

FORUM

Rule of Law in Iraq and Afghanistan?[†]

Mark Martins*

Good afternoon. Thank you for those gracious remarks, Dean Minow. And thanks to all of you for that warm welcome. It is a thrill and a privilege to be back home here in Cambridge, in such distinguished company, and following such accomplished prior recipients of this Medal.

If I may reciprocate for a moment, I would like to note that the scholarship of Dean Minow — and of my frequent sounding board during this most recent deployment to Afghanistan, Professor Jack Goldsmith — has not only featured the most illuminating sorts of conceptual and theoretical inquiry; their work has also been directed toward very practical problems. I am far from alone in benefiting from their writings during my years in public service.

I have to say, now that I am experiencing this, that less of the typical public speaking trepidation is present when you return to your own Law School to speak. With several of my teachers thankfully in attendance, I can always say that any faults you find in my reasoning are at least partly their responsibility, as they had their chance while I was here to correct those faults and apparently were unsuccessful in doing so. Professors Meltzer, Kaplow, Stone, Vagts, and Michelman know too well that the fact that I was an unusually difficult project only goes to extenuation and mitigation rather than to innocence on the merits and that they would unfortunately be guilty as charged on that count. I consider blameless David Barron, Ganesh Sitaraman, Harvey Rishikof, Ken Holland, and Jack Goldsmith because as

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gifted as they are as teachers and persuaders, their opportunities came much later, at a less formative time for me.

To say that I was a difficult case for this esteemed faculty is not to say that I didn't try to keep up with reading all of the homework. In fact Professor Meltzer probably doesn't know that I defended him when students in our Federal Courts course once portrayed him as unfeeling for having assigned some 300 pages of intricate case material and analysis one night. "He probably digested all of those hundreds of small-print pages of holdings and dicta himself in an hour — he doesn't care that it takes all of us so much longer!" they said. "Not true," I offered. "He surely did digest all of that material in a fraction of the time it takes us, but he's not oblivious to our struggles; he's orchestrating them!" They had to agree. It is one of the things Harvard Law professors have in common with Army Drill Sergeants: tough love.

There are other things in common as well. To borrow from remarks by General Eisenhower when joining Columbia University in 1948, if this were a land with a different sort of military, one whose weapons and ranks serve tyrannical ends and whose officers form a controlling elite, a soldier could hardly be welcomed here, in these halls of genuine academic freedom and independent scholarship. But in our nation, as General Eisenhower both explained and embodied, the military is drawn from and serves the people, and it is trained to protect our way of life. Duty in military ranks is an exercise of *citizenship*, so that the soldier who participates in the life of a truly great academic institution — in Ike's case from 1948 to 1951, in mine for three wonderful years of law school just over two decades ago and now for an additional single day at the Dean's generous invitation — enters no foreign field but finds himself or herself instead engaged in a different aspect of a citizen's duty.

So while bowing deeply to accept the high honor of this Medal of Freedom, I also welcome the opportunity to speak at Harvard — America's oldest law school and the school that has produced so many leading thinkers and citizens: Supreme Court justices, U.S. Senators, esteemed faculty, distinguished advocates, judges, and partners at great law firms, leaders in so many nations across the globe.

And of course the school where the current President of the United States received his law degree and served as President of the Law Review. I

have mentioned before how when we both walked these halls, enjoyed the famous yard outside, and spent a lot of time at Gannett House, I considered Barack Obama to have strong attributes for military service. He was fit, energetic, intelligent, and fiercely competitive; he also had a hunger for public service and a knack for finding common ground. But I did not anticipate that his entry-level position in the military would be as Commander-in-Chief.

The topic on which I have been invited to share my views today is a tremendously important one. But there is a risk that in setting out to assess the rule of law in Iraq and Afghanistan, and the implications of that assessment for our national security interests, I will create the impression that the features of the formal legal systems of both countries are more clearly discernible, more stable, and therefore more conducive to rule-governed judicial decisions than they really are. Let us mitigate that risk by affirming the reality up front: neither country's legal system possesses the settled law and procedures or commands the respect and authority within society that are possessed and commanded by the legal systems of the United States and other western democracies.

