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### A Man for All Seasons: Judge Frank M. Johnson Jr. and the Quest to Secure the Rule of Law Essay: John S. Stone Chair Inaugural Lecture

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## ESSAY

### JOHN S. STONE CHAIR INAUGURAL LECTURE: A MAN FOR ALL SEASONS: JUDGE FRANK M. JOHNSON JR. AND THE QUEST TO SECURE THE RULE OF LAW

*Ronald J. Krotoszynski, Jr.\**

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ALICE: (*Exasperated, pointing after RICH*) While you talk, he's gone!

MORE: And go he should, if he was the Devil himself, until he broke the law!

ROPER: So now you'd give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

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\* John S. Stone Chair, Director of Faculty Research, and Professor of Law, The University of Alabama School of Law. This Essay was delivered as the John S. Stone Chair Inaugural Lecture, on March 12, 2009, at The University of Alabama School of Law. I should note that I had the privilege of serving as a law clerk to Judge Frank M. Johnson Jr. from July 1991 to September 1992; my clerkship with Judge Johnson was an incomparable professional experience that has informed much of my work going forward. Any errors or omissions in this Essay are my responsibility alone.

MORE: (*Roused and excited*) Oh? (*Advances on ROPER*) And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? (*He leaves him*) This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>1</sup>

### INTRODUCTION

First, I wish to thank Dean Ken Randall and the faculty of The University of Alabama School of Law for inviting me to become a part of this outstanding academic community. In candor, I do not think any other law school in the nation has achieved so much, in such a short period of time, as has The University of Alabama School of Law. By any reasonable metric, including the quality and productivity of its faculty, its students, its staff and administration, or if measured by the scope and depth of its alumni's contribution to the state, the nation, and the world, The University of Alabama School of Law has achieved a remarkable level of success, success that has brought the School of Law well-deserved national, and international, attention. It is an exciting place to be, and I am both pleased and honored to be a member of this intellectual community.

My topic this afternoon is the rule of law.<sup>2</sup> Perhaps more than any other topic, the rule of law captures our collective imaginations; what greater virtue can a lawyer possess, one might ask, above a serious and thorough commitment to the rule of law? However easy it may be to extol the virtues and importance of the rule of law in contexts that are largely

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1. ROBERT BOLT, *A MAN FOR ALL SEASONS* 66 (1960).

2. By "rule of law," I mean the notion that a judicial body has an obligation to decide cases appearing before it without regard to the identities of the litigants and to apply the controlling rules without regard to whether doing so produces a congenial outcome from the decider's point of view. The great Chief Justice John Marshall made this point very nicely when he famously noted that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). As Professor Teemu Ruskola has explained:

Although there is much debate over just what the rule of law means, there is a resounding consensus about what it is *not*: it is not the "rule of men." Indeed, the idea that the rule of law means *precisely* not the rule of men is so fundamental that the two terms are best understood as forming a singular expression—"rule of law, and not of men"—even when the clarifying phrase "and not of men" is not tagged to the end.

Teemu Ruskola, *Law Without Law, or is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL RTS. J. 655, 659 (2003); *see also* RONALD DWORKIN, *LAW'S EMPIRE* 209–15 (1986) (discussing the constitutive elements of the rule of law and the importance of these conditions to a just and well-ordered society); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783–92 (1989) (discussing various iterations and elements of the rule of law and positing that the precise contours of the concept are both contestable and, in fact, contested).

hortatory, honoring the concept in contexts where it matters most can prove to be considerably more difficult. Lawyers have a particular obligation to help secure the rule of law, and this obligation extends beyond law school commencement speeches—and inaugural chair lectures. A meaningful commitment to the rule of law means, to use Robert Bolt's wonderful metaphor, a willingness to give the devil himself the benefit of law;<sup>3</sup> in the aftermath of 9/11, it is all too easy to forget this.<sup>4</sup>

In thinking about the obligation of lawyers to work to secure the rule of law, and in considering the cost of suiting deed to word, the example of Judge Frank M. Johnson, Jr., a hero of the Civil Rights Movement and a storied graduate of this institution, provides an instructive example.<sup>5</sup> Judge Johnson's lived commitment to securing the rule of law is instructive not only because of his willingness and ability to pursue justice, regardless of the personal consequences to himself or his family,<sup>6</sup> but because it demonstrates that a commitment to the rule of law is most emphatically *not* a commitment to reaching results that consistently favor one litigant or group of litigants. It is easy to follow the dictates of the law when it requires us to do things with which we agree, and believe to be good, but what about those times when law and personal morality (or loyalty) tread nonparallel paths? Only in the context of those harder cases can one truly test whether a professed commitment to the rule of law constitutes a meaningful commitment or, rather, pretty, but largely empty, verbiage.

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3. BOLT, *supra* note 1, at 66.

4. In this context, one should note that even Dr. Martin Luther King Jr., in advocating nonviolent resistance to unjust laws, recognized and accepted that a community dedicated to the rule of law could not suspend punishment for intentional violations of law:

In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it *openly, lovingly* (not hatefully as the white mothers did in New Orleans when they were seen on television screaming, "nigger, nigger, nigger"), and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.

MARTIN LUTHER KING JR., *Letter from a Birmingham Jail* (1963), reprinted in MARTIN LUTHER KING JR., *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 83, 90 (James Melvin Washington ed., 1986) [hereinafter King, *Letter from a Birmingham Jail*]. In this sense, then, Dr. King plainly and unequivocally embraced the rule of law, notwithstanding his deep and abiding commitment to nonviolent resistance of unjust laws.

5. See JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* (1993) [hereinafter BASS, *TAMING THE STORM*]; JACK BASS, *UNLIKELY HEROES* 19, 78–82, 331 (1981) [hereinafter BASS, *UNLIKELY HEROES*]; TINSLEY E. YARBROUGH, *JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA* (1981).

6. See *infra* text and accompanying notes 141–46; see also BASS, *UNLIKELY HEROES*, *supra* note 5, at 78–82.

## I. JOHN S. STONE: A BAR LEADER COMMITTED TO THE RULE OF LAW

Before moving into the substance of this lecture, please allow me first to thank publicly Dean Ken Randall and The University of Alabama School of Law faculty for appointing me to the John S. Stone Chair of Law. It is a tremendous professional honor to hold this prestigious title. Moreover, it is also a deep honor to hold a chair named for a leading member of the bar, a lawyer committed to promoting the highest standards of ethics and professionalism, who worked to promote law reform and the efficient administration of justice, and who, like Judge Frank M. Johnson Jr., was deeply committed to securing the rule of law.<sup>7</sup>

At a time of increasing economic uncertainty and dislocation, the importance of philanthropy to the success of higher education, including legal education, cannot be overstated. To put the matter simply, but for the Stone family's and its friends' support of The University of Alabama School of Law, none of us would be here this afternoon. Philanthropy of this sort is essential to the continued growth and success of both the School of Law and The University of Alabama more generally. Accordingly, I wish to publicly thank the Stone family and their friends for choosing to establish and endow the position that I now hold.

John Stone was an active and engaged member of the Alabama Bar, practicing corporate law in Birmingham and representing a diverse group of clients, including several major railroad companies.<sup>8</sup> Mr. Stone was a leader of the state and local bar and worked vigorously to advance the project of law reform; he was critically concerned with the fair and efficient administration of justice in Alabama.<sup>9</sup> Indeed, based on his professional activities and service to the bar, it is clear beyond peradventure that Mr. Stone was devoted to securing the rule of law in Alabama.<sup>10</sup> In this important sense, he shared a commitment with Judge Frank M. Johnson

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7. See Editorial, *Citizen John Stone: An Apostle of Decency*, BIRMINGHAM NEWS, July 29, 1932, at 8 (noting that attorney Stone "demanded clean practice and thoroughgoing decency in the profession," lauding Stone's efforts "to rid the local bar of members engaged in unethical practice," and predicting that "[h]is efforts fearlessly to set the legal house in order will be remembered beyond this generation"); Obituary, *John S. Stone*, BIRMINGHAM AGE-HERALD, July 30, 1932, at 4 (noting that Stone "struggled heroically to modernize procedure in the courts and to make justice at once alert and humane"); Editorial, *Alabama Loses a Leader*, BIRMINGHAM POST, July 30, 1932, at 4 (noting that "[i]n a profession where ethics are too often disregarded, Mr. Stone maintained and abided by the highest conception of the duties of his calling," that Stone's "work for corrective measures that would make justice as easily obtainable for the rich as for the poor and deserved punishment as certain for the mighty as for the lowly," and observing that "[t]he efforts he exerted as president of the Birmingham Bar Assn. toward reducing inefficiency and uncertainty in our court procedure are well known").

8. J.W. Patton, *Death Takes John S. Stone*, THE LOUISVILLE & NASHVILLE EMPLOYEES' MAGAZINE, Aug. 1932, at 5.

9. Editorial, *Alabama Loses a Leader*, *supra* note 7, at 4.

10. See Editorial, *Citizen John Stone*, *supra* note 7, at 8 (observing that Stone was "by very birth and breeding a strong and simple advocate of clean and aboveboard tactics").

