

SPEECH

WHAT PROCESS IS DUE? THE ROLE OF JUDGING IN NATIONAL SECURITY

*The Honorable James E. Baker**

I would like to start by thanking Judge Garth, the Garth Lecture Committee, Dean Chen, and Rutgers for the opportunity of appearing here today. I am especially honored to do so as part of the School's Veterans Day Commemoration.

Omar Bradley referred to Veterans Day as our "Day of Conscience."¹ He also spoke about the connection between security and liberty. "To defend democracy against attack, men must value freedom. And to value freedom they must benefit by it in happier more secure lives"² Thus, it is fitting that this lecture is named for Judge Garth, who as a soldier, lawyer, and judge has demonstrated every day of his adult life that security and liberty are partners.

On Veterans Day, we recognize and celebrate uniformed service as well as remind ourselves about the human costs of war. However, service comes in many forms. As I like to say when I hire law clerks, I am partial to anything with the word Corps in it: Marine Corps, Peace Corps, and AmeriCorps. Harvey Rishikof, in my view, embodies the virtues of someone who serves the law and his country, outside of uniform. Judge Garth and Harvey Rishikof wear the uniform of human dignity through law.

INTRODUCTION

I would like to start my presentation in the usual judicial manner—with a confession. My confession is that I wrote a long and boring speech about the role of courts in national security. But as I was preparing for oral argument I realized that my brief was a bit too judicious and devoid of personality. It was a book report on the traditional role of courts and some emerging post-9/11 trends.

Alas, for my sake, it occurred to me this past weekend that I should worry less about structure and thematic development and more

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1. General Omar N. Bradley, Armistice Day Address (Nov. 19, 1948), *reprinted in* AMY A. KASS & LEON KASS, VETERANS DAY: THE AMERICAN CALENDAR 8-12 (2012).

2. *Id.* at 11.

about telling you what it is I want to tell you, even if it does not fit together like a puzzle. It also happens that two of the four things I want to talk about relate to Veterans Day.

I will start by defining national security law in order to ask two questions: Should national security lawyers act more like judges? Conversely, should judges act more like national security lawyers? These are, of course, rhetorical questions. The real question is: In what way? What do judges bring to the subject, which national security lawyers should do more to emulate? And, what do national security lawyers bring to the fray that would assist judges? One answer to this last question, but not the only, is mastery of intelligence process and product.

I will then turn to the topic of military justice. Military justice is critical to national security because of its role in upholding good order and discipline. It also plays an important, perhaps disproportionate role, in the current discussion about sexual assault.

I will close with a discussion about judges and military service. My two not so hidden agendas are: First, to tell you stories about two judges I admire and the role of military service in their lives. And, second, in telling their stories, to remind us all about the importance of civil-military connections. In a democracy, the military and civil society should be connected, not distinct. A strong civil connection is better for the military. A strong military connection is better for civil society, including the judiciary.

THE PURPOSE OF NATIONAL SECURITY LAW

Let me start with a definition. By national security law, I am referring to U.S., international, and foreign law that impacts U.S. foreign relations, defense, and homeland security.

National security law serves three purposes. It provides the substantive authority to act. This is intuitive. Less intuitive is the importance of how that authority is described and conveyed. Where the law is clear and clearly invoked, the persons in the field, be they diplomats, intelligence officers, or military commanders, will take greater risks.

Next, national security law provides essential process. By process I mean Constitutional process as found in the separation of powers and federalism; I mean statutory process, as found in the National Security Act³ or the Foreign Intelligence Surveillance Act;⁴ and, I mean, executive process, as found in Executive Order 13,470,⁵ for example,

3. 50 U.S.C. § 3002 (2012).

4. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811 (2012)).

5. Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008).

but also in a myriad of other internal memoranda and directives, both classified and unclassified. As I will describe shortly, good process leads to better results. Bad process does not. The advantage of good process embedded in law is that it creates a normative expectation that guides in times of crisis when the temptation is strongest to deviate.

And, finally, national security law provides essential security as well as legal values. Let me give you three examples of what I mean. The humane treatment of prisoners of war is required by law, but it also is a more likely way to obtain informational dividends from those who are questioned. The proportionate and discriminate use of force is required by the law of armed conflict, but adherence to these legal principles is also essential to military success in the context of counterterrorism and counterinsurgency where the support, or at least neutrality, of the impacted population is essential. Finally, in constitutional terms, where there is shared authority and both political branches act together, the President will act at the zenith of his authority in the national security sphere. This is the *Youngstown* legal paradigm.⁶ But it is also a security virtue, if one believes, as I do, that serious threats warrant the potential and sustained use of America's arsenal of national security tools.

Most national security law is practiced within the executive branch. In turn, this means that law and the values of the law depend on executive lawyers: judge advocates, not judges; general counsel, not chief justices. So, too, the core constitutional issues are of the sort resolved through politics and legislation, not the courts. The ultimate question remains: What can the President do, and when can he do it unilaterally?

The Executive is the first branch of government when it comes to national security. The Judiciary is third. This is a good thing. The judiciary is not suited to address some of the normative aspects of national security law. This is not because judges are incapable of doing so, as some statements of the political question doctrine suggest, but because judicial process is inapt to a practice that is characterized by the necessity of timely and meaningful advice addressed to novel issues involving life and death circumstances under outrageous time constraints and pressure with incomplete facts. Moreover, appellate courts as pure oligarchies are poor modalities with which to make timely decisions. That being said, judges, but not the judicial branch, are specially suited to address some of the pitfalls of national security process.

Good process leads to better security results. That is because good process allows you to address multiple crises, identifies dissent, allows

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

for mitigation, provides unity of command and purpose, and includes the meaningful and honorable application of law.

Good process also addresses the pathologies of national security decision-making: Secrecy, speed, the Jackson Principle, and the national security imperative. What is meant by speed and secrecy is self-evident. “The Jackson Principle” refers to Justice Jackson’s *Youngstown* observation that the tendency in the Executive Branch is to focus on the immediate and transient results of actions and not their long-term effects, or as Jackson said, their enduring consequences to the Republic.⁷ Where national security is concerned, and especially U.S. lives, that tendency can be overwhelming, the pressure on the President to solve the problem matched only, perhaps, by the pressure on the lawyer to get to yes.

“The National Security Imperative” describes the tendency of security specialists to reach to the limit of the law, if not beyond. Consider: if you are searching for a mole in the Central Intelligence Agency (CIA), the counterintelligence specialist would rather investigate twenty innocent persons too many than fall one spy short. Of course, I am describing James Jesus Angleton, the head of CIA’s Counterintelligence Staff for much of the Cold War, who decimated the Russia Division looking for moles.⁸ But I am also describing the more successful pursuit of Aldrich Ames, which you may know from the television drama, “The Assets.”⁹ Likewise, if you are trying to prevent a terrorist attack, you will want to collect more data rather than less. In short, the specialist confronted with a threat will err on the side of doing. We should want this. We should also want lawyers to understand this dynamic and get there first with timely, meaningful, and contextual process that will guide the specialist back to the core mission, to the law, and to the most effective use of finite resources. There must be an “Angleton Circuit Breaker.”

