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Appendix: Obama–A

*President Barack Obama,
“Remarks by the President on National Security,”
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...

These are extraordinary times for our country. We’re confronting a historic economic crisis. We’re fighting two wars. We face a range of challenges that will define the way that Americans will live in the twenty-first century. So there’s no shortage of work to be done or responsibilities to bear.

...

In the midst of all these challenges, however, my single most important responsibility as president is to keep the American people safe. It’s the first thing that I think about when I wake up in the morning. It’s the last thing that I think about when I go to sleep at night.

And this responsibility is only magnified in an era when an extremist ideology threatens our people and technology gives a handful of terrorists the potential to do us great harm. We are less than eight years removed from the deadliest attack on American soil in our history. We know that Al Qaeda is actively planning to attack us again. We know that this threat will be with us for a long time and that we must use all elements of our power to defeat it.

Already, we’ve taken several steps to achieve that goal. For the first time since 2002, we’re providing the necessary resources and strategic direction to take the fight to the extremists who attacked us

on 9/11 in Afghanistan and Pakistan. We're investing in the twenty-first-century military and intelligence capabilities that will allow us to stay one step ahead of a nimble enemy. We have re-energized a global non-proliferation regime to deny the world's most dangerous people access to the world's deadliest weapons. And we've launched an effort to secure all loose nuclear materials within four years. We're better protecting our border and increasing our preparedness for any future attack or natural disaster. We're building new partnerships around the world to disrupt, dismantle, and defeat Al Qaeda and its affiliates. And we have renewed American diplomacy so that we once again have the strength and standing to truly lead the world.

These steps are all critical to keeping America secure. But I believe with every fiber of my being that in the long run we also cannot keep this country safe unless we enlist the power of our most fundamental values. The documents that we hold in this very hall—the Declaration of Independence, the Constitution, the Bill of Rights—these are not simply words written into aging parchment. They are the foundation of liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality, and dignity around the world.

I stand here today as someone whose own life was made possible by these documents. My father came to these shores in search of the promise that they offered. My mother made me rise before dawn to learn their truths when I lived as a child in a foreign land. My own American journey was paved by generations of citizens who gave meaning to those simple words—"to form a more perfect union." I've studied the Constitution as a student, I've taught it as a teacher, I've been bound by it as a lawyer and a legislator. I took an oath to preserve, protect, and defend the Constitution as commander-in-chief; and, as a citizen, I know that we must never, ever, turn our back on its enduring principles for expediency's sake.

I make this claim not simply as a matter of idealism. We uphold our most cherished values not only because doing so is right, but

because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset—in war and peace, in times of ease, and in eras of upheaval.

Fidelity to our values is the reason why the United States of America grew from a small string of colonies under the writ of an empire to the strongest nation in the world.

It's the reason why enemy soldiers have surrendered to us in battle, knowing they'd receive better treatment from America's armed forces than from their own government.

It's the reason why America has benefited from strong alliances that amplified our power and have drawn a sharp, moral contrast with our adversaries.

It's the reason why we've been able to overpower the iron fist of fascism and outlast the iron curtain of communism, and enlist free nations and free peoples everywhere in the common cause and common effort of liberty.

From Europe to the Pacific, we've been the nation that has shut down torture chambers and replaced tyranny with the rule of law. That is who we are. And where terrorists offer only the injustice of disorder and destruction, America must demonstrate that our values and our institutions are more resilient than a hateful ideology.

After 9/11, we knew that we had entered a new era—that enemies who did not abide by any law of war would present new challenges to our application of the law, that our government would need new tools to protect the American people, and that these tools would have to allow us to prevent attacks instead of simply prosecuting those who try to carry them out.

Unfortunately, faced with an uncertain threat, our government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often our government made decisions based on fear rather than foresight—that all too often our government trimmed facts and evidence to fit ideological predispositions. Instead

of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us—Democrats and Republicans, politicians, journalists, and citizens—fell silent.

In other words, we went off course. And this is not my assessment alone. It was an assessment that was shared by the American people who nominated candidates for president from both major parties who, despite our many differences, called for a new approach—one that rejected torture and one that recognized the imperative of closing the prison at Guantánamo Bay.

Now let me be clear: we are indeed at war with Al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process—in checks and balances and accountability. For reasons that I will explain, the decisions that were made over the last eight years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable—a framework that failed to rely on our legal traditions and time-tested institutions and that failed to use our values as a compass. And that's why I took several steps upon taking office to better protect the American people.

First, I banned the use of so-called enhanced interrogation techniques by the United States of America.

I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As commander-in-chief, I see the intelligence. I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation. What's more, they undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war

and counterterrorism efforts—they undermined them, and that is why I ended them once and for all.

Now, I should add, the arguments against these techniques did not originate from my administration. As Senator McCain once said, torture “serves as a great propaganda tool for those who recruit people to fight against us.” And even under President Bush, there was recognition among members of his own administration—including a secretary of state, other senior officials, and many in the military and intelligence community—that those who argued for these tactics were on the wrong side of the debate and the wrong side of history. That’s why we must leave these methods where they belong—in the past. They are not who we are, and they are not America.

The second decision that I made was to order the closing of the prison camp at Guantánamo Bay.

For over seven years, we have detained hundreds of people at Guantánamo. During that time, the system of military commissions that were in place at Guantánamo succeeded in convicting a grand total of three suspected terrorists. Let me repeat that: three convictions in over seven years. Instead of bringing terrorists to justice, efforts at prosecution met setback after setback, cases lingered on, and in 2006 the Supreme Court invalidated the entire system. Meanwhile, over 525 detainees were released from Guantánamo under not my administration, under the previous administration. Let me repeat that: two-thirds of the detainees were released before I took office and ordered the closure of Guantánamo.

There is also no question that Guantánamo set back the moral authority that is America’s strongest currency in the world. Instead of building a durable framework for the struggle against Al Qaeda that drew upon our deeply held values and traditions, our government was defending positions that undermined the rule of law. In fact, part of the rationale for establishing Guantánamo in the first place was the misplaced notion that a prison there would be beyond the law—a proposition that the Supreme Court soundly rejected.

Meanwhile, instead of serving as a tool to counter terrorism, Guantánamo became a symbol that helped Al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantánamo likely created more terrorists around the world than it ever detained.

So the record is clear: rather than keeping us safer, the prison at Guantánamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it. That's why I argued that it should be closed throughout my campaign, and that is why I ordered it closed within one year.

The third decision that I made was to order a review of all pending cases at Guantánamo. I knew when I ordered Guantánamo closed that it would be difficult and complex. There are 240 people there who have now spent years in legal limbo. In dealing with this situation, we don't have the luxury of starting from scratch. We're cleaning up something that is, quite simply, a mess—a misguided experiment that has left in its wake a flood of legal challenges that my administration is forced to deal with on a constant, almost daily, basis, and it consumes the time of government officials whose time should be spent on better protecting our country.

Indeed, the legal challenges that have sparked so much debate in recent weeks here in Washington would be taking place whether or not I decided to close Guantánamo. For example, the court order to release seventeen Uighur detainees took place last fall when George Bush was president. The Supreme Court that invalidated the system of prosecution at Guantánamo in 2006 was overwhelmingly appointed by Republican presidents—not wild-eyed liberals. In other words, the problem of what to do with Guantánamo detainees was not caused by my decision to close the facility; the problem exists because of the decision to open Guantánamo in the first place.

Now let me be blunt. There are no neat or easy answers here. I wish there were. But I can tell you that the wrong answer is to pretend like this problem will go away if we maintain an unsustainable status quo. As president, I refuse to allow this problem to fester. I refuse to pass it on to somebody else. It is my responsibility to solve the problem. Our security interests will not permit us to delay. Our courts won't allow it. And neither should our conscience.

Now, over the last several weeks we've seen a return of the politicization of these issues that have characterized the last several years. I'm an elected official; I understand these problems arouse passions and concerns. They should. We're confronting some of the most complicated questions that a democracy can face. But I have no interest in spending all of our time re-litigating the policies of the last eight years. I'll leave that to others. I want to solve these problems, and I want to solve them together as Americans.

And we will be ill-served by some of the fear-mongering that emerges whenever we discuss this issue. Listening to the recent debate, I've heard words that, frankly, are calculated to scare people rather than educate them—words that have more to do with politics than protecting our country. So I want to take this opportunity to lay out what we are doing and how we intend to resolve these outstanding issues. I will explain how each action that we are taking will help build a framework that protects both the American people and the values that we hold most dear. And I'll focus on two broad areas: first, issues relating to Guantánamo and our detention policy; but, second, I also want to discuss issues relating to security and transparency.

Now, let me begin by disposing of one argument as plainly as I can: we are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people. Where demanded by justice and national security, we will seek to transfer some detainees to the same type of facilities in which we hold all manner of dangerous

and violent criminals within our borders—namely, highly secure prisons that ensure the public safety.

As we make these decisions, bear in mind the following fact: nobody has ever escaped from one of our federal, super-max prisons, which hold hundreds of convicted terrorists. As Republican Lindsey Graham said, the idea that we cannot find a place to securely house 250-plus detainees within the United States is not rational.

We are currently in the process of reviewing each of the detainee cases at Guantánamo to determine the appropriate policy for dealing with them. And as we do so, we are acutely aware that under the last administration, detainees were released and, in some cases, returned to the battlefield. That's why we are doing away with the poorly planned, haphazard approach that let those detainees go in the past. Instead we are treating these cases with the care and attention that the law requires and that our security demands.

Now, going forward, these cases will fall into five distinct categories.

First, whenever feasible, we will try those who have violated American criminal laws in federal courts—courts provided for by the United States Constitution. Some have derided our federal courts as incapable of handling the trials of terrorists. They are wrong. Our courts and our juries, our citizens, are tough enough to convict terrorists. The record makes that clear. Ramzi Yousef tried to blow up the World Trade Center. He was convicted in our courts and is serving a life sentence in US prisons. Zacarias Moussaoui has been identified as the twentieth 9/11 hijacker. He was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantánamo.

Recently, we prosecuted and received a guilty plea from a detainee, [Ali] al-Marri, in federal court after years of legal confusion. We're preparing to transfer another detainee to the Southern District Court of New York, where he will face trial on charges related to the

1998 bombings of our embassies in Kenya and Tanzania—bombings that killed over 200 people. Preventing this detainee from coming to our shores would prevent his trial and conviction. And after over a decade, it is time to finally see that justice is served, and that is what we intend to do.

The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions. Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and [they allow] for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.

Now, some have suggested that this represents a reversal on my part. They should look at the record. In 2006, I did strongly oppose legislation proposed by the Bush administration and passed by the Congress because it failed to establish a legitimate legal framework, with the kind of meaningful due process rights for the accused that could stand up on appeal.

I said at that time, however, that I supported the use of military commissions to try detainees, provided there were several reforms, and in fact there were some bipartisan efforts to achieve those reforms. Those are the reforms that we are now making. Instead of using the flawed commissions of the last seven years, my administration is bringing our commissions in line with the rule of law. We will no longer permit the use of statements that have been obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay. And we will give detainees greater latitude in selecting their own counsel and more protections if they refuse to testify. These reforms, among others, will make our military commissions a more

credible and effective means of administering justice, and I will work with Congress and members of both parties, as well as legal authorities across the political spectrum, on legislation to ensure that these commissions are fair, legitimate, and effective.

The third category of detainees includes those who have been ordered released by the courts. Now, let me repeat what I said earlier: This has nothing to do with my decision to close Guantánamo. It has to do with the rule of law. The courts have spoken. They have found that there's no legitimate reason to hold twenty-one of the people currently held at Guantánamo. Nineteen of these findings took place before I was sworn into office. I cannot ignore these rulings because, as president, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.

The fourth category of cases involves detainees who we have determined can be transferred safely to another country. So far, our review team has approved fifty detainees for transfer. And my administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil for detention and rehabilitation.

Now, finally, there remains the question of detainees at Guantánamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here—this is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantánamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. Examples of that threat include people who've received extensive explosives training at Al Qaeda training camps, or commanded Taliban troops in battle, or expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States.

Let me repeat: I am not going to release individuals who endanger the American people. Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture—like other prisoners of war—must be prevented from attacking us again. Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide[s] alone. That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review so that any prolonged detention is carefully evaluated and justified.

I know that creating such a system poses unique challenges. And other countries have grappled with this question; now, so must we. But I want to be very clear that our goal is to construct a legitimate legal framework for the remaining Guantánamo detainees that cannot be transferred. Our goal is not to avoid a legitimate legal framework. In our constitutional system, prolonged detention should not be the decision of any one man. If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so, going forward, my administration will work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution.

Now, as our efforts to close Guantánamo move forward, I know that the politics in Congress will be difficult. These are issues that are fodder for thirty-second commercials. You can almost picture the direct mail pieces that emerge from any vote on this issue, designed to frighten the population. I get it. But if we continue to make decisions within a climate of fear, we will make more mistakes. And if we refuse to deal with these issues today, then I guarantee you that they

will be an albatross around our efforts to combat terrorism in the future.

I have confidence that the American people are more interested in doing what is right to protect this country than in political posturing. I am not the only person in this city who swore an oath to uphold the Constitution—so did each and every member of Congress. And together we have a responsibility to enlist our values in the effort to secure our people and to leave behind the legacy that makes it easier for future presidents to keep this country safe.

Now, let me touch on a second set of issues that relate to security and transparency.

National security requires a delicate balance. On the one hand, our democracy depends on transparency. On the other hand, some information must be protected from public disclosure for the sake of our security—for instance, the movement of our troops, our intelligence-gathering, or the information we have about a terrorist organization and its affiliates. In these and other cases, lives are at stake.

Now, several weeks ago, as part of an ongoing court case, I released memos issued by the previous administration's Office of Legal Counsel. I did not do this because I disagreed with the enhanced interrogation techniques that those memos authorized, and I didn't release the documents because I rejected their legal rationales—although I do on both counts. I released the memos because the existence of that approach to interrogation was already widely known, the Bush administration had acknowledged its existence, and I had already banned those methods. The argument that somehow by releasing those memos we are providing terrorists with information about how they will be interrogated makes no sense. We will not be interrogating terrorists using that approach. That approach is now prohibited.

In short, I released these memos because there was no overriding reason to protect them. And the ensuing debate has helped the American people better understand how these interrogation methods came to be authorized and used.

On the other hand, I recently opposed the release of certain photographs that were taken of detainees by US personnel between 2002 and 2004. Individuals who violated standards of behavior in these photos have been investigated and they have been held accountable. There was and is no debate as to whether what is reflected in those photos is wrong. Nothing has been concealed to absolve perpetrators of crimes. However, it was my judgment—informed by my national security team—that releasing these photos would inflame anti-American opinion and allow our enemies to paint US troops with a broad, damning, and inaccurate brush, thereby endangering them in theaters of war.

In short, there is a clear and compelling reason to not release these particular photos. There are nearly 200,000 Americans who are serving in harm's way, and I have a solemn responsibility for their safety as commander-in-chief. Nothing would be gained by the release of these photos that matters more than the lives of our young men and women serving in harm's way.

Now, in the press's mind and in some of the public's mind, these two cases are contradictory. They are not to me. In each of these cases, I had to strike the right balance between transparency and national security. And this balance brings with it a precious responsibility. There's no doubt that the American people have seen this balance tested over the last several years. In the images from Abu Ghraib and the brutal interrogation techniques made public long before I was president, the American people learned of actions taken in their name that bear no resemblance to the ideals that generations of Americans have fought for. And whether it was the run-up to the Iraq war or the revelation of secret programs, Americans often felt like part of the story had been unnecessarily withheld from them. And that caused suspicion to build up. And that leads to a thirst for accountability.

I understand that. I ran for president promising transparency, and I meant what I said. And that's why, whenever possible, my administration will make all information available to the American

people so that they can make informed judgments and hold us accountable. But I have never argued—and I never will—that our most sensitive national security matters should simply be an open book. I will never abandon—and will vigorously defend—the necessity of classification to defend our troops at war, to protect sources and methods, and to safeguard confidential actions that keep the American people safe. Here's the difference though: whenever we cannot release certain information to the public for valid national security reasons, I will insist that there is oversight of my actions by Congress or by the courts.

We're currently launching a review of current policies by all those agencies responsible for the classification of documents to determine where reforms are possible and to assure that the other branches of government will be in a position to review executive branch decisions on these matters. Because in our system of checks and balances, someone must always watch over the watchers—especially when it comes to sensitive information.

Now, along these same lines, my administration is also confronting challenges to what is known as the state secrets privilege. This is a doctrine that allows the government to challenge legal cases involving secret programs. It's been used by many past presidents—Republican and Democrat—for many decades. And while this principle is absolutely necessary in some circumstances to protect national security, I am concerned that it has been over-used. It is also currently the subject of a wide range of lawsuits. So let me lay out some principles here. We must not protect information merely because it reveals the violation of a law or embarrassment to the government. And that's why my administration is nearing completion of a thorough review of this practice.