Jr.; John S. Stone, Esq., firmly believed that a justly ordered community must be committed to securing the rule of law.

## II. THE RULE OF LAW AND TROUBLED TIMES

Regardless of their positions on the ideological spectrum, virtually all lawyers, judges, and politicians claim a deep and abiding commitment to the rule of law.<sup>11</sup> When the question is merely theoretical, a firm commitment to the rule of law imposes few costs and casts the person making the rhetorical commitment on the side of light and goodness. At the same time, when things seem difficult, when the costs of honoring a commitment to the rule of law seem less than negligible, our commitment to honoring its dictates can wane considerably. To borrow Robert Bolt's excellent turn of phrase, when "the weather turns nasty," all too often we readily "up with an anchor and let it down where there's less wind."<sup>12</sup>

The traumatic events of September 11, 2001, provide a telling case in point. In times of safety and plenty, it is easy, costless, in fact, to proclaim a strong commitment to the rule of law and to affording all persons its protection. But, when times become difficult, this commitment can be tested. September 11, 2001, was a day, like December 7, 1941, that will live in infamy. Al-Qaeda's vicious attacks on innocent civilians in New York City, New York, and Washington, D.C., will justly live on in our collective memory as exemplars of the basest sort of perfidy. Our national reaction to this tragedy, however, provided an important test of our core commitment to securing and advancing the rule of law. I fear, in retrospect, that our government did not entirely pass the test.<sup>13</sup>

Some of the brightest lawyers of their generation, working in the Department of Justice and the Office of Legal Counsel in the White House, saw in the attacks of 9/11 an astoundingly broad warrant for an unprecedented expansion of executive authority.<sup>14</sup> Seeking to counter an invisible

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11. See Fareed Zakaria, *The Enemy Within*, N.Y. TIMES BOOK REVIEW, Dec. 17, 2006, at 8 (asserting that "[e]veryone accepts that 'the rule of law' is the foundation of liberties in the Western world"). *But cf.* Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 359 (2006) ("Although everyone agrees that the rule of law is important, its existence in a polity is a question that tends to be answered the way U.S. Supreme Court Justice Potter Stewart once defined pornography: 'I know it when I see it.'"). Kahn notes that "[w]hen definitions are offered [of the rule of law], they are often unhelpfully conclusory and imprecise." *Id.*

12. See BOLT, *supra* note 1, at 69.

13. See Editorial, *The Tortured Memos*, N.Y. TIMES, Mar. 4, 2009, at A26; Neil A. Lewis, *Memos Reveal Scope of Power Bush Sought in Fighting Terror*, N.Y. TIMES, Mar. 3, 2009, at A1 (discussing memoranda providing justifications for broad, extra-constitutional presidential powers that the President could exercise domestically in order to combat the war on terror, including the unilateral suspension of substantial parts of both the First and Fourth Amendments of the Bill of Rights).

14. See Charlie Savage & Scott Shane, *Terror-War Fallout Lingers Over Bush Lawyers*, N.Y. TIMES, Mar. 9, 2009, at A1; see also Report: *Surveillance 'Unprecedented'*, SEATTLE TIMES, July 11, 2009, at A3 (noting that "[t]he Bush Administration built an unprecedented surveillance operation to pull in mountains of information far beyond the warrantless wiretapping previously acknowledged" and

enemy, our government's best legal talent concluded that the President was free to disregard constitutional constraints, ignore the Bill of Rights, and in the name of saving the Constitution, defile it.<sup>15</sup> For example, the Department of Justice and the White House Office of Legal Counsel both concluded that domestic spying, without warrants or any judicial supervision, did not implicate the Fourth Amendment's guarantee that "the people" were "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>16</sup> The relevant text, drafted by James Madison and adopted in the very first Congress, could not be more clear: "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>17</sup>

The Supreme Court has, of course, developed a byzantine case law that attempts to establish that the Fourth Amendment does not really mean what it seems so clearly to say. Leaving aside criticisms of various judicially-engrafted warrant exceptions, the notion of a freewheeling, unsupervised wiretap program of any telephone call initiated from a foreign nation to someone in the United States, or to someone outside the United States from someone here, should be shocking. It is a breathtaking claim that seems simply to disregard a clear limitation on the scope of governmental investigative power.

Liberty and security are always in tension, and if one sought absolute security, the price to liberty would be extreme. To be sure, freedom can be, and routinely is, abused. But the Framers of our Constitution made a conscious decision to assume risk, significant risk, to better secure liberty,<sup>18</sup> and no government official, high or low—even the President—has a unilateral right to revisit that allocation of risk.

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observing that the operation rested on a dubious legal basis). Moreover, whether one could attempt successfully to justify the unlawful (indeed, unconstitutional) means based on the ends sought to be achieved also appears rather doubtful, at least in hindsight. See Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value, Officials Report*, N.Y. TIMES, July 11, 2009, at A1.

15. See THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB xxv-xxxiv, 3-380 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (republishing major opinions and memoranda of the Department of Justice's Office of Legal Counsel authorizing, among other things, unlimited executive detention of enemy combatants and the use of "enhanced interrogation tactics" that many claimed constituted "torture" under the Geneva Convention); see also Josh Meyer & Julian Barnes, *Memos Gave Bush Overriding Powers*, L.A. TIMES, Mar. 3, 2009, at A1, A14 (discussing additional Office of Legal Counsel memoranda released by the Obama Administration that addressed the scope of the President's powers in the domestic context); Editorial, *The Tortured Memos*, *supra* note 13, at A26 (discussing and criticizing the same memoranda).

16. U.S. CONST. amend. IV; OFFICES OF INSPECTORS GENERAL, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 12-13 (2009), available at <http://www.fas.org/irp/eprint/psp.pdf> (documenting and criticizing the Bush Administration's domestic spying program and the use of warrantless wiretaps on U.S. citizens).

17. U.S. CONST. amend. IV.

18. See generally Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535, 565 (1998) (arguing that the structural separation of powers within the federal government makes governance more difficult, but works both to secure personal liberty and to facilitate ac-

Yet, in the weeks and months immediately following 9/11, senior lawyers working for the Bush Administration, ostensibly providing accurate and credible legal advice, advocated the following propositions:

- The President, acting alone and without the consent of Congress, may authorize warrantless wiretaps.<sup>19</sup>
- “First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully.”<sup>20</sup>
- The Fourth Amendment’s warrant and probable cause requirements, “however well suited” to criminal law enforcement, are simply “unsuited to the demands of wartime and the military necessity to successfully prosecute a war against an enemy.”<sup>21</sup>
- “In light of the well-settled understanding that constitutional constraints must give way in some respects to the exigencies of war, we think that the better view is that the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks.”<sup>22</sup>
- The President has the inherent and unlimited authority to transfer prisoners to third countries incident to extraordinary rendition, provided that no overt and express affirmative agreement existed that a transferee would be tortured.<sup>23</sup>

All of these propositions are remarkable for the sheer audacity of their scope and also for their departure from the notion that the President is subject to the rule of law.<sup>24</sup>

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countability for government actions); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513–17, 1531–40 (1991) (arguing that the separation of powers exists primarily not to protect the branches of the federal government from each other, but rather to protect citizens against the abuse of governmental authority, even at the cost of creating a cumbersome governmental framework that creates much inefficiency); Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–07 (1989) (arguing that separation of powers and rule of law work together to constrain government from unwise or unjust action).

19. See Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to David S. Kris, Assoc. Deputy Attorney General, Constitutionality of Amending Foreign Intelligence Service Act to Change the “Purpose” Standard for Searches 6–8 (Sept. 25, 2001), <http://www.usdoj.gov/opa/documents/memoforeignsurveillanceact09252001.pdf>.

20. See Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel, Dep’t of Def., Authority for Use of Military Force to Combat Terrorist Activities *Within the United States* 24 (Oct. 23, 2001), <http://www.usdoj.gov/olc/docs/memomilitaryforcecombat 10232001.pdf>.

21. *Id.*

22. *Id.* at 25.

23. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., to William J. Haynes II, Gen’l Counsel, Dep’t of Def., The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations 20, 25–26, 34–35 (Mar. 13, 2002), <http://www.usdoj.gov/opa/documents/memorandum03132002.pdf>.

24. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952) (holding that even a claim of national emergency in the context of an ongoing foreign military operation in Korea does not authorize unilateral presidential governance because the President lacks any general and independent lawmaking power and observing that “[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times”); *id.* at 650 (Jackson, J., dissenting) (noting



A question begs to be asked and answered: How did very smart lawyers, educated at and graduated from some of the finest law schools in the nation, find it possible to endorse a set of conclusions that, at bottom, rest on the notion that in times of war or crisis, the President is a law unto himself? Even if in contemporary context in late 2001 and early 2002, the costs of constitutional fealty seemed potentially very high, the Constitution itself simply does not authorize presidential dictatorship. To put the matter both simply and directly, lawyers vested with advising the President on the requirements of the Constitution and laws failed to discharge their duties to the President, the nation, and the profession.

