

Remarks to the 2009 Samuel Dash Conference on Human Rights Rule of Law in the Context of Military Interventions¹

*Mr. Jeh Johnson, General Counsel for the Department of Defense, presented the following comments, in his individual capacity, as the keynote address at the 2009 Sam Dash Conference on Human Rights.² This year's conference, titled the Rule of Law in the Context of Military Interventions, was co-sponsored by the Georgetown University Law Center, the University of Virginia School of Law, and The Judge Advocate General's Legal Center and School, U.S. Army. "More than 70 men and women in the U.S. armed forces—wearing nearly every type of military uniform from dress blues to army fatigues—were among the more than 200 attendees who participated."³ Participants heard from three panels, comprised of military servicemembers, U.S. government interagency civilian personnel, non-governmental organization representatives, and academics, along with a lunch address from Tom Ricks, a Washington Post reporter and best-selling author on the Iraq war.⁴ The panels covered the following topics: *Military Involvement in Rule of Law Activities: Boots on the Ground*; *The Institutional Approach to Rule of Law: Whose Job Is It Anyway?*; and *Military Involvement in the Rule of Law: Surveying the Risks and Reasons*. With this background, Mr. Johnson capped off day one of the conference by providing insights on what the rule of law means.*

Jeh Charles Johnson⁵

¹ The Judge Advocate General's Legal Center and School (TJAGLCS) would like to extend its thanks to the Dash family for their support to Georgetown University's Human Rights Institute which made this conference possible. These remarks were delivered on 19 March 2009 by the keynote speaker, Jeh Charles Johnson at Georgetown University to the 2009 Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions. It is sponsored by the Human Rights Institute at Georgetown Law and the Center for American Progress.

Mr. Sam Dash was a extraordinarily successful lawyer whose accomplishments, while too numerous to detail, include: ethics adviser to independent counsel Kenneth Starr during in the Whitewater Investigation; chief counsel to the Senate Watergate Committee; member of the Board of Directors for the International League of Human Rights; trial attorney, partner with various Philadelphia firms, and faculty of Georgetown University Law Center. His accomplishments are no surprise considering he was a member of the Greatest Generation who enlisted at age eighteen and served in Italy during World War II as a bombardier navigator in the Army Air Corps. For his service and his contributions which made this conference possible, TJAGLCS extends their appreciation to Mrs. Sara Dash and their daughters, Judi and Rachel.

² Webcast: Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions, <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=772> (Georgetown Univ. Law Ctr. 2009).

³ Ann W. Parks, Dash Conference Examines the Military's Role in the Rule of Law, <http://www.law.georgetown.edu/news/webstory/3.25.09.html> (last visited Apr. 12, 2009).

⁴ Mr. Ricks is author of *Fiasco: The American Military Adventure in Iraq (2006)* and *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006–2008 (2009)*.

⁵ Jeh Charles Johnson was appointed General Counsel of the Department of Defense on 10 February 2009, following nomination and confirmation by the Senate. In this capacity, he serves as the chief legal officer of the Department of Defense and the legal adviser to the Secretary of Defense.

Mr. Johnson's legal career has been a mixture of private practice and distinguished public service. Mr. Johnson began his career in public service as an Assistant U.S. Attorney in the Southern District of New York, where he prosecuted public corruption cases. From, 1989–1991, as a federal prosecutor, Mr. Johnson tried twelve cases and argued eleven appeals. He then moved on to become a successful trial lawyer in private practice at the New York City-based law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP. While at Paul Weiss, he personally tried some of the highest stakes commercial cases of modern times, for corporate clients such as Armstrong World Industries, Citigroup and Salomon Smith Barney. In 2004, Mr. Johnson was elected a Fellow in the prestigious American College of Trial Lawyers.

In October 1998, President Clinton appointed Mr. Johnson to be General Counsel of the Department of the Air Force following nomination and confirmation by the Senate. He served in that position for twenty-seven months and returned to private law practice at Paul Weiss in January 2001.

Returning to private practice, Mr. Johnson was active in numerous civil and professional activities. From 2001–2004, he chaired the Judiciary Committee of the New York City Bar Association, which rates and approves all the federal, state and local judges in New York City. Mr. Johnson is also a member of the Council on Foreign Relations, and was a director or trustee of Adelphi University, the Federal Bar Council, the New York Community Trust, the Fund for Modern Courts, the Legal Aid Society, the Lawyers Committee for Civil Rights Under Law, the New York City Bar Fund, Inc., the Vera Institute, the New York Hall of Science, and the Film Society of Lincoln Theater. He also served on the Board of Governors of the Franklin & Eleanor Roosevelt Institute from 2007–2009.