And we plan to embrace several principles for reform. We will apply a stricter legal test to material that can be protected under the state secrets privilege. We will not assert the privilege in court without first following our own formal process, including review by a Justice

Department committee and the personal approval of the attorney general. And each year we will voluntarily report to Congress when we have invoked the privilege and why because, as I said before, there must be proper oversight over our actions.

On all these matters related to the disclosure of sensitive information, I wish I could say that there was some simple formula out there to be had. There is not. These often involve tough calls, involve competing concerns, and they require a surgical approach. But the common thread that runs through all of my decisions is simple: we will safeguard what we must to protect the American people, but we will also ensure the accountability and oversight that is the hallmark of our constitutional system. I will never hide the truth because it's uncomfortable. I will deal with Congress and the courts as co-equal branches of government. I will tell the American people what I know and don't know, and when I release something publicly or keep something secret, I will tell you why.

Now, in all the areas that I've discussed today, the policies that I've proposed represent a new direction from the last eight years. To protect the American people and our values, we've banned enhanced interrogation techniques. We are closing the prison at Guantánamo. We are reforming military commissions and we will pursue a new legal regime to detain terrorists. We are declassifying more information and embracing more oversight of our actions; and we're narrowing our use of the state secrets privilege. These are dramatic changes that will put our approach to national security on a surer, safer, and more sustainable footing. Their implementation will take time, but they will get done.

There's a core principle that we will apply to all of our actions. Even as we clean up the mess at Guantánamo, we will constantly reevaluate our approach [and] subject our decisions to review from other branches of government as well as the public. We seek the strongest and most sustainable legal framework for addressing these issues in the long term—not to serve immediate politics, but to do

what's right over the long term. By doing that we can leave behind a legacy that outlasts my administration—my presidency—that endures for the next president and the president after that: a legacy that protects the American people and enjoys a broad legitimacy at home and abroad.

Now, this is what I mean when I say that we need to focus on the future. I recognize that many still have a strong desire to focus on the past. When it comes to actions of the last eight years, passions are high. Some Americans are angry; others want to re-fight debates that have been settled, in some cases debates that they have lost. I know that these debates lead directly, in some cases, to a call for a fuller accounting, perhaps through an independent commission.

I've opposed the creation of such a commission because I believe that our existing democratic institutions are strong enough to deliver accountability. The Congress can review abuses of our values, and there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws or miscarriages of justice.

It's no secret there is a tendency in Washington to spend our time pointing fingers at one another. And it's no secret that our media culture feeds the impulse that leads to a good fight and good copy. But nothing will contribute more than that to an extended re-litigation of the last eight years. Already, we've seen how that kind of effort only leads those in Washington on different sides to laying blame. It can distract us from focusing our time, our efforts, and our politics on the challenges of the future.

We see how the recent debate has obscured the truth and sends people into opposite and absolutist ends. On the one side of the spectrum, there are those who make little allowance for the unique challenges posed by terrorism, and would almost never put national security over transparency. And on the other end of the spectrum, there are those who embrace a view that can be summarized in two

words: “Anything goes.” Their arguments suggest that the ends of fighting terrorism can be used to justify any means, and that the president should have blanket authority to do whatever he wants—provided it is a president with whom they agree.

Both sides may be sincere in their views, but neither side is right. The American people are not absolutist, and they don’t elect us to impose a rigid ideology on our problems. They know that we need not sacrifice our security for our values, nor sacrifice our values for our security, so long as we approach difficult questions with honesty and care and a dose of common sense. That, after all, is the unique genius of America. That’s the challenge laid down by our Constitution. That has been the source of our strength through the ages. That’s what makes the United States of America different as a nation.

I can stand here today, as president of the United States, and say without exception or equivocation that we do not torture and that we will vigorously protect our people while forging a strong and durable framework that allows us to fight terrorism while abiding by the rule of law. Make no mistake: if we fail to turn the page on the approach that was taken over the past several years, then I will not be able to say that as president. And if we cannot stand for our core values, then we are not keeping faith with the documents that are enshrined in this hall.

The Framers who drafted the Constitution could not have foreseen the challenges that have unfolded over the last 222 years. But our Constitution has endured through secession and civil rights, through world war and cold war, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way. It hasn’t always been easy. We are an imperfect people. Every now and then, there are those who think that America’s safety and success require us to walk away from the sacred principles enshrined in this building. And we hear such voices today. But over the long haul the American people have resisted that temptation. And though we’ve made our share of mistakes, required some

course corrections, ultimately we have held fast to the principles that have been the source of our strength and a beacon to the world.

Now this generation faces a great test in the specter of terrorism. And unlike the Civil War or World War II, we can't count on a surrender ceremony to bring this journey to an end. Right now, in distant training camps and in crowded cities, there are people plotting to take American lives. That will be the case a year from now, five years from now, and—in all probability—ten years from now. Neither I nor anyone can stand here today and say that there will not be another terrorist attack that takes American lives. But I can say with certainty that my administration—along with our extraordinary troops and the patriotic men and women who defend our national security—will do everything in our power to keep the American people safe. And I do know with certainty that we can defeat Al Qaeda. Because the terrorists can only succeed if they swell their ranks and alienate America from our allies, and they will never be able to do that if we stay true to who we are, if we forge tough and durable approaches to fighting terrorism that are anchored in our timeless ideals. This must be our common purpose.

I ran for president because I believe that we cannot solve the challenges of our time unless we solve them together. We will not be safe if we see national security as a wedge that divides America—it can and must be a cause that unites us as one people and as one nation. We've done so before in times that were more perilous than ours. We will do so once again.

...

Appendix: Obama–B

*President Barack Obama,
“A Just and Lasting Peace,”
the 2009 Nobel Peace Prize Lecture,
Oslo, Norway, December 10, 2009*

...

We must begin by acknowledging the hard truth: we will not eradicate violent conflict in our lifetimes. There will be times when nations—acting individually or in concert—will find the use of force not only necessary but morally justified.

I make this statement mindful of what Martin Luther King Jr. said in this same ceremony years ago: “Violence never brings permanent peace. It solves no social problem: it merely creates new and more complicated ones.” As someone who stands here as a direct consequence of Dr. King’s life work, I am living testimony to the moral force of non-violence. I know there’s nothing weak—nothing passive—nothing naïve—in the creed and lives of [Mahatma] Gandhi and King.

But as a head of state sworn to protect and defend my nation, I cannot be guided by their examples alone. I face the world as it is, and cannot stand idle in the face of threats to the American people. For make no mistake: evil does exist in the world. A non-violent movement could not have halted Hitler’s armies. Negotiations cannot convince Al Qaeda’s leaders to lay down their arms. To say that force may sometimes be necessary is not a call to cynicism—it is a recognition of history, the imperfections of man, and the limits of reason.

...

I begin with this point because in many countries there is a deep ambivalence about military action today, no matter what the cause. And at times, this is joined by a reflexive suspicion of America, the world's sole military superpower.

But the world must remember that it was not simply international institutions—not just treaties and declarations—that brought stability to a post-World War II world. Whatever mistakes we have made, the plain fact is this: the United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms. The service and sacrifice of our men and women in uniform has promoted peace and prosperity from Germany to Korea and enabled democracy to take hold in places like the Balkans. We have borne this burden not because we seek to impose our will. We have done so out of enlightened self-interest—because we seek a better future for our children and grandchildren, and we believe that their lives will be better if others' children and grandchildren can live in freedom and prosperity.

So yes, the instruments of war do have a role to play in preserving the peace. And yet this truth must coexist with another—that no matter how justified, war promises human tragedy. The soldier's courage and sacrifice is full of glory, expressing devotion to country, to cause, to comrades in arms. But war itself is never glorious, and we must never trumpet it as such.

So part of our challenge is reconciling these two seemingly irreconcilable truths—that war is sometimes necessary, and war at some level is an expression of human folly. Concretely, we must direct our effort to the task that President Kennedy called for long ago. "Let us focus," he said, "on a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions."

"A gradual evolution of human institutions." What might this evolution look like? What might these practical steps be?

To begin with, I believe that all nations—strong and weak alike—must adhere to standards that govern the use of force. I—like any head of state—reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't.

The world rallied around America after the 9/11 attacks and continues to support our efforts in Afghanistan because of the horror of those senseless attacks and the recognized principle of self-defense. Likewise, the world recognized the need to confront Saddam Hussein when he invaded Kuwait—a consensus that sent a clear message to all about the cost of aggression.

Furthermore, America [cannot insist]—in fact, no nation can insist—that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified.

And this becomes particularly important when the purpose of military action extends beyond self-defense or the defense of one nation against an aggressor. More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government or to stop a civil war whose violence and suffering can engulf an entire region.

I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That's why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.

America's commitment to global security will never waver. But in a world in which threats are more diffuse, and missions more complex, America cannot act alone. America alone cannot secure the peace. This is true in Afghanistan. This is true in failed states like

Somalia, where terrorism and piracy are joined by famine and human suffering. And, sadly, it will continue to be true in unstable regions for years to come.

The leaders and soldiers of NATO countries, and other friends and allies, demonstrate this truth through the capacity and courage they've shown in Afghanistan. But in many countries, there is a disconnect between the efforts of those who serve and the ambivalence of the broader public. I understand why war is not popular, but I also know this: the belief that peace is desirable is rarely enough to achieve it. Peace requires responsibility. Peace entails sacrifice. That's why NATO continues to be indispensable. That's why we must strengthen UN and regional peacekeeping, and not leave the task to a few countries. That's why we honor those who return home from peacekeeping and training abroad to Oslo and Rome; to Ottawa and Sydney; to Dhaka and Kigali. We honor them not as makers of war, but as wagers of peace.

Let me make one final point about the use of force. Even as we make difficult decisions about going to war, we must also think clearly about how we fight it. The Nobel Committee recognized this truth in awarding its first prize for peace to Henry Dunant, the founder of the Red Cross and a driving force behind the Geneva Conventions.

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard-bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantánamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor those ideals by upholding them not when it's easy, but when it is hard.

...

Appendix: Obama–C

*Remarks by the president at the
National Defense University
(on US counterterrorism strategy)
Fort McNair, Washington, DC
May 23, 2013*

For over two centuries, the United States has been bound together by founding documents that defined who we are as Americans and served as our compass through every type of change. Matters of war and peace are no different. Americans are deeply ambivalent about war, but having fought for our independence, we know a price must

[*Editors' Note:* President Barack Obama delivered this speech on May 23, 2013, at the National Defense University (NDU), Fort McNair, Washington, DC. A short section of introductory material has been edited out in this version. In addition, the president was interrupted by a heckler, Medea Benjamin of the anti-war and anti-drone organization Code Pink; the president chose to engage her with his own remarks, and the exchange is preserved in the *official White House text* of the address. We have therefore kept that exchange in the text as well. Finally, the NDU speech was accompanied by two additional documents that are important commentaries and emendations to the president's remarks and intended to be read with them. The first is a White House press statement, *Fact Sheet: US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (May 23, 2013). The second is a letter dated May 22, 2013, from Eric H. Holder, Jr., Attorney General, to Sen. Patrick J. Leahy, Chair of the Senate Judiciary Committee, addressing drone operations in connection with US citizens. These two documents are included here as appendices to President Obama's NDU speech.]

be paid for freedom. From the Civil War to our struggle against fascism, on through the long twilight struggle of the Cold War, battlefields have changed and technology has evolved. But our commitment to constitutional principles has weathered every war, and every war has come to an end.

With the collapse of the Berlin Wall, a new dawn of democracy took hold abroad and a decade of peace and prosperity arrived here at home. And for a moment, it seemed the 21st century would be a tranquil time. And then, on September 11, 2001, we were shaken out of complacency. Thousands were taken from us, as clouds of fire and metal and ash descended upon a sun-filled morning. This was a different kind of war. No armies came to our shores, and our military was not the principal target. Instead, a group of terrorists came to kill as many civilians as they could.

And so our nation went to war. We have now been at war for well over a decade. I won't review the full history. What is clear is that we quickly drove Al Qaeda out of Afghanistan, but then shifted our focus and began a new war in Iraq. And this carried significant consequences for our fight against Al Qaeda, our standing in the world, and—to this day—our interests in a vital region.

Meanwhile, we strengthened our defenses—hardening targets, tightening transportation security, giving law enforcement new tools to prevent terror. Most of these changes were sound. Some caused inconvenience. But some, like expanded surveillance, raised difficult questions about the balance that we strike between our interests in security and our values of privacy. And in some cases, I believe we compromised our basic values—by using torture to interrogate our enemies and detaining individuals in a way that ran counter to the rule of law.

So after I took office, we stepped up the war against Al Qaeda but we also sought to change its course. We relentlessly targeted Al Qaeda's leadership. We ended the war in Iraq and brought nearly 150,000 troops home. We pursued a new strategy in Afghanistan and

increased our training of Afghan forces. We unequivocally banned torture, affirmed our commitment to civilian courts, worked to align our policies with the rule of law, and expanded our consultations with Congress.

Today, Osama bin Laden is dead, and so are most of his top lieutenants. There have been no large-scale attacks on the United States, and our homeland is more secure. Fewer of our troops are in harm's way, and over the next nineteen months they will continue to come home. Our alliances are strong, and so is our standing in the world. In sum, we are safer because of our efforts.

Now, make no mistake, our nation is still threatened by terrorists. From Benghazi to Boston, we have been tragically reminded of that truth. But we have to recognize that the threat has shifted and evolved from the one that came to our shores on 9/11. With a decade of experience now to draw from, this is the moment to ask ourselves hard questions—about the nature of today's threats and how we should confront them.

And these questions matter to every American.

For over the last decade, our nation has spent well over a trillion dollars on war, helping to explode our deficits and constraining our ability to nation-build here at home. Our service members and their families have sacrificed far more on our behalf. Nearly 7,000 Americans have made the ultimate sacrifice. Many more have left a part of themselves on the battlefield, or brought the shadows of battle back home. From our use of drones to the detention of terrorist suspects, the decisions that we are making now will define the type of nation—and world—that we leave to our children.

So America is at a crossroads. We must define the nature and scope of this struggle, or else it will define us. We have to be mindful of James Madison's warning that "No nation could preserve its freedom in the midst of continual warfare." Neither I, nor any president, can promise the total defeat of terror. We will never erase the evil that lies in the hearts of some human beings, nor stamp out every

danger to our open society. But what we can do—what we must do—is dismantle networks that pose a direct danger to us and make it less likely for new groups to gain a foothold, all the while maintaining the freedoms and ideals that we defend. And to define that strategy, we have to make decisions based not on fear, but on hard-earned wisdom. That begins with understanding the current threat that we face.

Today, the core of Al Qaeda in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghazi or Boston. They've not carried out a successful attack on our homeland since 9/11.

Instead, what we've seen is the emergence of various Al Qaeda affiliates. From Yemen to Iraq, from Somalia to North Africa, the threat today is more diffuse, with Al Qaeda's affiliates in the Arabian Peninsula—AQAP—the most active in plotting against our homeland. And while none of AQAP's efforts approach the scale of 9/11, they have continued to plot acts of terror, like the attempt to blow up an airplane on Christmas Day in 2009.

Unrest in the Arab world has also allowed extremists to gain a foothold in countries like Libya and Syria. But here, too, there are differences from 9/11. In some cases, we continue to confront state-sponsored networks like Hezbollah that engage in acts of terror to achieve political goals. Others of these groups are simply collections of local militias or extremists interested in seizing territory. And while we are vigilant for signs that these groups may pose a transnational threat, most are focused on operating in the countries and regions where they are based. And that means we'll face more localized threats like what we saw in Benghazi, or the BP oil facility in Algeria, in which local operatives—perhaps in loose affiliation with regional networks—launch periodic attacks against Western diplomats, companies, and other soft targets, or resort to kidnapping and other criminal enterprises to fund their operations.

And, finally, we face a real threat from radicalized individuals here in the United States. Whether it's a shooter at a Sikh temple in Wisconsin, a plane flying into a building in Texas, or the extremists who killed 168 people at the Federal Building in Oklahoma City, America has confronted many forms of violent extremism in our history. Deranged or alienated individuals—often US citizens or legal residents—can do enormous damage, particularly when inspired by larger notions of violent jihad. And that pull toward extremism appears to have led to the shooting at Fort Hood and the bombing of the Boston Marathon.

So that's the current threat—lethal yet less capable Al Qaeda affiliates; threats to diplomatic facilities and businesses abroad; home-grown extremists. This is the future of terrorism. We have to take these threats seriously, and do all that we can to confront them. But as we shape our response, we have to recognize that the scale of this threat closely resembles the types of attacks we faced before 9/11.