SHOULD NATIONAL SECURITY LAWYERS ACT MORE LIKE JUDGES?

Interestingly, Judges are specially suited to address some of these pathologies. Judges are slow and deliberate. Judges are independent,

7. “The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 592 (1952) (Jackson, J., concurring).

8. SANDRA GRIMES & JEANNE VERTEFEUILLE, *CIRCLE OF TREASON: A CIA ACCOUNT OF TRAITOR ALDRICH AMES AND THE MEN HE BETRAYED* (Naval Inst. Press 2012); TOM MANGOLD, *COLD WARRIOR: JAMES JESUS ANGLETON: THE CIA’S MASTER SPY HUNTER* (1991); Stephen Engelberg, *James Angleton, Counterintelligence Figure, Dies*, N.Y. TIMES, May 12, 1987, at A1, available at <http://www.nytimes.com/1987/05/12/obituaries/james-angleton-counterintelligence-figure-dies.html>.

9. Alessandra Stanley, *A Mole in Deepest Beige*, N.Y. TIMES, Jan. 2, 2014, at C1.

impartial, and insulated from the pressures of the moment, in part because the moment has usually passed by the time they take a look. All of which leads me to conclude that national security lawyers should act more like judges.

What does that mean?

Ask Questions: First, judges are good at asking questions and doing so with an independent perspective. That may be the essential judicial skill. In asking questions, judges check and validate facts. Judges also know, as school teachers and parents know, that there are two sides to every story and one should not decide the case until you hear both sides. National security lawyers would be wise to do the same.

More one hand-other hand analysis. Too often we see lawyers work back from yes, rather than forward by applying law to fact or policy proposal. The most glaring public example of this are the so-called “torture memos,” which are devoid of “other hand analysis,” legal policy consideration, skepticism, or curiosity. Some might say the same of the National Security Agency (NSA)’s metadata program under section 215 of the Patriot Act.¹⁰

What might one hand other hand analysis look like in the 215 context? It might look like Judge Pauley and Judge Leon addressing the constitutional challenges in the 2d and DC Circuits,¹¹ but in the form of a memo to the President presenting both hands followed by a statement as to whether both views were legally available, whether there was a better view of the law, and the potential consequences of proceeding one way or the other.

The 215 program as you now know involves the collection of telephone meta-data (data about data) “meant to detect: (1) domestic U.S. phone numbers calling *outside* of the U.S. to foreign phone numbers associated with terrorist groups; (2) foreign phone numbers associated with terrorist groups calling *into* the U.S. to U.S. phone numbers; and (3) ‘possible terrorist-related communications’ between U.S. phone numbers *inside* the U.S.”¹² Judge Pauley found that “all telephony metadata is a relevant category of information.”¹³ Further, the “Third Party Doctrine” combined with the nature of the terrorist threat made the government’s retention and review of the data reasonable under the Fourth Amendment.¹⁴ (The Doctrine posits that

10. 50 U.S.C. § 1861 (2012).

11. See *ACLU v. Clapper*, 959 F. Supp. 2d 724, 730 (S.D.N.Y. 2013) (rejecting Fourth Amendment challenge), *vacated and remanded*, 785 F.3d 787 (2d Cir. 2015); *Klayman v. Obama*, 957 F. Supp. 2d 1, 7 (D.C. Cir. 2013) (granting injunction on Fourth Amendment grounds).

12. *Klayman*, 957 F. Supp. 2d at 18.

13. *Clapper*, 959 F. Supp. 2d at 749.

14. *Id.* at 749-50 n.16.

a person who voluntarily shares information with a third party—such as the number called with a telephone company—loses any reasonable expectation of privacy in that data¹⁵).

In contrast, Judge Leon concluded that the collection and retention of meta-data from hundreds of millions of calls for five years was not the sort of data envisioned by the doctrine.¹⁶ Moreover, the data could be searched without the articulation of specific suspicion to a judge. Further, Leon concluded, the government had not demonstrated a special need to collect or search this data for, in his words, “the Government does not cite a single instance in which analysis of the NSA’s bulk metadata collection actually stopped an imminent attack.”¹⁷ Thus, the collection, retention, and search of such 215 meta data was unreasonable.

There, in judicial form, you have both hands of the argument presented.

More long term perspective. Judges look at the enduring consequences of their actions and anticipate where the law is heading. National security lawyers tend to live in the moment. For example, in the law of war context, the Government has not defined “direct participation in hostilities” or issued a Law of Armed Conflict Field Manual since 1956. And in the surveillance area we have avoided addressing the Third Party Doctrine. One reason, is because it is hard to do, and we are crisis driven. But I suspect that there is a cake problem as well, as in eating your cake and having it too. In defining the law we might be bound by it, losing flexibility today, even if we will be glad to have done so tomorrow.

The national security architecture has placed enormous weight on the Third Party Doctrine’s slender and weakening legs. I say slender for two reasons. First, *Smith*, on which the doctrine is based, involved the placement of a pen register on the phone of a suspected robber who was threatening a witness, not, as Judge Leon pointed out, the data from hundreds of millions of phone calls over five years.¹⁸ Second, *Smith* dates to 1979.¹⁹ This was before the Cloud, the iPhone, and the Internet, and Smith probably placed his calls on a rotary phone while listening to 8-Track Tapes.

Provide the process due [before the courts provide due process].

One area where courts have played an increasing and active role in national security is in adjudicating individual rights beyond the criminal law. We see this in cases involving the designation of foreign

15. See *Smith v. Maryland*, 442 U.S. 735 (1979).

16. *Klayman*, 957 F. Supp. 2d at 33.

17. *Id.* at 40.

18. *Smith*, 442 U.S. at 737.

19. *Klayman*, 957 F. Supp. 2d at 30.

terrorist organizations,²⁰ the national security implications of foreign investment in the United States,²¹ the no fly lists,²² and the issuance of airmen certificates by the Federal Aviation Administration.²³ Courts are moving beyond deference to filling procedural voids.