A related question arises from the public attacks on lawyers representing detainees at the U.S. Naval Base in Guantanamo Bay, Cuba. Assistant Secretary of Defense Charles “Cully” Stimson, in March 2007, called on corporations to boycott law firms if a firm provided pro bono legal assistance to the detainees.<sup>25</sup> Moreover, a major presidential candidate publicly celebrated the Guantanamo detention facility, arguing that rather than closing it the United States should “double Guantanamo,”<sup>26</sup> and helpfully

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that the Framers of the U.S. Constitution “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation” and concluding that “[w]e may also suspect that they suspected that emergency powers would tend to kindle emergencies”); Verkuil, *supra* note 18, at 317–18 (arguing that the President cannot enact legislative policies without the consent of Congress and noting that when “the President seeks to preempt the legislative branch,” such action “rais[es] the warning signs of executive hegemony that triggered the Glorious Revolution and its American counterpart”).

Notwithstanding the public firestorm associated with these policies, however, at least some of the Bush Administration lawyers responsible for them apparently remain utterly unapologetic and unrepentant about their legal advice to the President and the Attorney General. See John Yoo, *Why We Endorsed Warrantless Wiretaps*, WALL ST. J., July 16, 2009, at A13. Professor Yoo’s defense largely boils down to unsupported claims such as “[o]ur Constitution created a presidency whose function is to protect the nation from attack,” the more specific suggestion that “[i]n FISA, President Bush and his advisers faced an obsolete law not written with live war with an international terrorist organization in mind,” and the counterfactual (and hyperbolic) conclusion that “[i]t is absurd to think that a law like FISA should restrict live military operations against potential attacks on the United States.” *Id.*

With all due respect to Professor Yoo, the President is neither a king nor a dictator, and neither the President nor his aides may pick and choose which laws that they will deign to observe and which laws that they will elect to ignore. If Professor Yoo needs to conduct some supplementary reading on this question, he might take a gander at *United States v. Nixon*, 418 U.S. 683 (1974) (holding that the President, like all citizens, must comply with lawful discovery requests incident to the adjudication of criminal charges against a U.S. citizen). To state the matter simply, the existence of a war does not transform the President into an extraconstitutional monarch; he (or she) remains obliged to “faithfully execute” all the laws enacted by Congress (as opposed to only congenial laws) and to respect constitutional limitations on executive authority (such as, for example, the Fourth Amendment). See *Youngstown*, 343 U.S. at 585–89.

25. See Editorial, *Guantanamo Intimidation: Lawyers for Terrorism Suspects are Still Being Bullied*, WASH. POST, Mar. 6, 2007, at A18; *Pentagon Official Who Criticized Detainee Lawyer Quits*, WASH. POST, Feb. 3, 2007, at A6.

26. Contemporary media coverage of a 2007 GOP primary debate noted that:

Former Gov. Mitt Romney of Massachusetts said he would support “not torture but enhanced interrogation techniques.” And taking a tougher line than President Bush and Mr. McCain, who have said they would like to shut down the detention center at Guantánamo Bay, Mr. Romney said he wanted the facility doubled in size.

added that keeping the detainees in Cuba facilitated denial of both formal legal processes and access to lawyers.<sup>27</sup>

To be clear, I harbor no doubts about the reality of the threat of terrorism or the ill-will that some bear the United States and its citizens; the lessons of 9/11 cannot be ignored. Even so, however, it should be shocking for a major presidential candidate to openly advocate indefinite executive detention of persons without access either to lawyers or courts. This sort of unlimited executive power was one of the root causes of the American Revolution in 1776.<sup>28</sup> Indeed, the Framers of the Constitution believed that delineating and limiting the scope of government power was essential to preventing “tyranny.”<sup>29</sup> And the Framers’ fear was not of foreign invaders or domestic saboteurs, but rather of government officials, drunk with power, using that power to remain in office for as long as feasible and by any means necessary.<sup>30</sup>

In this regard, the American Bar Association’s strong stand in favor of affording even those accused of the vilest crimes access to lawyers and the Article III courts merits both notice and praise.<sup>31</sup> The ABA House of Dele-

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Adam Nagourney & Marc Santora, *Terror Attack Scenario Exposes Deep Differences Among G.O.P. Hopefuls*, N.Y. TIMES, May 16, 2007, at A17; see also Marc Santora, *3 Top Republican Candidates Take a Hard Line on the Interrogation of Detainees*, N.Y. TIMES, Nov. 3, 2007, at A17 (describing enthusiasm of several Republican would-be presidential nominees for “enhanced interrogation” techniques and noting specifically that Mitt Romney, after visiting the detainee facility in Cuba, was quoted as having “no concerns with regards to the fair and appropriate treating of these individuals” and also reporting that Mr. Romney wished to “double Guantánamo”).

27. See Paul Krugman, *Don’t Blame Bush*, N.Y. TIMES, May 18, 2007, at A25 (noting that at a Republican presidential candidate debate, “the candidates spoke enthusiastically in favor of torture and against the rule of law. Rudy Giuliani endorsed waterboarding. Mitt Romney declared that he wants accused terrorists at Guantánamo, ‘where they don’t get the access to lawyers they get when they’re on our soil. . . . My view is, we ought to double Guantánamo.’ His remarks were greeted with wild applause”); cf. James Podgers, *ABA Endorses Detainee Rights*, ABA J., Mar. 2009, at 66 (“The ABA’s policymaking House of Delegates voted overwhelmingly at the midyear meeting to endorse rights of due process for detainees held at Guantanamo Bay, Cuba.”).

28. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–56 (2004) (Scalia, J., dissenting) (noting that the Framers sought to prevent unilateral deprivations of liberty at the hand of executive authorities, quoting Blackstone on the centrality of this principle in a justly ordered society, and noting that “[t]he gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property”); *id.* at 554–55 (“The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”).

29. See Brown, *Separated Powers*, *supra* note 18, at 1513–16.

30. See Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450–51 (1991).

31. See Podgers, *supra* note 27, at 66. In fact, the ABA expressed misgivings about abuses associated with the Bush Administration’s efforts to prosecute the War on Terror even earlier, in 2004. See AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES, Aug. 9, 2004, reprinted in THE TORTURE PAPERS, *supra* note 15, at 1132–64. The ABA adopted the report at its 2004 annual meeting; the resolution and report, among other things, “condemns any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government (including its contractors) and any endorsement or authorization of such measures by government lawyers, officials and agents.” *Id.* at 1132.

gates has approved a resolution expressly calling for the Guantanamo detainees to have access to lawyers, to the Article III federal courts, and to legislative limitations on indefinite confinement of persons established to be enemy combatants after full and fair hearings.<sup>32</sup>

### III. THE RULE OF LAW AND THE JUDICIAL CRAFT

Without in any way attempting to lessen or minimize the importance of 9/11, the United States has faced other crises and not found it necessary to suspend the Constitution in order to meet the exigencies of the day. A telling case in point involves efforts to enforce the constitutional guarantees of equal protection of the laws in the states of the former Confederacy. Militant and widespread opposition to the Supreme Court's ruling in *Brown*,<sup>33</sup> so-called "massive resistance,"<sup>34</sup> made efforts to translate the decision into a lived reality a daunting task, particularly for the lower federal court judges in the South faced with crafting orders to desegregate the public schools, universities, parks, and libraries.<sup>35</sup>

Opposition to the implementation of *Brown* enjoyed the support of many white Southerners, and politicians throughout the South took heed of this fact. As Professor Spivack notes, "an overall segregationist strategy was developed to avoid, or at least postpone, the effect of the *Brown* decision."<sup>36</sup> This plan of action included a number of discrete steps, including "mobilization of political power to discourage school boards and judges from proceeding against segregation," "creation of obstacles to make it difficult for blacks to take desegregation suits before judges," "persuasion of southern federal judges not to issue desegregation orders through legal argument" and "circumvention of those orders which were issued," encouraging both school boards and school administrators to adopt the position "that they had no obligation to desegregate or cooperate with judges in any way," and last but not least, "attacking the Supreme Court, its decisions, and its personnel."<sup>37</sup>

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32. See Podgers, *supra* note 27, at 66.

33. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

34. JOHN M. SPIVACK, *RACE, CIVIL RIGHTS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT* 46-48 (1990). As Spivack explains: "Separation of the races was to be defended by a campaign of 'massive resistance.' The entire South would use all steps short of violence or secession to oppose desegregation of the schools." *Id.* at 46.

35. See BASS, *UNLIKELY HEROES*, *supra* note 5, at 9-10, 213-30, 297-318.

36. SPIVACK, *supra* note 34, at 47.

37. *Id.* at 47-48. For an example of "moderate" contemporary Southern views on the question of voluntary desegregation of the public schools and other public institutions, such as colleges and universities, public transportation systems, and parks, see WILLIAM D. WORKMAN JR., *THE CASE FOR THE SOUTH* (1960).

