THE ETHICAL DIMENSION OF NATIONAL SECURITY LAW

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I'd like to thank the organizers of this most important symposium for the opportunity to address you. I can hardly think of a more timely topic for our consideration than *Law, Ethics, and the War on Terror*, and I'm glad to have the opportunity to share some thoughts on some of the ethical challenges of our national security law practitioners.

Like any lawyer, I'd like to begin by addressing our terminology. Exactly what do we mean by the "War on Terror"? As you probably have heard from other sources, it is almost a cliché these days to say that you cannot have a "war on terror" because terror is a tactic, not an entity against which war can be waged.

Without necessarily disagreeing with the technical correctness of that view, I nevertheless believe it is useful to examine human conflict from the perspective of confronting adversaries for whom the law does not present any restraint and for whom exploitation of adherence to the rule of law is the norm. The word "terror" conveys exactly such a lawless approach. So in that sense, the phrase "war on terror" is useful shorthand for describing the conflict we find ourselves waging against a variety of actors on the world stage.

Paradoxically, no other conflict of this scale in human history has so involved the law. In today's military, few military commanders attempt to wage war without bringing along their lawyers. This is not because they have somehow fallen in love with the legal profession, but rather, it is a simple recognition that failure to account for—and adhere to—the law can seriously frustrate mission success.

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In short, concern about the law is a very pragmatic response to a phenomenon that is as real as logistics, communications, or any of the more traditional concerns of a military leader. Parenthetically, as you advise your clients about legal issues and, indeed, doing the proverbial "right thing," it helps if you can tap into something that resonates pragmatically with them. In the case of adherence to the law in military operations, it is clear that illegalities can be as serious a setback as any traditional military defeat. Abu Ghraib is "exhibit one" in this regard.[1]

There are many reasons for the legal complexity of modern military operations. I believe it has much to do with globalization, which requires legal instruments and international legal fora to facilitate commerce. In a real way, globalization has raised the consciousness of law around the world and has served to normalize its utility. In any event, it is no longer true, as Cicero asserted, that in times of war, the law falls silent.[2] One need only open a newspaper to understand that law is actually quite vocal these days.

As already indicated, the fact that many of the threats we face today are not posed by the traditional nation-state significantly complicates the advisory task for the national security law practitioner. We often find ourselves in an almost endless "threshold" debate as to what law applies. For example, when should a law enforcement legal regime apply to a particular situation, and when should the law of war analysis govern? My friend Ken Roth of Human Rights Watch suggested a set of criteria that the government must consider before applying a law of war regime. Specifically, he says that the government must demonstrate:

> [F]irst, that an organized group is directing repeated acts of violence against the United States, its citizens, or its interests with sufficient intensity that it can be fairly recognized as an armed conflict; second, that the suspect is an active member of an opposing armed force or is an active participant in the violence; and, third, that law enforcement means are unavailable.[3]

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1. *See, e.g.*, Tom Brokaw, *Sanchez: Abu Ghraib 'Clearly A Defeat'*, MSNBC.COM, Jun. 30, 2004, http://www.msnbc.msn.com/id/5333895.

2. OXFORD DICTIONARY OF QUOTATIONS 223 (Elizabeth Knowles ed., 6th ed. 2004) ("*Silent enim leges inter arma.*").

3. Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFF., Jan.–Feb. 2004, at 2, 2, *available at* http://www.foreignaffairs.org/20040101facomment83101/kenneth-roth/the-law-of-war-in-the-war-on-terror.html.

Notwithstanding this guidance, it will not furnish national security law practitioners the simplistic, bright-line answers that our clients crave. You cannot write a "cookbook" that provides a quick reference answer to every factual scenario that might arise. As difficult as this may make a national security practice, I believe it is best to keep these questions fact-dependant—that is, the application of the appropriate régime must take into account a thorough analysis of the particular circumstances.

