral Crowe's views, given his government and military experience).

<sup>184</sup> KISSINGER, *DIPLOMACY*, *see supra* note 73, at 392-93. Compare the statement that public deception, as opposed to secrecy in accordance with lawful constraints, is a self-contradictory notion in a democracy. BOK, *supra* note 3, at 171-72. Henry Kissinger often references Bismark's dictum, "Woe to the leader whose arguments at the end of a war are not as plausible as they were at the beginning," as a caution. KISSINGER, *DIPLOMACY*, *supra* at 217. The poor public understanding of both the Korean War and Vietnam War has been clouded by "partisan recriminations," because in each case, "the party in power when the war began could not maintain public support for the war's duration." GLYNN, *see supra* note 108, at 140.

The desire for candor is not limited to only the U.S. During the Gulf War, the U.S. Patriot missiles were not capable of completely annihilating the Iraqi Scuds. YOSS MELMAN, *THE NEW ISRAELIS* 8-9 (Birch Lane Press, New York 1992). Debris from the mid-air collision of the Scuds and

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Patriots, as well as from some Patriot missiles that exploded in mid-air without impact on a Scud, showered fragments over the land. *Id.* Israeli leaders and generals were aware of these facts but did not share them with the Israeli public, because a few years earlier Israel had rejected the Patriot defense system as unsuitable. *Id.* Israel's development of its own missile system was not operational when the war broke and Israel's leaders realized that most of the country was suffering from a serious loss of confidence. *Id.* Israeli leaders told their people that the U.S. Patriot missiles could perform miracles, withholding the truth, "fearing that the public confidence and order might break down under the strain of protracted anxiety." *Id.* Their "cynical decision to sacrifice truth for the relative and temporary public tranquility" achieved the short-term goal, but in the process they "helped to undermine one of the most sacred conventions of old Zionism and modern Israel: the Jewish state must be able to defend itself regardless of the circumstances." *Id.*

Is "deceiving the American public..." a more appropriate characterization of President Roosevelt's actions? It was not until 1981 that the British formally state in public for the first time that "nothing was known in London about Japanese intentions [to bomb Pearl Harbor] that was not known in Washington." ANTHONY CAVE BROWN, "C" 385 (Macmillan Publishing Co., New York 1987). Over the years there has been continuous and increased suspicion that a "Rooseveltian conspiracy, connivance or plot" was used to draw the U.S. into World War II. *Id.* Admiral Husband E. Kimmel, the officer whose fleet was sunk, was "appalled" when he was allowed to read the intelligence available to FDR before the attack on Pearl Harbor. *Id.* He stated that, "Nothing in my experience of nearly forty-two years service in the Navy had prepared me for the actions of the highest officials in our government which denied this vital information to the Pearl Harbor Commanders." *Id.* See generally, Roger D. Scott, *Kimmel, Short, McVay: Case Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 MIL. L.REV. 52 (1998).

It is worth a note at this point to at least mention the "intelligence" collection activities occurring at the time. As early as 1928, Great Britain's Sir Stewart Graham Menzies discovered that the German General Staff was converting to a new cipher system using a small machine the size of a portable typewriter, called "Enigma." BROWN, *supra* at 204. With its ability to produce "almost an infinity of ciphers," the German government used Enigma to conceal almost all their secret communications up to the level of armies. *Id.* at 204-205. A second machine, called "Geheimschreiber" was used to conceal communications from armies to the supreme command. *Id.* The encryption method of the Enigma was broken by the British in 1933, and the Geheimschreiber method was broken in 1936. *Id.* Originally called "Boniface," the name for the intercepted Enigma communications was later called "Hydro," and finally referred to as "Ultra." *Id.* at 250-251.

Also since the 1920s, the "Black Chamber," a secret U.S. crypto-analytical facility, had successfully broken the key Japanese military and diplomatic encrypted communications, an operation called "Magic." RANELAGH, *see supra* note 47, at 54. By 1940, a limited number of Office of Naval Intelligence and War Department officials were regularly reading the Japanese "Magic" communications, to include the most secret Japanese traffic, named "Purple." *Id.* See generally, DAVID KAHN, *CODEBREAKERS* (Sphere Books, London 1977) and RONALD LEWIN, *THE AMERICAN MAGIC* (Penguin Books, London 1982). *Id.* at 54, note text. (Throughout its history, the Black Chamber deciphered over than forty-five thousand encrypted communications and had broken the codes of countries as diverse as China, Cuba, France, Great Britain, Germany, Japan and the Soviet Union.) RANELAGH, *supra* at 27.

In April 1941, the U.S. and Great Britain agreed to an intelligence-sharing liaison, whereby technical data on Ultra and Enigma was transferred from the British to the U.S. Army's cryptographic facility at Arlington Hall, Virginia and the U.S. Army reciprocated with Japanese Magic decryptations. BROWN, *supra* at 329. Through Magic intelligence intercepts and an allied double-agent, Dusko Popov, the U.S. had indications in the summer of 1941 that the Japanese intelligence community was working through the Germans to conduct reconnaissance of Pearl Harbor. *Id.* at 371-73.

The "Venona" intercepts were decrypted Russian diplomatic and military communications that became possible to decipher during the early years of the war, when the Russians ran short of cipher material. PETER WRIGHT, *SPY CATCHER* (Viking, New York 1987). The Russians, however, knew that

According to Locke's theory, inherent within democracies is the realization that "in time of crisis the ordinary constitutional norms and processes are relaxed" and "extra-legal measures necessary for the survival of the society" are allowed.<sup>185</sup> Locke characterizes the rule of necessity as being distinct from the rule of law, and therefore, exigent measures occur outside of the legal system.<sup>186</sup> As deference is given to the Executive to define exigencies that are to be considered external to our foreign affairs

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the U.S. had broken their encryption system, because a cipher clerk, William W. Weisband, working at the same Arlington Hall decryption station was spying for them. WILLS, *see supra* note 181, at 310-12.

President Roosevelt's negative responses to Winston Churchill's pleas for fifty aged destroyers at the early part of World War II is cited as conclusive evidence that President Roosevelt was "in no way inveigled" into prematurely committing the U.S. to aid in Britain's war effort. RAY BEARS AND ANTHONY READ, *CONSPIRATOR: THE UNTOLD STORY OF TYLER KENT* 256 (Doubleday, New York 1991). Roosevelt's response to Churchill on May 16, 1940, stated that "only Congress could approve the sale of the ships," and Churchill's acknowledgement indicated that he both "understood and accepted" Roosevelt's situation. *Id.* Although later that year, then Attorney General Robert H. Jackson formulated a legal opinion arguing that Roosevelt's sale of the destroyers was allowable in his capacity as commander-in-chief of the U.S. armed forces, without congressional approval. *Id.*<sup>185</sup> Paul, *supra* note 28, at 684, (repeating Locke's argument that "a society has a right and a duty to protect itself, even at the expense of individual liberties, in order to preserve liberty. In particular, it was the prerogative of the executive to exercise emergency power, even where contrary to law, in order to preserve the society.").