These concerted efforts at defying the mandate of the Supreme Court of the United States made life very difficult for the lower federal court judges charged with the responsibility of translating the majestic generalities of *Brown* and *Brown II*<sup>38</sup> into concrete social changes on the ground in the hundreds of segregated school districts operating in the South. As the historian Jack Bass has eloquently stated the matter, “Operating in the eye of a storm, they made the Fifth Circuit Court of Appeals the institutional equivalent of the Civil Rights Movement itself.”<sup>39</sup> Professor Owen Fiss states the matter in even more epic terms: “It was not reasonable to expect the judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations—they fought the popular pressures at great personal sacrifice and discomfort.”<sup>40</sup>

On the Fifth Circuit, “The Four,” as a judicial colleague pejoratively labeled them, worked assiduously to implement *Brown*, sometimes with the cooperation of district court judges, but as often as not, without; Judges John R. Brown, Richard T. Rives, Elbert P. Tuttle, and John Minor Wisdom did as much as any jurists in the nation to disestablish state-sponsored racial discrimination in the states of the former Confederacy.<sup>41</sup> In addition, however, district court judges like Frank M. Johnson, Jr. and J. Skelly Wright labored mightily on the front lines of the federal judiciary to implement the fundamental constitutional principles of *Brown*.<sup>42</sup> Professor Bass notes, quite accurately, that “[b]efore their elevation as circuit judges, the roles of District Judge Johnson for more than two decades in Alabama and District Judge J. Skelly Wright for a much shorter period in New Orleans demonstrated the creative force of a single district judge.”<sup>43</sup> Moreover, “[t]heir interaction with the Fifth Circuit Court of Appeals intensified that court’s lasting historical impact.”<sup>44</sup>

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38. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1955) (calling for the admission of would-be students to the public schools on a “nonracial basis” and for the operation of the public schools on a “racially nondiscriminatory” basis going forward and instructing the lower federal courts to require that “the defendants [local public school districts] make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling [in *Brown I*]”).

39. JACK BASS, UNLIKELY HEROES 9 (1990).

40. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 90 (1978).

41. See BASS, UNLIKELY HEROES, *supra* note 5, at 15–19, 23–26; see also SPIVACK, *supra* note 34, at 52 (observing that “[t]he federal courts were thus entrusted with the primary responsibility for desegregation in southern public schools” and also that federal courts in the South “were staffed and operated in an atmosphere that was bitterly hostile to the law the judges were bound to enforce”); *id.* at 169–72 (discussing the crucial contributions made by these four judges to operationalizing *Brown* and asking “what might have happened in the South if there had been a different cast of characters on the Fifth Circuit Court of Appeals[?]”).

42. BASS, UNLIKELY HEROES, *supra* note 5, at 19, 56–58, 66–68, 112–16.

43. *Id.* at 19.

44. *Id.*

Given his clear and steadfast determination to implement *Brown* over many years,<sup>45</sup> one might casually assume that Judge Frank Johnson's personal sympathies were with the leadership of the Civil Rights Movement. Such an assumption would undoubtedly be correct, but this does not mean that Judge Johnson would excuse unlawful actions undertaken in the service of the cause. Many are familiar with Judge Johnson's famous decision in *Williams v. Wallace*,<sup>46</sup> in which he held that, in light of the horrific and longstanding constitutional wrongs committed against African-American citizens of Alabama, the state of Alabama had a duty to facilitate a mass march from Selma to Montgomery over U.S. Highway 80, the main arterial road in the region.

In issuing the injunction permitting the march to proceed, Judge Johnson explained that "it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against."<sup>47</sup> With respect to the denial of voting rights in Alabama, the subject of the protest march, "the wrongs are enormous," and "[t]he extent of the right to demonstrate against these wrongs should be determined accordingly."<sup>48</sup>

At a superficial level of analysis, one could read the opinion in *Williams* as reflecting broad sympathy for both the protestors and their cause; to some extent, such a reading would be warranted. For example, former U.S. Attorney General Nicholas Katzenbach wrote contemporaneously of the decision that "frankly, I question that rule [Judge Johnson's 'proportionality principle'] as a practical measure of the applicability of the first amendment."<sup>49</sup> To be sure, *Williams* was a very bold decision—creatively reasoned and creatively implemented; Judge Johnson fashioned a remedy appropriate to the events of March 7, 1965, when civil rights protestors were brutally attacked by Alabama state troopers after crossing the Edmund Pettus Bridge in Selma, Alabama.<sup>50</sup>

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45. See BASS, TAMING THE STORM, *supra* note 5, at 118–273; BASS, UNLIKELY HEROES, *supra* note 5, at 78–83, 259–77.

46. 240 F. Supp. 100 (M.D. Ala. 1965).

47. *Id.* at 106.

48. *Id.* For a general discussion and defense of Judge Johnson's proportionality principle in affording access to government property for speech activity, see Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411 (1995).

49. Nicholas DeB. Katzenbach, *Protest, Politics and the First Amendment*, 44 TUL. L. REV. 439, 445 (1970).

50. For an account of the Selma March and the failed precursor march of March 7, 1965, see DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 370–413 (1986) [hereinafter GARROW, BEARING THE CROSS]; DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 72–89, 115–19 (1978) [hereinafter GARROW, PROTEST AT SELMA]; see also BASS, UNLIKELY HEROES, *supra* note 5, at 249–52.

A largely forgotten part of this story, however, was Dr. Martin Luther King's intent to violate an injunction against proceeding with a march from Selma to Montgomery during the pendency of court proceedings before Judge Johnson. On Monday, March 8, 1965, lawyers representing the Southern Christian Leadership Conference (SCLC) sought an injunction against further state interference with the planned protest march in the U.S. District Court for the Middle District of Alabama, with an eye toward a second attempt at marching from Selma to Montgomery on Tuesday, March 9, 1965.<sup>51</sup> In fact, Dr. King announced on national television that the march would proceed again on Tuesday, March 9, 1965.<sup>52</sup> Judge Johnson, however, had other ideas.

Judge Johnson told the SCLC's lead lawyer, the legendary Fred Gray,<sup>53</sup> that he would not issue an injunction for a second march without a hearing and that he would enjoin the SCLC, including Dr. King, from proceeding during the pendency of the court proceedings; Judge Johnson sought a response from Dr. King and the SCLC not later than 9:00 PM on Monday, March 8, 1965.<sup>54</sup> Dr. King, having already announced that a second attempted march would take place on March 9, 1965, was reticent to stand down.<sup>55</sup> Ultimately, Judge Johnson issued a restraining order prohibiting any attempt to conduct the march prior to the scheduled hearing; if Dr. King violated the order, he risked being held in contempt of court.<sup>56</sup>

Wisely, Dr. King decided not to test Judge Johnson's resolve in the matter. Although Dr. King led a march on March 9, 1965, from downtown Selma to the Edmund Pettus Bridge, and across it, he made no effort to proceed beyond a police line on the east bank of the river; instead, after crossing the bridge, Dr. King turned back to downtown Selma.<sup>57</sup> In short,

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51. See GARROW, PROTEST AT SELMA, *supra* note 50, at 76.

52. *Id.* at 80; see also Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785, 787-88, 796-97 (1965) (discussing Dr. King's desire to proceed with a march notwithstanding Judge Johnson's injunction against proceeding during the pendency of the district court's consideration of the case).

53. Gray was a key figure in the Civil Rights Movement and actively represented civil rights litigants in the state and federal courts in Alabama; in fact, he served as legal counsel to Ms. Rosa Parks after her arrest for refusing to give up her seat on a Montgomery, Alabama city transit bus and also to the Montgomery Improvement Association—which comprised the leaders of the Montgomery Bus Boycott. See BASS, TAMING THE STORM, *supra* note 5, at 97-101, 148; BASS, UNLIKELY HEROES, *supra* note 5, at 58-59, 63-64; GARROW, BEARING THE CROSS, *supra* note 50, at 13-14, 21, 24-26, 76.

54. See GARROW, PROTEST AT SELMA, *supra* note 50, at 83-84.

55. See BASS, TAMING THE STORM, *supra* note 5, at 239; GARROW, BEARING THE CROSS, *supra* note 50, at 401-03.

56. See GARROW, PROTEST AT SELMA, *supra* note 50, at 86.

57. *Id.* at 86-87; see also Krotoszynski, *supra* note 48, at 1417-19 (describing the events up to and including the brutal police attack on the civil rights marchers on March 7, 1965, and Dr. King's actions on March 9, 1965). For Judge Johnson's own account of these events, see Frank M. Johnson, *Civil Disobedience and the Law*, 44 TUL. L. REV. 1, 9-10 (1969). Johnson reports that "Dr. Martin Luther King felt that an imminent march was essential and that he considered disregarding the restraining order." *Id.* at 10. Johnson notes that Dr. King did not violate the order and observes that "[t]he moral

he did not violate Judge Johnson's order. Burke Marshall, writing contemporaneously about Dr. King's dilemma, notes that

Dr. King did not disobey the court order, that he acted with the advice of lawyers, and that to the extent that there was ambiguity in what he did, he acted in the good faith belief that the court would find either that he had not been in contempt (as it later did), or that the order, if it was violated by his conduct, was too broad to be constitutionally valid.<sup>58</sup>

In the end, of course, Dr. King and the SCLC did obtain an order requiring Alabama to permit the march.<sup>59</sup> On Sunday, March 21, 1965, the march commenced from Selma, arriving in Montgomery four days later, with 25,000 participants.<sup>60</sup> The impact of the Selma March cannot be overstated; the events in Selma of March 1965 had a direct causal relationship with the introduction and passage of the landmark Voting Rights Act of 1965.<sup>61</sup>

I have no doubt, whatsoever, that Judge Johnson would have held Dr. King and the SCLC in contempt of court if they had violated his restraining order against the proposed March 9, 1965 march. This was not because Judge Johnson lacked sympathy for the merits of the SCLC's cause, but rather because he could not countenance intentional violation of the law, even by a very sympathetic contemnor.