In January 2007, Mr. Johnson was one of seven individuals nominated by the New York State Commission on Judicial Nominations to be Chief Judge of New York State. The governor reappointed the incumbent, Judith Kaye, though Mr. Johnson was rated well qualified for the position by the New York State Bar Association.

In early 2007, Mr. Johnson was recruited by Senator Barack Obama to become part of the Senator's presidential campaign. For the next twenty-one months, Mr. Johnson was involved in the campaign as an advisor on national security and foreign policy matters, and as a member of the campaign's national finance committee. During that time, Mr. Johnson also made numerous surrogate TV appearances for the campaign on MSNBC, Fox, NBC, and other networks.

Thank you for inviting me to be your keynote speaker. The topic of this conference is the role of the military in promoting the rule of law. The topic is a timely one for me because I was in Iraq and Afghanistan just two weeks ago, where I observed first-hand our efforts in those countries. My remarks this evening are my own, and do not reflect official Department of Defense or U.S. Government policy.

That said, promoting the rule of law is in fact one of the cornerstones of the national security policy of the new Administration, and is one of the reasons I joined this Administration, because I believe that the concept is a necessary part of the effort to combat international terrorism.

At the outset, it should be noted that reference to the rule of law means different things in different contexts, and we have to be careful how we use it.

The term has a political connotation, and carries some political baggage. To many, rule of law sounds a conservative theme. Some old enough to remember Richard Nixon's "Law and Order" society of the late 1960s, bristle at the term. During the campaign, I had a debate with an old-line ACLU attorney who did not like the term because it suggested to him the image of an authoritarian government, love it or leave it, a requirement that all swear allegiance to "the law" no matter what, and that it is disloyal or unpatriotic ever to want to change it through public advocacy or peaceful civil disobedience.

Obviously, that is not what we mean.

Some of you have heard me talk about a chapter from my own family history, the so-called Freeman Field Mutiny. I had two uncles who were Tuskegee Airmen. One of them, Lieutenant Robert B. Johnson, was a bombardier navigator in the Army Air Corps assigned to Freeman Field in Indiana in April 1945. The following is my recollection of published accounts with, I am sure, a bit of family folklore in between. At the time, the base commander had a rule requiring that the officers' club on base be white only. Lieutenant Johnson and about 100 other Tuskegee Airmen on base said no to that, and demanded entry into the club. They were ordered to leave. The next day the base commander asked all officers on base to sign a document acknowledging awareness of the rule that the officers' club was segregated. The Tuskegee Airmen refused to sign. Next, the commander, armed with a legal opinion from an Army lawyer, rounded up all the Tuskegee Airmen and told them it was a time of war, that it was a capital offense to violate an order during a time of war, and again ordered them to sign. And, again, they refused.

For their disobedience, my uncle and the other colored Airmen were sent to a military prison in Kentucky to be confined alongside German POWs (prior to passage of the law that prohibited such a thing). Eventually, General Marshall learned of the incident and told the base commander to knock it off. In that instance, who was promoting the rule of law? The base commander, armed with his base rule and a supporting legal opinion from an JAG, or my uncle, armed only with the idealistic notion of what the Equal Protection Clause should be, and eventually became?

My point here is that, for Americans, reference to the rule of law can be complicated, annotated by references in history such as this one. Reference to the rule of law is a good bumper-sticker message, but we need to be careful with it because it means different things in different contexts.

In Iraq, our rule of law initiatives have largely involved reviving the pre-Saddam Hussein system, including more progressive measures to protect individual rights.

In Afghanistan, our efforts are nothing short of creating a system where in many places none exists. From 1996 to 2001, Afghanistan simply had no functioning, legitimate government.

Domestically, reference to the rule of law in last year's political debate, as a goal for our new administration, and as one of my own personal goals in office, means respect, by the most powerful in our government, for the laws that we as a society create for ourselves—as a weapon to gain credibility and the moral high ground in the international struggle against terrorists.

In these remarks I will discuss all three.

Following the election, Mr. Johnson served on President-Elect Obama's transition team, and was then publicly designated by the President-Elect for nomination to the position of General Counsel of the Department of Defense on 8 January 2009, followed by formal nomination on 20 January 2009, and confirmation by the Senate on 9 February 2009.

