YALE LAW & POLICY REVIEW

National Security Law, Lawyers, and Lawyering in the Obama Administration

Dean's Lecture at Yale Law School February 22, 2012

*Jeh Charles Johnson**

Thank you for this invitation, and thank you, in particular, Professor Hathaway,[1] for your work in the national security legal field. Since we first met last fall, I have appreciated your scholarship and our growing friendship. I was pleased to welcome you to the Pentagon in December to introduce you to a number of my civilian and military colleagues there. I would like to count on you as someone with whom I can consult from time to time on the very difficult legal issues we wrestle with in national security.

I am a student of history and, as you will hear throughout my remarks tonight, I like to try to put things in the broader perspective.

I have been General Counsel of the Department of Defense now for exactly three years and twelve days, having been appointed to that position by President Obama on February 10, 2009. I have been on an incredible journey with Barack Obama for longer than that, over five years, going back to November 2006, when he recruited me to the presidential campaign he was about to launch. I remember thinking then, "This is a long-shot, but it will be exciting, historic, and how many times in my life will someone personally ask me to help him become President?" For the young people here, no matter your political affiliation, I can tell you that involvement in a presidential campaign was exciting—not for the chance to personally interact with the candidate or help develop his positions on issues; the best experiences were canvassing door to door with my kids in northwest Des Moines and northeast Philadelphia; personally observing the Iowa caucus take place in a high school cafeteria; and passing out leaflets at the train station in my hometown of Montclair, New Jersey. Involve-

* General Counsel, Department of Defense, 2009-2012. This Essay is a reprint of Mr. Johnson's Dean's Lecture at Yale Law School delivered on February 22, 2012.

1. Oona A. Hathaway is the Gerard C. and Bernice Latrobe Smith Professor of International Law and Director of the Center for Global Legal Challenges at Yale Law School.

ment in the Obama campaign in 2007-2008 was one of the highlights of my personal life.

Involvement in the Obama Administration has been the highlight of my professional life. Day to day, the job I occupy is all at once interesting, challenging, and frustrating. But, when I take a step back and look at the larger picture, I realize that I have witnessed many transformative events in national security over the last three years.

We have focused our efforts on al Qaeda and put that group on a path to defeat. We found bin Laden. Scores of other senior members of al Qaeda have been killed or captured. We have taken the fight to al Qaeda: where they plot, where they meet, where they plan, and where they train to export terrorism to the United States. Though the fight against al Qaeda is not over, and multiple arms of our government remain vigilant in the effort to hunt down those who want to do harm to Americans, counterterrorism experts state publicly that al Qaeda's senior leadership is today severely crippled and degraded. Thanks to the extraordinary sacrifices of our men and women in uniform, we have responsibly ended the combat mission in Iraq. We are making significant progress in Afghanistan and have begun a transition to Afghan-led responsibility for security there. We have applied the standards of the Army Field Manual to all interrogations conducted by the federal government in the context of armed conflict.[2] We worked with the Congress to bring about a number of reforms to military commissions, reflected in the Military Commissions Act of 2009[3] and the new Manual for Military Commissions.[4] By law, use of statements obtained by cruel, inhuman, and degrading treatment—what was once the most controversial aspect of military commissions—is now prohibited. We are working to make that system a more transparent one by reforming the rules for press access to military commission proceedings, establishing closed circuit TV, and a new public website for the commissions system.[5] We have ended "Don't Ask, Don't Tell," which I discussed the last time I was here.[6] Finally, we have, in these times of fiscal austerity, embarked upon a plan to transform the military to a more agile, flexible, rapidly deployable and technologically advanced force, which in-

2. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

3. Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2575 (2009) (codified as amended at 10 U.S.C. § 948b(c) (2012)).

4. *Manual for Military Commissions: United States*, Dep't of Defense (2010), http://www.defense.gov/news/d2010manual.pdf.

