MILITARY LAWYERING AT THE EDGE OF THE RULE OF LAW AT GUANTANAMO: SHOULD LAWYERS BE PERMITTED TO VIOLATE THE LAW?

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I. INTRODUCTION

"Where were the lawyers?" is the familiar refrain in the legal profession's reflection on various corporate scandals.[1] What is the legal and moral obligation of lawyers who have knowledge of ongoing illegality and criminal behavior of their clients? What should or must those lawyers do? What about government lawyers who have knowledge of such behavior?

This Article considers that question in the context of military lawyers at Guantanamo—those lawyers with direct knowledge of the treatment of prisoners at Guantanamo, treatment criticized throughout the world as violative of fundamental principles of international law. In essence, where were the lawyers for the government and for individual detainees when the government began to violate the most fundamental norms of the rule of law?

This Article discusses the proud history of several military lawyers at Guantanamo who consistently demonstrated an unwavering commitment to the Constitution and to the rule of law. They were deeply offended about the actions of the government they served as it

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1. Famously articulated by Judge Stanley Sporkin during the S & L crisis in the 1980s when he asked, "Where were [the] professionals . . . ?" and echoed throughout corporate scandals in the 1990s in Enron, WorldCom, Tyco and Arthur Andersen. Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).

undermined the fundamental premises upon which the country was formed. Their jobs placed them at the edge of the rule of law and caused consistent crises of conscience.[2] These military lawyers typically are not perceived among the "brave band" of lawyers and others who go to the edge of the law for a "cause."[3] Yet, in many instances, these lawyers were often at the edge of the law because the zealous representation of their clients demanded such action. Their jobs forced them to confront profound ethical dilemmas that civilian lawyers rarely face unless, of course, they represent clients accused of terrorism-related offenses. These military lawyers are often unable to communicate with clients or to share evidence with them, and are subject to a panoply of other restrictions on access that would be unthinkable in a typical case or courtroom in the United States.[4] Contrary to the due process provisions in courts-martial or in the federal criminal justice system, the military lawyers at Guantanamo operate within parameters that fundamentally defy the concept of an adversarial system.[5]

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2. There are significant questions, not discussed herein, about the responsibility of government lawyers who were the architects of the Torture Memo or other government lawyers who had responsibility for the implementation of such policies. *See* Milan Markovic, Essay, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 354-56 (2007); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 85 (2005).

3. Lawyers for the Center for Constitutional Rights filed the first legal challenge to the Guantanamo detentions when it was highly unpopular to do so. *See* Adam Liptak & Michael Janofsky, *Scrappy Group of Lawyers Shows Way for Big Firms*, N.Y. TIMES, June 30, 2004, at A14; Philip Shenon, *Suit to Be Filed on Behalf of Three Detainees in Cuba*, N.Y. TIMES, Feb. 19, 2002, at A11; *see also* CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (Austin Sarat & Stuart A. Scheingold eds., 2006) (describing lawyers' roles in social change, specifically civil rights, gay rights and other political struggles world-wide); *see generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart A. Scheingold eds., 1998) (discussing instances of lawyers engaging in unpopular advocacy for the purpose of social change).

4. One "glaring condition" of the military commissions, noted by the Supreme Court in its *Hamdan* decision, is that "[t]he accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to 'close.'" Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *see also* Reply of Petitioners to Opposition to Petition for Rehearing, at 4, Al Odah v. United States, 127 S. Ct. 3067 (2007) (No. 06-1196) (Declaration of Stephen Abraham, Lt. Colonel, U.S. Army Reserve), *available at* http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf.

5. In August of 2003, the National Association of Criminal Defense Lawyers ("NACDL") issued an opinion that it is unethical to represent detainees in military commissions because of the fundamental denial of due process in those proceedings. *See* NACDL Ethics Advisory Comm., Op. 03-04, at 25 (2003), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf; Jonas R. McDavit, *Conflating Organizational Policy with an Ethical Mandate: NACDL's Stance on the Guantanamo Military Commissions*, 18 GEO. J. LEGAL ETHICS 987, 988 (2005). Some of these constraints exist in terrorism cases in federal

This Article asks when, if ever, is it appropriate for a military lawyer to violate a law or regulation in order to uphold the government's legal obligations to observe fundamental norms of law. This question is not only one of legal ethics; it implicates underlying criminal laws and, more fundamentally, the moral order in a democratic society.

To explore this question, this Article first provides the background at Guantanamo and the context for the lawyers' actions. It then examines stories of three military lawyers who became newsworthy because of their courageous commitment to the rule of law and deep-seated concerns that their government was acting contrary to and beyond its bounds. Finally, it reviews existing civil whistleblower laws and necessity defenses in criminal cases and makes proposals for a safe harbor to permit lawyers, under a narrow set of circumstances, to take action to prevent the significant harms caused by the government's violations of fundamental norms of international law.

II. THE GUANTANAMO SYSTEM AND TORTURE

In early 2002, the United States military began transporting its first prisoners to Guantanamo Bay, most of whom were captured during hostilities in Afghanistan.[6] Today, the words "Guantanamo Bay" and the images of men in orange jumpsuits have become global symbols of the abuses of unchecked power and of a justice system that has become deeply derailed. The executive decision to detain prisoners at the naval base in Cuba was doubtless a legally strategic one: As then-Solicitor-General Ted Olson would later argue before the Supreme Court, the government's position was that Guantanamo Bay is a place from which there can be no appeal.[7]

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courts. *See* Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 82-83 (2003); Ellen C. Yaroshefsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 205-07 (2006).

6. *See* Rasul v. Bush, 542 U.S. 466, 470-71 (2004).

7. *See* Transcript of Oral Argument at 44, *Rasul*, 542 U.S. 466 (No. 03-334) (likening Guantanamo Bay to a military base where the United States exercises complete control); *see also* Brief of Respondent-Appellee at 14-25, *Rasul*, 542 U.S. 466 (No. 03-334) (arguing that U.S. courts lack jurisdiction over claims filed by Guantanamo detainees). *But see* 10 U.S.C. § 802(a)(9) (2000) ("Prisoners of war in custody of the armed forces"); § 802(a)(12).

> Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States* and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

This "legal black hole" has been the subject of countless human rights reports that have deplored the treatment of the hundreds of detainees who have landed there.[8] As early as the spring of 2002, Amnesty International listed a bevy of concerns in a sixty-two page memorandum sent to the U.S. government. Among other things, Amnesty deplored the prospect of indefinite detention and noted that the conditions under which the detainees were being held may "amount to cruel, inhuman or degrading treatment."[9] In 2003, Human Rights Watch concluded that the United States' handling of the 600-plus detainees held at the time was in violation of the Geneva Conventions.[10] It then launched a Detainee Abuse and Accountability Project, which found in 2006 that in at least fifty cases "U.S. military and civilian personnel are alleged to have abused detainees, ranging from beatings and assaults, to torture, sexual abuse, and homicide" in Guantanamo Bay.[11] Members of the FBI themselves have reported accounts of abuse at the hands of other personnel, including the shackling of a detainee to the floor in the fetal position who had pulled out his own hair through the night, and the wrapping of another detainee's head in duct tape.[12] The United Nations Commission on Human Rights concluded that the "excessive violence" used on many detainees amounted to torture and found a catalogue of lesser international law violations.[13] In 2004, the Red Cross was so concerned about the conditions it observed that it broke its tradition of confidentiality and announced the interrogation practices at Guantanamo

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Id. (emphasis added). Both categories of persons are subject to the Uniform Code of Military Justice. § 802(a).

8. There is now a vast literature about the human rights abuses at Guantanamo. *See* CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT GUANTANAMO BAY, CUBA 15-30 (2006), *available at* http://www.ccrjustice.org/files/Report_ReportOnTorture.pdf; THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

9. Matthew Engel, *Amnesty Sends U.S. Dossier of Complaints Over Afghanistan Detainees*, GUARDIAN, Apr. 15, 2002, *available at* http://www.guardian.co.uk/world/2002/apr/15/guantanamo.usa.

10. HUMAN RIGHTS WATCH, WORLD REPORT 2003: UNITED STATES 501-02 (2003), *available at* http://hrw.org/wr2k3/pdf/us.pdf.

11. HUMAN RIGHTS WATCH ET AL., BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 6 (2006), *available at* http://hrw.org/reports/2006/ct0406/ct0406webwcover.pdf.

12. FBI, DETAINEES POSITIVE RESPONSES 12, 26 (2004), *available at* http://foia.fbi.gov/guantanamo/detainees.pdf.

13. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Situation of Detainees at Guantanamo Bay*, ¶ 87-89, 92, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf.

were "tantamount to torture."[14] The Secretary General of Amnesty International has referred to the facility as "the gulag of our times" in the organization's 2005 International Report.[15]

The legal justification for this systematic abuse was furnished by the government's Office of Legal Counsel ("OLC"), which had been asked to provide guidance on interrogation procedures. The resulting memorandum, authored by John Yoo in August of 2002 and now infamously known as the "Torture Memo," made arguments that dodged every significant piece of domestic and international law that might limit cruelty and even torture.[16] The memo opined that "[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."[17] Criminal penalties, the memo went on, are reserved "solely for torture" *and not* cruel, inhuman or degrading treatment—all of which were thus implicitly permissible.[18] Perhaps most astoundingly, the memo held that "[a]ny effort to apply [the Convention Against Torture] in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional."[19] That is, the OLC concluded that even practices that fit the extreme definition of torture could be justified by self-defense or necessity and that the President's Article II executive power permitted the Commander-in-Chief to exempt government employees from the restrictions on torture. Experts in international, military, criminal and constitutional law—including Jack Goldsmith, whom President Bush selected to head the OLC after the memo had been written—have

14. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

15. Irene Khan, *Foreword* to AMNESTY INTERNATIONAL, REPORT 2005, at 4 (May 25, 2005), *available at* http://www.amnesty.org/en/alfresco_asset/fdacf4dd-a3b9-11dc-9d08-f145a8145d2b/pol100012005en.pdf.

16. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf [hereinafter Torture Memo] (authorship attributed to John Yoo); *see also* Markovic, *supra* note 2, at 351-54; Wendel, *supra* note 2, at 80-84.

17. Torture Memo, *supra* note 16, at 13.

18. *Id.* at 21-22.

19. *Id.* at 31.

roundly condemned its legal analyses.[20] As international legal scholar Jordan Paust stated: "Not since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war."[21] The human rights abuses detailed above are a logical outgrowth of this sweeping green light for interrogation procedures, issued from the highest levels of government.

III. BACKGROUND OF LAWYERING AT GUANTANAMO

In 2002, lawyers at the Center for Constitutional Rights filed a claim asserting that detainees had the right to file habeas petitions in federal courts. This later became the landmark case of *Rasul v. Bush*.[22] Meanwhile, in 2004, military officers (but not Judge Advocate lawyers) were assigned to represent some detainees in military commissions.[23] These commissions were so fundamentally flawed that in June 2006, the Supreme Court would find, in its landmark *Hamdan v. Rumsfeld* decision, that they were both in violation of the Uniform Code of Military Justice ("UCMJ") and Article 3 of the Geneva Conventions.[24] The Court found that specific flaws of the commissions included the admissibility of all evidence with "probative value," including hearsay and evidence gained through coercion, and the fact that the defendant could be barred from hearing all evidence against him or even be barred

20. *See, e.g.*, Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 834-36 (2005); *see also* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 144-51 (2007); Wendel, *supra* note 2, at 68-69. Goldsmith, a conservative who himself headed the Office of Legal Counsel, concluded that the Torture Memo's analysis was "legally flawed, tendentious in substance and tone, and overbroad." GOLDSMITH, *supra*, at 151.