To apply a phrase from the late Justice Harlan I prized almost as soon as I learned it for myself in some of that reading Dan Meltzer once assigned, the influence of law upon "primary, private individual conduct," particularly in Afghanistan, remains negligible in many places. Justice Harlan's phrase, from his influential 1971 concurring opinion in *Mackey v. United States*, provided a criterion for determining those cases in which a new constitutional interpretation should be retroactively applied in habeas proceedings. I make no such specific use of the phrase here, but only observe that in these two countries, and again particularly Afghanistan, it is a gross understatement to say that secular court processes are as yet very distant from the decisions individual private citizens make, the incentives they face, the fears they endure, and the survival they seek. Some nights in Kandahar and Khost and Helmand I reflect on the elaborateness of retroactivity doctrine to remind myself of just how distant things are there — where some 80 percent of all disputes are referred to village elders rather than courts — from the cherished system I first studied in earnest here in Harvard.

Nevertheless, despite the risk, there is much value in asking, "rule of law in Iraq and Afghanistan?" This is because the question urges inquiry

into how law has constrained, enabled, and informed our own military operations since September 11th, 2001, even as it also causes us to mull whether and how an abstract concept we all approach with a multitude of assumptions arising from our own experience can possibly help oppose ruthless and diverse insurgent groups halfway across the globe. The case I will briefly sketch here today is this: your Armed Forces heed and have continued to heed the law, take it seriously, and in fact respect it for the legitimacy it bestows upon their often violent and lethal — necessarily violent and lethal — actions in the field. Furthermore, a conscious and concerted reliance upon law to defeat those inside and outside of government who scorn it happens to be good counterinsurgency. Efforts to promote the rule of law must be only part of a comprehensive counterinsurgency campaign and must be focused upon the building and protection of those key nodes and institutions — formal and informal — upon which the authorities' legitimacy depends. Great care must also be taken to preserve the initiative of the individual troops who continue to shoulder the most dangerous and significant burdens of this decentralized conflict. But if prosecuted effectively within these ground rules, such efforts may well prove decisive. After illustrating these points with several examples, I would like to take questions.

In two examples, I will describe significant instances in which law constrained, enabled, and informed U.S. military operations being commanded by General David Petraeus, instances in which I was not directly involved in the decision-making and have reconstructed things with help from General Petraeus and those who were present and advising him. For the remaining examples, I will draw upon personal direct experience.

[slide 2] I did not want to disappoint those of you who insist upon a dose of Powerpoint when being briefed by an Army general. As the slide suggests, the cases I will cite are also evenly divided between Iraq and Afghanistan, and they are both inward and outward-looking. By that I mean they don't artificially restrict focus on conformity of foreign state and nonstate actors with rule of law. My working definition of the rule of law is that it is a principle of governance which holds that all entities in society, public and private, including the state itself, and including coalition partners from whom the state has sought assistance, are accountable to laws. The rule of law in the society concerned increases in proportion to which the laws are made by a legislature or by some process representative of the people's interests, enforced by police and security forces that themselves

follow the law, and interpreted, elaborated, and applied by judges who are evenhanded, honest, and independent. So the first three examples are inward-looking and focusing on us, with the impact upon the rule of law in Iraq or Afghanistan necessarily indirect, through example-setting, the conduct of joint patrols, and other mechanisms. The latter three are more outward-looking and focused upon the governments and societies we find ourselves operating with and in, and upon actions and effects that have a more direct impact upon the rule of law and upon the legitimacy of the governments we are supporting.