In the 1980s, we lost Americans to terrorism at our embassy in Beirut; at our Marine barracks in Lebanon; on a cruise ship at sea; at a disco in Berlin; and on a Pan Am flight—Flight 103—over Lockerbie. In the 1990s, we lost Americans to terrorism at the World Trade Center; at our military facilities in Saudi Arabia; and at our embassy in Kenya. These attacks were all brutal; they were all deadly; and we learned that, left unchecked, these threats can grow. But if dealt with smartly and proportionally, these threats need not rise to the level that we saw on the eve of 9/11.

Moreover, we have to recognize that these threats don't arise in a vacuum. Most, though not all, of the terrorism we face is fueled by a common ideology—a belief by some extremists that Islam is in conflict with the United States and the West, and that violence against Western targets, including civilians, is justified in pursuit of a larger cause. Of course, this ideology is based on a lie, for the United States is not at war with Islam. And this ideology is rejected

by the vast majority of Muslims, who are the most frequent victims of terrorist attacks.

Nevertheless, this ideology persists, and in an age when ideas and images can travel the globe in an instant, our response to terrorism can't depend on military or law enforcement alone. We need all elements of national power to win a battle of wills, a battle of ideas. So what I want to discuss here today is the components of such a comprehensive counterterrorism strategy.

First, we must finish the work of defeating Al Qaeda and its associated forces.

In Afghanistan, we will complete our transition to Afghan responsibility for that country's security. Our troops will come home. Our combat mission will come to an end. And we will work with the Afghan government to train security forces, and sustain a counterterrorism force, which ensures that Al Qaeda can never again establish a safe haven to launch attacks against us or our allies.

Beyond Afghanistan, we must define our effort not as a boundless "global war on terror" but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. In many cases, this will involve partnerships with other countries. Already, thousands of Pakistani soldiers have lost their lives fighting extremists. In Yemen, we are supporting security forces that have reclaimed territory from AQAP. In Somalia, we helped a coalition of African nations push Al Shabaab out of its strongholds. In Mali, we're providing military aid to French-led intervention to push back Al Qaeda in the Maghreb and help the people of Mali reclaim their future.

Much of our best counterterrorism cooperation results in the gathering and sharing of intelligence, the arrest and prosecution of terrorists. And that's how a Somali terrorist apprehended off the coast of Yemen is now in a prison in New York. That's how we worked with European allies to disrupt plots from Denmark to Germany to

the United Kingdom. That's how intelligence collected with Saudi Arabia helped us stop a cargo plane from being blown up over the Atlantic. These partnerships work.

But despite our strong preference for the detention and prosecution of terrorists, sometimes this approach is foreclosed. Al Qaeda and its affiliates try to gain footholds in some of the most distant and unforgiving places on Earth. They take refuge in remote tribal regions. They hide in caves and walled compounds. They train in empty deserts and rugged mountains.

In some of these places—such as parts of Somalia and Yemen—the state only has the most tenuous reach into the territory. In other cases, the state lacks the capacity or will to take action. And it's also not possible for America to simply deploy a team of special forces to capture every terrorist. Even when such an approach may be possible, there are places where it would pose profound risks to our troops and local civilians—where a terrorist compound cannot be breached without triggering a firefight with surrounding tribal communities, for example, that pose no threat to us; times when putting US boots on the ground may trigger a major international crisis.

To put it another way, our operation in Pakistan against Osama bin Laden cannot be the norm. The risks in that case were immense. The likelihood of capture, although that was our preference, was remote given the certainty that our folks would confront resistance. The fact that we did not find ourselves confronted with civilian casualties, or embroiled in an extended firefight, was a testament to the meticulous planning and professionalism of our special forces, but it also depended on some luck. And it was supported by massive infrastructure in Afghanistan.

And even then, the cost to our relationship with Pakistan—and the backlash among the Pakistani public over encroachment on their territory—was so severe that we are just now beginning to rebuild this important partnership.

So it is in this context that the United States has taken lethal, targeted action against Al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones.

As was true in previous armed conflicts, this new technology raises profound questions—about who is targeted, and why; about civilian casualties and the risk of creating new enemies; about the legality of such strikes under US and international law; about accountability and morality. So let me address these questions.

To begin with, our actions are effective. Don't take my word for it. In the intelligence gathered at bin Laden's compound, we found that he wrote, "We could lose the reserves to enemy's air strikes. We cannot fight air strikes with explosives." Other communications from Al Qaeda operatives confirm this as well. Dozens of highly skilled Al Qaeda commanders, trainers, bomb-makers, and operatives have been taken off the battlefield. Plots have been disrupted that would have targeted international aviation, US transit systems, European cities, and our troops in Afghanistan. Simply put, these strikes have saved lives.

Moreover, America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with Al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as it could if we did not stop it first. So this is a just war—a war waged proportionally, in last resort, and in self-defense.

And yet, as our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion. To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance. For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power—or risk abusing it. And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists—insisting

upon clear guidelines, oversight, and accountability that are now codified in the “Presidential Policy Guidance” that I signed yesterday.

In the Afghan war theater, we must—and will—continue to support our troops until the transition is complete at the end of 2014. And that means we will continue to take strikes against high-value Al Qaeda targets, but also against forces that are massing to support attacks on coalition forces. But by the end of 2014, we will no longer have the same need for force protection, and the progress we’ve made against core Al Qaeda will reduce the need for unmanned strikes.

Beyond the Afghan theater, we only target Al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners and respect for state sovereignty.

America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near certainty that no civilians will be killed or injured—the highest standard we can set.

Now, this last point is critical, because much of the criticism about drone strikes—both here at home and abroad—understandably centers on reports of civilian casualties. There’s a wide gap between US assessments of such casualties and nongovernmental reports. Nevertheless, it is a hard fact that US strikes have resulted in civilian casualties, a risk that exists in every war. And for the families of those civilians, no words or legal construct can justify their loss. For me, and those in my chain of command, those deaths will haunt us as long as we live, just as we are haunted by the civilian casualties that have occurred throughout conventional fighting in Afghanistan and Iraq.

But as commander in chief, I must weigh these heartbreaking tragedies against the alternatives. To do nothing in the face of terrorist networks would invite far more civilian casualties—not just in our cities at home and our facilities abroad, but also in the very places like Sana'a and Kabul and Mogadishu where terrorists seek a foothold. Remember that the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes. So doing nothing is not an option.

Where foreign governments cannot or will not effectively stop terrorism in their territory, the primary alternative to targeted lethal action would be the use of conventional military options. As I've already said, even small special operations carry enormous risks. Conventional airpower or missiles are far less precise than drones, and are likely to cause more civilian casualties and more local outrage. And invasions of these territories lead us to be viewed as occupying armies, unleash a torrent of unintended consequences, are difficult to contain, result in large numbers of civilian casualties, and ultimately empower those who thrive on violent conflict.

So it is false to assert that putting boots on the ground is less likely to result in civilian deaths or less likely to create enemies in the Muslim world. The results would be more US deaths, more Black Hawks down, more confrontations with local populations, and an inevitable mission creep in support of such raids that could easily escalate into new wars.

Yes, the conflict with Al Qaeda, like all armed conflicts, invites tragedy. But by narrowly targeting our action against those who want to kill us and not the people they hide among, we are choosing the course of action least likely to result in the loss of innocent life.

Our efforts must be measured against the history of putting American troops in distant lands among hostile populations. In Vietnam, hundreds of thousands of civilians died in a war where the boundaries of battle were blurred. In Iraq and Afghanistan, despite

the extraordinary courage and discipline of our troops, thousands of civilians have been killed. So neither conventional military action nor waiting for attacks to occur offers moral safe harbor, and neither does a sole reliance on law enforcement in territories that have no functioning police or security services—and, indeed, have no functioning law.

Now, this is not to say that the risks are not real. Any US military action in foreign lands risks creating more enemies and impacts public opinion overseas. Moreover, our laws constrain the power of the president even during wartime, and I have taken an oath to defend the Constitution of the United States. The very precision of drone strikes and the necessary secrecy often involved in such actions can end up shielding our government from the public scrutiny that a troop deployment invites. It can also lead a president and his team to view drone strikes as a cure-all for terrorism.

And for this reason, I've insisted on strong oversight of all lethal action. After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: not only did Congress authorize the use of force, it is briefed on every strike that America takes. Every strike. That includes the one instance when we targeted an American citizen—Anwar al-Awlaki, the chief of external operations for AQAP.

This week, I authorized the declassification of this action, and the deaths of three other Americans in drone strikes, to facilitate transparency and debate on this issue and to dismiss some of the more outlandish claims that have been made. For the record, I do not believe it would be constitutional for the government to target and kill any US citizen—with a drone, or with a shotgun—without due process, nor should any president deploy armed drones over US soil.

But when a US citizen goes abroad to wage war against America and is actively plotting to kill US citizens, and when neither the United States nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield

than a sniper shooting down on an innocent crowd should be protected from a SWAT team.

That's who Anwar al-Awlaki was—he was continuously trying to kill people. He helped oversee the 2010 plot to detonate explosive devices on two US-bound cargo planes. He was involved in planning to blow up an airliner in 2009. When Farouk Abdulmutallab—the Christmas Day bomber—went to Yemen in 2009, al-Awlaki hosted him, approved his suicide operation, helped him tape a martyrdom video to be shown after the attack, and his last instructions were to blow up the airplane when it was over American soil. I would have detained and prosecuted al-Awlaki if we captured him before he carried out a plot, but we couldn't. And as president, I would have been derelict in my duty had I not authorized the strike that took him out.

Of course, the targeting of any American raises constitutional issues that are not present in other strikes—which is why my administration submitted information about al-Awlaki to the Department of Justice months before al-Awlaki was killed, and briefed the Congress before this strike as well. But the high threshold that we've set for taking lethal action applies to all potential terrorist targets, regardless of whether or not they are American citizens. This threshold respects the inherent dignity of every human life. Alongside the decision to put our men and women in uniform in harm's way, the decision to use force against individuals or groups—even against a sworn enemy of the United States—is the hardest thing I do as president. But these decisions must be made, given my responsibility to protect the American people.

Going forward, I've asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress. Each option has virtues in theory, but poses difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial author-

ity. Another idea that's been suggested—the establishment of an independent oversight board in the executive branch—avoids those problems, but may introduce a layer of bureaucracy into national security decision-making without inspiring additional public confidence in the process. But despite these challenges, I look forward to actively engaging Congress to explore these and other options for increased oversight.

I believe, however, that the use of force must be seen as part of a larger discussion we need to have about a comprehensive counterterrorism strategy—because for all the focus on the use of force, force alone cannot make us safe. We cannot use force everywhere that a radical ideology takes root; and in the absence of a strategy that reduces the wellspring of extremism, a perpetual war—through drones or special forces or troop deployments—will prove self-defeating and alter our country in troubling ways.

So the next element of our strategy involves addressing the underlying grievances and conflicts that feed extremism—from North Africa to South Asia. As we've learned this past decade, this is a vast and complex undertaking. We must be humble in our expectation that we can quickly resolve deep-rooted problems like poverty and sectarian hatred. Moreover, no two countries are alike, and some will undergo chaotic change before things get better. But our security and our values demand that we make the effort.

This means patiently supporting transitions to democracy in places like Egypt and Tunisia and Libya—because the peaceful realization of individual aspirations will serve as a rebuke to violent extremists. We must strengthen the opposition in Syria, while isolating extremist elements—because the end of a tyrant must not give way to the tyranny of terrorism. We are actively working to promote peace between Israelis and Palestinians—because it is right and because such a peace could help reshape attitudes in the region. And we must help countries modernize economies, upgrade education, and encourage entrepreneurship—because American leadership has

always been elevated by our ability to connect with people's hopes, and not simply their fears.

And success on all these fronts requires sustained engagement, but it will also require resources. I know that foreign aid is one of the least popular expenditures that there is. That's true for Democrats and Republicans—I've seen the polling—even though it amounts to less than 1 percent of the federal budget. In fact, a lot of folks think it's 25 percent, if you ask people on the streets. Less than 1 percent—still wildly unpopular. But foreign assistance cannot be viewed as charity. It is fundamental to our national security. And it's fundamental to any sensible long-term strategy to battle extremism.

Moreover, foreign assistance is a tiny fraction of what we spend fighting wars that our assistance might ultimately prevent. For what we spent in a month in Iraq at the height of the war, we could be training security forces in Libya, maintaining peace agreements between Israel and its neighbors, feeding the hungry in Yemen, building schools in Pakistan, and creating reservoirs of goodwill that marginalize extremists. That has to be part of our strategy.

Moreover, America cannot carry out this work if we don't have diplomats serving in some very dangerous places. Over the past decade, we have strengthened security at our embassies, and I am implementing every recommendation of the Accountability Review Board, which found unacceptable failures in Benghazi. I've called on Congress to fully fund these efforts to bolster security and harden facilities, improve intelligence, and facilitate a quicker response time from our military if a crisis emerges.

But even after we take these steps, some irreducible risks to our diplomats will remain. This is the price of being the world's most powerful nation, particularly as a wave of change washes over the Arab world. And in balancing the trade-offs between security and active diplomacy, I firmly believe that any retreat from challenging regions will only increase the dangers that we face in the long run.

And that's why we should be grateful to those diplomats who are willing to serve.

Targeted action against terrorists, effective partnerships, diplomatic engagement and assistance—through such a comprehensive strategy we can significantly reduce the chances of large-scale attacks on the homeland and mitigate threats to Americans overseas. But as we guard against dangers from abroad, we cannot neglect the daunting challenge of terrorism from within our borders.

As I said earlier, this threat is not new. But technology and the Internet increase its frequency and in some cases its lethality. Today, a person can consume hateful propaganda, commit to a violent agenda, and learn how to kill without leaving home. To address this threat, two years ago my administration did a comprehensive review and engaged with law enforcement.

And the best way to prevent violent extremism inspired by violent jihadists is to work with the Muslim American community—which has consistently rejected terrorism—to identify signs of radicalization and partner with law enforcement when an individual is drifting toward violence. And these partnerships can only work when we recognize that Muslims are a fundamental part of the American family. In fact, the success of American Muslims and our determination to guard against any encroachments on their civil liberties is the ultimate rebuke to those who say that we're at war with Islam.

Thwarting homegrown plots presents particular challenges in part because of our proud commitment to civil liberties for all who call America home. That's why, in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are. That means reviewing the authorities of law enforcement, so we can intercept new types of communication, but also build in privacy protections to prevent abuse.

That means that—even after Boston—we do not deport someone or throw somebody in prison in the absence of evidence. That

means putting careful constraints on the tools the government uses to protect sensitive information, such as the state secrets doctrine. And that means finally having a strong Privacy and Civil Liberties [Oversight] Board to review those issues where our counterterrorism efforts and our values may come into tension.

The Justice Department's investigation of national security leaks offers a recent example of the challenges involved in striking the right balance between our security and our open society. As commander in chief, I believe we must keep information secret that protects our operations and our people in the field. To do so, we must enforce consequences for those who break the law and breach their commitment to protect classified information. But a free press is also essential for our democracy. That's who we are. And I'm troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable.

Journalists should not be at legal risk for doing their jobs. Our focus must be on those who break the law. And that's why I've called on Congress to pass a media shield law to guard against government overreach. And I've raised these issues with the attorney general, who shares my concerns. So he has agreed to review existing Department of Justice guidelines governing investigations that involve reporters, and he'll convene a group of media organizations to hear their concerns as part of that review. And I've directed the attorney general to report back to me by July 12.

Now, all these issues remind us that the choices we make about war can impact—in sometimes unintended ways—the openness and freedom on which our way of life depends. And that is why I intend to engage Congress about the existing Authorization to Use Military Force, or AUMF, to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing.

The AUMF is now nearly twelve years old. The Afghan war is coming to an end. Core Al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every

collection of thugs that label themselves Al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant presidents unbound powers more suited for traditional armed conflicts between nation-states.

So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That's what history advises. That's what our democracy demands.

And that brings me to my final topic: the detention of terrorist suspects. I'm going to repeat one more time: as a matter of policy, the preference of the United States is to capture terrorist suspects. When we do detain a suspect, we interrogate him. And if the suspect can be prosecuted, we decide whether to try him in a civilian court or a military commission.

During the past decade, the vast majority of those detained by our military were captured on the battlefield. In Iraq, we turned over thousands of prisoners as we ended the war. In Afghanistan, we have transitioned detention facilities to the Afghans, as part of the process of restoring Afghan sovereignty. So we bring law-of-war detention to an end, and we are committed to prosecuting terrorists wherever we can.