21. Paust, *supra* note 20, at 811; *see also* Wendel, *supra* note 2, at 68-69.

22. Rasul v. Bush, 542 U.S. 466, 470 (2004); Shenon, *supra* note 3.

23. These non-lawyer officers are designated "Personal Representatives" of the prisoners. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy 1 (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. Among other legal issues is the fact that these officers have no attorney-client or other privilege, making confidential communications impossible. To view the current Combatant Status Review Tribunal procedures, see Memorandum from Gordon England, Deputy Sec'y of Def. to the Sec'ys of the Military Dep'ts, Chairman of the Joint Chiefs of Staff and Under Sec'y of Def. for Policy, at Enclosure 3 (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

24. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. The Court held that Hamdan's military commission "lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions." *Id.* at 2759.

from his own trial.[25] The Court found, furthermore, that these commissions were not "regularly constituted courts" as understood by the Geneva Conventions.[26] Lieutenant Colonel Stephen Abraham, a Reserve Military Intelligence officer[27] who had submitted a declaration in a previous suit in 2007, stated that, in these tribunals: "What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence."[28] Moreover, Lieutenant Colonel Abraham noted that there was pressure from above to reach an "enemy combatant" verdict in the tribunals, which were often composed of personnel with limited or no intelligence experience.[29]

The Supreme Court made its first significant ruling against the government's Guantanamo policies in the spring of 2004, with its ruling in *Rasul v. Bush*.[30] Contrary to the Defense Department and President Bush's position, the Court ruled that detainees were, in fact, entitled to file habeas corpus petitions in federal courts.[31] At the most basic level, the majority found the need for judicial—and not simply executive—oversight of Guantanamo Bay.[32] Subsequently, the District Court for the District of Columbia ruled that detainees were entitled to lawyers in the filing of such petitions.[33]

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25. *Id.* at 2786-87.

26. *Id.* at 2796-98.

27. Lieutenant Colonel Abraham is not a Judge Advocate, but is a practicing attorney in his civilian capacity. *See Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the H. Armed Services Comm.*, 110th Cong. 2-3 (2007) (statement of Stephen E. Abraham, Lt. Colonel, U.S. Army Reserve), *available at* http://armedservices.house.gov/pdfs/FC072607/Abraham_Testimony072607.pdf.

28. Reply of Petitioners, *supra* note 4, at app. vi.

29. *Id.* at app. vii.

30. Rasul v. Bush, 542 U.S. 466, 485 (2004).

31. *Id.* at 484.

32. *Id.* at 475, 485.

33. Al Odah v. United States, 346 F. Supp. 2d 1, 8 (D.D.C. 2004). Notably, the majority ruling made the following comment:

> To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is "seriously impaired" is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system. Finally, this Court's ability to give Petitioners' claims the "careful consideration and plenary processing" which is their due would be stymied were Petitioners to proceed unrepresented by counsel.

Id.

The abuses at Guantanamo did not become transparent until the Red Cross's public denunciation of torture at the facility in late 2004.[34] The release of the Abu Ghraib photographs earlier that year and the leak of the Torture Memo prompted further investigations into practices at Guantanamo.[35]

IV. MILITARY LAWYERS CROSSING THE PROVERBIAL LINE

Lieutenant Commander Charles Swift, a member of the Navy Judge Advocate General Corps ("JAGC" or "JAG") who was assigned to represent Salim Hamdan, the petitioner in the now-landmark case of *Hamdan v. Rumsfeld*, was a lawyer who *arguably* "stepped out of line."[36] In May 2003, Swift was "detailed"[37] to represent Hamdan[38] who had been placed in solitary confinement in Camp Echo at Guantanamo, a special, segregated facility for "pre-commission detainees."[39] Hamdan languished in these conditions, with Swift as his sole authorized visitor.[40] In fact, Swift's access to his client had been premised on his willingness to represent Hamdan solely for the purpose of negotiating a guilty plea.[41]

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34. *See* Lewis, *supra* note 14.

35. *See, e.g.*, Dana Priest et al., *Justice Department Memo Said Torture 'May Be Justified'*, WASH. POST, June 13, 2004, at A3; Thom Shanker & Jacques Steinberg, *Bush Voices 'Disgust' at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, at A1; Editorial, *The New Iraq Crisis: The Military Archipelago*, N.Y. TIMES, May 7, 2004, at A30.

36. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *see* Brooks Egerton, *'Moral Decision' Jeopardizes Navy Lawyer's Career*, DALLAS MORNING NEWS, May 18, 2007, at 1A (describing Swift as "[o]ne of the best-known Guantanamo rebels").

37. In military terminology, a uniformed defense counsel is formally "detailed" as counsel for a specific defendant. *See generally* 10 U.S.C. § 827 (2000) (using the term "detailed" as being synonymous with "appointed").

38. Prior to Swift's detail to defend Hamdan, an earlier group of military defense attorneys were summarily fired for refusing to comply with the conditions imposed upon their representation of Guantanamo prisoners. *See, e.g.*, James Meek, *U.S. Fires Guantanamo Defence Team*, GUARDIAN, Dec. 3, 2003, *available at* http://www.guardian.co.uk/guantanamo/story/0,13743,1098618,00.html.

39. Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus, Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) (No. CV04-0777L).

40. *Id.*

41. Swift testified before Congress in 2005 as follows:

> At the onset of my representation of Mr. Hamdan, I was deeply troubled by the fact that to ensure that Mr. Hamdan would plead guilty as planned, the Chief Prosecutor's request came with a critical condition that the Defense Counsel was for the limited purpose of "negotiating a guilty plea" to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea.

As the Defense Department continued to refuse to set a date for a hearing, Swift violated the terms of his appointment and decided to press for due process of law. He obtained counsel who filed a writ of habeas corpus, deciding that the most prudent course of action to protect Swift from potential sanctions was to act as Hamdan's "next friend" for the purpose of the petition.[42] Given the skewed structure and operation of the military commissions, and the hesitance of the military commission authorities even to set a date for such a hearing, Swift believed that he would otherwise be denied the ability to adequately represent his client.[43] He did not seek a formal ethics opinion or "go up the chain of command" before the writ was filed. He incurred hostility from his superiors and reports that left him uncertain whether or not charges would be filed against him.[44] But he was public about his involvement in the case, believing this could accomplish the goals of his client and afford him protection in the court of public opinion.[45]

Hamdan v. Rumsfeld became a landmark Supreme Court victory, holding that the Guantanamo military commission procedures violated both the UCMJ[46] and the Geneva Conventions,[47] and Swift was made one of the "100 Most Influential Lawyers in America" by the *National Law Journal*.[48] But shortly after the ruling, he was passed over for promotion and subsequently forced to retire.[49] "The environment at Guantánamo is poisonous," Swift told *The Dallas Morning News*. "I've watched colleagues and people who are close friends, people I have the

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Detainees: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005) [hereinafter *Detainees Hearing*] (statement of Lieutenant Commander Charles D. Swift, JAGC, USN), *available at* http://judiciary.senate.gov/testimony.cfm?id=1542&wit_id=4361.

42. *Id.*; *see also* Egerton, *supra* note 36. Military regulations generally forbid military defense counsel from seeking collateral relief in federal courts—they were silent on the issue of being a party, *viz.*, the "next friend" of an unavailable petitioner.

43. *See Detainees Hearing*, *supra* note 41.

44. *See* Marie Brenner, *Taking on Guantanamo*, VANITY FAIR, Mar. 2007, at 328 (describing Swift's concerns about being prosecuted for speaking with reporters about material that the Department of Defense would later deem classified).

45. Telephone Interview with Lt. Commander Charles Swift (Oct. 1, 2007).

46. 10 U.S.C. §§ 801-946 (2000 & Supp. V 2005).

47. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

48. *Profiles in Power: The 100 Most Influential Lawyers in America*, NAT'L L.J., June 19, 2006, at S1.

49. Joe Shaulis, *Hamdan Navy Lawyer Denied Promotion, Will Leave US Military*, JURIST, Oct. 9, 2006, http://jurist.law.pitt.edu/paperchase/2006/10/hamdan-navy-lawyer-denied-promotion.php. Under military promotion procedures, there is what is called the "up or out" policy. After a specific time at a particular rank, if one is not promoted to the next higher rank, he is subject to mandatory retirement, as was the situation for Swift. *Id.*

utmost respect for, just ground down by this."[50] In interviews, Swift has speculated that all of the JAG's over the course of the past five years have been faced with "decisions of conscience," almost invariably as a result of the "island you are on."[51] He believes that the reason he was not prosecuted is that *Hamdan* was decided in his favor.[52] As to the risk he took and the military chain of command, he said: "It might be easy to say 'Go up the chain,' but if you do so you might prejudice the act at the expense of your client."[53]

A. Major Michael Dan Mori

Major Michael Mori of the U.S. Marine Corps is a now-celebrated military officer who was detailed to represent Guantanamo detainee David Hicks. Hicks, an Australian citizen, was detained in Afghanistan in December of 2001 and brought to Guantanamo Bay, where he was eventually charged as an enemy combatant for his alleged associations with al Qaeda operatives.[54] He was denied access to a civilian lawyer until December of 2003, and only then was permitted to have one, because his lawyer agreed not to discuss the conditions of Hicks's captivity.[55] Major Mori was assigned by the Judge Advocate General's office to represent him.[56]

Mori proceeded to speak out strongly against the legal regime in Guantanamo Bay and the treatment Hicks claimed to be subject to during his confinement and interrogations.[57] Public exposure and

50. Egerton, *supra* note 36.

51. Telephone Interview with Lt. Commander Charles Swift (Oct. 1, 2007).

52. *Id.*

53. *Id.*

54. *See Terror Detainee Back in Australia*, N.Y. TIMES, May 20, 2007, at 8.

55. *See* Raymond Bonner, *Australian Parents Have New Hope for U.S.-Detained Son*, N.Y. TIMES, Jan. 19, 2004, at A8.

56. *Id.* Joshua Dratel was the civilian lawyer who along with Major Mori defended David Hicks. *See* LEX LASRY, THE UNITED STATES V. DAVID MATTHEW HICKS: FINAL REPORT OF THE INDEPENDENT OBSERVER FOR THE LAW COUNCIL OF AUSTRALIA 18, 20-21 (2007), *available at* http://www.lawcouncil.asn.au/shared/2440377524.pdf.