5. Office of Military Commissions, Military Commissions, http://www.mc.mil (last visited Dec. 1, 2012).

6. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321 (repealing 10 U.S.C. § 654).

volves reducing the size of the active duty Army and Marine Corps and the defense budget by $487 billion over ten years.[7]

Perhaps the best part of my job is that I work in the national security field with, truly, some of the best and brightest lawyers in the country. In this illustrious and credentialed group, I often ask myself "how did I get here?" Many in this group are graduates of this law school: my special assistant and Navy reservist Brodi Kemp, who is here with me today (class of '04); Caroline Krass at Office of Legal Counsel (OLC) (class of '93); Dan Koffsky at OLC (class of '78); Marty Lederman, formerly of OLC (class of '88); Greg Craig, the former White House Counsel (class of '72); Bob Litt, General Counsel of Office of the Director of National Intelligence (class of '76); Retired Marine Colonel Bill Lietzau (class of '89); Beth Brinkman at the Department of Justice (class of '85); Sarah Cleveland, formerly at State Legal (class of '92); David Pozen at State Legal (class of '08); Steve Pomper (class of '93), and my Deputy Bob Easton (class of '90). I also benefit from working with a number of Yale law students as part of my office's internship and externship programs.

Last, but not least, your former Dean. Like many in this room, I count myself a student of Harold Koh. Within the Obama Administration, Harold often reminds us of many of the things Barack Obama campaigned on in 2007-2008. As I wrote these remarks, I asked myself to settle on the one theme from the 2008 campaign that best represents what Harold has carried forward in his position as lawyer for the State Department. The answer was easy: "The United States must lead by the power of our example and not by the example of our power."

There have been press reports that, occasionally, Harold and I, and other lawyers within the Obama Administration, disagree from time to time on national security legal issues.[8] I confess, this is true, but it is also true that we actually agree on issues most of the time. The public should be reassured, not alarmed, to learn there is occasional disagreement and debate among lawyers within the executive branch of government.

From 2001 to 2004, while I was in private practice in New York City, I also chaired the Judiciary Committee of the New York City Bar Association, which rates all the nominees and candidates for federal, state, and local judicial office in New York City. In June 2002, our bar committee was in the awkward position of rejecting the very first candidate the new mayor's judicial screening committee had put forth for the family court in New York City. On very short notice, I was summoned to City Hall for a meeting with Mayor Michael Bloomberg and the chair of his judicial screening committee, who was called on to defend his committee's recommendation of the judge. The mayor wanted to

7. *See* Lisa Daniel & Karen Parris, *Budget Proposal Requests Smaller, More Modern, Agile Force*, Am. Forces Press Serv., Feb. 13, 2012, http://www.defense.gov/news/newsarticle.aspx?id=67167.

8. *See, e.g.*, Charlie Savage, *At White House, Weighing Limits of Terror Fight*, N.Y. Times, Sept. 15, 2011, http://www.nytimes.com/2011/09/16/us/white-house-weighs-limits-of-terror-fight.html.

know why our committees had come out differently. The meeting was extremely awkward, but I'll never forget what Mayor Bloomberg said to us: "If you guys always agree, somebody's not doing their job."

Knowing that we must subject our national security legal positions to other very smart lawyers, who will scrutinize and challenge them, has made us all work a lot harder to develop and refine those positions. On top of that, our clients are sophisticated consumers of legal advice. The President, the Vice President, the National Security Adviser, the Vice President's National Security Adviser, the Secretary of State, the Secretary of Defense, and the Secretary of Homeland Security are themselves all lawyers. They are not engaged in the practice of law, but in the presentation to them of our legal advice, any weakness in the logic chain will be seized upon and questioned immediately, usually with a statement that begins with the ominous preface, "I know I'm not supposed to play lawyer here, but . . . ."

By contrast, "group think" among lawyers is dangerous, because it makes us lazy and complacent in our thinking and can lead to bad results. Likewise, shutting your eyes and ears to the legal dissent and concerns of others can lead to disastrous consequences.

