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THE ROLE OF LAWYERS IN THE GLOBAL WAR ON TERRORISM

MICHAEL B. MUKASEY*

Abstract: The following article is edited remarks from Attorney General Mukasey's Commencement address at Boston College Law School on May 23, 2008. His remarks focus on the role and ethics of lawyers in the Global War on Terrorism. Attorney General Mukasey contends that lawyers must faithfully adhere to the law, especially in the national security context where the questions are complex, the stakes are high and the pressures to do something other than adhere to the law are great. Attorney General Mukasey argues that political and public pressure on national security lawyers can lead to "cycles of timidity and aggression," and that scrutiny of their work, given the threats facing the country following September 11, 2001, must be conducted responsibly, with an appreciation of its institutional implications.

Boston College Law School has a history of inviting commencement speakers who reflect diverse views on important legal and public policy issues. Of course, this has meant speakers with whom some faculty members and students have strongly disagreed—including, most recently, me. That history is consistent with what elevates American legal education above mere indoctrination and makes it worthy of being called *higher* education; that history includes a hearty welcome to open discourse on vital questions of the day.

Many of those questions in today's world revolve around the terrorist threat to the civilization we all treasure. It should be no surprise that questions about how we should confront that threat have generated vigorous debate at this law school, and at others around the country. Those questions are among the most complex and consequential that a democratic government can face. How we as a nation should seek to protect ourselves; whether the steps we take are proportional to the threat and consistent with our history and principles; where the legal lines are in this new and very different conflict; and,

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as a matter of policy, how close to those legal lines we should go, and whether the lines themselves should be redrawn—these are questions that, understandably, trigger passionate debate.

Whether or not you pursue national security law as a vocation, and whether or not you go into other kinds of public service, all of you, as lawyers, will have a special role in that debate—as you will in many others. This is not only because, as Alexis de Tocqueville famously observed, political questions in the United States often turn into legal questions,¹ but also because, as lawyers, you have developed a set of tools that enable you—and assumed a set of commitments that *require* you—to conduct dispassionate and reasoned analysis, to distinguish what is legally relevant from what is not and, most important, to distinguish legal questions from political questions.

Answering legal questions often involves a close reading and a critical analysis of text—the Constitution, statutes, judicial decisions and the like. Regrettably, that elementary point—elementary at least to those of you in this graduating class—is far too often lost in public discourse. Newspapers and commentators, for example, often discuss legal questions with barely any acknowledgement of the fact that the answers may depend on the language of, say, the Constitution or a statute. And critics of a policy decision far too rarely draw the distinction between whether that course of action is *prudent* as a matter of policy and whether it is *permitted* as a matter of law.

That is a critical distinction; indeed, it is a distinction that goes to the heart of what it means to live in a society governed by the rule of law. I don't mean to suggest that lawyers can or should approach legal questions with no regard for their own values or moral commitments. Nor do I mean to suggest that a lawyer should express no opinion about matters of policy—although policy opinion should be expressed without disguising it in the language of the law.

A lawyer's principal duty is to advise his client as to the best reading of the law—to define the space in which the client may legally act. If you do your job well, there will be times when you will advise clients that the law prohibits them from taking their desired course of action, or even prohibits them from doing things that are, in your view, the right thing to do. And there will be times when you will have to advise clients that the law permits them to take actions that you may find imprudent, or even wrong.

¹ See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley, ed., Alfred A. Knopf, Inc. 1945) (1835).

This nation's well-proved commitment to the rule of law is what sets it apart from many other countries around the world and throughout history. If that commitment is to persist—if we are to remain, as we often say, “a nation of laws, not of men”²—then we must insist that law matters, that the law is something other than a hollow vessel into which a client, or a policymaker, may pour his or her personal views or preferences. And whether you go into public service (as I hope many of you will) or into the private sector (as I did initially and have more than once since); whether you pursue the public interest in some other way or enter the legal academy, you, as lawyers, must *do* law.

You must do law even—you must do law *especially*—when the stakes are high and the pressures to do something else are tremendous. Nowhere are the stakes higher and the pressures greater than when the subject is national security, where, as I said earlier, the questions are as complex and as consequential as they come.