57. The military and civilian defense lawyers attempted to publicly litigate the "conditions" issue but were unsuccessful because the government would not declassify relevant records and information. *See* United States v. Al Halabi, ACM 36272, 2007 WL 1245840, at *2 (A.F. Ct. Crim. App. Apr. 11, 2007) (affirming the court martial of U.S. Air Force Senior Airman Ahmad Al Halabi, the U.S. Air Force translator and library assistant at Guantanamo). Al Halabi was initially accused of espionage and other offenses involving the Guantanamo prisoners while he was assigned there. The "conditions" issue became irrelevant in Al Halabi's case because the government withdrew and dismissed all of the charges except a technical mishandling of one classified document. Interview with Donald G. Rehkopf, Jr., Al Halabi's Lead Def. Counsel (Jan. 2008).

condemnation of the tribunals was essential to representation because, as Mori correctly strategized, the case ultimately would be resolved in the political arena. He believed that it was essential for Australians to understand the Guantanamo system that its government supported. Mori launched a full-scale defense effort and a frontal attack on the system that would be used to try Hicks. When traveling to Australia to investigate the case, he referred to the military tribunals as "kangaroo courts" and argued that Hicks should be tried in conformity with international legal standards, or else returned to Australia.[58] In his statements and speeches, Mori was one of the military lawyers who were rattling their superiors by harshly criticizing the tribunals. The day before a conference at Oxford—in which Lieutenant Commander Swift and Major Mark Bridges also denounced the tribunals—Mori declared that "[t]he system is not set up to provide even the appearance of a fair trial."[59] Mori spoke at public rallies in Australia and became a celebrity there for taking his stance. He was even made an honorary member of the Australian Bar Association this past summer.[60]

Colonel Morris Davis, chief prosecutor for the military commissions at the time, made statements to the Australian press suggesting that Mori could be prosecuted for his actions under Article 88 of the UCMJ, which forbids officers from speaking "contemptuous words" about the President, Vice President or Secretary of Defense.[61] While Davis's notion that Mori could have been prosecuted[62] appears far-fetched—Article 88 has rarely been invoked in military courts-

58. *See* Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, Mar. 5, 2007, at A10; Neil A. Lewis, *Military's Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

59. Lewis, *supra* note 58.

60. *Honorary Membership for Major Mori*, HERALD SUN, June 29, 2007, *available at* http://www.news.com.au/heraldsun/story/0,21985,21990165-5005961,00.html.

61. Bonner, *supra* note 58.

> Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

See 10 U.S.C. § 888 (Supp. V 2005).

62. Ironically, Colonel Davis resigned as Chief Prosecutor over the "politicized" nature of the military commission's procedures and subsequently leveled his own criticisms of his former superiors. *See, e.g.*, Morris D. Davis, Opinion, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, *available at* http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story.

martial, and only in extreme cases[63]—Davis's allegations were serious enough to cause Mori to worry that he might be impeding Hicks' case by continuing to represent him.[64] And while Major Mori avoided actual prosecution, he was reassigned to a base in San Diego as soon as Hicks left Guantanamo and has been passed over for promotion twice since taking on his case.[65]

Major Mori's strategy was successful. In March 2007, Hicks ultimately plead guilty to providing material support for terrorism in exchange for a sentence that permitted him to return to Australia to serve only nine remaining months.[66] Hicks also agreed to refrain from speaking to the media for one year and, notably, to make a statement that he "has never been illegally treated," along with a promise not to file any lawsuits pursuant to his treatment in Guantanamo.[67] The case was widely reported in the media.

Swift and Mori understood that zealous—or even minimally diligent and competent—representation required forceful challenges to military rules, regulations and norms, which could be viewed by others as violations of law. As Hicks's case demonstrates, Mori's public relations strategy was essential to the defense; his public statements and participation in marches and rallies had the effect of building political pressure that well served his client. Yet although both Mori and Swift became public figures and even heroes, they argue that had they not won their cases in the court of public opinion and, in Swift's case, the Supreme Court as well, they just as readily could have been prosecuted.

B. Matthew Diaz

A military lawyer who *was* court-martialed and sentenced to six months in prison is Navy lawyer Lieutenant Commander Matthew Diaz. Diaz had eighteen years of highly distinguished service in both the Army

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63. *See* Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW., July 1999, at 1, 12; *see also* Posting of David Luban, The Vindication of Major Mori, to Balkinization, http://balkin.blogspot.com/2007/04/vindication-of-major-mori.html (Apr. 1, 2007, 10:02PM).

64. *See* Tom Allard, *Hicks Trial at Risk if Mori Taken off Case*, AGE, Mar. 5, 2007, http://www.theage.com.au/news/national/hicks-trial-at-risk/2007/03/04/1172943276209.html.

65. Leigh Sales, *Mori Reassigned to 'Top Gun' Marine Base*, ABC NEWS ONLINE, May 22, 2007, http://www.abc.net.au/news/stories/2007/05/22/1929231.htm.

66. Though he was sentenced to seven years, the plea bargain permitted him to serve only nine remaining months after what had been five years in American custody. He is scheduled to be released by the end of 2007. *See Terror Detainee Back in Australia*, *supra* note 54.

67. William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. TIMES, Mar. 31, 2007, at A10.

and Navy before the fall of 2004 when he was fatefully assigned to a six-month tour of duty as Deputy Staff Judge Advocate to the Joint Task Force at Guantanamo Bay.[68] Just months before, the Supreme Court had ruled in *Rasul v. Bush* that Guantanamo detainees had the right to file writs of habeas corpus,[69] and the District Court for the District of Columbia had subsequently clarified the principle that, in doing so, these detainees could be represented by legal counsel.[70] The Guantanamo Joint Task Force to which Diaz was assigned was responsible for the detention, interrogation, intelligence-gathering, and care of detainees. With the government as his client, Diaz's job included giving legal advice to the Staff Judge Advocate[71] and the chain-of-command on habeas corpus petitions, establishing ground rules for attorney visits, and acting as the liaison with outside counsel for the detainees. He also monitored allegations of prisoner abuse.[72]

Diaz spent his months at Guantanamo during the eye of the public storm of the worst abuses by the United States government, both at Guantanamo and Abu Ghraib. Several months after the Supreme Court ruled that Guantanamo detainees were entitled to file petitions for habeas corpus and that they were entitled to have access to lawyers, Diaz was troubled to see his superiors stalling on both counts while allegations of abusive interrogation tactics continued to surface. The detainees without lawyers, he observed, were especially likely to report abuse.[73] Meanwhile, he perceived that the lawyers attempting to gain access to the potential clients, let alone file habeas corpus petitions pursuant to the *Rasul* and *Al Odah* decisions, were being stonewalled by the Department of Defense.[74] Diaz saw memos that documented the stonewalling.[75] Swirling around the military legal community was the Abu Ghraib

68. Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES MAG., Oct. 21, 2007, at 78, 80-81.

69. Rasul v. Bush, 542 U.S. 466, 481-84 (2004).

70. Al Odah v. United States, 346 F. Supp. 2d 1, 8 (D.D.C. 2004).

71. A "Staff Judge Advocate" is the ranking military lawyer at a given base, installation or command. *See* BLACK'S LAW DICTIONARY 858 (8th ed. 2004). Here, it was the Joint Task Force, Guantanamo.

72. *See* Letter from Appellate Counsel to Commander, Navy Region Mid-Atlantic, Request for Clemency I.C.O. United States v. L.C.D.R. Matthew M. Diaz, JAGC, USN; Response to Staff Judge Advocate Recommendation, at 6 (Aug. 31, 2007) (on file with author) [hereinafter Request for Clemency]; Golden, *supra* note 68, at 81-83.

73. Request for Clemency, *supra* note 72, at 6-7.

74. *See, e.g.*, Egerton, *supra* note 36; Golden, *supra* note 68, at 83.

75. Request for Clemency, *supra* note 72, at 6.

scandal, when an Army Sergeant leaked the graphic images of prisoners abused in American custody that were splashed across the globe.[76]

Diaz found the government's conduct in failing to follow the strictures of *Rasul* and *Al Odah* unconscionable, if not in violation of the mandates of those decisions. With just two years of service remaining before he was set to retire, Lieutenant Commander Diaz, acknowledged as an "outstanding officer, leader and judge advocate" and "a superstar" by his superiors,[77] decided that he had a responsibility to take action. As he himself put it, Diaz felt a "moral obligation" to act, based upon "my upbringing, my experiences, my father's experiences, my own sense of justice and what looks like injustice, and what I've been trained as a Soldier and a Sailor."[78]

In February of 2005, he printed out thirty-nine pages of names of the detainees from the Guantanamo database and sent them in a Valentine's card to Barbara Olshansky, the lawyer at the Center for Constitutional Rights litigating the issue of access to counsel for detainees.[79] He did not identify himself as the sender. The document was not marked classified or secret, but it contained alphanumeric characters. Ultimately, the government obtained the document and was able to identify Diaz through fingerprints.[80] In July 2006, he was charged with: (1) unlawful mailing of the list; (2) conduct unbecoming an officer by mailing the list to an unauthorized individual; and, the most serious charge, (3) knowingly and willfully printing, removing and mailing classified information in violation of the Espionage Act.[81]

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76. *See* Shanker & Steinberg, *supra* note 35.

77. Request for Clemency, *supra* note 72, at 4-5; *see also* Golden, *supra* note 68, at 80-81 (Diaz's superiors describing him as "the consummate naval officer" and "a stellar leader of unquestionable integrity").

78. Request for Clemency, *supra* note 72, at 7 (quoting Diaz's testimony). Working his way out of childhood poverty, Diaz enlisted in the Army at the age of seventeen after his father, a nurse, was convicted and sentenced to death for injecting twelve elderly patients with lidocaine that resulted in their deaths. Proclaiming his innocence to this day, Diaz's father contends that bad science and bad lawyering led to his conviction; he is still alive because a habeas corpus petition is pending. After Diaz enlisted, he worked his way up the ranks, earning both his high school equivalency and a college degree. After earning an honorable discharge to obtain a law school degree, Diaz was then commissioned as an officer in the Navy Judge Advocate General Corps, where he served for ten years. *See* Golden, *supra* note 68, at 80-82. No doubt, Diaz's unique history informed his actions.

79. *See* Golden, *supra* note 68, at 80.

80. *Id.*

81. Request for Clemency, *supra* note 72, at 2; *see also* Scott Horton, *A Tale of Two Lawyers*, HARPER'S MAG., May 20, 2007, *available at* http://www.harpers.org/archive/2007/05/hbc-90000117.

The prosecution's case focused on establishing that the documents, and, particularly, the alphanumeric characters that appeared next to the names, were properly classified. The government claimed that if the documents had fallen into the wrong hands, the countries of origin of the prisoners and the interrogation teams handling them could have been identified.[82] Moreover, the government treated the case as one of "national security," thereby invoking restrictive procedures for defense access to documents and other secrecy mechanisms.[83]

Diaz contended that he did not know that the information was classified and that he had no intent to harm the United States, a critical element to the espionage charge.[84] Rather he claimed, and hoped to present evidence of, his intent to protect prisoners from physical and mental abuse.[85] This proffered evidence included reports of human rights violations, references to the *Rasul, Al Odah* and *Hamdan* decisions, and various affidavits demonstrating Diaz's acute awareness that he was operating in a system that had badly derailed from fundamental norms of justice.[86] He expected to show that when he released the names of the detainees to a human rights lawyer, he may have been breaking the rules such as they were—but that he had nonetheless acted to right what had become distortions of greater, more basic rules and norms of law.[87] Diaz had grappled with these contradictions and his own sense of what he described as "moral obligation" when he decided he would no longer play along within the Guantanamo system.[88] All of this evidence, however, was excluded from the trial because it was deemed proof of

82. This latter claim has been criticized as an extremely unlikely eventuality. *See* Horton, *supra* note 81; Donald G. Rehkopf, Jr., Flawed Prosecution in Diaz, http://jurist.law.pitt.edu/hotline/2007/05/flawed-proseduction-in-diaz.php (May 21, 2007, 3:24PM) (arguing that the disclosed rosters were not classified, but rather labeled "for official use only").