The Supreme Court has said “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”²⁴ *Mathews v. Eldridge* has become the operative administrative law test. The test weighs the private interest at stake; the risk of erroneous deprivation of that interest through the procedures used and the value of any additional procedures; and, the government’s interest at stake.²⁵

There are at least two interesting things about this. First, *Mathews v. Eldridge* is a social security disability case and it is now being applied in national security law cases in contexts where the application of due process was previously not provided or anticipated. Second, the Executive branch appears to have applied *Mathews* itself to targeted killing. At least that appears the case in that portion of the redacted OLC opinion on targeted killing that cites to *Mathews* and concludes

at least where, as here, the target’s activities pose a ‘continued and imminent threat of violence or death’ to U.S. person . . . ‘the realities of combat’ and the weight of the government’s interest . . . would not require the government to provide further process to the U.S. person before using such force.²⁶

From a national security and military perspective, this is nuts. I would not have thought a social security disability case would become the template for national security process, let alone for law of armed conflict targeting. It is not a good fit. The interest of the individual at stake is the highest—the liberty interest in life. The interest of the Government’s is the highest—the security of the United States. And

20. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39-40 (2010) (rejecting First Amendment challenge to statute prohibiting the provision of material support to designated terrorist groups).

21. See, e.g., *Ralls Corp. v. Comm. on Foreign Inv. In U.S.*, 758 F.3d 296, 325 (D.C. Cir. 2014) (holding that foreign investor subject to the Committee for Foreign Investment in the United States (CFIUS) must be accorded due process rights).

22. See, e.g., *Latif v. Holder*, 28 F. Supp. 3d 1134, 1162-63 (D. Or. 2014) (finding no-fly list process unconstitutional).

23. See, e.g., *Cooper v. Nat’l Transp. Safety Bd.*, 660 F.3d 476, 478 (D.C. Cir. 2011) (reviewing revocation of pilot’s airman certificate).

24. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

25. See *id.* at 334-35.

26. DAVID J. BARRON, OFFICE OF THE ASSISTANT ATT’Y GEN., O.L.C.: APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATIONS AGAINST SHAYKH ANWAR AL-AULAQI 40 (2010) (internal citations omitted).

additional hearing procedures do not work. They are inapt to the battlefield context: its speed of decision, its changing circumstances, and the necessity for surprise and secrecy. Courts and the government seem to have ignored the admonition from *Mathews* itself: “differences in the origin and function of administrative agencies ‘preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.’”²⁷

Good process is not the same as due process. National security lawyers should think more like courts and consider what process is due. Where the government does not provide a process, and a process that works, courts may do so. But because they are courts, they may look to ill-fitting Supreme Court precedent for guidance. Rote incantation of *Mathews* is ill-advised and ill-fitting.

Accountable decision making.

National security lawyers should also emphasize accountable legal process as courts do, by which I mean written and traceable to a particular person or persons. The past year has validated the maxim “Justice [must] not only be done[,] . . . [it must] appear to be done.”²⁸ Recall that the 215 program was legislatively renewed seven times and validated thirty-six times by fifteen different Foreign Intelligence Surveillance Court (FISC) judges before the Snowden disclosures.²⁹ The process worked. And yet, there remains doubt about the legality and legitimacy of the program.³⁰ Clearly, it is not enough to be a court. A court must be seen being a court, which means hearing cases, or at least deciding cases in a public opinion. As one’s math teacher might exhort, “show me your work.” Showing your work, if only internally, tends to focus one’s attention on its accuracy and objectivity. The same is true of national security lawyers who necessarily work in secret.

If none of this seems remarkable to you, you would be surprised how controversial some these ideas are within the Executive branch.

Should judges act more like national security lawyers?

My next question is: Should judges act more like national security lawyers? Should judges be more involved, less involved, or do they have the balance about right?

There are a number of possible models in ascending order of participation. In the area of habeas corpus, the model is deference, at least before the D.C. Circuit, where most of the Guantanamo and

27. *Mathews*, 424 U.S. at 348 (quoting *FCC v. Pottsville Broad Co.*, 309 U.S. 134, 143 (1940)).

28. *R. v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256 (Hewart, C.J.).

29. See News Desk, *FISA Court Reauthorizes NSA Phone Surveillance Program*, PBS (Jan. 3, 2014), <http://www.pbs.org/newshour/rundown/fisa-court-reauthorizes-nsa-phone-surveillance-program/>.

30. See *id.*

Bagram action occurs.³¹ The habeas test is a high one; the cases a reservoir of two-sided national security deference. First, deference to the President: “[T]he President alone conducts the nation’s foreign policy and it is to him that we turn for authoritative statements on our relations with foreign powers.”³² And, second, lack of deference to courts, which “lack the competence and, more importantly, the power to negotiate the subtleties of international politics.”³³ Executive decisions are “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and . . . belong in the domain of political power not subject to judicial intrusion or inquiry.”³⁴

Another model is found in the FOIA line of cases, where courts like the Second Circuit have tested the Government’s assertions concluding, for example, in the case involving *New York Times* reporter Charlie Savage, that the Government cannot give speeches drawn from classified OLC opinions and then withhold all of those same opinions because they are classified.³⁵

A third model comes from the due process line of cases, which I have already addressed, in which courts have sought to fill procedural vacuums with *Mathews*-like process where individual rights are concerned.³⁶

The most active model occurs where courts are legislatively or constitutionally assigned responsibility, as in the case of criminal trials and foreign intelligence surveillance.

While most judges would say they are doing no more than following the law, where there is genuine discretion, I would like to see courts act more like national security lawyers.

What does this mean?

Define Boundaries.

Understanding the national security imperative I discussed earlier, courts should be prepared to step in and set or signal the outer boundaries of permissive conduct, before rather than after it is crossed.

Process police. Courts should also require a minimum standard of process, which is different from crafting that process themselves or framing it as due process.

Validate: And courts should not hesitate to validate government

31. See Jonathan Shaw, *The War and the Writ: Habeas Corpus and Security in an Age of Terrorism*, HARV. MAGAZINE (Jan.-Feb. 2009), available at www.harvardmagazine.com/2009/01/the-war-the-writ.

32. *Maqaleh v. Hagel*, 738 F.3d 312, 333 (D.C. Cir. 2013).

33. *Id.*

34. *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948).

35. See *N.Y. Times v. DOJ*, 756 F.3d 100, 103 (2d Cir. 2014).

36. See *supra* note 21.

assertions. “Trust, but verify” comes to mind. I call this informed deference. Just as writing memos to the President tends to highlight and focus facts and arguments, having to make an argument to a court does the same. There is a *Youngstown* corollary here—where courts validate executive action the President acts on surer lawful footing. This is an obvious point, but oddly it is a point that is rarely obvious to lawyers within the Executive branch.

All of this is hard to do with classified information, but Courts can write about classified information without giving secrets away, while also letting the parties and the public know why the decision was made. The *El-Masri* case is a good illustration of this.³⁷ In that case, the Fourth Circuit explained why the government properly invoked the state secrets privilege in the context of a tort suit alleging both mistaken identity and wrongful conduct, including torture, in the context of a rendition.³⁸ Whether one agrees with the opinion or not, it states as clearly as it can, without actual disclosure, what the underlying secrets or type of secrets are that are at issue and why they warrant protection in the view of the government.³⁹ Thus, the parties know why they won or lost and have an opportunity to appeal. Likewise, the public can see for itself whether and how the law is being applied.