In 1810, Thomas Jefferson similarly conceded that the law must yield to self-preservation:

A strict observance of the written laws is one of the high duties of a good citizen, but it is not the highest. The laws of necessity, self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

WILLS, *see supra* note 47, at 53. Probably the most internationally recognized assessment of self-preservation is, "You must know, then, that there are two methods of fighting, the one by law, the other by force: the first method is that of men, the second of beasts; but as the first method is often insufficient, one must have recourse to the second." NICCOLO MACHIAVELLI, *PRINCE* 92 (Penguin Books, New York 1980) 1532.

<sup>186</sup> Paul, *supra* note 28, at 685. There is a great deal of meaning compromised in restating or summarizing another's statements. Compare the argument that much of the discussion surrounding John Locke's social contract theory confuses the "qualitative" aspect of individual liberty with "quantitative" terms. WILLS, *see supra* note 47, at 298-303. The concept that our system of government is founded on a necessary loss of liberty or individual freedoms is a "vulgarized" theory of Locke's philosophy. *Id.* Locke perceived a "substitution" of one kind of liberty for an enhanced kind liberty, not the sacrifice of "one's potentially disruptive liberty in order to enjoy more security in one's possessions." *Id.*

law, the international obligations are conceded or congealed without Constitutional limitations.

Under the Constitution, both the President and Congress have national accountability to the electorate, but they function differently according to their designed expertise.<sup>187</sup> The constitutional responsibility to protect the national interest may not rest with the President alone, but he alone faces the political accountability for determining which activities can be protected or advanced only by action within the constitutionally ambiguous gray areas of the acceptable and the unacceptable.<sup>188</sup> The justification for government manipulation and deception is generally an expression of doubt that the electorate is capable of making the immediate sacrifices needed to confront the danger.<sup>189</sup>

But, "secrecy is the great enemy of accountability in our government and the source of the greatest danger to our democracy."<sup>190</sup> Secrecy almost always includes not only the act of withholding of the truth but also positive acts of deception, such as the secret bombing of Cambodia in 1970 that obviously was no secret to the

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<sup>187</sup> Goldsmith, *supra* note 33, at 1397-98.

<sup>188</sup> GATES, *supra* note 84, at 560, (emphasizing the role and necessity of the CIA in conducting the covert activities.).

<sup>189</sup> BOK, *supra* note 3, at 179. She notes, though, that these individuals typical

"overestimate the likelihood that the benefit will occur and that the harm will be averted; they underestimate the chances that the deceit will be discovered and ignore the effects of such a discovery on trust; they underrate the comprehension of the deceived citizens, as well as their ability and their right to make a reasoned choice. And most important such a benevolent self-righteousness disguises the many motives for political lying which could not serve as moral excuses: the need to cover up past mistakes, the vindictiveness, the desire to stay in power. These self-serving ends provide the impetus for countless lies that are rationalized as "necessary" for the public good. *Id.* at 173.

Cambodians.<sup>191</sup> We all stand to suffer as a nation when government efficiency is divorced from accountability, and especially under circumstances where the Executive has no political accountability to Congress or the voters.<sup>192</sup>

Provided there is a discernable benefit, complaints for any public deception are typically marginal, but absent some public benefit, though, there is considerably less tolerance. The executive branch bureaucracies are notorious for overclassifying security information, which creates an impenetrable barrier, since they alone determine what clandestine matters of national security can be publicized or disseminated.<sup>193</sup> “We can stand some inefficiency when it is the necessary

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<sup>190</sup> WILLS, *see supra* note 47, at 310.

<sup>191</sup> *Id.* at 314. The secret bombing in Cambodia, starting in March 1969, was President Nixon’s reaction to a North Vietnamese offensive and over 1,000 American casualties. KISSINGER, YEARS OF RENEWAL, *see supra* note 34, at 497. To allege that the bombings of the border zone 10 kilometers (six miles) wide where the North Vietnamese sanctuaries were located were unprovoked violations of Cambodian neutrality is a distortion of history. *Id.* Prince Sihanouk, the Cambodian chief of state, implied that he would ignore such attacks because the North Vietnamese had expelled the Cambodian population from the area. *Id.* Key members of Congress were briefed, including the chairman of the Armed Services and Appropriations Committees, the Speaker and other congressional leaders. *Id.*

<sup>192</sup> *Id.* at 309-310.

<sup>193</sup> Matthew N. Kaplan, *Who Will Guard The Guardians? Independent Counsel, State Secrets, And Judicial Review*, 18 NOV L. REV. 1787, 1841 (1994)(quoting William G. Florence, formerly the Air Force’s Deputy Assistant for Security and Trade Affairs, who once testified that disclosure of 99.5 percent of classified documents would not prejudice the nation’s defense interests.) The Attorney General has unrestricted discretion to declassify information necessary for a criminal trial, which effectively gives the attorney general the discretion and power “to block almost any potential embarrassing prosecution that requires the declassification of information.” *Id.* at 1803. In another assessment, the Pentagon alone held over 20 million classified documents and only 1-5 percent of the legitimately required protection. LEHMAN, *supra* note 23, at 185. The U.S. secrecy system still “produces more than 6 million classified documents a year” and conducts some 3 million security investigations of individuals to determine their “worthiness to be trusted....” MOYNIHAN, *see supra* note 91, at 2, (from the introduction by Richard Gid Powers).

*See* Freedom of Information Act, 5 U.S.C. §552, as amended by Public Law No. 104-231, 110 Stat. 2422, (Jun. 3, 2000), <<http://foia.state.gov/foia.htm>>. The Executive branch has a national security exception to The Freedom of Information Act - a “right to lie” exception. *See generally* the Glomar denial based on the factual circumstances surrounding the *Glomar* exploration. *See also* *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Despite a forty-five year intelligence battle against the Kremlin, in October 1992, Robert Gates became the first CIA director to visit Moscow and personally disclosed the *Glomar’s* activity. GATES, *supra* note 84, at 553, (in his visit with Boris

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Yeltsin, he delivered the Soviet naval flag that had shrouded the coffins of the half dozen Soviet sailors returned to the sea, after the *Glomar Explorer* recovered part of a Soviet ballistic missile submarine deep in the Pacific Ocean in the mid-1970's.")

There are arguably means to force the judicial branches of the government to be accountable for their role in permitting the CIA's abusive actions against private citizens that are taken in the name of "national security." Debra S. Katz and Lynne Bernabei, *Practicing Public Interest Law In a Private Public Interest Law Firm: The Ideal Setting to Challenge The Power*, 96 WEST VIRGINIA L. REV. 293, 315(1993-94). But generally, the Classified Information Procedures Act ("CIPA"), a set of procedural mechanisms for managing the declassification of classified information during the course of criminal prosecutions, is effective for only classified information of which there is no dispute over the classification. Kaplan, *supra* at 1803, ("No court can challenge the substance of [an attorney general's exercise of CIPA] and no litigant has standing to contest the attorney general's decision.") The Ethics Act creates the authorization for an independent counsel to specifically contest claims of privilege on grounds of national security, but concerns over potential interference with "military preparedness and diplomatic relations" can limit its effectiveness. *Id.* at 1859. When the Pentagon Papers were leaked, the Nixon administration tried to prevent their publication, not because of any secrets they could reveal to an enemy, but because they showed that our leaders did not have any clear and convincing rationale or justification for their stumbling into the Vietnam War.