The glaring exception to this time-tested approach is the detention center at Guantánamo Bay. The original premise for opening GTMO—that detainees would not be able to challenge their detention—was found unconstitutional five years ago. In the meantime, GTMO has become a symbol around the world for an America that flouts the rule of law. Our allies won't cooperate with us if they think a terrorist will end up at GTMO.

During a time of budget cuts, we spend \$150 million each year to imprison 166 people—almost \$1 million per prisoner. And the

Department of Defense estimates that we must spend another \$200 million to keep GTMO open at a time when we're cutting investments in education and research here at home and when the Pentagon is struggling with sequester and budget cuts.

As president, I have tried to close GTMO. I transferred sixty-seven detainees to other countries before Congress imposed restrictions to effectively prevent us from either transferring detainees to other countries or imprisoning them here in the United States.

These restrictions make no sense. After all, under President Bush, some 530 detainees were transferred from GTMO with Congress's support. When I ran for president the first time, John McCain supported closing GTMO—this was a bipartisan issue. No person has ever escaped one of our super-max or military prisons here in the United States—ever. Our courts have convicted hundreds of people for terrorism or terrorism-related offenses, including some folks who are more dangerous than most GTMO detainees. They're in our prisons.

And given my administration's relentless pursuit of Al Qaeda's leadership, there is no justification beyond politics for Congress to prevent us from closing a facility that should have never been opened. (Applause.)

AUDIENCE MEMBER: Excuse me, President Obama—

MR. OBAMA: So—let me finish, ma'am. So today, once again—

AUDIENCE MEMBER: There are 102 people on a hunger strike. These are desperate people.

MR. OBAMA: I'm about to address it, ma'am, but you've got to let me speak. I'm about to address it.

AUDIENCE MEMBER: You're our commander in chief—

MR. OBAMA: Let me address it.

AUDIENCE MEMBER: —you can close Guantánamo Bay.

MR. OBAMA: Why don't you let me address it, ma'am.

AUDIENCE MEMBER: There's still prisoners—

MR. OBAMA: Why don't you sit down and I will tell you exactly what I'm going to do.

AUDIENCE MEMBER: That includes fifty-seven Yemenis.

MR. OBAMA: Thank you, ma'am. Thank you. (Applause.) Ma'am, thank you. You should let me finish my sentence.

Today, I once again call on Congress to lift the restrictions on detainee transfers from GTMO. (Applause.) I have asked the Department of Defense to designate a site in the United States where we can hold military commissions. I'm appointing a new senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries.

I am lifting the moratorium on detainee transfers to Yemen so we can review them on a case-by-case basis. To the greatest extent possible, we will transfer detainees who have been cleared to go to other countries.

AUDIENCE MEMBER: —prisoners already. Release them today.

MR. OBAMA: Where appropriate, we will bring terrorists to justice in our courts and our military justice system. And we will insist that judicial review be available for every detainee.

AUDIENCE MEMBER: It needs to be—

THE PRESIDENT: Now, ma'am, let me finish. Let me finish, ma'am. Part of free speech is you being able to speak, but also, you listening and me being able to speak. (Applause.)

Now, even after we take these steps one issue will remain—just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted, for example, because the evidence against them has been compromised or is inadmissible in a court of law. But once we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.

I know the politics are hard. But history will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it. Imagine a future—ten years from now or twenty years from now—when the United States of America is still holding people who have been charged with no crime on a piece of land that is not part of our country. Look at the current situation, where we are force-feeding detainees who are being held on a hunger strike. I'm willing to cut the young lady who interrupted me some slack because it's worth being passionate about. Is this who we are? Is that something our Founders foresaw? Is that the America we want to leave our children? Our sense of justice is stronger than that.

We have prosecuted scores of terrorists in our courts. That includes Umar Farouk Abdulmutallab, who tried to blow up an airplane over Detroit; and Faisal Shahzad, who put a car bomb in Times Square. It's in a court of law that we will try Dzhokhar Tsarnaev, who is accused of bombing the Boston Marathon. Richard Reid, the shoe bomber, is, as we speak, serving a life sentence in a maximum security prison here in the United States. In sentencing Reid, Judge William Young told him, "The way we treat you . . . is the measure of our own liberties."

AUDIENCE MEMBER: How about Abdulmutallab—locking up a 16-year-old—is that the way we treat a 16-year-old? (Inaudible)—can

you take the drones out of the hands of the CIA? Can you stop the signature strikes killing people on the basis of suspicious activities?

MR. OBAMA: We're addressing that, ma'am.

AUDIENCE MEMBER: —thousands of Muslims that got killed—will you compensate the innocent families—that will make us safer here at home. I love my country. I love (inaudible)—

MR. OBAMA: I think that—and I'm going off script, as you might expect here. (Laughter and applause.) The voice of that woman is worth paying attention to. (Applause.) Obviously, I do not agree with much of what she said, and obviously she wasn't listening to me in much of what I said. But these are tough issues, and the suggestion that we can gloss over them is wrong.

When that judge sentenced Mr. Reid, the shoe bomber, he went on to point to the American flag that flew in the courtroom. "That flag," he said, "will fly there long after this is all forgotten. That flag still stands for freedom."

So, America, we've faced down dangers far greater than Al Qaeda. By staying true to the values of our founding, and by using our constitutional compass, we have overcome slavery and civil war and fascism and communism. In just these last few years as president, I've watched the American people bounce back from painful recession, mass shootings, natural disasters like the recent tornadoes that devastated Oklahoma. These events were heartbreaking; they shook our communities to the core. But because of the resilience of the American people, these events could not come close to breaking us.

I think of Lauren Manning, the 9/11 survivor who had severe burns over 80 percent of her body, who said, "That's my reality. I put a Band-Aid on it, literally, and I move on."

I think of the New Yorkers who filled Times Square the day after an attempted car bomb as if nothing had happened.

I think of the proud Pakistani parents who, after their daughter was invited to the White House, wrote to us, “We have raised an American Muslim daughter to dream big and never give up because it does pay off.”

I think of all the wounded warriors rebuilding their lives, and helping other vets to find jobs.

I think of the runner planning to do the 2014 Boston Marathon, who said, “Next year, you’re going to have more people than ever. Determination is not something to be messed with.”

That’s who the American people are—determined, and not to be messed with. And now we need a strategy and a politics that reflects this resilient spirit.

Our victory against terrorism won’t be measured in a surrender ceremony at a battleship or a statue being pulled to the ground. Victory will be measured in parents taking their kids to school; immigrants coming to our shores; fans taking in a ballgame; a veteran starting a business; a bustling city street; a citizen shouting her concerns at a president.

The quiet determination; that strength of character and bond of fellowship; that refutation of fear—that is both our sword and our shield. And long after the current messengers of hate have faded from the world’s memory, alongside the brutal despots, and deranged madmen, and ruthless demagogues who litter history—the flag of the United States will still wave from small-town cemeteries to national monuments, to distant outposts abroad. And that flag will still stand for freedom.

Thank you very, everybody. God bless you. May God bless the United States of America.

END OF SPEECH

Addenda I

*(To Remarks by the President at
National Defense University)*

Fact Sheet:

*US Policy Standards and Procedures for the
Use of Force in Counterterrorism Operations Outside
the United States and Areas of Active Hostilities
White House Office of the Press Secretary
May 23, 2013*

Since his first day in office, President Obama has been clear that the United States will use all available tools of national power to protect the American people from the terrorist threat posed by Al Qaeda and its associated forces. The president has also made clear that, in carrying on this fight, we will uphold our laws and values and will share as much information as possible with the American people and the Congress, consistent with our national security needs and the proper functioning of the executive branch. To these ends, the president has approved, and senior members of the executive branch have briefed to the Congress, written policy standards and procedures that formalize and strengthen the administration's rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities. Additionally, the president has decided to share, in this document, certain key elements of these standards and procedures with the American people so that they can make informed judgments and hold the executive branch accountable.

This document provides information regarding counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time. As administration officials have stated publicly on numerous occasions, we are continually working to refine, clarify, and strengthen our standards and processes for using force to keep the nation safe from the terrorist threat. One constant is our commitment to conducting counterterrorism operations lawfully. In addition, we consider the separate question of whether force should be used as a matter of policy. The most important policy consideration, particularly when the United States contemplates using lethal force, is whether our actions protect American lives.

Preference for Capture

The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable laws and consistent with our obligations to other sovereign states.

Standards for the Use of Lethal Force

Any decision to use force abroad—even when our adversaries are terrorists dedicated to killing American citizens—is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force will be used only to prevent or stop attacks against US persons and, even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met:

First, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

Second, the United States will use lethal force only against a target that poses a continuing, imminent threat to US persons. It is simply not the case that all terrorists pose a continuing, imminent threat to US persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

Third, the following criteria must be met before lethal action may be taken:

1. Near certainty that the terrorist target is present
2. Near certainty that non-combatants¹ will not be injured or killed
3. An assessment that capture is not feasible at the time of the operation
4. An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to US persons
5. An assessment that no other reasonable alternatives exist to effectively address the threat to US persons

Finally, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the

1. *Non-combatants are individuals who may not be made the object of attack under applicable international law. The term “non-combatant” does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.*

ability of the United States to act unilaterally— and on the way in which the United States can use force. The United States respects national sovereignty and international law.

US Government Coordination and Review

Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities are made at the most senior levels of the US government, informed by departments and agencies with relevant expertise and institutional roles. Senior national security officials—including the deputies and heads of key departments and agencies—will consider proposals to make sure that our policy standards are met, and attorneys—including the senior lawyers of key departments and agencies—will review and determine the legality of proposals.

These decisions will be informed by a broad analysis of an intended target's current and past role in plots threatening US persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on US foreign relations, and on US intelligence collection. Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.

Other Key Elements

US Persons. If the United States considers an operation against a terrorist identified as a US person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States.

Reservation of Authority. These new standards and procedures do not limit the president's authority to take action in extraordinary circumstances when doing so is both lawful and necessary to protect the United States or its allies.

Congressional Notification. Since entering office, the president has made certain that the appropriate members of Congress have been kept fully informed about our counterterrorism operations. Consistent with this strong and continuing commitment to congressional oversight, appropriate members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved. In addition, the appropriate committees of Congress will be notified whenever a counterterrorism operation covered by these standards and procedures has been conducted.

Addenda 2

*(To Remarks by the President at
National Defense University)*

*Letter from Eric H. Holder, Jr., Attorney General, to
Sen. Patrick J. Leahy, Chairman,
Senate Judiciary Committee
May 22, 2013
(Re: Drone Warfare and US Citizens)*

May 22, 2013

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20530

Dear Mr. Chairman:

Since entering office, the President has made clear his commitment to providing Congress and the American people with as much information as possible about our sensitive counterterrorism operations, consistent with our national security and the proper functioning of the Executive Branch. Doing so is necessary, the President stated in his May 21, 2009 National Archives speech, because it enables the citizens of our democracy to “make informed judgments and hold [their Government] accountable.”

In furtherance of this commitment, the Administration has provided an unprecedented level of transparency into how sensitive counterterrorism operations are conducted. Several senior Administration officials, including myself, have taken numerous steps to explain publicly the legal basis for the United States' actions to the American people and the Congress. For example, in March 2012, I delivered an address at Northwestern University Law School discussing certain aspects of the Administration's counterterrorism legal framework. And the Department of Justice and other departments and agencies have continually worked with the appropriate oversight committees in the Congress to ensure that those committees are fully informed of the legal basis for our actions.

The Administration is determined to continue these extensive outreach efforts to communicate with the American people. Indeed, the President reiterated in his State of the Union address earlier this year that he would continue to engage with the Congress about our counterterrorism efforts to ensure that they remain consistent with our laws and values, and become more transparent to the American people and to the world.

To this end, the President has directed me to disclose certain information that until now has been properly classified. You and other Members of your Committee have on numerous occasions expressed a particular interest in the Administration's use of lethal force against US citizens. In light of this fact, I am writing to disclose to you certain information about the number of US citizens who have been killed by US counterterrorism operations outside of areas of active hostilities. Since 2009, the United States, in the conduct of US counterterrorism operations against Al Qaeda and its associated forces outside of areas of active hostilities, has specifically targeted and killed one US citizen, Anwar al-Awlaki. The United States is further aware of three other US citizens who have

been killed in such US counterterrorism operations over that same time period: Samir Khan, ‘Abd al-Rahman Anwar al-Awlaki, and Jude Kenan Mohammed. These individuals were not specifically targeted by the United States.

As I noted in my speech at Northwestern, “it is an unfortunate but undeniable fact” that a “small number” of US citizens “have decided to commit violent attacks against their own country from abroad.” Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during the current conflict, it is clear and logical that United States citizenship alone does not make such individuals immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to US citizens—even those who are leading efforts to kill their fellow, innocent Americans. Such considerations allow for the use of lethal force *in a foreign country* against a US citizen who is a senior operational leader of Al Qaeda or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) the US government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law-of-war principles.

These conditions should not come as a surprise: the Administration’s legal views on this weighty issue have been clear and consistent over time. The analysis in my speech at Northwestern University Law School is entirely consistent with not only the analysis found in the unclassified white paper the Department of Justice provided to your Committee soon after my speech, but also with the classified analysis the Department shared with other congressional committees in May 2011—months before the operation that resulted in the

death of Anwar al-Awlaki. The analysis in my speech is also entirely consistent with the classified legal advice on this issue the Department of Justice has shared with your Committee more recently. In short, the Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a US citizen who is a senior operational leader of Al Qaeda or its associated forces, and who is actively engaged in planning to kill Americans.

Anwar al-Awlaki plainly satisfied all of the conditions I outlined in my speech at Northwestern. Let me be more specific. Al-Awlaki was a senior operational leader of Al Qaeda in the Arabian Peninsula (AQAP), the most dangerous regional affiliate of Al Qaeda and a group that has committed numerous terrorist attacks overseas and attempted multiple times to conduct terrorist attacks against the US homeland. And al-Awlaki was not just a senior leader of AQAP—he was the group’s chief of external operations, intimately involved in detailed planning and putting in place plots against US persons.

In this role, al-Awlaki repeatedly made clear his intent to attack US persons and his hope that these attacks would take American lives. For example, in a message to Muslims living in the United States, he noted that he had come “to the conclusion that jihad against America is binding upon myself just as it is binding upon every other able Muslim.” But it was not al-Awlaki’s *words* that led the United States to act against him: they only served to demonstrate his intentions and state of mind, that he “pray[ed] that Allah [would] destro[y] America and all its allies.” Rather, it was al-Awlaki’s *actions*—and, in particular, his direct personal involvement in the continued planning and execution of terrorist attacks against the US homeland—that made him a lawful target and led the United States to take action.

For example, when Umar Farouk Abdulmutallab—the individual who attempted to blow up an airplane bound for Detroit on Christmas Day 2009—went to Yemen in 2009, al-Awlaki arranged an introduction via text message. Abdulmutallab told US officials that he stayed at al-Awlaki’s house for three days, and then spent two weeks at an AQAP training camp. Al-Awlaki planned a suicide operation for Abdulmutallab, helped Abdulmutallab draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a US airliner. Al-Awlaki’s last instructions were to blow up the airplane *when it was over American soil*. Al-Awlaki also played a key role in the October 2010 plot to detonate explosive devices on two US-bound cargo planes: he not only helped plan and oversee the plot, but was also directly involved in the details of its execution—to the point that he took part in the development and testing of the explosive devices that were placed on the planes. Moreover, information that remains classified to protect sensitive sources and methods evidences al-Awlaki’s involvement in the planning of numerous *other* plots against US and Western interests and makes clear he was continuing to plot attacks when he was killed.

Based on this information, high-level US government officials appropriately concluded that al-Awlaki posed a continuing and imminent threat of violent attack against the United States. Before carrying out the operation that killed al-Awlaki, senior officials also determined, based on a careful evaluation of the circumstances at the time, that it was not feasible to capture al-Awlaki. In addition, senior officials determined that the operation would be conducted consistent with applicable law-of-war principles, including the cardinal principles of (1) necessity—the requirement that the target have definite military value; (2) distinction—the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted; (3) proportionality—the notion that the anticipated collateral damage of an action cannot be

excessive in relation to the anticipated concrete and direct military advantage; and (4) humanity—a principle that requires us to use weapons that will not inflict unnecessary suffering. The operation was also undertaken consistent with Yemeni sovereignty.

While a substantial amount of information indicated that Anwar al-Awlaki was a senior AQAP leader actively plotting to kill Americans, the decision that he was a lawful target was not taken lightly. The decision to use lethal force is one of the gravest that our government, at every level, can face. The operation to target Anwar al-Awlaki was thus subjected to an exceptionally rigorous interagency legal review: not only did I and other Department of Justice lawyers conclude after a thorough and searching review that the operation was lawful, but so too did other departments and agencies within the US government.