THE ROLE OF INTELLIGENCE

The key to informed deference is an understanding of intelligence.

If I could require just one course for federal judges handling national security cases it would be on intelligence. I would make three points. First, I would highlight the reasons we collect intelligence.

To inform decision-making; or, as some would describe it, to seek decisional advantage or in security context situational awareness.

To prevent surprise—both tactical (storming of an embassy) and strategic (Soviet missiles in Cuba).

To prevent attack—by which I mean both the threat of kinetic attack, let’s say by terrorists, as well as cyber attack by state actors. In this context, I also place efforts to prevent intelligence penetration of U.S. political, military and economic interests.

To predict the future—Where will we be in ten years, or twenty years? By constructing informed analytic answers we can better prepare for political, economic and environmental transition or to influence preferred outcomes.

Understanding the purposes of intelligence we can ask:

37. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

38. *Id.*

39. *Id.*

Why are we doing this?

What are the intelligence opportunities, resources, risks, and costs to doing it? And how should we weigh those costs in context?

What are the parallel policy costs and benefits?

And, is it lawful?

An executive actor who cannot articulate the answers to these questions before a court might well deserve less, if any, deference. Moreover, if an executive actor cannot persuasively answer these questions internally we shouldn't be doing it in the first place.

Point two is a qualitative point—intelligence is not evidence. The Intelligence Community is fond of citing to the “Mosaic Theory,” especially in the context of FOIA lawsuits.⁴⁰ The Mosaic Theory posits that a single piece of information may not be classified in its own right, but when put together with other data can present in sum a classified whole; the concept is subject to overuse or abuse, but it is an apt metaphor for intelligence collection.⁴¹ One hopes that when intelligence information is collected, collated, and analyzed it will present a mosaic picture of a greater whole; intelligence supplements open source information. It is a source of corroboration and affirmation; rarely does it present a conclusive picture in its singular form.

Some judges and lawyers may look for information that would pass the test for admission in court under Federal Rules of Evidence 401, 402, 403. One might call this the “CSI,” “24,” or “smoking gun” dilemma. The fact is, it is rare that you get the intercept from Germany confirming that the Government of Libya was behind an attack; more often, you have to piece it together in mosaic form—in other words, it is far more like piecing together the 1988 Pan Am 103 plot than determining culpability through a singular and immediate source as in the case of the 1986 La Belle Disco bombing in Berlin.⁴² In this respect, Judge Leon may be expecting too much when he looks for evidence that the 215 program has stopped an imminent attack.

My third point is a quantitative point. Intelligence analysts and decision-makers face an ageless problem involving the amount of information available. Depending on the issue, invariably, there is

40. David E. Pozen, *The Mosaic Theory, National Security, and The Freedom of Information Act*, 115 YALE L.J. 628 (2005).

41. *Id.*

42. *Terrorist Bombing of Pan Am Flight 103*, CIA (July 23, 2012), <https://www.cia.gov/about-cia/cia-museum/experience-the-collection/text-version/stories/terrorist-bombing-of-pan-am-flight-103.html>; *Terrorist Attacks on Americans, 1979-1988*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/cron.html> (last visited Mar. 27, 2015).

either too little information (think of North Korea, or the Soviet Politburo during the Cold War) or too much information (think of Watch Lists or indeed the 215 and 702 programs).

In the 1970s and 1980s, for example, we used as our metaphorical unit of measure the number of Libraries of Congress collected by the Intelligence Community each day. Today, we are moving up the byte ladder: we are now measuring the intake in terms of yottabytes, which is a number with twenty-four zeroes after it, or a septillion pages of text.⁴³ Next comes the Brontobyte, which is ten to the twenty-seventh power or a number with twenty-seven zeroes after it.

Too little information can distort judgment, leading to overreliance on singular sources or perspectives or place too much emphasis on the secret report over the open source observation; there is risk of throwing oneself a curveball. Tools are needed to quickly confirm you cannot find or possess more data or are effectively managing the data you have. Conversely, where there is too much data, tools are needed to quickly sift and focus on the right data and to make essential links. In this way, metadata can be a source of corroboration, elimination, and indeed silent exoneration, and not just connection and confirmation.

In this regard, and in my view, Judge Pauley is closer to intelligence reality than Judge Leon. ‘Relevance’ to an intelligence specialist is a broad concept. “Aggregated telephony metadata . . . allows the querying technique to be comprehensive. And NSA’s warehousing of that data allows a query to be instantaneous.”⁴⁴ However, Judge Leon is correct, when he concludes that this does not mean the U.S. government has the right process for approving access to this data. Without stating so, Leon is looking for what Sherman Kent, the father of U.S. intelligence analysis, described as the man in the loop,⁴⁵ or more precisely the judge in the loop, who is asking hard questions and validating, by forcing the Executive to answer: Is this wise? Is this lawful? And, what process is due?

MILITARY JUSTICE

I would now like to pivot to a different area of national security law and judging—military justice.

In multiple decades of conflict, military justice has played an

43. James Bamford, *Who’s in Big Brother’s Database?*, THE NEW YORK REVIEW OF BOOKS, <http://www.nybooks.com/articles/archives/2009/nov/05/whos-in-big-brothers-database/> (last visited Mar. 27, 2015).

44. *ACLU v. Clapper*, 959 F. Supp. 2d 724, 748 (S.D.N.Y. 2013).

45. Sherman Kent described the “feedback loop” as a critical instrument in furthering relationships between intelligence analysts and policymakers. See *Kent Center Occasional Papers*, CIA, <https://www.cia.gov/library/kent-center-occasional-papers> (last updated Feb. 12, 2013, 11:38 AM).

important role in providing accountability over the actions of military members. You will be familiar with cases, like Abu Ghraib,⁴⁶ Behenna,⁴⁷ Manning,⁴⁸ and Bales.⁴⁹ You will also be familiar with the so-called Blue-on-Blue cases involving Fort Hood and Akbar. However, you may not be aware that from 2000-2011, there were 46,539 courts-martial in the Armed Forces, including, for the Army, approximately 717 courts-martial in Afghanistan or Iraq.⁵⁰ The majority of these cases involved criminal offenses like rape, murder, larceny and the possession of child pornography.

The public may not appreciate the extent to which good order and discipline are essential to mission accomplishment. This may be particularly true in complex operations like counterinsurgency, counterterrorism, and homeland defense. In these contexts, discipline as well as the manner in which the military interacts with civilians is as critical as tactical skill or firepower. Leadership is the prerequisite for good order and discipline, but where leadership fails, or is not enough, the military justice system provides a backstop of non-judicial punishment and, if necessary, courts-martial.

U.S. military justice is also in many parts of the world the prism through which others perceive America's commitment to the law. Thus, it is judge advocates who are often the face of America's legal values and that provide the daily contact with counterparts necessary to build a culture of law and not just a structure for law.