Responding to attacks from shrine in Najaf (Iraq)

So now, the first example: The setting was in and around the Iraqi city of An Najaf in late March and early April 2003. Then Major General Dave Petraeus was at the time the commander of a division — a unit of about 20,000 troops and associated helicopters, weapons, communications systems, etc. As division commander, he — and certainly also the commanders and soldiers junior to him — faced time-sensitive and often difficult decisions as they complied with orders to destroy Iraqi military objectives and as they confronted an enemy that routinely fired on them from areas around the Shrine of Imam Ali. (This shrine is one of the holiest sites in Shi'ia Islam.) They also fired on U.S. soldiers from the schools and houses in Najaf — a city of some 600,000 people.

In addition to being militarily sound, the decisions made needed to reflect common sense as well as awareness of the cultural and religious importance of the shrine and other buildings and areas. These decisions — made by individuals who were often tired and under fire — also needed to comply with the law of armed conflict, which permits military forces to kill or capture forces of the enemy but which also requires the minimizing of noncombatant casualties, the avoidance of unnecessary destruction of civilian facilities, and protection of religious and medical sites. United States operations in Najaf in 2003 complied with the law because that is how we had trained, because soldiers had internalized the rules and commanders were setting the right tone, and because operational lawyers — the judge advocates who deploy with our forces — were there in each headquarters down to brigade level to provide sound advice and supervise training on rules of engagement. A brigade, incidentally, is about 4,000 troops and is commanded by a colonel. At one point, General Petraeus recalls putting a precision munition within some 400 meters of the Imam Ali Shrine, having

received reliable intelligence that about 200 armed Saddam Fedayeen were operating in and around the shrine [there is an exception to the rule protecting religious sites that exposes them to attack if they are used for military purposes]. In the end, Najaf fell with less destruction and less loss of life than had he decided differently. We and our Iraqi partners were relieved that the Shrine's Gold Dome escaped the fighting without damage.

Opening the Syria border crossing (Iraq)

A second example: In mid-May of 2003, General Petraeus and the newly elected Governor of Nineveh Province in northern Iraq had just located sufficient Iraqi bank funds to pay government workers in the province. General Petraeus's training in economics came back to him, and he realized that without getting additional goods into the marketplace, the result of paying the workers would be inflation: more Iraqi dinar chasing a relatively fixed amount of goods. So the question to the new governor was how to get additional goods into Mosul, knowing that the flow of vehicles and persons at the Turkish border crossing to the north was already at capacity and that there was no hope in the near term of getting additional goods from Iran in the east. The governor's answer was "Reopen the Syrian border crossing." So the Syrian border-crossing was reopened.

The military decisions associated with reopening the border needed to reinforce the authority and legitimacy of the governor and other Iraqi officials. They needed to respect the economic forces at work. They needed to account for the distribution of units and leaders throughout the province. And they needed to address new security concerns raised by an open international border across which weapons and combatants could flow. The decisions also needed to avoid running afoul of a law — the Case Act — that delineates who in the United States government is authorized to make binding international agreements. They needed to comply with sanctions contained in various laws and UN resolutions — which were not yet lifted at that point — governing trade with Iraq. Legal advice was indispensable in this effort, and General Petraeus's staff judge advocate, my good friend Colonel Rich Hatch, overnight drafted documents that remained below the threshold of an international agreement with Syria. These documents also reassured Washington that General Petraeus was taking emergency measures within his authority. And the documents addressed all of the other key legitimacy, economic, and security concerns. Within days, thousands of trucks were crossing the border, paying modest,

flat taxes — \$10 for a little truck, \$20 for a big truck — that were then used to refurbish and operate the customs stations. The area was teeming with commerce, giving the people hope for normalcy. The inflation General Petraeus had been concerned about never materialized.

Acting upon reports of excessive force or crime (Iraq & Afghanistan)

A third example — and this one is representative of incidents that have confronted commanders in Iraq and Afghanistan: on rare occasions we have received reports alleging use of excessive force against civilians or maltreatment of detainees, either at the point of capture during operations or while held in a facility under U.S. control.

