2014

Process, Practice, and Principle: Teaching National Security Law and the Knowledge that Matters Most

James E. Baker
Georgetown University Law Center

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1445
http://ssrn.com/abstract=2556851


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Constitutional Law Commons, Educational Methods Commons, Legal Education Commons, Legal Ethics and Professional Responsibility Commons, and the National Security Law Commons
ARTICLES

Process, Practice, and Principle: Teaching National Security Law and the Knowledge that Matters Most

JAMES E. BAKER*

ABSTRACT

The meaningful application of national security law requires a commitment to substantive knowledge, good process, and a capacity to cope (and indeed thrive) under the prevailing conditions of practice. This essay describes how and why to teach these three essential elements of national security law from an academic and practitioner perspective.

The essay starts with substantive law, placing emphasis not just on the breadth of knowledge and interpretive skills required, but also on the importance of depth, perspective, theory, purpose, history, and legal values in teaching the law. Next, the essay describes the importance of timely, meaningful, and contextual process, explaining why mastery of good process leads to better security and legal outcomes. Good process also addresses the pathologies of national security decision-making.

The essay also recognizes that national security practice is difficult to teach in law school because it is impossible to replicate the personalities, conditions, and context of practice. To address this, the essay identifies four essential practice traits and techniques for nurturing those traits. Two methods are treated in detail, so-called experiential learning and ethics. Specific training methods are considered, as is the importance of realism and feedback, both of which require

* Judge Baker is Chief Judge of the United States Court of Appeals for the Armed Forces and an adjunct professor at Georgetown University, The University of Iowa, and Washington University in St. Louis. He has also taught national security law at Yale University and the University of Pittsburgh. Prior to serving as a judge, he served as Legal Advisor to the National Security Council, Deputy Legal Advisor to the National Security Council, Counsel to the President's Foreign Intelligence Advisory Board, an Attorney-Adviser at the Department of State, a legislative aide and chief of staff to a United States Senator, and a Marine Corps infantry officer. The author thanks Lala Qadir, Nan Mooney, and Mattie Godzala for their helpful input while noting that any errors in text are entirely his own. This article is a footnoted and lightly edited version of a keynote address originally delivered on February 1, 2013, on “Teaching National Security Law” during a meeting of the Georgetown University Law Center Strategic Planning Council. © 2014, James E. Baker.
schools and students to move outside existing academic comfort zones. No training is more important than that addressed to ethics—not the Model Rules or the MPRE, but the principles that should define essential national security boundaries as well as the fortitude to address real world challenges with judgment and honor. Case studies, ethical codes, and critical thinking are helpful here, but role models matter most.

In sum, this essay provides a framework and a checklist against which law schools should evaluate their national security law offerings and programs (see Appendix A). What is appropriate will depend on context: a school’s mission, its size, its location, and its commitment to national security. Regardless of context, the essay offers critical lessons on how to more effectively prepare students for the national security field, or alternatively, to serve more meaningful and informed roles as citizen-lawyers as we address the security challenges ahead.

TABLE OF CONTENTS

I. INTRODUCTION .................................................. 165

II. SUBSTANCE OF NATIONAL SECURITY LAW .................. 167
   A. DEFINING NATIONAL SECURITY LAW ...................... 167
   B. TEACHING THE SUBSTANCE OF NATIONAL SECURITY LAW .......................................... 169

III. UNDERSTANDING PROCESS ................................. 172
   A. WHY DOES PROCESS MATTER? ......................... 172
   B. HOW DO YOU TEACH PROCESS? ......................... 174
      1. REALISM IN SUBSTANCE, PROCESS, AND TEXTURE 177
      2. FEEDBACK IN EXPERIENTIAL LEARNING .............. 177

IV. TEACHING PRACTICE ........................................ 178
   A. THE ABILITY TO HANDLE PRESSURE .................... 179
   B. THE ABILITY AND WILLINGNESS TO DECIDE ............ 179
   C. THE MANAGEMENT OF PERSONALITY .................... 179
   D. COPING AND RELIANCE ................................... 179

V. ETHICS IN THE PRACTICE OF NATIONAL SECURITY LAW ..... 181
I. INTRODUCTION

National security law in legal academia continues to be a growing industry, even as law school enrollment declines. However, this has not always been the case. Although the term “national security” was used as early as 1777 as a subject of college debate, the first national security law course was not taught in law school until 1974. Casebooks on military law and justice existed, but the first casebook in the national security law field was not published until 1987 and even then, it focused on international law and its application in the United States. Today, the landscape is markedly different, particularly in a post-9/11 society. There are over 130 law schools offering national security law courses. Some schools offer multiple courses as well as advanced legal degrees in national security law.

It should not have taken 9/11 to demonstrate the immediate and daily relevance

1. Ethan Bronner, Law Schools' Applications Fall as Costs Rise and Jobs Are Cut, N.Y. TIMES, January 31, 2013, available at http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?pagewanted=all&_r=0; see also Scott L. Silliman, Teaching National Security Law, 1 J. Nat'l Security L. & Pol'y 161 (2005) (discussing the increasing interest in national security law, as well as the teaching of it); Tung Yin, The Impact of the 9/11 Attacks on National Security Law Casebooks, 19 St. Thomas L. Rev. 157, 192 (2006) (noting that after 9/11, a survey of course offerings at “100 law schools ranging from Yale to Kansas showed that two-thirds (67) of those law schools include in their online course catalogs a national security law or terrorism-related course”).


of national security law. National security law resides at the constitutional intersection of security and liberty. It delimits the exercise of essential Executive branch tools, particularly those involving force, intelligence, law enforcement, and diplomacy. It also defines the processes, if any, by which policy and legal decisions are made (or not made) involving vital state responsibilities. And, depending on how it is practiced, national security law helps define and project our values, which by themselves can often contribute to preferred national security policy outcomes. It is no surprise then that many of the national security debates since 9/11 revolved around national security law, process, and values.

Law schools under increasing pressure to ensure post-graduate placements for their students surely also recognize the potential career opportunities in the national security field. These opportunities are found not just in the federal bureaucracy, where over twenty-five agencies engage in national security law practice, but also in the legislative and judicial branches of government, as well as various state and local agencies. In addition, for the reasons stated above, an increasing number of think tanks and policy organizations are hiring lawyers to address issues involving surveillance, cyber space, and immigration. And although a national security lawyer employs the same set of skills that are relevant to the practice of law generally, these skills are shaped and refined through a unique set of practice conditions and constraints. Specifically, the national security field offers an exceptional base of experiential learning as well as the opportunity to rapidly and regularly test those skills in telescoped pressure settings where lives are at stake and the conditions of practice rigorous.

National security law serves three essential purposes. First, it provides the substantive authority for the Executive branch to act as well as to delimit that authority. Second, it informs essential processes found in the Constitution, in statutes, and in Executive directives of both classified and unclassified nature, as well as informal norms and practices such as those of the National Security Council ("NSC") Lawyers Group. Finally, the law is itself an essential national security value; i.e., in military terms, a force multiplier. A national security lawyer must know and understand each of these purposes.

