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Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys

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An explosive video released in spring 2010, by Elizabeth Cheney, accused the Obama Administration of hiring “terrorist” lawyers to guide national security. The so-called “al Qaeda Seven” had represented or advocated for the rights of Guantánamo detainees before joining the Administration. The ensuing debate raised important questions about the relation of lawyers to politics in times of threats to national security. Do, and should, lawyers share the values of their clients? Should lawyers be guided by a normative vision for the legal profession? In other words, what consideration, if any, should lawyers pay to the larger social values implicated in their work?

This Article explores these questions by examining two dominant conceptions of lawyers deployed by critics and supporters of Guantánamo lawyers: cause lawyers and neutral partisan lawyers. This Article argues that neither model adequately explains the motivations and behaviors of Guantánamo habeas lawyers during the period between the Supreme Court decisions in Rasul and Boumediene. This Article advances a third conception of lawyers as “rule of law lawyers” to explain the emergence of a “Guantánamo bar” to represent detainees in habeas proceedings. This model identifies that, under certain conditions, lawyers will work to defend basic freedoms and other procedural and structural guarantees of political liberalism. The Article analyzes Guantánamo habeas attorneys as an example of rule of law lawyering. It examines the self-described motivations of these lawyers to take up this work. It also looks to several objective factors—the recruitment and composition of the Guantánamo bar; the legal goals pursued by these lawyers; their relationship to civil society; and the relationship of Guantánamo habeas attorneys to the organized bar—that support the argument that Guantánamo habeas attorneys fit the paradigm of rule of law lawyers. Finally, this Article explores some important implications for legal practice and theory presented by this new conception of Guantánamo habeas attorneys.

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Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys

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I. INTRODUCTION

In the spring of 2010, a conservative group led by Elizabeth Cheney released a short video demanding the Obama Administration make public the names of seven Department of Justice lawyers who represented or advocated for the rights of Guantánamo detainees before joining the Administration.¹ The advertisement charged that the so-called “al Qaeda Seven” shared the values of the alleged terrorists whose interests they defended.² By permitting these “terrorist” lawyers to serve in government, the Administration was placing America’s national security in jeopardy.³

Immediately, the “al Qaeda Seven” attack advertisement stirred public controversy about the motivations, goals, and values of “Guantánamo lawyers.”⁴ Although the critics of the video successfully condemned it as a partisan attack,⁵ the ensuing debate raised a number of important questions

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¹ Ben Smith, *Cheney Group Questions Loyalty of Justice Lawyers*, POLITICO (Mar. 2, 2010), http://politico.com/blogs/bensmith/0310/Cheney_group_questions_loyalty_of_justice_lawyers.html.

² Keep America Safe, *Who Are The Al Qaeda Seven?*, YOUTUBE (Mar. 1, 2010), http://www.youtube.com/watch?v=ZlXg7LmlEQg&feature=youtube_gdata.

³ *Id.*

⁴ See Ari Shapiro, *‘Al-Qaeda 7’ Controversy: Detainees and Politics*, NPR (Mar. 11, 2010), <http://www.npr.org/templates/story/story.php?storyId=124546087> (noting that attorneys and government officials both criticized and defended the advertisement).

⁵ See, e.g., Eugene Robinson, *Smearing the Constitution*, WASH. POST, Mar. 9, 2010, at A19 (“The smear campaign . . . can only be an attempt to inflict political damage on the Obama administration by portraying the Justice Department as somehow ‘soft’ on terrorism.”); see also Tobin Harshaw, Opinionator, *Liz Cheney’s ‘Al Qaeda Seven’*, N.Y. TIMES (Mar. 5, 2010, 8:00 PM), <http://opinionator.blogs.nytimes.com/2010/03/05/liz-cheney-al-qaeda-seven/> (describing the critical reaction from left leaning media commentators and outlets).

about the appropriate role of lawyers. Do, and should, lawyers share the values of their clients? Should lawyers be guided by a normative vision for the legal profession? In other words, what consideration, if any, should lawyers pay to the larger social values implicated in their work?

Scholars have proposed several different—and sometimes competing—models of lawyering, each providing guidance with respect to these and other normative questions about the role of the legal profession. The al Qaeda Seven debate implicates at least two of these models. In particular, the video released by Elizabeth Cheney's group suggests that Guantánamo lawyers are acting consistent with the "cause lawyering" model, sharing the political goals of their clients.⁶ Many defenders of the Guantánamo lawyers, however, invoked the "traditional model" of lawyering, responding to the attacks by arguing that the Guantánamo lawyers were instead acting as neutral partisans who zealously advocate for their clients but who do not share their views or goals.⁷ The Guantánamo lawyers, their supporters argued, were following a time-honored tradition of defending unpopular clients.⁸

Yet neither of these two conceptions of the social role of the lawyer adequately captures the publicly articulated, moral vision of the attorney-client relationship of the attorneys who represented Guantánamo detainees by seeking habeas corpus on their behalf. The cause lawyering model, as framed by Cheney, simply was a poor fit. Whether the military in fact had captured and detained al Qaeda and Taliban fighters or had mistakenly captured men in overly broad sweeps was a central controversy surrounding Guantánamo.⁹ Indeed, a frequent claim made by habeas

⁶ See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Political Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 3 (Austin Sarat & Stuart Scheingold eds., 1998) ("[T]he morally activist lawyer . . . 'shares and aims to share with her client responsibility for the ends she is promoting in her representation.'").

⁷ See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 103 (arguing that the principles of neutrality and partisanship encourage lawyers to act as advocates while shielding them from public criticism for their advocacy); Robinson, *supra* note 5, at A19 (arguing that the Guantánamo lawyers helped "ensure that even the most unpopular defendants ha[d] adequate legal representation").

⁸ See Theodore B. Olson & Neal Katyal, *We Want Tough Arguments*, LEGAL TIMES, Jan. 22, 2007 (describing John Adams' defense of British soldiers on trial for killing Americans during the Boston Massacre).

⁹ See LAUREL E. FLETCHER & ERIC STOVER, THE GUANTANAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES 83–84 (2009) (noting a CIA report that concluded that approximately two hundred of six hundred detainees "had no connection to terrorism"); Tim Golden & Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 (noting that none of the Guantánamo detainees were al Qaeda leaders, and very few were "sworn Qaeda members").

attorneys was that the government had no basis to detain their clients.¹⁰ Cheney's assertions notwithstanding, these lawyers, the majority of who worked at large, corporate law firms,¹¹ could not plausibly be said to share the values of terrorism or al Qaeda *even if* their clients arguably subscribed to such views. Yet the traditional model of lawyers as neutral partisans also fails to explain the formally pronounced, normative commitments of Guantánamo habeas lawyers. While they did not advocate terrorism or Islamic fundamentalism, they did understand their work as promoting a particular vision of society.¹²

To be sure, these characterizations are, by nature, somewhat crude and reductive. Attorneys make arguments and public statements for their strategic value and these statements may (or may not, or may only partially) reflect their personal views. Potentially motivating factors for Guantánamo habeas attorneys abound. For example, there may be some habeas attorneys who pursued their clients' habeas claims purely out of a belief that every detainee was entitled to vigorous advocacy, regardless of whether he was a fighter for al Qaeda or the Taliban. Others may have taken up representation out of a political commitment to expose the ways in which the government's War on Terror promoted anti-Islamic sentiment. And still others may have privately believed in al Qaeda's aims. What attorneys filed in legal briefs may or may not have mirrored their inner thoughts. Ascertaining the particular motivation for each attorney is unrealistic; nonetheless, the legal rhetoric, tactics, and strategy employed by Guantánamo habeas lawyers forms a public narrative about the role and purpose of law and lawyers during conflict. This narrative is one that neither cause lawyering nor traditional lawyering adequately explains.

This Article advances a third notion—the “rule of law lawyering”

¹⁰ As early as 2002, government officials reportedly expressed concerns about the number of individuals detained at the facility who had no link to terrorism. JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 183 (2008); see also Christopher Cooper, *Detention Plan: In Guantánamo, Prisoners Languish in Sea of Red Tape—Inmates Waiting to Be Freed Are Caught in Uncertainty; Improvising Along the Way*, WALL ST. J., Jan. 26, 2005, at A1 (“American commanders acknowledge that many prisoners shouldn’t have been locked up [in Guantánamo] in the first place because they weren’t dangerous and didn’t know anything of value.”); Golden & Van Natta, *supra* note 9, at A1 (stating that high-level officials admitted only a small minority of detainees were “sworn Qaeda members”). The U.S. government has transferred the substantial majority of the estimated eight hundred detainees detained at the Cuba naval base to the custody of governments in other countries, without conviction of any criminal offense. FLETCHER & STOVER, *supra* note 9, at 88, 93–94.

¹¹ See *Guantanamo Lawyers Say Work is Life-Changing*, NPR (Dec. 1, 2007), <http://www.npr.org/templates/story/story.php?storyId=16804483> (noting that “[m]any of the lawyers representing . . . prisoners at Guantánamo work at some of the county’s [sic] top law firms”).

¹² See Adam Serwer, *The New McCarthyism*, AM. PROSPECT (Mar. 2, 2010), <http://prospect.org/article/new-mccarthyism-0> (asserting that the attorneys viewed the controversy as whether “people accused of terrorism [should] be afforded the same human rights and due process protections as anyone else in American custody”).

model—in order to make intelligible which conceptions of lawyering were actually at play in the case of Guantánamo habeas attorneys. Based on political lawyering theory,¹³ this model identifies that, under certain conditions, lawyers will work to defend basic freedoms and other procedural and structural guarantees of political liberalism. Drawing on judicial opinions, secondary materials by and about habeas attorneys, and qualitative interviews with Guantánamo habeas attorneys, this Article analyzes the lawyering practices of this group under the rule of law lawyering model.

Concluding that the Guantánamo bar is an example of rule of law activist lawyering suggests where law and politics stand in particular relation to one another in this context, with law serving to support the political structure of the liberal state.

The al Qaeda Seven debate was not really about whether Guantánamo habeas attorneys supported terrorism; the dispute questioned whether it was morally defensible for lawyers to oppose the political strategy of the Bush Administration.¹⁴ By invoking the duty of lawyers to zealously defend their clients, defenders of the Guantánamo bar overlooked the fact that a goal of these lawyers was to roll back Bush Administration policies and instate legal restraints on executive power.¹⁵ At the same time, understanding that these habeas lawyers employed and defended the rule of law to achieve this goal illuminates the limits of the law and lawyers to address political crises. Guantánamo is a material and symbolic manifestation of our nation's response to a national security crisis. It touches upon fundamental questions about the values and character of the country. Law expresses these values, but follows, rather than leads, in the resolution of disputes about how the nation should defend itself. This is not to say that Guantánamo habeas attorneys are irrelevant to these political questions; indeed they have played a critical role in revealing the way that law becomes distorted by politics. It is, however, meant to suggest that securing habeas rights is not the same as securing the necessary political commitment to shutter Guantánamo or to repudiate the decision to declare a “war” on terror.

In arguing that a rule of law lawyering model better reflects the identity and activities of Guantánamo habeas attorneys, this Article does not suggest that this role conception is static. The data regarding the experiences of this group focus on the 2002–2007 time period, spanning

¹³ See discussion *infra* Part IV.

¹⁴ See Serwer, *supra* note 12 (arguing that the lawyers representing detainees were motivated by a desire to challenge what they viewed as “an unconstitutional power grab”).

¹⁵ See *id.* (noting that some of the “al-Qaeda Seven” lawyers worked for “groups that opposed the Bush administration’s near-limitless assumption of executive power”).

from the Supreme Court decision in *Rasul v. Bush*,¹⁶ which established the right to habeas access for Guantánamo detainees,¹⁷ up to the Court's *Boumediene v. Bush*¹⁸ opinion, which grounded this right in the Constitution.¹⁹ The post-*Boumediene* phase is marked by a different doctrinal and political world. Habeas rights exist, but some Guantánamo lawyers are disappointed that their vindication of formal rights has not translated into closure of the base or a more thorough repudiation of Bush Administration policies.²⁰ These conditions may lead to further developments in the attitudes and behaviors of the Guantánamo bar. In other words, while it may be accurate to characterize habeas attorneys during this five year period as rule of law activist lawyers, this conception may not apply to later periods. Nevertheless, by drawing attention to the explanatory power of models of lawyering, this Article offers a deeper understanding of the relationships between politics, law, and lawyering. Even as lawyering roles evolve, paying greater attention to the normative framework upon which these models are based will more accurately delineate the stakes of the debate.

This Article develops the case for the rule of law activist model of lawyering as follows. Part II describes the al Qaeda video and the controversy surrounding its release. In order to understand the legal context in which the video is fore-grounded, a brief history of Guantánamo habeas litigation is provided. Part III lays out the theories of lawyering and legal representation at play in the debate over the video and analyzes how each side deployed these competing frameworks. In Part IV, the theory of the rule of law lawyer is introduced as this concept applies to Guantánamo habeas attorneys. The Article argues that the rule of law theory of lawyering provides a heuristic framework to explain the emergence of a "Guantánamo bar" to represent detainees in habeas proceedings. Part V analyzes Guantánamo habeas attorneys as an example of rule of law lawyering. It examines the self-described motivations of these lawyers to take up this work, as well as several objective factors—the recruitment and composition of the Guantánamo bar; the legal goals pursued by these lawyers; their relationship to civil society; and the relationship of Guantánamo habeas attorneys to the organized bar—to support the argument that the narrative these materials offer of Guantánamo habeas attorneys fits the paradigm of rule of law lawyers. In Part VI some

¹⁶ 542 U.S. 466 (2004).

¹⁷ *Id.* at 484.

¹⁸ *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

¹⁹ *Id.* at 771.

²⁰ Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 438–39 (2011) (stating that in the wake of President Obama's election victory and a repudiation of some Bush-era War on Terror policies, there has not been an accompanying return to greater protection of individual rights and the rule of law).

implications for legal practice and the theory of a conception of Guantánamo habeas attorneys as rule of law lawyers are explored. Part VII briefly concludes.

II. BACKGROUND

A. *The al Qaeda Seven Controversy*

The story behind the al Qaeda Seven video began in November 2009. During a Senate Judiciary Committee hearing, Attorney General Eric Holder was asked about the decision by the Department of Justice to prosecute Guantánamo detainees in federal courts.²¹ Republican Senator Chuck Grassley asked Holder to provide the names of political appointees “who represent[] detainees or who worked for organizations advocating on their behalf.”²² Several months later, the Department of Justice stated that nine current DOJ attorneys were once involved in representing detainees and provided the names of two of them:²³ Principal Deputy Solicitor General Neal Katyal, who represented Osama bin Laden’s driver Salim Hamdan; and Jennifer Daskal, who, before joining the National Security Division of the Department, was a leading advocate on detainee policy for the nongovernmental group Human Rights Watch.²⁴

On March 1, 2010, Keep America Safe, an organization run by Elizabeth Cheney, released an explosive forty-eight-second video calling on President Obama to release the remaining names. The clip opened with footage of Attorney General Eric Holder delivering a speech from June 13, 2008:

The pendulum is starting to swing! Ah, an America run by progressives is really . . . it’s about to happen. We’re going to be looking for people who share our values . . .

<<Break to Narrator>>:

So who did President Obama’s Attorney General, Eric Holder, hire?

²¹ *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 23 (2009) (statement of Sen. Grassley).

²² *Id.* At the hearing, Holder added that attorneys working with the Department of Justice recuse themselves from working on matters when appropriate, addressing the concern that government attorneys could be violating the conflict of interest rules. *Id.*

²³ Shapiro, *supra* note 4.

²⁴ Richard A. Serrano, *Uncertainty Raised over Justice Department’s Handling of Detainees*, L.A. TIMES, Mar. 3, 2010, at A1.

Nine lawyers who represented or advocated for terrorist detainees.

Who are these government officials?

Eric Holder will only name two.

Why the secrecy behind the other seven?

Whose values do they share?

Tell Eric Holder Americans have a right to know the identity of the Al-Qaeda 7.

Concludes with print, "JOIN
KEEPAMERICASAFE.COM TODAY."²⁵

Within days of the video release, the media identified the remaining attorneys.²⁶ By that time, the controversy had expanded beyond the issue of transparency in government to focus on the propriety of linking the politics of Guantánamo lawyers to the presumed politics of their clients.

Response to the video was swift and furious. Some conservatives defended the advertisement,²⁷ while others joined the outcry from liberals and roundly condemned the video as a scurrilous attack on lawyers who were upholding the finest traditions of the legal profession in their representation of Guantánamo detainees.²⁸

The push for transparency in government by naming Justice Department attorneys, while a useful foil, was not the central political goal of the advertisement. Captured succinctly by conservative National Review columnist Andrew McCarthy, the advertisement was principally "a

²⁵ *Who Are The Al Qaeda Seven?*, *supra* note 2. The transcript of the video was prepared at the direction of the author.

²⁶ See Tony Vega, *The Al-Qaeda 7 DOJ Lawyers Identified*, N.Y. POLITICAL BUZZ EXAMINER (Mar. 4, 2010), <http://www.examiner.com/political-buzz-in-new-york/the-al-qaeda-7-doj-lawyers-identified> (identifying the remaining attorneys as: Deputy Assistant Attorney General in the Justice Department's Civil Division Beth Brinkmann; Office of Legal Counsel Attorney Jonathan Cedarbaum; Senior Counsel in the Office of the Deputy Attorney General Eric Columbus; Office of the Attorney General Official Tali Farhadian; Principal Deputy Associate Attorney General Joseph Guerra; Office of Legal Counsel Official Karl Thompson; and Assistant Attorney General for the Justice Department's Civil Division Tony West).