For example, even during the Senate Iran-Contra hearings, Senator Bill Bradley asked Elliott Abrams, Assistant Secretary of State for Inter-American Affairs, if he had "any knowledge or indication that the Contras were receiving funds from Middle Eastern sources." COHEN AND MITCHELL, *see supra* note 99, at 114-16. Abrams said, "No," and subsequently explained that he had "responded truthfully because Brunei was not a Middle Eastern country." At the same Senate hearing Abrams was asked whether he had "ever discussed the problems of fund raising by the contras with members of the NSC staff." *Id.* His response was, "No. I can't remember ... we're not in the fund-raising business." *Id.* Abrams later claimed that he had been "technically accurate, because he had been asked about 'fund raising by the Contras' and he, in soliciting Brunei, had engaged in fund raising for the Contras." *Id.* Abrams justified his deception by claiming that he "had not been authorized to reveal this solicitation." *Id.*

On November 26, 1985, CIA General Counsel Stanley Sporkin drafted a finding, which provided retroactive approval of all preceding covert missions involving the Iran undertaking. WRIGHT, *supra* note 15, at 432-33. Reagan signed the finding on December 5, 1985, certifying the covert deal to be in the national interest and authorizing the CIA to participate. *Id.* When Attorney General Meese told Poindexter to bring all of the related documents to his office, Poindexter realized that the December 5, 1985, finding portrayed the Iran operation as a straight arms-for-hostage deal and destroyed it. *Id.* at 436-37. Reagan announce the resignation of Poindexter and the dismissal of LTC Ollie North on November 25, citing to Meese's determination that the evidence showed that the funds from the Iran arms sales had been diverted by North to the Contras. *Id.* President Reagan denied knowledge of the Contra diversion, saying he had not been "fully informed" about the Iran arms project." *Id.*

While Congress never condones some activities, there are occasions where the activities are disclosed, but are somehow lost in the bureaucratic chaos. During March 1984, a number of ships hit mines placed in the Nicaraguan harbors by the CIA. GATES, *supra* at 307. Technically or legally, the mining of the harbors was "an act of war," but even more accurately, it was considered "an act of utmost stupidity." *Id.* Secretary Shultz originally stopped the plan, but President Reagan reversed Shultz's decision. *Id.* at 306. The House Intelligence Committee was given a detailed briefing, but the CIA acknowledged that the briefing to the Senate committee "was scant at best." *Id.* Although chastised for withholding information, Casey had stated in the middle of a lengthy Senate briefing, with his standard monotone mumble, that, "Magnetic mines have been placed in the Pacific harbor of Corinto and the Atlantic harbor of El Bluff as well as the oil terminal of Puerto Sandino." *Id.*

concomitant of accountability. To get neither is the curse of a government machiner that protects itself more than the people it is meant to serve.”<sup>194</sup>

The research, development, production and testing of the atomic and nuclear weapons represent “the most long-lived program of public deception in U.S. history.”<sup>195</sup> Secrecy was used to develop the bomb; deception was used to sell it; and lies, evasions and cover-ups were used to minimize the radiation fallout effects over the next two decades.<sup>196</sup> The purpose of such secrecy was not the Cold War deception of the Russians, who had their own bombs and fallout to measure, but the purpose has been to keep the American people unaware of the threat to their safety and health.<sup>197</sup>

When Congress fails to aggressively use its Constitutional authority to curb the excess power of the Executive, the President becomes the main threat

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<sup>194</sup> WILLS, *see supra* note 47, at 310-12. Still, absent criteria to measure success, we are unable to evaluate what sacrifices have been futile or to appreciate the magnitude of the compromise. The U.S. courts have generally rejected “extra-legal” executive powers with the “notable exception of the internment of U.S. citizens of Japanese descent” during World War II. Paul, *supra* note 28, at 685. President Franklin D. Roosevelt’s February 19, 1942, Executive Order 9066 mandated the incarceration of 80,000 American citizens of Japanese descent and 40,000 Japanese-American residents. ROGER DANIELS, PRISONERS WITHOUT TRIAL (Hill and Wang, New York 1993)(with the simultaneous creation of the War Relocation Authority (WRA), ten permanent concentration camps in the United States became “home” to 120,000 Japanese-Americans after national fear following the bombing of Pearl Harbor consumed the mechanics of the government’s decision-making process.) Daniels states that Supreme Court Justice Owen J. Roberts falsely reported that sympathizers aided in the attack on Pearl Harbor and said that the “FBI was inhibited, because it paid too much attention to the Constitution.” *Id.* at 37. The only evidence of a threat to the interior of the mainland of the U.S. occurred on February 23, 1942, when a Japanese submarine fired twenty-five rounds at an oil refiner near Santa Barbara, California. JEFFREY M. DORWART, CONFLICT OF DUTY 184 (Naval Institute Press, Annapolis 1983).

<sup>195</sup> WILLS, *see supra* note 47, at 313, (quoting Stewart Udall).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* Klaus Fuchs and David Greenglass, two scientists working at Los Alamos, smuggled information to Russia through Julius Rosenberg and others’ assistance. *Id.* Theodore Alvin, another spy at Los Alamos whose role only recently became public knowledge, probably did even more

to American liberty.<sup>198</sup> Congress reached its limit of tolerance for executive abuses of domestic law during the early 1970's and reacted with a host of legislation.<sup>199</sup> But, the effectiveness of these Congressional limitations is still debatable.<sup>200</sup> By conceding authority over foreign affairs, Congress effectively allows the Executive branch to "shroud the policy-making process

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damage, though the FBI had discovered his activities in 1950. *Id.* Through the scientific disclosures from Fuchs and Hall, the Russians were able to complete a successful atomic explosion in 1947. *Id.*  
<sup>198</sup> Kaplan, *supra* note 193, at 1784. Several allegations have been made that the President has in fact undermined national security in that he and his administration engaged in "deliberately ignoring, playing down or covering up dangerous developments abroad that affect vital US interests." GERTZ, *see supra* note 25, at 58, (The allegations assert that "appeasement diplomacy" and "White House spin-control" has become the Clinton administration's substitutes for missile defenses.)

<sup>199</sup> President Nixon had at one point argued "that wiretaps, nocturnal invasions of private property and theft of private records - all patently illegal - ceased to be illegal when authorized by the president or his duly constituted agent." WRIGHT, *supra* note 15, at 199-201, (in an interview with David Frost). He asserted that, "when the president does it, that means it is not illegal." *Id.* As a result, during 1973 and 1974, Congress took three critical stands to curb the presidential powers. *Id.* at 202. With the War Powers Resolution, Congress restricted the President's authority to deploy American troops in emergency situations to sixty days, unless Congressional approval for an extended period was given, they outlawed executive impoundments of federal appropriations and created the machinery to restore effective congressional control over the federal budget, and with the courts assistance limited the exercise of the "Executive Privilege" doctrine. *Id.*