83. Request for Clemency, *supra* note 72, at 14-15. Because so many of the trial documents are therefore classified, the Request for Clemency is by necessity a primary source of information about the case in this Article.

84. The government had originally made the same claim in *United States v. Al Halabi*, ACM 36272, 2007 WL 1245840 (A.F. Ct. Crim. App. Apr. 11, 2007), in 2003-04, but later withdrew when the defense challenged the legality of the classifications. Ultimately in *Al Halabi*, the government withdrew their claims that the names and ISN's of the Guantanamo detainees were classified—a fact not apparently raised in the *Diaz* court-martial. *See* Interview with Donald G. Rehkopf, Brenna, Brenna & Boyce PLLC (Oct. 2, 2007).

85. *See* Golden, *supra* note 68, at 83.

86. *See* Request for Clemency, *supra* note 72, at 7.

87. *Id.*; *see also* Golden, *supra* note 68, at 83.

88. Request for Clemency, *supra* note 72, at 7.

motive, not intent.[89] And because the trial was termed a "national security case," numerous evidentiary and procedural constraints were imposed, including denial of access to a broader forum in the court of public opinion.[90]

Diaz was ultimately found guilty of all but the most severe espionage charge. In addition to conduct unbecoming an officer, he was found guilty of transmitting information with reason to believe that it *could* be used to the injury of the United States or aid its enemies, but acquitted of acting with intent or reason to believe that it *would* be used for such purposes.[91] The prosecution requested a seven-year prison sentence and dismissal from the Navy with loss of all military pension rights and benefits.

Diaz, proclaiming that he acted upon his "moral conscience," was deeply remorseful. "I made a stupid decision, I know," he stated. "[B]ut I felt it was the right decision, the moral decision, the decision that was required by international law . . . . No matter how the conflict was identified, we were to treat [the detainees] in accordance with [international law], and it just wasn't being done."[92] Diaz's remorse included shame about acting secretively. "I wasn't really willing to put my neck on the line, to jeopardize my career," he admitted, "[s]o I did it anonymously. I'm disgraced, I'm ashamed. . . . I let the JAG Corps down. I let the Navy down."[93] Diaz was sentenced to six months in prison, dismissal from the Navy, and loss of pay and pension following

89. It was, however, relevant to the *element* that such evidence was in fact, *legally classified*. A military court-martial is *not* the forum for challenging the classification of information—that requires a separate administrative process.

90. Request for Clemency, *supra* note 72, at 14-15 (Affidavit of Karen Somers). Technically, under the UCMJ, there is no such thing as a "National Security Case." A court-martial may deal with "national security" or "classified" issues, but there is an orderly process to deal with that, *viz.*, Rule 505, Military Rules of Evidence. MIL. R. EVID. 505. See the court's discussion for proper procedure in *United States v. Schmidt*, 60 M.J. 1, 2 (C.A.A.F. 2004), and the use of the All Writs Act, 28 U.S.C. § 1651(a) (2000), for interlocutory relief.

91. *See* Request for Clemency, *supra* note 72, at 7 (noting convictions under 18 U.S.C. § 793(d)-(e) (2000)); *see also* 18 U.S.C. § 793(a) (concerning information that "is to be used to the injury of the United States"), (d)-(e) (concerning information that "could be used" to such ends); *Virginia: Navy Lawyer Is Guilty of Communicating Secret Information*, N.Y. TIMES, May 18, 2007, at A23.

92. Egerton, *supra* note 36.

93. Kate Wiltrout, *Naval Officer Sentenced to Six Months in Prison, Discharge*, VIRGINIAN-PILOT, May 18, 2007, *available at* http://hamptonroads.com/node/268001.

his incarceration.[94] He went to the brig immediately, where he remained until the end of 2007.[95]

One of the ironies of the case is that the list of detainees was released by the government two months before Diaz began trial, pursuant to a lawsuit under the Freedom of Information Act filed by the Associated Press. In seeking to keep the names classified in the lawsuit, the government had not even attempted to claim that their release would jeopardize national security. Its only argument was that the names should be kept classified out of respect for the detainees' *privacy*—a claim roundly dismissed in federal court.[96] By the time of Diaz's trial, the government claimed only that the identifying marks on the document—the alphanumeric characters *next to* the names—were the valuable, classified, national security information at stake.[97]

C. Diaz Revisited

Diaz's military colleagues are sympathetic about his crisis of conscience, but argue that he could have accomplished the same result differently without incurring such significant consequences.[98] They agree that given Diaz's good-faith intentions and the reasonable belief that detainees with lawyers were less likely to undergo torture, he could have pursued the same objective more cautiously. To begin with, he could have cut and pasted the names of the detainees, sending them to Olshansky without the markings.[99] He would thus have acted to prevent possible torture with little if any risk that the information disclosed could be dangerous. Also, he could have consulted counsel, as Swift did, in order to assist in decision-making and examine the circumstances under

94. *Id.*; *see also* Golden, *supra* note 68, at 83.

95. On April 3, 2008, Matthew Diaz was honored at the National Press Club in Washington, D.C. with the Ridenhour Prize for Truth-Telling. *See* The Ridenhour Prizes, www.ridenhour.org (last visited Apr. 2, 2008).

96. Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 15, 15-17 (S.D.N.Y. 2005); *U.S. Reveals Details on Guantanamo Detainees After AP FOIA Lawsuit*, ASSOCIATED PRESS, Mar. 7, 2006, http://www.ap.org/FOI/foi_030706a.html.

97. *See* Golden, *supra* note 68, at 83.

98. Telephone and In-Person Interviews with Four Unnamed Military Lawyers (Sept. 2007).

99. This Article assumes for the sake of argument that the names of detainees were classified because the government claimed that status at the time of the disclosure. However, as noted above, the government had conceded in early 2004 in the *Al Halabi* case that the names of the various "detainees" were not classified. The argument that the *government* was *estopped* from claiming that the names were classified was apparently not made in *Diaz*. *Cf.* United States v. Stinde, 21 M.J. 734, 736 n.1 (N-M. C.M.R. 1985) (holding that the government is estopped from arguing that a defendant had no right to counsel when it had previously stated otherwise).

which his actions might be deemed justified. Additionally, he could have gone further up the chain of command or documented his attempts to do so, strengthening his case that the action taken was his only recourse. Moreover, Diaz could have instituted a formal "classification challenge" seeking a determination of the legality of the government's classification decisions. Lastly, he could have acted publicly—that is, accepted responsibility by signing the letter that he sent, or by making a more public statement that he had sent the list in accordance with the Court's decision in *Rasul v. Bush*.

Even if the release of the names was a violation of law, had Diaz complied with the criteria above—due caution, weighing of harms, exhaustion of the chain of command, and public notice (termed "Diaz Revisited" in this Article)—in addition to his good faith and reasonable belief for action, should he or others such as Swift or Mori be permitted under carefully circumscribed circumstances to violate regulations or laws in order to uphold the government's legal obligations, when failing to do so results in ongoing violations of fundamental norms? That is, if Diaz, after exercising reasonable care, had sent only the names of the detainees and accepted public responsibility for his actions, should the law permit such acts?

V. LEGAL FRAMEWORK: POSITIVIST AND NATURAL LAW, NUREMBERG AND *JUS COGENS*

The framework for this discussion is, of course, the premise that one must obey and respect the law, and if an individual disagrees or thinks that a law is unjust, that person must work to change it within legal bounds. There is an extensive literature grounded in moral and political philosophy about the limits of the lawyer's role, responsibilities and obligations and the issue of whether a lawyer may violate the law.[100]

100. *See generally* H.L.A. HART, *Positivism and the Separation of Law and Morals*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49 (1983) (outlining key principles of legal positivism, such as law's essential grounding in social practice and recognition); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) (describing the ethical problems facing lawyers and arguing that legal ethics affects society as a whole); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 77-108 (1998) (discussing philosophical theories and the effect these theories have on views of lawyers' obligations); Stephen Ellmann, *To Live Outside the Law You Must Be Honest: Bram Fischer and the Meaning of Integrity*, 26 N.C. J. INT'L L. & COM. REG. 767 (2001) (examining the ethical challenges that faced South African lawyers during apartheid); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003) (describing the various legal ethics issues that arise during national crises and arguing that constitutional principles need not always be followed in these cases); Martha Minow,

The dominant view is that zealous advocacy stops at the "bounds of the law"; that is, nonlegal norms, unless embodied in the law itself, do not provide a basis for proper action by lawyers. In other words, there is a "commitment to law (and only law)."[101] This view posits that this commitment is essential to promote social order, fairness and democracy and that anarchy would result from a different formulation. There is significant force to this argument in the military context where the protection of national security is paramount and thus strict adherence to this normative view is essential.

An alternative conception of law, often referred to as natural law, posits that legal norms embody underlying values of fairness, democracy and order and that obligations must be interpreted in terms of these values.[102] Thus, under some circumstances, lawyers may or even must disobey unjust laws or take reasonable action to restore respect for law and fundamental human rights in an unjust system of laws. Within this view, nullification of unjust laws through individual action that upholds underlying legal values is acceptable.[103] Outside the lawyering context, noted historical examples include events such as the Boston Tea Party, civil disobedience within various groups including anti-slavery and

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Breaking the Law: Lawyers and Clients in Struggles for Social Change, 52 U. PITT. L. REV. 723 (1991) (discussing challenges facing lawyers who represent clients who have broken the law to further social change); William H. Pryor Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1 (2003) (explaining how Pryor reconciled his Christian beliefs with his decision to obey the federal injunction to remove the Ten Commandments from an Alabama federal courthouse); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (claiming that lawyers have an obligation to exercise discretion in client choice and to choose cases that will promote justice); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995) (criticizing the positivist approach to legal ethics, favoring instead the interpretive integrity approach); Timothy P. Terrell, *Toward Duty-Based Lawyering?: Rethinking the Dangers of Lawyer Civil Disobedience in the Current Era of Regulation*, 54 ALA. L. REV. 831 (2003) (arguing that legal codes should not be amended to give more lenient punishments to lawyers who commit ethical violations); W. Bradley Wendel, *Civil Obedience*, 101 COLUM. L. REV. 363 (2004) (claiming that lawyers should not look to their own morals in representing clients but instead should focus on adhering to the law); Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191 (2001) (discussing the reconciliation of lawyers' moral and religious beliefs with professional obligations).

101. *See* SIMON, *supra* note 100, at 7-9.

102. *See* David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 801-04 (1991); William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 223 (1996) (defining this concept as "substantivism" as contrasted with positivism).