The decision to target Anwar al-Awlaki was additionally subjected to extensive policy review at the highest levels of the US Government, and senior US officials also briefed the appropriate committees of Congress on the possibility of using lethal force against al-Awlaki. Indeed, the Administration informed the relevant congressional oversight committees that it had approved the use of lethal force against al-Awlaki in February 2010—well over a year before the operation in question—and the legal justification was subsequently explained in detail to those committees, well before action was taken against al-Awlaki. This extensive outreach is consistent with the Administration’s strong and continuing commitment to congressional oversight of our counterterrorism operations—oversight which ensures, as the President stated during his State of the Union address, that our actions are “consistent with our laws and system of checks and balances.”

The Supreme Court has long “made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi v. Rumsfeld*, 542 US 507, 536 (2004);

Youngstown Sheet & Tube Co. v. Sawyer, 343 US 578,587 (1952). But the Court's case law and longstanding practice and principle also make clear that the Constitution does not prohibit the Government it establishes from taking action to protect the American people from the threats posed by terrorists who hide in faraway countries and continually plan and launch plots against the US homeland. The decision to target Anwar al-Awlaki was lawful, it was considered, and it was just.

* * * * *

This letter is only one of a number of steps the Administration will be taking to fulfill the President's State of the Union commitment to engage with Congress and the American people on our counterterrorism efforts. This week the President approved and relevant congressional committees will be notified and briefed on a document that institutionalizes the Administration's exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities; these standards and processes are either already in place or are to be transitioned into place. While that document remains classified, it makes clear that a cornerstone of the Administration's policy is one of the principles I noted in my speech at Northwestern: that lethal force should not be used when it is feasible to capture a terrorist suspect. For circumstances in which capture is feasible, the policy outlines standards and procedures to ensure that operations to take into custody a terrorist suspect are conducted in accordance with all applicable law, including the laws of war. When capture is not feasible, the policy provides that lethal force may be used only when a terrorist target poses a continuing, imminent threat to Americans, and when certain other preconditions, including a requirement that no other reasonable alternatives exist to effectively address the threat, are satisfied. And in all circumstances there must be a legal basis for using force against the target. Significantly, the

President will soon be speaking publicly in greater detail about our counterterrorism operations and the legal and policy framework that governs those actions.

I recognize that even after the Administration makes unprecedented disclosures like those contained in this letter, some unanswered questions will remain. I assure you that the President and his national security team are mindful of this Administration's pledge to public accountability for our counterterrorism efforts, and we will continue to give careful consideration to whether and how additional information may be declassified and disclosed to the American people without harming our national security.

Sincerely,

Eric H. Holder, Jr.
Attorney General

cc:

Ranking Member Charles
Grassley
Chairman Dianne Feinstein
Vice Chairman Saxby Chambliss
Chairman Carl Levin
Ranking Member James Inhofe
Chairman Bob Goodlatte
Ranking Member John
Conyers, Jr.
Chairman Mike Rogers
Ranking Member C.A. Dutch
Ruppersberger
Chairman Howard P. McKeon

Ranking Member Adam Smith
Chairman Robert Menendez
Ranking Member Bob Corker
Chairman Ed Royce
Ranking Member Eliot Engel
Majority Leader Harry Reid
Minority Leader Mitch
McConnell
Speaker John Boehner
Majority Leader Eric Cantor
Minority Leader Nancy Pelosi
Minority Whip Steny Hoyer

Appendix: Obama–D

*President Barack Obama,
“Remarks by the President on Review of
Signals Intelligence,” Department of Justice,
Washington, D.C., January 17, 2014*

At the dawn of our republic, a small, secret surveillance committee borne out of “The Sons of Liberty” was established in Boston. And the group’s members included Paul Revere. At night they would patrol the streets, reporting back any signs that the British were preparing raids against America’s early patriots.

Throughout American history, intelligence has helped secure our country and our freedoms. In the Civil War, Union balloon reconnaissance tracked the size of Confederate armies by counting the number of campfires. In World War II, code-breakers gave us insights into Japanese war plans, and when Patton marched across Europe, intercepted communications helped save the lives of his troops. After the war, the rise of the Iron Curtain and nuclear weapons only increased the need for sustained intelligence gathering. And so, in the early days of the Cold War, President Truman created the National Security Agency, or NSA, to give us insights into the Soviet bloc and provide our leaders with information they needed to confront aggression and avert catastrophe.

Throughout this evolution, we benefited from both our Constitution and our traditions of limited government. US intelligence agencies were anchored in a system of checks and balances with oversight from elected leaders and protections for ordinary citizens. Meanwhile,

totalitarian states like East Germany offered a cautionary tale of what could happen when vast, unchecked surveillance turned citizens into informers and persecuted people for what they said in the privacy of their own homes.

In fact, even the United States proved not to be immune to the abuse of surveillance. And in the 1960s, government spied on civil rights leaders and critics of the Vietnam War. And partly in response to these revelations, additional laws were established in the 1970s to ensure that our intelligence capabilities could not be misused against our citizens. In the long, twilight struggle against communism, we had been reminded that the very liberties that we sought to preserve could not be sacrificed at the altar of national security.

If the fall of the Soviet Union left America without a competing superpower, emerging threats from terrorist groups and the proliferation of weapons of mass destruction placed new and, in some ways, more complicated demands on our intelligence agencies. Globalization and the Internet made these threats more acute, as technology erased borders and empowered individuals to project great violence as well as great good. Moreover, these new threats raised new legal and new policy questions. For while few doubted the legitimacy of spying on hostile states, our framework of laws was not fully adapted to prevent terrorist attacks by individuals acting on their own, or acting in small, ideologically driven groups on behalf of a foreign power.

The horror of September 11 brought all these issues to the fore. Across the political spectrum, Americans recognized that we had to adapt to a world in which a bomb could be built in a basement and our electric grid could be shut down by operators an ocean away. We were shaken by the signs we had missed leading up to the attacks—how the hijackers had made phone calls to known extremists and traveled to suspicious places. So we demanded that our intelligence community improve its capabilities and that law enforcement change practices to focus more on preventing attacks before they happen than prosecuting terrorists after an attack.

It is hard to overstate the transformation America's intelligence community had to go through after 9/11. Our agencies suddenly needed to do far more than the traditional mission of monitoring hostile powers and gathering information for policymakers. Instead, they were now asked to identify and target plotters in some of the most remote parts of the world and to anticipate the actions of networks that, by their very nature, cannot be easily penetrated with spies or informants.

And it is a testimony to the hard work and dedication of the men and women of our intelligence community that over the past decade we've made enormous strides in fulfilling this mission. Today, new capabilities allow intelligence agencies to track who a terrorist is in contact with, and follow the trail of his travel or his funding. New laws allow information to be collected and shared more quickly and effectively between federal agencies, and state and local law enforcement. Relationships with foreign intelligence services have expanded and our capacity to repel cyber-attacks has been strengthened. And taken together, these efforts have prevented multiple attacks and saved innocent lives—not just here in the United States, but around the globe.

And yet, in our rush to respond to a very real and novel set of threats, the risk of government overreach—the possibility that we lose some of our core liberties in pursuit of security—also became more pronounced. We saw, in the immediate aftermath of 9/11, our government engaged in enhanced interrogation techniques that contradicted our values. As a senator, I was critical of several practices, such as warrantless wiretaps. And all too often new authorities were instituted without adequate public debate.

Through a combination of action by the courts, increased congressional oversight, and adjustments by the previous administration, some of the worst excesses that emerged after 9/11 were curbed by the time I took office. But a variety of factors have continued to complicate America's efforts to both defend our nation and uphold our civil liberties.

First, the same technological advances that allow US intelligence agencies to pinpoint an Al Qaeda cell in Yemen or an e-mail between two terrorists in the Sahel also mean that many routine communications around the world are within our reach. And at a time when more and more of our lives are digital, that prospect is disquieting for all of us.

Second, the combination of increased digital information and powerful supercomputers offers intelligence agencies the possibility of sifting through massive amounts of bulk data to identify patterns or pursue leads that may thwart impending threats. It's a powerful tool. But the government collection and storage of such bulk data also creates a potential for abuse.

Third, the legal safeguards that restrict surveillance against US persons without a warrant do not apply to foreign persons overseas. This is not unique to America; few, if any, spy agencies around the world constrain their activities beyond their own borders. And the whole point of intelligence is to obtain information that is not publicly available. But America's capabilities are unique, and the power of new technologies means that there are fewer and fewer technical constraints on what we can do. That places a special obligation on us to ask tough questions about what we should do.

And finally, intelligence agencies cannot function without secrecy, which makes their work less subject to public debate. Yet there is an inevitable bias not only within the intelligence community, but among all of us who are responsible for national security, to collect more information about the world, not less. So in the absence of institutional requirements for regular debate—and oversight that is public, as well as private or classified—the danger of government overreach becomes more acute. And this is particularly true when surveillance technology and our reliance on digital information are evolving much faster than our laws.

For all these reasons, I maintained a healthy skepticism toward our surveillance programs after I became president. I ordered that our

programs be reviewed by my national security team and our lawyers, and in some cases I ordered changes in how we did business. We increased oversight and auditing, including new structures aimed at compliance. Improved rules were proposed by the government and approved by the Foreign Intelligence Surveillance Court. And we sought to keep Congress continually updated on these activities.

What I did not do is stop these programs wholesale—not only because I felt that they made us more secure, but also because nothing in that initial review, and nothing that I have learned since, indicated that our intelligence community has sought to violate the law or is cavalier about the civil liberties of their fellow citizens.

To the contrary, in an extraordinarily difficult job—one in which actions are second-guessed, success is unreported, and failure can be catastrophic—the men and women of the intelligence community, including the NSA, consistently follow protocols designed to protect the privacy of ordinary people. They're not abusing authorities in order to listen to your private phone calls or read your e-mails. When mistakes are made—which is inevitable in any large and complicated human enterprise—they correct those mistakes. Laboring in obscurity, often unable to discuss their work even with family and friends, the men and women at the NSA know that if another 9/11 or massive cyber-attack occurs they will be asked, by Congress and the media, why they failed to connect the dots. What sustains those who work at NSA and our other intelligence agencies through all these pressures is the knowledge that their professionalism and dedication play a central role in the defense of our nation.

Now, to say that our intelligence community follows the law, and is staffed by patriots, is not to suggest that I or others in my administration felt complacent about the potential impact of these programs. Those of us who hold office in America have a responsibility to our Constitution, and while I was confident in the integrity of those who lead our intelligence community, it was clear to me in observing our intelligence operations on a regular basis that changes

in our technological capabilities were raising new questions about the privacy safeguards currently in place.

Moreover, after an extended review of our use of drones in the fight against terrorist networks, I believed a fresh examination of our surveillance programs was a necessary next step in our effort to get off the open-ended war footing that we've maintained since 9/11. And for these reasons, I indicated in a speech at the National Defense University last May that we needed a more robust public discussion about the balance between security and liberty. Of course, what I did not know at the time is that within weeks of my speech, an avalanche of unauthorized disclosures would spark controversies at home and abroad that have continued to this day.

And given the fact of an open investigation, I'm not going to dwell on Mr. (Edward) Snowden's actions or his motivations; I will say that our nation's defense depends in part on the fidelity of those entrusted with our nation's secrets. If any individual who objects to government policy can take it into their own hands to publicly disclose classified information, then we will not be able to keep our people safe or conduct foreign policy. Moreover, the sensational way in which these disclosures have come out has often shed more heat than light, while revealing methods to our adversaries that could impact our operations in ways that we may not fully understand for years to come.

Regardless of how we got here, though, the task before us now is greater than simply repairing the damage done to our operations or preventing more disclosures from taking place in the future. Instead, we have to make some important decisions about how to protect ourselves and sustain our leadership in the world, while upholding the civil liberties and privacy protections that our ideals and our Constitution require. We need to do so not only because it is right, but because the challenges posed by threats like terrorism and proliferation and cyber-attacks are not going away any time soon. They are going to continue to be a major problem. And for our intelligence community

to be effective over the long haul, we must maintain the trust of the American people and people around the world.

This effort will not be completed overnight and, given the pace of technological change, we shouldn't expect this to be the last time America has this debate. But I want the American people to know that the work has begun. Over the last six months, I created an outside Review Group on Intelligence and Communications Technologies to make recommendations for reform. I consulted with the Privacy and Civil Liberties Oversight Board, created by Congress. I've listened to foreign partners, privacy advocates, and industry leaders. My administration has spent countless hours considering how to approach intelligence in this era of diffuse threats and technological revolution. So before outlining specific changes that I've ordered, let me make a few broad observations that have emerged from this process.

First, everyone who has looked at these problems, including skeptics of existing programs, recognizes that we have real enemies and threats and that intelligence serves a vital role in confronting them. We cannot prevent terrorist attacks or cyber-threats without some capability to penetrate digital communications—whether it's to unravel a terrorist plot; to intercept malware that targets a stock exchange; to make sure air traffic control systems are not compromised; or to ensure that hackers do not empty your bank accounts. We are expected to protect the American people; that requires us to have capabilities in this field.

Moreover, we cannot unilaterally disarm our intelligence agencies. There is a reason why BlackBerrys and iPhones are not allowed in the White House Situation Room. We know that the intelligence services of other countries—including some who feign surprise over the Snowden disclosures—are constantly probing our government and private sector networks, and accelerating programs to listen to our conversations, and intercept our e-mails, and compromise our systems. We know that.

Meanwhile, a number of countries, including some who have loudly criticized the NSA, privately acknowledge that America has

special responsibilities as the world's only superpower; that our intelligence capabilities are critical to meeting these responsibilities; and that they themselves have relied on the information we obtain to protect their own people.

Second, just as ardent civil libertarians recognize the need for robust intelligence capabilities, those with responsibilities for our national security readily acknowledge the potential for abuse as intelligence capabilities advance and more and more private information is digitized. After all, the folks at NSA and other intelligence agencies are our neighbors. They're our friends and family. They've got electronic bank and medical records like everybody else. They have kids on Facebook and Instagram and they know, more than most of us, the vulnerabilities to privacy that exist in a world where transactions are recorded, and e-mails and text and messages are stored, and even our movements can increasingly be tracked through the GPS on our phones.

Third, there was a recognition by all who participated in these reviews that the challenges to our privacy do not come from government alone. Corporations of all shapes and sizes track what you buy, store and analyze our data, and use it for commercial purposes; that's how those targeted ads pop up on your computer and your smartphone periodically. But all of us understand that the standards for government surveillance must be higher. Given the unique power of the state, it is not enough for leaders to say: "Trust us, we won't abuse the data we collect." For history has too many examples when that trust has been breached. Our system of government is built on the premise that our liberty cannot depend on the good intentions of those in power; it depends on the law to constrain those in power.

I make these observations to underscore that the basic values of most Americans when it comes to questions of surveillance and privacy converge a lot more than the crude characterizations that have emerged over the last several months. Those who are troubled by our existing programs are not interested in repeating the tragedy of 9/11, and those who defend these programs are not dismissive of civil liberties.

The challenge is getting the details right, and that is not simple. In fact, during the course of our review, I have often reminded myself I would not be where I am today were it not for the courage of dissidents like Dr. King, who were spied upon by their own government. And as president, a president who looks at intelligence every morning, I also can't help but be reminded that America must be vigilant in the face of threats.

Fortunately, by focusing on facts and specifics rather than speculation and hypotheticals, this review process has given me—and hopefully the American people—some clear direction for change. And today, I can announce a series of concrete and substantial reforms that my administration intends to adopt administratively or will seek to codify with Congress.

First, I have approved a new presidential directive for our signals intelligence activities both at home and abroad. This guidance will strengthen executive branch oversight of our intelligence activities. It will ensure that we take into account our security requirements, but also our alliances; our trade and investment relationships, including the concerns of American companies; and our commitment to privacy and basic liberties. And we will review decisions about intelligence priorities and sensitive targets on an annual basis so that our actions are regularly scrutinized by my senior national security team.

Second, we will reform programs and procedures in place to provide greater transparency to our surveillance activities and fortify the safeguards that protect the privacy of US persons. Since we began this review, including information being released today, we have declassified over forty opinions and orders of the Foreign Intelligence Surveillance Court, which provides judicial review of some of our most sensitive intelligence activities—including the section 702 program targeting foreign individuals overseas and the section 215 telephone metadata program.

And going forward, I'm directing the director of national intelligence (DNI), in consultation with the attorney general, to annually

review for the purposes of declassification any future opinions of the court with broad privacy implications and to report to me and to Congress on these efforts. To ensure that the court hears a broader range of privacy perspectives, I am also calling on Congress to authorize the establishment of a panel of advocates from outside government to provide an independent voice in significant cases before the Foreign Intelligence Surveillance Court.