²⁷ See, e.g., Marc A. Thiessen, *No, It's Not McCarthyism*, WASH. POST, Mar. 8, 2010, at A19 (arguing that the public has a right to know whether the lawyers hold "radical and dangerous views" that may be "affecting detainee policy").

²⁸ Ben Smith, *Republicans Scold Liz Cheney*, POLITICO (Mar. 8, 2010, 6:19 AM), <http://www.politico.com/news/stories/0310/34050.html> (stating that many conservatives, including some officials aligned with the Bush administration, labeled the attacks as "shameful").

call for political accountability, a contention that these lawyers, and the positions they took during the Bush years, instantiate the kind of counterterrorism policies President Obama favors—policies that endanger our national security.”²⁹ The attack advertisement questioned the values and motivations of attorneys who had represented Guantánamo detainees and thus linked professional legal activities to normative policy outcomes. It was this linkage between law, the legal profession, and politics that sparked the greatest outcry.

Across the political spectrum, attorneys were galvanized in the defense of the Guantánamo lawyers. Their primary counterargument to the Cheney group advertisement maintained that lawyers do not share the values of their clients and that the profession sanctions—if not conventionally requires—that lawyers zealously advocate for unpopular clients without assuming the ideals or substantive goals of those they represent.³⁰ This defense was featured in an open letter signed within days of the al Qaeda Seven advertisement by prominent conservative attorneys, several of whom had served in the Bush Administration and worked on counterterrorism policy:

The American tradition of zealous representation of unpopular clients is at least as old as John Adams’s representation of the British soldiers charged in the Boston massacre.

....

The War on Terror raised any number of novel legal questions, which collectively created a significant role in judicial, executive and legislative forums alike for *honorable advocacy* on behalf of detainees.³¹

Several high-level former government lawyers joined in the chorus of support for the lawyers. For example, Walter Dellinger, who served in the Office of Legal Counsel in the Clinton administration, published an opinion piece in the *Washington Post* arguing that those who represented

²⁹ Andrew C. McCarthy, *Why the al-Qaeda Seven Matter*, NAT’L REV. ONLINE (Mar. 9, 2010, 4:00 AM), <http://www.nationalreview.com/articles/229281/why-al-qaeda-seven-matter/andrew-c-mccarthy>.

³⁰ See, e.g., Olson & Katyal, *supra* note 8 (“The ethos of the bar is built on the idea that lawyers will represent both the popular and the unpopular, so that everyone has access to justice. . . . Maligning those lawyers undercuts the important task they are undertaking and insults our system of justice.”).

³¹ Benjamin Wittes et al., *Statement on Justice Department Attorney Representation of Guantánamo Detainees*, BROOKINGS INST. (Mar. 8, 2010), http://www.brookings.edu/opinions/2010/0307_guantanamo_statement.aspx (emphasis added).

or advocated for detainees “all deserve our respect and gratitude for fulfilling the professional obligations of lawyers.”³² He further noted, “[t]his sentiment is widely shared across party and ideological lines by leaders of the bar.”³³ The *New York Times* published a strong editorial which defended the attorneys along similar lines:

In order to attack the government lawyers, Ms. Cheney and other critics have to twist the role of lawyers in the justice system. In representing Guantánamo detainees, they were in no way advocating for terrorism. They were ensuring that deeply disliked individuals were able to make their case in court, even ones charged with heinous acts—and that the Constitution was defended.³⁴

The al Qaeda Seven video was only one of several periodic controversies about the role and propriety of attorneys representing Guantánamo detainees.³⁵ The recurrence of the attacks indicates that the

³² Walter Dellinger, *Keep America Safe—From Whom?*, WASH. POST, Mar. 5, 2010, at A19.

³³ *Id.*

³⁴ Editorial, *Are You or Have You Ever Been a Lawyer*, N.Y. TIMES, Mar. 8, 2010, at A22; see also Editors, *Attacking Lawyers From the Right and Left*, N.Y. TIMES: ROOM FOR DEBATE (Mar. 9, 2010, 6:49 PM), <http://roomfordebate.blogs.nytimes.com/2010/03/09/attacking-lawyers-from-the-right-and-left> (including responses from a variety of prominent commentators including Benjamin Wittes, the primary author of the Brookings Institute letter, Harvard Professor Alan Dershowitz, and others, arguing that representation of unpopular clients is an important feature of our system of justice).

³⁵ For example, a remark made in early 2007 by Charles Stimson, the Deputy Assistant Secretary of Defense for Detainee Affairs raised another public outcry. *Guantanamo Bay: Five Years Later*, FED. NEWS RADIO (Jan. 1, 2007), <http://www.federalnewsradio.com/?nid=318&sid=1029671> (Interview with Charles Stimson). He suggested that American corporations should make the major law firms that were providing pro bono assistance to Guantánamo detainees “choose between representing terrorists or representing reputable firms.” Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1. Leading newspaper editorials and columnists soundly denounced the remark. E.g. Ted Pincus, *Attack on Guantánamo Lawyers Threatens Nation’s Principles*, CHI. SUN-TIMES, Jan. 23, 2007, at 43 (“This was a matter of a subcabinet officer of the government blatantly intimidating an entire profession. . . . You could only imagine the precedent this would have set for future police state tactics aimed at other sectors of society that might be at odds with White House aims.”). The Department of Defense repudiated the comment, and Stimson quickly resigned his post. David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1982–83 (2008). Another controversy erupted more recently. In response to allegations that attorneys interfered with intelligence operations by showing their detainee clients pictures of interrogators to identify suspected torturers, lawmakers proposed a provision to a defense authorization bill which would allow the Department of Defense Inspector General to investigate Guantánamo attorneys. Wendy Kaminer, *Congress Targets Lawyers for Detainees*, ATLANTIC (May 25, 2010, 5:08 PM), <http://www.theatlantic.com/national/archive/2010/05/congress-targets-lawyers-for-detainees/57251>. Critics fear incursion by the Department of Justice will interfere with the ability of attorneys to effectively represent their clients and will threaten the independence of the bar. See Steve Vladeck, *The War on Lawyers, Continued* . . . , BALKINIZATION (May 25, 2010), <http://balkin.blogspot.com/2010/05/war-on-lawyers-continued.html> (noting that the bill might limit access to courts and attorney-client interaction). The proposed bill was criticized by the American Bar Association as compromising

political support for counter-terrorism policies remains unstable; the salience of the narrative of lawyers who defend Guantánamo detainees as morally, if not professionally, suspect is a symptom of a deeper anxiety about law's relationship to war.³⁶

B. *A Brief History of Guantánamo Habeas Litigation: Rasul to Boumediene*

Advocacy for those held at the U.S. Naval Base in Guantánamo Bay, Cuba, has been the subject of legal and political debate since the first plane of detainees arrived at the facility in early 2002.³⁷ From the beginning, the central legal strategy of advocates for detainees has been to focus on the procedural rights of detainees against claims by the government that the events of 9/11 had necessarily recalibrated the executive power. The first case, filed by a small group of attorneys on behalf of four detainees, sought judicial review of President Bush's decision to hold alleged enemies.³⁸ Led by death penalty lawyers Joseph Margulies and Clive Stafford Smith, along with Michael Ratner, President of the Center for Constitutional Rights ("CCR"), a progressive public interest advocacy group,³⁹ the case immediately sparked a hostile response from the public.⁴⁰ Stafford Smith, Ratner, and another CCR attorney on the case, Barbara Olshansky, received "plenty of hate mail"⁴¹ and even a few death threats. Margulies attributes the hostility to "the public's natural tendency to associate the lawyer with his client."⁴² For two years the lawyers fought through the

professional independence and exerting "a severe chilling effect on the ability of lawyers to provide zealous advocacy and effective assistance of counsel to their clients at Guantanamo." Letter from Carolyn B. Lamm, President, American Bar Association, to Hon. Carl Levin and Hon. John McCain, Senate Armed Services Committee (May 26, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/antiterror/2010may26_ndaas_1.authcheckdam.pdf.

³⁶ See PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 10–15 (2008) (discussing the relationship between law, torture, and the war on terror); see also discussion *infra* Section III.B.

³⁷ JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 145–46 (2006) (describing the negative reception of the public and legal community to the first attorneys representing detainees); see also Michael Ratner, *Guantánamo: The Ninth Circle of Hell*, in THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 15, 18 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) (noting that fear of negative public reaction kept private law firms from working on the first habeas cases).

³⁸ *Rasul v. Bush*, 542 U.S. 466, 470–71 (2004) ("Petitioners in [this case] are 2 Australian citizens Since early 2002, the U.S. military has held them . . . at the naval base at Guantánamo Bay.").

³⁹ MARGULIES, *supra* note 37, at 9–10. Shortly after *Rasul* was filed, Thomas Wilner and a team of lawyers with the law firm of Shearman & Sterling filed a second case on behalf of a dozen Kuwaiti detainees at Guantánamo. The cases were joined for purposes of appeal. *Id.* at 1.

⁴⁰ *Id.* at 146.

⁴¹ MICHAEL RATNER & ELLEN RAY, GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW xvi–xvii (2004).

⁴² MARGULIES, *supra* note 37, at 146.

courts for access to judicial review of their clients' detention. The case, *Rasul v. Bush*, reached the Supreme Court, which in 2004 decided that Guantánamo detainees possessed the statutory right to file habeas corpus petitions.⁴³

The right to habeas corpus (Latin for "you have the body") is a deeply embedded common law principle that requires the sovereign to produce a prisoner before a judge and to justify the legality of that individual's detention.⁴⁴ The *Rasul* habeas attorneys sought a writ to secure a hearing before independent judges who would review the government's evidence and determine whether their clients were detained legally, in other words, whether the detainee was properly determined to be an "enemy combatant."⁴⁵ This objective ran contrary to the Bush Administration's post-9/11 policy in favor of exercising unilateral executive authority to wage war against al Qaeda and the threat of terrorism. The Administration's War on Terror paradigm meant the President, as Commander-in-Chief, exercised expanded powers, including, according to officials, the authority to keep detainees outside the reach of civilian courts.⁴⁶

Lawyers challenged this assertion of power on behalf of suspected enemy combatants detained in Guantánamo, presenting to the courts the opportunity to consider how best to balance liberty interests with national security.⁴⁷ The authority of the Executive to detain combatants until the

⁴³ The Supreme Court distinguished the Guantánamo detainees from the German nationals in its earlier decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which stemmed from prosecutions by a U.S. military commission sitting in Germany of German nationals alleged to have committed criminal acts in China after Germany's surrender in World War II. *Id.* at 765–66. The German defendants requested that U.S. courts review their detention under habeas corpus, claiming that their trial and conviction violated the U.S. Constitution. *Id.* at 765–67. The Supreme Court held that U.S. courts did not have jurisdiction over the claim. *Id.* at 768, 790–91. However, in *Rasul*, the Court found that *Eisentrager* did not control and U.S. courts did have jurisdiction over claims from detainees. In reaching this result, the Court noted the significance of the time that Guantánamo detainees had been in custody, the lack of due process, and extent of U.S. "exclusive jurisdiction and control" over its naval base in Cuba. *Rasul*, 542 U.S. at 475–76. The Supreme Court found that the habeas statute made no distinction between U.S. citizens and aliens with respect to eligibility for relief under the law. Therefore, the court held that non-nationals "no less than American citizens, are entitled to invoke the federal courts' authority under [the habeas statute]." *Id.* at 480–81.

⁴⁴ See *Rasul*, 542 U.S. at 473–75 (detailing the history and purpose of habeas petitions).

⁴⁵ *Id.* at 472.

⁴⁶ See *Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004)) (finding that the Authorization for Use of Military Force permits detention of individuals fighting against the United States in Afghanistan since "the particular conflict in which [individuals] were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use").

⁴⁷ See, e.g., *Hamdi*, 542 U.S. at 532 ("Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to

end of hostilities was not in question. Nevertheless, given the open-ended nature of the conflict, the prospect of indefinite detention became a central concern and raised the stakes for capturing and holding the wrong man.⁴⁸ Another critical challenge for the Court in *Rasul* was to delineate the appropriate application of the separation of powers principles to the question of which branch of government should decide who is an enemy combatant and legitimately subject to detention. As Justice Stevens wrote for the majority in *Rasul*, “at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”⁴⁹ The Court ruled that the courts did, in fact, possess jurisdiction.⁵⁰

The procedural issues raised by the post-9/11 detention cases resonated favorably with the Court.⁵¹ In a related case, *Hamdi v. Rumsfeld*,⁵² the Court, in a plurality opinion, expressed its views on the essential importance of law as a restraint on the power of the state, particularly in times of war. In considering the need for checks on government detention of enemies, the Court observed that “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”⁵³ While the Executive branch enjoys expanded authority in matters of war, its powers are not unchecked. As the Court stated, “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”⁵⁴

Issued along with *Hamdi*, the *Rasul* opinion opened up opportunities for federal courts to review the cases of Guantánamo detainees to ensure that the government had properly identified those captured as posing a threat to national security. With the right to judicial review came the right to counsel, and in the weeks following the *Rasul* decision, lawyers flocked to take on cases. Barbara Olshansky, an attorney with CCR at the time, recalled how private attorneys from around the country “[r]egardless of

due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”); *Rasul*, 542 U.S. at 485 (holding that federal courts have jurisdiction for habeas petitions filed by individuals detained by the Executive).

⁴⁸ See *Hamdi*, 542 U.S. at 519–21 (describing the unique situation of the war in Afghanistan and the need to balance personal liberties against national security concerns).

⁴⁹ *Rasul*, 542 U.S. at 485.

⁵⁰ *Id.*

⁵¹ See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1041–49 (2008) (discussing the effect of procedures on substantive rights).

⁵² 542 U.S. 507, 532 (2004).

⁵³ *Id.* at 530.

⁵⁴ *Id.* at 536.

their political stripes” volunteered their time to represent Guantánamo detainees.⁵⁵ “Attorneys from eleven law firms decided to jump into the representation on a moment’s notice and filed habeas petitions on behalf of fifty-three detainees,” she recalled.⁵⁶

Over the next seven years, the small group of *Rasul* lawyers was joined by throngs of other attorneys who undertook legal representation of Guantánamo detainees, filing hundreds of petitions for habeas corpus on behalf of detainees.⁵⁷ The Court ruling conferred legitimacy on the issue, but the legal victory did not soften the government’s opposition to judicial review. The government instead sought new ways to prevent it. Nine days after the Supreme Court decided *Rasul*, Deputy Secretary of Defense Paul Wolfowitz issued an order establishing a military procedure to review the status of each detainee held at the base.⁵⁸ According to the government, this procedure would be used in place of habeas review. These new boards, called Combatant Status Review Tribunals (“CSRTs”), were to conduct individual hearings and determine if each detainee was an “enemy combatant,” subject to detention.⁵⁹ Decisions of the tribunal were not subject to review by an independent body.⁶⁰ In other words, under the new

⁵⁵ BARBARA J. OLSHANSKY, *DEMOCRACY DETAINED: SECRET, UNCONSTITUTIONAL PRACTICES IN THE U.S. WAR ON TERROR* 99 (2007).

⁵⁶ *Id.*

⁵⁷ Managing the growing numbers of attorneys who offered their services pro bono to help in the wake of *Rasul* posed new challenges for the team. Most of the new attorneys had no background in international human rights and international humanitarian law. In response, CCR provided a “crash course” in the relevant international law as well as training sessions led by torture treatment professionals to prepare attorneys for meeting clients who may have been subjected to solitary confinement and perhaps torture. CCR also established an extranet site and listserv that created a “virtual law office” to pull together attorneys from around the country into an organized web of legal counsel. In addition to members of the private bar, the Chief Administrative Judge in the U.S. District Court for the District of Columbia authorized federal public defenders to represent Guantánamo detainees. Interview with anonymous habeas attorney (on file with author).

⁵⁸ Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), available at <http://www.defense.gov/news/jul2004/d20040707review.pdf>.

⁵⁹ *Id.* As defined by the order: “[T]he term ‘enemy combatant’ shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” *Id.*

⁶⁰ The tribunal’s record and decision were reviewed by the Staff Judge Advocate for the Convening Authority—“the body designated by the Secretary of the Navy to appoint tribunal members and Personal Representatives.” *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 450–51 (D.D.C. 2005). In other words, the Combatant Status Review Tribunal (“CSRT”) system did not provide for external review. The Convening Authority could accept or reject the Staff Judge’s recommendation. In the latter instance, the case was sent back to the tribunal for further proceedings. *Id.* at 451. The government’s position was that if the Convening Authority approved the recommendation by the Tribunal that the detainee was an “enemy combatant,” the government had the legal right to “hold the [person] in custody until the war on terrorism has been . . . concluded or until the President or his designees have determined that the detainee is no longer a threat to national security.” *Id.*

system, the military would determine who was an enemy combatant and could thus be held indefinitely without review by any court.