103. *See, e.g.*, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION lx-lxi (Liberty Classics 1982) (1885); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 206-22 (1977); Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 11-14, 20 (2007); Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL'Y 695, 695-96 (1997).

suffragist activists, and the civil rights, anti-war, nuclear disarmament, and pro-choice and anti-abortion movements.[104] Such actions within the lawyering context are more problematic because of the established role of the lawyers as having "special responsibility" as officers of the legal system. As the preamble to the American Bar Association's *Model Rules of Professional Conduct* puts it, "A lawyer's conduct should conform to the requirements of the law . . . . A lawyer should demonstrate respect for the legal system . . . ."[105] Yet there are also noteworthy examples of lawyers themselves acting to nullify unjust laws; Helmuth James Moltke, to name one, was a lawyer under Germany's Third Reich who joined the anti-Hitler resistance movement and was eventually convicted of treason and executed.[106]

The natural law premise, under which brave citizens and lawyers such as Moltke acted, is well grounded in modern military law—notably through its adherence to the Nuremberg principles that obedience to orders does not excuse patently illegal acts that violate basic norms of justice. Most famously, a lack of existing legislation in one's own state barring such crimes, or even a direct order to commit them, was no defense to those convicted at the Nuremberg tribunals. In other words, as one Nuremberg decision put it, the *ex post facto* principle would be satisfied where "the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught."[107]

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104. *See, e.g.*, GEORGE BIZOS, ODYSSEY TO FREEDOM (2007); Robert P. George, *Natural Law and Civil Rights: From Jefferson's "Letter to Henry Lee" to Martin Luther King's "Letter from Birmingham Jail"*, 43 CATH. U. L. REV. 143, 146, 154-55 (1993).

105. MODEL RULES OF PROF'L CONDUCT pbml., at 1 (2007); *see also* Luban, *supra* note 102, at 796 (repeating the language from the Model Rules).

106. Luban, *supra* note 102, at 797-99.

107. United States v. Alstoetter (The Justice Case), 3 T.W.C. 1 (1948), *excerpts available at* http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm.

This reflects the *jus cogens* standard in international law.[108] That is, Nuremberg set at least some limits to a purely positivist approach by appealing to basic moral intuitions of right and wrong—and by punishing, sometimes by death, those who assumed the legalisms of the Reich would protect them.[109] Moreover, these principles applied not only to Nazi commanders, but to the lawyers and jurists who provided the legal trappings for their actions.[110] Natural law aside, it is now enshrined as a matter of *positive precedent* that morally outrageous war crimes, crimes against humanity and breaches of the peace are illegal.[111]

Currently, there is no unanimous academic or judicial agreement about a definition of torture or cruel and degrading treatment.[112] Yet at

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108. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining a *jus cogens* norm as a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"); *see also* Siderman de Blake v. Argentina, 965 F.2d 699, 714-16 (9th Cir. 1992) (discussing *jus cogens* and precedent for U.S. courts' understanding of the concept); *see generally* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63 (1996) (arguing that because of insufficient state practices, obligations stemming from *jus cogens* crimes are rarely met); Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307 (2000); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004) (examining what makes a crime a crime against humanity).

109. Vichy France provides another detailed example of a state that used legal formalisms to justify actions that were patently wrong, resulting in the eventual prosecution of civil servants such as Maurice Papon for crimes against humanity. *See* Richard H. Weisberg, *The Risks of Adjudicating Vichy*, 5 ROGER WILLIAMS U. L. REV. 127, 127 (1999). For a thorough analysis of the role of lawyers in Vichy France, see the work of Richard H. Weisberg including: VICHY LAW AND THE HOLOCAUST IN FRANCE 293-354 (1996); *The True Story: Response to Five Essayists*, 15 CARDOZO L. REV. 1245, 1253-55, 1257-58 (1994); *The Hermeneutic of Acceptance and the Discourse of the Grotesque, with a Classroom Exercise on Vichy Law*, 17 CARDOZO L. REV. 1875, 1884-91 (1996). *See also* Symposium, *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1121, 1133-38 (1995) (Weisberg discussing how French lawyers, more so than the Germans, did more to promulgate anti-Jewish laws).

110. See United States v. Alstoetter (The Justice Case), 3 T.W.C. 1 (1948), *excerpts available at* http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm, for the prosecution of some of the Reich's leading judges.

111. Control Council Law No. 10, Art. II(1), Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette of the Control Council for Germany 50-55 (1946), *available at* http://www1.umn.edu/humanrts/instree/ccno10.htm.

112. While not unanimous, there are accepted norms. Despite these norms, note the Torture Memo and the furious opposition it generated. *See, e.g.*, M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 396-97 (2006); Sanford Levinson, *In Quest of a "Common Conscience": Reflections on the Current Debate about Torture*, 1 J. NAT'L SECURITY L. & POL'Y 231, 235-36 (2005); Christian M. De Vos,

some juncture the Nuremberg decisions, the Geneva Conventions, the Convention Against Torture, and other international treaties and precedents articulate norms so fundamental that it can reasonably be assumed that their violation is punishable by law. In hindsight, at the very least, current arguments as to whether or not water-boarding, various forms of sleep deprivation and other actions at Guantanamo constitute torture, are likely to be just that—arguments. Many of the actions taken against detainees at Guantanamo are torture and recognized as violations of the fundamental norms of international law.[113]

VI. NUREMBERG AND MILITARY LAW

The Nuremberg principles—that there are universal, obligatory norms and that acting "under orders" does not provide a waiver for violating those norms—necessitate the creation of various legal "escape valves" for actors faced with unlawful systems or commands. It is well established that members of the military in particular are not only permitted, but may be obligated, to disobey unlawful orders. Accordingly, while the U.S. military code requires service members to obey orders, it explicitly notes that the orders must be lawful.[114] But for the soldier who disobeys an order he considers unlawful, the burden of proof is steep. The *Manual for Courts-Martial* states, and military courts have repeatedly held: "An order . . . may be inferred to be lawful and it is disobeyed at the peril of the subordinate."[115] Unless an order is

Mind the Gap: Purpose, Pain, and the Difference Between Torture and Inhuman Treatment, HUM. RTS. BRIEF, Winter 2007, at 4, 5-6; *see also* GOLDSMITH, *supra* note 20, at 144-51; Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 645-53 (2005) (offering a critique of the Torture Memo's reasoning). For a heated debate about whether water-boarding constitutes torture, the Senate confirmation hearings of Attorney General Michael Mukasey are instructive. *Senate Judiciary Committee Hearing for Nomination of Judge Mukasey as Attorney General, Day Two*, CQ Transcripts Wire, Oct. 18, 2007, *available at* http://www.washingtonpost.com/wp-srv/politics/documents/transcript_mukasey_hearing_day_two_101807.html.

113. *See supra* notes 9-15 and accompanying text.

114. 10 U.S.C. § 892 (2000); *see also* United States v. New, 55 M.J. 95, 100 (C.A.A.F. 2001) ("The term 'lawful' recognizes the right to challenge the validity of a regulation or order with respect to a superior source of law.").

115. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14.c.(2)(a)(i) (2005) [hereinafter MCM]; *see also* United States v. Kisala, 64 M.J. 50, 52 (C.A.A.F. 2006); *New*, 55 M.J. at 106; United States v. Nieves, 44 M.J. 96, 98 (C.A.A.F. 1996).

"patently illegal," the subordinate who disobeys must assume the burden of demonstrating its unlawfulness.[116]

Current military law places significant hurdles for one to demonstrate unlawfulness, and saddles the insubordinate soldier with the risk. The judge—and not the members of the court-martial panel (the equivalent of a jury)—is the sole determinant of an order's legality. That is, the legality is treated as a binary issue of law and not of fact for the jury's determination.[117] Thus, the individual soldier's reasonable belief that an order was not lawful is not relevant to guilt.

Moreover, military courts have invoked the political question doctrine to avoid ruling on the legality of military orders that might be politically controversial.[118] Particularly on the question of deployment, courts have abstained from ruling on the legality of military orders—an issue that arose in several cases concerning the Vietnam War.[119]

Military courts have understandably been reluctant to allow soldiers' personal judgments on the legality of wars and their interpretations of international laws and treaties to excuse their disobedience to orders. That is, a soldier should not feel free to disregard commands based on his own legal theory of the war he finds himself in. This sort of fear—of soldiers' personal opinions undermining command structure—has led judges to set a considerably high bar for a soldier to demonstrate unlawfulness. In a case involving the deployment of troops in the Persian Gulf, a court held that "[t]he duty to disobey an unlawful order applies only to 'a positive act that constitutes a crime' that is 'so manifestly beyond the legal power or discretion of the commander as to admit of *no rational doubt* of their unlawfulness.'"[120]

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116. MCM, *supra* note 115; *see also Kisala*, 64 M.J. at 52; *New*, 55 M.J. at 108; United States v. Hughey, 46 M.J. 152, 154 (C.A.A.F. 1997); United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989) (military orders must be clear and specific); Unger v. Ziemniak, 27 M.J. 349, 359 (C.M.A. 1989).

117. *See New*, 55 M.J. at 100-07; *see also* United States v. Carson, 35 C.M.R. 379, 380 (C.M.A. 1965).

118. To take one example, an American soldier who was ordered to deploy to Macedonia in the late 1990s on a U.N. peacekeeping mission refused to wear a U.N. uniform, claiming that the grounds for his deployment were illegal. *New*, 55 M.J. at 97-98. The court held that his arguments failed "because they would unacceptably substitute appellant's personal judgment of the legality of an order for that of his superiors and the Federal Government," and that "[i]t is not a defense for appellant to claim that the order is illegal based on his interpretation of applicable law." *Id.* at 107-08.

119. *See* United States v. Noyd, 40 C.M.R. 195, 203 (C.M.A. 1969); United States v. Wilson, 41 C.M.R. 100, 101 (C.M.A. 1969); United States v. Johnson, 38 C.M.R. 44, 45 (C.M.A. 1967).

120. United States v. Huet-Vaughn, 43 M.J. 105, 114-15 (C.A.A.F. 1995) (emphasis added) (citation omitted).

So where might this leave the soldier who reads the Torture Memo and disagrees with its sweeping pronouncements,[121] or the JAG officer who wishes to file a writ of habeas corpus for his client even though his instructions forbid it? Are these the sorts of "personal judgments" that are "unacceptable substitutes" for superior orders? Or would the judiciary simply deem these questions too politically controversial and defer to the executive branch's judgment? Under current military law, the soldier who disobeys an order takes on all these risks and more.

To what extent do our current whistleblower laws and criminal laws create the correct incentives and protections for those like Swift, Mori and "Diaz revisited" who desire to act morally and legally? To what extent do current laws provide protection for a "safe harbor" to take action to uphold fundamental norms of international law?[122]

VII. WHISTLEBLOWER LAWS SHOULD, BUT DO NOT, OFFER PROTECTION

Whistleblowers are those who call their superiors to account when they are acting illegally or failing to uphold the duties of their office. The whistleblower is often a vaunted figure who embodies integrity, courage and solid ethical judgment. In general, however, whistleblowers do not take offensive action to prevent a greater harm. Instead, they are

121. This conclusion was reached not only by human rights lawyers but by the next Bush-appointed Office of Legal Counsel leader himself. *See supra* note 20.