Military justice is also critical in addressing sexual assault. Leadership, of course, is even more critical. That is because commanders are essential actors in military justice and in setting the culture in the military. This is both a risk and a necessity, for commanders control the resources and have the greatest stake in good order and discipline.

While sexual assault is a societal problem, including on campuses, in the military it is not just a matter of victim impact and justice, but also a national security problem. That is because sexual assault can affect the potential pool of an already diminishing number of qualified

46. See *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010).

47. *United States v. Behenna*, 71 M.J. 228 (C.A.A.F. 2012).

48. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST (Aug. 21, 2013), http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html.

49. Greg Botelho, *Army's Robert Bales gets life, no parole for Afghan rampage – but was it justice?*, CNN (Aug. 23, 2013), <http://www.cnn.com/2013/08/23/justice/robert-bales-afghan-killings/>.

50. *Sourcebook of Criminal Justice Statistics Online*, U.S. DEPT OF JUSTICE, tbls. 5.80.2011; 5.81.2011; 5.82.2011; 5.83.2011, http://www.albany.edu/sourcebook/tost_5.html (last visited Mar. 27, 2015).

recruits. It also can impact unit cohesion and morale, undermine trust in leadership, and impact mission accomplishment.

The importance of military justice notwithstanding, the academic bar pays scant attention to military justice.⁵¹ This is too bad. The system provides an important point of comparison to civilian practice. For example, a scholar or student can learn a lot about *Miranda*⁵² by comparing its reach to Article 31, which provides more comprehensive warnings and was enacted fifteen years before *Miranda*.⁵³ The military also provides counsel free to the accused, regardless of means, all the way to the Supreme Court. One might compare and contrast that process and the result with one that provides public representation on the basis of indigency and only for certain criminal offenses. As a final illustration, there is much to learn from and to compare in the distinctions between a Sixth Amendment jury of one's peers and the military version of a jury, known as a Members Panel, that is selected by the Commander who brought the charges.

The absence of a broader understanding also means that military commissions at Guantanamo play a disproportionate and inaccurate role in coloring public perceptions about military justice. The two systems are distinct and should be assessed on their individual strengths and weaknesses. It also means that policy debates risk being swayed by anecdote rather than empirical data or legal purpose. An academic bar is also a critical, and in many cases, the only form of substantive "oversight" that military appellate courts encounter.

In my case, "oversight" came in the form of Professor David Baldus at Iowa. I have taught at Iowa for ten years in part because Baldus would greet me each spring with a stack of my opinions and a pile of questions. Why did I conclude this? Why didn't I cite that? What are the consequences of this approach? It was awesome. Dave's commitment to the law and to judicial practice was relentless. Occasionally, I would hide under my desk when I saw him coming down the hallway or heard his voice. But I loved every minute of it. It was terrific feedback as well as my only feedback and, I hope, helped to make me a more humble and better judge.⁵⁴

51. There are a few notable exceptions, like Bobby Chesney, Steve Vladeck, Geoffrey Corn, and Greg Maggs.

52. *Miranda v. Ariz.*, 384 U.S. 436 (1966).

53. 10 U.S.C. § 831 (2012).

54. In the opinion of some, Dave played this role in a more formal and academic sense. See, e.g., Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1905, 1923-24 (2012) (noting that "[n]o single accomplishment, however impressive, does justice to a person as remarkable as [law professor] David Baldus," whose research played an instrumental role in shaping Supreme Court Justices' views on death penalty and race).

JUDGES AND THE MILITARY

I would like to close by considering the role of military service and the judiciary. I am prompted to do so because of Veterans Day, but also because this year marks the 100th anniversary of the First World War, the 75th anniversary of the Second World War and the 150th anniversary of Sherman's March to the Sea. I recently had the opportunity to visit and speak at the Greenwich Historical Society's centennial exhibition on the First World War. I came upon a number of surprises in the course of preparing.

First, 1,013 of the 21,000 residents of Greenwich served in the military during the War.⁵⁵ One hundred of the 187 graduating Greenwich high school class of 1917 volunteered for military service.⁵⁶

Second, although there are varying ways to compile and assess the statistics, the incidence of post-traumatic stress disorder for soldiers serving in the First World War is about the same as that for soldiers who have served in Iraq and Afghanistan.⁵⁷

Third, seven Supreme Court Justices alone served during World War One.⁵⁸ At one point, in 1949, six of the nine Justices on the Court had served on active duty during the War, including Harold Burton

55. *Town gets an A for (World War I) effort*, GREENWICH TIME (Oct. 16, 2014, 7:47 PM), <http://www.greenwichtime.com/local/article/Town-gets-an-A-for-World-War-I-effort-5828137.php>.

56. *History: 1910-1919*, GREENWICH HIGH SCHOOL, <http://www.greenwickschools.org/page.cfm?p=4225> (last visited Mar. 27, 2015).

57. Vanessa Williamson & Erin Mulhall, *Invisible Wounds: Psychological and Neurological Injuries Confront a New Generation of Veterans*, IRAQ AND AFGHANISTAN VETERANS OF AM. (2009); Hans Pols & Stephanie Oak, *War & Military Mental Health: The U.S. Psychiatric Response in the 20th Century*, 97 AM. J. PUB. HEALTH 2132, 2137 (2007); Steve Bentley, *A Short History of PTSD: From Thermopylae to Hue Soldiers Have Always Had a Disturbing Reaction to War*, THE VVA VETERAN (Mar./Apr. 2005), http://www.vva.org/archive/TheVeteran/2005_03/feature_HistoryPTSD.htm (last visited June 28, 2015).

58. See *Biographical Directory of Judges: Black, Hugo Lafayette*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=181&cid=999&ctype=na&instate=na>; *Biographical Directory of Judges: Burton, Harold Hitz*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=331&cid=999&ctype=na&instate=na>; *Biographical Directory of Judges: Frankfurter, Felix*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=791&cid=999&ctype=na&instate=na>; *Biographical Directory of Judges: Minton, Sherman*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1658&cid=999&ctype=na&instate=na>; *Biographical Directory of Judges: Murphy, Frank*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1722&cid=999&ctype=na&instate=na>; *Biographical Directory of Judges: Reed, Stanley Forman*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1984&cid=999&ctype=na&instate=na>; *Biographical Directory of Judges: Vinson, Frederick Moore*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2463&cid=999&ctype=na&instate=na>.

who was wounded in France.⁵⁹ At the time of the *Brown*⁶⁰ and *Youngstown*⁶¹ decisions a majority of the Court was comprised of World War I veterans.⁶² President Truman's own service in France during the war and exposure to African American troops was also instrumental in his decision to push the military toward integration in 1948 not just on constitutional principle, but as a military value.⁶³

What I didn't realize until now was that military service by members of the federal judiciary once was the norm. Here are the statistics. For judges who came of age during World War II, which is to say, they were born on or about 1903-1927, were age eligible to serve during the War, and later became judges, 85% of District Court Judges were veterans and 67% of Court of Appeals Judges.⁶⁴ For the Korean War immediate Cold War era the comparative figures are 61% and 40%.⁶⁵ However, for judges born after 1956 who would have come of

59. See *supra* note 58; see also Brian P. Smentkowski, *Harold H. Burton*, ENCYCLOPEDIA BRITANNICA (July 6, 2014), <http://www.britannica.com/EBchecked/topic/85891/Harold-H-Burton>.

60. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

62. See *Biographical Directory of Judges: Black, Hugo Lafayette*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=181&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Burton, Harold Hitz*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=331&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Frankfurter, Felix*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=791&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Minton, Sherman*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1658&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Reed, Stanley Forman*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1984&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Vinson, Frederick Moore*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2463&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Warren, Earl*, FED. JUDICIAL CTR., <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.asp> (last visited Feb. 9, 2015).

63. See Truman, A. Philip Randolph and the Desegregation of the Armed Services, THE WHITE HOUSE HISTORICAL ASSOC., www.whha.org/whha.classroom/classroom_9-12-pressure-services.html.

64. Donald N. Zillman, *Where Have All the Soldiers Gone? Observations on the Decline of Military Veterans in the Government*, 49 ME. L. REV. 85, 100 (1997); see also Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC (Aug. 13, 2012, 11:22 AM), <http://www.theatlantic.com/national/archive/2012/08/none-of-the-supreme-court-justices-has-battle-experience/260973/>.

65. See *supra* note 64.

age during the Vietnam era, only 28% of District Court Judges had seen military service, and only 20% of appellate judges.⁶⁶

Today, prior active service is, I would guess, even more uncommon. On the Supreme Court, for example, the total active duty service of the Justices is four months.⁶⁷ There are different reasons for the absence of military service in the background of federal judges, but those reasons are not just related to the presence or absence of a draft, for many of the judges I have already cited and will soon cite, were volunteers.

However, my underlying question is not why, but whether we should care? Might anything be lost?

To be sure, military service is but one form of diversity a judge might bring to the bench. Moreover, in an adversarial process it is the counsel who are supposed to bring essential knowledge and law to the attention of the court, as opposed to the judge deriving this information from his or her personal background. I am also cognizant that just as service as a lieutenant does not make one a military strategist, it does not make one a constitutional expert on the use of force or foreign relations either.

Nor am I aware of diary entries or other information that might directly link the views of the *Brown* or *Youngstown* justices to their military service. But what I do know is that military service exposes one to persons from different walks of life far beyond the range of persons one is exposed to in college and in law school. And, especially during wartime, military service emphasizes that character and merit, and not background, are the measures by which you judge whether you would want someone on your right or your left in combat.

From a military perspective, leaders who share the risks of their troops are said to bear the moral as well as legal authority to lead. The Justices who served in the benchmark year of 1949 can be said to have had the moral authority to sit in judgment of veterans and matters of security importance. Harder to assess is the role military service may play in steeling judges for the challenges they face. However, after some military service it is fair to say everything else might well seem like a “lesser-included challenge.” As Army Chief of Staff, as well as Secretary of State and Defense, George Marshall was purported to be fond of saying during moments of crisis while others flapped about, “I have seen worse.”⁶⁸

66. See *supra* note 64.

67. See SUSAN NAVARRO SMELCER, CONG. RESEARCH SERVS., SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010 27 (2010); see also Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 U.C. DAVIS L. REV. 999, 999 n.1 (2010).

68. ARTHUR M. SCHLESINGER, THE CYCLES OF AMERICAN HISTORY xii (1986).

Perhaps most importantly, the civil-military link is a vital one in any democracy, and perhaps especially in ours, which sees the military as part of the solution to almost every intractable issue. In addition, a military system that is understood and addressed in college and in law school will draw its talent from all parts of society and all regions of the country. This will make the military stronger and it will make it more credible to those who serve as well as to those who do not serve. Judges who have served in the military might better exercise informed deference over security matters.

I like to say that service in the infantry was the best legal training I ever received. We have always known about the impact of military service on certain judges. This starts with John Marshall at Valley Forge who viscerally connected his own military service to the constitutional freedoms he would later help to define and uphold.⁶⁹ Oliver Wendell Holmes kept his bloodied uniform in his library closet.⁷⁰ You do not need a degree in psychology to see and feel the influence of the Civil War and his multiple wounds there. In addition, six of the great civil rights judges—John Wisdom, John Brown, Richard Rives, Skelly Wright, Frank Johnson, and Elbert Tuttle all served during the First or Second World War.⁷¹

The impact of military service on Frank Johnson and Elbert Tuttle is unmistakable.⁷² The stories may be well known to this audience, but

69. See Stewart G. Pollack, *George Washington and John Marshall: Friends, Patriots and Nation Builders*, N.J. LAWYER, THE MAGAZINE 20 (Jan. 1997).

70. See Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC (Aug. 13, 2012, 11:22 AM), <http://www.theatlantic.com/national/archive/2012/08/none-of-the-supreme-court-justices-has-battle-experience/260973/2/>.

71. See *Biographical Directory of Judges: Brown, John Robert*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=285&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Johnson, Frank Minis Jr.*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1180&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Rives, Richard Taylor*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2019&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Tuttle, Elbert Parr*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2427&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Wisdom, John Minor*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2622&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015); *Biographical Directory of Judges: Wright, James Skelly*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2661&cid=999&ctype=na&instate=na> (last visited Feb. 9, 2015).

72. Background for the stories derived from the following sources: JACK BASS, *TAMING THE STORM* (Doubleday 1992); ANNE EMMANUEL, *ELBERT PARR TUTTLE* (The

less so to law students. They bear repeating.

Frank Johnson was once the most famous judge in America.⁷³ He was on the cover of *Time* magazine.⁷⁴ But before all of that, he was first a soldier, a judge advocate, and a country lawyer.⁷⁵ He grew up in Winston County, Alabama, which he would note in interviews did not secede from the Union during the Civil War.⁷⁶ Men would in fact exfiltrate through the Confederate states to join the Union Army.⁷⁷ He was proud of this fact for the independence it reflected in the people from his county.⁷⁸ (That is foreshadowing; more on that in a second.) Johnson attended the University of Alabama Law School and graduated in the Class of 1943 along with George Wallace.⁷⁹ They are depicted together in a Prom Photo at law school with their wives—apparent friends.⁸⁰ Later, however, their paths would diverge and Wallace would call Johnson all sorts of names and epithets.⁸¹

After law school, Johnson joined the Army, not as a lawyer, but as an infantry officer.⁸² As part of his service he landed at Normandy just days after the initial June 6 landings.⁸³ He was wounded crawling through one of the ubiquitous Normandy hedge groves.⁸⁴ However, when given the option to evacuate to England for medical treatment, he declined.⁸⁵ In Hollywood fashion, but in a very real manner, he asked the medics to apply sulfa powder to his leg wound and returned

Univ. of Georgia Press 2011); JACK BASS, *UNLIKELY HEROES* (The Univ. of Alabama Press 1981); ROBERT F. KENNEDY, *JUDGE FRANK M. JOHNSON JR.* (Putnam 1978); FRANK SIKORA, *THE JUDGE: THE LIFE AND OPINIONS OF ALABAMA'S FRANK M. JOHNSON JR.* (NewSouth 2007); Interview with Judge Frank M. Johnson, Jr., Academy of Achievement (1992), available at <http://www.achievement.org/autodoc/page/joh2int-1> (last visited Jan. 9, 2015).