As importantly, in order to effectively fulfill these roles, the lawyer must understand and adapt to the practice of national security law, which is to say not just the forms of practice but also the pressures of practice. In this regard, no training is more important than the training a student receives in ethics, defined here as doing the right thing the right way. That is because the great national security lawyers are not just sophists who can find a path to "yes"; they are keepers of values who in getting to "yes" or "no" with honor guide decision-makers to preferred and honorable national security solutions through the exercise of good judgment.

For academia, a number of questions follow. What is national security law? What does the national security lawyer need to know about the law, the national security process, and the practice of law, and how do you teach it? This essay
addresses these questions, turning first to the teaching of substantive law, then the national security process, and finally the practice of law, including the importance of ethical context. Each is exponentially harder to teach, but more important to know. The goal of the essay is to suggest a framework against which law schools might evaluate their strategic and tactical approaches to national security law.

II. SUBSTANCE OF NATIONAL SECURITY LAW

A. DEFINING NATIONAL SECURITY LAW

Let’s start with a working definition of national security from which flows the scope of national security law. Without such a definition it is impossible to determine what substantive knowledge is required for the field. Definitions of “national security” abound, though they often use the terms foreign affairs and defense without defining them. For example, the Classified Information Procedures Act states that “national security’ as used in this Act means the national defense and foreign relations of the United States.” Other statutes, such as the National Security Act or the PATRIOT Act, simply do not define the term. President George W. Bush—in National Security Presidential Directive 1 (NSPD-1) entitled “Organization of the National Security Council System”—stated, “[n]ational security includes the defense of the United States of America, protection of our constitutional system of government, and the advancement of United States interests around the globe. National security also depends on America’s opportunity to prosper in the world economy.”

In contrast, President Obama defined security as one of the country’s “four enduring national interests,” including:

- Prosperity: A strong, innovative, and growing U.S. economy in an open international economic system that promotes opportunity and prosperity.
- Values: Respect for universal values at home and around the world.
- International Order: An international order advanced by U.S. leadership that promotes peace, security, and opportunity through stronger cooperation to meet global challenges.

Academics and commentators have also adopted a range of definitions, emphasizing different facets of national security over the years. For example,

8. Id. (citing 18 U.S.C. app. 3 § 1b).
commentator Walter Lippmann remarked in 1943 that "a nation has security when it does not have to sacrifice its legitimate interests to avoid war and is able, if challenged, to maintain them by war."\(^{11}\)

The objective here is not to agree on a particular definition, but rather, in sampling definitions, to expose four points: (1) multiplicity of subjects, (2) integration of disciplines, (3) breadth of courses, and (4) fluidity of the national security field.

First, national security law incorporates multiple subject matter fields. Some of these subjects derive from and are found in traditional law school curricula, including foreign relations law, international law, and criminal law. However, as current events indicate, knowledge of the law of armed conflict, surveillance law, cyber law, and immigration law are also core subjects. Moreover, no subject is as important to this field as intelligence law and process. That is because intelligence informs the use of all the other tools while also serving as the legal predicate for most of those tools. Thus, the lawyer cannot effectively operate without a command of intelligence law and process.

Second, the national security field incorporates multiple interpretive disciplines, including constitutional law, legislation, executive directives, agency directives, foreign law, and international law. This body of law is sometimes collectively described as transnational law. This means the national security lawyer must be adept at and comfortable with case law, administrative law, statutory interpretation, and treaty law, as well as the identification and application of customary international law, among other skills.

Third, course breadth is also important not only as a matter of topical scope, but because personality and theory can play an important role in national security law. For example, it makes a difference whether one learns constitutional law from a John Yoo or a Harold Koh, a Louis Fischer or a David Addington. Each espouses a different view of how, if at all, the Constitution delimits presidential power. The student who is exposed to multiple views will better understand and distinguish between theory and law and therefore more effectively identify the legal and legal policy choices presented as well as their pros and cons.

The same is true of international law. Perspective matters. One course is not enough. Consider the different perspectives offered by Samantha Power and Jack Goldsmith. A school that only offers one course cannot be said to fully educate or prepare its students for the national security field.

Fourth, the subject matter of national security is fluid. It grows, but does not shrink. As each new threat or capability emerges, so does the necessity of knowing, shaping, and—in some cases—making the legal regime that follows. Consider that cyber law was not part of the core national security curriculum

---

before 2000 or the national dialogue before 1998. Neither was federalism, nor, for that matter, homeland security generally considered a national security discipline before 9/11. Likewise, in the 1990s, the national security generalist might not have considered knowledge of military justice essential; now it is, as Cavalese, Abu Ghraib, and Wikileaks illustrate. And there will likely come a day when knowledge of environmental and treaty law will be essential to address the security challenges resulting from environmental change and degradation, including migration, a melting Arctic ice cap, rising seas, and competition for resources.

B. TEACHING THE SUBSTANCE OF NATIONAL SECURITY LAW

Law schools teach the substance of the law well; otherwise, their students presumably would not pass the bar or be hired as lawyers. The case law method and textbook system emphasizes substance, as well as "thinking like a lawyer" in civil or criminal practice. Therefore, on substance, the first question a law school should ask is whether it is providing enough breadth, depth, and perspective when it comes to substantive offerings. If not, the next question is how to better employ adjuncts and visiting professors to do so. In fact, national security law is a particularly good candidate for the wider use of remote learning and shared learning capacities in law schools. After all, presidents and commanders regularly use teleconferencing to formulate and execute policy. Law schools could make greater use of remote technology to offer students not only depth of knowledge gained from a diverse set of practitioners, but also a range of perspectives. This might also be done remotely by following and critiquing commentary on blogs like Lawfare or by assigning the same topical chapters from multiple authors—that is, "chapter challenges"—thus showing how different professors make use of the same language and reach different results. The question of what is "enough" when it comes to offerings is specific to each individual school, depending on that school's mission, size, and capacity. Nonetheless, however desirable it might be to teach multiple courses on all


national security matters with multiple professors, that is beyond the reach of all but the largest law schools with committed national security programs. The teaching point—and a more realistic alternative—is to nurture nimble and adaptable thinking as well as expose students to the breadth of knowledge required by this field. This will activate a young lawyer's ability to spot issues as well as to cope with substantive and procedural uncertainty. This is done by forcing students out of their comfort zones with new methods, new formats, strange hours, varied professorial personalities, and terrifying courses. In this regard, the national security student might substantively benefit the most from a course on the corporate taxation of agricultural equipment, if that is the one course that persuades the student she can cope with and apply unknown law.

But depth, breadth, and perspective do not end the discussion of substance. There are additional questions law schools should ask collectively and on an individual basis, specifically with reference to history as well as the theory and purpose behind the law. To start, are national security problems and challenges effectively integrated into traditional courses such as constitutional law and criminal law? A school need not offer the full phalanx of national security law courses if it is already effectively relating its curriculum to the field. Similarly, a law school need not offer a course exclusively on technology to effectively initiate a discussion about privacy, surveillance, and the law's capacity (or incapacity) to keep pace with technological and social change.