The questions are complex because, in this area, the limits of executive power are not clearly defined by the Constitution or by well-settled precedent; because the laws Congress has enacted often speak in general terms and do not provide clear answers to the novel questions we confront; and because there are few judicial markers to guide the conscientious lawyer.

The questions are consequential because the stakes are anything but academic. Lives, economic prosperity—our way of life—may hang in the balance.

As if that weren't enough, every national security lawyer knows that decisions made in the heat of crisis may be second-guessed under radically different conditions: in the comparative calm of a hearing room or an editorial board room, with the well-known but rarely acknowledged benefit of perfect hindsight.

Consider the aftermath of the attacks on September 11, 2001. I was a federal judge in New York City that day; my courtroom was not far from Ground Zero. I can personally attest to the bravery and hard work of many people—government employees and civilians alike—in response to the attacks; but I cannot describe from any personal experience what that day, and the days that followed, were like inside the executive branch, for those with the duty and the responsibility of protecting the country.

² *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

But I do recall the very public scrutiny that followed in the months after the attacks. The 9/11 Commission and congressional committees, among other bodies, conducted thorough investigations into whether the attacks could have been prevented, and how our government could be better equipped to prevent future terrorist strikes.

The narratives produced by these investigations were, in many instances, stories of missed opportunities. The subtext of these narratives—in fact, at times, the text—was that risk-aversion can have grave costs. The 9/11 Commission report, for example, tells of operations against Osama bin Laden that were contemplated but not executed; of surveillance considered but not requested; of information not shared; of so-called “dots” not connected.³

Understandably, and reasonably, government lawyers were not immune from that public scrutiny. For example, lawyers in the Justice Department and in our intelligence agencies were criticized for interpreting the law as establishing a “wall” between intelligence collection and law enforcement⁴—an interpretation that the federal appeals court responsible for reviewing foreign intelligence surveillance would later conclude was wrong.⁵ Others asserted that this interpretation was too cautious, and impeded information-sharing about threats.⁶

Complaints about risk-averse national security lawyers were commonplace in the first few years following the September 11 attacks. About a year after the attacks, one prominent senator said:

[W]e are not living in times in which lawyers can say no to an operation just to play it safe. We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes.⁷

A few years later, another blue-ribbon commission made a similar observation, noting that many people in our intelligence agencies

³ See FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 126–34 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> [hereinafter 9/11 REPORT].

⁴ See *id.* at 270–71.

⁵ See *In re Sealed Case*, 310 F.3d 717, 721 (For. Intel. Surv. Ct. of Rev. 2002).

⁶ See, e.g., 9/11 REPORT at 270–71.

⁷ Hearing Before the Select Committee on Intelligence, U.S. Senate, 107th Cong., on the Nomination of Scott W. Muller to be General Counsel to the Central Intelligence Agency, S. 107–814 (Oct. 9, 2002) (Statement of Senator Bob Graham).

claimed that their efforts to protect our country were hampered by risk-averse lawyers.⁸ In the words of that commission's report, "quite often the cited legal impediments ended up being . . . myths that overcautious lawyers had never debunked Needless to say, such confusion about what the law actually requires can seriously hinder the Intelligence Community's ability to be proactive and innovative."⁹

In short, the message sent to our national security lawyers in the aftermath of the September 11 attacks was clear; it was bipartisan; and it was all but unanimous. This message was that the legal culture in our intelligence agencies, and in the Justice Department, was too risk-averse. It needed to be more aggressive, it needed to push to the limits of the law, to give policymakers and operators the most flexibility possible to confront the existential threat of international terrorism.

As Professor Jack Goldsmith, a former Assistant Attorney General in the Justice Department who now teaches at Harvard Law School, put it in what I regard as his indispensable recent book, *The Terror Presidency*: "The consistent refrain from the [9/11] Commission, Congress, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse."¹⁰

As of now, we have gone seven years without another terrorist attack within the United States, and we are now hearing a rather different refrain. Today, many of the senior government lawyers who provided legal advice in support of the nation's most important counterterrorism policies have been subjected to relentless public criticism. In some corners, one even hears suggestions—suggestions that are made in a manner that is almost breathtakingly casual—that some of these lawyers should be subject to civil or criminal liability for the advice they gave. The rhetoric of these discussions is hostile and unforgiving.