122. Safe harbor is a concept used throughout the law and provisions abound from electronic security to sexual discrimination law; in various forms, they generally "enable a party to take some desired action without risk of incurring legal liability." Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 609-10 (2004); *see* 15 U.S.C. § 78u-5(c)(1) (2000) (providing safe harbor for forward-looking financial statements when reasonable precautions are taken); 17 U.S.C. § 512(a) (2000) (establishing safe harbor provisions under the Digital Millennium Copyright Act to shield Internet service providers from activities of users); 33 U.S.C. § 1321(b)(5) (1988 & Supp. V 1994) (granting criminal immunity under the Clean Water Act for ship captains who report oil spills); FED. R. CIV. P. 11(c)(1)(A) (allowing attorneys to withdraw challenged claims or statements and thus avoid Rule 11 sanctions); FED. R. CIV. P. 37(f) (establishing safe harbor for good-faith actors who have lost information in electronic discovery cases); 8 C.F.R. § 274a.4 (2007) (establishing safe harbor regulations by the Department of Homeland Security for employers to avoid liability for hiring illegal immigrants); 42 C.F.R. § 1001.952(e)(2)(iv)(B) (2006) (establishing safe harbor for good-faith recruitment efforts by physicians who might otherwise violate the Anti-Kickback Statute); JAMES F. MANNING, U.S. DEP'T OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST - PART THREE (2005), http://www.ed.gov/print/about/offices/list/ocr/docs/title9guidanceadditional.html (establishing various safe harbor provisions for compliance with Title IX). In this Article, safe harbor encompasses taking action which violates a law or regulation.

protected under certain circumstances from retaliation for releasing information to hold their superiors accountable.

The Whistleblower Protection Act ("WPA") prohibits government employers from firing employees because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . ."[123]

However, whistleblower protection does not extend to disclosure of classified information.[124] Moreover, the WPA does not apply to various intelligence agencies, including the FBI, CIA, NSA, and others that may be designated by the President.[125] For the intelligence community, separate and narrower rules apply. The Intelligence Community Whistleblower Protection Act ("ICWPA"), passed in 1998, provides limited safeguards for those who report matters of "urgent concern."[126] This statute covers those intelligence agencies singled out for exception in the original WPA and requires strict adherence to following proper channels. Before being permitted to give information to Congressional intelligence committees, employees must first go through their agency's Inspector General, who then determines how they may proceed.[127] The question of what constitutes a matter of "urgent concern" remains largely unresolved, and the ICWPA provides little guidance—an "urgent concern" can be a "serious or flagrant problem, abuse, violation of law or Executive order" or a "deficiency" in the operations of an intelligence

123. 5 U.S.C. § 2302(b)(8)(A)(i)-(ii) (2000).

124. The general ban on employer retaliation against whistleblowers includes a caveat that its protections only extend where "such disclosure is not specifically prohibited by law and . . . such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *Id.*

There are additional channels where sensitive information is involved. Whistleblower protections, whether applied to classified material or not, apply to "any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures . . . ." *Id.* § 2302(b)(8)(B).

125. *Id.* § 2302(a)(2)(C)(ii).

126. 5 U.S.C. app. § 8H(a)(1)(A) (2000 & Supp. IV 2004).

127. *Id.* app. § 8H(d)(1)-(2); *see also* Jamie Sasser, Comment, *Silenced Citizens: The Post-*Garcetti *Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 779-85 (2007) (disclosing any information to the general public is flatly prohibited by implication).

agency. Notably, and perhaps ominously, it *does not* include "differences of opinions concerning public policy matters."[128]

As for the armed forces, the UCMJ includes its own whistleblower provision, but on similarly narrow grounds. The Military Whistleblower Protection Act ("MWPA") creates a blanket protection for communications between members of the military and members of Congress (and to Inspectors General and various officials at the Department of Defense)—but only when that communication is lawful.[129] These are thus "protected communications."[130] "Unlawful" communications, which would likely include communications disclosing classified information, are by implication subject to restriction. The MWPA also prohibits *retaliation* against those who disclose evidence of "[a] violation of law or regulation" or "[g]ross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety," but says nothing about prior restraints where such evidence might be classified.[131] Thus, a service member who discloses classified information to a member of Congress because he believes it evidences violations or misconduct takes a similar risk to the soldier who disobeys orders; he acts "at his own peril." Moreover, the prohibition on retaliation only applies to communications made through the proper channels, and not to the general public.[132]

At the national security level, then, whistle-blowing becomes much less a matter of public outcry and more a matter of internal compliance procedures. One must go through the proper "chain of command" or else face potential criminal penalties.

Nor is there a safe harbor provision within current government whistleblower laws that is deemed adequate to protect a wide range of government employees, including those who leak information to the public. Leaks have become a primary source of information in the context of the "war on terror." In 2004, the Torture Memo was leaked;[133] in November 2005, there was a leak of the information about black sites

128. 5 U.S.C. app. § 8H(h)(1) (Supp. IV 2004); *see also* Thomas Newcomb, *In from the Cold: The Intelligence Community Whistleblower Protection Act of 1998*, 53 ADMIN. L. REV. 1267 (2001); Sasser, *supra* note 127, at 784.

129. 10 U.S.C. § 1034(a)(1)-(2) (2000).

130. *See* Daniel A. Lauretano, *The Military Whistleblower Protection Act and the Military Mental Health Evaluation Protection Act*, ARMY LAW., Oct. 1998, at 1, 5.

131. § 1034(c)(2).

132. *See id.* § 1034(b)(1).

133. *See* Priest et al., *supra* note 35; *see also* Editorial, *The New Iraq Crisis: The Military Archipelago*, *supra* note 35 (reacting to the 2004 leak of the Abu Ghraib abuse photographs).

in Eastern Europe to Dana Priest of the Washington Post;[134] soon after (December 2005) a National Security Administration ("NSA") employee blew the whistle on the NSA domestic wiretap program in which the NSA was tapping phones of Americans without warrants from the Foreign Intelligence Surveillance Act ("FISA") court.[135] These leaks were the primary mechanism of accountability that led to media attention, public outcry, and ultimately intervention by other branches of government to correct abuses.[136] Yet the current state of whistleblower law and practice discourages individuals from acting in the public interest as responsible members of the body politic. At the same time that the Supreme Court curtailed First Amendment protections for government employee whistleblowers, the Bush administration has aggressively pursued government whistleblowers who have leaked information to the media.[137] Recognition of the essential role that government leaks have played in this context has led to suggestions for a comparable safe harbor provision for whistleblowers leaking information to the press, and/or for reporters who wish to protect their sources.[138]

VIII. NECESSITY DEFENSE IN COURTS-MARTIAL

The doctrine of necessity as a defense in a criminal case posits that even though certain conduct violates the law, it is justified because it prevents a greater evil and hence produces a net benefit to society.[139] As

134. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

135. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

136. For a history of the role of leaks in American governance, see Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425 (2006).

137. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006); *see also* Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 489-503 (2006) (discussing the Bush administration's efforts to limit disclosure of information to the press).

138. *See* Kielbowicz, *supra* note 136, at 487. The controversy around the *New York Times* reporter Judith Miller and her refusal to disclose the name of her leak source is an instructive example. *See, e.g.*, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22; *see also* Nathan Swinton, Note, *Privileging a Privilege: Should the Reporter's Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979, 986-90 (2006) (contrasting the roles of the reporter's privilege and the attorney-client privilege).

139. *See* JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW 189 (1934); John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 124 (2007); *see also* GLANVILLE

one common theory puts it: "The law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law."[140] The necessity defense thus involves weighing a "choice of evils."

In general, one who intends to invoke this defense to justify his conduct must show, "(1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law."[141] This defense presents significant hurdles to an actor who intends to invoke it.[142] First, it is difficult to proffer sufficient evidence to establish the elements of the defense. Many defendants have difficulty establishing that the harm sought to be avoided is imminent—as one court has stated, the harm must be "a clear and imminent danger, not one which is debatable or speculative."[143] Another hurdle is the causation requirement; some jurisdictions impose a nearly insurmountable showing that the actions taken would definitively have eliminated the harm in question.[144] Moreover, even if a defendant can

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WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 198 (1957) (discussing the application of the necessity defense in Catholic theology).

140. WAYNE R. LAFAVE, CRIMINAL LAW § 5.4, at 477 (3d ed. 2000).

141. United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989) (citing United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985)), *superseded by statute*, Pub. L. No. 99-603, § 112, 100 Stat. 3381, *as recognized in* United States v. Gonzalez-Torres, 273 F.3d 1181, 1187 (9th Cir. 2001); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 11-12 (2003); *see also* Cohan, *supra* note 139, at 124 (adding a fifth factor, the "preemption factor").

142. At least one commentator noted that the law of necessity, notably in the civil disobedience area, is "vague, fragmented, political, and fraught with contradiction." Quigley, *supra* note 141, at 72. Courts, through confusing and inconsistent analysis, consistently keep the issue from jury consideration. *Id.* at 65. *See also* Cohan, *supra* note 139, at 121-22 (describing judicial anxiety about allowing juries to hear evidence of the necessity defense). Justice Thomas in *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 490 (2001), cast doubt on the validity of this common law necessity defense.

143. Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (Mass. App. Ct. 1982); *see also* State v. Warshow, 410 A.2d 1000, 1002 (Vt. 1979) (defining "imminent" as a danger that "must be, or must reasonably appear to be, threatening to occur immediately"); State v. Huett, 104 S.W.2d 252, 262 (Mo. 1937) ("The word 'imminent' means . . . 'threatening to occur immediately; near at hand; impending.'"). For a general discussion of the "imminence" requirement, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 387-88 (1972); Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 95-98 (1989).

144. *See, e.g.*, United States v. Seward, 687 F.2d 1270, 1273 (10th Cir. 1982) (requiring defendant to show that a reasonable person would think that the defendants' actions would terminate the official policy of the U.S. Government about nuclear weapons); Commonwealth v.

establish the elements of "imminence" and the causal relationship between the conduct and the harm to be avoided, courts frequently deny the defendant the ability to present the necessity defense to a jury because there are legal alternatives to violating the law. Courts have not been approving of arguments that the legal alternatives are ineffective or inadequate.[145]

As to the first element of the necessity defense, the actor typically has less difficulty establishing that he weighed competing harms and made a personal judgment as to which of various competing claims would take precedence. Where, however, such a judgment requires a judge or jury to evaluate executive and legislative policies, such as whether a war was lawful or not, the necessity defense may become unavailable. This "preemption" factor was raised in cases that arose during the Vietnam War and resulted in denial of the necessity defense on political question or legislative preemption grounds.[146] Courts deferred from judging what were inherently policy decisions—and where a legislative body had already affirmatively promulgated a policy, the courts would not interfere to permit the implementation of that policy to be declared a "harm."[147]

A critical issue to allowing presentation of the necessity defense to a jury is the applicable standard to assess each of these factors. The standard is a combined subjective and objective one—that is, the actor must have a "reasonable belief" as to each element of the defense: the choice of evils, the imminence of harm, the ability of the conduct to

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Averill, 423 N.E.2d 6, 7-8 (Mass. App. Ct. 1981) (finding that none of the defendants expected that trespassing would immediately reduce the danger of a nuclear power plant).