The decision-making process in these rare situations — and I am pleased to be able to say that they have been rare, even as we have faced some who have hidden themselves among civilians and who have sought to mount attacks while in detention — the decision-making process in these rare situations has been governed foremost by law and by our investigative and military justice system. The law requires prompt reporting and investigation of all potential violations and, if the evidence points to it, the prosecution of violators. In these situations, our deployed judge advocates take a lead role. But commanders making decisions in these situations also must incorporate comprehensive non-legal measures to prevent future violations and to eliminate factors that might have contributed to the reported incident. These measures may include immediate instructions through the chain of command, training of guards and interrogators, improvement of facilities, invitations to the International Committee of the Red Cross and others to conduct assessments, discussions with and visits by mullahs and Imams and local council members, and so on. Take the case of a so-called escalation-of-force incident in which troops employ the rules of engagement to, with escalating force, warn an approaching vehicle to slow at a checkpoint and end up tragically claiming the life of a civilian. To help prevent such incidents, non-legal measures may include improvements to traffic control points such as physical barriers, clearly understandable warning signs, better lighting, and refinements to procedures.

Funding local security efforts (Iraq & Afghanistan)

My fourth example is the use of Commanders' Emergency Response Program funds to support the so-called Sons of Iraq in 2007 and 2008. Many of you may have heard of this program, called "CERP" for short. This was initially a program funded with hidden stashes of Ba'ath Party cash — literally scores of aluminum cases contained stacks of hundred dollar bills — discovered by U.S. troops in early 2003. These stashes were secured, accounted for, and then put to use for the Iraqi people by coalition commanders. In late 2003, Congress supplemented these seized Iraqi funds with U.S. appropriated funds, specifying in law that the money must be used "for urgent humanitarian relief and reconstruction projects." The successes of the CERP have been widely reported and documented. While larger-scale U.S. and international reconstruction stalled due to a lack of security or in-country capacity, and while the Iraqi government struggled to execute initiatives of its own, commanders responsibly spent hundreds of millions of dollars in small-scale, immediate-impact projects. These have included thousands of schools, hundreds of medical clinics, thousands of kilometers of road repairs, tens of thousands of minor sewage and sanitation construction and repair jobs, irrigation systems, cement plants, internet cafes for local governments, supplies for courtrooms, air conditioners for homeless shelters, and a host of others.

In 2007, the decision confronting us was whether to use CERP to pay Sons of Iraq — local unemployed Iraqis in communities and neighborhoods in a growing number of provinces, who were willing to turn away from al Qaeda in Iraq and other extremist groups and to provide security for various nearby sites, such as electrical plants, bridges, wells and water treatment facilities, and local government offices. This was the legal piece of a much larger set of decisions aimed at peeling away individuals we came to call "reconcilables" from those who were unwilling to reconcile themselves to a new Iraq and its elected government — so-called "irreconcilables." We calculated that for a fraction of the cost of fielding a new Mine-Resistant-Ambush-Protected (or MRAP) vehicle — the wonderful new vehicles with V-shaped hulls that have saved many of our troops' lives—we could save even more U.S. and Iraqi lives by spending CERP to pay the Sons of Iraq. Once initially reconciled, we and the Iraqi government then developed DDR programs — Disarmament, Demobilization, and Reintegration programs — to begin to move these young Iraqi males into more economically productive trades.

The problem initially, however, was that Congress had said CERP was for “humanitarian” projects, and the prevailing interpretation of the law was that hiring armed Sons of Iraq did not fit the legal definition. To make a long story short, we did a lot of consultation with Senate and House members and staffers. In those consultations, we relied on textual as well as purposive arguments of legislative interpretation first learned right here. The result was that Congress became comfortable with the idea that using CERP to pay the Sons of Iraq was an acceptable humanitarian use of the funds for a limited period in 2007 and 2008. In that period, the use of CERP funds was absolutely essential to success in the larger counterinsurgency effort. As I will point out a bit later in discussing efforts of the Rule of Law Field Force in Afghanistan, this approach of employing appropriations provided by Congress for the Department of Defense as a bridge to other funding sources is something the Executive Branch is doing of necessity in Afghanistan in several other contexts.