Third, we will provide additional protections for activities conducted under section 702, which allows the government to intercept the communications of foreign targets overseas who have information that's important for our national security. Specifically, I am asking the attorney general and DNI to institute reforms that place additional restrictions on government's ability to retain, search, and use in criminal cases communications between Americans and foreign citizens incidentally collected under section 702.

Fourth, in investigating threats, the FBI also relies on what's called national security letters, which can require companies to provide specific and limited information to the government without disclosing the orders to the subject of the investigation. These are cases in which it's important that the subject of the investigation, such as a possible terrorist or spy, isn't tipped off. But we can and should be more transparent in how government uses this authority.

I have therefore directed the attorney general to amend how we use national security letters so that this secrecy will not be indefinite, so that it will terminate within a fixed time unless the government demonstrates a real need for further secrecy. We will also enable communications providers to make public more information than ever before about the orders that they have received to provide data to the government.

This brings me to the program that has generated the most controversy these past few months—the bulk collection of telephone records under section 215. Let me repeat what I said when this story first broke: this program does not involve the content of phone calls

or the names of people making calls. Instead, it provides a record of phone numbers and the times and lengths of calls—metadata that can be queried if and when we have a reasonable suspicion that a particular number is linked to a terrorist organization.

Why is this necessary? The program grew out of a desire to address a gap identified after 9/11. One of the 9/11 hijackers—Khalid al-Mihdhar—made a phone call from San Diego to a known Al Qaeda safe house in Yemen. NSA saw that call, but it could not see that the call was coming from an individual already in the United States. The telephone metadata program under section 215 was designed to map the communications of terrorists so we can see who they may be in contact with as quickly as possible. And this capability could also prove valuable in a crisis. For example, if a bomb goes off in one of our cities and law enforcement is racing to determine whether a network is poised to conduct additional attacks, time is of the essence. Being able to quickly review phone connections to assess whether a network exists is critical to that effort.

In sum, the program does not involve the NSA examining the phone records of ordinary Americans. Rather, it consolidates these records into a database that the government can query if it has a specific lead—a consolidation of phone records that the companies already retained for business purposes. The review group turned up no indication that this database has been intentionally abused. And I believe it is important that the capability that this program is designed to meet is preserved.

Having said that, I believe critics are right to point out that without proper safeguards, this type of program could be used to yield more information about our private lives and open the door to more intrusive bulk collection programs in the future. They're also right to point out that although the telephone bulk collection program was subject to oversight by the Foreign Intelligence Surveillance Court and has been reauthorized repeatedly by Congress, it has never been subject to vigorous public debate.

For all these reasons, I believe we need a new approach. I am therefore ordering a transition that will end the section 215 bulk metadata program as it currently exists and establish a mechanism that preserves the capabilities we need without the government holding this bulk metadata.

This will not be simple. The review group recommended that our current approach be replaced by one in which the providers or a third party retain the bulk records, with government accessing information as needed. Both of these options pose difficult problems. Relying solely on the records of multiple providers, for example, could require companies to alter their procedures in ways that raise new privacy concerns. On the other hand, any third party maintaining a single, consolidated database would be carrying out what is essentially a government function but with more expense, more legal ambiguity, potentially less accountability—all of which would have a doubtful impact on increasing public confidence that their privacy is being protected.

During the review process, some suggested that we may also be able to preserve the capabilities we need through a combination of existing authorities, better information sharing, and recent technological advances. But more work needs to be done to determine exactly how this system might work.

Because of the challenges involved, I've ordered that the transition away from the existing program will proceed in two steps. Effective immediately, we will only pursue phone calls that are two steps removed from a number associated with a terrorist organization instead of the current three. And I have directed the attorney general to work with the Foreign Intelligence Surveillance Court so that during this transition period, the database can be queried only after a judicial finding or in the case of a true emergency.

Next, step two, I have instructed the intelligence community and the attorney general to use this transition period to develop options for a new approach that can match the capabilities and fill the gaps that the section 215 program was designed to address without the government holding this metadata itself. They will report back to me

with options for alternative approaches before the program comes up for reauthorization on March 28. And during this period, I will consult with the relevant committees in Congress to seek their views and then seek congressional authorization for the new program as needed.

Now, the reforms I'm proposing today should give the American people greater confidence that their rights are being protected, even as our intelligence and law enforcement agencies maintain the tools they need to keep us safe. And I recognize that there are additional issues that require further debate. For example, some who participated in our review, as well as some members of Congress, would like to see more sweeping reforms to the use of national security letters so that we have to go to a judge each time before issuing these requests. Here, I have concerns that we should not set a standard for terrorism investigations that is higher than those involved in investigating an ordinary crime. But I agree that greater oversight on the use of these letters may be appropriate, and I'm prepared to work with Congress on this issue.

There are also those who would like to see different changes to the FISA Court than the ones I've proposed. On all these issues, I am open to working with Congress to ensure that we build a broad consensus for how to move forward and I'm confident that we can shape an approach that meets our security needs while upholding the civil liberties of every American.

Let me now turn to the separate set of concerns that have been raised overseas and focus on America's approach to intelligence collection abroad. As I've indicated, the United States has unique responsibilities when it comes to intelligence collection. Our capabilities help protect not only our nation, but our friends and our allies, as well. But our efforts will only be effective if ordinary citizens in other countries have confidence that the United States respects their privacy, too. And the leaders of our close friends and allies deserve to know that if I want to know what they think about an issue, I'll pick up the phone and call them, rather than turning to surveillance. In other words, just as we balance security and privacy at home, our global leadership demands that we balance our security requirements

against our need to maintain the trust and cooperation among people and leaders around the world.

For that reason, the new presidential directive that I've issued today will clearly prescribe what we do, and do not do, when it comes to our overseas surveillance. To begin with, the directive makes clear that the United States only uses signals intelligence for legitimate national security purposes, and not for the purpose of indiscriminately reviewing the e-mails or phone calls of ordinary folks. I've also made it clear that the United States does not collect intelligence to suppress criticism or dissent, nor do we collect intelligence to disadvantage people on the basis of their ethnicity, or race, or gender, or sexual orientation, or religious beliefs. We do not collect intelligence to provide a competitive advantage to US companies or US commercial sectors.

And in terms of our bulk collection of signals intelligence, US intelligence agencies will only use such data to meet specific security requirements: counterintelligence, counterterrorism, counter-proliferation, cyber-security, force protection for our troops and our allies, and combating transnational crime, including sanctions evasion.

In this directive, I have taken the unprecedented step of extending certain protections that we have for the American people to people overseas. I've directed the DNI, in consultation with the attorney general, to develop these safeguards, which will limit the duration that we can hold personal information while also restricting the use of this information.

The bottom line is that people around the world, regardless of their nationality, should know that the United States is not spying on ordinary people who don't threaten our national security and that we take their privacy concerns into account in our policies and procedures. This applies to foreign leaders as well. Given the understandable attention that this issue has received, I have made clear to the intelligence community that unless there is a compelling national security purpose, we will not monitor the communications of heads of state and government of our close friends and allies. And I've instructed my national security team, as well as the intelligence community, to

work with foreign counterparts to deepen our coordination and cooperation in ways that rebuild trust going forward.

Now let me be clear: our intelligence agencies will continue to gather information about the intentions of governments—as opposed to ordinary citizens—around the world, in the same way that the intelligence service of every other nation does. We will not apologize simply because our services may be more effective. But heads of state and government with whom we work closely, and on whose cooperation we depend, should feel confident that we are treating them as real partners. And the changes I've ordered do just that.

Finally, to make sure that we follow through on all these reforms, I am making some important changes to how our government is organized. The State Department will designate a senior officer to coordinate our diplomacy on issues related to technology and signals intelligence. We will appoint a senior official at the White House to implement the new privacy safeguards that I have announced today. I will devote the resources to centralize and improve the process we use to handle foreign requests for legal assistance, keeping our high standards for privacy while helping foreign partners fight crime and terrorism.

I have also asked my counselor, John Podesta, to lead a comprehensive review of big data and privacy. And this group will consist of government officials who, along with the President's Council of Advisors on Science and Technology, will reach out to privacy experts, technologists, and business leaders and look how the challenges inherent in big data are being confronted by both the public and private sectors; whether we can forge international norms on how to manage this data; and how we can continue to promote the free flow of information in ways that are consistent with both privacy and security.

For ultimately, what's at stake in this debate goes far beyond a few months of headlines or passing tensions in our foreign policy. When you cut through the noise, what's really at stake is how we remain true to who we are in a world that is remaking itself at dizzying speed. Whether it's the ability of individuals to communicate

ideas; to access information that would have once filled every great library in every country in the world; or to forge bonds with people on other sides of the globe, technology is remaking what is possible for individuals, and for institutions, and for the international order. So while the reforms that I have announced will point us in a new direction, I am mindful that more work will be needed in the future.

One thing I'm certain of: this debate will make us stronger. And I also know that in this time of change, the United States of America will have to lead. It may seem sometimes that America is being held to a different standard. And I'll admit the readiness of some to assume the worst motives by our government can be frustrating. No one expects China to have an open debate about their surveillance programs, or Russia to take privacy concerns of citizens in other places into account. But let's remember: we are held to a different standard precisely because we have been at the forefront of defending personal privacy and human dignity.

As the nation that developed the Internet, the world expects us to ensure that the digital revolution works as a tool for individual empowerment, not government control. Having faced down the dangers of totalitarianism and fascism and communism, the world expects us to stand up for the principle that every person has the right to think and write and form relationships freely—because individual freedom is the wellspring of human progress.

Those values make us who we are. And because of the strength of our own democracy, we should not shy away from high expectations. For more than two centuries, our Constitution has weathered every type of change because we have been willing to defend it and because we have been willing to question the actions that have been taken in its defense. Today is no different. I believe we can meet high expectations. Together, let us chart a way forward that secures the life of our nation while preserving the liberties that make our nation worth fighting for.

Thank you. God bless you. May God bless the United States of America.

Appendix: Koh–A

*Harold H. Koh, legal adviser to the
Department of State, address to the
American Society of International Law,
“The Obama Administration and International Law,”
March 25, 2010*

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II. The Strategic Vision

That brings me to my second topic: what strategic vision of international law are we trying to implement? How does obeying international law advance US foreign policy interests and strengthen America’s position of global leadership? Or to put it another way, with respect to international law, is this administration really committed to what our president has famously called “change we can believe in”? Some, including a number of the panelists who have addressed this conference, have argued that there is really more continuity than change from the last administration to this one.

To them I would answer that, of course, in foreign policy, from administration to administration, there will always be more continuity than change; you simply cannot turn the ship of state 360 degrees from administration to administration every four to eight years, nor should you. But, I would argue—and these are the core of my remarks today—to say that is to understate the most important difference between this administration and the last. And that is with respect to its approach and attitude toward international law. The difference in that approach to international law, I would argue, is captured in an

emerging “Obama-Clinton doctrine” which is based on four commitments to:

1. Principled engagement
2. Diplomacy as a critical element of smart power
3. Strategic multilateralism
4. The notion that living our values makes us stronger and safer, by following rules of domestic and international law and following universal standards, not double standards.

As articulated by the president and Secretary [of State Hillary] Clinton, I believe the Obama/Clinton doctrine reflects these four core commitments:

First, a commitment to principled engagement: a powerful belief in the interdependence of the global community is a major theme for our president, whose father came from a Kenyan family and who as a child spent several years in Indonesia.

Second, a commitment to what Secretary Clinton calls “smart power—a blend of principle and pragmatism” that makes “intelligent use of all means at our disposal,” including promotion of democracy, development, technology, and human rights and international law to place diplomacy at the vanguard of our foreign policy.

Third, a commitment to what some have called strategic multilateralism: the notion acknowledged by President Obama at Cairo that the challenges of the twenty-first century “can’t be met by any one leader or any one nation” and must therefore be addressed by open dialogue and partnership by the United States with peoples and nations across traditional regional divides “based on mutual interest and mutual respect” as well as acknowledgment of “the rights and responsibilities of [all] nations.”

And fourth and finally, a commitment to living our values by respecting the rule of law. As I said, both the president and Secretary Clinton are outstanding lawyers, and they understand that by imposing

constraints on government action, law legitimates and gives credibility to governmental action. As the president emphasized forcefully in his National Archives speech and elsewhere, the American political system was founded on a vision of common humanity, universal rights, and rule of law. Fidelity to [these] values makes us stronger and safer. This also means following universal standards, not double standards. In his Nobel lecture at Oslo, President Obama affirmed that “[a]dhering to standards, international standards, strengthens those who do, and isolates those who don’t.” And in her December speech on a twenty-first-century human rights agenda, and again two weeks ago in introducing our annual human rights reports, Secretary Clinton reiterated that “a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves.”

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III. The Law of 9/11

Let me focus the balance of my remarks on that aspect of my job that I call the Law of 9/11. In this area, as in the other areas of our work, we believe, in the president’s words, that “living our values doesn’t make us weaker, it makes us safer and it makes us stronger.”

We live in a time when, as you know, the United States finds itself engaged in several armed conflicts. As the president has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is a “conflict that America did not seek, one in which we are joined by forty-three other countries . . . in an effort to defend ourselves and all nations from further attacks.” In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, Al Qaeda (as well as the Taliban forces that harbored Al Qaeda).

Everyone here at this meeting is committed to international law. But as President Obama reminded us, “the world must remember that it was not simply international institutions—not just treaties

and declarations—that brought stability to a post–World War II world. . . . [T]he instruments of war do have a role to play in preserving the peace.”

With this background, let me address a question on many of your minds: how has this administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? Let there be no doubt: the Obama administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts. As the president reaffirmed in his Nobel Prize lecture, “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct . . . [E]ven as we confront a vicious adversary that abides by no rules . . . the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength.” We in the Obama administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts—in particular, detention operations, targeting, and prosecution of terrorist suspects—in a manner consistent not just with the applicable laws of war but also with the Constitution and laws of the United States.

Let me say a word about each: detention, targeting, and prosecution.

1. Detention

With respect to detention, as you know, the last administration’s detention practices were widely criticized around the world and, as a private citizen, I was among the vocal critics of those practices. This administration and I personally have spent much of the last year seeking to revise those practices to ensure their full compliance with domestic and international law: first, by unequivocally guaranteeing humane treatment for all individuals in US custody as a result of

armed conflict; and second, by ensuring that all detained individuals are being held pursuant to lawful authorities.

a. Treatment

To ensure humane treatment, on his second full day in office the president unequivocally banned the use of torture as an instrument of US policy, a commitment that he has repeatedly reaffirmed in the months since. He directed that executive officials could no longer rely upon the Justice Department OLC [Office of Legal Counsel] opinions that had permitted practices that I consider to be torture and cruel treatment—many of which he later disclosed publicly—and he instructed that, henceforth, all interrogations of detainees must be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised *Army Field Manual*. An interagency review of US interrogation practices later advised—and the president agreed—that no techniques beyond those in the *Army Field Manual* (and traditional non-coercive FBI techniques) are necessary to conduct effective interrogations. That Interrogation and Transfer Task Force also issued a set of recommendations to help ensure that the United States will not transfer individuals to face torture. The president also revoked Executive Order 13440, which had interpreted particular provisions of Common Article 3, and restored the meaning of those provisions to the way they have traditionally been understood in international law. The president ordered CIA “black sites” closed and directed the secretary of defense to conduct an immediate review—with two follow-up visits by a blue ribbon task force of former government officials—to ensure that the conditions of detention at Guantánamo fully comply with Common Article 3 of the Geneva Conventions. Last December, I visited Guantánamo, a place I had visited several times over the last two decades, and I believe that the conditions I observed are humane and meet Geneva Conventions standards.

As you all know, also on his second full day in office, the president ordered Guantánamo closed and his commitment to doing so has not wavered, even as closing Guantánamo has proven to be an arduous and painstaking process. Since the beginning of the administration, through the work of my colleague Ambassador Dan Fried, we have transferred approximately fifty-seven detainees to twenty-two different countries, of whom thirty-three were resettled in countries that are not the detainees' countries of origin. Our efforts continue on a daily basis. Just this week, five more detainees were transferred out of Guantánamo for resettlement. We are very grateful to those countries who have contributed to our efforts to close Guantánamo by resettling detainees; that list continues to grow as more and more countries see the positive changes we are making and wish to offer their support.