73. See *supra* note 72.

74. Frank Johnson May 12, 1967, *TIME*, available at <http://content.time.com/time/covers/0,16641,19670512,00.html>.

75. See *supra* note 72; see also Robert D. McFadden, *Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N.Y. TIMES, July 24, 1999, at A12, available at <http://www.nytimes.com/1999/07/24/us/frank-m-johnson-jr-judge-whose-rulings-helped-desegregate-the-south-dies-at-80.html>.

76. See *supra* note 72; see also McFadden, *supra* note 75.

77. See *supra* note 72; see also McFadden, *supra* note 75.

78. See *supra* note 72.

79. See *id.*; see also McFadden, *supra* note 75.

80. See *supra* note 72.

81. See *id.*; see also McFadden, *supra* note 75.

82. See *supra* note 72; see also McFadden, *supra* note 75.

83. See *supra* note 72; see also *People & Events: Frank Johnson*, PBS, <http://www.pbs.org/wgbh/amex/wallace/peopleevents/pande03.html> (last visited June 29, 2015).

84. See *supra* note 72; see also McFadden, *supra* note 75.

85. See *supra* note 72; see also McFadden, *supra* note 75.

to his unit.⁸⁶ He was not as fortunate the next time.⁸⁷ During fighting in the Falaise Pocket, he was struck in the chest by shrapnel from a German artillery shell and evacuated to England.⁸⁸

While Johnson was in England, there came a time when General Eisenhower ordered an investigation of misconduct at the Litchfield Disciplinary Barracks.⁸⁹ A disciplinary barracks is more commonly known as a prison. This was the prison where American deserters, among others, were held during and after the War.⁹⁰ It turns out that a number of the prisoners were being beaten and abused, perhaps to send a message about desertion.⁹¹ One soldier, an African American, was murdered.⁹² A number of guards came under suspicion, but none of the commanders.⁹³ Two sergeants were put on trial for mistreating prisoners.⁹⁴ Frank Johnson served as defense counsel. Johnson suspected the incidents reflected either a climate of tacit command approval or express direction. To make his case he called to the stand the senior U.S. general in the United States Army responsible for the Disciplinary Barracks at Litchfield.⁹⁵ This wasn't done back then. The story made front page news in *The Washington Post*. The April 11, 1946 headline reads: "Lieutenant Charges General Failed Duty in Brutality Case."⁹⁶ When Mrs. Johnson, who was serving in the Navy as a Lieutenant Commander, heard a paper boy exclaim, "Extra Extra Read All about It, Lieutenant Tells off Major General," she immediately thought Frank was in trouble.⁹⁷

The trial proceeded and in the end the two sergeants were acquitted of most charges and received short sentences to confinement.⁹⁸ Johnson was demobilized and returned home to Winston County, Alabama, with a Bronze Star for valor and two Purple Hearts.⁹⁹ Johnson went into a local law practice.¹⁰⁰ However,

86. See *supra* note 72; see also Amy Reynolds Alexander, *Judge Frank M. Johnson Jr. His Commitment to Justice Boosted Civil Rights*, INVESTORS BUS. DAILY (Jan. 16, 2001 3:00 AM), <http://news.investors.com/management-leaders-and-success/011601-347676-judge-frank-m-johnson-jr-his-commitment-to-justice-boosted-civil-rights.htm>.

87. See *supra* note 72.

88. See *supra* note 72.

89. BASS, *TAMING THE STORM*, *supra* note 72, at 64.

90. See *id.* at 61-63.

91. See *id.* at 65.

92. See *id.* 61.

93. *Id.*

94. *Id.*

95. See *id.* at 64.

96. *Lieutenant Charges General Failed Duty in Brutality Case*, WASH. POST, Apr. 11, 1946, at 1.

97. BASS, *TAMING THE STORM*, *supra* note 72, at 65.

98. See *id.*

99. *Id.* at 58.

100. *Id.* at 52.

in 1952 he helped to run General Eisenhower's presidential campaign in Alabama, and, following Eisenhower's election, was appointed United States Attorney for the Northern District of Alabama.¹⁰¹ In 1955, Johnson was called to the White House to be interviewed personally by President Eisenhower as a candidate to serve as a federal district court judge.¹⁰² (President Eisenhower interviewed all persons he nominated to serve as federal judges.) Then, in the fall of 1955, Frank Johnson was confirmed and appointed Federal District Court Judge, Montgomery, Alabama.¹⁰³ Three weeks later Rosa Parks refused to take a seat in the back of the bus, and as they say, the rest is history. But there was nothing inevitable about the outcome or the manner of the outcome. History was in the first instance shaped by the leadership of the civil rights movement, as well as the movement itself, but also by a handful of federal judges.

Rosa Parks' case was assigned to Judge Johnson, but under the law at the time, because a constitutional issue was concerned, it was actually heard by three judges. The vote was 2-1, with Judges Johnson and Rives holding that "the statutes and ordinances requiring segregation . . . on the motor buses . . . violate due process and equal protection."¹⁰⁴ Johnson would go on to serve as the principal Federal District Court Judge who desegregated Alabama—the buses, the schools, the YMCA, and upheld the right of African Americans to vote, to serve as jurors, and to assemble and march. In his words, these were easy cases: "I had no problems with desegregation cases. Discrimination on the basis of race is basically unconstitutional."¹⁰⁵

Johnson also issued the injunction that prevented the Alabama State Police from blocking or impeding the seminal 1965 march from Selma to Montgomery. But it should be noted, he also called in the leadership of the march and advised them that if they blocked all of the lanes of the highway running from Selma to Montgomery he would hold them in contempt as well, for the people of Alabama also had the right to go about their travel and business.

For his actions as a Judge, Johnson was ostracized in Montgomery. He lost friends and acquaintances. At one point his mother's house was bombed, likely a case of mistaken identity as she was listed under Frank Johnson in the phone book; the judge was Frank Johnson, Jr. Another time a cross was burned on his lawn. And yet another time, he was fishing off the Florida Keys alone, when a powerboat pulled aside with a number of Alabama State troopers on

101. *Id.* at 80.