Adopting Counterinsurgency Theory (Afghanistan)

My fifth example is the express pursuit of a counterinsurgency strategy in Afghanistan since 2009, and what that means in theory. A good deal of theory on these matters can be found in the U.S. military’s 2006 COIN manual and other recent professional literature.

United States uniformed men and women who are deployed to Afghanistan recognize that the rule of law principle I defined at the outset is essentially a principle of civilian governance. By “civilian,” we do not mean that the laws don’t apply to or require enforcement by the military. Surely they must for the rule of law to exist. As examples one, two, and three illustrated, the 98,000 U.S. troops in Afghanistan are formally bound by written codes of military justice, by commanders’ orders, and by rules of engagement consistent with law. The same is true for the some 40,000 international, and 170,000 Afghan troops deployed in partnership with our forces. All of these military forces join some 134,000 Afghan police in providing security within Afghanistan’s boundaries based upon specific United Nations Security Council, North Atlantic Treaty Organization, and Afghan domestic legal mandates.

By “civilian” governance, we mean to stress that the rule of law principle speaks to and provides a framework for evaluating the effectiveness of the sort of civilian-led government that ordinary Afghans clearly aspire to

have. Scarred by decades of armed conflict and forcible occupations by the Soviets, by warring tribal chiefs, and by the Taliban, Afghanistan wants no part of military rule.

The American occupation of Afghanistan ended in 2001, and the country is seeing some still-reversible positive trends, but armed conflict continues in 14 of Afghanistan's 34 provinces. That makes the government's employment of both military and police forces a necessity. The armed conflict in Afghanistan is insurgency — a form of warfare in which non-ruling groups employ a mix of violent, persuasive, and other means in an effort to gain power, unseat the government, or otherwise change the political order.

When fighting an insurgency, a government that protects the population and upholds the rule of law can earn legitimacy — that is, authority in the eyes of the people. This is true even against insurgents who both flout and cynically invoke the law. A government's respect for preexisting and impersonal legal rules can provide a key to gaining it widespread, enduring societal support. This is because distributions of resources, punishments, and other outcomes under law are, ideally, blind to whether one is Popalzai or Shinwari, Pashtun or Tajik, Shi'a or Sunni, or any other tribe, ethnicity, or sect.

Law is thus a powerful potential tool in COIN, though it was from the influence of my professors in this room that I instinctively avoid ever calling the law a mere "tool" in the service of some other end. Let's say law is a powerful potential force in COIN.

Fielding the Rule of Law in Practice (Afghanistan)

My sixth and final case example descends from the theoretical heights of the fifth example and encourages looking with a cold eye at what is being done in Afghanistan and how things are going.

As we move further into 2011, it's worth recalling that there were core grievances 20 years ago in the Afghanistan of the early 1990s that spawned and subsequently empowered the Taliban, leading to its opening as a safe haven for al-Qaida. One of these grievances was the inability of the post-communist Afghan governments to establish a foundation at the subnational level. With no competing authority, the predatory actions of

corrupt warlords fueled hatred as local strongmen vying for power sought to compel obedience through the use of force in support of blatant self-interest. Under such conditions, even the harsh and repressive forms of dispute resolution and discipline, advertised by the Taliban as justice, seemed a tolerable alternative.

Fast forward to today. And while much about the situation is different from and more favorable than that of 20 years ago, it is significant that surveys of the Afghan population in key districts reflect a continued lack of governance at this subnational level. Note that Afghanistan is subdivided into 34 provinces and 369 districts. [slide 3] Afghanistan's Independent Directorate of Local Governance reports that there are 88 districts lacking saranwals, or prosecutors. [slide 4] And there are 117 lacking judges. The numbers are actually higher, as some prosecutors and judges on provincial and district payrolls are actually not at their province or district of duty, choosing instead to remain in Kabul or some other relatively safe locale.