This brings me to my first observation about ethics—that is, the duty to be competent. This obligation is embedded at several points in our *Air Force Rules of Professional Conduct* (which largely mirror the American Bar Association *Model Rules*), beginning with the very first rule.[4] In my experience the competency issue for national security law practitioners arises with respect to the law, *per se*, much less often than it does with regard to the ability to understand the facts in order to be able to apply them to the law.

Understanding the facts in national security situations can be quite challenging at times. For example, imagine finding yourself assigned to an Air Operations Center,[5] where we have military lawyers on duty around-the-clock.[6] That position requires our attorneys to advise commanders on the legality of airstrikes.

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4. *Compare* DEP'T OF THE AIR FORCE, TJS-2, AIR FORCE RULES OF PROF'L CONDUCT R. 1.1 (2005), *with* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

5. *See* DEP'T OF THE AIR FORCE, OPERATIONS AND ORGANIZATION: AIR FORCE DOCTRINE DOCUMENT 2, at ch. 7 (2007) (discussing Air and Space Operations Centers), *available at* http://www.dtic.mil/doctrine/jel/service_pubs/afdd2.pdf; *see also* Anna Mulrine, *Targeting the Enemy: Inside the Air Force's Control Center for Iraq and Afghanistan*, U.S. NEWS & WORLD REP., June 9, 2008, at 26; Anna Mulrine, *Lawyers Review Airstrike Plans: An Extra Check on Actions When There is the Risk of Civilian Casualties*, U.S. NEWS & WORLD REP., May 29, 2008, http://www.usnews.com/articles/news/world/2008/05/29/lawyers-review-airstrike-plans.html [hereinafter *Lawyers Review Airstrike Plans*].

6. *Lawyers Review Airstrike Plans*, *supra* note 5.

There are many factors to such a determination. You must apply the rules of engagement, which usually contain a heavy dose of policy limitations, as well as the traditional law of war. The policy issues could be quite complex. In his book about Kosovo, *Waging Modern War*, General Wesley Clark recounts the sheer technical difficulty in providing decision-makers with extremely detailed information about targets—much more than the law of war would require—in order to obtain approval.[7] Moreover, to apply the traditional law of war, you would need to employ a proportionality analysis. Typically, we apply the standard found in Protocol I of the Geneva Conventions (even though the U.S. is not a party to it), and this would mean determining whether the expected incidental death or injury to civilians or the loss of their property as a result of the airstrike "would be excessive in relation to the concrete and direct military advantage [sought]."[8] In addition, if there is "a choice . . . between several military objectives for obtaining a similar military advantage, [then] the objective to be selected shall be [the one] expected to cause the least danger to civilian lives and to civilian objects."[9] Of course, overlaying all of this is the need to "take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects."[10]

As you think about how to advise on these issues, it becomes clear rather quickly that it is necessary to know quite a bit about military operations and precisely how they are carried out. What facts constitute adequate "military advantage" in order to tolerate the deaths of innocent civilians? To warrant the destruction of certain civilian property? How viable are the alternatives? What is reasonable under the exigencies of combat?

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7. WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 201 (2001).

8. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57, para. 2(b), *adopted* June 10, 1977, 1125 U.N.T.S. 3. Although the U.S. is not a party to Protocol I, military lawyers often refer to it for guidance, and parts of it are considered customary international law.

9. *Id.* at para. 3.

10. *Id.* at para. 4.

As to the latter, much effort these days goes to training our lawyers about the whole process of air warfare. This is more than just learning to interpret photos and other intelligence data but also necessitates a lot of familiarity with technical features of various weapons, including their fusing and their blast patterns. For example, the exact moment that a bomb explodes can make a huge difference in the amount of collateral damage. A microsecond difference in the fusing of a bomb could make the explosion contained within a targeted compound—or not.

Ideally, you become able to offer a better alternative that meets military needs yet minimizes collateral damage. This requirement for technical expertise is hardly limited to the application of kinetics on the battlefield. Some of the trickiest questions arise in the cyber realm. For example, one of the classic questions that remains a challenge is when a particular cyber activity crosses the line from a law enforcement matter to one properly considered to reside in the law of armed conflict realm.