Before I was confirmed by the Senate for this job, Senator Carl Levin, the chairman of the Armed Services Committee, made sure that I read the committee's November 2008 report on the treatment and interrogation of detainees at Guantánamo.[9]

The report chronicles the failure of my predecessor in the Bush Administration to listen to the objections of the Judge Advocate General (JAG) leadership about enhanced interrogation techniques, the result of which was that the legal opinion of one lieutenant colonel, without more, carried the day as the legal endorsement for stress positions, the removal of clothing, and the use of phobias to interrogate detainees at Guantánamo Bay.[10]

Just before becoming President, Barack Obama told his transition team that the rule of law should be one of the cornerstones of national security in his Administration. In retrospect, I believe that President Obama made a conscious decision three years ago to bring into his Administration a group of strong lawyers who would reflect differing points of view. And, though it has made us all work a lot harder, I believe that over the last three years, the President has benefited from healthy and robust debate among the lawyers on his national security team, which has resulted in carefully delineated, pragmatic, credible, and sustainable judgments on some very difficult legal issues in the counterterrorism realm—judgments that, for the most part, are being accepted within the mainstream legal community and the courts.

This afternoon, I want to summarize for you, in this one speech, some of the basic legal principles that form the basis for the U.S. military's counterter-

9. *See* S. Comm. on Armed Servs., 110th Cong., Inquiry into the Treatment of Detainees in U.S. Custody (Nov. 20, 2008).

10. *Id.*

rorism efforts against al Qaeda and its associated forces. These are principles with which the top national security lawyers in our Administration broadly agree. My comments are general in nature about the U.S. military's legal authority, and I do not comment on any operation in particular.

First, in the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historical precedent, and traditional principles of statutory construction. Put another way, we must not make it up to suit the moment. Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy, and invite challenge. As I told the Heritage Foundation last October, overreaching with military power can result in national security setbacks, not gains.[11] Particularly, when we attempt to extend the reach of the military onto U.S. soil, the courts resist, consistent with our core values and our American heritage—reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a *posse comitatus* unless expressly authorized by Congress or the Constitution.[12]

Second, in the conflict against al Qaeda and its associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the Use of Military Force passed by Congress one week after 9/11.[13] The AUMF, as it is often called, is Congress's authorization to the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[14]

Ten years later, the AUMF remains on the books and it is still a viable authorization today.

In the detention context, we in the Obama Administration have interpreted this authority to include "those persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hos-

11. *See* Jeh Johnson, *Is More Detainee Legislation Needed?*, HERITAGE FOUND. (Oct. 18, 2011), http://www.heritage.org/events/2011/10/jeh-johnson.

12. *See* Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2012)).

13. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

14. *Id.*

tilities against the United States or its coalition partners."[15] This interpretation of our statutory authority has been adopted by the courts in the habeas cases brought by Guantánamo detainees.[16] In 2011, Congress joined the executive and judicial branches of government in embracing this interpretation when it codified it almost word-for-word in Section 1021 of this year's National Defense Authorization Act,[17] ten years after enactment of the original AUMF. (A point worth noting here: contrary to some reports, neither Section 1021, nor any other detainee-related provision in this year's Defense Authorization Act, creates or expands upon the authority for the military to detain a U.S. citizen.)

But, the AUMF, the statutory authorization from 2001, is not open ended. It does not authorize military force against anyone the executive labels a "terrorist." Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11 or associated forces.

Nor is the concept of an "associated force" an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context,[18] and it is based on the well-established concept of cobelligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last ten years, become more decentralized and relies more on associates to carry out its terrorist aims. An "associated force," as we interpret the phrase, has two characteristics: (1) it is an organized, armed group that has entered the fight alongside al Qaeda, and (2) it is a cobelligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an "associated force" is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.