Second, is history taught along with the substance of the law? The point of knowing the substance of the law is not to recite it in a vacuum, but to apply it to facts. History informs and provides precedent in national security law as cases inform and provide precedent in the common law. History is imperative in applying constitutional and intelligence law. For example, one cannot effectively debate a war powers question if one is not able to wield constitutional practice as precedent, which comes not in cases but through historical example. The key question: when have presidents asserted unilateral authority to resort to force and on what basis? Invariably, citation is made to historical rather than legal precedent.

Likewise, one cannot appreciate or meaningfully respond to debates about the use of intelligence instruments without knowledge of past events. The passion behind a debate about NSA metadata collection and executive trust, for example, makes less sense to someone unfamiliar with the Church, Pike, and Rockefeller Committees from the 1970s documenting the use and abuse of intelligence instruments.\footnote{Among other things, the Senate Church Committee and the House Pike Committee, as well as the Rockefeller Commission established by President Gerald Ford in 1975, investigated allegations of unlawful domestic spying by U.S. intelligence agencies in the 1960s and before, as well as certain overseas activities such as coups and assassination plots. Gerald K. Haines, \textit{The Pike Committee Investigations: Looking for a Rogue Elephant}, CENT. INTELLIGENCE AGENCY, CENTER FOR THE STUDY OF INTELLIGENCE (Apr. 14, 2007), \url{https://}} Similarly, in the case of covert action, historical knowledge is
literally part of the law. That is because the statutory definition of covert action, which serves as a threshold for triggering internal and external procedural requirements, exempts “traditional diplomatic, military, or law enforcement activities” from its scope. What constitutes “traditional military activity”—or, in the parlance of the military, “TMA”—depends on practice, which necessitates contemporary and historical knowledge if the lawyer is to meaningfully and honestly apply the law. The use of the acronym “TMA” itself suggests such a necessity. To further the point, Congress did not define covert action until 1990, following the Iran-Contra affair. The legislative history of that act also states that “it is not intended that the new definition exclude activities which were heretofore understood to be covert actions, nor to include activities not heretofore understood to be covert actions.” Put directly, and in a no-fault manner, I find that few students enter law school with a working knowledge of U.S. foreign policy in the 20th century that allows them to engage in a debate about covert action, Iran, Syria, or the use of force. But national security lawyers cannot effectively operate without this knowledge.

Next, do substantive courses address the theory and purpose behind the law? This is essential for two reasons. First, honest acknowledgment of the role of theory is important if the student is to later articulate to decision-makers the role of choice and legal policy in the application of law. It also allows the lawyer to better identify and present both, or all, sides of an issue so that the client can better understand from where opposition will arise and engage the debate. This point is illustrated with reference to war powers. A declaratory statement as to what authority the Commander-in-Chief Clause grants—as if it were received wisdom or settled law—will not help the client if he is unaware of where on a continuum of views the argument falls and that other actors might take a different view. Second, theory is essential to articulating for decision-makers why they should follow the law and, in many cases, why the law’s meaningful application will lead to a better national security result. When the lawyer is able to quickly and succinctly articulate the policy benefits of following the law, and not just the law’s limitations, the client is more likely to listen and accurately apply the law when the lawyer is not around to guide. That first sentence, in writing or voice, will buy the lawyer a second sentence to make the case. The client will also more readily see the value added from the meaningful participation of the lawyer. “Because it is the law” is not persuasive to a decision-maker in crisis. Neither is an eloquent reference to Grotius. Policymakers are not impressed by lawyers who can recite the U.S. Code. They are impressed with the lawyer who relates law to fact connecting the humane treatment of prisoners to better intelligence, showing


16. BAKER, supra note 8, at 150-51.
how the proportional use of force leads to counterinsurgency success, or demonstrating how effective legal oversight helps operators better focus finite resources on genuine threats and challenges rather than noise and rabbit holes.

Theory is also a question of legal values, which is a third critical area law schools cannot neglect in teaching the substance of the law. In interpreting the Constitution, for example, one can place weight on the shared and interlocking powers between the branches or one can place emphasis on the separate nature of the powers and responsibilities. There is an interpretive basis for both. One can also emphasize the security aspects of the Constitution, the liberty aspects, or both. Whether one treats these matters in a zero-sum manner or as a collective whole to address in context is often a question of which values are taught and later emphasized in practice.

III. UNDERSTANDING PROCESS

A. WHY DOES PROCESS MATTER?

Knowledge of process is essential to the study and practice of national security law. It is more important to teach process than it is to teach the substance of the law, although one should, of course, teach both in an integrated manner. Why?

As an initial matter, the lawyer who knows all the law in the world is of little value if she is not literally and metaphorically in the room when policy is formulated and decisions are made. That requires knowledge of process and an understanding of bureaucracy. There is no annotated code to consult to find out where and when targeting cells meet, or where and when counter-terrorism working groups convene, or how to insist that you attend a meeting. The rendition meeting is not posted on the bulletin board. The trained lawyer will understand bureaucracy and agency culture and thus sense where decisions are actually made, when, and by whom, including whether they are made in informal settings or formal settings. The effective lawyer gets there first with meaningful legal advice in a form that is accessible to the client.

In addition, without a sophisticated understanding of process the lawyer is less likely to effectively communicate with decision-makers at critical moments. A memorandum will sit unread when an urgent telephone call is needed. The lawyer will send an email, or perhaps even a Tweet, when a hall interception is required. Moreover, where the trained lawyer knows how to look up the law, the master of process will know how to effectively engage the bureaucracy. The master of process will also find the expert within the government on the area of law in question and do so on the decision-maker's timeline. It is the expert and not the code that will tell the lawyer how the law has been interpreted and applied in the past as well as provide any classified nuance. Moreover, the student of process will ensure the advice rendered is authoritative and accountable. In other words, the department and the lawyers involved will stand behind the advice rendered, even when the pressure mounts to do otherwise.
An understanding of process also entails knowledge of culture. Will a lawyer at the Department of Justice respond in the same manner to the same advice as a lawyer at the CIA or in the military? Will the client? Is one client or agency more inclined to read between the lines or run off the page than another? If so, how should that knowledge shape advice? These are, of course, rhetorical questions; those who practice in the field already know that a Marine, a diplomat, and a lawyer will likely respond differently to the same request or advice.

Another reason that knowledge of process is essential to teaching law is that good process generally leads to better policy and legal outcomes. Note that the emphasis here is not on process per se, the mere mention of which will scare most security operators off, especially when lawyers are involved. The focus is on teaching and understanding good process.

Good process is timely, contextual, and meaningful. A good process is one that, among other things, fuses information rapidly and accurately; invites dissent so as to better identify weaknesses, which in turn invites mitigation; and results in a clear and accountable decision that is transparent to those with a need to know or to implement the decision. In a legal context, that means a process that includes relevant legal actors, relates law to fact, and identifies the pros and cons of each argument, as well as the legal policy implications of choosing between lawfully available options.