Indeed, direct evidence of Judge Johnson's evenhanded enforcement of the law is available. Two lesser known civil rights era protest cases demonstrate quite conclusively that he held leaders of the Civil Rights Movement no less accountable to the rule of law than renegade state officials.

In 1966, the situation was quite tense in Greenville, Alabama. The SCLC had been organizing local residents to protest systemic forms of discrimination in the community, including the denial of voting rights. The

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impact of the march, which was to produce the Voting Rights Act of 1965, would have been greatly diminished if the court order had been violated." *Id.*

58. Marshall, *supra* note 52, at 796-97.

59. Judge Johnson decided the case quickly, ruling in favor of the plaintiffs on Wednesday, March 17, 1965, and issuing his formal opinion two days later, on Friday, March 19, 1965. *See Williams v. Wallace*, 240 F. Supp. 100, 100, 111 (M.D. Ala. 1965).

60. *See GARROW, PROTEST AT SELMA, supra* note 50, 114-17.

61. *See id.* at 117-19; Krotoszynski, *supra* note 48, at 1427-28; *see also Katzenbach, supra* note 48, at 444 (noting that the events of Selma "helped to get the necessary legislation enacted and helped to demonstrate to the white southerners, and particularly to the white southern officials, that the President had the political support of the country necessary to carry through enforcement of constitutional principles"). *But cf.* Marshall, *supra* note 52, at 788 (rhetorically questioning the importance of the march, asking "[w]hat national interest was served by this display?" and arguing that "[t]he immediate results of the protest are at most ambiguous: the voting legislation which was at issue had already been asked by President Johnson, and he and the Department of Justice and the federal government as a whole were already doing everything in their power to deal with the underlying problems").

local SCLC organizer, R.B. Cottonreader, Jr., brought suit against Elton Johnson, the mayor of Greenville, Alabama, seeking an injunction against police efforts to impede civil rights protests on the streets and sidewalks of the city. The city, in turn, counterclaimed against the SCLC and Cottonreader, seeking an injunction against unlawful marches and disregard of local traffic laws. The city refused lawful requests for parade permits and cast a blind eye on groups of “white civilians” who “congregate[d] at or near the place where the marching and demonstrating was taking place” and were “armed with knives, brass knuckles, and, upon occasion, guns.”<sup>62</sup> Judge Johnson accepted as credible testimony to the effect that the protests and the reaction to them had created “an explosive situation” in Greenville.<sup>63</sup>

Reaching the merits of the case, Judge Johnson granted the SCLC’s request for an injunction against the city’s unlawful denials of parade permits and failure to provide adequate protection to the civil rights protestors.<sup>64</sup> However, he also enjoined the SCLC from parading without a permit or prior notice to local authorities, parading or demonstrating at night, disregarding traffic signals, and disrupting the operation of the local public schools.<sup>65</sup> As Judge Johnson stated the matter, “*The fault lies on both sides.*”<sup>66</sup> He expected *everyone* to respect the rule of law and to obey the law, including those seeking redress of unconstitutional state action. Moreover, he was unwilling to ignore or cast a blind eye on unlawful conduct by those seeking to advance equal civil rights for all.

Two years later, in 1968, Judge Johnson decided *Houser v. Hill*,<sup>67</sup> another case that involved illegal conduct by both civil rights protestors and local government officials. The case involved a melee associated with a rally and protest in Prattville, Alabama, that featured Stokely Carmichael. Carmichael, at the time of the rally, was a leader of the Student Nonviolent Coordinating Committee (SNCC);<sup>68</sup> he went on to be a founder and leader of the Black Panther Party, serving as its “Honorary Prime Minister.”<sup>69</sup> At a rally and protest meeting on the afternoon of June 11, 1967, Stokely Carmichael spoke and invoked his famous “Black Power!” cry repeatedly in the presence of local Prattville and Autauga County, Alabama law en-

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62. Cottonreader v. Johnson, 252 F. Supp. 492, 494–95 (M.D. Ala. 1966).

63. *Id.* at 496.

64. *Id.* at 496, 499.

65. *See id.* at 496–97, 499–500.

66. *Id.* at 496 (emphasis in original).

67. Houser v. Hill, 278 F. Supp. 920 (M.D. Ala. 1968).

68. *See* GARROW, BEARING THE CROSS, *supra* note 50, at 472–78.

69. *See* STOKELY CARMICHAEL, BLACK POWER: THE POLITICS OF LIBERATION (1992); STOKELY CARMICHAEL, READY FOR REVOLUTION: THE LIFE AND STRUGGLES OF STOKELY CARMICHAEL (2005).



forcement officers.<sup>70</sup> After seeking reinforcements, the officers moved to arrest Carmichael for “disorderly conduct” and held him in the county jail for two days.<sup>71</sup>

Members and supporters of SNCC regrouped and gathered at the home of Dan Houser, in the Happy Hollow area of Prattville; Prattville city police cars patrolled the area, and witnesses reported that gunshots issued from at least one of the police cars.<sup>72</sup> At the same time, attendees at the meeting “armed themselves with guns, rocks and other missiles,” “rocks and bottles were thrown at automobiles, two police cars were fired on by unknown individuals,” and a sheriff and city policeman “were each wounded to a minor extent by shotgun pellets.”<sup>73</sup> Things quickly deteriorated: “From this point on, until about 2:00 a.m. on Monday, June 12, Prattville, Alabama, literally became an armed camp.”<sup>74</sup>

The protests related back, at least in part, to the shooting of Charles Raspberry, an African-American, by Kenneth Hill, a Prattville city police officer, incident to an alleged escape attempt from the local jail.<sup>75</sup> The shooting, which took place earlier in 1967, served as a flashpoint for racial tensions in the community and was the genesis of the June 11, 1967 protest rally. Perhaps predictably, it was Officer Hill who arrested Carmichael at the June 11 rally and protest.

Judge Johnson was clearly displeased with both the protestors and the city: “This Court unequivocally and emphatically condemns any advocacy of violence or the use of violence at any time, and particularly in connection with activities that are ostensibly designed to secure full rights of citizenship to members of the minority race.”<sup>76</sup> At the same time, however, Judge Johnson “equally condemn[ed]” the “excessive use of force or power, or any brutality, on the part of police officials.”<sup>77</sup> Quoting his ear-

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70. *Houser*, 278 F. Supp. at 930–31 (transcript of testimony of Nitricia Hadnott); *see also id.* at 935–36 (press release account of the incident issued by SNCC); *id.* at 937 (notes of eyewitness Sandra Colvin). According to an eyewitness account, Carmichael said, “The only way to get Kennedy [sic] Hill off force is to organize the black power in this area and use your guns. . . . Black power! . . . Black Power! . . . Black Power!” *Id.* at 937. Prattville police officer Kenneth Hill had shot Charles Raspberry earlier in the year and members of the community wanted him removed from the local police force. *See id.* at 925. When Officer Hill confronted Carmichael following these comments, Carmichael did not back down: “You know, the only time black people are allowed to meet without interference is to pray and to dance. Whenever black people get together for any other reasons, the hunkies get scared and come out to beat and kill us.” *Id.* Hill responded, “Shut up, boy cause I’m the law around here,” whereupon Carmichael, giving no ground, told Hill, “Take off that tin badge and drop your gun. I’ll show you something, hunkie.” *Id.* The conversation continued downhill from here; after Carmichael said, “From now on, its going to be an eye for an eye, a toot[h] for a toot[h], and a hunkie for every black man killed!” *Id.* Hill placed Carmichael under arrest. *Id.*

71. *Id.* at 924.