Attorneys representing the detainees persisted in pressing for habeas review, despite repeated legal setbacks. The government moved to dismiss the habeas claims, and the cases—collectively referred to as *Boumediene v. Bush*⁶¹—were sent to the D.C. Circuit for review.⁶² On September 8, 2005, the Court of Appeals heard oral argument,⁶³ but before the court ruled, Congress stepped in and passed the Detainee Treatment Act (“DTA”).⁶⁴ The Act imposed limits on government treatment of detainees in order to ensure that regulations were more in line with international standards.⁶⁵ But the DTA also struck a blow to pending habeas petitions. The law short-circuited the impending decision from the Court of Appeals⁶⁶ by amending the habeas statute to withdraw federal jurisdiction over petitions from Guantánamo detainees.⁶⁷ President Bush signed the bill into law on

⁶¹ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd* 553 U.S. 723 (2008). Lakhdar Boumediene was one of six Algerians who had settled in Bosnia during that country’s conflict in the early 1990s. Petition for Writ of Certiorari at 4, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195). He and five others were arrested in Bosnia in October 2001 on terrorism charges. Bosnian authorities found no evidence to support the allegations and ordered them released. *Id.* As they prepared to leave the jail in Sarajevo, Bosnian police put the men in shackles, hooded them, and delivered them to U.S. custody. The United States flew the men from Bosnia to Guantánamo, where they remained for the next six years. *Id.* at 5.

⁶² To manage what was expected to be a complex litigation, the district court Case Management Committee issued an order in September 2004 assigning all detainee habeas litigation to Judge Joyce Hens Green for the purpose of coordinating the habeas cases. *In re Guantanamo*, 355 F. Supp. 2d at 451. However, the order allowed any judge originally assigned a habeas petition to continue to decide issues in that case. *Id.* The litigation got underway in the fall of that year, with counsel for detainees requesting that the government disclose its basis for detaining their clients. In response, the government moved to dismiss the cases in October. *Id.* at 452. The fifty-three individual petitions were subsequently consolidated into two separate cases, one before Judge Leon, who kept the cases filed with him and one before Judge Green. *Id.* at 452 n.14. On January 19, 2005, Judge Leon granted the government’s motion to dismiss the habeas claims. *Khalid v. Bush*, 355 F. Supp. 2d 311, 323 (D.D.C. 2005). Less than two weeks later, on January 31, Judge Joyce Hens Green issued a contrary ruling in her case and denied the government’s motion. *In re Guantanamo*, 355 F. Supp. 2d at 463. The government filed an appeal of Judge Green’s ruling and requested that she stay the proceedings. See Sabin Willett, *Clericalism and The Guantánamo Litigation*, 1 NE. U. L.J. 51, 52 (2009) (analyzing and critiquing Judge Green’s decision to grant the stay). The cases were consolidated for appeal.

⁶³ *Boumediene*, 476 F.3d at 981.

⁶⁴ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, & 42 U.S.C.).

⁶⁵ *Id.*

⁶⁶ The *Boumediene* Supreme Court panel questioned both sides about the sufficiency of the CSRT process. Transcript of Oral Argument at 21–22, 35, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195). A number of areas of concern emerged including the legal basis for the CSRTs process for adjudication (as an agency order rather than a statute); the presumption in favor of the government’s determination that the individual was an enemy combatant; the evidentiary standards employed; and uncertainty about what level of review Article III courts should apply to these agency determinations. *Id.* at 36–43, 47–51.

⁶⁷ The law stated that “no court, justice, or judge” may exercise jurisdiction over:

December 30, 2005.⁶⁸

While a decision in *Boumediene* was pending before the appellate court, the Supreme Court decided another Guantánamo case, *Hamdan v. Rumsfeld*,⁶⁹ ruling on the impact of the DTA on pending habeas petitions.⁷⁰ In considering Hamdan's claims, the Supreme Court held that the DTA did not strip courts of jurisdiction over those habeas cases that were pending at the time that the law was passed.⁷¹ This meant the *Boumediene* petitioners' claims survived the DTA and remained before the circuit court. However, Congress immediately took up new legislation. On October 17, 2006, President Bush signed the Military Commissions Act (MCA) into law.⁷² The new law contained a further amendment to the habeas statute, unequivocally stripping courts of the authority to hear habeas petitions from Guantánamo detainees.⁷³ In February 2007, the Court of Appeals

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba

28 U.S.C. § 2241(e), *amended by* 28 U.S.C. § 2241.

⁶⁸ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended in scattered sections of titles 10, 28, & 42 U.S.C.).

⁶⁹ 548 U.S. 557 (2006).

⁷⁰ Salim Hamdan, Osama bin Laden's driver, was held at Guantánamo and faced trial for war crimes by a military commissions system established under Executive Order by President Bush. *Id.* at 566, 570. Hamdan had filed a challenge in federal court to the legality of military commissions. *Id.* at 567. The Supreme Court ruled that the President did not have the authority to establish these special tribunals under his commander-in-chief powers, but rather only Congress could create a separate commission process. *Id.* at 594-95.

⁷¹ *Id.* at 583-84.

⁷² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of titles 10, 28, & 42 U.S.C.).

⁷³ Section 7 of the MCA states:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Except as provided [by DTA provisions 1005(e)(2) and (e)(3)], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Id. § 7(e)(1)-(2).

dismissed *Boumediene*, holding that the MCA stripped courts of jurisdiction.⁷⁴

Eventually, the case was heard by the Supreme Court,⁷⁵ which considered whether Guantánamo detainees had a constitutionally protected right to habeas and, if they did, whether the DTA provisions for review of the CSRT rulings were an “adequate and effective substitute” under the Constitution.⁷⁶ The Supreme Court heard oral argument in the case in December 2007.⁷⁷ The legal questions were narrow and procedural. The lawyers for the detainees did not seek legal review of substantive questions—for example the legality of a “war” on a non-state entity or

To remove any doubt as to the date the statute would become effective, the MCA specifies that these provisions:

[S]hall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Id. § 7(b).

⁷⁴ *Boumediene v. Bush*, 476 F.3d 981, 988 (D.C. Cir. 2007), *rev'd* 553 U.S. 723 (2008).

⁷⁵ Initially, the Court denied the petitioners’ request for review, with Justices Stevens and Kennedy issuing a statement on behalf of the court explaining that petitioners had not pursued an appeal of their CSRT rulings in the D.C. Circuit as provided for under the DTA. *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007). However, the justices left the door open a crack by noting that petitioners did not need to exhaust remedies that are “inadequate.” *Id.* at 1332. The Court could take up the case if petitioners later “establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act . . .” *Id.* at 1329.

After over five years of litigation, it looked like the door to the courts was effectively closed. Then a “totally serendipitous” opportunity presented itself, according to Thomas Wilner. Interview with Thomas Wilner (on file with author). The law firm of Pillsbury Winthrop Shaw Pittman represented a Guantánamo detainee and had filed a challenge to his CSRT under the DTA; the firm also represented petitioners in the Al-Odah case. A close relative of one of the lawyers at the firm was Stephen Abraham, a lieutenant colonel in the United States Army Reserve. See William Glaberson, *Military Insider Becomes Critic of Hearings at Guantanamo*, N.Y. TIMES, July 23, 2007, at A1 (“[L]awyers at [Abraham’s] sister’s firm, Pillsbury Winthrop Shaw Pittman, began representing detainees in 2006.”). Lt. Col. Abraham worked in the Office for the Administrative Review of the Detention of Enemy Combatants (“OARDEC”), the office which housed the CSRT. He served as a liaison between OARDEC and the intelligence agencies in order to gather evidence for the CSRTs and, additionally, served on a CSRT panel. Declaration of Stephen Abraham at 103, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195). OARDEC could not get access to all the evidence and had no way of knowing if evidence existed that contradicted the government’s determination that the detainee was an enemy combatant. Declaration of Stephen Abraham, *supra*, at 106–07. Lt. Col. Abraham put his concerns in writing and the Pillsbury lawyers filed his declaration in court. Glaberson, *supra*. Two days later, on June 29, 2007, for the first time in sixty years, *Boumediene v. Bush/Al Odah v. United States*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://www.ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states> (last visited Nov. 6, 2011), the Supreme Court reversed a prior denial of certiorari and granted petitioners’ request to hear the case, *Boumediene v. Bush*, 551 U.S. 1160 (2007).

⁷⁶ *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

⁷⁷ *Id.* at 723.

whether confinement under these circumstances violated other fundamental rights, such as freedom from torture. The legal question pursued and the remedy sought were facially quite modest: were detainees guaranteed by the Constitution independent, judicial review of the basis of their detention?⁷⁸ A decision was expected to be issued late in the term, as had occurred with similar cases.⁷⁹

On Thursday, June 12, 2008, Thomas Wilner, one of the lead attorneys in *Boumediene* was on a golf course in Colorado, blinking into the sun and wishing he were somewhere else.⁸⁰ He hated golf but was keeping a promise to his wife that he would participate in a tournament. He was scheduled to be back in Washington, D.C. on Monday, when he had expected the Supreme Court would issue its ruling in *Boumediene*. Out on the links, there was a flurry of activity and Wilner found himself taking an urgent call: the Supreme Court had issued its opinion. It took him until the afternoon to get a copy. As he read through the pages, he smiled. "I was just very happy because it's exactly the opinion we were aiming for," Wilner said.⁸¹

Justice Kennedy authored the opinion. The Court held that Guantánamo detainees enjoy constitutional protections and that the DTA review procedures were not an "adequate and effective substitute for habeas corpus."⁸² It referred the petitioners back to the district courts which were charged with making individual determinations of the legality of their detention consistent with the essential procedural protections afforded under habeas corpus.⁸³ The Court explicitly demurred on the political debate sparked by the litigation.⁸⁴ The central current running through Kennedy's opinion was the importance of judicial responsibility for safeguarding democracy through the maintenance of the separation of powers between the branches of government.⁸⁵

⁷⁸ *Id.* at 739.

⁷⁹ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (decided on June 29, 2006).

⁸⁰ Interview with Thomas Wilner (on file with author).

⁸¹ *Id.*

⁸² *Boumediene*, 553 U.S. at 733.

⁸³ *Id.* at 798.

⁸⁴ *Id.* ("The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.").

⁸⁵ In flatly rejecting the government's argument that the Constitution only extends to areas in which the government has de jure sovereignty, the Court traced a history of more flexible extra-territorial application of the Constitution. Kennedy's interpretation of this history emphasized, in part, prior cases in which the Court adopted a contextual approach to constitutional application outside the United States that turned on the feasibility of application—including the Court's opinion in *Eisenrager*. *Id.* at 766–67.

Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.⁸⁶

The Court recoiled at the implications of the government's argument that the Constitution did not apply to Guantánamo detainees because the U.S. naval base was situated on land leased from the Cuban government.⁸⁷ Under this reading of the Constitution, "it would be possible for the political branches to govern without legal constraint."⁸⁸ Kennedy continued, "[o]ur basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."⁸⁹ The Court reaffirmed core rule of law principles, vindicating the goals and the values advanced by habeas counsel since initiating the first habeas petitions.

Wilner's celebration of the Court's ruling suggests that the habeas attorneys got what they wanted: the establishment of a constitutional, procedural right that, in theory, was capable of restoring independent judicial review of executive determinations about who was an enemy combatant. The legal strategy employed in these cases was court-centered, one in which the role of the lawyer was aimed to invigorate judicial power to provide a check on the executive. It was not an effort that sought to create new rights or to overthrow executive powers to wage war—although critics claimed it was. It was also not framed simply as an effort to see that detainees got their day in court—although habeas attorneys argued for this remedy. Guantánamo lawyers mobilized to protect the role of courts and law in opposition to a political movement that aimed, in their view, to dangerously expand executive powers. Guantánamo lawyers galvanized around the defense of the rule of law.

III. CONCEPTIONS OF LAWYERS AT PLAY IN THE AL QAEDA SEVEN DEBATE

Before turning to the conception of the role of lawyers that this Article argues drove Guantánamo habeas attorneys during the time period from *Rasul* to *Boumediene*, the following Sections review the competing

⁸⁶ *Id.* at 797.

⁸⁷ *Id.* at 754–55.

⁸⁸ *Id.* at 765.

⁸⁹ *Id.*

characterizations of lawyers in the al Qaeda Seven debate. The traditional lawyering role and cause lawyering models are introduced briefly, followed by a more detailed analysis of how the detractors and defenders of Guantánamo habeas attorneys deployed these models to justify their arguments.

A. *The Traditional Model of Lawyering*

Legal ethics literature addresses questions about what lawyers can and should do to defend their clients.⁹⁰ Lawyers owe their clients a professional duty of zealous advocacy,⁹¹ but not their moral allegiance. “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”⁹² The distinction between professional arguments and personal beliefs enshrined in the regulation of attorneys would seem to serve lawyers and their clients well. Lawyers’ professional identities are defined by their ability to exercise their judgment based on the needs and goals of their clients, which is limited only in exceptional circumstances.⁹³

Scholars have paid particular attention to the normative questions of the role of the lawyer in the adversarial system, including whether it is moral for lawyers to behave in ways that would otherwise be immoral if carried out by non-lawyers and, additionally, whether lawyers can or should believe in their clients’ legal goals.⁹⁴ Classic examples of questionable behavior include lawyers employing deception or delay tactics, or keeping a client confidence when doing so harms a third party. The traditional view holds that the suspension of moral accountability for lawyers is justified by the role they play in the adversary system: a system that relies on zealous advocacy by opposing sides to serve the interests of discovering the truth and achieving justice.⁹⁵ This suspension of moral

⁹⁰ See, e.g., Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725, 729–30 (2010) (discussing the difficulties lawyers face in an unjust tribunal); David Luban, *Introduction to THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 1, 1 (David Luban ed., 1984) (discussing whether the legal profession can be “morally worthy” while being an adversary).

⁹¹ See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2006) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

⁹² *Id.* R. 1.2(b).

⁹³ For example, lawyers are permitted, *but not required*, to disclose a client confidence without the client’s consent to prevent death or substantial injury. *Id.* R. 1.6(b)(1).

⁹⁴ Luban, *supra* note 90, at 17 (exploring issues regarding representing “immoral causes” and adopting different approaches to how lawyers should handle such cases).

⁹⁵ David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, *supra* note 90, at 83, 89 (“Each side of an adversary proceeding is represented by a lawyer whose sole obligation is to present that side as forcefully as possible . . .”). Luban goes on to say:

accountability is commonly referred to as “role morality.”⁹⁶ In this conception, the representation of unpopular clients or causes is thus treated as a moral, not ethical or political, dilemma. While such representation may be objectionable to some, the lawyer is not violating an ethical obligation because the profession entitles clients to zealous representation, and, in fact, our justice system is based on the assumption that lawyers will comport themselves in precisely this manner.⁹⁷

Legal ethics scholars focus on how lawyers can address the tensions presented by advocating for an outcome which they do not personally support. These scholars resolve these dilemmas largely by resorting to the traditional conceptions of mainstream lawyering based on its foundational principles of neutral partisanship, zealous advocacy, and professionalism.⁹⁸ The principle of neutrality establishes moral and political distance between lawyer and client and offers a moral safe harbor for the attorney representing controversial clients. As framed by legal scholar William Simon, “[t]he lawyer is expected to represent people who seek his help regardless of his opinion of the justice of their ends. . . . [W]henever he takes a case, he is not considered responsible for his client’s purposes. Even if the lawyer happens to share these purposes, he must maintain his distance.”⁹⁹

Lawyers have to assert legal interests unsupported by moral rights all the time; asserting legal interests is what they do, and everyone can’t be in the right on all issues. Unless zealous advocacy could be justified by relating it to some larger social good, the lawyer’s role would be morally impossible. That larger social good, we are told, is justice, and the adversary system is supposed to be the best way of attaining it.

Id.

⁹⁶ See, e.g., Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 501–02 (2011).

⁹⁷ *Id.* There are myriad examples of U.S. lawyers representing unpopular clients and causes including the targets of McCarthy hearings, death penalty defendants, and others. Not all categories of unpopular clients share the attributes of Guantánamo habeas attorneys considered here. Namely, to represent particular clients in part out of a desire to advance a conception of the liberal state, protective of certain individual rights. It is beyond the scope of this Article to consider the history of representation of unpopular causes or to offer a topography of this area.

⁹⁸ See, e.g., Luban, *supra* note 95, at 84 (discussing the principles of neutrality, professionalism, and partisanship as they apply to partisan advocacy); Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 641–649 (2006) (recognizing the difficulty of conflicting values in dealing with client loyalty and attorney autonomy); Simon, *supra* note 7, at 36–39 (discussing the principles of neutrality, partisanship, and professionalism).

⁹⁹ Simon, *supra* note 7, at 36. With respect to the special case of criminal defense and zealous advocacy, “[t]he goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. . . . And so the adversary system is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government and we have political reasons for wanting this.” Luban, *supra* note 95, at 92. Luban acknowledges that there are political theory justifications for the role of the lawyer in particular cases. His discussion extends beyond criminal

As captured by arguments of defenders of Guantánamo habeas lawyers, questions of politics are not central to this perspective on the role of the lawyer, but rather must be specifically elided to allow for zealous advocacy of their clients.

B. *The Cause Lawyering Model*

Cause lawyering is an alternative model of the role of the lawyer that embraces lawyering with an explicit moral mission. Leading scholars have defined cause lawyers broadly to refer to attorneys “who commit themselves and their legal skills to furthering a vision of the good society.”¹⁰⁰ The cause lawyer is a moral activist who “shares and aims to share with her client responsibility for the ends she is promoting in her representation.”¹⁰¹ The values of the client are not irrelevant to the cause lawyer, but are, in fact, the most salient feature in the representation.¹⁰² Cause lawyering is a capacious category and encompasses a broad spectrum of goals. A central feature, however, is the lawyer’s commitment to social change. As described by leading cause lawyer scholars Austin Sarat and Stuart Scheingold:

While [cause lawyers] may be forced by necessity to defend established rights, their real goal is to contribute to the kind of transformative politics that will redistribute political power and material benefits in a more egalitarian fashion. Their primary loyalty is not to clients, to constitutional rights, nor to legal process but to a vision of the good society and to political allies who share that vision. Moreover, they may also want to incorporate into their practices these broader social values.¹⁰³

Cause lawyering describes a set of lawyering practices and reflects a normative vision of the social role of lawyers. The array of causes captured in this category is substantively diverse and includes promoting justice for workers, immigrants, economically marginalized communities,

matters to include cases in which justice, in the sense of adjudicating individual rights, is not at stake, but rather “the preservation of the proper relation between the state and its subjects” and could include administrative hearings or “quasi-criminal contexts.” *Id.* at 92–93.