This lack of governance, the surveys show, is accompanied by a lack of confidence in the government's ability to deliver justice, resolve civil disputes and address a perceived culture of impunity among the powerful. Establishing the rule of law in these districts is critical to the kind of sound governance that will enable an enduring transition of security responsibility to Afghan forces and deny that rugged country as a sanctuary for global threats.

[slide 5] By providing essential field capabilities — and by that I mean security, communications, transportation, contracting, engineering — the Rule of Law Field Force is helping Afghan officials establish rule-of-law green zones in recently cleared areas in Afghanistan. Doing so requires close coordination with locally deployed military units and partnered Afghan forces, as well as with talented civilian officials from the U.S. interagency, from Canada, the United Kingdom, the European Union, the United Nations and other committed international donors.

[slide 6] All Rule of Law Field Force operations are undertaken with an Afghan government lead, and pursuant to civilian policy guidance from Ambassadors Karl Eikenberry, the U.S. chief of diplomatic mission, and Hans Klemm, the coordinating director for rule of law and law enforcement. And as with all international rule-of-law support efforts in

Afghanistan, those of the Rule of Law Field Force fall under the aegis of the United Nations and United Nations Security Council Resolution 1917.

[slide 7] Recent efforts to deliver better governance in western Kandahar City illustrate how an Afghan- and civilian-led rule-of-law campaign is being carried out, and how the Rule of Law Field Force is contributing. The campaign is focused upon holding areas that have been cleared and then building the institutions necessary for security that will last after soldiers are no longer present.

[slide 8] The large Sarposa detention facility in this area, run by Afghanistan's Ministry of Justice, has in recent years been chronically vulnerable and a symbol of the government's ineffectiveness. In 2008, some 400 Taliban prisoners escaped in a daring daylight attack. Assassinations of investigators, bribery of prosecutors, intimidation of justices, and attacks upon witnesses have corrupted the system and obscured both evidence and law. The Afghan national government has been reinforcing the objective of establishing the rule-of-law green zone adjacent to Sarposa prison, and then projecting criminal justice, as well as mediation and civil-dispute resolution, to outlying districts.

[slide 9] Afghanistan's ministers of Justice and Interior on 27 September — of last year — agreed to immediately build and man, with coalition-nation financing and international advisory assistance, a secure complex known as the Chel Zeena Criminal Investigative Center. [slide 10] The goal of Chel Zeena is to build Afghan capacity to conduct professional, evidence-based investigations, and independent, law-governed prosecutions of the individuals detained in the newly refurbished Sarposa pre-trial detention facility adjacent to it.

Civilian corrections mentors, meanwhile, will work to bring the conditions of detention into compliance with Afghanistan's 2005 law on prisons and detentions, while also reviving the vocational, technical and education bloc of the facility.

[slide 11] The Chel Zeena center, two buildings of which have been inhabited since mid-December, features modest but efficient offices, round-the-clock lighting and utilities, administrative facilities, evidence and hearing rooms, as well as protective housing for investigators, prosecutors, guards and clerical personnel.

[slide 12] With a reinforced hub, consisting of green zones in key governance and dispute resolution nodes in Kandahar City, the projection of support to the districts in Kandahar province becomes more feasible, as district centers rely heavily on the institutions in provincial capitals. The importance of reinforcing the key nodes making up the provincial hub cannot be overstated, as the assassination this past Friday of Kandahar Police Chief Khan Mohammad Mujahid at the police headquarters reminds us. The substantial gains across large swaths of land formerly controlled by the Taliban, reported just yesterday by Rajiv Chandrasekran of the Washington Post, have made assassination, particularly with suicide car bombs or vests, the desperate tactic of weakened cells no longer able to hold terrain or confront government forces. [slide 13] In addition to Kandahar City, rule of law green zones are being established in other provincial centers, with linkage to protective zones for outlying districts. This hub-and-spoke linkage between green zones in key provinces and districts is helping to create a system of justice at the subnational level.