Professor Michael Schmitt, a retired Air Force Judge Advocate—or "JAG"—proposed an analytical test which essentially takes the position that once a cyber activity in effect equates to the kinetics of a traditional armed attack, the law of armed conflict regime applies.[11] Yet as helpful as this is, it still requires real expertise in substantive cyber matters to apply the test that, like all tests, demands subjective evaluation of complex facts.[12]

I mention all this because I cannot emphasize strongly enough that in order to be a competent legal advisor on national security matters, it is imperative that the lawyer become a student of national security. It is not enough to have even an encyclopedic knowledge of the law, it is necessary to have a rather in-depth *substantive* knowledge of the client's "business," so to speak.

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11. *See* Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 934–36 (1999).

12. Professor Schmitt sets forth a multi-factor test for analyzing a computer network attack under international law, with a particular view toward the United Nations Charter. His analysis turns on such questions as whether an attack is "intended to directly cause physical damage to . . . objects or injury to human beings," whether the "consequences [of the attack] track those consequence commonalities which characterize armed force," and whether principles such as self-defense are applicable. *Id.* Professor Schmitt's test uses similar questions in order to evaluate the appropriateness of a response by armed force to such an attack.

We need this expertise not just to provide legal advice competently but also to obtain and maintain the client's confidence. In the armed forces particularly, if a commander gets the sense that the lawyer—uniformed or civilian—does not fully grasp the military dimension of the issue, the lawyer's continued effectiveness is in real jeopardy. And in war, there may not be a second chance to make a good first impression.

So how can a practitioner build substantive competence? There really is no easy way. It likely means a rather rigorous course of self-study that requires reading classic works of military history and strategy, as well as staying familiar with the up-to-the-minute developments in the technologies and strategies of war often best reflected in not just military journals and trade publications but increasingly the rather sophisticated array of online resources to include blogs.

That said, I firmly believe that national security law is not—and should not be—the exclusive purview of military and other government attorneys. In fact, I often urge law students to take national security law courses even if they have no current plans to serve in government.

The reason is that national security issues, whether we like it or not, provide context for much of what occurs in this country, not to mention around the world. The front page of virtually every newspaper has some reference to some aspect of national security, an activity which is, in essence, a nearly $600 billion "business" in this country.[13] I believe every lawyer these days, regardless of his or her practice, ought to be familiar with the basics of national security law.

Apart from everything else, lawyers ought to be the ones ensuring that debates about critical policies and issues are framed correctly from the legal perspective. Is this not part of our responsibility as legal professionals? It is remarkable to me how often the law itself is misunderstood or misstated. Accuracy as to what the law provides, as well as its rationale, is vitally important today because it is increasingly clear that our adversaries are trying to turn our respect for the rule of law into a weapon to be used against us.

13. *See* OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT OF THE U.S., HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, at tbl.3.1 (2007), *available at* www.whitehouse.gov/omb/budget/fy2008/pdf/hist.pdf.

I call this phenomena "lawfare" and define it as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."[14] The perception of illegality can have powerful effects on the ability of democracies to wage war. As Professor Michael Reisman and Chris T. Antoniou explained in their 1994 book, *The Laws of War*:

> In modern popular democracies, even a limited armed conflict requires a substantial base of popular support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.[15]

Accordingly, talking about the importance of legal and ethical behavior to my military clients has a very practical rationale. Military operations need to be legal both in fact and—importantly—in *perception*. I would especially invite your attention to the word "believe" in the quote above. In other words, an erroneous belief about what the law provides can undermine worthy efforts.