102. *Id.* at 88.

103. *Id.*

104. *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956).

105. Interview with Judge Frank M. Johnson, Jr., *supra* note 72.

board. The officers told the judge to take care, for they worried, that if he were to fall off his boat and drown no one would be the wiser. I cannot imagine it was an easy life, but it was an honorable life indeed. Later, Judge Johnson was appointed to the Eleventh Circuit, but it is as a district court judge that he is remembered, if he is remembered at all.

When Judge Johnson's cases were appealed, they were appealed to the Fifth Circuit, which at that time comprised all of what is now the Eleventh and Fifth Circuits. From 1960-1967, the Chief Judge of the Circuit was Elbert Tuttle.¹⁰⁶ Elbert Tuttle was from Georgia. He graduated from Cornell University in 1917. Following graduation, he trained as a pilot and then as artillery aerial observer at Fort Sill, Oklahoma. However, his training was not completed until after the First World War concluded. Tuttle returned home to Atlanta and went into private practice with his brother in law. He also joined the Georgia National Guard.

In 1931, his unit was mobilized by the Governor of Georgia following the arrest of John Downer, an African American and an acquaintance, for the alleged rape of a white woman. The men were being held in the Elberton jail, which was on the second floor of the Sheriff's house. When word was received that a mob was gathering to storm the building and seize the prisoners, the National Guard was ordered to defend the building and its occupants. At one point the mob stormed the building and was kept from the second floor jail only when National Guard troops fired down the stairwell to keep the crowd at bay.

For various reasons, now Captain Tuttle and his friend Leckie Mattox were not with their unit at the outset. But they were soon called in Atlanta and ordered to report. They did. However, they first had the good sense to have Mattox don civilian clothing and mix with the crowd, while Tuttle reported in uniform and joined his unit. As a result, it was Mattox who reported to the unit that the leaders of the mob had gone in search of dynamite with which to blow up the building and its occupants. This necessitated quick thinking. The prisoners dressed in National Guard uniforms and, so disguised, snuck out of the building and into a car outside around which members of the unit appeared to either take their respite or stood in formation. The crisis passed, but not for John Downer.

Downer was subsequently placed on trial for rape. He was convicted by an all white male jury on scant evidence. After six minutes of deliberation, the jury sentenced him to death. Tuttle who

106. My account of Judge Tuttle's military service, including during the Downer incident and during World War II, is derived entirely from Professor Emmanuel's wonderful biography. *See generally* Emmanuel, *supra* note 72.

had returned to his law offices in Atlanta, was appalled at the proceeding and volunteered to join Downer's appeal pro bono. He would eventually win the appeal before a federal court in Georgia. Downer received a new trial. However, the story does not end well. This time an all white male jury convicted Downer and sentenced him to death following twenty minutes of deliberation. Downer was executed by electric chair in 1933.

Tuttle went on to serve with distinction during the Second World War with distinction. At the outbreak of war with Japan, he was a forty-six-year-old lieutenant colonel slated for a stateside administrative assignment. However, he requested and received orders to an operational unit and became commanding officer of an artillery battalion in the Pacific. In this capacity he took part in a number of island campaigns, including Okinawa. After first being subjected to relentless kamikaze attacks his unit went ashore on Ia Shima, the small island to the north of Okinawa where the great and noble journalist Ernie Pyle was killed. Tuttle's unit was assigned to provide fire support to the Marines taking the island. One night Tuttle's command post was attacked by a suicide squad of Japanese soldiers armed only with sticks, swords, grenades, and mortar ammunition. Brutal hand-to-hand combat ensued. Tuttle received wounds to the head and to his body. But the attack failed. The Japanese soldiers were killed. Because of his wounds and a case of dysentery Tuttle was evacuated to Hawaii and eventually home to Atlanta. Like Johnson, he returned with a Bronze Star with valor and two Purple Hearts. He resumed private practice and in 1954 was appointed by President Eisenhower to U.S. Court of Appeals for the Fifth Circuit.

At the time, as stated by Jack Bass, the Court was equally and generally divided between four judges who would defer to the right of each state to determine rights and four judges who believed that the Thirteenth, Fourteenth and Fifteenth Amendments granted rights that invalidated any state laws to the contrary. Remarkably, in most of the cases raising civil rights issues, panels of three were comprised of two of the activist judges. Like Johnson, Tuttle would go on to say that the civil rights cases were the easiest cases he ever heard: "They were the easiest cases I ever decided. The Constitutional Rights were so compelling, and the wrongs so enormous."

There is much to celebrate about Frank Johnson and Elbert Tuttle, as well as many of the other great judges of the Civil Rights era. Surprisingly however, few know of their work today. I made it through law school without ever hearing their names mentioned once. And year after year, my own students arrive to class having never heard of Johnson or Tuttle, or for that matter Wright or Wisdom. We fix that. We should know these names. They remind us of the promise

of the law. They remind us, as A.W. Griswold did:

This experience has obscured the fact that, no matter how carefully defined and administered, no government of laws is insensible to what Plato termed "The endless irregular movements of human things." Laws are made by men, interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself.¹⁰⁷

I like to think as well that they also prompt us to consider our own promise and potential as lawyers; or perhaps said a different way, they limit our excuses for not rising to the potential of the law. Frank Johnson was not born a federal district court judge in Montgomery, Alabama. He started as a soldier, a judge advocate, and a country lawyer. That is a lot like us. We may live in different times and we may not sit on a case as compelling as *Browder v. Gayle*. But there will be other challenges.

And when they come, we would do well to remember that these two war heroes are remembered, if they are remembered at all, for their moral courage and not their physical courage. That is the type of courage that lawyers get to practice. And, as Field Marshal Slim stated, it is the rarest form of courage there is. We could do worse than follow in their footsteps.

Finally, I believe these judges remind us of the importance of public service, and in particular military service, as life experience. I see it as an essential backdrop to much, if not all, that these great judges did.

CONCLUSION

I started my talk with a reference to Omar Bradley and the connection between security and freedom. I would like to close with the same connection, but this time in the context of the Frank Johnson Courthouse in Montgomery, Alabama. There is a plaque outside the courthouse recognizing Johnson's military service during World War II. In turn, the Courthouse recognizes his legal service. The courthouse recognizes something else as well. One block away is the site of the fountain where African-Americans were bought and sold as slaves during the antebellum South. The Frank Johnson Courthouse now overlooks this site. It always will. It represents the march of history and the triumph of the law and it shows us what can come of the constitutional ideal when wielded wisely and well, in this case by a Normandy veteran. Thank you.

107. A. WHITNEY GRISWOLD, *LIBERAL EDUCATION & THE DEMOCRATIC IDEAL* 124 (Yale Univ. Press 1959).