Conclusion

A few concluding observations before taking questions. [slide 14] First, although potentially decisive, law was not the sole consideration in these examples, whether inward- or outward-looking. Instead, legal rules joined a host of tactical, operational, logistical, organizational, and other imperatives, all of which were and are significant enough to cause mission success or failure. Notably, in the first two examples, among the imperatives was initiative, without which the military units and soldiers involved would not have been even in position to succeed, and, in the examples that I cited, to save lives. In the 4th, 5th, and 6th examples, it is funding, a comprehensive approach to protecting the population and legitimating the government, and the field projection of governance, respectively, that are the dominant considerations.

Second, and my and General Petraeus's experiences here are by no means unique, the vast majority of soldiers and commanders took great pains to stay within the bounds of the law and in fact relied upon legal advice or legally sound training to sort through what sometimes appeared to be conflicting rules and other complex situations: Can I target the man who is shooting at me from behind the school? Am I authorized to notify the Syrians that we're opening the border? What rules of engagement do I give to my troops at the checkpoint, now that a suicide bomber has just attacked

a nearby government building? Can I use CERP funds to pay Sons of Iraq or to rebuild Afghan prisons? This should not be surprising. Our troops respect the law because it is what distinguishes them from an armed mob. It is what legitimates those occasions when they are required to use violence to accomplish their mission. Professor David Kennedy, in “Of War and Law,” which is on my Kindle — I should note that Kindle Store via Whisper Net does not work in Helmand Province, Afghanistan — puts it well when he says that law does not “stand[] outside violence, silent or prohibitive. Law also permits injury, as it privileges, channels, structures, legitimates, and facilitates acts of war.”

Third observation — in all of the examples, we had lawyers deployed with us who could help. I have not come close to exhausting all that operational lawyers must be, know, and do in modern U.S. military operations. They must be soldiers — physically fit to endure the rigors and stresses of combat while keeping a clear head, as well as able to navigate the area of operations, communicate using radios and field systems, and, when necessary, fire their assigned weapons. They must also be prepared, when called upon, to foster cooperation between local national judges and police, to plan and supervise the security and renovation of courthouses, to support the training of judges and clerks on case docketing and tracking, to establish public defenders’ offices, to set up anti-corruption commissions, to mentor local political leaders and their staffs, to explain governmental happenings on local radio and television, to develop mechanisms for vehicle registration. Because of their work ethic, creativity, intelligence, and common sense; because of their ability to think and write quickly, persuasively, and coherently; and because of their talent for helping leaders set the proper tone for disciplined and successful operations—I and other commanders tend to deploy as many field-capable lawyers as we can. The number of judge advocates in the 101st Airborne Division reached 29 under General Petraeus’s command. At the Multi-National Force-Iraq, a force of about 160,000, we had 670 uniformed legal personnel, including 330 operational lawyers — several of whom were great British and Australian judge advocates — and 340 paralegal specialists and sergeants. In Afghanistan, we have nearly 500 judge advocates and paralegal specialists.

Not all deployed personnel who can help in these endeavors are uniformed, or practicing lawyers. Michael Gottlieb, Harvard Law School Class of 2003 and Sears Prize winner that year, just completed 15 months of outstanding service in Afghanistan as Senior Civilian of Task Force 435 and

superb Deputy to the inspiring and dynamic Vice Admiral Robert Harward. Professor Ken Holland of Ball State University, who has spent many months in Afghanistan in dozens of journeys there, is, I am grateful to say, the Senior Civilian in the Rule of Law Field Force. And I have my eye in this year's upcoming "draft" on great civilian talent such as Jacob Bronsther, 3rd year law student at New York University Law School, who could not be here this afternoon or else he would have missed celebrating Passover with his family — and I certainly don't wish to fall out of favor with his Mother, as I'm going to need her on my side when Jake and I soon discuss his potential deployment as a District Rule of Law Field Support Officer and Advisor to the Rule of Law Field Force.