72. *Id.*

73. *Id.* at 925.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 926.

lier opinion in *Cottonreader*, Johnson found that “*the fault lies on both sides*.”<sup>78</sup> He proceeded to issue an injunction against both the plaintiffs and the defendants. With respect to SNCC, the court prohibited “[s]ponsoring and arranging meetings and assemblies to be addressed by those who advocate violence through the use of guns and other actions designed to and tending to disrupt the peace and order of the community” and also “[u]sing violent means to protest and demonstrate.”<sup>79</sup> With respect to the local law enforcement authorities, the court enjoined summary punishment, unlawful interference with lawful protests and assemblies, failure to provide police protection to the plaintiffs, false arrest, and permitting roving gangs of “hostile white groups to gather and congregate for the purpose of committing acts of violence upon the plaintiffs and those similarly situated.”<sup>80</sup>

In *Houser*, as in *Cottonreader*, it is clear that Judge Johnson is serving as a neutral enforcer of the law and not as an advocate; he condemns and enjoins unlawful behavior on both sides and expressly finds that “*the fault lies on both sides*.”<sup>81</sup> To be sure, the African-American community in both Greenville, Alabama, and in Prattville, Alabama, had just cause to seek legal redress for systemic forms of discrimination and officially sanctioned harassment and oppression. Even though the plaintiffs were the victims of unlawful government conduct, this fact did not excuse them from complying with otherwise valid neutral laws of general applicability, including traffic laws, laws against assault and battery, and laws against uttering threats of violence. Thus, in Judge Johnson’s view, even when a plaintiff class has meritorious legal claims against the government, this does not entitle the group to take the law into their own hands.

Indeed, if one looks to Judge Johnson’s writings both on and off the bench during the 1960s, one finds a jurist anxious to defend the rule of law and the need for civil rights leaders to respect it: “Civil disobedience necessarily involves *violation of the law*, and the law can make no provision for its violation except to hold the offender liable for punishment.”<sup>82</sup> At the height of the Civil Rights Movement, he explained his position at greater length in *Forman v. City of Montgomery*.<sup>83</sup>

There is no immunity conferred by our Constitution and laws of the United States to those individuals who insist upon practicing civil disobedience under the guise of demonstrating or protesting for “civil rights.” The philosophy that a person may—if his cause is labeled “civil rights” or “states rights”—determine for himself

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78. *Id.* (quoting *Cottonreader v. Johnson*, 252 F. Supp. 492, 496 (M.D. Ala. 1966)).

79. *Id.* at 927, 929.

80. *Id.* at 928–29.

81. *Id.* at 926.

82. Johnson, *supra* note 57, at 3.

83. 245 F. Supp. 17 (M.D. Ala. 1965).

what laws and court decisions are morally right or wrong, and either obey or refuse to obey them according to his own determination, is a philosophy that is foreign to our “rule-of-law” theory of government.<sup>84</sup>

Judge Johnson also specifically denounced violence in the name of social change: “There is no legal or moral justification for the rioting, burning, looting and killing that have occurred in such cities as Los Angeles, Detroit, Chicago, Newark, Kansas City and Washington. Understandable, perhaps; justifiable, never.”<sup>85</sup>

Judges, lawyers, and citizens all have a duty to respect the rule of law: “It is the duty and unique responsibility of every fair-minded citizen to recognize and follow the proposition that respect for law is the most fundamental of all social virtues, for the alternative to the rule of law is violence and anarchy.”<sup>86</sup> This holds true “whether the individual agrees or not”<sup>87</sup> with the law because “[n]o system can endure where each citizen is free to choose which law he will obey.”<sup>88</sup> Echoing the language of the playwright Robert Bolt in *A Man for All Seasons*, Judge Johnson concludes that “[o]bedience to the laws we like and defiance of those we dislike is the route to chaos.”<sup>89</sup>

Insofar as civil disobedience “involves violation of the law, . . . the law can make no provision for its violation except to hold the offender liable for punishment.”<sup>90</sup> Thus, “[i]t would be a mistake to conclude here that civil disobedience is justified provided only that it is disobedience in the name of high principles.”<sup>91</sup> Issuing a warning that it appears the Bush Administration failed to heed in its pursuit of Al-Qaeda terrorists post 9/11,<sup>92</sup> Judge Johnson admonishes that “[s]trong moral conviction is not all that is required to turn breaking the law into a service that benefits society.”<sup>93</sup> In the end, “Respect for law is the most fundamental of all social virtues, for the alternative to the rule of law is violence and anarchy.”<sup>94</sup>

84. *Id.* at 24.

85. Johnson, *supra* note 57, at 5; *see also* Marshall, *supra* note 52, at 799 (“The point is only that governmental authority cannot act upon a general policy of sanctioning lawless behavior disruptive of the rights of other citizens because of sympathy with the motives of the protesting group.”).

86. Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 20 U. FLA. L. REV. 267, 271 (1968); *see also* *Letter from a Birmingham Jail*, *supra* note 6, at 90 (“In no sense do I advocate evading or defying the law. . . . This would lead to anarchy.”).

87. Johnson, *supra* note 86, at 271.

88. *Id.*

89. *Id.*

90. *Id.* at 275 (emphasis in original).

91. *Id.*

92. *See supra* text and accompanying notes 13 to 27.

93. Johnson, *supra* note 86, at 275.

94. *Id.* at 271.

Finally, judges should not labor alone in maintaining the rule of law and the supremacy of law. Judge Johnson strongly believed that members of the bar had a professional obligation to defend the judiciary's labors—"the attorney must consistently uphold the supremacy of law."<sup>95</sup> "Therefore, as a part of his duty to maintain the supremacy of the law, the lawyer owes an obligation to the courts, if not to the individual judges, to cease irresponsible criticism and substitute a program of constructive analysis and elucidation."<sup>96</sup> Lawyers have a special duty to work to foster respect for the rule of law, but also have a self-interest in supporting the principle: "The lawyer should remember that the man who defies or flouts the law is like the proverbial fool who saws away the plank on which he sits, and that a disrespect or disregard for law is always the first sign of a disintegrating society."<sup>97</sup>

#### IV. THE PROMISE OF THE RULE OF LAW: LEGAL REMEDIES FOR LEGAL WRONGS

If Judge Johnson's conception of the rule of law could make no exception for civil disobedience, to say nothing of violence, it did hold out the promise of meaningful relief for any person suffering a legal wrong who invoked the protection of the federal courts. Judge Johnson's approach to constitutional interpretation reflects his deep commitment to securing equal justice under law.

Judge Johnson believed that "[t]he Constitution is not an inert and lifeless body of law from which legal consequences automatically flow."<sup>98</sup> Instead, the Constitution "is dynamic and living, requiring constant reexamination and reevaluation."<sup>99</sup> For Johnson, then, "[t]he true strength of the Constitution lies in its flexibility, its ability to change, to grow, and to respond to the special needs and demands of our society at a particular time."<sup>100</sup> The Constitution "must be read actively" because "[i]ts broad and general terms do not lend themselves to a single, strict construction."<sup>101</sup>

Even though Judge Johnson endorsed a dynamic approach to constitutional interpretation, it bears noting that he most emphatically *did not* equate the Constitution with his own, or any individual judge's, personal

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95. Frank M. Johnson, Jr., *The Attorney and the Supremacy of Law*, 1 GA. L. REV. 38, 39 (1966).

96. *Id.* at 40.

97. *Id.* at 42.

98. Frank M. Johnson, Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 468 (1977).

99. *Id.*

100. *Id.*

101. Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 905 (1979); see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 117–20 (2005) (discussing the duty of judges to interpret and apply constitutional values in ways that ensure relevancy of moral and political commitments enshrined in the document itself).

moral preferences.<sup>102</sup> He characterized this understanding of judicial review as a “misleading fallacy.”<sup>103</sup> Instead, “[t]aking into account the language of the [Constitution], the intent of the framers, and the logic of prior cases, the judge must attempt to state the essence of the constitutional guaranty.”<sup>104</sup> Judge Johnson recognized that many questions of constitutional law will be susceptible to competing answers: “There will always be several possible formulations.”<sup>105</sup> The key point here is that the imprecision that exists in interpreting constitutional text is not a license for simply writing one’s own personal morality into the document—the judicial task requires that a judge subordinate her own moral code in order to uphold and enforce the Constitution’s political morality.<sup>106</sup>

Judge Johnson emphatically rejected a model of judicial review in which constitutional rights exist without effective legal remedies; such an approach would fatally undermine efforts to secure the rule of law. In consequence, when faced with recalcitrant state officials unable, or unwilling, to remediate unconstitutional conditions in the Alabama state prisons and mental hospitals, Judge Johnson deployed the equitable powers of a district court judge creatively and aggressively to provide a meaningful remedy to the plaintiff classes. As he explained, “[i]f we, as judges, have learned anything from *Brown v. Board of Education* and its progeny, it is that prohibitory relief alone affords but a hollow protection to the basic and fundamental rights of citizens to equal protection of the law.”<sup>107</sup> Accordingly, “when a state fails to meet constitutionally mandated requirements, it is the solemn duty of the courts to assure compliance with the Constitution.”<sup>108</sup>

For Judge Johnson, these duties included overseeing the desegregation of a wide variety of facilities and institutions in Alabama, including public schools, colleges and universities, jails, parks, municipal transit systems, airport and bus terminals, public libraries, and museums.<sup>109</sup> With respect to

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102. See Johnson, *supra* note 101, at 907 (“A second and more misleading fallacy is that judicial decision-making is elitist—reflecting no more than the judge’s personal view of right and wrong. I reject that contention, whether stated in its simple or sophisticated form.”).