Our adversaries see great benefit in creating confused beliefs in this regard. For example, recently we have seen a concerted effort by the Taliban to delegitimize the use of airpower in Afghanistan through a sophisticated campaign to propagandize civilian casualties. They want to do so because airpower has become the weapon that they fear the most. Here is what one Taliban commander has said: "Tanks and armor are not a big deal. The fighters are the killers. I can handle everything but the jet fighters."[16] The way the Taliban and al Qaeda are seeking to counter coalition airpower is not through some kind of anti-aircraft weapon but by intermingling with civilians to discourage airstrikes by raising the specter of innocents dying unnecessarily. In addition to propagandizing deaths that do occur as a result of their actions, they are very clever about disinformation and fabrication. All of this is to create the impression, as Riesman and Antoniou might put it, that "the war is being conducted in an unfair, inhumane, or iniquitous way."[17]

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14. Charlie Dunlap, *Lawfare in Modern Conflicts*, REPORTER, Oct. 3, 2005, at 95, 95 (edited transcript of remarks given by Major General Dunlap at the Keystone Leadership Summit on October 3, 2005).

15. THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT, at xxiv (W. Michael Reisman & Chris T. Antoniou eds., 1994).

16. Rowan Scarborough, *Pentagon Notebook: McPeak Calls McCain Too Fat*, WASH. TIMES, Jun. 26, 2008, at B1 (quoting "U.S. intelligence officials").

17. LAWS OF WAR, *supra* note 15, at xxiv.

The response by the U.S. and Western powers to this manipulation has not always been as effective as it needs to be. Most people realize that using human shields is wrong, but there seems to be markedly less understanding of what the law actually provides. While every civilian death is a tragedy, the law recognizes that they do inevitably occur. Therefore, the law only prohibits "excessive" casualties in relation to the military advantage anticipated.

Furthermore, it is absolutely imperative that national security practitioners understand the rationale behind the law in order to provide advice to those well-meaning decision-makers who want, for example, to ban the use of airstrikes if there is *any chance* of civilians being present.

Of course, the law does not require any such rule because if it were put into effect, it would simply encourage belligerents to maximize their intermingling with civilians as a way of protecting themselves from the air weapon. In the case of terrorists, if they can be protected from an airstrike, they then can survive to kill innocents in any number of illegal and wholly depraved ways.

Understanding the second order effects of legal advice brings me to the next ethical point I wish to make, and this is the one set forth in Rule 2.1. That rule says:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[18]

The advisory function of national security practitioners is particularly important in today's extremely complex national security environment. In her highly acclaimed 2008 book, *The Dark Side*, author Jane Mayer severely criticizes the performance of some lawyers in national security decision-making. She argues that "[w]hat was missing was a discussion of policy—not just what was legal, but what was moral, ethical, right, and smart to do."[19]

In fact, it was consideration of exactly those matters that brought military lawyers into conflict with some of their civilian counterparts in recent years. In truly incisive analysis, Professor Richard Schragger of the University of Virginia Law School, contrasts JAG conceptions from those of other government attorneys. He notes that:

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18. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008).

19. JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 55 (2008).

> Military lawyers seem to conceive of the rule of law differently [than civilian government lawyers]. Instead of seeing law as a barrier to the exercise of the clients' power, these attorneys understand the law as a prerequisite to the meaningful exercise of power. . . . Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.[20]

Consequently, JAGs frame their advice with a keen understanding that whatever is approved may well have to be executed in a split-second decision by a teenage soldier. Legal advice that requires the soldier-client to conduct a hyper-legalistic analysis in the midst of the chaos and extreme stress of combat is not just unwelcome but also extremely dangerous. Thus, military lawyers understand that advice that only speaks to technical legality does a disservice to the client.

At the same time, the practitioner must not allow these other factors to cloud unambiguous and candid advice to the client as to what the law specifically requires. In his searing book indicting the role some senior government attorneys allegedly played in the development of legal memoranda authorizing coercive interrogation for detainees, author Philippe Sands makes a number of interesting observations.[21] The lawyers' shortcoming, he argues, was their failure to "provide independent advice and instead [they became] advocates for a cause."[22]

It is a mistake to think, however, that the issue only applies to government lawyers. Consider this story from the *New York Times* concerning a plan by the American Civil Liberties Union and the National Association of Criminal Defense Lawyers to provide attorneys for Guantanamo detainees.[23] After noting that some lawyers signed on to the effort "were expecting to use the detainees' cases to expose what they see as flaws in the Bush administration's war-crimes system," the *Times* reported:

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20. Richard Schragger, *Cooler Heads: The Difference Between the President's Lawyers and the Military's*, SLATE, Sept. 20, 2006, http://www.slate.com/id/2150050/?nav/navoa.