Good process and leadership are also the antidote to the endemic pathologies of national security decision-making. These pathologies may, and no doubt do, occur in other fields, but nowhere are they more pronounced than in the field of national security. They include secrecy, speed, the national security imperative, and the innate tendency of the Executive to focus on the immediate versus the long-term effects of policies and legal judgments. The final reason that process is essential to learning national security law is that lawyers more often than not are the keepers and guardians of process, to the extent anyone is at all. It is lawyers who will know that a classified directive exists. It is lawyers who are trained in constitutional processes. And it is lawyers who should operate without the burden of a policy portfolio, and thus operate with the objective to guide decision-makers to an effective contextual process without the conscious or subconscious burden of having that process result in a particular outcome.

18. This refers to the innate (and appropriate) pressure policymakers feel to solve the problem and thus the innate tendency to reach and sometimes overreach.

19. I call this the “Jackson principle,” based on Justice Jackson’s observation in Youngstown that “[t]he tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
B. HOW DO YOU TEACH PROCESS?

A number of points bear emphasis. The first point is recognition that national security process is a core subject, just as civil procedure and criminal procedure are central to the study of civil or criminal law. A law school would hardly judge a student to be trained in criminal law or civil law if she did not know the judicial structure at the state and federal level, how many Justices sit on the Supreme Court, or understand the relative jurisdiction between courts. Similarly, a key aspect of national security practice is understanding the variety of procedures and processes that apply. Here, a comparative study of process is useful, as between subject areas, between institutions, and between countries. Moreover, in contrast to criminal procedure or civil procedure, for example, national security processes are not, as a general matter, initiated or run by lawyers. However, it is the lawyer who often has to explain and articulate the benefit of good process to the decision-maker.

Second, comparative analysis and case studies are also useful methods for conveying real-world process points, in the absence of experience. Thus, a national security law course should consider the normative processes by which the President and other key actors make national security decisions, including the military chain of command and the NSC process. It should also include consideration of ad hoc and informal mechanisms. Who is in the room and who is not? In this regard, White House pictures are a useful asset; however, agency decision-making can be even more opaque in the absence of the pictures and narrative that sometimes accompanies NSC decision-making. Each process offers different perspectives on vertical and horizontal input and decision-making. They also identify the critical actors and thus, by extension, the critical lawyers involved.

A comparison to parallel models of decision-making is also helpful in highlighting key distinctions. In the NSC context, this might be done by comparing the NSC models adopted in the UK and Australia, which are informed by but not copied from the U.S. system. Case studies can serve this purpose as well, such as: Essence of Decision, Graham Allison’s account of Executive branch decision-making during the Cuban Missile Crisis;20 Dereliction of Duty, a study of the Joint Chiefs during the Vietnam conflict;21 or Mark Bowden’s The Finish: The Killing of Osama Bin Laden, covering process during the work-up and execution of the 2011 Bin Laden raid.22 Inspector General (IG) and Commission reports—such as those covering the use of national security letters or the Beirut Bombing (Long Commission)—can be used to encourage students

in identifying the elements of successful process as well as what worked and what did not.

With respect to bureaucratic culture and internal agency process, guest speakers serve well—especially when asked uniform questions—to draw out distinctions in culture. For example, “How would the typical case officer or Marine respond to legal advice?”

Finally, experiential learning is essential. This sounds fancy, especially when described as pedagogy. It is not. The military has been teaching this way for decades. Moot court for national security lawyers is experiential learning using mock meetings and exercises with students playing every imaginable type of role: from line attorneys to the Attorney General; from lance corporals to the Chairman of the Joint Chiefs; and from first responders to governors. Under this approach, students get a better idea of what works and what does not work and why. This can be done on a micro scale with focus on individual skills and processes or on a macro scale in the form of tabletop exercises.

For example, Professor Dakota Rudesill (formerly at Georgetown Law and now at Ohio State) has students take turns preparing a mock two-page Presidential Daily [Intelligence] Brief (PDB) before class, featuring the most important news stories and their sources. Students then orally brief a guest “President” at the beginning of each class. The exercise accomplishes four teaching goals. First, it emphasizes the importance of written and oral nuance. Second, it trains students to sift through and condense voluminous, complex information into concise policy, intelligence, and legal talking points in a way that writing briefs and papers and exams assuredly do not. Third, it exposes students to the sort of cross-examination that intelligence and legal specialists encounter. And finally, by using an array of guest “Presidents,” the exercise exposes students to a range of personalities as well as the necessity of the lawyer adapting his or her personality to the needs and style of the client.

At the other end of a continuum, Georgetown Professor Laura Donohue runs a multi-day simulation, inspired by the Government’s Top-Off Exercises. Students role-play members of Congress, the media, the Executive, the military, and so on while confronting a constantly evolving national security crisis. This National Security Crisis simulation is part of a semester-long, five-credit course immersing students in the substance and process of the law. Faced with a series of rolling facts and consequences, students conduct press conferences, appear


before Congressional Committees, draft legislation, seek Court orders, and consult with state and local authorities. What is more, the scenario plays out, as many crises do, continuously through the night. In this way, students get a feel for how process affects outcome, and how law relates to facts. They also get just a hint about the importance of endurance in the practice of national security. They also encounter the law and lawyers from the policymaker’s perspective, which—depending on personality and context—can be an asset or an obstacle. Furthermore, they are exposed to the sorts of time management choices that lawyers and decision-makers face on a daily basis.

Additionally, the exercise illustrates how schools can work together to maximize opportunities for their students. The Georgetown simulation is most certainly not accessible as a MOOC (Massive Open Online Course) or remote offering, but has at times involved teams of students from over ten law schools. It also shows how a law school can maximize experiential opportunities by drawing on the local community. Coaches, judges, and controllers are all drawn from the local bar and adjunct community. It helps when that local community is Washington, D.C.; however, it is not essential. What is essential is a continual and intensive feedback loop.

Between extremes, there is a continuum of opportunities from the traditional to the less traditional. These options might include a class debate on a current event with students not only spotting the issues and debating the policy, military, or intelligence options, but also determining who should attend the meeting and role-playing the actors. When a conclusion is reached (or a split decision) the students should determine what form the decision should take and whether additional authority is required and from whom. Press and legislative legal talking points should follow. Or, alter the scenario, and present a fact pattern requiring the application of law to fact, such as a national rendition or drone strike. Students can also be asked to draft an order for a search warrant, a memorandum to the President, a background paper for a Deputies Committee meeting, press guidance on a legal issue, or talking points for a telephone call or congressional meeting.

For example, I like to run an exercise I call “snap-problems.” Amidst a class discussion on a particular subject, I will ask one or more students to leave the room. The class as a whole will then construct a fact pattern, perhaps involving a targeting decision or intelligence dilemma. The excused students then return and are given a set time, usually five minutes, to advise the decision-maker on whether he can proceed. But first, the student must figure out how to ask and extract the necessary factual information so as to meaningfully apply law to fact. The exercise mimics the sort of pop-up questions operational lawyers receive. The essential skill, the students soon observe, is not in knowing the law, but in rapidly applying law to fact by asking the right questions quickly and clearly, and then applying well-structured analytic templates to those facts without losing essential law or fact-based nuance in doing so.
In my view, there are two keys to any successful experiential opportunity large or small: realism and feedback.