Mr. Johnson is a member in good standing of the bars of New York State and the District of Columbia.

Shortly before the Iraq war was launched in 2003, Colin Powell reportedly warned President Bush of the so-called Pottery Barn Rule: “You Break it, You Own it.” When we go into a sovereign nation and push out its ruling government, we assume a moral obligation to the people there, who, as a result of our actions, may find themselves with no army, no police, and no running water or electricity. The Pottery Barn Rule is also codified in international law, in Article 43 of the Fourth Hague Convention:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁶

After six years and much cost in lives and tax dollars, it appears that we have turned the corner in Iraq. Thanks to the dedication and bravery of our military, levels of violence are way down, to a fraction of what they once were as recently as two years ago.

While in Iraq one of the most memorable experiences I had was visiting that nation’s Chief Justice Medhat al-Mahmoud. Appointed by the Coalition Provisional Authority in Iraq, Chief Justice Medhat remains in office and is regarded by many as a courageous leader of a judiciary that has made great progress toward independence and credibility as part of the new government. Chief Justice Medhat, personally, deserves much of the credit for that progress. I met with the Chief Justice late one night in the heavily-guarded apartment building where he lives, and he described to me with pride the history of the courts in Iraq and the progress made.

Our Army Corps of Engineers has executed numerous construction projects throughout Iraq supporting the courts, police and corrections services, and our Judge Advocates in Iraq have been instrumental in helping to coordinate our overall rule of law efforts there, in addition to their normal duties as lawyers for the commanders there.

A word about our JAGs. In Iraq and Afghanistan they work long hours in difficult conditions. In the corporate law world I come from, many of us are accustomed to comfortable surroundings to cushion the demands of practice. In Kabul, I visited the law office of the staff judge advocate there. The hours are from about 0800 to 2200 at night. The windows were boarded up because the glass had shattered from a nearby suicide bomb several weeks before. A twenty-one year old Army reservist died of her wounds from that blast while I was there. I met with the JAGs there and probed to learn if there was anything I could provide or advocate for back home that could make their life any easier. Are you having trouble meeting your CLE requirements? Can I get you some relief from bar association dues? In the middle of that very dangerous place, forward deployed in those conditions, no one wanted to complain about anything.

The government in Iraq has evolved to the point where last year it was in a position to negotiate with us a security agreement that requires that all U.S. Forces be out of the country by the end of 2011.

In Iraq we have turned the corner, and we have an exit strategy.

In Afghanistan our efforts are nowhere near this far along, and await direction as part of an overall strategy that the Administration is currently in the process of developing. Our rule of law initiatives there are scattered and have been under-resourced when compared with our activities in Iraq, and I fear that a successful effort in Afghanistan will require much more than our effort in Iraq.

While in Afghanistan I was struck by the degree of poverty and the lack of an infrastructure. The average life expectancy of an Afghan male is forty-four years. Even in the urban center of Kabul, in much of that city there is no electricity, no running water, and no drainage. Except for the dusty automobiles, a street scene in Kabul in March 2009 could be mistaken for March 1909 or March 1809. Donkeys, skinned goats, mud everywhere. On the perimeter of our air base in Baghram are mud huts where people live and children herd goats and play amidst old land mines buried in the fields from the Russian invasion. Not far away, one can also see the rusted remains of Russian tanks and trucks from that occupation—a stark reminder of the hazards for any outsiders there.

Some have said that Afghanistan is not really a nation; it is more a series of tribes that happen to reside within a national border. Most of the population is indeed tribal, and is largely untouched by any system of laws as we know them, or a court

⁶ Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, U.S.T.S. 539.

system. In tribal Afghanistan, the punishment and compensation for a felony committed by a member of one tribe visited on another tribe is resolved by the tribal elders, and may involve the transfer of a young girl into a forced marriage in the victim tribe. You and I would regard that as a crude form of alternative dispute resolution, or ADR—but in Afghanistan this is *not* the alternative, it is the cultural norm. The *courts* are the alternative, for both criminal offenses and civil disputes, but even when the courts are utilized, corruption is often part of the package.

In Afghanistan the Ministry of Defense counterpart whom I met with does not have a law degree from a graduate school, and the newly formed bar association in Afghanistan has, I'm told, only several hundred members in it.

On top of all this, whatever wealth there is in Afghanistan comes about from the illegal drug trade.