¹⁰⁰ Sarat & Scheingold, *supra* note 6, at 3.

¹⁰¹ *Id.* (quoting DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xxii (1988)).

¹⁰² *Id.* at 13 (“[Cause lawyers] take pride in . . . challenging traditional conceptions of professionalism.”).

¹⁰³ *Id.* at 7 (internal citation omitted).

and gay, lesbian, and transgendered individuals.¹⁰⁴ Although largely associated with left-leaning or politically progressive social projects, scholars also count lawyers promoting conservative projects as examples of cause lawyering.¹⁰⁵ Cause lawyers do not necessarily agree on a normative vision for social transformation, and in fact their causes may be in direct conflict or tension with each other.¹⁰⁶ The unifying feature of cause lawyering and what differentiates it from traditional lawyering is the embrace by these legal practitioners of the goals of their clients and their dedication to promoting those ends.¹⁰⁷

To be sure, lawyers may have a pluralistic approach to their clients and their causes, pursuing conventional lawyering strategies as well as cause lawyering on behalf of the same clients or over the course of their careers.¹⁰⁸ Some general contrasts to conventional lawyers may be helpful to illustrate the distinctions between the two groups. Cause lawyers prioritize pursuit of an ideology over their clients, “choos[ing] clients and cases in order to pursue their own ideological and redistributive projects.”¹⁰⁹ The practice of law for traditional lawyers is driven by the specific needs of specific clients; the practice of cause lawyers is driven to use law as a means to achieve substantive social transformation. In this latter drive, cause lawyers are closely associated with social movements, even as the precise nature of the relationship is subject to ongoing debate and study.¹¹⁰ They pursue political mobilization strategies alongside legal ones to advance their goals.¹¹¹ In other words, cause lawyers are *defined* by their political engagement; the aim of cause lawyering is to change the dominant social arrangements.

Cause lawyers self-consciously seek to challenge and subvert the paradigm of traditional lawyers through their commitment to legal activism

¹⁰⁴ Austin Sarat & Stuart A. Scheingold, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 12–21 (Austin Sarat & Stuart A. Scheingold eds., 2006).

¹⁰⁵ See Kevin R. Den Dulk, *In Legal Culture but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 104, at 197, 199–200 (describing issues championed by “evangelical cause lawyers”).

¹⁰⁶ See *id.* at 200 (“[E]vangelical lawyers . . . were particularly influenced by evangelical intellectuals who directly targeted lawyers for rights-based activism.”).

¹⁰⁷ Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3, 13 (Austin Sarat & Stuart A. Scheingold eds., 2001).

¹⁰⁸ *Id.* (“[C]ause and conventional lawyering overlap in a multiplicity of ways.”).

¹⁰⁹ *Id.*

¹¹⁰ See Sarat & Scheingold, *supra* note 104, at 1–2 (describing the controversial role of lawyers in “movements for social change”).

¹¹¹ See *id.* at 1–3 (discussing whether lawyers, accustomed to litigation, could change their methods and “serve, rather than seek to control, political organizations”).

based on moral convictions.¹¹² “In so doing, cause lawyers threaten the profession by destabilizing the dominant understanding of lawyering as properly wedded to moral neutrality and technical competence.”¹¹³ In this way, cause lawyers are cultural outsiders to the dominant conception of lawyers. In identifying with political causes, cause lawyers are culturally understood as “pushing the boundaries between law and politics.”¹¹⁴

C. Deployment of Traditional and Cause Lawyering Models in the al Qaeda Seven Debate

The Keep America Safe attack video explicitly linked the moral commitments of government attorneys, who formerly “represented or advocated for terrorist detainees,” with al Qaeda suspects, by provocatively asking “whose values” did these Department of Justice attorneys share?¹¹⁵ Insofar as the critique of these lawyers was based on linking the personal motivations of attorneys with the purported values of their clients, one can understand this view as invoking a conception of Guantánamo habeas attorneys as cause lawyers. This narrative was reinforced by the general association of cause lawyering with left-wing political causes.

In the days following the release of the video, conservative commentators elaborated on this link. For example, *Washington Post* columnist Marc Thiessen rhetorically asked: “Should a lawyer who advocates setting terrorists free, knowing they may go on to kill Americans, have *any* role in setting U.S. detention policy?”¹¹⁶ Writing in

¹¹² See Austin Sarat & Stuart Scheingold, *Bringing Cultural Analysis to the Study of Cause Lawyers: An Introduction*, in *THE CULTURAL LIVES OF CAUSE LAWYERS* 1, 2 (Austin Sarat & Stuart A. Scheingold eds., 2008) (“[C]ause lawyers serve both to subvert and legitimate mainstream conceptions of the legal profession.”).

¹¹³ *Id.*

¹¹⁴ *Id.* at 7.

¹¹⁵ Keep America Safe, *supra* note 2. The attack advertisement from Keep America Safe was directed at “lawyers who advocated for terrorist detainees” a category which included lawyers who defended detainees before military commissions or worked on policy issues as well as those who represented detainees in habeas proceedings. While the ensuing debate referred collectively to these groups, this Article specifically addresses the role of Guantánamo habeas attorneys. The military commission defense attorneys are a distinct group with particular ethical rules, procedural, and substantive legal regimes that deserve separate study which is beyond the scope of this Article.

¹¹⁶ Thiessen, *supra* note 27, at A19. In his book, Thiessen provides a more extensive treatment of the efforts of the CCR on behalf of Guantánamo detainees. One of his central points is that some of these attorneys are using their legal skills to support the political goals of al Qaeda. See MARC A. THIESSEN, *COURTING DISASTER: HOW THE CIA KEPT AMERICA SAFE AND HOW BARACK OBAMA IS INVITING THE NEXT ATTACK* 274 (2010) (“[Some Guantánamo habeas attorneys] are aiding and abetting America’s enemies by filing lawsuits on their behalf, and turning U.S. courtrooms into a new battlefield in the war on terror. These lawsuits . . . make it more difficult for our military and intelligence officials to defend our country from terrorist dangers.”); see also McCarthy, *supra* note 29 (asserting that the Keep America Safe video is “a call for political accountability, a contention that these lawyers, and the positions they took during the Bush years, instantiate the kind of counterterrorism policies President Obama favors—policies that endanger our national security”).

the *National Review*, Andrew C. McCarthy framed the link between politics and the law explicitly in terms of a “common cause” among some lawyers and Islamic terrorists to defeat “the American constitutional tradition of a society based on individual liberty, in which government is our servant, not our master.”¹¹⁷ In his view, these lawyers were seeking to promote a substantive vision of society consonant with Islamic extremism and, therefore, the al Qaeda Seven controversy exposes “the fault line in the defining debate of our lifetime, the debate about what type of society we shall have.”¹¹⁸

The main defense of Guantánamo lawyers came in the form of an open letter signed by twenty-two lawyers, many of whom had been highly-placed officials in previous Republican Administrations, and published within days of the attack advertisement.¹¹⁹ The signatories castigated the Cheney video as “shameful” and defended Guantánamo lawyers as upholding the fundamental principles of zealous advocacy in our adversary system.¹²⁰ The letter framed the role of Guantánamo lawyers as part of the American legal tradition of defending unpopular clients and likened these present-day advocates to John Adams’ defense of British soldiers charged in the Boston Massacre.¹²¹ They also emphasized the critical role defense counsel played in upholding our legal system by providing vigorous representation.¹²² A slew of public commentary followed which largely defended Guantánamo lawyers along similar lines of argument. The traditional lawyering principles of neutrality, zealous advocacy, and role morality frequently were invoked.¹²³ The message was clear: the U.S.

¹¹⁷ McCarthy, *supra* note 29.

¹¹⁸ *Id.*

¹¹⁹ Wittes et al., *supra* note 31.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* (“Good defense counsel is thus key to ensuring that military commissions, federal juries, and federal judges have access to the best arguments and most rigorous factual presentations before making crucial decisions that affect both national security and paramount liberty interests.”).

¹²³ See *Are You or Have You Ever Been a Lawyer?*, *supra* note 34 (“Ms. Cheney and other critics have to twist the role of lawyers in the justice system. In representing Guantánamo detainees, they were in no way advocating for terrorism. They were ensuring that deeply disliked individuals were able to make their case in court, even ones charged with heinous acts—and that the Constitution was defended.”); Walter Dellinger, *A Shameful Attack on the U.S. Legal System*, WASH. POST, Mar. 5, 2010, at A19 (The Department of Justice lawyers provided “assistance to detainees in a number of ways, but they all deserve our respect and gratitude for fulfilling the professional obligations of lawyers”); Stephen Jones, *The Case for Unpopular Clients—The Demands to Name the ‘al Qaeda Seven’ Weaken the Country’s Democratic Ideals*, WALL ST. J., Mar. 13, 2010, at W1 (“We cannot properly assume [Guantánamo] lawyers identify or sympathize with their clients’ goals. Lawyers must remain professionally neutral with respect to the moral merits of their clients or their clients’ objectives.”); Alan M. Dershowitz, *Representing the Despised*, ROOM FOR DEBATE (Mar. 9, 2010, 6:49 PM), <http://roomfordebate.blogs.nytimes.com/2010/03/09/attacking-lawyers-from-the-right-and-left/> (“Lawyers should remain free to provide zealous representation and cutting edge advice to clients, whether their clients are terrorists who are accused of waging war against our nation, or a government

legal system relies on vigorous advocacy by lawyers, and lawyers should not be judged by the clients they represent.

The invocation of “cause lawyering” to describe Guantánamo habeas lawyers put into sharp relief the moral and political dimensions of advocating on behalf of the nation’s “enemies” when the country is waging war. Political opponents employed loaded imagery to discredit the Obama Administration’s counter-terrorism politics.¹²⁴ However, there was little beyond fiery rhetoric to substantiate the accusations. The overwhelming response to the video was negative, and the fact that lawyers across the political spectrum rallied to the defense of Guantánamo lawyers effectively dispelled the charge that lawyers had no business representing detainees—and exposed the video as a partisan ploy.¹²⁵

At the same time, the defense of Guantánamo lawyers as strict neutral partisans was a thin response which sidestepped the important normative questions about the social role of lawyers. Although some tied legal representation of detainees to defense of procedural rights and principles of legality,¹²⁶ these lines of argumentation were not central in the debate. The main defense offered by supporters of the habeas lawyers was that representing clients is what lawyers *do*; clients are not indicative of *who lawyers are* or *what they believe*.¹²⁷ This conceptualization of the lawyers’

that is accused of denying rights to these terrorists. That is the strength of our adversary system of justice.”); Michael Doyle, *Commentary: Why Marc Thiessen’s Wrong About ‘al Qaeda 7,’* MCCLATCHY (Mar. 12, 2010, 10:45 PM), <http://www.mcclatchydc.com/2010/03/12/90303/commentary-marc-thiessen-still.html> (asserting, in response to Thiessen’s association of Guantánamo lawyers with the character of their clients, “[i]t’s not the pleasantness of the plaintiff that is important, it’s the preciousness of the right”); Stephen Gillers, *Moral Choice in Lawyering*, ROOM FOR DEBATE (Mar. 9, 2010, 6:49 PM), <http://roomfordebate.blogs.nytimes.com/2010/03/09/attacking-lawyers-from-the-right-and-left/> (“Sadly, people are sometimes quick to criticize lawyers because of the identity of their clients. These critics may not understand the role lawyers play in our constitutional democracy.”).

¹²⁴ See Andrew C. McCarthy, *Would Obama Really Fight the War?*, NAT’L REV. ONLINE (Sept. 10, 2009, 4:00 AM), <http://www.nationalreview.com/articles/228206/would-obama-really-fight-war/andrew-c-mccarthy> (“Terrorist sympathizers . . . have assumed positions throughout the Obama administration, and—as the president apologizes to the world for the sins of American national defense—terrorists themselves are being released from custody.”).

¹²⁵ See John Schwartz, *Conservatives Split Deeply Over Attacks on Justice Dept. Lawyers*, N.Y. TIMES, Mar. 10, 2010, at A1 (describing the responses to the video by both liberals and prominent conservatives).

¹²⁶ Nevertheless, there were exceptions to those who defended the work of Guantánamo lawyers in terms of protecting the rule of law. See, e.g., Serwer, *supra* note 12 (quoting Ken Gude, a human rights expert with the Center for American Progress, as stating: “These lawyers were advocating on behalf of our Constitution and our laws. The detention policies of the Bush administration were unconstitutional and illegal, and no higher a legal authority than the Supreme Court of the United States agreed. . . . The disgusting logic of these attacks is that the Supreme Court is in league with al-Qaeda.”). Similarly, a former defense attorney before the military commissions denounced the link between Guantánamo lawyers and terrorist suspects: “That’s not sympathy for a terrorist—that’s sympathy for the rule of law, the American way of doing business.” *Id.*

¹²⁷ See Olson & Katyal, *supra* note 8 (“The ethos of the bar is built on the idea that lawyers will represent both the popular and the unpopular, so that everyone has access to justice.”).

role centered on the professional duties of attorneys rather than on their moral vision.

In the case of Guantánamo attorneys, however, what they did was mobilize to defend the rule of law. This activism is at odds with a strict defense of these lawyers as neutral partisans. Placing Guantánamo lawyers within the paradigm of traditional lawyering also ignored evidence that suggests that the values of habeas counsel were relevant motivations—although these values were not necessarily shared in common with their clients.

Each side to the debate invoked a narrative or script about the relationship between the lawyer's values and the client's. As with all rhetorical tools, these scripts convey a constructed understanding, in this case of the acceptable professional comportment of lawyers. The constructions rely on particular understandings of the lawyer's social and political role. Thus the debate invites closer inspection of what Guantánamo habeas lawyers actually *did*, the values their work expressed, and the social role they played. The failure of cause lawyering and traditional lawyering to adequately account for the expressed self-conception of Guantánamo habeas attorneys points to the need for a better account of their professional role. It is to this effort which this Article now turns.

IV. TOWARD A NEW MODEL OF GUANTÁNAMO LAWYERS: RULE OF LAW/POLITICAL LAWYERING

Political lawyering provides a better analytical model for describing the publicly-expressed motives and goals of representation of Guantánamo habeas attorneys than do traditional or cause lawyering models. Guantánamo habeas lawyers inserted themselves into a larger debate about U.S. counter-terrorism policies by pressing for procedural rights to habeas corpus. More broadly, the legal strategy involved claims that the President's powers to combat terrorism should be regulated by law. The prominence of the link these lawyers made between law and politics suggests that political lawyering theory may more accurately describe the role of the lawyer conceptualized by Guantánamo habeas attorneys because it accounts for the normative commitments and legal activities of these legal professionals.

In elaborating this theory and its application to the present case, it is important to note that in practice, the various conceptions of the lawyer's role may overlap. There may be attorneys whose self-conception of their role does not neatly match the political lawyering model. Or some strategies pursued by some attorneys may be in tension with the proposed model. Such inconsistency is inevitable and points to the imperfect link of theory to practice. Nevertheless, the political lawyering model captures important dimensions of the lawyering role of Guantánamo lawyers. The

model is important not just because it better encompasses the motivations of these legal professionals and gives us a better understanding of who they are, but also because it provides us with a deeper understanding of the relationship of Guantánamo lawyers to political change.

The theory of political lawyering has been elaborated on by legal scholars Terence Halliday, Lucien Karpik, and Malcolm Feeley. The central question these theorists seek to address is the link between politics and law, with particular attention paid to the role legal actors play in the interchange between these two fields. Political lawyering theory responds to two dominant sociological theories of the legal profession—the functionalist and market control theories—and proposes an alternative theory that addresses the role of politics.¹²⁸ Based on comparative legal studies, these scholars have found that, over time and across a variety of legal systems and cultures, in particular contexts “lawyers are active agents in the construction of liberal political regimes.”¹²⁹ The contribution of a theory of the profession that focuses on the law-politics relationship is valuable to case studies of Guantánamo habeas attorneys because it suggests an analytic model for examining the role and function of legal professionals in the context of the larger debate surrounding counter-terrorism policies. It also suggests some of the limits of lawyering in this context.

Halliday, Karpik, and Feeley pose the question: What is political liberalism? Their operative definition is narrow and multi-faceted. Political liberalism has three characteristics: First, it refers to a political society which “offers and protects *basic legal freedoms*,” including due process, habeas corpus, and other fundamental rights.¹³⁰ Second, the term “encompasses a *moderate state*.”¹³¹ A moderate state, in turn, is multi-dimensional: it is composed of legislatures, courts, and the military, with power fragmented among these components such that the “constitutionally-structured contestation among elements of the state” serves to restrain

¹²⁸ T. C. Halliday & L. Karpik, *Political Lawyering*, in 17 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 11673, 11673 (Neil J. Smelser & Paul B. Baltes eds., 2001).