Fourth observation: having competent and deployable legal support, much of it trained in halls such as these, is not enough. I grow concerned when I hear of an Italian prosecutor filing charges against a U.S. soldier who followed his rules of engagement and tragically shot and killed an Italian agent during the agent's rescue of an Italian journalist. Investigation established that the agent had failed to communicate his plan to coalition forces or comply with the soldier's instructions; wisely, the Italian court dismissed the case. I grow concerned by suggestions that soldiers during armed conflict should be held to the same standards of collecting evidence, establishing chains of custody, and giving rights warnings to which policemen are held in American cities and towns.

To be sure, it is sound counterinsurgency to establish the forensic trace linking captives to their terrorist acts. This de-legitimizes them in the eyes of the people they hide among and kill. Sound counterinsurgency is a good thing; trying to stage CSI Baghdad or CSI Kandahar on a military objective is not, and quite frankly, the latter is dangerous. It is also dangerous — and unsound counterinsurgency — to move away from law-of-armed-conflict detention to criminal-based detention more rapidly than is feasible. On the other hand, I am encouraged by proposed laws that improve the environment for sound and timely decisions by military commanders and soldiers in the field. Professors David Barron and Jack Goldsmith and Dan Meltzer, during their time in Government, deservedly were renowned throughout the Executive Branch for their incorporation of these considerations into legislative and policy reviews.

As a consequence of our troops' respect for the law, we all share a responsibility to evaluate whether legally significant proposals will promote

or constrain the initiative which my examples suggest is essential to military success. And by “we,” I mean not only military Commanders and operational lawyers, but also members of the legal Academy and the Bar, as well as legislators and judges and diplomats and other executive branch officials — in short, I mean you and other citizens who provide or receive training, at some time or another, in law school settings such as this one.

Which brings me to a fifth and concluding observation. Rule of law in Iraq and Afghanistan remains mostly just a goal, but also an indispensable one. And in the context of Afghanistan, where my own experience is freshest and therefore this one Harvard Law Grad is more confident in my assessments, the challenges are very practical ones. There is much talk about whether the gains of the troop uplift ordered by the President at West Point in 2009 are sustainable. Simply put, this Grad’s view is that the emplacement and transitional support of relatively small numbers of Afghan government officials at the provincial and district level is key to sustaining recent security gains and transferring security responsibility. We need to assist committed Afghans in fielding a network that surpasses what is a very real — if complex and multi-aimed — network opposing them. The resulting improvements in district governance can help displace the Taliban and prevent their return by offering less arbitrary dispute resolution and dispelling fear among the population. These efforts are modest in cost, and the improvements are achievable and sustainable. Anyone who has seen the district governors, police chiefs, and prosecutors in Khost City, Zheray, Arghandab, and Nawa help transform those places from active combat zones into places where Pashtuns are shouting and squabbling over civil claims rather than shooting and planting bombs, knows the force of this observation. The strengthening of traditional dispute resolution at the local level is one of the most efficient and effective ways to achieve the kind of security and stability that can enable transition of responsibility to the Afghan government and its forces, and protect our own core national security interests.

I close where I began, in humility and thanks for having received this opportunity to return to a place I hold dear, to thank the faculty that helped prepare me for service, and to recognize — by accepting this high honor — the extraordinary contributions and sacrifices being made by my comrades in Afghanistan and by those with whom I have served throughout my career since leaving Harvard Law. I also wish to thank Amy Hilton for her tireless efforts in setting up this event, Peter Melish for audiovisual

support, and terrific Harvard alum and Deputy General Counsel of the Department of Defense Paul Koffsky, who helped set a record in clearing me to participate in these events today. My final note of thanks is easily the most important: I thank my family — mother Sadie, children Nathan and Hannah, and amazing, inspirational wife and partner, Kate. This day would have been inconceivable without their constant love and support. Kate, Honey, I'll be home from Afghanistan as soon as I pass the exit exam. And now I will be happy to take questions.