<sup>200</sup> While some commentators think the war powers resolution causes the President "to structure national security decisions more carefully," others consider "the 'successes' of the War Powers Resolution [to be] more illusory than real." Michael P. Kelly, *Fixing The War Powers*, 141 MIL. L. REV. 83, 97 (1993). Although the Haitian crisis was resolved peacefully, many constitutional scholars speculated that President Clinton's failure to seek congressional authorization was an indication that he intended to disregard the War Powers Resolution if the military invasion had taken place as planned. Mark T. Uyeda, *Presidential Prerogative Under The Constitution To Deploy U.S. Military Forces In Low-Intensity Conflict*, 44 DUKE L.J. 777 (1995). The Justice Department's Office of Legal Counsel position was that prior congressional authorization was unnecessary, because "after examining the circumstances, nature, scope and duration of the anticipated deployment...the Haiti operation was not a 'war' in the constitutional sense." *Id.*

Presidents continue to not only act without consulting Congress, but frequently presents Congress "with incomplete or misleading information on which to deliberate," and "keep evidence of both the intervention and the concealment classified for years." Jonathan A. Bush, *The Binding Of Gulliver: Congress And Courts In An Era Of Presidential Warmaking*, 80 VA. L. REV. 1723, 1731 (1994). This practice of non-disclosure and the classification of information by the Executive not only precludes public accountability, but it serves to conceal all of the foreign policy values under the single value of national security.

from public view” and further decrease the “degree of democratic accountability in foreign policy.”<sup>201</sup>

How does the attorney interpret Executive intent within the framework of American foreign policy, absent a personal audience with the President <sup>202</sup> The concealment of this information not only hamstrings Congress, but it can hamper or preclude a government attorney’s accurate assessment of Executive intentions when analyzing foreign affairs matters. Starting from one extreme, we might return to the ethical canon that seems to prioritize some independent moral authority in the absence of legislative authority, especially where the classified information is not generally accessible to the entire Executive branch.<sup>203</sup> We might argue that in such cases where

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<sup>201</sup> Paul, *supra* note 28, at 679, (explaining that in the absence of congressional debate, U.S. policy has often lacked coherence or public support, because Congress was not “politically invested in the policy.”)

<sup>202</sup> Making a distinction between the Executive acting constitutionally and politically would seem to be irrelevant for foreign affairs matters. But, as our constitutionally designed foreign affairs policymaking becomes the product of only a few Executive branch officials, the opportunity for foreign governments to influence that process increases. Paul, *supra* note 28, at 680, (noting the recent allegations that the Chinese government and foreign business interests have attempted to buy influence with President Clinton, which in turn, “undermines the constitutional value of democratic accountability and distorts foreign policy-making.”)

At the beginning of 1997, senior Clinton administration policymakers were notified that Kumchangni nuclear weapons program in North Korea was continuing development. GERTZ, *see supra* note 25, at 110. Madeline Albright was at the same time telling the House Appropriations Committee that the Framework Agreement had stopped the nuclear weapons program in North Korea. *Id.* In February 1998, she defended a request for \$35 million to support continued North Korean compliance with its non-proliferation obligations, and in March 1998, she also told the House Foreign Operations Appropriations committee that North Korea’s nuclear program had been stopped by the agreement, as repeated the statement to the Senate Finance committee in July 1998. *Id.* When she was confronted about the misrepresentations in August 1998, Madeline Albright attempted to claim she had just become aware of the contradictory information in July, but was politely corrected by Army Lieutenant General Patrick Hughes, director of the Defense Intelligence Agency, who reminded her that her office had been apprised of the situation over eighteen months earlier. *Id.* In February 1999, Albright acknowledged that the Kumchangni project was not frozen and an embarrassed Clinton administration gave the 1997 report a special access program (SAP) level of secrecy, “a classification normally reserved for the Pentagon’s most secret weapons and so secret that officials allowed into the Pentagon compartments are authorized to lie about their very existence.” *Id.*

<sup>203</sup> How can we make accurate moral judgments about policies and activities where we do not have all of the information? *See generally*, LAZAREFF, *supra* note 144, at 31-33, (discussing the binding effect

there are no expressed foreign affairs values, the government attorney has the functional responsibility or duty to individually act on behalf of the American public to further the collective international interests of peace, a balance of world power, economic stability, and the humanitarian treatment of others.<sup>204</sup>

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of secret agreements, specifically Status of Forces Agreements (SOFA's), between Administrations which are not published and have questionable application to third-party individuals.) *See also*, JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* (Martinus Nijhoff Publishers 1992)(a more recent reference of status of forces arrangements as reviewed by John E. Parkerson, Jr., 141 *MIL. L. REV.* 232 (1993).

<sup>204</sup> Consider forcing an extreme logical application of national security values solely for the purpose of narrowing the focus or divining a line for interpretations. The closest analogy to an example of "misdirected morality" in the executive branches (note that the true motivation might be an individual benefit as opposed to a moral or public benefit) concerns the sacrifice of national interest to international interests by the notorious "spy." Consider the perceived necessity and moral appeal of the following statement:

"In the press, in Parliament, in the United Nations, from the pulpit, there is a ceaseless talk about the rule of law, civilized relations between nations, the spread of democratic processes, self-determination and national sovereignty, respect for the rights of man and human dignity. The reality, we all know perfectly well, is quite the opposite and consists of an ever-increasing spread of lawlessness, disregard of international contract, cruelty and corruption. The nuclear stalemate is matched by a moral stalemate. It is the spy who has been called upon to remedy the situation created by the deficiencies of ministers, diplomats, generals and priests. Men's minds are shaped, of course, by their environment and we spies, although we have our professional mystique, do perhaps live closer to the realities and hard facts of international relations than other practitioners of government. We are relatively free of the problems of status, of precedence, departmental attitudes and evasions of personal responsibility, which create the official cast of mind. We do not have to develop, like the Parliamentarians conditioned by a lifetime, the ability to produce the ready phrase, the smart reply and the flashing smile. And so it is not surprising these days that the spy finds himself the main guardian of intellectual integrity."

GEORGE BLAKE, *NO OTHER CHOICE* 168 (Simon & Schuster, New York 1990)(quoting from a circular issued by George Young, Vice-Chief Secret Intelligence Service.) George Blake, a senior British Secret Intelligence Service officer was convicted and sentenced in 1961 to forty-two years of imprisonment for spying, although he escaped to Moscow after serving five years.

Aldrich Ames admitted to identifying to the KGB, virtually all Soviet agents of the CIA and other American agents in foreign services know to him for millionaire lifestyle. TIM WEINER, DAVID JOHNSTON, AND NEIL A. LEWIS, *BETRAYAL: THE STORY OF ALDRICH AMES, AN AMERICAN SPY* 263-64 (Random House, New York 1995). He justified his attack on the CIA by the explanation,

"I had come to believe that the espionage business, as carried out by the CIA and a few other American agencies, was and is a self-serving sham, carried out by careerist bureaucrats who have managed to deceive several generations of American policy makers and the public about both the necessity and value of their work. There is and has been no rational need for thousands of case officers and tens

The government attorney is tasked with interpreting foreign affairs policy for his or her agency, with an absence of information and only “national security” and international legal principles as defining guidelines.<sup>205</sup> Using a moral philosophy, an attorney can justify any number of political ideologies within the international community, and of most importance, a political ideology inconsistent with the U.S. Constitution.<sup>206</sup> Where all foreign policy analysis is conducted against the single