¹²⁹ Terence C. Halliday, Lucien Karpik & Malcolm M. Feeley, *The Legal Complex and Struggles for Political Liberalism*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 1, 2–3 (Terence C. Halliday, Lucien Karpik & Malcolm M. Feeley eds., 2007).

¹³⁰ *Id.* at 10. These scholars have found that lawyers across contexts mobilize around so-called, “first generation rights,” i.e., rights necessary for individual freedom, and not necessarily economic rights or social rights. Lucien Karpik, *Postscript: Political Lawyers*, in FIGHTING FOR POLITICAL FREEDOM, *supra* note 129, at 463, 466. A second characteristic of political liberalism as defined by Halliday, Karpik, and Feeley is that the concept is not necessarily linked with democracy. Cases in which they have found lawyer mobilization have occurred in formal democracies that exist without enjoyment of individual freedoms (e.g., Egypt) or countries in which individual freedoms exist without formal democracy (e.g., Hong Kong). *Id.* at 466–69.

¹³¹ Halliday, Karpik & Feeley, *supra* note 129, at 10.

authority.¹³² Finally, it means that politically liberal societies have a judiciary capable of restraining the “other elements of the state or advanc[ing] claims to rights or justice.”¹³³ Such states may be quite diverse and include not only western industrialized countries like Canada, France, Germany, and the United States, but also Chile, China, Japan, and Turkey.

Through a series of case studies, the authors elaborate their theory of mobilization and identify basic orientations of lawyers and other legal actors (collectively referred to as the “legal complex”) to legal freedoms. Of relevance here is their finding that, in times of threat to national security, “a normally liberal legal complex is inhibited or selectively constrained from mobilising to defend political liberalism.”¹³⁴ Under these conditions, the legal complex fails to mobilize to support either an independent judiciary or limits on executive power, as was the case in the United States after 9/11.¹³⁵

Measured in terms of collective mobilization by judges, lawyers, and other legal actors to defend protection of civil liberties in the wake of 9/11, legal scholar Richard Abel reasonably concluded that the efforts by the legal complex were anemic and ineffective. He attributed this failure, in large part, to insurmountable challenges created by the political climate: “Faced with a determined executive and a complicit or complacent legislature in the world’s only superpower, the rest of the legal complex—lawyers, legal academics, professional associations, judges and NGOs—could do little to protect political liberalism.”¹³⁶ Yet Karpik noted that after 9/11, in the face of overwhelming and countervailing political atmosphere hostile to protection of civil liberties, some lawyers *did* mobilize to defend the rule of law. In fact, Karpik believes these very adversities create conditions under which some attorneys *will* act to defend political liberalism.¹³⁷ In this sense, the legal action by Guantánamo habeas lawyers after 9/11 was both predictable and exceptional.

Political lawyering theory provides a heuristic framework to explain

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 12. The authors identify four basic orientations of the legal complex to defense of basic freedoms. The other three are: (1) collective defense of legal freedoms by the legal complex; (2) mobilization of lawyers to defend legal freedoms but not other legal actors; and (3) instances in which the legal complex fails to mobilize or is openly hostile to basic legal freedoms. *Id.*

¹³⁵ See Richard L. Abel, *Contesting Legality in the United States after September 11*, in *FIGHTING FOR POLITICAL FREEDOM*, *supra* note 129, at 361, 397–98 (discussing how the government’s response to 9/11 undermines efforts to preserve legality and political liberalism).

¹³⁶ *Id.* at 398.

¹³⁷ See Karpik, *supra* note 130, at 479 (“[W]hen judges are divided, when civil society is weak because people are frightened or indifferent, when mass media have forgotten their critical tasks, at least provisionally, the executive can become an arbitrary power. . . . [T]hese conditions explain why attorneys and law professors who alone rose to defend basic freedoms were almost not heard.”).

the fact that some lawyers did galvanize to promote civil liberties. In applying this framework to the present examination of Guantánamo lawyers, however, the term “rule of law lawyering” is used instead of “political lawyering.” Halliday and Karpik coined the term “political lawyers” to capture the law-politics link central to their theory of the legal profession.¹³⁸ They use the term “political” to refer to the particular structure of the moderate liberal state and to distinguish “political” in this context from interest group politics, which is a familiar form of political activism by the collective bar in the United States.¹³⁹ Nevertheless, the term creates invariable confusion between the two meanings. By contrast, “rule of law lawyering” faithfully captures the procedural and substantive goals of Guantánamo habeas attorneys as well as the risks and range of activities they employed to pursue these goals. This analysis adopts the latter term, while noting that it may not resolve all ambiguities.¹⁴⁰ In particular, the legal strategy of a “traditional lawyer’s” representation of a detainee and the strategy of Guantánamo attorneys might have been the same—a court-based strategy seeking habeas relief. They would also agree on the need for government restraint in observing procedural rights. What differentiates the two conceptions of legal roles is that Guantánamo habeas attorneys, as a group, mobilized to pursue this narrow fundamental

¹³⁸ *Id.* at 490–92 (“For political lawyers . . . to defend individual rights has become self-evident.”).

¹³⁹ See Terence C. Halliday & Lucien Karpik, *Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES* 15, 16 (Terence C. Halliday & Lucien Karpik eds., 1997) (“[P]osing the problems of lawyers’ politics in terms of their engagement with political liberalism compels us to transcend everyday political activity, and to confront the taken-for-granted, institutional foundations of politics.”). Reviewing the relationship of lawyers to civil society, the authors found that the political orientations of the American legal profession have “historically ranged from classic interest group politics . . . through to the effective ‘inside’ politics of corporatist, expert consultation.” *Id.* at 42.

¹⁴⁰ For example, Thomas Hilbink has generated a useful topology of cause lawyers identifying three categories—proceduralists, elite/vanguard, and grassroots—each associated with particular orientations to the law, practice, and the cause. Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 *LAW & SOC. INQUIRY* 657, 663–64 tbl.1 (2004). Hilbink suggests that those he categorizes as “proceduralist” cause lawyers could also be referred to as “rule of law” cause lawyers. *Id.* at 665–66. Moreover, Hilbink notes that proceduralist lawyers—he uses the example of death penalty defense lawyers—with their narrow focus on a particular set of rights and fundamental support of the foundations of the status quo legal system, are at the periphery of cause lawyering. These lawyers are not trying to change the legal system so much as to ensure that the state affords their clients their full procedural rights. Hilbink remarks that there is good reason to question whether this group properly belongs within the cause lawyering domain. *Id.* at 667–70. Although some death penalty lawyers may also seek to use litigation to reduce the number of defendants sentenced to death or to abolish the death penalty, these larger systemic goals do not apply to them as a class. In this way, the proceduralist cause lawyers differ from Guantánamo habeas attorneys in that the latter are committed in principle to a structural reform agenda necessary to secure procedural rights for their clients. Nevertheless, while we differentiate the Guantánamo habeas attorneys from proceduralist cause lawyers, we do adopt the term “rule of law lawyering” despite potential confusion with Hilbink’s sub-category of cause lawyers.

right as a means to strengthen the liberal legal order. The traditional lawyer would not have felt called upon as a matter of professional role to pursue this larger, political goal.

V. RULE OF LAW LAWYERING OF GUANTÁNAMO ATTORNEYS

This Part examines Guantánamo habeas attorneys as an example of rule of law lawyering.¹⁴¹ Karpik's work points to objective factors as well as subjective factors that we can apply to this group to analyze their behavior as indicative of rule of law lawyers. Objective indicators include the recruitment and composition of the Guantánamo bar; the legal goals pursued by these lawyers; their relationship to civil society; and the relationship of Guantánamo habeas attorneys to the organized bar.¹⁴² While determining motivations is necessarily imprecise, the self-reported accounts by habeas attorneys as to why they sought out these cases suggest that many are guided by a conception of the lawyer's duty to defend the rule of law. Objective and subjective factors support application of the rule of law lawyering model to this group of legal professionals. This analysis is a useful starting point to evaluate the case of Guantánamo habeas attorneys as rule of law lawyers mobilizing for basic freedoms during a national security crisis. It also suggests directions for further elaboration of the distinct role, and its limits, of Guantánamo habeas attorneys.

The present case study is limited to that sub-set of lawyers defending civil liberties and the rule of law post-9/11 who represented Guantánamo detainees requesting habeas corpus review in the aftermath of the *Rasul* decision.¹⁴³ Since 2002, over 900 attorneys have joined the network sponsored by CCR, filing individual habeas petitions for approximately 430 detainees.¹⁴⁴ This analysis is based on primary and secondary sources by and about the work of these Guantánamo habeas attorneys, including court records, narrative accounts, and information regarding the CCR network. These data were supplemented by interviews with eighteen

¹⁴¹ The interviews relied upon in this Part were conducted pursuant to federally regulated research protocols. As such, the decisions of those interviewees who prefer to remain anonymous are protected. Only where an interviewee has agreed to be named has an individual been identified. All transcripts are on file with the author.

¹⁴² See Karpik, *supra* note 130, at 490–93 (identifying the resources of rule of law attorneys, their belief in defending individual rights, and the relation to the bar's "collective identity" as factors indicative of the group).

¹⁴³ Attorneys defending Guantánamo detainees before the military commissions and attorneys who opposed domestic legislations restricting civil liberties, such as the PATRIOT Act, are also included among those post-9/11 lawyers defending the rule of law, but are not included in this analysis.

¹⁴⁴ E-mail from Liz Bradley, CCR Legal Worker, to author (Mar. 2, 2011, 11:25 EST) (on file with author); see also FLETCHER & STOVER, *supra* note 9, at 6–7. As of November 2006, approximately 340 of the 435 detainees in Guantánamo had filed habeas petitions. OLSHANSKY, *supra* note 55, at 139.

habeas attorneys, who served as lead counsel for habeas petitions on behalf of 164 detainees, or approximately thirty-eight percent of all habeas petitioners.¹⁴⁵ Of those interviewed, nine were employed with private corporate law firms, four taught at law schools in the United States; three were staff attorneys of public interest organizations; one was a solo practitioner and one was a federal public defender.¹⁴⁶ The interviews were conducted between October 2007 and January 2008,¹⁴⁷ using a semi-structured questionnaire.¹⁴⁸ These interviews were conducted as part of a larger study of the impact of Guantánamo on detainees released from the facility.¹⁴⁹

A. *Mobilization of Lawyers for Guantánamo Detainees*

Opponents of Guantánamo habeas lawyers have cast highly-loaded political aspersions against the group: they aid the enemy, they seek to undermine the country's security, or worse, they support terrorism. Yet these hyperbolic claims are unsubstantiated¹⁵⁰ and therefore, while valuable for their political potency, deteriorate under scrutiny. In 2007, Charles "Cully" Stimson lost his job as the Deputy Assistant Secretary of Defense for Detainee Affairs after he remarked that American corporations should make the country's major law firms that were providing pro bono assistance to Guantánamo detainees "choose between representing terrorists or representing reputable firms."¹⁵¹

¹⁴⁵ FLETCHER & STOVER, *supra* note 9, at 14.

¹⁴⁶ The aggregate number of these categories is greater than the number of attorneys interviewed because the respondents could identify as belonging to more than one category. FLETCHER & STOVER, *supra* note 9; see also Richard Grigg, *A Human Face*, in THE GUANTÁNAMO LAWYERS, *supra* note 37, at 19, 19 ("[T]he majority of the volunteer attorneys were from large, national, conservative law firms.").

¹⁴⁷ Some attorneys were re-interviewed by the researchers between March and July 2009.

¹⁴⁸ Each interview lasted approximately one to two hours. Attorneys were asked about the nature of their legal practice, their motivations for representing their clients, as well as their experiences during the course of representation. A copy of the questionnaire is on file with the author and is available upon request. The interviews were anonymous unless the attorney wished to be identified.

¹⁴⁹ The two-year study, based on interviews with sixty-two former detainees and fifty others who worked in and around the detention system, was published first as a report, FLETCHER & STOVER, GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES (Univ. of Cal., Berkeley 2008), and subsequently as a book. FLETCHER & STOVER, *supra* note 9.

¹⁵⁰ The case of Lynn Stewart is an exception. Stewart, the criminal defense attorney for Sheik Abdel-Rahman (commonly referred to by U.S. media as the "blind Sheik"), was convicted on conspiracy charges for assisting in terrorist activity as a result of her public announcement on behalf of her client that he was disavowing the cease fire to which his group had committed. Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 381-82 (2009). The Stewart case received widespread attention. However, there have been no similar criminal allegations against any of the Guantánamo habeas attorneys.

¹⁵¹ Lewis, *supra* note 35, at A1. In an interview with Federal News Radio on January 11, 2007, Stimson said:

Attacks on the habeas lawyers backfire, in part, because these elite members of the profession are not likely candidates to make common cause with terrorists. Their firms represent the large institutions and players in the private business sector and thus have a lot at stake in terms of their professional reputations and financial bottom line in accepting Guantánamo detainees as clients. Perhaps ironically, as the detainee litigation gained legitimacy after *Rasul*, large firms *sought out* habeas clients—the legal market *avored* firm representation of detainees. In fact, representation of Guantánamo detainees became part of law firms' recruitment efforts for new associates.¹⁵² Yet the cases did not only appeal to lawyers new to the practice. Detainee representation was high-profile legal work, and the firms staffed these matters with senior partners, signaling to attorneys within the firm, as well as to clients, the value the firm placed on the work. The demographic profile of the corporate attorneys leading the litigation effort—white, male, middle-aged—presented the paradigmatic, well-established, and respected face of the private corporate bar.¹⁵³

With habeas representation for detainees now accepted, if not expected on a firm's pro bono docket, CCR successfully recruited hundreds of corporate attorneys to provide legal assistance to detainees. Attorneys from corporate practices were not the only ones to volunteer—lawyers from a diverse range of practices and academia took on cases. However, corporate attorneys made up the bulk of the Guantánamo bar. According to CCR, lawyers from eighty different private law firms comprised roughly

I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.

Guantánamo Bay: Five Years Later, *supra* note 35. The Department of Defense repudiated the comment, and Stimson quickly resigned his post. See Luban, *supra* note 35, at 1982–83 (quoting and discussing Stimson's comment).

¹⁵² See Martinez, *supra* note 57, at 1063 (noting that many large law firms represent Guantánamo detainees and might have difficulty attracting summer associates without doing so).

¹⁵³ For example, several leading attorneys fit this profile: David J. Cynamon, partner with Pillsbury Winthrop Shaw Pittman LLP, and Thomas B. Wilner, a partner with Shearman & Sterling LLP, represented several Kuwaiti detainees and were lead lawyers in the *Boumediene* litigation. *Lawyers: Thomas B. Wilner*, SHEARMAN & STERLING LLP, <http://www.sherman.com/twilner> (last visited Oct. 13, 2011); *Professionals: David J. Cynamon*, PILLSBURY LAW, <http://www.pillsburylaw.com/index.cfm?pageID=15&itemID=21266> (last visited Oct. 13, 2011). Sabin Willett, a partner with Bingham McCutchen LLP, represents several Uygher detainees, a sympathetic group of high-profile detainees because the United States cleared most of them for release. However, as a persecuted ethnic minority from China, the United States could not return them to their country of origin and had difficulty finding third countries that would accept them. Editorial, *Pawns in Guantanamo's Game*, BOS. GLOBE, Mar. 11, 2007, at D8.

seventy percent of the lawyers representing Guantánamo detainees.¹⁵⁴

It became acceptable for private firms to represent Guantánamo detainees as criticism of Bush Administration policies mounted.¹⁵⁵ But the extent of support suggests that the values associated with this legal work had a deeper resonance among those at the top of the legal profession. One habeas attorney working at a large firm in New York with offices damaged by the collapse of the World Trade Center explained that it was difficult to gain support to represent Guantánamo detainees initially, but attitudes changed over time as members of the firm appreciated that “there wasn’t a legitimate system in place for these people to receive a fair trial” and “it just became more and more obvious that we needed to be involved.”¹⁵⁶

This rule of law explanation to join the effort is buttressed by the fact that the appetite of corporate attorneys to represent Guantánamo detainees has been specific to the pursuit of habeas corpus. Law firms staffed the detainee habeas cases with senior partners, indicating the level of interest from the leadership of the firms, as well as the suitability of highly-skilled, corporate attorneys to successfully manage complex procedural issues.¹⁵⁷ Notably, although corporate attorneys swelled the ranks of CCR’s habeas representation network, they have not displayed the same appetite for assisting detainees facing charges before the military commissions.¹⁵⁸

In fact, the goal of asserting habeas rights for Guantánamo detainees is a quite conservative one. As framed by the *Rasul* Court, habeas attorneys simply sought to avail their clients of the right to have the government show they were the right sort of people the government could detain, i.e., al Qaeda or Taliban fighters; they never sought to defend the *actions* of “the enemy.”¹⁵⁹ Stimson’s remarks and the al Qaeda Seven video backfired *precisely because* vindicating narrow procedural rights could not be equated with political support for “the cause” of terrorism. While vindication of procedural rights did not pose a direct challenge to the War on Terror paradigm, and therefore was capable of mobilizing support

¹⁵⁴ E-mail from Liz Bradley, CCR Legal Worker, to author (Mar. 2, 2011, 11:25 EST) (on file with author); see also Brendon M. Driscoll, *The Guantánamo Protective Order*, 30 *FORDHAM INT’L L.J.* 873, 887–88 n.64 (2007) (showing that CCR actively recruited attorneys from large law firms).

¹⁵⁵ See Margulies & Metcalf, *supra* note 20, at 451–52 (discussing the criticism of the Bush Administration’s Guantanamo policies).