The difficulty and novelty of the legal questions these lawyers confronted is scarcely mentioned. Indeed, the vast majority of the criticism is unaccompanied by any serious legal analysis. Additionally, it is rarely acknowledged that those public servants were often working in an atmosphere of almost unimaginable pressure, without the academic luxury of endless time for debate. Equally ignored is the

⁸ STAFF OF COMM. ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION 335 (2005).

⁹ *Id.*

¹⁰ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 74 (2007).

fact that, based on all the evidence I have seen and heard, those lawyers reached their conclusions in good faith based upon their best judgments of what the law required.

Those of you who may be students of national security issues—or those who have simply been around long enough—know that we have, as the saying goes, “seen this movie before.” For decades, we have witnessed what Professor Goldsmith calls “cycles of timidity and aggression” among political leaders, and the public, in their attitudes towards the intelligence community.¹¹

As Professor Goldsmith explains, political leaders—and he might as well have added opinion leaders outside the government, including academics, to that list as well—in his words:

pressure the community to engage in controversial action at the edges of the law, and then fail to protect it from recriminations when things go awry. This leads the community to retrench and become risk averse, which invites complaints by politicians that the community is fecklessly timid. Intelligence excesses of the 1960s led to the Church committee reproaches and reforms of the 1970s, which led to complaints that the community had become too risk averse, which led to the aggressive behavior under William Casey in the 1980s that resulted in the Iran-Contra and related scandals, which led to another round of intelligence purges and restrictions in the 1990s that deepened the culture of risk aversion and once again led (both before and after 9/11) to complaints about excessive timidity.¹²

That is the political pendulum as Jack Goldsmith describes it. The pendulum is swinging back once again; indeed, it is safe to say that this latest swing began some time ago. No doubt this cycle, or something like it, is healthy in some sense. The sometimes competing imperatives to protect the nation and to safeguard our civil liberties are undoubtedly worthy of public debate and discussion. Oversight and review of our intelligence activities—by Congress, the executive branch, and, where possible, by the public—is vitally important.

But it is equally important that such scrutiny be conducted responsibly, with appreciation of its institutional implications. In evaluating the work of national security lawyers, political leaders and the

¹¹ *Id.* at 163.

¹² *Id.*

public must not forget what was asked of those lawyers in the days and months following the attacks of September 11. We cannot afford to invite another “cycle of timidity” in the intelligence community; the stakes are simply too high.

For the good lawyer who understands that there will be such scrutiny of his or her decisions in the future, there is no alternative except to *do* law. Hard though it may be, the good lawyer must be indifferent to the fact that he may well be criticized, *whatever* he may decide. It is the task of the good lawyer to tune out this white noise, to give the best reading of what the law is—and not to confuse what the law is with what that lawyer, or someone else, thinks the law ought to be.

If the lawyer’s best reading of the law permits some policy, he has a professional obligation to say that it would be lawful—even if he personally disagrees with it, or recognizes that it may one day prove *politically* controversial. Just as important—perhaps more important—if the lawyer believes that some policy would be unlawful, he has a professional and ethical obligation to say no—even if some people think that the policy is critical. The rule of law, and the oath every public servant takes to support and defend the Constitution, depend on it.¹³

Although only a few of you are likely to become national security lawyers and face these precise dilemmas, the responsibility to do law applies to each of you. The lawyer in private practice must not confuse his client’s interest with the law; he has an obligation to say no if no is the right answer, even if the client doesn’t want to hear it. The lawyer pursuing what he believes to be the public interest must not confuse personal views on what the law ought to be for what the law is. And the lawyer in robes (as I once was, and as some of you no doubt will be), like the image of Justice blindfolded, must decide cases, as the judicial oath says, without respect to persons; that is, not based on who the parties are or what outcome may be well received in any particular quarter, but based on his or her best reading of what the law requires.¹⁴

In becoming lawyers, you are becoming the custodians of a trust—a trust whose assets are the rule of law and the justice that results from that rule of law. Being a custodian of that trust carries with it solemn responsibilities. But it is also a great privilege because you

¹³ See U.S. CONST., art. VI, cl. 3.

¹⁴ See 28 U.S.C. § 453.

will play a large role in the most essential debates of our times. I urge you to play it well; much hangs in the balance.