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of thousands of agents working around the world, primarily in and against friendly countries. The information our vast espionage network acquires at considerable human and ethical costs is generally insignificant or irrelevant to our policy makers' needs. Our espionage establishment differs hardly at all from many other federal bureaucracies, having transformed itself into a self-serving interest group, immeasurably aided by secrecy. Now that the cold war is over and the Communist tyrannies largely done for, our country still awaits a real national debate on the means and ends - and costs - of our national security policies. To the extent that public discussions of my case can move from government-inspired hypocrisy and hysteria to help even indirectly to fuel such a debate, I welcome and support it.” *Id.*

Although President Clinton considered the charges against both Rick Ames and his wife, Rosario “very serious,” the more important concern was the overall relations between the United States and Russia, to include supporting the administration’s \$2.5 billion aid package to Russia. DAVID WISE, NIGHTMOVER 283 (HarperCollins, New York 1995). Following are the ten Soviet agents working for the CIA who were executed after their identities were disclosed to the KGB by Aldrich Ames. Their CIA code names, all beginning with the letters GT, and in some cases their FBI code names, are listed along with a brief description of each victim. (1) GTBEEP: Dimitri Fedorovich Polyakov, FBI code name TOPHAT. General of the GRU, Soviet military intelligence. (2) GTGENTILE: Valery F. Martynov, FBI code name PIMENTA. KGB lieutenant colonel stationed in Washington. (3) GTGAUZE: Sergei M. Motorin, FBI code name MEGAS. KGB major stationed in Washington. (4) GTJOGGER: Vladimir M. Piguzov, KGB lieutenant colonel stationed in Indonesia. (5) GTACCORD: Vladimir Mikhailovich Vasilyev, GRU colonel stationed in Budapest. (6) GTCOWL: Sergi Vorontsov, KGB officer in Moscow who revealed spy dust to the CIA. (7) GTMILLION: Gennady Smetanin, lieutenant colonel of the GRU stationed in Lisbon. (8) GTFITNESS: Gennady Grigorievich Varenik, KGB officer stationed in Germany. (9) GTWEIGH: Leonid Polyshuk, KGB officer stationed in Africa. (10) GTSPHERE: Adolf G. Tolkachev, Soviet defense researcher in Moscow. *Id.* at 331-32. Three other names are also attributable to Ames’ espionage: (1) TICKLE: Oleg Gordievsky, the KGB chief in London, (2) TWINE: Boris Yuzhin, a KGB lieutenant colonel who worked undercover as a journalist for the TASS news agency in San Francisco, and (3) BLIZZARD: Sergei Bokhan, a Soviet military intelligence colonel based in Athens. Both Bokhan and Gordievsky successfully escaped and defected to the West. WEINER, JOHNSTON, AND LEWIS, *supra* at 40-41.

<sup>205</sup> See *supra* note 24, designating the agency as the client.

<sup>206</sup> Before rejecting the notion or nexus between attorneys and the secrecy activities altogether, we might recall that our “expertise” has contributed to the majority of these activities. William Donovan consciously drew upon his legal background in forming the American secret intelligence organization in 1929. RANELAGH, *see supra* note 47, at 28-29. While the idea of spying in peacetime seemed unnecessary and disconcerting to many, spying was not unusual. *Id.* at 30. There was “a reservoir of

national security value, any issue affecting our ideology can affect our national security. Individual concessions of national interests, even though interpreted according to some moral responsibility or in relation to some specific international legal agreement, still does not justify the unilateral imposition of national benevolence.<sup>207</sup>

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experience in predatory conduct in America,” developed from the ruthless competition and conspiratorial activities of bankers, lawyers, and industrialists. *Id.* Lawyers were accustomed to acting as shields for their clients, discretely obtaining buried information from a network of informants, influencing legislation and the political processes that were intensively combative and involved a complexity of regulations. *Id.* Lawyers held unique special place in society, as well as possessing a range of resourcefulness that could never be underestimated. *Id.* In sum, they were “formidable, possessing the qualities of intellectual precision and highly sophisticated practical competence - the same qualities required in intelligence work.” *Id.* Men like these joined the intelligence services and made deals with the Mafia to facilitate the Allied landings in Sicily and Italy in World War II and in the 1960s made deals with criminals in attempts to assassinate Fidel Castro. *Id.*

<sup>207</sup> “The covert actions of which we speak began in ideas and in ideals. Noel and Herta Field, Anthon Blunt and Donald Maclean, and Alger and Priscilla Hiss never would have entered the world of espionage and betrayal except through a portal they saw as one opening onto the very highest moral commitment.” STEPHEN KOCH, *DOUBLE LIVES* 158 (The Free Press, New York 1994).

For example, a case of arguably good intentions gone awry involved the case against the Navy’s civilian employee, Johnathan Pollard, for spying on the U.S. for our ally, Israel. ALAN M. DERSHOWITZ, *CHUTZPAH* 302 (Little, Brown and Company, Boston 1991). Pollard denied that he had ever placed the interests of Israel over the U.S, claiming that he “had given Israel only material that was necessary to its survival but that would not harm the U.S. - information to which Israel was both morally and legally entitled under two intelligence exchange agreements executed between the US and Israel.” *Id.* Pollard explained that while he had access to information that could harm the national interests of the U.S., he had refrained from disclosing it. *Id.* at 302.

The commitment of the modern conservative to Israel is both theological and political. WATT AND WEAD, *see supra* note 140, at 189. During the Palestinian terrorist attack on the Achille Lauro vessel near Port Said, Egyptian President Mubarak sent a cable to National Security Advisor, Bud McFarlane explaining that any “diplomatic pressure was in vain,” because the terrorists escaped the Achille Lauro on a tugboat and were already out of Egypt en route to Tunis. SAMUEL M. KATZ, *SOLDIER SPIES, ISRAELI MILITARY INTELLIGENCE* 329 (Presidio Press, CA 1992). McFarlane suspected that Mubarak was lying and directed Lieutenant Colonel Ollie North at NSC to “clarify the situation.” *Id.* North use a secure line connecting the NSC, the A’MAN Headquarters in Tel Aviv, the Israeli Embassy in Washington, and the White House. *Id.* at 328-29. The A’MAN intercepted a telephone conversation between the commander of the Egyptian Muchabarat and the Egypt Air pilot designated to fly the four terrorist, Abu Abbas, and O’zzudin Badrak Kan, the PLF’s chief of military operations, to Tunis. *Id.* Israeli Major General Barak provided North with the Egyptian Air Boeing 737’s tail number, and radio and radar call signs, as the plane departed from Cairo airport. *Id.* at 330. While the American Navy scrambled aircraft to intercept the Egyptian aircraft, Arabic-speaking experts sat at computerized consoles in one of Israel’s specially modified intelligence-gathering Boeing 707’s and monitored all military and civilian communications as well as transmitting some deceitful messages of its own. *Id.* One A’MAN officer, utilizing the frequency of the Tunis air traffic controller and

Whether there is an isolated breach or technical violation that occurs, the danger for the attorney not making distinctions between law and morality is that a gradual practice of “cutting corners” or even callousness toward the complying with U.S. law occurs. Consider the example where any national security exigency involves “creating the conditions” for which the U.S. might justify its actions -international unfairness must somehow be distinguishable from a breach of international law.<sup>208</sup>

Without an appreciation of the motivating factors, to include exploring the supporting legal and factual justifications for the activity, the attorney cannot accurately advise a client regarding the activity.