During the past year, we completed an exhaustive, rigorous, and collaborative interagency review of the status of the roughly 240 individuals detained at Guantánamo Bay when President Obama took office. The president's executive order placed responsibility for review of each Guantánamo detainee with six entities—the departments of Justice, State, Defense, and Homeland Security, the Office of the Director of National Intelligence (ODNI), and the Joint Chiefs of Staff—to collect and consolidate from across the government all information concerning the detainees and to ensure that diplomatic, military, intelligence, homeland security, and law enforcement viewpoints would all be fully considered in the review process. This interagency task force, on which several State Department attorneys participated, painstakingly considered each and every Guantánamo detainee's case to assess whether the detainee could be transferred or repatriated consistently with national security, the interests of justice, and our policy not to transfer individuals to countries where they would likely face torture or persecution. The six entities ultimately reached unanimous agreement on the proper disposition of all detainees subject to review. As the president has made clear, this

is not a one-time review; there will be “a thorough process of periodic review, so that *any* prolonged detention is carefully evaluated and justified.” Similarly, the Department of Defense has created new review procedures for individuals held at the detention facility in Parwan at Bagram Airfield, Afghanistan, with increased representation for detainees, greater opportunities to present evidence, and more transparent proceedings. Outside organizations have begun to monitor these proceedings, and even some of the toughest critics have acknowledged the positive changes that have been made.

b. Legal Authority to Detain

Some have asked what legal basis we have for continuing to detain those held on Guantánamo and at Bagram. But as a matter of both international and domestic law, the legal framework is well-established. As a matter of international law, our detention operations rest on three legal foundations. First, we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of “all necessary measures” by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan. As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II [of the Geneva Conventions] recognized and as our own Supreme Court recognized in *Hamdi v. Rumsfeld*.

The federal courts have confirmed our legal authority to detain in the Guantánamo habeas cases, but the administration is not asserting an unlimited detention authority. For example, with regard to indi-

viduals detained at Guantánamo, we explained in a March 13, 2009, habeas filing before the D.C. federal court—and repeatedly in habeas cases since—that we are resting our detention authority on a domestic statute, the 2001 Authorization for Use of Military Force (AUMF), as informed by the principles of the laws of war. Our detention authority in Afghanistan comes from the same source.

In explaining this approach, let me note two important differences from the legal approach of the last administration. First, as a matter of domestic law, the Obama administration has not based its claim of authority to detain those at Gitmo and Bagram on the president’s Article II authority as commander-in-chief. Instead, we have relied on legislative authority expressly granted to the president by Congress in the 2001 AUMF.

Second, unlike the last administration, as a matter of international law, this administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantánamo detainees and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF as informed by the laws of war. Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy. Therefore construing what is “necessary and appropriate” under the AUMF requires some “translation,” or analogizing principles from the laws of war governing traditional *international* conflicts.

Some commentators have criticized our decision to detain certain individuals based on their membership in a non-state armed group. But as those of you who follow the Guantánamo habeas litigation know, we have defended this position based on the AUMF, as informed by the text, structure, and history of the Geneva Conventions and other sources of the laws of war. Moreover, while the various judges who have considered these arguments have taken issue with certain points, they have accepted the overall proposition that

individuals who are part of an organized armed group like Al Qaeda can be subject to law-of-war detention for the duration of the current conflict. In sum, we have based our authority to detain not on conclusory labels, like “enemy combatant,” but on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of Al Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with Al Qaeda, or taking positions with enemy forces. Often these factors operate in combination. While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at “functional” membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

A final point: the Obama administration has made clear its goals not only of closing Guantánamo but also of moving to shift detention responsibilities to the local governments in Iraq and Afghanistan. Last July, I visited the detention facilities in Afghanistan at Bagram, as well as Afghan detention facilities near Kabul, and I discussed the conditions at those facilities with both Afghan and US military officials and representatives of the International Committee of the Red Cross. I was impressed by the efforts that the Department of Defense is making both to improve our ongoing operations and to prepare the Afghans for the day when we turn over responsibility for detention operations. This fall, DOD created a joint task force led by a three-star admiral, Robert Harward, to bring new energy and focus to these efforts, and you can see evidence of his work in the rigorous implementation of our new detainee review procedures at Bagram, the increased transparency of these proceedings, and closer coordination with our Afghan partners in our detention operations.

In sum, with respect to both treatment and detainability, we believe that our detention practices comport with both domestic and international law.

2. Targeting

In the same way, in all of our operations involving the use of force, including those in the armed conflict with Al Qaeda, the Taliban, and associated forces, the Obama administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say is that it is the considered view of this administration—and it has certainly been my experience during my time as legal adviser—that US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law the United States is in an armed conflict with Al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, Al Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level Al Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that

does not have conventional forces but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law-of-war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack.
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In US operations against Al Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

Recently, a number of legal objections have been raised against US targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four.

First, some have suggested that the *very act of targeting* a particular leader of an enemy force in an armed conflict must violate the

laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapons system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth, and finally, some have argued that our targeting practices violate *domestic law*, in particular, the long-standing *domestic*

ban on assassinations. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”

In sum, let me repeat: as in the area of detention operations, this administration is committed to ensuring that the targeting practices that I have described are lawful.

3. Prosecution

The same goes, third and finally, for our policy of prosecutions. As the president made clear in his May 2009 National Archives speech, we have a national security interest in trying terrorists, either before Article III courts or military commissions, and in keeping the number of individuals detained under the laws of war low.

Obviously, the choice between Article III courts and military commissions must be made on a case-by-case basis, depending on the facts of each particular case. Many acts of terrorism committed in the context of an armed conflict can constitute both war crimes and violations of our federal criminal law, and they can be prosecuted in either federal courts or military commissions. As the last administration found, those who have violated American criminal laws can be successfully tried in federal courts: for example, Richard Reid, Zacarias Moussaoui, and a number of others.

With respect to the criminal justice system, to reiterate what Attorney General Holder recently explained, Article III prosecutions have proven to be remarkably effective in incapacitating terrorists. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11. In February 2010, for example, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States; conspiracy to commit murder in a

foreign country; and provision of material support to Al Qaeda. We have also effectively used the criminal justice system to pursue those who have sought to commit terrorist acts overseas. On March 18, 2010, for example, David Headley pleaded guilty to a dozen terrorism charges in US federal court in Chicago, admitting that he participated in planning the November 2008 terrorist attacks in Mumbai, India, as well as later planning to attack a Danish newspaper.

As the president noted in his National Archives speech, lawfully constituted military commissions are also appropriate venues for trying persons for violations of the laws of war. In 2009, with significant input from this administration, the Military Commissions Act was amended, with important changes to address the defects in the previous Military Commissions Act of 2006, including the addition of a provision that renders inadmissible any statements taken as a result of cruel, inhuman, or degrading treatment. The 2009 legislative reforms also require the government to disclose more potentially exculpatory information, restrict hearsay evidence, and generally require that statements of the accused be admitted only if they were provided voluntarily (with a carefully defined exception for battlefield statements).

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Appendix: Koh–B

*Harold H. Koh, legal adviser to the Department of State,
address to the USCYBERCOM Inter-Agency Legal
Conference, “International Law in Cyberspace,”
Fort Meade, Maryland, September 18, 2012*

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Everyone here knows that cyberspace presents new opportunities and new challenges for the United States in every foreign policy realm, including national defense. But for international lawyers, it also presents cutting-edge issues of international law, which go to a very fundamental question: how do we apply old laws of war to new cyber-circumstances, staying faithful to enduring principles while accounting for changing times and technologies?

Many, many international lawyers here in the US government and around the world have struggled with this question, so today I'd like to present an overview of how we in the US government have gone about meeting this challenge. At the outset, let me highlight that the entire endeavor of applying established international law to cyberspace is part of a broader international conversation. We are not alone in thinking about these questions; we are actively engaged with the rest of the international community, both bilaterally and multilaterally, on the subject of applying international law in cyberspace.

With your permission, I'd like to offer a series of questions and answers that illuminate where we are right now—in a place where we've made remarkable headway in a relatively short period of time, but are still finding new questions for each and every one we answer.

In fact, the US government has been regularly sharing these thoughts with our international partners. Most of the points that follow we have not just agreed upon internally, but made diplomatically, in our submissions to the UN Group of Governmental Experts (GGE) that deals with information technology issues.

I. International Law in Cyberspace: What We Know

So let me start with the most fundamental questions.

Question 1: Do established principles of international law apply to cyberspace?

Answer 1: Yes, international law principles do apply in cyberspace. Everyone here knows how cyberspace opens up a host of novel and extremely difficult legal issues. But on this key question, this answer has been apparent, at least as far as the US government has been concerned.

Significantly, this view has not necessarily been universal in the international community. At least one country has questioned whether existing bodies of international law apply to the cutting-edge issues presented by the Internet. Some have also said that existing international law is not up to the task and that we need entirely new treaties to impose a unique set of rules on cyberspace. But the United States has made clear our view that established principles of international law do apply in cyberspace.

Question 2: Is cyberspace a law-free zone, where anything goes?

Answer 2: Emphatically no. Cyberspace is not a “law-free” zone where anyone can conduct hostile activities without rules or restraint.

Think of it this way. This is not the first time that technology has changed and that international law has been asked to deal with those changes. In particular, because the tools of conflict are constantly

evolving, one relevant body of law—international humanitarian law, or the law of armed conflict—affirmatively anticipates technological innovation and contemplates that its existing rules will apply to such innovation. To be sure, new technologies raise new issues and thus new questions. Many of us in this room have struggled with such questions, and we will continue to do so over many years. But to those who say that established law is not up to the task, we must articulate and build consensus around how it applies and reassess from there whether and what additional understandings are needed.

Developing common understandings about how these rules apply in the context of cyber-activities in armed conflict will promote stability in this area.

That consensus-building work brings me to some questions and answers we have offered to our international partners to explain how both the law of going to war (*jus ad bellum*) and the laws that apply in conducting war (*jus in bello*) apply to cyber-action:

Question 3: Do cyber-activities ever constitute a use of force?

Answer 3: Yes. Cyber-activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law. In analyzing whether a cyber-operation would constitute a use of force, most commentators focus on whether the direct physical injury and property damage resulting from the cyber-event looks like that which would be considered a use of force if produced by kinetic weapons. *Cyber-activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force.* In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors including the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects, and intent, among other possible issues. Commonly cited examples of cyber-activity that would

constitute a use of force include, for example: (1) operations that trigger a nuclear plant meltdown; (2) operations that open a dam above a populated area causing destruction; or (3) operations that disable air traffic control resulting in airplane crashes. Only a moment's reflection makes you realize that this is common sense: if the physical consequences of a cyber-attack work the kind of physical damage that dropping a bomb or firing a missile would, that cyber-attack should equally be considered a use of force.

Question 4: May a state ever respond to a computer network attack by exercising a right of national self-defense?

Answer 4: Yes. A state's national right of self-defense, recognized in Article 51 of the UN Charter, may be triggered by computer network activities that amount to an armed attack or imminent threat thereof. As the United States affirmed in its 2011 International Strategy for Cyberspace, "when warranted, the United States will respond to hostile acts in cyberspace as we would to any other threat to our country."

Question 5: Do *jus in bello* rules apply to computer network attacks?

Answer 5: Yes. In the context of an armed conflict, the law of armed conflict applies to regulate the use of cyber-tools in hostilities, just as it does other tools. The principles of necessity and proportionality limit uses of force in self-defense and would regulate what may constitute a lawful response under the circumstances. There is no legal requirement that the response to a cyber-armed attack take the form of a cyber-action, as long as the response meets the requirements of necessity and proportionality.

Question 6: Must attacks distinguish between military and non-military objectives?

Answer 6: Yes. The *jus in bello* principle of *distinction* applies to computer network attacks undertaken in the context of an armed conflict. The principle of distinction applies to cyber-activities that amount to an “attack”—as that term is understood in the law of war—in the context of an armed conflict. As in any form of armed conflict, the principle of distinction requires that the intended effect of the attack must be to harm a legitimate *military* target. We must distinguish military objectives—that is, objects that make an effective contribution to military action and whose destruction would offer a military advantage—from civilian objects, which under international law are generally protected from attack.

Question 7: Must attacks adhere to the principle of proportionality?

Answer 7: Yes. The *jus in bello* principle of *proportionality* applies to computer network attacks undertaken in the context of an armed conflict. The principle of proportionality prohibits attacks that may be expected to cause incidental loss to civilian life, injury to civilians, or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. Parties to an armed conflict must assess what the expected harm to civilians is likely to be and weigh the risk of such collateral damage against the importance of the expected military advantage to be gained. In the cyber-context, this rule requires parties to a conflict to assess: (1) the effects of cyber-weapons on both military and civilian infrastructure and users, including shared physical infrastructure (such as a dam or a power grid) that would affect civilians; (2) the potential physical damage that a cyber-attack may cause, such as death or injury that may result from effects on critical infrastructure; and (3) the potential effects of a cyber-attack on civilian objects that are not military objectives, such as private, civilian computers that hold no military significance but may be networked to computers that are military objectives.

Question 8: How should states assess their cyber-weapons?

Answer 8: States should undertake a legal review of weapons, including those that employ a cyber-capability. Such a review should entail an analysis, for example, of whether a particular capability would be *inherently indiscriminate*, i.e., that it could not be used consistent with the principles of distinction and proportionality. The US government undertakes at least two stages of legal review of the use of weapons in the context of armed conflict—first, an evaluation of new weapons to determine whether their use would be *per se* prohibited by the law of war; and second, specific operations employing weapons are always reviewed to ensure that each particular operation is also compliant with the law of war.

Question 9: In this analysis, what role does state sovereignty play?

Answer 9: States conducting activities in cyberspace must take into account the sovereignty of other states, including outside the context of armed conflict. The physical infrastructure that supports the Internet and cyber-activities is generally located in sovereign territory and subject to the jurisdiction of the territorial state. Because of the interconnected, interoperable nature of cyberspace, operations targeting networked information infrastructures in one country may create effects in another country. Whenever a state contemplates conducting activities in cyberspace, the sovereignty of other states needs to be considered.

Question 10: Are states responsible when cyber-acts are undertaken through proxies?

Answer 10: Yes. States are legally responsible for activities undertaken through “proxy actors” who act on the state’s instructions or under its direction or control. The ability to mask one’s identity and geography in cyberspace and the resulting difficulties of timely, high-confidence attribution can create significant chal-

lenges for states in identifying, evaluating, and accurately responding to threats. But putting attribution problems aside for a moment, established international law does address the question of proxy actors. States are legally responsible for activities undertaken through putatively private actors who act on the state's instructions or under its direction or control. If a state exercises a sufficient degree of control over an ostensibly private person or group of persons committing an internationally wrongful act, the state assumes responsibility for the act, just as if official agents of the state itself had committed it. These rules are designed to ensure that states cannot hide behind putatively private actors to engage in conduct that is internationally wrongful.

II. International Law in Cyberspace: Challenges and Uncertainties

These ten answers should give you a sense of how far we have come in doing what any good international lawyer does: applying established law to new facts and explaining our positions to other interested lawyers. At the same time, there are obviously many more issues where the questions remain under discussion. Let me identify three particularly difficult questions that I don't intend to answer here today. Instead, my hope is to shed some light on some of the cutting-edge legal issues that we'll all be facing together over the next few years.

Unresolved Question 1: How can a use-of-force regime take into account all of the novel kinds of *effects* that states can produce through the click of a button?

As I said above, the United States has affirmed that established *jus ad bellum* rules do apply to uses of force in cyberspace. I have also noted some clear-cut cases where the physical effects of a hostile cyber-action would be comparable to what a kinetic action could achieve: for example, a bomb might break a dam and flood a civilian population, but insertion of a line of malicious code from a distant

computer might just as easily achieve that same result. As you all know, however, there are other types of cyber-actions that do not have a clear kinetic parallel, which raise profound questions about exactly what we mean by “force.” At the same time, the difficulty of reaching a definitive legal conclusion or consensus among states on when and under what circumstances a hostile cyber-action would constitute an armed attack does not automatically suggest that we need an entirely new legal framework specific to cyberspace. Outside of the cyber-context, such ambiguities and differences of view have long existed among states.

To cite just one example of this, the United States has for a long time taken the position that the inherent right of self-defense potentially applies against *any* illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an “armed attack” that may warrant a forcible response. But that is not to say that any illegal use of force triggers the right to use any and all force in response—such responses must still be *necessary* and of course *proportionate*. We recognize, on the other hand, that some other countries and commentators have drawn a distinction between the “use of force” and an “armed attack,” and view “armed attack”—triggering the right to self-defense—as a subset of uses of force, which passes a higher threshold of gravity. My point here is not to rehash old debates but to illustrate that states have long had to sort through complicated *jus ad bellum* questions. In this respect, the existence of complicated cyber-questions relating to *jus ad bellum* is not in itself a new development; it is just applying old questions to the latest developments in technology.

Unresolved Question 2: What do we do about “dual-use infrastructure” in cyberspace?