¹⁵⁶ Interview with anonymous habeas attorney (on file with author).

¹⁵⁷ See Martinez, *supra* note 51, at 1063 n.277 (noting that senior partners took on a high volume of Guantánamo detainee cases).

¹⁵⁸ For a discussion of military commission lawyers, see Luban, *supra* note 35, at 1999; and Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 *B.C. INT’L & COMP. L. REV.* 179, 182–83 (2009).

¹⁵⁹ See *Rasul v. Bush*, 542 U.S. 466, 470 (2004) (“These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”).

among legal professionals, the strategy did not anticipate the extent to which the formal establishment of rights would be diminished by the political prevalence of a national security crisis.¹⁶⁰

B. Belief in Justice and Commitment to Rule of Law

“[F]or attorneys, justice as an institution brings with it an ideal conception of the function of lawyers,”¹⁶¹ observed Karpik. Yet the content of this ideal conception varies according to one’s theory of the legal profession. The traditional conception of the lawyers’ role in the adversary system holds that lawyers fulfill a commitment to justice as a profession by fulfilling their role as partisan advocates for their clients.¹⁶² Justice is served by presenting the strongest case to the court to determine the outcome; the lawyers’ personal commitment to the client’s cause is irrelevant. On the other hand, cause lawyers pursue justice but do not necessarily believe that the judicial system on its own is capable of guaranteeing this result. For example, cause lawyers may desire outcomes like changed social attitudes toward same sex marriage. In such instances a court victory establishing legal rights is only one component of a larger social project. Pursuing a particular vision of a just society may lead some cause lawyers to pursue strategies to mobilize grassroots support and advance interest group political ambitions, thereby blurring the line between legal professionals and political or social activists.¹⁶³

However, Karpik’s assertion about attorneys’ self-conception referred to the justice conception subscribed to by political lawyers. Using the nomenclature adopted in this Article, rule of law lawyers pursue justice within the framework of the judicial system of a moderate liberal state. As such, these lawyers define professional identity in terms of their faith in the rule of law:

It is the belief in its value and in the rule of law that is perhaps everywhere at the source of radical professional commitment. . . . It is the paradox of justice that at the same time it puts limits on state action and it radicalises the conception of the attorneys’ duty.¹⁶⁴

Radicalization, in this context, means that rule of law lawyers will

¹⁶⁰ See Margulies & Metcalf, *supra* note 20, at 445–49 (discussing how proceduralists were positioned between two extremes, so they were unsatisfying to sides that wanted an interventionist approach); see also discussion *supra* Section III.C.

¹⁶¹ Karpik, *supra* note 130, at 489.

¹⁶² See *supra* notes 7–8 and accompanying text.

¹⁶³ See *supra* Section III.B.

¹⁶⁴ Karpik, *supra* note 130, at 489.

mobilize to advance political liberalism rather than remain neutral to the values instantiated by the legal complex. Thus, rule of law attorneys assume an ownership of the rule of law such that their legal activities are intentionally directed with the aim of strengthening its institutional structure and guarantees.

Interviews with Guantánamo habeas attorneys, and other materials about their motivations, highlight this activist conception of their professional role as including a commitment to promote the rule of law.¹⁶⁵ Relying on self-reported motivations of Guantánamo habeas attorneys may not accurately reflect their intentions.¹⁶⁶ It is also possible that attorneys have mixed motives, or that their motives change over time. For some, justifying habeas review for detainees as necessary to promote the rule of law may have been strategic. In their judgment the most effective legal strategy during a national security crisis was one that appealed to procedural principles rather than one that opened a public discourse linking detention policies to politically sensitive issues like public attitudes toward Islam, racialized assumptions about religious extremism, or the nation's dependence on oil and its influence on our military response to 9/11. Yet, although we interviewed a small number of attorneys, their responses (given in individual interviews) were remarkably consistent. In addition, the themes that emerged among those interviewed were also found in a separate study of Guantánamo habeas attorneys.¹⁶⁷ Thus, while the available evidence suggests that a belief in the rule of law figured prominently in the public construction of the Guantánamo bar, this understanding is also contingent and deserves further study.

1. *Attorney Conception of Role as Restraining Government Abuse of Power*

In both interview sets, the attorneys shared a commitment to the rule of law, a commitment that served as a source of self-identification for the "Guantánamo Bar." Many were motivated to take on detainee representation because they believed "it was the right thing to do" and necessary to counter the Bush Administration's policies that they believed violated the fundamental tenets of the country's legal order and social values. As one put it:

¹⁶⁵ See FLETCHER & STOVER, *supra* note 9, at 120–21 (describing the experience of detainees at Guantánamo and the impact of lack of access to effective judicial review).

¹⁶⁶ In responding to questions, individuals may be biased and report answers that portray themselves favorably. See Donna M. Randall & Maria F. Fernandes, *The Social Desirability Response Bias in Ethics Research*, 10 J. BUS. ETHICS 805, 805 (1991) (examining the impact of social desirability response bias on studies examining ethical conduct).

¹⁶⁷ Devyani Prabhat, *After 9/11: Guantánamo and the Mobilization of Lawyers*, in 54 STUDIES IN LAW, POLITICS, AND SOCIETY: SPECIAL ISSUE: SOCIAL MOVEMENTS/LEGAL POSSIBILITIES 213 (Austin Sarat ed., 2011).

The government was asserting that it could arrest anyone, anywhere in the world, call the person an enemy combatant, and on that basis alone, hold the person forever. . . . That struck me as a legally, ethically, and strategically suspect idea. So it was in the hopes of bringing some semblance of the rule of law to Guantánamo that the cases were appealing to me and I think generally my firm held a similar view.

Another had “a sense that [habeas rights for detainees] is an extremely important issue right at the core of what our judicial system is about. And so it was our duty as lawyers to get involved and to do something about it.”

The strength of this commitment is difficult to gauge, but it is telling that New York law firms proximate to the World Trade Center sought out detainee habeas cases. A lawyer in a firm that had represented family members of some who were killed in the collapse of the World Trade Center towers later took on habeas representation of detainees because the firm saw this type of work as “fighting for [the] fundamental rule of law” and therefore consistent with representing family members of 9/11 victims. A rule of law esprit de corps appears to have prevailed, as described by one attorney:

The common thread is that all of [the habeas lawyers] . . . are deeply committed to the concept that the rule of law means something Although the Bush administration came pretty close to killing the rule of law, I am proud to be a small part of the large group of lawyers who prevented that from happening.¹⁶⁸

For some, representing detainees deepened their understanding of the rule of law, making the abstract concept vivid, if only in the consequences of its denial. One attorney explained that due process of law had been a “rhetorical phrase” before representing Guantánamo detainees but that this understanding changed after working with a client who said he was studying the Quran in Pakistan and was picked up and taken to Guantánamo for no discernible reason. Representing the client

helped me understand how a lack of due process impacts an individual human being and then to talk to those men’s families and see how the loss of that individual whether

¹⁶⁸ David J. Cynamon, *Rule of Law*, in *THE GUANTÁNAMO LAWYERS*, *supra* note 37, at 27, 27.

it's a son or a husband or a breadwinner or . . . a father,
that due process really means something very concrete.

A third put it simply: "[W]hat the rule of law means more than anything else is that you can't just be thrown in prison to rot there at the whim of the executive."

2. Attorneys' Response to Witnessing Government Exercise of Power

Confronting the exercise of executive power in the context of how officials treated their clients was sobering for many Guantánamo habeas attorneys and deepened their commitment to fighting for judicial review of their clients' detention. As attorneys gained access to their clients and to the evidence that justified their confinement, many discussed their disillusionment with the government. Sabin Willet, who represented a dozen detainees from China and Saudi Arabia, said:

Once I went down and got to learning about who's actually there, and discovered that the vast, vast majority of the people there have absolutely nothing to do with crime, with war fighting, [I learned] that it's a massive, intentional public relations lie as to who we're actually holding in Guantánamo¹⁶⁹

Marc Falkoff, a habeas attorney and law professor, who initially believed the U.S. military was holding some terrorists on the base, echoed a similar sentiment:

I was stunned by the lack of quality of the evidence against them. . . . This is the kind of thing where if you look at the classified evidence, anyone who would look at it, would say: "Are you kidding me?" This is why these guys are being detained here, because of third or fourth-hand hearsay based on something heard over a walkie-talkie or based on a statement that was elicited from another detainee being tortured. It's remarkable how poor the evidence is, how thoroughly unconvincing it is, even leaving legal technicalities aside.¹⁷⁰

Several attorneys cited examples of the ways in which the government's tactics opposing the habeas cases, in their minds, crossed the line from zealous advocacy to behavior that undermined fundamental

¹⁶⁹ Interview with Sabin Willet (on file with author).

¹⁷⁰ Interview with Marc Falkoff (on file with author).

principles of fairness central to the adversary system.¹⁷¹ Examples of egregious behavior cited include the government's arguments against detainees' habeas claims immediately after *Rasul*,¹⁷² its opposition to allowing attorneys to visit clients,¹⁷³ as well as its repeated recalcitrance in turning over evidence. Willet offered, as an example of questionable litigation tactics by the government, the fact that before the Supreme Court ruled in *Boumediene*, the government had avoided any federal court hearing to determine the legality of individual detention.¹⁷⁴ On the eve of any hearing "the government did the same thing, they always released the prisoner before the hearing," stated Willet. "Now why is that?" he continued, "[when] you go to a federal court and somebody's charged with a crime do they release [the defendant] because his lawyer says I'd like a trial?"¹⁷⁵ Willet speculated that the government wanted to avoid a public hearing in which its evidence would be subject to scrutiny.¹⁷⁶

Pushing back against the exercise of executive authority meant that habeas attorneys confronted the considerable power of the Executive Branch to obstruct and delay the litigation. To many of these counsel the use of delay tactics by the government went beyond the norm and became an illegitimate end-game and another affront to the rule of law. Thomas Wilner said the most challenging aspect of the representation was "[t]he fact that the government has been able to delay this forever. That these people can be kept there without a fair hearing for almost six years is just disgusting and we couldn't do anything about it."¹⁷⁷

The Bush Administration had been concerned about the possibility that detainees in Guantánamo might access federal courts even before they

¹⁷¹ See Luban, *supra* note 35, at 1983 (noting that the government had policies that made it more difficult to provide legal representation to detainees at Guantánamo).

¹⁷² See Neil A. Lewis, *Disagreement Over Detainees' Legal Rights Simmers*, N.Y. TIMES, Nov. 1, 2004, at A15 ("The administration has also argued that a new legal proceeding it put in place here at Guantánamo after the Supreme Court Ruling . . . should satisfy the justices' demand that the detainees get individualized fair hearings.").

¹⁷³ In spring 2007, the government sought to further restrict attorney access to Guantánamo clients by limiting the total number of visits attorneys could have with clients and instituting other restrictions, arguing that attorney visits had caused unrest at the camp. William Glaberson, *U.S. Asks Court to Limit Lawyers at Guantánamo*, N.Y. TIMES, Apr. 26, 2007, at A1. Guantánamo's camp commander later contradicted the government's legal position and stated: "I have no issue with habeas visits." He explained that the government request to restrict attorney-client meetings came on the heels of a detainee riot in Camp 4 in August 2006, and suicides of three detainees in September 2006, and that they had instituted revised procedures at the base to "better facilitate" attorney visits. Carol Rosenberg, *Guantánamo Chief Backs Off Limits on 'Habeas Corpus' Visits*, MIAMI HERALD, May 4, 2007.

¹⁷⁴ Interview with Sabin Willet (on file with author).

¹⁷⁵ *Id.*

¹⁷⁶ Since the Supreme Court ruling in *Boumediene*, most of the courts that have reached a substantive decision on the legality of confinement have ruled in favor of detainees. *Guantánamo Bay Habeas Decision Scorecard*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/GTMOscorecard> (last visited Oct. 14, 2011).

¹⁷⁷ Interview with Thomas Wilner (on file with author).

arrived at the base.¹⁷⁸ From this perspective, Guantánamo habeas counsel were impeding the war effort; the government fought back in kind. In the view of Falkoff, the Administration's interest in delay was simply to keep detainees behind bars for as long as possible, regardless of the individual merits of each case, explaining that as long as the litigation continued—"five, or six, or seven years"—the Administration had succeeded in keeping detainees in its custody.¹⁷⁹

For many habeas attorneys with whom we spoke, their commitment to defending the rule of law assumed a new urgency as they came to witness the impact of prolonged detention on their clients. One attorney described the toll that confinement with very little opportunity for social interaction took on detainees, remarking that "[detainees are] all going nuts and some of them have . . . a certain amount of awareness of it, they can remember what they used to be like and they know they're having difficulty concentrating so they . . . have some consciousness that this is causing an impact on them."

Although the study did not ask specifically about the mental health of clients, twelve of the eighteen habeas attorneys volunteered that they believed their clients' mental health had worsened significantly. "Some of them have gotten more and more psychotic because of the isolation, the severe isolation," said one. Another remarked: "[T]he most painful thing is . . . going down there and having [my clients] see no hope. One of my clients said, 'Look, you can't help me. This is just inconvenient. I'd rather lie in my cell, than pretend I have hope' That's tough."

Isolation, lack of stimulation, and uncertainty over when and whether detainees would be released caused their clients to despair and exhibit signs of depression, according to their attorneys. One respondent described a client who had been held for over a year in a cell for twenty-two out of twenty-four hours a day without being able to speak or have contact with other detainees. "He's a very social person and that isolation was just brutal for him," said the respondent. During a visit, the client asked the respondent: "How can I keep myself from going crazy?" After a break, the respondent came back to the meeting room and found the client had hung himself and cut open his arm. The client required surgery, but survived.

While most habeas attorneys interviewed stated they undertook

¹⁷⁸ A Department of Justice legal memorandum concluded that "[t]here is little doubt" that habeas litigation "could interfere with the operation of the system that has been developed to address the detention and trial of enemy aliens." Patrick F. Philbin & John Yoo, *Memorandum for William J. Haynes, II, General Counsel for the Department of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, Dec. 28, 2001*, in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 29, 36 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge Univ. Press 2005).

¹⁷⁹ Interview with Marc Falkoff (on file with author).

representation of detainees to promote principles of legality and rule of law, for several, the experience of representing individuals detained at Guantánamo over time changed the meaning they ascribed to this lawyering. One attorney characterized the attorney-client relationship changing from one of being somewhat distant to “realiz[ing] how important it is to affirm each client’s . . . humanity” and through the lawyer-client interaction to validate that the client is “not just an animal being caged.”

The lawyers were interviewed at a bleak time in the litigation, over six years since detainees arrived at the base and approximately six months before the *Boumediene* decision was announced. At a time during which legal relief seemed remote, perhaps it is not surprising that some attorneys refocused their attention on the more humanitarian aspects of representation. Habeas counsel were the only outside visitors detainees were allowed to see whose professional interests were to advocate for their interests.¹⁸⁰ What this meant for some was that they came to see their lawyer-client relationship, if not the legal engagement, as the opportunity to provide their clients a measure of social control and interaction.

Taken as a whole, the interviews with habeas counsel suggest that this group saw itself as not only defending unpopular clients, but also as fighting for rule of law. Habeas attorneys were the underdog, matched against the three branches of government. The Supreme Court was the exception, though it granted only partial victories. Guantánamo habeas attorneys understood their role to be larger than serving as neutral partisans fighting for detainees to have their day in court. Their goal was to hold the government accountable to the Constitution and the values it embodies. Their fight was to instantiate law in President Bush’s War on Terror.

C. Legal Goals Guided by a Restricted Conception of Political Liberalism

Preservation of the rule of law was one of the central goals of the habeas litigation. The *Rasul* attorneys decided to file a case initially, in large part, because they were concerned that the President’s announced policies for the detainees were taking an unprecedented approach that eroded fundamental legal rules that maintain the rule of law even during war.¹⁸¹

¹⁸⁰ Representatives of the International Committee for the Red Cross visited the camps to monitor and report on conditions, Josh White, *U.N. Inspectors Are Invited to Guantanamo Bay*, WASH. POST, Oct. 29, 2005, at A16, but they are not individual legal advocates, *The ICRC’s Mandate and Mission*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm> (last visited Oct. 10, 2011).

¹⁸¹ See MARGULIES, *supra* note 37, at 10 (2006) (“In an interview on *Meet the Press*, Vice President Dick Cheney said that the war might require that the government go ‘to the dark side’ in its dealings with prisoners.”).

The goal of the Guantánamo habeas litigation remained remarkably consistent and narrowly constructed over time. One motivating factor behind the *Rasul* attorneys' decision to file a case was their alarm that the government had refused to publicly disclose the allegations against Australian detainee David Hicks that allowed his imprisonment, let alone officially acknowledge that he was being held.¹⁸² The attorneys decided to file suit, turning to the courts to enforce the age-old writ of habeas corpus and force the government to justify the legality of Hicks' detention.