Third, there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the "hot" battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate

15. *See* Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-0442, at 2 (D.D.C. March 13, 2009), http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

16. *See, e.g.*, Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); Awad v. Obama, 608 F.3d 1, 11-12 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

17. National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, 125 Stat. 1298 (2011).

18. *See, e.g.,* Barhoumi v. Obama, 609 F.3d 416, 432 (D.C. Cir. 2010); Hamlily v. Obama, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009); Gherebi v. Obama, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

force against the organizations and persons connected to the September 11th attacks—al Qaeda and the Taliban—without a geographic limitation. The legal point is important because, in fact, over the last ten years, al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.

However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe that we are in any "Global War on Terror," or that we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.

Fourth, I want to spend a moment on what some people refer to as "targeted killing." Here, I will largely repeat Harold's much-quoted address to the American Society of International Law in March 2010.[19] In an armed conflict, lethal force against known, individual members of the enemy is a longstanding and long-legal practice. What is new is that, with advances in technology, we are able to target military objectives with much more precision, to the point where we can identify, target, and strike a single military objective from great distances.

Should the legal assessment of targeting a single identifiable military objective be any different in 2012 than it was in 1943, when the U.S. Navy targeted and shot down over the Pacific the aircraft flying Admiral Yamamoto, the commander of the Japanese navy during World War II, with the specific intent of killing him? Should we take a dimmer view of the legality of lethal force directed against individual members of the enemy because modern technology makes our weapons more precise? As Harold stated two years ago, the rules that govern targeting do not turn on the type of weapons system used, and there is no prohibition under the law of war on the use of technologically advanced weapons systems in armed conflict, so long as they are employed in conformity with the law of war.[20] Advanced technology can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

On occasion, I read or hear a commentator loosely refer to lethal force against a valid military objective with the pejorative term "assassination." Like any American shaped by national events in 1963 and 1968, the term is to me one of the most repugnant in our vocabulary, and it should be rejected in this context. Under well-settled legal principles, lethal force against a valid *military* objective in an armed conflict is consistent with the law of war and does not, by definition, constitute an "assassination."

19. Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, The Obama Administration and International Law (Mar. 25, 2010) (transcript available at http://www.state.gov/s/l/releases/remarks/139119.htm).

20. *Id.*

Fifth, as I stated at the public meeting of the ABA Standing Committee on Law and National Security, belligerents who also happen to be U.S. citizens do not enjoy immunity where noncitizen belligerents are valid military objectives.[21] Reiterating principles from *Ex Parte Quirin* in 1942,[22] the Supreme Court in 2004 in *Hamdi* v. *Rumsfeld* stated that a "citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States."[23]

Sixth, contrary to the view of some, targeting decisions are not appropriate for submission to a court. In my view, they are core functions of the executive branch, and often require real-time decisions based on an evolving intelligence picture that only the executive branch may timely possess. I agree with Judge Bates of the federal district court in Washington, who ruled in 2010 that the judicial branch of government is simply not equipped to become involved in targeting decisions.[24] As I stated earlier in this address, within the executive branch, the views and opinions of the lawyers on the President's national security team are debated and heavily scrutinized; a legal review of the application of lethal force is the weightiest judgment a lawyer can make. (When these judgments start to become easy, it will be time for me to return to private law practice.)

Finally, as a student of history, I believe that those who govern today must ask ourselves how we will be judged ten, twenty, or fifty years from now. Our applications of law must stand the test of time, because, over the passage of time, what we find tolerable today may be condemned in the permanent pages of history tomorrow.

I'm going to tell one more story. There's a movie out now called *Red Tails* that reminds us all about the exploits and courage of the famed Tuskegee airmen of World War II.[25] In March 1945, about one hundred Tuskegee Airmen were sent to train at Freeman Field in Indiana. At the time, Army Regulation 210-10 prohibited segregated officers' clubs in the Army. Determined to continue a system of segregation despite this rule, the base commander devised two different officers' clubs: one for all the Tuskegee airmen "instructors" (all of whom happened to be white), and another for the Tuskegee airmen "trainees" (all of whom happened to be black). Over the course of two days in April 1945, sixty-one Tuskegee airmen were arrested for challenging the segregated clubs, in what is now known in the history books as the "Freeman Field Mutiny." Several days later, all the Tuskegee airmen on the base were rounded up, read the base

21. Jeh C. Johnson, Speech to the ABA Committee on Law and National Security (September 10, 2009), *in* 31 Am. Bar. Ass'n Nat'l Sec. L. Rep. 15 (2009), http://www.americanbar.org/content/dam/aba/publications/national_security_law_report/volume31_issue1.authcheckdam.pdf.