103. *Id.*

104. *Id.* at 909. Justice Breyer has endorsed this description of the judicial task:

Moreover, to consider consequences is not to consider simply whether the consequences of a proposed decision are good or bad, in a particular judge’s opinion. Rather, to emphasize consequences is to emphasize consequences related to the particular textual provision at issue. The judge must examine the consequences through the lens of the relevant constitutional value or purpose. The relevant values limit interpretive possibilities,

BREYER, *supra* note 101, at 120.

105. Johnson, *supra* note 101, at 909.

106. See *id.* (“But it is one thing for a judge to adopt a theory of political morality *because it is his own*; it is another for him to exercise his judgment about what the political morality implied by the Constitution is.”).

107. Johnson, *supra* note 98, at 471.

108. Frank M. Johnson Jr., *Observation: The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 915 (1976).

109. See *id.* at 905–06, 905 nn.12–18.

unconstitutional conditions in the state prisons and mental hospitals, Judge Johnson found that simply ordering the remediation of the unconstitutional conditions was ineffective because the state government failed to implement any serious program of reform.<sup>110</sup>

As Professor Barry Friedman has observed, “Johnson saw himself as filling a vacuum in leadership” because of “the ‘Alabama Punting Syndrome,’ in which state officials became the subject of judicial decrees only because of their unwillingness to take responsibility upon themselves.”<sup>111</sup> As Judge Johnson stated the matter, “As long as those state officials entrusted with the responsibility for fair and equitable governance completely disregard that responsibility, the judiciary must and will stand ready to intervene on behalf of the deprived.”<sup>112</sup>

One can thus see the complementarity of Judge Johnson’s judicial philosophy: citizens have a general obligation to obey the law, but when the government fails to meet its constitutional responsibilities, the federal courts must stand ready to provide prompt and effective remedies. “[A] judge cannot discharge his oath of office without seeing to it that relief is provided.”<sup>113</sup> The availability of effective relief from the federal courts, under the Constitution, should moot the need for acts of civil disobedience. Moreover, the rule of law requires that those with legitimate grievances against the government use the courts, rather than self-help or acts of violence, to seek satisfaction.

Judge Johnson also believed that the legal system, in order to serve the ends of justice, had to be both open and accessible to average citizens. As he put the matter, “Access is the byword for the possibility of translating public expression into legal action.”<sup>114</sup> Such access is a part of the bargain that a citizen receives for agreeing to seek judicial assistance rather than self-help in remediating unfair or unjust government action; it constitutes “the steam whistle on society’s teapot.”<sup>115</sup> Thus, “[t]he promise of access which underlies the American legal system is just as important as the sub-

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110. See *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972) and 344 F. Supp. 387 (M.D. Ala. 1972), *modified sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *James v. Wallace & Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff’d sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev’d in part.* *Alabama v. Pugh*, 438 U.S. 781 (1978). For a discussion of these cases and the conditions that existed in these state facilities prior to federal court intervention, see Johnson, *supra* note 108, at 906–14. On the use of structural injunctions to remediate pervasive constitutional violations in public institutions, such as prisons and mental hospitals, see FISS, *supra* note 41. See also Barry Friedman, *Right and Remedy*, 43 VAND. L. REV. 593, 597–604 (1990).

111. Friedman, *supra* note 110, at 599–600.

112. Johnson, *supra* note 108, at 915.

113. Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 273 (1981); see also *id.* at 274 (“Faced with defaults by government officials, however, a judge does not have the option of declaring that litigants have rights without remedies.”).

114. Frank M. Johnson, Jr., *Equal Access to Justice*, 41 ALA. L. REV. 1, 1 (1989).

115. *Id.* at 3.

stantive rights which our Constitution guarantees.”<sup>116</sup> Although abstract concepts such as “equality” and “justice” can “make fine subjects for speechmaking, . . . these high-minded words may provide little comfort to those denied a practical means for the implementation of those ideals.”<sup>117</sup>

“Access” for Judge Johnson also meant that the Constitution, and the law more generally, should be comprehensible to average citizens without specialized professional training. On one of my first assignments as a law clerk, I took a simple employee benefits case arising under ERISA and generated a forty page opinion festooned with something like 100 footnotes. After reading the draft, the judge called me into his chambers and started flipping, page by page, through the draft opinion and calling out page numbers and the running footnote count. Needless to say, I began to have an out of body experience; how could I have so badly misjudged the nature of the task at hand? After Judge Johnson had completed his page and footnote count, accented with hearty laughs as the count rose on both fronts, he became serious and stared at me: “This Court does not write for the law reviews!”

Although I found the experience more than a little terrifying at the time, I have come to appreciate the wisdom in Judge Johnson’s approach to judicial craftsmanship. For the rule of law to be a meaningful reality, the law itself cannot be restricted to an isolated caste of secular priests.<sup>118</sup> Judge Johnson has asserted that “[o]ne of the worst characteristics of judges in particular, and the legal profession in general, is a penchant for dull or simply incomprehensible writing, a fact decried by the likes of Shakespeare, Swift, Bentham, and many others.”<sup>119</sup> To the extent possible, he argued that judicial opinions should be “accessible to the layman.”<sup>120</sup>

If courts cannot produce legal opinions that a reasonably intelligent layperson can understand, public confidence in the judiciary will surely suffer for it. The judiciary must endeavor, when going about its business, to remain connected to the citizenry who live outside the confines of the court-

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116. *Id.* at 3–4.

117. *Id.* at 1.

118. *Cf.* Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520-1640*, 146 U. PA. L. REV. 323 (1998).

119. Frank M. Johnson, Jr., *Civilization, Integrity, and Justice: Some Observations on the Function of the Judiciary*, 43 SW. L.J. 645, 652 (1989).

120. *Id.* Justice Breyer has made a very similar argument: “Still, courts, as highly trusted government institutions, might help in various ways. Judges can explain *in terms the public can understand* just what the Constitution is about.” BREYER, *supra* note 101, at 134 (emphasis added); *see also* Norman Dorsen, *The Second Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 253 (1969) (describing Justice Harlan’s commitment to writing lucid, clear opinions, which reflected his “desire to deal with problems comprehensively and to elucidate the reasons for his judgment, so as to leave lawyers and lower courts in no doubt about the meaning or scope of an opinion”).

house walls.<sup>121</sup> As Judge Johnson explained, “[t]he citizenry’s confidence in justice is essential—is absolutely essential—to a government of laws.”<sup>122</sup>

Judges also must possess certain characteristics, including reason, courage, and integrity.<sup>123</sup>

Each judge sitting in this country, whether in a state or a federal court, whether in a trial court or an appellate court, has a grave responsibility to maintain our system of ordered liberties by maintaining supremacy of the law so that—to paraphrase Theodore Roosevelt—no person is above the law and no person is below it.<sup>124</sup>

A judge “guard[s] the gate between order and anarchy” and serves as the “preserver[ ] of our system of ordered liberties.”<sup>125</sup> In approaching her work, “[a] judge must always be consumed by a passion for justice which propels judgment toward the just conclusion.”<sup>126</sup> One should take care to note, however, that for Judge Johnson, the “just conclusion” was never necessarily the conclusion that he personally found most congenial.

Judge Johnson harbored serious doubts about the fundamental fairness of the death penalty.<sup>127</sup> Although he shared these views privately with his law clerks in chambers, he did not generally publish them from the bench. I believe that his concerns related to the skewed application of the death penalty against poor and minority defendants; the machinery of death does not choose its subjects randomly. Thus, in *McCleskey*,<sup>128</sup> Judge Johnson, writing in dissent, found that the statistical disparities in prosecutor charging decisions and jury convictions of the death penalty gave rise to a cogni-

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121. In this respect, I am reminded of Ronald Dworkin’s argument that the public generally reposes greater faith and confidence in the judiciary than in the political branches of government precisely because judges must give reasons for their decisions, and to be credible, these reasons must at least appear to be principled. See Ronald Dworkin, *The Secular Papacy*, in *JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION* 67, 75–79, 104–06 (Robert Badinter & Stephen Breyer eds., 2004); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 383–403 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (considering the importance of reason giving to principled decision making and its relationship to a judge reaching a legitimate resolution of a case).

122. Frank M. Johnson, Jr., Senior Judge, U.S. Court of Appeals for the Eleventh Circuit, Dedication Ceremony of Frank M. Johnson, Jr. Federal Building and United States Courthouse (May 22, 1992), in 989 F.2d at CX.

123. Frank M. Johnson, Jr., *Reflections on the Judicial Career of Robert S. Vance*, 42 ALA. L. REV. 964, 966–69 (1991).

124. *Id.* at 965–66.

125. *Id.* at 965.

126. *Id.* at 970.