1. **REALISM IN SUBSTANCE, PROCESS, AND TEXTURE**

A scenario will better prepare a student for national security work if it is realistic in substance, process, and texture. For example, students can be asked to perform tasks without notice of the topic or knowledge as to who will participate and in what role. The client call or the crisis can come at any time, just as the lawyer attending a staff meeting does not know all the issues she will need to spot or what questions she might be asked.

Realistic, which is to say unreasonable, time constraints should be added. Twenty-minutes to draft a presidential memorandum is realistic. The instructor can add to the realism by calling the student drafting the memorandum on his or her cell phone every minute to ask where the memo is and to change the facts.

Whatever the context, realism is added when no facts are provided and students must determine which questions to ask and whom to ask in order to elicit the critical facts. In other words, a realistic process is iterative and responsive, not static. As a result, experiential learning does not lend itself to online learning applications, especially since feedback is so important.

2. **FEEDBACK IN EXPERIENTIAL LEARNING**

It is critical to spend as much class time on the back-end, debriefing and discussing an exercise, as teachers and students spend on the front-end preparing for it. The goal of the exercise is not the grade, but the debrief. This means that in contrast to ordinary academic process, the learning process is both sped up in the case of the exercise itself, and slowed down in the case of the feedback, with each element of the exercise reviewed. Which issues might have been spotted? What substantive law applies? Who should have been informed, and in what form? What was realistic? What wasn’t? The reality is that it is easier to grade an exam or review a paper than it is to debrief a class-length exercise, especially if the professor is trying to do so while also running or participating in the exercise. As a result, the use of guest role players and observers is helpful. In the case of the National Security Crisis simulation run by Professor Donohue, for example, the control room included as many actors and respondents as there were student scenario participants. Coaches were also assigned to students for the duration of the exercise to provide more immediate feedback and guidance. Without such detailed feedback, students would pick up bad law and bad habits by trying to do too much with too little.

Of course, in teaching process through experiential learning, one is also teaching critical practice skills. What is harder to do is recreate the actual texture, personalities, and pressures of practice.
IV. TEACHING PRACTICE

In 2009, the Office of Legal Counsel withdrew a number of opinions issued in the previous decade that were found wanting as a matter of substance, process, or both. The opinion noted, as mitigation, that the lawyers who had written and issued the opinions had "confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure."26 However, what the opinion didn’t state is that it is the nature of national security practice to confront novel questions under great pressure where lives are at stake. Therefore, these are not reasons to get the substance, process, or values of the law wrong.

National security practice is hard to teach in law school because it is hard to recreate the defining conditions of national security practice in a traditional classroom setting or in a mock format. To begin, there are pressures national security lawyers confront that one cannot recreate—such as the impact one’s decisions will have on real people and events—or will not be permitted to recreate in law school, like an abusive personality. There are, however, ways to inoculate students against the pressure from personality, the pressure to get to yes, and the national security imperative.

The first question is often how do you prepare students for this type of practice? I like to joke that the best legal training I ever received was serving in the Marine Corps as an infantry officer because I got yelled at a lot. But it is not a joke; the best legal training I ever received was serving in the Marine Corps as an infantry officer. It was the training that most closely related to the actual practice of national security law. For sure, yelling is part of military life, but military service also offers the opportunity to make decisions for which one is held accountable. The importance of sequential timelines and deadlines is also imperative. In addition, effective military officers must at times step out of their inherent personalities to accomplish the task or the mission. A quiet voice, for example, must become a loud voice if one is to effectively drill a platoon or a company. Perhaps most of all, service in the infantry teaches you to cope with the unknown, the unfair, and the unruly, and to do all this while short on sleep and food.

Of course, there are many different places where one can learn these skills; however, law school is generally not one of them. And yet, these are some of the defining aspects of national security law practice. Therefore, more should be done in law school (and in some places it is) to develop traits that will help the student-lawyer later cope with the pressures of practice. Four traits in particular will serve students well: (a) the ability to handle pressure, (b) the ability and

willingness to decide, (c) the management of personality, and (d) coping and reliance.

A. THE ABILITY TO HANDLE PRESSURE

The reality is that taking an exam does not create the sort of pressures that arise in legal practice; a point no doubt true of many practice areas. But the law school context seems particularly inapt at creating the same ambiguities and pressures of national security practice like those found when the facts are unknown, the law is uncertain, and lives are at stake. Or the complexity of deciding when, and if, to interrupt the President or the Attorney General at a meeting if they do not have the law quite right or what to do if the DNI presents as fact information one knows has been contested within the lower bureaucracy or without reference to the dissent.

B. THE ABILITY AND WILLINGNESS TO DECIDE

There are a lot of smart lawyers in government, but not all of them can make decisions on the timelines presented with an incomplete knowledge of the facts and of the law. The capacity to plow forward and do your best in such circumstances is essential.

C. THE MANAGEMENT OF PERSONALITY

Some decision-makers will find reasons to avoid having lawyers in the room. “They take too long.” “They don’t keep secrets.” “They always tell us no.” A lawyer’s personality should not be one of those reasons. Ego subordination and its inverse, personality management, are critical traits if one believes in the meaningful application of law and process. If a lawyer’s personality is in the way, then the decision-maker will find a different lawyer or, just as likely, he will figure out how to function without a lawyer. Moreover, if the lawyer is a jerk, he will find it harder to locate the law, engage the bureaucracy, and thus accurately and timely provide advice.

Conversely, the lawyer will need to contend with a full range of personality types and behaviors to effectively serve the law. A lawyer need not tolerate uncivil behavior, but he does need to distinguish between boorish behavior and the ordinary application of pressure that intelligence and legal specialists will invariably feel when they do not deliver the right message. Moreover, the honor of upholding and defending the Constitution is often the only thanks one will get. A student who wants more affirmation may wish to test other fields.

D. COPING AND RELIANCE

Senator Daniel Patrick Moynihan used to refer tasks to his staff by placing a one word note on top of an incoming bill, letter, or request from a government official: “Cope.” Sometimes “Cope!” if extra direction was called for. He didn’t
tell the staff what to do or how to do it, but he expected it to get done, done right, and done immediately. In the military, this is sometimes referred to as “carrying the message to Garcia.”27 The skill is an essential one because in national security practice one is not often told what to do or how to do it. There may not be time to do so, and most bureaucracies do not include training components. In school terms, there are no instructions provided, and no one tells you what is on the exam. Of course, “coping” requires judgment as well; there are a number of different ways a knight might interpret the question: “Who will rid me of this meddlesome priest?”

Law schools have a number of standing tools to foster these traits. These include clinical programs, internships, and externships. More is better. War stories also help. Anecdotes are a respite from the substantive grind of law school classes, but here they are also essential knowledge. Learning of the experiences and challenges of others, the student-lawyer will know they are not the first lawyer to get yelled at, the first lawyer to be wrong, nor the first lawyer to be ignored.