The timing of the suit, just weeks after the attacks of 9/11, meant the litigation was greeted with hostility,¹⁸³ but the attorneys felt compelled to act in light of the fundamental threat to the rule of law posed by the President's announced policies. Michael Ratner explained:

[CCR] decided that the military order was so contrary to law and represented such a threat to fundamental liberties that we needed to challenge it, particularly its denial of habeas corpus. Habeas corpus is the hallmark of a state in which authority is under law. This principle is so important that we were willing to put aside our concerns regarding funding and the angry, vengeful mood in much of the country.¹⁸⁴

Political lawyering theorists posit that lawyers mobilize to defend a "restricted" set of rights that are often called "first generation" or "negative rights."¹⁸⁵ These include political and civil rights such as access to courts, due process, habeas corpus, and freedoms of speech and association.¹⁸⁶ They are distinguishable from "second generation" economic and social rights, like guarantees to access to housing, healthcare, employment, and education.¹⁸⁷ Comparative studies suggest that political lawyers are conservative in this regard, distinguishing them from most cause lawyers.¹⁸⁸

In the case of Guantánamo habeas lawyers, the focus on winning the right to habeas corpus review, a quintessential basic procedural right, united the Guantánamo bar. As one Guantánamo attorney explained: "[O]ur strategy has always been to ask for a very, very basic fundamental

¹⁸² *Id.* at 10.

¹⁸³ *See id.* at 146 ("[I]t is probably fair to say [the attorneys representing Guantánamo detainees] had more than a few enemies."); RATNER & RAY, *supra* note 41, at xvi (stating that the attorneys representing detainees received "plenty of hate mail").

¹⁸⁴ Ratner, *supra* note 37, at 15.

¹⁸⁵ Halliday, Karpik, & Feeley, *supra* note 129, at 10.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 10, 28.

¹⁸⁸ *See generally id.* at 10.

right, our strategy hasn't been to expand that or to go beyond and look at a bunch of collateral litigation, we've just stayed focused on something very simple, a fair hearing."

The Guantánamo bar publicly defended this narrow legal strategy outside the courtroom. Habeas counsel have published books, articles, and other writings regarding their cases,¹⁸⁹ as well as spoken widely to the media about their clients. The central message the lawyers have advanced in these activities has been that the United States has treated their clients unjustly, violating core legal principles and fundamental values. The lack of a fair hearing to determine whether their clients are subject to lawful detention is one dimension of their argument.¹⁹⁰ In making this claim, habeas lawyers frequently juxtapose the length of their clients' detention with the lack of evidence or justification from the government for keeping clients in custody.¹⁹¹

Outside of the courtroom, Guantánamo habeas attorneys also have raised the issue of mistreatment and torture of their clients by U.S. officials.¹⁹² The harsh conditions of confinement and their effects on detainees provide compelling stories about the vivid impact of policies defended by the Bush Administration.¹⁹³ Such public appeals generated political pressure on the Bush Administration to restrain alleged government transgressions of core rights by rule of law lawyers, in this case, the prohibition against torture. Seen in this light, the non-legal advocacy undertaken by habeas attorneys has remained confined to

¹⁸⁹ See generally THE GUANTÁNAMO LAWYERS, *supra* note 37; KRISTINE A. HUSKEY, JUSTICE AT GUANTÁNAMO: ONE WOMAN'S ODYSSEY AND HER CRUSADE FOR HUMAN RIGHTS (2009) (with Aleigh Acerni); MARGULIES, *supra* note 37; BARBARA OLSHANSKY, SECRET TRIALS AND EXECUTIONS: MILITARY TRIBUNALS AND THE THREAT TO DEMOCRACY (2002); RATNER & RAY, *supra* note 41; CLIVE STAFFORD SMITH, BAD MEN: GUANTÁNAMO BAY AND THE SECRET PRISONS (2007); Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009).

¹⁹⁰ See MARGULIES, *supra* note 37, at 220 (explaining that none of the clients had an opportunity to contest the legality of their detention in a fair hearing and essentially remained in "legal limbo"); Thomas P. Sullivan, "Due Process" at Guantánamo, in THE GUANTÁNAMO LAWYERS, *supra* note 37, at 148, 148–49 (recounting the views and experiences of many habeas attorneys with respect to CSRTs and military commissions).

¹⁹¹ See MARGULIES, *supra* note 37, at 166 (discussing the lack of evidence supporting US detention of many detainees); STAFFORD SMITH, *supra* note 189, at 169 ("In five years, the US military offered no evidence—nor even a suggestion—that Ahmed took part in any fighting in Afghanistan, or planned to . . . How likely was it, five years later, that the military would admit their mistake?").

¹⁹² See THE GUANTÁNAMO LAWYERS, *supra* note 37, at 229–88 (providing numerous first-person accounts from lawyers describing the torture of their clients); MARGULIES, *supra* note 37, at 228, 238 (explaining that torture of detainees is considered a symbol of Guantánamo); STAFFORD SMITH, *supra* note 189, at 70 ("American officials have talked about 'enhanced interrogation techniques,' or 'torture lite.' Is a beating torture? Do days of sleep deprivation constitute torture? Is forcing a prisoner to stand for hours torture? [The detainee] would assure you that they are . . .").

¹⁹³ See STAFFORD SMITH, *supra* note 189, at 155 ("At the time [Sami al Laithi] was in Camp Five, the worst part of Guantánamo where prisoners were segregated into small, individual concrete cells.").

promoting public support to advance a narrow set of rights associated with political liberalism.¹⁹⁴ In other words, the central narrative habeas attorneys put forth was that the conduct of the United States toward their clients was fundamentally at odds with the nation's commitment to rule of law and restricted government powers.

Finally, the durability of this narrowly-tailored advocacy strategy attests to its power to hold together the large network of attorneys representing detainees. It also resulted in formal recognition of fundamental rights. Almost seven years after the detainees first challenged their confinement in U.S. courts, the Supreme Court, in *Boumediene*, ruled that detainees had a right under the U.S. Constitution to pursue habeas relief.¹⁹⁵ The opinion vindicated the arguments advanced by Guantánamo habeas counsel over the years about constitutional restraint on executive power and the role of courts in times of conflict. As a legal strategy, the arguments for extending habeas rights to detainees reflect the legal judgment of Guantánamo habeas attorneys about the most persuasive legal arguments to advance. They are also consistent with the rule of law commitments of this same group.

D. Relationship to Civil Society

Karpik and his colleagues find political lawyering to be linked to the independence of the collective bar, which enables lawyers as a group to represent the interests of civil society vis-à-vis an authoritarian state.¹⁹⁶ Karpik theorizes, in part from this observation, that the state and civil society are divided: civil society, fearful of and distrusting state authority, needs and benefits from restraints on state power that otherwise would

¹⁹⁴ Efforts by some habeas attorneys to lobby foreign governments to press U.S. authorities for the return of their nationals held at the naval base may appear to be of a different character than conventional lawyering techniques and look more like cause lawyering. However, because of the unusual circumstances of their clients' detention—foreign nationals detained by the U.S. military who are not part of a recognized army—advocacy by habeas counsel with governments who may be able to exert diplomatic pressure on the United States to release their nationals can be considered akin to lawyers negotiating with third parties for the benefit of their clients, and therefore a form of advocacy that falls within traditional conceptions of lawyering. Indeed, given that the United States transferred hundreds of detainees from Guantánamo prior to *Boumediene* pursuant to diplomatic agreement rather than court-ordered habeas, habeas attorneys were pursuing perhaps the only reasonable avenue to advance their clients' interests. FLETCHER & STOVER, *supra* note 9, at 88.

¹⁹⁵ *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

¹⁹⁶ See Halliday, Karpik & Feeley, *supra* note 129, at 18–19 (“In every country in which the legal complex mobilised it gained impetus from the renaissance of civil society just as lawyers, in particular, stimulated the resurgence of civic groups, often through positions of leadership.”); Karpik, *supra* note 130, at 463 (“[T]hrough legal-political battles against the authoritarian state, lawyers have participated in the construction of the collective representation of a society divided into the state and civil society.”).

impinge on enjoyment of rights by citizens.¹⁹⁷ Yet, according to Karpik, civil society does not act on its own; it is represented by political lawyers who act as spokespersons for civil society.¹⁹⁸ Political lawyers mobilize to defend the limited rights necessary for a moderate liberal state.¹⁹⁹ Such representation of civil society need not be literal to fulfill this conception, i.e., serving as counsel in legal actions against the state. Rather, political lawyers use civil society as a “figure of political speech” on whose behalf the lawyer mobilizes and claims to advocate.²⁰⁰

American lawyers operating under conventional modes of lawyering, however, do not conceive of their profession as serving a similar function as the political lawyer of Karpik’s model. In fact, the role of U.S. lawyers in the adversarial system is to serve their clients’ interests and not a wider, social interest.²⁰¹ Similarly, cause lawyers do not as a general matter serve as Karpik’s “political lawyer” because the “causes” for which they advocate are not restricted to those basic rights associated with a moderate liberal state (protecting civil society from state intrusion), but in fact they may employ a rights-based strategy to force the state to recognize and fulfill new, positive entitlements for a marginalized group.²⁰² Their claims tend to be more expansive than those of rule of law lawyers, which are advanced on behalf of a targeted segment of civil society rather than on behalf of society as a whole.

Application of this theory to this study of Guantánamo habeas attorneys reveals some interesting insights. One of the central themes advanced by Guantánamo habeas lawyers was an urgency to restrain the executive powers that President Bush had unilaterally imposed, or sought with the consent of Congress. As Joseph Margulies, the lead lawyer in *Rasul* wrote:

The question is not whether the United States has the power to imprison people seized in connection with the war on terror; without doubt the government has such

¹⁹⁷ See Karpik, *supra* note 130, at 486 (describing the dichotomy between the public and the discretionary power of the state).

¹⁹⁸ See *id.* at 486–87 (explaining that this spokesman must be “trusted and followed,” and that “the representative has power that is given to him by the represented”).

¹⁹⁹ See *id.* at 487 (attributing a political lawyer’s power to the judicial system itself, and the lawyer’s ability to navigate it).

²⁰⁰ *Id.* at 487.

²⁰¹ Additionally, it may be observed that the role of the lawyer, as understood in relation to legal ethics, does not articulate a role for the collective bar that is separate from the role of the individual lawyer. Accordingly, there is no theory of collective representation of the bar akin to the mobilization theory of political lawyering.

²⁰² “Proceduralist” cause lawyers represent individual clients as a way to promote the rule of law. Their theory of representation does not include the public-oriented dimension captured by the spokesperson role identified by political lawyering theory. See Hilbink, *supra* note 140, at 665–67.

power. The question is, and has always been, whether the exercise of this power would be restrained by the rule of law.²⁰³

This rhetorical framing implicitly invokes the unspecified public, a common framing technique among Guantánamo habeas attorneys.²⁰⁴ Who will restrain the government in its exercise of detention power? Not the Administration, which itself had sought unilateral power to decide who should be detained. Not Congress, which granted the President the powers he sought or did not limit their application. Margulies' words invoke the specter of tyranny: a state unrestrained by law that is then able to restrict basic rights of its citizens. The work of the Guantánamo habeas lawyer, then, was to instantiate the rule of law. The particular application was to the detainees, but advancing these cases was a method to restrain executive authority which served the general public by upholding fundamental values of our constitutional system.

Framing the fight for habeas review as necessary to restrain executive power was more than a public communications strategy; it was also a legal argument. The *Boumediene* lawyers argued that independent judicial review—the essential function of habeas corpus—was essential to ensure the reasonable exercise of executive authority.²⁰⁵ The *Boumediene* lawyers pressed the Court to affirm habeas rights for Guantánamo detainees as necessary to restore the appropriate balance of power needed to protect American liberal democracy.²⁰⁶ In this way, the goals of rule of law

²⁰³ MARGULIES, *supra* note 37, at 9.

²⁰⁴ Bernhard Docke, *Lost and Found: The Experience of a Lawyer From "Old Europe" Defending in a Law-Free Zone*, 1 NE. U. L.J. 111, 115 (2009) (reflecting on his representation of Murat Kurnaz, a Turkish citizen who was born and raised in Germany, the author notes that in his public outreach regarding his client's case he "focused attention on the fundamental deprivations of human rights and due process at Guantánamo"); Avi Stadler & John Chandler, *Look to Israel to Learn How to Handle Guantanamo Detainees*, ATLANTA J. CONST., Oct. 21, 2007, at B1 (comparing U.S. and Israeli procedures for suspected terrorists and urging the United States to adopt more robust procedures similar to Israel, where citizens "believe that the rule of law is central to [the country's] identity as a democratic society"); Thomas P. Sullivan, *You Have the Bodies*, GUANTÁNAMO LAWYERS DIGITAL ARCHIVE 22–23, available at http://dlib.nyu.edu/guantanamo/documents/word/Sullivan_You.doc (last visited Oct. 3, 2010) (observing that, "[w]e are committed as a nation to affording all persons fair hearings and due process of law. . . . Our actions with regard to the men at Guantánamo Bay have violated and continue to this day to violate these basic American principles[.]" and calling on the government to "consider the standard we have established for redressing unjust imprisonment of other nation's citizens").

²⁰⁵ Brief for the Petitioners at 8, *Boumediene v. Bush*, 554 U.S. 723 (2008) (No. 06-1195).

²⁰⁶ See *id.* at 9 (referring to the Suspension Clause of the Constitution as "the surest guarantee of liberty and due process" because it limits the circumstances under which the writ of habeas corpus may be restricted. Attorneys for detainees argued that "[b]y allowing the indefinite military detention of Petitioners to stand without adequate judicial examination, the court of appeals disregarded the Founders' deliberate protection of the greatest legal instrument they knew").

lawyers are pursued on behalf of civil society as a whole.²⁰⁷

E. *Support of the Bar*

Rule of law lawyers, as distinguished from cause lawyers, are more easily able to marshal support from segments of the organized bar. Karpik theorizes that because political lawyers act as defenders of foundational freedoms—a long-standing tradition of the organized bar—they are able to tap into the “collective identity” of the legal profession.²⁰⁸

The collective bar has framed its support of Guantánamo habeas attorneys’ efforts in terms of promoting rule of law. The American Bar Association (ABA) was an early and consistent voice advocating for the application of the rule of law in the country’s response to the events of 9/11. The association adopted resolutions, issued reports and press statements, filed amicus curiae briefs, and published letters to Congress regarding the appropriate treatment of detainees captured in the government’s anti-terrorism efforts.²⁰⁹ In particular, the ABA urged Senators to reject the DTA and MCA provisions that limited habeas review. In pressing for defeat of the DTA, the ABA President argued, “[p]reserving the opportunity for Guantánamo detainees to seek habeas review in our federal courts will demonstrate *our nation’s commitment to its own constitutional values* and serve as an important example to the rest of the world.”²¹⁰

Even if unsuccessful in stopping the legislation, support of the ABA conferred a measure of legitimacy to habeas counsels’ efforts. The public

²⁰⁷ Some civil society groups did support these rule of law lawyers, as evidenced by the number of amici briefs filed in support of Guantanamo detainees in court proceedings—according to the record, there were twenty-four pro-petitioner briefs in *Rasul* and twenty-nine in *Boumediene*. This support suggests the salience of the concept of representation by Guantánamo habeas lawyers as well as its link to political action—in this case a legal challenge to the authority of the President to detain alleged terrorists. See Karpik, *supra* note 130, at 486–87 (describing lawyers as representatives of civil society willing to oppose authoritarian powers).

²⁰⁸ *Id.* at 492.

²⁰⁹ See, e.g., Brief for the American Bar Association as Amicus Curiae Supporting Petitioner-Appellee-Cross-Appellant Jose Padilla at 8–9, 27, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (No. 03-2235(L), 03-2438(con)) (outlining the ABA’s view of the constitutional protections due to *Padilla*); Brief for the American Bar Association as Amicus Curiae Supporting Petitioners at 2–3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); ABA TASK FORCE ON THE TREATMENT OF ENEMY COMBATANTS, REPORT TO THE HOUSE OF DELEGATES 7–10 (2003) (recommending that detainees be afforded meaningful judicial review and access to counsel); ABA, MEASURE 10(A), REPORT TO THE HOUSE OF DELEGATES, available at [http://abajournal.com/files/10A_Revised\(2\).pdf](http://abajournal.com/files/10A_Revised(2).pdf) (last visited Jan. 26, 2012) (aligning the ABA’s position with that of the Supreme Court’s directive in *Boumediene* concerning detainee rights and privileges); Letter from Michael S. Greco, President, American Bar Association, to United States Senators (Nov. 14, 2005), available at <http://www.abanet.org/media/docs/grahamamend.pdf> (“The fundamental purpose of the writ of habeas corpus is to prevent unlawful detention by the government.”).

²¹⁰ Letter from Michael S. Greco, *supra* note 209 (emphasis added).

stance of the organized bar also added to the symbolic framing of the litigation as a struggle to restrain executive authority and advance basic freedoms, an attempt to counter the war paradigm narrative promoted by the Bush Administration with defense of the rule of law.

Along with support of the collective bar, rule of law lawyers enjoy support from diverse segments of the bar. Karpik finds that business lawyers “will accept and even support action in favour of individual rights because the defence of liberties has become the counterpart of the special status of the profession.”²¹¹ This is born out largely in the post-*Rasul* phase of representation of Guantánamo detainees. After the Supreme Court decided *Rasul*, business attorneys flocked to provide pro bono services to detainees.²¹² Moreover, the diversity of attorneys in the Guantánamo bar further suggests the wide appeal across the bar of joining this effort.