21. *See generally* PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008) (discussing the history and effects of the Haynes Memo in recommending new interrogation methods for detainees).

22. *Id.* at 230.

23. *See* William Glaberson & Neil A. Lewis, *2 Groups to Help Defend Detainees at Guantanamo*, N.Y. TIMES, Apr. 4, 2008, at A16.

> In some cases there has been friction between the civilian and the military lawyers. One lawyer who is involved in the military defense effort said . . . there could be tensions over the extent to which legal efforts focus on defending individual detainees and how much they focus on challenging the entire military commission system.[24]

In short, taking into account moral, economic, social, and political considerations should not become a rationale for partisanship and ideological proselytizing that undermines the lawyer's ethical responsibility to be a zealous advocate for his or her individual client.

For military lawyers not assigned to represent an individual, the client is the United States, and sometimes that can create tensions with our political masters. It is certainly true that an administration is free to implement whatever policies it wishes, so long as they comply with the law. Military lawyers especially must be scrupulously *apolitical* and strongly advocate the principle of civilian control of the military. At the same time, however, they must be conscious of their duty to provide independent and candid counsel.

This is not always easy to do. As Jane Mayer notes, the circulation of the original draft of the military commissions order in late 2001 alarmed more than civil libertarians. Mayer writes: "Uniformed military lawyers were galvanized by the order into taking the first steps in what would become a remarkable role as defenders of America's honor . . . against what they saw as illegitimate and ruinous incursions . . . ."[25] Many of you no doubt know that later there were disputes about interrogation techniques and other issues related to what we call today the "War on Terror."[26]

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24. *Id.*

25. MAYER, *supra* note 19, at 88.

26. *See, e.g.*, CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 179–80 (2007) (discussing how "the top uniformed lawyers . . . erupted" over memorandums that concluded that "it would be lawful to inflict cruel, inhuman, and degrading treatment on Guantánamo detainees, and that the anti-torture statute 'does not apply to the conduct of U.S. personnel' at Guantánamo").

I think it is important to understand that military lawyers raised the concerns at times when it was hardly popular to do so and at a time when the nation was in the grip of what even Philippe Sands concedes was a fear of further attacks that was "palpable and real."[27] Today, as a result of legislation that followed these disputes, the ability of military lawyers to provide independent legal advice without interference is protected by law.[28] That was not, however, the case before 2004.

Indeed, it is remarkable how much times have changed. No doubt, many of you recall the now infamous Charles "Cully" Stimson episode where the former Deputy Assistant Secretary of Defense for Detainee Affairs was rightly excoriated for suggesting that business clients should bring pressure on their civilian law firms to abandon representation of detainees. The *Washington Post* editorialized, appropriately enough, that the lawyers were "upholding the highest ethical traditions of the bar by taking on the most unpopular of defendants."[29]

While they were certainly "upholding the highest ethical traditions of the bar," I am not so sure that defending detainees is all that unpopular these days. In May of 2008, a Seattle newspaper reported the following from a civilian lawyer representing a detainee:

> "I had always worried that we would get some input from clients that was less than supportive," [the defense counsel] said. "But we must have gotten 10 e-mails, phone calls, personal contacts from Fortune 500 companies that said the opposite. One big client said, 'That makes me want to send you more work—not less.'"[30]

I would suggest, however, that such popularity could be quite fragile. If we have another horrific incident along the lines of 9/11—as many experts predict will happen—or even one much less devastating, I believe that public opinion could change rapidly and radically.

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27. SANDS, *supra* note 21, at 224.

28. *See* 10 U.S.C. § 8037(f) (2006).

29. Editorial, *Unveiled Threats: A Bush Appointee's Crude Gambit on Detainees' Legal Rights*, WASH. POST, Jan. 12, 2007, at A18.