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speaking in a perfect Tunisian dialect, informed the pilot of the Egypt Air jet that he was denied permission to land, until American Tomcats intercepted the plane. *Id.*

During the Gulf War, Israel faced the issue of is whether to coordinate action the Americans, or to act independently after Saddam Hussein threatening to use chemical warfare against Israel. ARENS, *see supra* note 145, at 197. While the Gulf War emphasized to Israel the importance of modern technology on the battlefield, America’s hesitation to react when Israel came under attack, was a reminder that Israel would have to rely solely on itself for its future defense. *Id.* at 217.

Some of the first major U.S. spy cases came to light in 1985, with the arrest of John Walker, who worked for the U.S. Navy. GATES, *supra* note 84, at 361-62, (Walker gave the Soviets the most sensitive U.S. cryptographic capability, “enabling them to decipher perhaps a million US Navy coded messages,” as well as other documents over a seventeen-years period.) At about the same time, Ronald W. Pelton, a National Security Agency employee for fourteen years, was also arrested for spying for the Soviets. *Id.* at 365. Two other CIA officers were arrested that year, Sharon Scranage was arrested “for providing intelligence information to a boyfriend employed by the Ghanaian government,” and Larry Wu-tai Chin was arrested for spying for Communist China. *Id.*

<sup>208</sup> Arguing a right of self-defense or the right to invoke force, after we deliberately create the condition or justification that would invoke a response is a pilpul exercise in itself. KATZ, *see supra* note 18, at 25. *See* MOYNIHAN, *supra* note 91, at 209-210, (noting that the U.S. was looking for a rationale for intervention in Nicaragua and ultimately resorted to violating international law). When CIA Director William Casey told the Senate Intelligence Committee that he was hoping to “harass” Nicaragua into “becoming more democratic,” Senator Moynihan challenged him by asking, “how and where did the U.S. draw the line between deliberate harassment and an effort to overthrow?” WRIGHT, *supra* note 15, at 421-22.

One comment that capsulizes the justification for the CIA’s clandestine operations in other countries came from William Casey, who said, “it is much easier and much less expensive to support an insurgency than it is for us and our friends to resist one. It takes relatively few people and little support to disrupt the internal peace and economic stability of a small country.” WOODWARD, *see supra* note 93, at 195.

Only through declassifying and conducting an analysis of the documents associated with historical confrontations can we evaluate the factors that were actually used in defining our foreign policy decisionmaking.<sup>209</sup> One weakness of a logical analysis of the documents associated with these situations is that they typically have context only within the period in which they occurred.<sup>210</sup> In other words, whether the

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<sup>209</sup> Documents have no real context of their own, but under the critical oral history analysis, using “the documentary record, the expertise of specialists in the field, and the explanations of those key individuals who lived through the event” we can develop a comprehensive context. MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 9, (the Cuban missile crisis of October 1962 was the first event analyzed by the method of critical oral history). Throughout the post-World War II period, America’s key foreign policy decisions have been “justified as both promoting democracy and resisting aggression.” KISSINGER, DIPLOMACY, *see supra* note 73.

<sup>210</sup> A retrospective study of the Cuban missile crisis made very clear that the decisions of the Soviet Union, the U.S. and Cuba before and during the crisis had been distorted by “misinformation, miscalculation, and misjudgment” and the motives driving U.S. foreign policy were almost entirely defensive. MCNAMARA, BLIGHT, BRIGHAM, BIERSTEKER AND SCHANDLER, *see supra* note 74, at 26, 39. “The tendency of Western scholars to equate Washington’s knowledge, estimates, and assumptions with the totality of empirical fact has led to underestimation of the extent to which decision-making in the Cuban missile crisis was conducted in the dark” Philip Nash, *The Cuban Missile Crisis Revisited*, 18 FLETCHER F. WORLD AFF. 172, 173 (1994)(quoting Laurence Chang). *See* GLYNN, *supra* note 108, at 163, (miscalculation is one of the major underlying causes of war); HENRY KISSINGER, DIPLOMACY, *supra* note 73, at 581)(conflicts among nations are caused by misunderstandings rather than by clashing interests).

In 1959, Fidel Castro successfully overthrew the Cuban dictator, Fulgencio Batista, and created the first Cuban government hostile to the United States. Chayes, *supra* note 39, at 461. Castro openly criticized the U.S. and simultaneously initiated discussions and intelligence-sharing with the Soviet Union. *Id.* During this period, the United States had approximately 3,000 nuclear warheads in comparison to the Soviet’s arsenal of 300 nuclear warheads. Whitefield and Dorschner, *see supra* note 171. Some U.S. military leaders believed that the Communists dared not instigate a confrontation, but others speculated that the Soviets, with fewer weapons, might be resort to a first attack out of fear. *Id.* In Russia, Nikita Khrushchev, chairman of the Council of Ministers in the Soviet Union, felt humiliated by the US overwhelming superiority in intercontinental missiles. Chayes, *supra* note 39, at 478. He developed a plan to place nuclear missiles in Cuba that would negate the need for as many intercontinental missiles in Russia and would allow him to conserve Russia’s resources and work to improve their suffering economy. *Id.*

The U.S. (CIA) then began a covert campaign to discredit Castro’s regime in hopes of eventually ousting him and an attempted American-supported coup at the Bay of Pigs in April 1961 failed miserably, embarrassing the U.S. and bolstering Castro’s popularity both in Cuba and the Soviet Union. *Id.* at 459. President Kennedy was discontent with the accuracy and efficiency of the CIA, prompting a change in the CIA leadership. Chayes, *supra* note 39, at 459-61. One of Bill (William) Casey’s early observations in the CIA came from Helms’ response to the Kennedy brothers during the Bay of Pigs. WOODWARD, *see supra* note 93, at 44. “The Kennedys wanted results. They wanted Castro out - dead, though they never said it in as many words. If Helms, who was running covert operations then, had said it couldn’t be done, he would have been out.” *Id.* The 1975 Church Committee Report, Richard Helms provided evidence on the CIA involvement with assassination plots

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during his tenure as chief of operations, including sending paid assassins to the Congo in 1960 to try to kill Lumumba and to Cuba in 1961 to have Castro killed as part of Operation Mongoose. RANELAGH, *see supra* note 47, at 383. The Taylor Commission report focused on administrative rather than operational matters: "Top level direction was given through ad hoc meetings of senior officials," the report stated, "without consideration of operational plans in writing and with no arrangement for recording conclusions and decisions reached...They reviewed the successive changes of the plan piecemeal and only within a limited context, a procedure which was inadequate for a proper examination of all the military ramifications." *Id.* at 379.

Cuba had an unquestionable legal right to seek Soviet protection and assistance in defending itself from another possible U.S. attack, especially after the Bay of Pigs affair. Chayes, *supra* note 39, at 393. Cuba's actions were entirely consistent with the actions being taken by the U.S., although, their actions were from the opposite perspective. Roger Fisher explains that, "Behind opposed positions lie shared and compatible interests as well as conflicting ones. We tend to assume that because the other side's positions are opposed to ours, their interests must also be opposed. If we have an interest in defending ourselves then they must want to attack us." ROGER FISHER AND WILLIAM URY AND BRUCE PATTON, *GETTING TO YES*, 2nd Ed. 42 (Penguin Books 1991).