Knowing what to expect goes a long way in preparing someone for what actually happens. It should also come as no surprise that practical application or experiential learning is the key to teaching the feel for practice as well as the importance of process. Therein lies the tricky part. Whereas military schools have additional tools at their disposal to recreate the feel and texture of practice—such as sleep deprivation, yelling, and so on—civilian law schools generally do not permit such realism. They should, if the goal is to prepare students for practice. However, using such tools to move students out of their comfort zones also requires moving professors and law schools, out of their comfort zones.

What might be added to further develop the four traits identified above?

- Permit additional personality role-playing by permitting a wider display of personality types and styles. This can be done by introducing guest participants as both Rudesell and Donohue do. It can also be done by opening the aperture to the sorts of pressures a professor may bring to bear on students.
- Permit additional off-hours assignments and events. For example, a professor might arrange to have the school’s IT department “crash” the computers at a critical moment to mimic a cyber event or simply to impose an obstacle with which students must contend. Those who successfully do so will find new confidence in their ability to cope.

---

27. A reference to the short story written by Elbert Hubbard in 1899. A Message to Garcia recounts the efforts of Army Colonel Rowan to deliver a message, at the behest of the President McKinley, to a Cuban rebel general at a time when the U.S. faced the prospect of war with Spain. ELBERT HUBBARD, A MESSAGE TO GARCIA (Kessinger 2010) (1898). Colonel Rowan is celebrated for having done so without asking how, when, where, or what, but rather having received his mission direction, he used his initiative to execute the mission.
• Evaluate leadership and practice traits—such as teamwork, loyalty, initiative, tact, and decisiveness—and not just performance, similar to how the military evaluates officers.28 (At the peer level, such evaluations are sometimes sarcastically referred to as “spear evals.”) Business leaders will equate such an approach to 360-degree reviews. However, the idea here is not to grade personality, but to offer feedback so that students understand how they are perceived and better develop the practice traits necessary for effective national security law practice. In addition, where a student is not able or willing to absorb or adapt to such feedback, this too is a valuable teaching moment because it helps the student recognize this insight into their personality. The professor can then teach the student how to constructively receive feedback; if not, at the very least, it enables the student to better gauge where he or she might find a better practice fit.

• Do not explain the rules or provide instructions to assignments, but define the goal.

• Triple, then double, then triple again the amount of feedback, including feedback on style and not just substance.

Of course, these are exemplars. All this might be the focus of a new third-year format for students “majoring” in national security law and who opt-in to this different and challenging format. The bottom line is that any task that builds confidence through the capacity to cope is an exercise worth undertaking. However, the most important thing a law school can do to prepare students for national security practice is to embed the substance and practice of law within a framework of ethics.

V. ETHICS IN THE PRACTICE OF NATIONAL SECURITY LAW

A grounding in the ethical practice of law—perhaps more than anything else—will prepare and permit students to cope with the pressures of national security practice (and, no doubt, other practice areas). However, this is not an area that law schools emphasize independent from the study of the Model Rules and MPRE requirements.

By ethics, I do not mean rules like those found in the Model Rules of Professional Conduct, but principles like those found in the preamble to the Model Rules. For example, the notion that lawyers are public citizens with special responsibility for the quality of justice and that a lawyer has a duty to uphold

28. For example, the Marine Corps describes fourteen leadership traits, which, if demonstrated in daily activities, help Marines earn the respect, confidence, and loyal cooperation of other Marines. These include justice, judgment, dependability, initiative, decisiveness, tact, integrity, enthusiasm, bearing, unselfishness, courage, knowledge, loyalty, and endurance. See U.S. MARINE CORPS, MARINE CORPS LEADERSHIP TRAITS, http://www.au.af.mil/au/awc/awcgate/usmc/leadership_traits.htm (last visited Nov. 24, 2013); see also http://www.marines.com/being-a-marine/leadership (last visited Nov. 24, 2013).
legal process while advocating zealously on behalf of the client. 29 By ethics, I mean a commitment to doing the right thing the right way. That means not just getting to yes with the skill of a sophist, but in a manner that reflects the spirit of the law and the intent of its drafters in both substance and process. That means, for example, if someone ought to know something, they should be told, whether the law requires it or not. Ethics also entails guiding decision-makers to preferred outcomes where alternatives are available, where those outcomes better uphold U.S. legal values or better accomplish the national security mission.

Ethics—and not rules—provide the principles that most directly relate to the practice of national security law. That is because the Model Rules are generally addressed to private rather than public practice. It is also because a commitment to ethics rather than rules better addresses the sorts of challenges that arise in national security practice—challenges requiring good judgment rather than yes or no answers. For example, the Model Rules do not tell you what to do when your advice is not followed or when you learn of new and critical intelligence after a decision is already taken. Neither do they tell you how to hold the line when a cabinet officer is screaming at you or a general states that the lawyer will be responsible for the death of his soldiers. A commitment to doing the right thing as well as a framework in which to identify the right thing will help address these scenarios. Where does one find such a framework and how does one best apply it?

A. SUBSTANTIVE REGULATION

Legal culture and regulation is a good place to start. The Judge Advocates General of the Armed Services, for example, have issued regulations on the ethical practice of law. These regulations include specific guidance on what to do when the client does not follow advice. The lawyer is not left on his or her own, but has a regulation that offers a process to follow to find relief. Regulation also


As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Id.
offers the bureaucratic protection that comes from adhering to regulation. It is not "disloyal" to go outside the operational chain of command and appeal to one's technical chain of command (that is, more senior lawyers who can offer supporting arms fire) where there is a regulation that invites one to do so. In *United States v. Diaz*, for example, the U.S. Court of Appeals for the Armed Forces affirmed the conviction of a Deputy Staff Judge Advocate (SJA) for releasing classified lists of detainee names to the Center for Constitutional Rights.\textsuperscript{30} Noting the "failure to adhere to presidential directives and departmental regulations, including those regarding classified information and for addressing differences of legal views within the Department," the court highlighted that the appellant "did not avail himself of the Judge Advocate General's guidance on addressing differences of legal view within the chain of command."\textsuperscript{31} Among other things, this guidance suggested four specific steps an attorney might take, including "referring the matter to, or seeking guidance from, higher authority in the [technical] chain of command."\textsuperscript{32} That is not to say that what works for a judge advocate will necessarily work in an agency, presidential, or legislative context. Nonetheless, these regulations should be studied by every national security student, not because they might become judge advocates, but because they offer concrete "what to do if" advice that students can examine, debate, and if appropriate, apply in later contexts.

B. CASE STUDY

Ethical case studies should also be taught in law school as part of the regular national security curriculum, just as they are already used for teaching policy or process. Emphasis should be placed on positive and negative case studies. More often than not, the young lawyer needs to know what to do, not what not to do. Don't just emphasize the negative. There are a number of useful resources on this point, including IG reports and academic studies of the sort pioneered by Kathleen Clark.\textsuperscript{33}

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 136 n.11.
C. PRINCIPLES OF CONDUCT

The identification of a code of conduct or principles of conduct is also helpful, especially when the pressure is on. First, such a code can help the lawyer define and maintain a strategic focus on the enduring legal mission and avoid the tactical risks that arise with the immediacy of time, presence and crisis, also known as clientitis, group think, and role-conflation.