22. 317 U.S. 1 (1942).

23. 542 U.S. 507, 519 (2004) (internal quotation marks omitted).

24. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

25. Red Tails (Twentieth Century Fox 2012).

regulation, and told to sign a certification that they had read it and understood it. Every one of them refused to sign. Next, with the legal help of a JAG from First Air Force, every Tuskegee airman on base was interviewed one-by-one in the base legal office and given three choices: (1) sign the certification, (2) write and sign your own certification, or (3) be arrested for disobeying a direct order. Almost all of them, again, refused to sign.[26]

As a result, my uncle, Second Lieutenant Robert B. Johnson, and over one hundred other Tuskegee airmen became detainees of the U.S. military, arrested and charged with a violation of Article 64 of the Articles of War—disobeying a direct order in a time of war—a capital offense. Eventually, once the public learned of the episode, the Tuskegee airmen were released, but Lt. Johnson was denied the opportunity to serve in combat and given a letter of reprimand from the U.S. Army.

My legal colleagues and I who serve in government today will not surrender to the national security pressures of the moment. History shows that, under the banner of "national security," much damage can be done—to human beings, to our laws, to our credibility, and to our values. As I have said before, we must adopt legal positions that comport with common sense and fit well within the mainstream of legal thinking in the area, consistent with who we are as Americans.

I have talked today about legally sustainable and credible ways to wage war, not to win peace. All of us recognize that this should not be the normal way of things, and that the world is a better place when the United States does indeed lead by the power of an example and not by the example of its power.

In addition to my uncle, one of my personal heroes is my former law partner Ted Sorensen, who died a little over a year ago. Ted was John F. Kennedy's speechwriter, one of his closest advisors, and himself one of the most eloquent communicators of our time. In May 2004, Ted Sorensen gave one of the best speeches I've ever heard. It was right after the Abu Ghraib scandal broke. He said this, which I will never forget:

> Last week a family friend of an accused American guard in Iraq recited the atrocities inflicted by our enemies on Americans and asked: Must we be held to a different standard? My answer is YES. Not only because others expect it. We MUST hold ourselves to a different standard. Not only because God demands it, but because it serves our security. Our greatest strength has long been not merely our military might but our moral authority. Our surest protection against assault from abroad has been not all our guards, gates and guns or even our two oceans, but our essential goodness as a people.[27]

26. *See* John D. Murphy, The Freeman Field Mutiny: A Study in Leadership (Mar. 1997) (unpublished research paper, Air Command and Staff College), http://www.au.af.mil/au/awc/awcgate/acsc/97-0429.pdf.

27. Theodore Sorensen, Commencement Address at the New School University (May 21, 2004).

My goal here this afternoon was to inform and to educate. My other reason for being here is to appeal directly to the students, to ask that you think about public service in your career. Law students become trained in the law for many different reasons, with many different traits and interests. Some are naturally suited for transactions, to help structure deals. Others want to be in the courtroom and love advocacy. There are so many facets of the law—and people who want to pursue them—that help make our profession great.

Over the years, one of my big disappointments is to see a law student or young lawyer who went to law school motivated by a desire for public service, but who gave up the pursuit because of student loans, lack of a readily available opportunity, or the lure of a large law firm and a large starting salary. To those law students who are interested in public service, I hope that you do not lose that interest as your career progresses. We need talented lawyers serving in government at all levels. You will find every day interesting and rewarding, and, in the end, you and others will assess the sum total of your legal career, not by what you got, but by what you gave.