145. *See, e.g.*, *Aguilar*, 883 F.2d at 694 (legal alternative of filing petition for certiorari to Supreme Court available to Salvadoran and Guatemalans denied political asylum). The standard set in *United States v. Bailey*, 444 U.S. 394, 410 (1980), is that the defense is not available if there is a "reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,'" (citing LAFAVE & SCOTT, *supra* note 143, at 379). The lower courts have interpreted this standard too broadly to deny the necessity defense. *See* Cohan, *supra* note 139, at 140-44; Quigley, *supra* note 141, at 62. The Model Penal Code's codification of the elements of the necessity defense does not include an imminence requirement. *See* MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962).

146. Cohan, *supra* note 139, at 157-58 (citing Chase v. United States, 468 F.2d 141, 142 (7th Cir. 1972); United States v. Glick, 463 F.2d 491, 492 n.2 (2d Cir. 1972); United States v. Cullen, 454 F.2d 386, 387 (7th Cir. 1971); United States v. Beneke, 449 F.2d 1259, 1260 (8th Cir. 1971); United States v. Turchick, 451 F.2d 333, 334 (8th Cir. 1971); United States v. Eberhardt, 417 F.2d 1009, 1011 (4th Cir. 1969); United States v. Berrigan, 283 F. Supp. 336, 338 (D. Md. 1969)).

147. *But see* Cohan, *supra* note 139, at 150-52, describing an abortion case where protesters attempted to claim a moral harm even though abortion is legal. In *People v. Archer*, 537 N.Y.S.2d 726, 732 (City Ct. 1988), the court left at least some leeway for the notion that consequences of lawful conduct could nonetheless be reasonably considered as harms.

prevent said harm, and the lack of legal alternatives. This need not necessarily mean that the actor is correct,[148] but it requires that, given the information (subjectively) at hand, the actor's decision is objectively reasonable.[149]

Finally, there is the question of the "underlying evidentiary foundation"[150] to present the case to the jury. While "some evidence" is the standard articulated by the Supreme Court, lower federal courts and some state courts have effectively precluded the trier of fact from considering the defense by its evaluation of the quality of the proffered evidence.[151]

For members of the armed forces, the necessity defense is particularly difficult to mount and has rarely been done so effectively. The Military Code's closest articulation of a necessity defense is in its treatment of duress.[152] The Code holds that "[i]t is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act."[153] In other words, a member of the military can only break rules where the alternative is "immediate" death or serious bodily injury to himself or to another.[154]

Military cases thus significantly narrow the necessity defense. As one court observed:

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148. *See* United States v. Ashton, 24 F. Cas. 873, 874-75 (C.C.D. Mass. 1834). This case, involving the crew of a ship who disobeyed their captain's orders, laid the groundwork for the necessity defense. It held that if defendants "acted bona fide upon reasonable grounds of belief" they may be found not guilty even where facts are uncertain. *Id.*; *see also* Aldrich v. Wright, 53 N.H. 398, 401 (1873) (focusing not on the real danger, but on the danger that defendant reasonably believed existed).

149. *See* Schulkind, *supra* note 143, at 84; *see also* United States v. Simpson, 460 F.2d 515, 517-18 (9th Cir. 1972) (articulating the difference between a reasonable belief and a merely subjective, "actual" belief); Quigley, *supra* note 141, at 7.

150. *See* United States v. Maxwell, 254 F.3d 21, 26-29 (1st Cir. 2001) (rejecting the defendant's necessity defense because he failed to satisfy the required entry-level burden of producing evidence).

151. *See* Quigley, *supra* note 141, at 65-66.

152. Necessity and duress existed for centuries at common law but the law has been "poorly developed" and the distinctions in military law are not made readily apparent. *Id.* at 6.

153. MANUAL FOR COURTS-MARTIAL, UNITED STATES 1984, R.C.M. 916(h) (amended 1994). Notably, this condition is not too far off the mark where torture is concerned.

154. For a general discussion of the necessity defense in the military, see Timothy Grammel, *The Oracle at CAAF: Clear Pronouncements on Manslaughter, and Ambiguous Utterances on the Defense of Necessity*, ARMY LAW., Apr. 2000, at 78, 89-92.

> [T]he ramifications of an individual choosing to commit an illegal act, in order to avoid what they perceive to be a greater harm, are drastically different in the military than they are in civilian life. . . . Such a decision affects an individual's shipmates, the safety and efficiency of the ship, as well as the effectiveness of the mission.[155]

However, at least one case, *United States v. Rockwood*, provides a more expansive framework to consider the necessity defense in the military context.[156] Lawrence Rockwood, an Army Captain, left his post while deployed in Haiti to investigate human rights abuses allegedly taking place at a prison. In his court-martial, he argued that his duty to uphold human rights and international law justified his disobedience to orders, and that his actions were necessary in light of the harm that would otherwise ensue.[157] Although he ultimately lost his case, the *Rockwood* decision crystallizes the application of the necessity defense in the military context when broader norms conflict with direct orders and duties.[158]

A counterintelligence officer with the 10th Mountain Division, Rockwood arrived in Haiti in September of 1994 as part of an American-led U.N. mission to restore Aristide as President, known as Operation Uphold Democracy.[159] His position in counterintelligence required him to prepare daily reports concerning both American force protection and Haitian-on-Haitian violence. In investigating the latter, he became increasingly concerned about conditions in the prisons, and, particularly, at the National Penitentiary in Port-au-Prince. On September 28,

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155. United States v. Olinger, 47 M.J. 545, 547-49, 551 (N-M. Ct. Crim. App. 1997) (dismissing the necessity defense where a member of the Navy deserted his post to care for his severely depressed wife, who he claimed was suicidal and may have killed herself in his absence), *aff'd*, 50 M.J. 365, 367 (C.A.A.F. 1999). *But see* United States v. Denson, No. 200400048, 2005 WL 1799558, at *3 (N-M. Ct. Crim. App. July 20, 2005) ("necessity" defense instruction given). The legal status of the necessity defense in the U.S. military is unsettled at this juncture:

> [I]f the defense of necessity applies in the military justice system—a question which we need not resolve at this time—similar considerations would call for an application of the prevailing civilian doctrine regarding the requirement for the necessity to arise from a natural force, as opposed to a human action.

United States v. Washington, 57 M.J. 394, 398 (C.A.A.F. 2002), *aff'd*, 58 M.J. 129 (C.A.A.F. 2003).

156. United States v. Rockwood (*Rockwood II*), 52 M.J. 98, 113-14 (C.A.A.F. 1999).

157. *See, e.g.*, *Dismissal of Officer Upheld in Haiti Case*, N.Y. TIMES, Nov. 28, 1995, at B8; *Officer Guilty After Seeking Rights Abuses*, N.Y. TIMES, May 14, 1995, at 24.

158. *See Rockwood II*, 52 M.J. at 114; United States v. Rockwood (*Rockwood I*), 48 M.J. 501, 509 n.19 (A. Ct. Crim. App. 1998).

159. *Rockwood II*, 52 M.J. at 100.

Rockwood received a particularly alarming report on the deplorable conditions at a small prison in Les Cayes. He believed the report, which had been widely distributed and had provoked public outrage, would give his superiors an extra push toward heeding his claims and investigating the other prisons. The next day, however, Aristide supporters were killed in deadly grenade attacks; Rockwood was subsequently told that priorities had shifted, and that the prison investigations would have to wait.[160]

The next morning, Rockwood submitted a formal complaint to the Inspector General against his command's alleged disregard for the protection of human rights. He gave a detailed account of his efforts to inform his superiors of violations and to urge them to take action. That evening, he left his task force headquarters and went to the Port-au-Prince prison. His suspicions about the dismal conditions there were largely confirmed, but when he reconnected with his superiors he was sent to a psychological facility for examination and eventually brought up on charges.[161] In May of 1995, he was convicted of failure to report for duty, disrespect toward a superior officer, disobedience to orders, and conduct unbecoming an officer.[162]

Rockwood attempted to mount a necessity and related justification defense. In proffering evidence of human rights violations in Haitian prisons, Rockwood claimed that he was acting to prevent murder, torture, and other outrages.[163] While the *Rockwood* court rejected both the necessity and justification defenses, it addressed the actual merits of the necessity claim, including substantive evaluations of abuse at the prison.[164] The court also cited, with approval, the "blended" jury instructions on necessity and duress, which depart from the strict notion

160. Brief of Appellant at 7-11, United States v. Rockwood, No. 98-0488 (C.A.A.F. Oct. 28, 1998) [hereinafter Rockwood Brief].

161. *Id.* at 11-14, 17-18.

162. *Dismissal of Officer Upheld in Haiti Case*, *supra* note 157.

163. Rockwood also mounted a "justification" defense, in which he attempted to claim that he had a legal duty to act in the way he did. Rockwood based this argument on the premise that the entire purpose of the U.S. mission was to protect human rights, an argument not far off the mark given the U.N. Security Counsel's stated objective to restore the "legitimately elected President" and to "establish and maintain a secure and stable environment." S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/904 (July 31, 1994), *quoted in Rockwood II*, 52 M.J. at 100. This notion of "command intent," combined with broader Nuremberg principles establishing the duty to stop atrocities, not only allowed him to act, but also may have required it. *See* Rockwood Brief, *supra* note 160, at 84-87.

164. *Rockwood II*, 52 M.J. at 112-13.

of military duress arising exclusively from human agency.[165] Thus, while the *Rockwood* ruling ultimately rejected Rockwood's claim, it also created a window that may provide for an expanded necessity defense in cases such as Mori, Swift or "Diaz revisited."[166]

IX. THE SAFE HARBOR FRAMEWORK JUSTIFYING A LAWYER'S VIOLATION OF A LAW

The framework proposed below would establish a "safe harbor" to permit a lawyer to act contrary to law under limited circumstances—whether that safe harbor would be created legislatively by expanded whistleblower protection or by an expanded necessity defense to criminal charges in the military justice system when such personnel choose to act to protect *jus cogens* norms. The expanded necessity defense, outlined below, would allow a jury to consider each element and thus air the defendant's claims in open court—an opportunity that was allowed to Lawrence Rockwood but denied to Matthew Diaz. As the *Rockwood* case demonstrates, juries are capable of evaluating necessity claims without the anarchical consequences of any and every soldier substituting personal moral codes for direct orders.

There would be four elements to establish the necessity defense. The actor must demonstrate a *good faith reasonable belief* that:

1. *His actions were the lesser evil in the balance between violating a law or regulation and the harm that could reasonably be avoided by failing to act to uphold fundamental norms of international law.*

In the balance in "Diaz revisited," the calculus would weigh the reasonably foreseeable actual harm that could be caused by the release of the detainees' names against the reasonably foreseeable harm that could be caused by failing to act to uphold the government's obligation—that is, that detainees without lawyers were more likely to be tortured. Distinct from some existing necessity case law, the balance does *not* include weighing the lawyer's action against the general

165. *Id.* at 113. Others have attempted to argue that military duress can only be a defense where a human being directly threatens the actor. *See* Eugene R. Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 MIL. L. REV. 95, 104 (1988).