Second, such codes establish essential boundaries—conduct red-lines—beyond which the lawyer should not slip. Because one cannot know when he or she will be put on the spot in a manner that will ultimately test one’s identity as a person and a lawyer—think here of Jim Comey’s ride to the hospital—it is often too late at such a moment to consider for the first time where you will draw your principled line, and perhaps, whether you value your integrity more than you value your job. 34

In my view, the constitutional oaths that the President and military officers take are good examples of a code of conduct that remind lawyers that they are not just wordsmiths, but also guardians of values. Every president since George Washington has been administered the oath of office where the President pledges “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States.” 35 Similarly, military officers are required to recite the following oath upon commissioning:

I, [name], having been appointed an officer in [military branch], as indicated above in the grade of [rank] do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion;

34. At a 2007 Senate Judiciary Committee hearing, Jim Comey relayed the account of this ride to the hospital. Specifically, when Comey was serving as Deputy Attorney General to Attorney General Ashcroft, he and Ashcroft came to a mutual decision that a certain classified program should not continue because of problems in certifying its legality; shortly afterwards, Ashcroft was taken gravely ill and hospitalized. Comey became acting Attorney General and communicated to the White House and others that he would not reauthorize the program. The following night, he heard that the White House Counsel and Chief of Staff were headed to the hospital to persuade the gravely ill Ashcroft to reauthorize the program anyhow. Comey raced to the hospital where he was later joined by FBI Director Robert Mueller. When the White House Counsel and Chief of Staff arrived, they attempted to persuade Mr. Ashcroft to reauthorize the existing program as-is, but he declined stating that Comey was now the Acting Attorney General. Comey indicated that if the program proceeded without changes, he would resign. The program was subsequently amended. Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? Hearing on S. 110-495 before the S. Comm. on the Judiciary, 110TH CONG. 213-240 (2007) (statement of Jim Comey); see also Nomination of James B. Comey Jr. to be Director of the Federal Bureau of Investigation (FBI): Hearing before the S. Comm. on the Judiciary, 113TH CONG. (2013) (statement of Sen. Charles Schumer).

and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.36

There is no higher legal calling than to “uphold and defend the Constitution” in deed as well as in word. Keeping this duty in mind can surely increase a lawyer’s tolerance for the grind and sometimes the costs of practice.

Likewise, the intelligence community has also adopted ethical codes to guide professionalism. The Office of the Director of National Intelligence articulated a set of principles of professional ethics for the intelligence community that include mission, truth, lawfulness, integrity, stewardship, excellence, and diversity.37 Similarly, the Central Intelligence Agency espouses core values of service, integrity, and excellence. It further defines integrity as upholding the highest standards of conduct and as a mandate to “seek and speak the truth—to our colleagues and to our customers . . . [w]e honor those agency officers who have come before us and we honor the colleagues with whom we work today.”38 These principles are general, but they provide a baseline. And finally, Leon Fuerth has offered a principle for national security lawyers built around honor, stating that the hallmark of a successful national security lawyer is “to move forward with honor, under the law, and to approach the job from the perspective of always leaving the law and Constitution intact, with the nation well taken care of.”39

Law students should debate these codes and principles, and devise their own, not just as part of classes on professional responsibility, but as core elements of the study of national security considering how their application might provide guidance in real world context. Thus armed in substance, the national security lawyer is better equipped to confront challenge.

D. CRITICAL THINKING

“The only sure weapon against bad ideas is better ideas,” Whit Griswold once said.40 If the lawyer is boxed in or pressured, the best course is not to dig-in deeper or resign, but to persuade by finding a better course and convincing the client to follow it. This is done with critical thinking, not rule citation. Critical thinking also helps to distinguish between a difference of view, and a violation of

39. Email from Leon Fuerth, Research Professor of International Affairs, the George Washington University Elliott School of International Affairs, to author (April 11, 2012) (on file with the author).
40. ALFRED WHITNEY GRISWOLD, ESSAYS ON EDUCATION 96 (1954).
law and integrity. Without such critical judgment the lawyer might be prone to turn every day into an existential crisis.

Critical thinking is most assuredly taught at law school. It is the hallmark of legal training. It is also the hallmark of the successful national security lawyer, regardless of where they practice. For example, at a hearing of the Personnel Subcommittee of the Senate Armed Services Committee, Retired Marine Corps Lieutenant Pete Osman said this of his interview with General Petraeus:

In fact, when I did my interview with General Petraeus asking how many judge advocates he had on his staff, he said not enough. And he had way more than he rated at that time, but nonetheless he said he used them in a lot of positions that were out of the judge advocate community because, as he said, they are very good critical thinkers.\textsuperscript{41}

Thus, the key for the lawyer is to realize that judgment and critical thinking may be his or her greatest strengths when confronted with a practice or ethical challenge.

E. ROLE MODELS AND THE POWER OF EXAMPLE

There are times when persuasion alone does not work and the lawyer will be pressured to change his or her mind, get out of the way, bend a rule, or engage in an exercise in logical gymnastics. Such moments do not typically arise when the law is clear and there is a choice between what is lawful and what is not. Rather they arise in the grey areas where the key distinction is between the merely lawful and doing the right thing, whether the law compels it or not. For example, while back-benching a meeting with senior officials, does the lawyer speak up when an erroneous and material fact is introduced or critical intelligence is overlooked? If a critical actor is omitted from a meeting, does the lawyer advise the client? If it would be better for the Attorney General to know and approve an action but the subordinate lawyer knows that her agency head will resist, does the lawyer raise the matter knowing she will likely be yelled at and face repercussions for doing so? When the lawyer has been omitted from a meeting that he should attend, does he raise the matter up the chain of command and insist on attending, or resign

\textsuperscript{41.} See Hearing on Providing Legal Services by Members of the Judge Advocate Generals' Corps Before the Subcomm. on Pers. Of the S. Comm. on Armed Services, 112th Cong. 480 (2011) (statement of Retired U.S. Marine Corps Lt. Gen.); see also Michael L. Kramer & Michael N. Schmitt, Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations, 55 UCLA L. REV. 1407, 1434 (2008) (referencing remarks made by General Petraeus where he noted that "military lawyers were true combat multipliers in Iraq. They were not only invaluable in dealing with a host of operational law issues, they also made enormous contributions in helping resolve a host of issues that were more than a bit out of the normal legal lanes. In essence, we 'threw' lawyers at very difficult problems and they produced solutions in virtually every case—often under very challenging circumstances and in an uncertain security environment . . . . I tried to get all the lawyers we could get our hands on—and then sought more.") (citing JOINT CHIEFS OF STAFF, LEGAL SUPPORT TO MILITARY OPERATIONS, JOINT PUBL. 1-04, at II-9, Aug. 17, 2011).
himself to catching up with the process or the memo at a later time? And, finally, how does the lawyer respond when his or her advice is ignored?