30. Paul Shukovsky, *Firm's Unlikely Client: Bin Laden's Ex-Driver Seattle Lawyers Taking on Bush, Guantanamo*, SEATTLE POST-INTELLIGENCER, May 27, 2008, at A1 (quoting Harry Schneider).

How will we, as lawyers, react? I say all this to highlight that no set of ethical rules or legislation is effective absent the moral courage to speak truth to power when necessary and appropriate. In the military, physical courage traditionally defines a warrior; however, in the future it may well change.

Although it is certainly true that national security law practitioners—both military and civilian—are finding themselves in harm's way today,[31] duty and ethical responsibility make further demands. The Air Force Court of Criminal Appeals made the following observation in a somewhat different context in a 1990 case:

> [W]e opine that there are two kinds of courage involved in the profession of arms and the profession of law. On the one hand, many are called upon for physical courage. On the other hand, judges are called upon from time to time for moral courage—the courage to subordinate a personal philosophy of the law or private distaste . . . to decide an issue logically and dispassionately.[32]

I think what the court said about judges must be extended to the whole national security law practitioner community. We must steel ourselves for the day when we must make hard, unpopular decisions that are open to widespread dispute because of the passions of the day.

This is not to say that we should not aggressively seek proper methodologies to safeguard our nation; after all, as Justice Jackson wrote in *Terminiello v. Chicago*,[33] the Constitution is not a "suicide pact."[34] Difficult accommodations must be made to address legitimate security needs in the context of preserving individuals' rights. As the late Supreme Court Justice William R. Rehnquist put it:

> In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail.[35]

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31. *See, e.g.*, Bill Graham, *Locals Mourn Army Major*, KANSAS CITY STAR, Jan. 12, 2006, at B1; James V. Grimaldi, *Army's JAG Corps Deals with Reality of War in Iraq*, WASH. POST, Nov. 17, 2003, at E1.

32. United States v. Stidman, 29 M.J. 999, 1002 (A.F.C.M.R. 1990).

33. 337 U.S. 1 (1949).

34. *Id.* at 37 (Jackson, J., dissenting).

35. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 222–23 (1998).

Still, the Constitution is also not a blank check. Americans understand that there is a sliding scale at work, where security may be sacrificed for freedom and individual rights, and—sometimes—vice versa. The Supreme Court's recent decision overturning the District of Columbia's gun ban will no doubt result in the deaths of innocent people as, inevitably, criminals will have easier access to weapons.[36] This is the price we pay for our way of life and its emphasis on individual rights and freedoms.

As lawyers, probably as much as any profession, we are in the business of telling our clients what they need to hear as opposed to necessarily what they want to hear. I think that perhaps the greatest ethical lesson since 9/11 is that lawyers must be prepared to give that needed, albeit unwanted, advice at times when it is least personally opportune. Yes, those that stood up in the past have been largely vindicated, and those that wrote the convoluted legal opinions that sought to justify what is now generally considered wrong have been mostly vilified. But even Sands concedes that "it will be said that these lawyers acted in what they thought to be the best interests of the country."[37]

I would suggest that we cannot necessarily count on vindication given the wholly unpredictable nature of the issues that could arise in the future. The real measure of our character and, indeed, our ethics is when we must do the right thing under circumstances where there will clearly be a heavy personal cost. We may find ourselves alone. But, it's in those defining moments where true courage is found.

Accordingly, I would invite your attention to the remarks of another lawyer who had to make hard, wartime decisions, Abraham Lincoln. At the height of the Civil War in 1863 he said: "I desire to so conduct the affairs of this Administration that if, at the end, when I come to lay down the reins of power, I have lost every other friend on earth, I shall at least have one friend left, and that friend shall be down inside of me."[38] Those are certainly our watchwords for an uncertain future.

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36. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2854–55 (2008) (Breyer, J., dissenting).

37. SANDS, *supra* note 21, at 230.

38. IDA M. TARBELL, 2 THE LIFE OF ABRAHAM LINCOLN 175 (Lincoln Mem'l Ass'n 1900).