127. For on-the-record comments on this topic by Judge Johnson, see BASS, *TAMING THE STORM*, *supra* note 5, at 448–55.

128. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1986) (en banc), *aff’d*, 481 U.S. 279 (1987); see also BASS, *TAMING THE STORM*, *supra* note 5, at 448–55 (discussing Judge Johnson’s legal and moral views of the death penalty).



zable Eighth Amendment violation.<sup>129</sup> The Supreme Court, of course, like the Eleventh Circuit as a whole,<sup>130</sup> saw the matter differently and was not moved by the Baldus Study's statistical findings.<sup>131</sup>

Even though Judge Johnson personally opposed capital punishment,<sup>132</sup> so long as binding precedent from the Supreme Court held the practice to be constitutional, he would uphold capital sentences if the product of constitutionally adequate proceedings. As he explained, "I do not believe it's proper for an Appellate Court Judge in the federal system to take that position [holding the death penalty unconstitutional on Eighth Amendment grounds] since the established law in the United States holds contrary. . . . I feel obligated, as long as I stay a federal judge, to follow the law."<sup>133</sup> In this sense, then, a judge, like the average citizen, has a duty to the law that transcends her personal moral beliefs and convictions.<sup>134</sup>

If judges in a hierarchal system have a duty to follow the law, even when doing so proves disagreeable, judges must labor free and clear of political or social pressures and decide cases as they come; Judge Johnson was a vigorous defender of the absolute necessity of an *independent* judiciary. He believed that "[t]he basic strength of the federal judiciary has been—and continues to be—its independence from political or social pressures, its ability to rise above the influence of popular clamor."<sup>135</sup> And, in describing his own aspirations as a federal judge, Judge Johnson observed that "[d]uring my thirty-seven years as a federal judge, my only aspiration has been, and will continue to be, to remove myself from the passion of the

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129. *McCleskey*, 753 F.2d at 908–09 (Johnson, J., dissenting). Judge Johnson argued that the Baldus Study was sufficient evidence to establish an Eighth Amendment violation because "the Eighth Amendment prohibits the racially discriminatory application of the death penalty and *McCleskey* does not have to prove intent to discriminate in order to show that the death penalty is being applied arbitrarily and capriciously." *Id.* at 908.

130. *Id.* at 886–87 ("[W]e affirm the district court on the ground that, assuming the validity of the research [the Baldus Study], it would not support a decision that the Georgia law was being unconstitutionally applied, much less would it compel such a finding"); *id.* at 891 (rejecting Eighth Amendment claim because "[a] successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious").

131. *McCleskey v. Kemp*, 481 U.S. 279, 294–99 (rejecting Fourteenth Amendment claim); *id.* at 306–08 (rejecting Eighth Amendment claim).

132. As he put the matter in an interview with biographer Jack Bass, "If I was making the law, I'd rule and hold—and I think there's a valid, a very valid legal basis for it—that the death penalty laws violate the Eighth Amendment." BASS, *TAMING THE STORM*, *supra* note 5, at 448.

133. *Id.* at 449.

134. See Johnson, *supra* note 95, at 40 ("The judge must, regardless of the temptation, remain objective and detached."); see also Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 103, 106 (1991) (noting Justice Harlan's regular practice of "follow[ing] a case from which he had dissented when it was initially decided" as part of a larger commitment to securing rule of law values associated with Legal Process Theory).

135. Johnson, *supra* note 98, at 474–75.

moment in order to render the fairest interpretation of the law that I'm capable of."<sup>136</sup>

#### CONCLUSION

MORE: Will, I'd trust *you* with my life. But not your principles. (*They mount the stairs*) You see, we speak of being anchored to our principles. But if the weather turns nasty, you up with an anchor and let it down where there's less wind, and the fishing's better. And "Look," we say, "look, I'm anchored!" (*Laughing, inviting ROPER to laugh with him*) "To my principles!"<sup>137</sup>

Judge Frank M. Johnson Jr. was more securely fixed to his principles than most of us; his commitment to securing the rule of law during one of the most troubled periods of our recent national history provides an object lesson in the transformative potential of the law as an agent of progressive social change. As we think about the challenges of the current economic crisis, and the continuing sense of dread associated with a seemingly endless war on terror, we should take heart from the fact that the nation has faced grave challenges in the past and risen to the occasion, successfully meeting them and moving forward renewed and transformed.

We should be sober and clear eyed about what a meaningful commitment to the rule of law implies for all of us as lawyers: it means working to ensure fundamentally fair judicial processes, regardless of how popular, or despised, the particular litigants happen to be. This contemporary description of life for lawyers representing civil rights litigants in the Deep South during the 1960s is illustrative of the potential stakes:

Consider the risk the white lawyer in Alabama or in Mississippi would take by representing Negroes or other workers in civil rights cases or by speaking out for civil rights causes. If he does so, his action is certain to be followed by the loss of his clients and other economic sanctions. He will see old friends turning against him. He may soon find himself and his family the subject of persecution by the police. They may become the target for bombings and other forms of violence. He and his family may well have to dig up stakes and leave the community entirely. In my own experience, when I have called upon lawyers in Alabama, in Mississippi, in Louisiana, in South Carolina, and elsewhere in the South, I have found them willing, even anxious, to help, but it has had to be behind the scenes. Concern for themselves, but more often fear for

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136. Johnson, *supra* note 122, at CXI.

137. BOLT, *supra* note 1, at 69.

their families, drove them to insist that their participation be kept confidential.<sup>138</sup>

These are not mere predictions about the consequences of public support for the Civil Rights Movement, but rather descriptions of past events. Indeed, Judge Johnson himself faced persistent death threats, and the Ku Klux Klan bombed his mother's house (mistakenly believing it to be Judge Johnson's residence).<sup>139</sup> Although, as Judge Johnson once said, "[i]t's hard to ostracize a fellow who does his own ostracizing,"<sup>140</sup> this did not stop either the general community, or Governor George C. Wallace in particular, from making concerted efforts to let Judge Johnson know precisely how deeply they despised him and his efforts to enforce constitutional rights in Alabama.<sup>141</sup>

In the teeth of these threats and catcalls, and at a great cost to himself and his family, Judge Johnson did not waver, he did not look back, and he did not falter in his duty to see that the rule of law prevailed. As he once explained, "You don't make decisions on the basis of public acceptance;" instead, "[a] judge must decide cases on the basis of fact and on the basis of applicable law."<sup>142</sup> These admonitions should apply to the lawyers advising the Attorney General or the President with no less force; if the rule of law is to prevail, we cannot as a society vest federal judges with sole responsibility for its protection. Instead, attorneys have a particular duty to work to explain and defend the rule of law, even when doing so is not popular with our clients (even when that client is the President or the Attorney General) or with our fellow citizens. When we reflect on our profession's response to 9/11, we should consider carefully whether individually and collectively we faithfully discharged our obligations to our profession, to the Constitution, and to the rule of law itself.

Judge Johnson called on all of us to work to secure the rule of law, but he had particularly high expectations of lawyers; he viewed lawyers as full partners with the judiciary in working to secure the rule of law. As Judge Johnson so wisely stated the matter, "[I]lawyers, therefore, face a special

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138. Bernard Segal, Comments at the 1966 Judicial Conference of the U.S. Court of Appeals for the Third Judicial Circuit (Sept. 6, 1966), in 42 F.R.D. at 441, 447-48.

139. BASS, UNLIKELY HEROES, *supra* note 5, at 79.

140. *Id.* at 80.

141. *Id.* at 80-82. Governor Wallace famously suggested that "a vote for George Wallace might give a political barbed-wire enema to some federal judges," in an obvious reference to Judge Johnson. Lawrence Wright, *Atticus Finch Goes to Washington*, NEW TIMES, Dec. 9, 1977, 31, 35. In addition, Wallace applied other equally colorful epithets to Judge Johnson, including denominating him "a low-down, carpetbaggin', scalawaggin', race-mixin' liar." *Id.* at 39. Notwithstanding Judge Johnson's steadfast determination not to engage Wallace publicly or to acknowledge the various public slights—and threats—inflicted not only on him, but also on his wife, Ruth, and son, Johnny, these targeted efforts at harassment must have exacted a toll. *See id.* As a friend of Judge Johnson stated the matter, "[o]ne thing that people don't understand is the sadness and sorrow Frank has had to bear." *Id.*

142. Wright, *supra* note 142, at 33.

challenge in this period of emotionalism: to fulfill the finest traditions of their profession by directing their efforts in support of the continuing struggle to maintain the rule of law.”<sup>143</sup> It is not always easy to tell a client something that she does not want to hear; it is undoubtedly doubly so when the client also happens to be the President of the United States. But, if our system of justice is to retain the confidence of the citizenry, and if the rule of law is to prevail, lawyers have a special obligation not to cut down the laws to get at the devil,<sup>144</sup> where ever, and however, the devil has appeared.

Judge Johnson’s passionate commitment to respecting, promoting, and securing the rule of law provides an important lesson to us today, one that should have been heeded in those frightening days in the immediate aftermath of 9/11. Let us hope that, over the run of time, we as a profession rise to the challenge that Judge Johnson’s example calls us to meet.

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143. Johnson, *supra* note 57, at 13.

144. BOLT, *supra* note 1, at 66.