The *Rasul* decision shifted the normative debate over detainees and legitimated the legal challenge to the Bush Administration’s assertion of unilateral power. Because cause lawyers advance novel rights or press for the extension of rights in new contexts, they confront the challenge of legitimating their struggle in the eyes of the rest of the bar as well as the public.²¹³ In this sense, pre-*Rasul* attorneys defending habeas rights served as “cause lawyers.” At the time, arguing for habeas rights for alleged terrorists was viewed skeptically by the public and the lower courts that ruled on the cases. The threats these early attorneys received were directed at them because they were seen as defending the enemy. As such, the Supreme Court’s decision in *Rasul* was a watershed event. It conferred legitimacy for the *Rasul* attorneys and symbolically transformed them overnight from advocates of a fringe cause to leaders of a fight to protect fundamental rights in the finest tradition of the bar. Although the goal of these habeas lawyers remained the same (i.e., vindicating narrow, procedural rights), the Supreme Court opinion elevated the status of their struggle within the profession and legitimated the role of the judiciary to restrain executive power. The Supreme Court ruling also coincided with the detainee abuse scandal at Abu Ghraib, and over the next several years, public criticism of the Bush Administration’s war on terror policies increased steadily, to the point that in the run up to the 2008 election, senior members of the White House staff stated that Guantánamo should be closed.²¹⁴ Popular political consensus conferred additional legitimacy on the legal work of Guantánamo attorneys, rendering this work

²¹¹ Karpik, *supra* note 130, at 492.

²¹² See *supra* note 57 and accompanying text.

²¹³ Karpik, *supra* note 130, at 491 (“[N]o cause lawyer can take the cause he is defending for granted in such a way that is considered by everybody from the public as important and legitimate.”).

²¹⁴ Margulies & Metcalf, *supra* note 20, at 453.

respectable in ways not imaginable when the small group of lawyers filed *Rasul*.

VI. IMPLICATIONS OF CONCEPTUALIZING GUANTÁNAMO HABEAS ATTORNEYS AS RULE OF LAW LAWYERS

The analytical model of rule of law lawyering “fits” the case of Guantánamo habeas lawyers; it plausibly explains the essential features of this type of legal activity and the goals of these legal professionals. It also reasonably distinguishes Guantánamo habeas attorneys from traditional lawyers and cause lawyers. This Part addresses some of the consequences of this analysis. Why is it important to conceptualize Guantánamo habeas attorneys as rule of law lawyers? What difference does this make? There are three types of implications that emerge from this initial treatment of the issue: the first are practical or instrumental; the second are additional insights that distinguish rule of law lawyers from cause lawyers; and the third are contributions to elaborating a theory of rule of law lawyers.

A. *Practical Implications of a Rule of Law Lawyering Model*

Conceptualizing Guantánamo habeas lawyers as rule of law lawyers provides a more robust defense of the value of their work than is offered by the conventional conception of lawyers as neutral partisans and more precise than casting them as cause lawyers. Adopting rule of law lawyering as a model for Guantánamo habeas lawyers as an alternative conception of the role of the lawyer makes explicit the moral values of the legal profession that support political liberalism. In addition, the values of fundamental fairness, protection of individual liberties, and restraint on the abuse of power are normative values of the legal profession—essential components of justice which the law is to provide and lawyers are to implement. They are also the legal profession’s more “noble” values as well as components of its collective identity. Adopting a rule of law conception of these lawyers draws on the tradition of the legal profession as serving the public good rather than serving the narrow interests of clients or operating in the attorneys’ financial self-interest. Guantánamo detainee representation served as a vehicle for lawyers to express their commitment to rule of law as a professional enactment of public spiritedness post-9/11.²¹⁵ This response captures a particular strand of lawyer activism prompted by the country’s national security crisis.

How might this conception be employed? Returning, as a thought exercise, to the al Qaeda Seven debate, one can outline what a response to the Keep America Safe video might emphasize if Guantánamo habeas

²¹⁵ See *supra* Section III.A.

attorneys were understood to be rule of law lawyers. First, the efforts of these lawyers could be placed within the history of lawyers defending basic freedoms when the country was threatened with or engaged in war. The Sedition Act of 1798; President Lincoln's suspension of the writ of habeas corpus during the Civil War; prosecution during World War I of opponents to the war and the draft; the internment of individuals of Japanese descent during World War II; investigation of suspected members of the Communist Party during the Cold War; and federal efforts to enjoin publication of the Pentagon Papers during the Vietnam War are all examples of attacks on basic freedoms.²¹⁶ Yet lawyers were involved in these battles, on both sides of the efforts. Defenders of Guantánamo habeas counsel could mine these episodes for stories of the lawyers who fought to defend civil society, to protect basic freedoms, and to preserve a political structure in which government power is restrained by law. While each crisis is unique, the Bush Administration characterized al Qaeda as an unprecedented "enemy" that required an entirely new paradigm to combat—one in which executive authority reigned supreme and unchecked. Reminders of historic examples in which governments have employed similar invocations could help counter the narrative of the war on terror as an event without historic parallel which justified a diminished role for lawyers.

Second, Guantánamo lawyers could invoke their symbolic role as spokespersons for a civil society threatened by unrestrained executive authority. Government observance of the rule of law during armed conflict—even when fighting occurs abroad—protects citizens at home, as the damage that the detainee abuse scandals wrought on the political prestige of the United States sadly reminds us. Particularly because in the months following 9/11 public sentiment largely favored the Bush Administration policies, the "civil society" that rule of law lawyers defended was more symbolic or imaginary than a real constituency—but this makes its defense no less urgent. In fact, defense of the public is arguably more urgent during times of crisis because there is less popular opposition to measures that curtail fundamental rights. Lawyers have unique professional access to courts—the independent branch of government with the power to limit excesses of governmental action.

Finally, antipathy toward the work of Guantánamo habeas attorneys could be productively located in the larger pattern of hostility toward defenders of the rule of law during times of threats to national security. Thus, the Guantánamo bar can be placed within a trend in which, even during periods in which the country's security is threatened, exceptional

²¹⁶ For a history of the protagonists involved in these episodes, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

members of the legal profession do battle to protect fundamental freedoms. Rule of law lawyers may not always win, or, as in the case of Guantánamo habeas lawyers, a legal victory may not transform the broader political climate. For instance, although habeas merits hearings that have already concluded have frequently been decided in favor of detainees, President Obama's policies arguably have only moderated rather than rejected many of his predecessor's controversial counter-terrorism policies.²¹⁷

The limits of Guantánamo habeas lawyers are common to similar efforts of rule of law lawyers in other analogous circumstances. Placing Guantánamo habeas attorneys in this broader context provides both a global and historical frame for interpreting their efforts and counters the restricted narrative about these lawyers as simply serving their clients or working to undermine national security.

B. Distinctions Between Cause Lawyering and Rule of Law Lawyering

Understanding Guantánamo habeas attorneys as rule of law lawyers draws additional distinctions between this group and cause lawyers, the latter of which was the conception of lawyers employed by the Cheney attack ad. The Guantánamo bar sought to establish procedural rights for detainees as part of a needed defense of the rule of law.²¹⁸ This normative vision is primarily structural rather than substantive and therefore too narrow and thin a social vision to be considered an example of cause lawyering.

Arguments comparing Guantánamo lawyers to John Adams and to other historic legal champions of unpopular clients have been offered by defenders of Guantánamo habeas counsel.²¹⁹ Aspects of the rule of law model may be offered to justify the work of Guantánamo habeas attorneys—the tradition of defending freedoms and the promotion of the social good through a defense of the rule of the law. However, this is only part of the story. Comparing the work of Guantánamo habeas attorneys to criminal defense lawyers serves to obscure the moral values the Guantánamo bar lawyers seek to promote. A criminal defense attorney seeks to protect his or her client's procedural rights; the Guantánamo attorney seeks habeas to promote a vision of restrained government authority achieved through a commitment to rule of law. The relation of the attorney to the administration of justice is different in each role conception.

²¹⁷ See John B. Bellinger, *More Continuity Than Change*, INT'L HERALD TRIB., Feb. 15, 2010, at 8 ("[T]he Obama administration . . . has . . . continued many of the Bush administration's . . . counter-terrorism policies, including many that are highly controversial with America's allies.").

²¹⁸ See, e.g., Brief for the Petitioners at 8, *Boumediene v. Bush*, 554 U.S. 723 (2008) (No. 06-1195) (stating that detainees were denied basic procedures required by due process).

²¹⁹ See *supra* notes 31–34 and accompanying text.

Put slightly differently: just as the work of criminal defense attorneys or death penalty defense attorneys as a class is aimed at securing procedural justice for their clients, this is not sufficient to identify these legal professionals as cause lawyers. The difference may be illustrated by noting that attorneys who defend individuals facing the death penalty are referred to as “death penalty” lawyers and not death penalty “abolitionists.” While some death penalty attorneys may seek to abolish the death penalty, as a class, these legal professionals are not mobilized around the substantive goal of abolition, but rather procedural due process.²²⁰ The argument advanced here is that Guantánamo habeas attorneys are more accurately described as a class of attorneys who are mobilized around a conception of the liberal state, of which procedural due process is a fundamental element. The distinction clarifies the animating narrative and professional role-identification of lawyers in the two examples.

The divide between substance and procedure is one fault-line separating rule of law activist lawyers from cause lawyers, the phenomenon of attorney mobilization around the narrow, fundamental right of habeas corpus, is another. What united this diverse group of attorneys together was defense of the rule of law rather than defense of a type of client (i.e., neutral partisans). They shared a goal to pursue a rule of law as a value central to the conception of justice in liberal democracies rather than a vision for the content of justice (i.e., cause lawyering).

A further distinction between Guantánamo lawyers and cause lawyers is the relationship of legal strategy to political goals. The habeas attorneys pursued a narrowly-defined litigation strategy framed tightly around pursuit of the rule of law. The goal—the right to habeas corpus—was court-centric and did not require larger political mobilization to secure its aim. This is not to say that these legal efforts were indifferent to larger social and political opposition to Bush war on terror policies. The habeas litigation served to highlight the divergence between the country’s commitment to rule of law and its treatment of al Qaeda suspects. But the legal strategy was conceptually isolated from any broader political campaign against the Bush Administration. A fuller agenda to dismantle the Bush Administrations’ policies would have included a meaningful rollback of executive authority, full repudiation of detention and interrogation practices that deviated from international law and standards, and restoration of civil liberties enjoyed prior to 9/11—and these aims would have been characteristic of a substantive social and political agenda pursued by cause lawyers.²²¹

²²⁰ See *supra* note 140.

²²¹ See Margulies and Metcalf, *supra* note 20, at 463–65.

C. *Implications of a Rule of Law Lawyering Model for Theory of Political Lawyering*

Noting that the habeas lawyers did not succeed in bringing about a larger political transformation is not to suggest that they failed, but rather to more closely identify what they set out to do. In fact, it may well be that had the *Rasul* attorneys sought to pursue a broader agenda, they would not have secured the support and resources of the private bar that contributed to the legal victories. The legitimacy of political lawyering is critical to mobilizing attorneys and illuminates how diverse elements of the bar can join together in a common effort. The Supreme Court in *Rasul* decided that Guantánamo detainees had the right to file habeas petitions and implicitly validated and authorized lawyers to provide such services. But the decision also encouraged the other branches of government to establish a legal framework for the exercise of state authority after 9/11. By holding that habeas applied to detainees held at Guantánamo, the Court rejected a central tenet of the Bush Administration's war on terror: the President's Commander-in-Chief powers to detain and interrogate terrorist fighters indefinitely and without legal process were not subject to judicial review. Post-*Rasul*, the issue was no longer *whether* the rule of law applied, but *how* to ensure that it would be.

The need for lawyers was great. Yet the appeal of serving as an attorney for individuals detained at Guantánamo was brokered by the narrow, procedural right being vindicated through representation. Representation did not require attorneys to assert that the government had no substantive authority to imprison enemy combatants. Nor did representation require that attorneys defend the substantive allegations against their clients (though many did). Rather, habeas attorneys sought to vindicate a narrow procedural right to have an independent court determine the legality of the detention. Securing this age-old procedural right—once authorized by the highest court—appealed to the core principles of the profession and helps explain why large corporate law firms sought to represent detainees. Defending habeas rights appealed to the core values of large private firms. It also helped to sustain the efforts of the attorneys over the years it took to overcome subsequent legal challenges to habeas rights for detainees.

This case study also helps to explain why Guantánamo habeas lawyers, in some sense, are still losing. The Supreme Court in *Boumediene* established unequivocally that Guantánamo detainees had the right to habeas corpus under the Constitution. Habeas hearings are being conducted, but as of the date of this writing, over a dozen detainees who have secured a grant of habeas are still in detention.²²² Some legal scholars

²²² *Guantanamo Bay Habeas Decision Scorecard*, *supra* note 176.

and practitioners recently have noted the limits of the legal, procedural, strategy pursued by the Guantánamo bar. Jenny Martinez ruefully observed: “[T]he ‘war on terror’ litigation thus far seems to have resulted in a great deal of process, and not much justice.”²²³ And Joseph Margulies, counsel of record for the *Rasul* plaintiffs, reflected his disappointment in the failure of the litigation effectively to reverse the illiberal treatment and policies of the war on terror directed against detainees.²²⁴ In this sense, the victories of rule of law lawyering are fragile and contingent, in particular with respect to altering political consensus about the relationship of law and the state.

The Guantánamo habeas lawyers pursued a narrow legal strategy and won on that ground. Their efforts expose weaknesses in the legal complex, but there is surprisingly little political resistance to the government’s counter-terrorism policies. Both political parties appear comfortable with the general approach to combating terrorism initiated by the Bush Administration—as evidenced by the Democrat-controlled Congress’ thwarting President Obama’s pledge to close Guantánamo by January 2010.²²⁵ A narrow legal strategy may garner support from across the bar, but it will not be sufficient to change the underlying political environment hostile to basic rights. This suggests that efficacy of lawyers is severely limited in such contexts. Without political support to place greater priority on the rule of law in debates over national security, rule of law lawyers will win only limited victories.

More work needs to be done to understand under what conditions political will begins to change, and what role the legal profession may play in this regard. Larger empirical studies of the Guantánamo bar will help us to understand the sociology, perspectives, and culture of the habeas lawyers. Longitudinal work would help us to understand how this group changes over time. Will attorneys largely confine themselves to habeas representation or will they expand their work? Important substantive questions about the legal and political boundaries of detainee treatment have not been addressed by the courts: Will the government be able to hold detainees indefinitely? How will we ensure that the government is detaining the right people? How will we ensure that detainees are treated humanely and according to law? Which law? Will we hold accountable those responsible for detainee abuse and torture? If attorneys do mobilize to address these questions, will their roles and behaviors transform them

²²³ Martinez, *supra* note 51, at 1092.

²²⁴ Margulies & Metcalf, *supra* note 20, at 471.

²²⁵ See Editorial, *The Guantanamo Delay: Will Mr. Obama Miss His Deadline to Close the Reviled Prison?*, WASH. POST, May 27, 2010, at A26 (describing the House Armed Services Committee’s attempt to block an Obama administration proposal to convert a U.S. state prison into a facility to hold Guantanamo detainees).

from rule of law lawyers to cause lawyers or something else?

VII. CONCLUSION

This Article argues that a new conception of Guantánamo habeas lawyers is needed to more completely reflect their function and role. This case study is limited. It relies primarily on information about Guantánamo habeas lawyers collected before the *Boumediene* opinion was decided. Data was collected primarily from attorneys who began their work after the *Rasul* decision. Attitudes among this group may have changed over time. Similarly, the relationship of this group to a new administration deserves closer consideration than is given here. Nevertheless, this example illustrates the dynamic interaction between lawyering theory and practice. The two dominant models of lawyering—that of the traditional lawyer and that of the cause lawyer—fall short in providing an account of the Guantánamo bar during this period, as analysis of the al Qaeda Seven debate demonstrates. The theory of political lawyering offers an attractive alternative from which to construct a model of Guantánamo habeas attorneys as rule of law lawyers.

Conceiving of the role of these lawyers as rule of law lawyers serves three purposes. First, it acknowledges the normative, political nature of their activism. These attorneys are not neutral professionals; they are committed to defending basic rights and enforcing the rule of law. Application of the rule of law requires transparency, independent adjudication, and accountability. It also requires lawyers. The rule of law lawyer model accounts for this role. Second, a conception of these lawyers as rule of law attorneys makes explicit the values at stake, as well as the material manifestations of the rule of law and its attendant rights like habeas corpus. Guantánamo habeas attorneys set in motion a series of legal activities that culminated in a ruling by the highest court of the country that judges, not the military, will determine the legality of indefinite detention of alleged terrorists in the nation's War on Terror. Instantiating judicially-enforced, procedural rights for detainees in this political context constitutes a significant achievement. The ruling is a narrow, legal response to the arbitrary exercise of power. These lawyers, with their professional allegiance to the application of the rule of law, were the midwives to this precedent. Third, even while the model validates the roles of lawyers to defend the rule of law, it also predicts that lawyers will play a limited, if important, role during threats to the nation's security. Aimed to limit the exercise of state power, rule of law lawyers do not advance a normative assessment of the nature of the threat to national security. These lawyers will not claim that the War on Terror is good or bad; they will not support or oppose the substantive decision to invade Afghanistan or Iraq as a legitimate form of self defense. In short, rule of law attorneys confine their legal activities to the means that the state has

chosen to implement its commitment to due process. They accept the legitimacy of the liberal state and its ability to defend itself.

Law and war are uneasy companions. Rule of law values are imbued in the legal profession and are a resource to mobilize lawyers to defend and protect fundamental values and rights, even during armed conflict. Society, in turn, benefits from lawyers' efforts to promote the rule of law when political circumstances render it vulnerable to erosion. The contributions of lawyers are important, but limited. Conceptual framing that captures the contributions, as well as the limits, of rule of law lawyers alerts us to their legal accomplishments and to the work that remains.