In such contexts, rules directed to specific scenarios may not guide and they certainly offer little moral or other support. Perhaps the most powerful and effective source of ethical guidance comes at such times from our legal and personal role models. Because we cannot predict what challenges will arise and when, role models have the advantage of always being by one’s side. They also address all contexts. That is because the relevant question to ask oneself is not how did they respond to the exact scenario, but how would they, and, will you let them down or their standard of conduct down in the manner of your response?

Moreover, role models also serve to inspire. How, for example, can one not be inspired by the lives and service of a Frank Johnson, an Elbert Tuttle, a Nelson Mandela, or an Aung San Suu Kyi? A lawyer with these individuals in mind will feel a sense of purpose that can put up with a lot of crisis and a lot of grief. Although legal biography is not often taught in law school—let alone in national security law courses—one does not have to study a person’s entire career to find value in a particular vignette that serves as both a lesson and inspiration. If one is looking for an example of modesty and calm, for example, one might think of George Marshall. When confronted with wide-eyed staff during a crisis, Marshall is reported to have said, “I have seen worse,” immediately inducing a feeling of calm amongst those gathered. When Douglas Southall Freeman, the greatest biographer of his generation, asked Marshall to keep notes during World War II so that Freeman might later write his biography, Marshall asked an aide to decline, explaining:

My policy has been not to do this for two reasons[.] In the first place it tends to cultivate a state of mind unduly concerned with possible investigations, rather than a complete concentration on the business of victory. Further, it continually introduces the factor of one’s own reputation, the future appreciation of one’s decision, which leads, I feel, subconsciously to self-deception or hesitations in reaching decisions. 42

Such self-awareness is rare at any grade of legal and policy service. So too is the laser focus on the mission at hand without regard to personal consequence or gain.

Role models put the pressures of practice in perspective. They can also remind one that while the lawyer may be by herself, she is never alone, nor the first to face challenge. For example, if one is feeling oppressed by the burden of legal chore and responsibility and wants a dose of perspective, one might consider someone like Jack Downey. A Superior Court Judge in New Haven, Connecticut, Downey has served with such distinction in the Juvenile Justice division for over

thirty years that the state has named the court and the detention center after him, a point of some honor. It is also a point of irony because before becoming a judge, Downey spent over twenty years in detention as a prisoner in China during the Mao era after being shot down on a clandestine CIA mission. Many of these years were in solitary confinement. Thus, when I am feeling sorry for myself, I just think about Jack Downey and how for over twenty years of his life a good day was one that brought pigeon with the water soup.

I also think about Downey’s dignity and grace, and perhaps, sit a little higher in my chair as a result. Downey could have done many things when he returned from captivity; he chose to serve the law. Moreover, despite his hardships and the lost years of his life, this judge has always looked forward with hope and not back in anger or frustration.43

For examples of accountability and integrity, consider and debate how Cyrus Vance resigned before he knew the outcome of the Iran Hostage Rescue Mission, how Janet Reno tendered her resignation after the Waco raid, or how Robert Gates responded to the Minot-Barksdale nuclear incident.

The point, of course, is not to assign students a list of role models, but rather to encourage students to think about who their role models might be as well as why those role models might help them in the practice of law as well as the course of life. Such consideration requires an understanding of history and is one of many reasons why the teaching of history, here in the form of biography, is fundamental in a national security law curriculum. It is too late to do so at the moment of crisis.

VI. CONCLUSION

National security law requires a commitment to substantive knowledge, good process, and a capacity to cope with—and indeed thrive under—the prevailing conditions of practice. This article has addressed each component, suggesting means and methods of teaching each. Experiential learning is critical, whether this occurs in a mock setting or in the context of internships, externships, or through the conveyance of war stories and case studies. As this paper describes, such learning requires realism and feedback, which is hard to do in the context of an ordinary law school course structure and time format. The solution seems fairly plain: if law schools are eager to demonstrate the relevance and importance of a third year of training, national security process and practice is a good place to start, and, if you ask me, finish. Why not use the third year of law school to develop these skills, with students and professors opting-in to new formats? Moreover, these are skills that transfer well to other topical settings.

The confidence and competence that derives from such practice must also

include a commitment to doing the right thing the right way, because such commitment reflects our constitutional values and better provides for national security. In an introduction to the fiftieth anniversary edition of *The Spy Who Came in from the Cold*, John le Carré states that the book’s enduring merit derives from its credibility. “[I]t asked the same old question that we are asking ourselves fifty years later: how far can we go in the rightful defense of our Western values without abandoning them along the way?”

That question resides at the heart of the practice of national security law as well as national security policy.

The student who is prepared to answer that question in substance, process, and practice will be ready to start serving as a national security lawyer, and do so with honor.

**APPENDIX A**

**Checklist for Teaching National Security Law**

<table>
<thead>
<tr>
<th>Substance</th>
<th>Process</th>
<th>Principles</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Constitutional Law</td>
<td>✓ Executive Process</td>
<td>✓ Model Rules of Professional Conduct</td>
</tr>
<tr>
<td>✓ International Law</td>
<td>✓ NSC Process</td>
<td>✓ Service Ethics Regulations</td>
</tr>
<tr>
<td>✓ Criminal Law</td>
<td>✓ The Military Chain of Command</td>
<td>✓ Agency Ethics Regulations</td>
</tr>
<tr>
<td>✓ Immigration Law</td>
<td>✓ Agency Process and Purpose</td>
<td>✓ Codes of Conduct</td>
</tr>
<tr>
<td>✓ Cyber law</td>
<td>✓ Ad Hoc Process</td>
<td>✓ Job Opportunities Public Sector</td>
</tr>
<tr>
<td>✓ Military law</td>
<td>✓ Informal Process</td>
<td></td>
</tr>
<tr>
<td>✓ Homeland security (Public Health, Nonproliferation, and Maritime Law)</td>
<td>✓ Legislative Process</td>
<td></td>
</tr>
<tr>
<td>✓ Aviation Law</td>
<td>✓ Judicial Process</td>
<td></td>
</tr>
<tr>
<td>✓ Intelligence</td>
<td>✓ Media Process</td>
<td></td>
</tr>
<tr>
<td>✓ Administrative Law</td>
<td>✓ Decision-Making Theory</td>
<td></td>
</tr>
</tbody>
</table>

**Experiential Learning**

- ✓ Mock FIDs, Congressional hearings
- ✓ Practice NSC Principals/Deputies
- ✓ Top-Off Scenarios
- ✓ Mock Press Interviews
- ✓ Oral Arguments
- ✓ Legal and Legislative Talking Points
- ✓ Press Talking Points
- ✓ Memos to Officials
- ✓ Draft Warrants & Orders

**Role Models & Lessons Learned**

- ✓ Current event debates
- ✓ War Stories
- ✓ IG Reports
- ✓ "Chapter Challenges"
- ✓ "Snap problems"
- ✓ Comparative Studies
- ✓ Biographies
- ✓ Case Studies
- ✓ Guest Speakers
- ✓ Adjuncts
- ✓ Visitors

**Field Experiences**

- ✓ Externships
- ✓ Internships
- ✓ Practicums
- ✓ Clinics

---