166. The *Diaz* court-martial did not follow the *Rockwood* precedent. Rockwood was allowed reasonable latitude in marshalling a necessity defense, the crux of which was weighing the harms of disobedience with broader laws, precedents and norms. Even though he lost, he was allowed to present his grievances in open court. *See* Rockwood Brief, *supra* note 160.

underlying purpose of the statute that is violated—in this case the classified information statute.[167]

2. *The harm would be inevitable* (but not necessarily imminent or immediate).

While some courts have interpreted imminence narrowly,[168] others have connected it to the concept of inevitability rather than immediacy.[169] Where the harm in question involves a systematic and ongoing policy, as it did in Diaz's case, imminence must be interpreted in these latter terms of inevitability.[170]

3. *There is a causal nexus between his action and the harm sought to be avoided*.

A requirement that the actor demonstrate a *definitive* causal relationship is too rigorous a standard and should not be required for such a safe harbor. In other words, the defendant should not have to demonstrate certainty that his actions would prevent the harm in question.

4. *There are no reasonable legal alternatives or it is futile to exhaust other remedies.*[171]

Exhaustion of remedies would also involve a demonstration of the exercise of reasonable care.[172] A factor in making the determination as to

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167. *See, e.g.*, United States v. Schoon, 971 F.2d 193, 198 (9th Cir. 1991) (noting that existing policy or law of Congress authorizing financial and military support to the government of El Salvador does not constitute a cognizable harm).

168. *See supra* note 143 and accompanying text.

169. *See* Aldrich v. Wright, 53 N.H. 398, 403 (1873) (holding that "imminent danger is relative, and not absolute, and is measured more by the nature of consequences than by the lapse of time"); Schulkind, *supra* note 143, at 96-97. Missouri's codification of the necessity defense also expresses this formulation:

> [I]t must be remembered that what constitutes "emergency measure" and "imminent" does not depend solely on the interval of time before the injury sought to be prevented will occur. Additional circumstances of the particular fact situation must also be evaluated. Thus, if under the circumstances, the mere passage of time is such that a reasonable man would perceive no viable alternatives to his present course of conduct the fact that the injury sought to be prevented will not take place for some time hence . . . will not prevent the use of the defense . . . ."

MO. ANN. STAT. § 563.026 cmt. (West 1999). *See supra* note 145, noting that the Model Penal Code specifically rejects an imminence requirement to invoke the necessity defense. Commentators concur. *See, e.g.*, Cohan, *supra* note 139, at 133; Quigley, *supra* note 141, at 56-57.

170. This standard also mirrors the Nuremberg standards of accountability—as in the Justice Cases, those prosecuted for war crimes were not involved in their immediate implementation, but could reasonably foresee their inevitable occurrence. *See supra* note 107 and accompanying text.

171. These criteria are akin to, but less stringent than the requirements for the necessity defense in criminal law. *See supra* notes 141-45 and accompanying text.

172. Diaz might largely have avoided criminal charges had he simply redacted the serial numbers next to the detainees' names. While the names were classified at the time Diaz took action,

the exercise of reasonable care could be whether or not the actor consulted an adviser, supervisor, or attorney before making such a decision.[173]

The actor would also be required to:

5. *Demonstrate that he acted openly or, if not, why reasonably he did not do so*.

Swift and Mori acted openly; Diaz did not. Diaz could have signed his name at the bottom of the list or the card mailed to Olshansky. Or, he might have sent an open letter to a newspaper declaring what he had done, with the list attached. Alternatively, he could have written to a member of Congress—a form of communication by military members that may, in fact, be protected under various whistleblower provisions.[174] Public action—like in the cases of Swift and Mori[175]—may have shored up sympathy and support preemptively before charges were filed, and thus have created political pressure and exposure against those who eventually sent Diaz to serve time in a military brig. In some cases,

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the government ultimately declassified them. *See supra* notes 96-97 and accompanying text. Diaz could still have been prosecuted for a variety of infractions including conduct unbecoming an officer, but he might have received an administrative non-judicial punishment without a court-martial. Telephone and In-Person Interviews with Four Unnamed Military Lawyers (Sept. 2007).

173. Swift consulted with and obtained an attorney to represent him before filing as the next friend in *Hamdan*. *See supra* note 42 and accompanying text.

174. *See* 10 U.S.C. § 1034 (2000); *see also supra* Part VII (discussing the "Military Whistleblower Protection Act"). National praise was heaped on Ian Fishback, the Army Captain who wrote a letter to Senator John McCain about the abuse of military prisoners. That letter was published in the *Washington Post*. Fishback implicated his own men in "a wide range of abuses including death threats, beatings, broken bones, murder, exposure to elements, extreme forced physical exertion, hostage-taking, stripping, sleep deprivation and degrading treatment." Letter from Capt. Ian Fishback to Sen. John McCain (Sept. 16, 2005), *in A Matter of Honor*, WASH. POST, Sept. 28, 2005, at A21. Fishback's letter was read on the floor of Congress and was a key impetus behind the "McCain Amendment" prohibiting cruel, inhuman and degrading treatment of prisoners. He was named one of the *Time 100: The People Who Shape Our World* for 2006. Coleen Rowley, *Ian Fishback*, TIME, Apr. 30, 2006, at 120.

175. Lieutenant Commander Charles Swift and Major Michael Mori, by contrast, took their claims to the news media and publicly asserted their objections to the system in which their job required participation. Both played close to the edges, with Swift stretching the rules to their limit by filing a habeas petition as a "next friend," *see supra* note 42 and accompanying text, and Mori incurring threats of prosecution by denouncing the military's "kangaroo courts." *See* Bonner, *supra* note 58. As in the case of Charles Stimson, the Deputy Assistant Defense Secretary who had suggested that clients should boycott law firms representing Guantanamo detainees, and who subsequently apologized and resigned over his comments, Colonel Morris Davis's attempt to intimidate Mori eventually backfired in large part due to exposure in the media. *Official Resigns Over Gitmo Lawyer Remarks*, CBS NEWS, Feb. 2, 2007, http://www.cbsnews.com/stories/2007/02/02/terror/main2428473.shtml; William Glaberson, *Detainee's Lawyers Seek Removal of Chief Prosecutor*, N.Y. TIMES, Mar. 26, 2007, at A12.

public action may exacerbate the underlying harm but such open action should be the rebuttable presumption.

The crucial factor is the evidentiary requirement to permit the jury, and not only the judge, to consider the necessity defense. The proposed necessity defense would permit the jury to decide the issue where the actor has proffered *some evidence of his "good faith defense of necessity . . . a non-frivolous claim that his otherwise criminal act was done to preserve some higher value."*[176] The court should not, at the outset, measure the quantum of evidence and take the case from the jury's consideration.[177]

X. BEYOND THE NECESSITY DEFENSE

An alternative and complementary proposal to the expansion of the necessity defense is that Congress should undertake consideration of whistleblower protection including safe harbor provisions for military personnel who take action (including violation of regulations or laws) in order to uphold the government's legal obligations to fundamental norms of international law. The parameters of such safe harbor protection for whistleblowers should track the elements of the expanded necessity defense.

Finally, prosecutorial standards for the exercise of discretion for courts-martial and federal prosecutions should include criteria to decline prosecutions in circumstances where an actor is able to demonstrate the elements of the expanded necessity defense.[178]

A safe harbor or expanded necessity provision permitting lawyers to violate the law necessarily raises significant concerns, notably in the military context. Military law is grounded in military discipline as well as protection of national security, an overriding concern that gives rise to

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176. Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 296 (1974) (emphasis added).

177. When the necessity defense has been presented to the trier of fact, defendants are usually acquitted. *See* Quigley, *supra* note 141, at 27 & n.87 (citing People v. Gray, 571 N.Y.S.2d 851, 853 (Crim. Ct. 1991)).

178. There is a systemic problem in the military justice system. On one hand, a military accused has considerable pretrial rights before the final decision to prosecute is made. The decision to prosecute a given case is made by the commander exercising the requisite level of court-martial convening jurisdiction (called the "Convening Authority") after being advised by the Staff Judge Advocate, *not* the military prosecutors. 10 U.S.C. § 834 (2000) (applying to general courts-martial, as in the *Diaz* case). In practice however, most Convening Authorities follow the advice of their "lawyer" and rarely send cases to trial over prosecution objections.

significant constraints on such actions by lawyers. This is especially the case with respect to a lawyer's release of classified information. The executive branch's role to classify information is for the protection of national security and any proposed permissible breach for a higher good necessarily and rightfully must be viewed with grave skepticism. However, the acknowledged culture of secrecy and over-classification that defines this administration, the arcane system used to challenge classification and the lack of clarity about what exactly is classified, has resulted in a system that withholds information essential for the body politic to act upon democratic principles.[179] While the strong presumption must be that military personnel may not leak classified information, the law should permit a justification defense for such leaks under narrow circumstances.[180]

XI. CONCLUSION

The issue of whether a lawyer should ever be permitted to violate a law has particular resonance for military lawyers at Guantanamo. Some lawyers have violated directives, regulations and laws and have become national and international heroes. Others have been court-martialed and imprisoned. The distinction between the hero and the criminal is often dependent upon the courage and caution of the individual lawyers who choose to and are able to establish, in hindsight, not only the high moral ground, but the reasoned analysis for their actions and the subsequent ratification that the judgment to violate a law was broadly supported. The danger of making a wrong judgment call is grave, and the risk imposed is too high a burden that discourages lawyers from taking individual action to uphold fundamental norms established at Nuremberg.

Rather, under carefully defined circumstances, a lawyer should be permitted to violate a regulation or law to uphold the government's greater legal obligations when failure to do so results in ongoing violations of fundamental norms of international law. Whether by a legislative proposal for a safe harbor provision in whistleblower laws, or as part of an expanded necessity defense, or by ethical rules and guidelines for the exercise of prosecutorial discretion, the elements that

179. Editorial, *The Dangerous Comfort of Secrecy*, N.Y. TIMES, July 12, 2005, at A20.

180. An alternative or complementary conception is that prosecutorial discretion should be exercised in such cases to decline prosecution. *See, e.g.*, Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 756 (1999).

give rise to such a safe harbor include that the lawyer act in good faith belief and exercise reasonable caution in making a judgment about violating the law; that he balance the harm caused by his actions against the actual harm caused by the failure to act; that he demonstrate a causal nexus between his action and the harm sought to be avoided; that he demonstrate exhaustion of other remedies or the futility of doing so; and finally, that he act openly, or, if not, demonstrate why it was reasonable not to do so.[181]

For future lawyers who encounter a crisis of conscience like that of Matthew Diaz, the knowledge of an established safe harbor provision might be sufficient encouragement to engage in the careful reasoning and exercise of judgment required before one decides to violate a policy, regulation or law. In the final analysis, that result might best serve the profession and ultimately promote democratic government where fundamental rights are enforced.

> Laws can embody standards; governments can enforce laws—but the final task is not a task for government. It is a task for each and every one of us. Every time we turn our heads the other way when we see the law flouted—when we tolerate what we know to be wrong—when we close our eyes and ears to the corrupt because we are too busy, or too frightened—when we fail to speak up and speak out—we strike a blow against freedom and decency and justice.[182]

181. *See* discussion *supra* Part IX.

182. LASRY, *supra* note 56, at 1 (quoting Robert F. Kennedy June 21, 1961).