Any policy for a new U.S. direction in Afghanistan must take account of these harsh realities, as well as the harsh lessons learned from our recent experience in Iraq.

Whether in Iraq or Afghanistan, our rule of law efforts must be constrained by the art of the possible, sensitivity to the culture of the country, and the realization that much of *our* laws and system of justice reflect *our* Western culture, and not *their* culture.

The other thing we must be sensitive to is the very real possibility that a soldier with a gun and a uniform may not be the ideal messenger for change. Rule of law initiatives must be an interagency process, involving our partners at State and Justice.

Finally, there is the rule of law as it pertains to our own nation, and how we project ourselves on the world stage. It hangs over our first two initiatives in Iraq and Afghanistan, and all that we do to combat international terrorism. Like our President, I believe we must lead *not* by the example of our power, but by the power of our example, and that human rights abuses and failure by our own government to follow the rule of law actually harm our national security interests, and serve as a recruitment tool for al Qaeda and related terrorist organizations in the communities in which they recruit.

As a result of our broad assertions of executive authority, we also find ourselves in a situation where the executive's actions are today actually given less deference in the courts, and as we are forced to justify our detention decisions to skeptical judges (many of whom were appointed by the prior administration) in hundreds of cases in litigation.

This is why this administration has made adherence to the rule of law a cornerstone of our national security policy, in the international struggle against terrorism.

Our professional war fighters teach that terrorists will not be defeated by conventional means; they will not surrender by signing a peace treaty on the deck of a battleship. We combat terrorists by occupying the moral high ground, by marginalizing and discrediting the extremists in the communities in which they exist, thereby limiting their ability to recruit in those communities. The strategy is simple: capture or kill those who go through the training camps and take up arms against us, at a rate faster than their leaders can recruit new ones. Human rights abuses at the hands of our government constitute self-inflicted wounds because they bolster enemy recruitment and undermine the strategy.

This is one of my guiding principles in office, and I am pleased that on his second full day in office President Obama signed the three executive orders closing Guantanamo, and appointed task forces to find a new detention policy and a new interrogation policy for our government. Those task forces have begun their work, and the senior most officials of our government, the Attorney General, Secretary Gates, Secretary Clinton, Director Blair, and Director Panetta are personally involved in this effort.

Here, I want to spend a minute on the filing we made in court last Friday concerning the definition of "enemy combatant" that we had been using to defend the habeas cases brought by Guantanamo detainees. Three judges in those cases ordered the Department of Justice to inform them whether the new administration wished to make any refinements to the definition, and that we had to tell them this by March 13. We took them up on the invitation. *The New York Times* reported that the change we made appears largely cosmetic.

But they fail to appreciate the significance of what we did, which reflects the President's personal views on the subject. The first three words of the old definition reflected the problem with it: "At a minimum, the President's power to detain includes the ability to detain as enemy combatants those individuals who were part of, or supporting, forces engaged in hostilities against the United States or its coalition partners and allies."

To be sure, the President has the authority as Commander-in-Chief to direct military actions without congressional authorization in times of emergency or exigent threat to American lives or national security. In regard to detention, however, the new definition by its terms relies on the authority of the President to detain rooted in authorizations granted by Congress, in this case the authorization for the use of military force passed shortly after 9/11 in 2001 (as opposed to the Commander-in-Chief authority in the Constitution), as informed by international law embodied in the laws of war. This is in accord with the President's personal views of his authority.

The new definition also reflects our broader, new approach to the role of the law—the rule of law—in our society. The “just trust us” approach to empowering senior government officials to decide whether an individual enjoys the protections of our laws, based entirely upon the discretion of that individual to label you an “enemy combatant” or not, is fraught with problems. Even when that system is populated with senior officials with the best of intentions, those individuals, in the short term, eventually resign, lose elections, or serve out their terms. It is basic human nature that broad government authority conferred upon some will be abused by others. In my lifetime, in the 1950s and 60s, before the label “enemy combatant” became commonplace in our vocabulary, civil liberties and rights of privacy were lost for many simply upon the application by some in our government of the term “dangerous Communist subversive.” As I told you at the outset of this speech, my own uncle became a “detainee,” care of our U.S. military, simply because a JAG, in a time of war, found within the law the discretion to punish someone who dared assert his basic right to equal treatment in this country.

So, in this speech I have described three separate efforts in support of the rule of law: Our efforts in Iraq and Afghanistan are vital. But, the last effort is the most important to our long-term security and peace.

Thank you for listening.