Even before the missiles were discovered on Cuba, the U.S. was overtly engaged in "decidedly unroutine maneuvers and redeployment of forces" throughout the area, which gave the impression that the U.S. was preparing for another invasion. Nash, *supra* at 172, (In reference to "Operation Mongoose," which involved military exercises designed to conduct an invasion of an island territory such as Cuba.) The U.S. instituted a complete embargo on Cuba in the spring of 1962, denying Cuban ships entry to U.S. ports and initiated discussions through the O.A.S. to "organize an economic embargo and [to sever] diplomatic relations with Cuba." Chayes, *supra* note 39, at 459-460. Normal legal-political distinctions became opaque, because 1962 was also an election year and the situation in Cuba was a big political issue, especially after photographs from the U.S. U-2 planes flying over Cuba eventually confirmed that the Soviets had actually emplaced "offensive" nuclear missiles in Cuba, as opposed to defensive missile systems. *Id.* at 459.

The CIA originally became aware of Soviet troops preparing missile sites in Cuba from Phillippe DeVosjoli, a French master spy in Washington in charge of counterintelligence in North America, who controlled a spy-ring in Cuba. Larry Stewart, Jim M. Perdue, Erwin Chemerinsky and Gary R. Gober, *Keys to Success*, JTLA TRIAL 41-42 (1999). In negotiating the Cuban Missile Crisis, both the US and the Soviets seriously miscalculated the actions of the other and had unknown "blind spots." Laurence Jolidon, *Missteps Of October: Cuban Missile Crisis Took World To Edge*, USA TODAY, October 22, 1992, at 4A. The "most chilling revelation," disclosed by former Soviet generals and officials thirty years later, was that Moscow had supplied Cuba with "battlefield nuclear arms, in addition to the long-range nuclear missiles. *Id.* Additionally, during October and November 1962, the United States had good intelligence on the missiles in Cuba, but the information on the number of Soviet military personnel was weak. Garthoff, *Soviet Scholars Shed New Light On Cuban Missile Crises 42,000 Troops*, LOS ANGELES TIMES, September 4, 1988, at 6. The official U.S. intelligence estimate on the Soviet troop strength in Cuba varied from 4500 Soviet troops at the beginning of October to an estimated 16,000 troops in mid-November 1962. *Id.* According to Soviet scholar, Sergo Mikoyan, there was a full Soviet military complement in Cuba in October 1962, of 42,000 troops. *Id.*

Another unknown lack of control over information became evident from a Soviet working as a spy for the U.S., who provided the names of four Americans who were spying for Moscow during the Cuban Missile Crisis time period: Nelson C. "Bulldog" Drummond, a Navy yeoman recruited by the Soviets in 1957 sold US secrets to the Soviet GRU for until 1962; Jack E. Dunlap, an Army sergeant at the National Security Agency began passing secrets in 1960 to the Soviet GRU until 1963; William H. Whalen, an Army lieutenant colonel working in intelligence for the Joint Chiefs of Staff, spied for Moscow for four years until 1963; and Herbert W. Boeckenhaupt, an Air Force sergeant and code-machine repairman was convicted in 1967 of providing secret information regarding the Strategic Air Command to Moscow. WISE, *see supra* note 202, at 61-62.

activities were legal under international law is dependent on the interpretation of underlying national values at that time.<sup>211</sup> Of course, our one-value “national

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<sup>211</sup> The initial legal issue under consideration was whether Soviet’s emplacement of offensive nuclear weapons in Cuba qualified as an “armed attack” within the meaning of Article 51 of the U.N. Charter. Chayes, *supra* note 39, at 469. There is no question that Cuba had a perfect legal right to emplace the Soviet-made missiles in Cuba, just as Turkey had the legal right to emplace U.S.-made North Atlantic Treaty Organization (NATO) missiles within the Turkish borders, only 150 miles from the Soviet border. *Id.* The US missiles in Turkey threatened the Soviet Union in the same manner as Cuba’s missiles threatened the U.S. *Id.* An interpretation that the Soviet’s missile emplacement in Cuba was “a threat or use of force in violation of Article 2.4 of the U.N. Charter or an armed attack under the definition of Article 51,” would simultaneously put the U.S.’ Turkish allies in jeopardy from the Soviets for the same reasoning. *Id.*

The U.S. ultimately determined that the Soviet’s emplacement of a missile system in Cuba was not an armed attack within the meaning of Article 51 of the U.N. Charter, which also meant that the U.S. could not take military action unless the authorized by the O.A.S. Chayes, *supra* note 39, at 469. Katzenbach was convinced that the U.S. could act unilaterally under the Monroe Doctrine. President Kennedy, though, had no intention of invoking the Monroe Doctrine that would appear to create some special set of legal privileges for the United States. Surprisingly, Dean Acheson, former secretary of state argued that this crisis had nothing to do with law because in situations where U.S. sovereignty is threatened, international law is irrelevant. *Id.* at 469.

The U.S. still could not legally use a quarantine as an enforcement action even if approved by the O.A.S., because Article 53 of the U.N. Charter states that no regional organization can authorize the use of force without the prior permission of the U.N. Security Council. *Id.* at 476. *Compare*, “If the world accepted what Kennedy did during the Cuban missile crisis as legal – and it did – and if it therefore perceived what the Soviet Union did as illegal – and it did – then international law thereby acknowledged the altogether exceptional and sensitive character of everything to do with nuclear weapons.” EUGENE V. ROSTOW, *supra* note 20, at 394, (noting that under the “exceptional nature” of nuclear weapons theory, the U.S. could act unilaterally under Article 51 of the U.N. Charter because of the absolute right of every state to use force in self-defense - and to help other states in their efforts at self-defense - without the prior permission of the Security Council.).

The greatest obstacle to proceeding with the quarantine plan was getting approval from the U.N. Security Council. Chayes, *supra* note 39, at 476. Even though Cuba was subject to the Rio Treaty, which empowered the O.A.S. to authorize the use of force within this hemisphere, the Soviets were not members of the treaty. In the interim the Whitehouse leaked warnings that the U.S. might resort to a quarantine, which worked as a “stopgap” measure that gave President Kennedy some additional time to plan. *Kennedy Was the Right Man To Lead During Missile Crisis* OMAHA WORLD-HERALD, October 22, 1997, at 14. President Kennedy also gave a speech stating, “I am going to order a quarantine of Cuba,” which conveyed his future intention, but recognized that he had to wait for the O.A.S. authorization first or else he would make a mockery of the process. Chayes, *supra* note 39, at 473-74. The Soviets immediately petitioned the U.N. Security Council to condemn the proposed quarantine, but the Security Council rejected the resolution. *Id.* The Security Council’s reaction was the pivotal event in developing a legal argument for the use of force. *Id.* The U.S. created a theory to justify the use of force based on the premise that the Security Council’s refusal to condemn the quarantine was by default an authorization. *Id.* at 476. The U.S. was also aware that the Soviets would need a two-thirds majority vote of the U.N. General Assembly to change the Security Council’s decision. *Id.*

security” foreign policy means that almost anything goes - at least until someone gets caught.

Generally speaking, over 95% of the relevant classified information about foreign countries is available from a competent search and review of perfect legitimate library archives throughout the U.S., and the remaining 5% is discoverable from similar sources abroad.<sup>212</sup> Herein lies the inescapable functional responsibility for the international practitioner, who is trained both in the research and analysis of information; we reject the hyperbole of secrecy in favor of generally accessible factual substantiation. Attorneys traditionally contribute definition and meaning to factual and statistical data relevant to American foreign policy objectives.

In this manner, we can independently and ethically examine the importance and priority of the underlying values and openly challenge compromises of any legal principle - provided we are all attentive and systematic in approaching the issues.<sup>213</sup> Maybe then we can legitimately define additional foreign policy values. The key to our national security is the analysis of this information, not hording it through secrecy.<sup>214</sup> In the triage of international legal responsibilities, recognizing a formal binding obligation to which the U.S. must comply would lead to “law,” as opposed to principled agreements that the U.S. may violate at will under the national security umbrella. Agreements that operate based upon the imposition of force or a

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<sup>212</sup> MOYNIHAN, *see supra* note 91, at 227.

<sup>213</sup> It is still questionable whether world leadership is truly inherent in America’s conscious values or whether it is simply a byproduct of its nation security objective, a foreign policy attitude that Kissinger characterizes as “self-righteous posturing.” KISSINGER, *DIPLOMACY*, *see supra* note 73, at 834. His main point is that our long-term national survival and progress will depend on the ability to make choices [among both national and international values], which reflect contemporary reality. *Id.*

willingness to comply is not equal to legal authority, which is a power or control concept.

### Conclusion

Absent a binding supranational authority, how government attorneys interpret not only international legal principles and agreements, but also our national commitment, plays a major role in characterizing them as “law.” International law, apart from U.S. statutes and ratified treaties, is currently defined as both obligator legal principles and as sacrificial global interest policies. My contention is that we cannot make the determination from routine success in forming the agreements or passive conduct that gives the inference of compliance with a legal obligation.

With the growing onslaught of information produced today, we are learning that having more data “is no more helpful in divining the truth than is having too little.”<sup>215</sup> An assumption behind all principles of international law, however, is that professionals will practice both competently and according to the highest principles of ethics.<sup>216</sup> Defining those standards is not limited to any particular profession, though the legal profession is broaching the ethical parameters of the international practice. Still, the underlying questions of law and policy, academician-practitioner disputes,

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<sup>214</sup> MOYNIHAN, *see supra* note 91, at 222.

<sup>215</sup> Thomas Pickering, *Managing Information Chaos* (June 3, 2000) <[http://www.state.gov/www/policy\\_remarks/1999/990313\\_pickering.html](http://www.state.gov/www/policy_remarks/1999/990313_pickering.html)> (Under Secretary for Political Affairs addressing the U.S. Institute for Peace on Mar. 12, 1999). Also note that the information is not available to everyone, because seventy-five percent of the world’s six billion human beings does not yet have telephones, much less access to the internet, and more than half have never made a telephone call. Secretary of State Madeline K. Albright, *America and the World in the Twenty-first Century* (June 3, 2000) <<http://secretary.state.gov/www/statements/2000/000216.html>> (statement before the House International Relations Committee, Feb. 16, 2000).

<sup>216</sup> Jennifer Leaning, *Medicine and International Humanitarian Law*, 319 *BRIT. MED. J.* 393, Aug. 14, 1999 (1999 WL 10992303).

and propriety of government activities are not issues that more regulation by the ethical authorities will resolve.

There is an unsettling danger in liberally exercising moral authority within the attorney's functional role and ethical rules, especially in government practice where the ethical approach to resolving legal issues is not consistent with the Constitutional division of authority. While there are some misgivings in compromising or exercising restraint of international moral and ethical concerns in foreign policy making, the concession to a government attorney's "intellectual posture of technicism" is more palatable as sequestered within the bounds of the Constitution, than the reliance upon an unrepresentative individual's arbitrary morality.<sup>217</sup>

As long as the attempt is to change another sovereign's ideology to a representative democracy, there is a lesser chance of acting or advising inconsistent with Constitutionally supported law. Other sovereigns are currently battling inconsistencies between their laws and their newly advocated ideologies.<sup>218</sup> Attempts

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<sup>217</sup> Tompkins, *supra* note 29, at 564, (taking the opposing view).

<sup>218</sup> China is experiencing the forces of changes with their economic expansion and move toward a more democratic rule of law. President Clinton's Remarks on Foreign Policy in San Francisco, California, Feb. 26, 1999, (June 3, 2000), <[http://www.state.gov/www/global/general\\_foreign\\_policy/990226\\_clinton.html](http://www.state.gov/www/global/general_foreign_policy/990226_clinton.html)>. China faces a number of "internal challenges, including the further development of its economic infrastructure and the tension between a modern market economy and authoritarian political system." William S. Cohen, Secretary of Defense, Report of The Quadrennial Defense Review, May 1997 (Dec. 12, 1999) <<http://www.defenselink.mil/pubs/qdr/sec2.html>>. See generally National Security Strategy for a New Century, December 1999, and National Security Strategy Report, October 1998 (June 3, 2000) <[http://www.state.gov/www/global/general\\_foreign\\_policyindex.html](http://www.state.gov/www/global/general_foreign_policyindex.html)>.

The key to Russia's future is the success of its developing economy and its political stability. William S. Cohen, Secretary of Defense, Report of The Quadrennial Defense Review, May 1997 (Dec. 12, 1999) <<http://www.defenselink.mil/pubs/qdr/sec2.html>> (also noting the projected absence of an "global peer competitor" to the U.S. until at least 2015). "Despite its peaceful democratic and economic reforms," Russia is still recovering from its "seven-decade forced march to a dead end." Secretary of State Madeline K. Albright, America and the World in the Twenty-first Century (June 3, 2000) <<http://secretary.state.gov/www/statements/2000/000216.html>> (statement before the House

at legal reforms within the U.S. law, however appropriate according to international legal principles, create serious risks for the government attorney when the attempts fall outside formal legislative or executive channels. The government practitioner should be aware that while the ethical rules identify the agency as the client, our oath is to protect the Constitution - regardless as to whether there the conflict might be resolved by pilpul techniques. At that point, each attorney must determine his or her own duty.

*There are goods so opposed that we cannot seize both, but, by too much prudence, may pass between them at too great a distance to reach either. This is often the fate of long consideration.*<sup>219</sup>

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International Relations Committee, Feb. 16, 2000). The U.S. must remain aware that Russia's ability to threaten U.S. worldwide interests is still greater than all other potential adversaries combined. Assistant Secretary for Intelligence and Research J. Stapleton Roy's statement before the Senate Select Committee on Intelligence, Feb. 2, 2000 (June 3, 2000), <[http://www.state.gov/www/policy\\_remarks/2000/000202\\_roy\\_security.html](http://www.state.gov/www/policy_remarks/2000/000202_roy_security.html)>.

<sup>219</sup> JOHNSON, *supra* note 2, at 115.