As you all know, information and communications infrastructure is often shared between state militaries and private, civilian communities. The law of war requires that civilian infrastructure not be used to seek to immunize military objectives from attack, including in the

cyber-realm. But how, exactly, are the *jus in bello* rules to be implemented in cyberspace? Parties to an armed conflict will need to assess the potential effects of a cyber-attack on computers that are *not* military objectives, such as private, civilian computers that hold no military significance but may be networked to computers that are valid military objectives. Parties will also need to consider the harm to the civilian uses of such infrastructure in performing the necessary proportionality review. Any number of factual scenarios could arise, however, which will require a careful, fact-intensive legal analysis in each situation.

Unresolved Question 3: How do we address the problem of *attribution* in cyberspace?

As I mentioned earlier, cyberspace significantly increases an actor's ability to engage in attacks with "plausible deniability" by acting through proxies. I noted that legal tools exist to ensure that states are held accountable for those acts. What I want to highlight here is that many of these challenges—in particular, those concerning attribution—are as much questions of technical and policy nature rather than exclusively or even predominantly questions of law. Cyberspace remains a new and dynamic operating environment, and we cannot expect that all answers to the new and confounding questions we face will be *legal* ones.

These questions about effects, dual use, and attribution are difficult legal and policy questions that existed long before the development of cyber-tools, and that will continue to be a topic of discussion among our allies and partners as cybertools develop. Of course, there remain many other difficult and important questions about the application of international law to activities in cyberspace—for example, about the implications of sovereignty and neutrality law, enforcement mechanisms, and the obligations of states concerning "hacktivists" operating from within their territory. While these are not questions that I can address in this brief speech, they are critically

important questions on which international lawyers will focus intensely in the years to come.

And just as cyberspace presents challenging new issues for lawyers, it presents challenging new technical and policy issues. Not all of the issues I've mentioned are susceptible to clear legal answers derived from existing precedents—in many cases, quite the contrary. Answering these tough questions within the framework of existing law, consistent with our values and accounting for the legitimate needs of national security, will require a constant dialogue between lawyers, operators, and policymakers. All that we as lawyers can do is to apply in the cyber-context the same rigorous approach to these hard questions that arise in the future, as we apply every day to what might be considered more traditional forms of conflict.

III. The Role of International Law in a “Smart Power” Approach to Cyberspace

This, in a nutshell, is where we are with regard to cyber-conflict: we have begun work to build consensus on a number of answers, but questions continue to arise that must be answered in the months and years ahead. Beyond these questions and answers and unresolved questions, though, lies a much bigger picture, one that we are very focused on at the State Department, which brings me to my final two questions.

Final Question 1: Is international humanitarian law the only body of international law that applies in cyberspace?

Final Answer 1: No. As important as international humanitarian law is, it is not the only international law that applies in cyberspace.

Obviously, cyberspace has become pervasive in our lives, not just in the national defense arena, but also through social media, publishing and broadcasting, expressions of human rights, and expansion of international commerce, both through online markets and online

commercial techniques. Many other bodies of international and national law address those activities, and how those different bodies of law overlap and apply with the laws of cyber-conflict is something we will all have to work out over time.

Take human rights. At the same time that cyber-activity can pose a threat, we all understand that cyber-communication is increasingly becoming a dominant mode of expression in the twenty-first century. More and more people express their views not by speaking on a soap box at Speakers' Corner but by blogging, tweeting, commenting, or posting videos and commentaries. The 1948 Universal Declaration of Human Rights (UDHR)—adopted more than seventy years ago—was remarkably forward-looking in anticipating these trends. It says: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas *through any media and regardless of frontiers*” (emphasis added). In short, all human beings are entitled to certain rights, whether they choose to exercise them in a city square or an Internet chat room. This principle is an important part of our global diplomacy and is encapsulated in the Internet freedom agenda about which my boss, Secretary Clinton, has spoken so passionately.

You all know of this administration's efforts not just in the areas of cyber-conflict but also in many other cyber areas: cyber-security, cyber-commerce, fighting child pornography and other forms of cyber-crime and stopping intellectual property piracy, as well as promoting free expression and human rights. So the cyber-conflict issues with which this group grapples do not constitute the whole of our approach to cyberspace; they are an important part—but only a part—of this administration's broader “smart power” approach to cyberspace.

What I have outlined today are a series of answers to cyberspace questions that the United States is on the record as supporting. I have also suggested a few of the challenging questions that remain before us and developments over the next decade will surely produce

new questions. But you should not think of these questions and answers as just a box to check before deciding whether a particular proposed operation is lawful or not. Rather, these questions and answers are part of a much broader foreign policy agenda which transpires in a broader framework of respect for international law.

That leads to my final question for this group.

Final Question 2: Why should US government lawyers care about international law in cyberspace at all?

Final Answer 2: Because compliance with international law frees us to do more, and do more legitimately, in cyberspace, in a way that more fully promotes our national interests. Compliance with international law in cyberspace is part and parcel of our broader “smart power” approach to international law as part of US foreign policy.

It is worth noting a fundamental difference in philosophy about international law. One way to think about law, whether domestic or international, is as a straitjacket, a pure constraint. This approach posits that nations have serious, legitimate interests, and legal regimes restrict their ability to carry them out. One consequence of this view is that, since law is just something that constrains, it should be resisted whenever possible. Resisting so-called “extensions” of the law to new areas often seems attractive because, after all, the old laws weren’t built for these new challenges anyway, some say, so we should tackle those challenges without the legal straitjacket, while leaving the old laws behind.

But that is *not* the US government’s view of the law, domestic or international. We see law not as a straitjacket but as what one great university calls it when it confers its diplomas: a body of “wise restraints that make us free.” International law is not purely constraint, it frees us and empowers us to do things we could never do without law’s legitimacy. If we succeed in promoting a culture of compliance, we will reap the benefits. And if we earn a reputation for compliance, the

actions we *do* take will earn enhanced legitimacy worldwide for their adherence to the rule of law.

These are not new themes, but I raise them here because they resonate squarely with the strategy we have been pursuing in cyberspace over the past few years. Of course, the United States has impressive cyber-capabilities; it should be clear from the bulk of my discussion that adherence to established principles of law does not prevent us from using those capabilities to achieve important ends. But we also know that we will be safer the more that we can rally other states to the view that these established principles *do* impose meaningful constraints and that there is already an existing set of laws that protects our security in cyberspace. And the more widespread the understanding that cyberspace follows established rules—and that we live by them—the stronger we can be in pushing back against those who would seek to introduce brand new rules that may be contrary to our interests.

That is why, in our diplomacy, we do not whisper about these issues. We talk about them *openly and bilaterally* with other countries—about the application of established international law to cyberspace. We talk about them *multilaterally*, at the UN Group of Governmental Experts and at other fora, in promoting this vision of compliance with international law in cyberspace. We talk about them *regionally*, as when we recently co-sponsored an ASEAN Regional Forum event to focus the international community's attention on the problem of proxy actors engaging in unlawful conduct in cyberspace. Preventing proxy attacks on us is an important interest, and as part of our discussions we have outlined the ways that existing international law addresses this problem.

The diplomacy I have described is not limited to the legal issues this group of lawyers is used to facing in the operational context. These issues are interconnected with countless other cyber-issues that we face daily in our foreign policy, such as cyber-security, cyber-commerce, human rights in cyberspace, and public diplomacy through

cybertools. In all of these areas, let me repeat again, *compliance with international law in cyberspace is part and parcel of our broader smart power approach to international law as part of US foreign policy*. Compliance with international law—and thinking actively together about how best to promote that compliance—can only free us to do more, and to do more legitimately, in the emerging frontiers of cyberspace in a way that more fully promotes our US national interests.

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Appendix: Kris–A

David Kris, assistant attorney general for national security, “Law Enforcement as a Counterterrorism Tool,” address at the Brookings Institution, June 11, 2010

...

I’ve been asked to discuss the role of law enforcement as a counterterrorism tool. This is a timely subject; you may have noticed recently some talk about whether the federal courts should be used against international terrorists. I will discuss this issue in four main parts.

First, I’ll review the recent history of our national counterterrorism strategy, focused in particular on the origins and evolution of the Justice Department’s National Security Division (NSD), which I head. Knowing a little about NSD may be interesting to you anyway (I hope), but it’s also an important part of how the country came to a consensus, at least until recently, about the appropriate role of law enforcement as a counterterrorism tool.

Second, I will try to sketch out a conceptual framework for thinking about the role of law enforcement in the current conflict. The idea here is to identify the right questions, the right way of approaching the policy debate that we are now engaged in as a country. Identifying the right questions, I think, is not as easy as it sounds, but it is, as always, critically important.

Third, I’ll try to answer these questions that I have identified. To do this, I’ll briefly describe some of the empirical evidence about how law enforcement has been used to combat terrorism. I’ll also offer a

comparison between civilian law enforcement and its two major alternatives: detention under the law of war and prosecution in a military commission. This comparison will not be nearly as detailed as you would need to make intelligent decisions about public policy, let alone about particular cases, but it will give you an idea of the major pros and cons of each system as I see them.

Fourth, and finally, I will conclude with some ideas on how to improve the effectiveness of law enforcement as a counterterrorism tool. Here I'll address, among other things, the idea of legislation on the public-safety exception to *Miranda* that has been discussed of late.

To begin with recent history, we often hear that before September 11, [2001], the United States took a “law enforcement approach” to counterterrorism. There is some truth in that, but I think it oversimplifies things. In fact, the 9/11 Commission found that before September 11, “the CIA was plainly the lead agency confronting Al Qaeda”; law enforcement played a “secondary” role; and military and diplomatic efforts were “episodic.” I was involved in national security before September 11, and that seems about right to me.

After September 11, of course, all of our national security agencies ramped up their counterterrorism activities; as our troops deployed to foreign battlefields and the intelligence community expanded its operations, the Department of Justice (DOJ) and the FBI also evolved. We began with an important legal change, tearing down the so-called “FISA wall,” under which law enforcement and intelligence were largely separate enterprises and law enforcement was correspondingly limited as a counterterrorism tool. For those of you who don't know what FISA is, it is a federal statute [Foreign Intelligence Surveillance Act], enacted by Congress in 1978, that governs electronic surveillance and physical searches of foreign intelligence targets in the United States. It is an extremely powerful investigative tool, and one that is vitally important to our national security. Until the wall came down, however, the price of using FISA—

or preserving the option to use FISA—was a requirement to keep law enforcement and intelligence at arm's length. Tearing down the wall permitted intelligence and law enforcement to work together more effectively.

I think this legal change reflected, and also reinforced, the conclusion that law enforcement helps protect national security. Not that law enforcement is the only way to protect national security, or even that it's the best way. But I do think we came to a national consensus, in the years immediately after 9/11, that law enforcement is one important way of protecting national security.

This consensus led to significant structural changes at DOJ and the FBI. The Bureau integrated intelligence and law enforcement functions with respect to counterterrorism and dramatically increased its resources and focus on intelligence collection and analysis. The FBI has long been the intelligence community element with primary responsibility for collecting and coordinating intelligence about terrorist threats in the United States, and since 9/11 it has made this mission its highest priority. It also led Congress to strengthen our counterterrorism criminal laws and to create NSD, which combines terrorism and espionage prosecutors with intelligence lawyers and other intelligence professionals. NSD personnel are all united by a single, shared mission: to protect against terrorism and other threats to national security using all lawful methods. At some level, NSD is indifferent to the particular lawful method used to neutralize a threat; we prefer the method that is most effective under the circumstances. This, I think, is the crystallized consensus of our federal government and the American people in the aftermath of 9/11.

Today, however, the consensus that developed in the aftermath of 9/11 shows some signs of unraveling. In particular, there are some who say that law enforcement can't—or shouldn't—be used for counterterrorism. They appear to believe that we should treat all terrorists exclusively as targets for other parts of the intelligence community or the Defense Department.

The argument, as I understand it, is basically the following:

- (1) We are at war.
- (2) Our enemies in this war are not common criminals.
- (3) Therefore we should fight them using military and intelligence methods, not law enforcement methods.

This is a simple and rhetorically powerful argument and, precisely for that reason, it may be attractive.

In my view, however, and with all due respect, it is not correct. And it will, if adopted, make us less safe. Of course, it's not that law enforcement is always the right tool for combating terrorism. But it's also not the case that it's never the right tool. The reality, I think, is that it's sometimes the right tool. And whether it's the right tool in any given case depends on the specific facts of that case.

Here's my version of the argument:

- (1) We're at war. The president has said this many times, as has the attorney general.
- (2) In war you must try to win—no other goal is acceptable.
- (3) To win the war, we need to use all available tools that are consistent with the law and our values, selecting in any case the tool that is best under the circumstances.

We must, in other words, be relentlessly pragmatic and empirical. We can't afford to limit our options artificially or yield to preconceived notions of suitability or "correctness." We have to look dispassionately at the facts, and then respond to those facts using whatever methods will best lead us to victory.

Put in more concrete terms, we should use the tool that's designed best for the problem we face. When the problem looks like

a nail, we need to use a hammer. But when it looks like a bolt, we need to use a wrench. Hitting a bolt with a hammer makes a loud noise, and it can be satisfying in some visceral way, but it's not effective and it's not smart. If we want to win, we can't afford that.

If you take this idea seriously it complicates strategic planning, because it requires a detailed understanding of our various counterterrorism tools. If you're a pragmatist, focused relentlessly on winning, you can't make policy or operational decisions at 30,000 feet. You have to come down and get into the weeds, and understand the details of our counterterrorism tools at the operational level. And that leads me to this question: as compared to the viable alternatives, what is the value of law enforcement in this war? Does it in fact help us win? Or is it categorically the wrong tool for the job—at best a distraction, and at worst an affirmative impediment?

I think law enforcement helps us win this war. And I want to make clear, for the limited purpose of today's remarks and in light of the nature of our current national debate, that this is not primarily a values-based argument. That is, I am not saying law enforcement helps us win in the sense that it is a shining city on a hill that captures hearts and minds around the world (although I do think our criminal justice system is widely respected). Values are critically important, both in themselves and in their effect on us, our allies, and our adversaries, but I am talking now about something more direct and concrete.

When I say that law enforcement helps us win this war, I mean that it helps us disrupt, defeat, dismantle, and destroy our adversaries (without destroying ourselves or our way of life in the process). In particular, law enforcement helps us in at least three ways: it can disrupt terrorist plots through arrests, incapacitate terrorists through incarceration resulting from prosecution, and gather intelligence from interrogation and recruitment of terrorists or their supporters via cooperation agreements.

Here's some of the evidence for that argument. Between September 2001 and March 2010, DOJ convicted more than 400 defendants

in terrorism-related cases. Some of these convictions involve per se terrorism offenses, while others do not—Al Capone was convicted of tax fraud rather than racketeering, but that doesn't make him any less of a gangster. Of course we have Najibullah Zazi and David Headley, both of whom have pleaded guilty and are awaiting sentencing, and now Faisal Shahzad, but there have been many others over the years, ranging from Ramzi Yousef (the first World Trade Center bomber) to the East Africa Embassy bombers, to Richard Reid, to Ahmed Omar Abu Ali, all of whom are now serving life sentences in federal prison. Just in the past year, among others, Wesam al-Delaema was sentenced to twenty-five years for planting IEDs in Iraq, Syed Harris and Ehsanul Sadequee were sentenced to thirteen and seventeen years for providing material support to Al Qaeda, and Oussama Kassir was sentenced to life in prison for attempting to establish a jihad training camp in the United States. Last year we also arrested two individuals in separate undercover operations after they allegedly tried to blow up buildings in Dallas, Texas, and Springfield, Illinois. And there are many others.

Not all of these cases make the headlines and not all of the defendants we've convicted were hard-core terrorists or key terrorist operatives. As in organized crime or traditional intelligence investigations, aggressive and wide-ranging counter-terrorism efforts may net a lot of smaller fish along with the big fish. That may mean we are disrupting plots before they're consummated, and it may give us a chance to deter or recruit the smaller fish before they're fully radicalized.

We've also used the criminal justice system to collect valuable intelligence. In effect, the criminal justice system has worked as what the intelligence community would call a HUMINT [HUMAN INTelligence] collection platform. The fact is that when the government has a strong prosecution case, the defendant knows he will spend a long time in prison and this creates powerful incentives for him to cooperate with us.

There's a limit to what I can say publicly, of course, but I can say that terrorism suspects in the criminal justice system have provided information on all of the following:

- Telephone numbers and e-mail addresses used by Al Qaeda
- Al Qaeda recruiting techniques, finances, and geographical reach
- Terrorist tradecraft used to avoid detection in the West
- Experiences at, and the location of, Al Qaeda training camps
- Al Qaeda weapons programs and explosives training
- The location of Al Qaeda safe houses (including drawing maps)
- Residential locations of senior Al Qaeda figures
- Al Qaeda communications methods and security protocols
- Identification of operatives involved in past and planned attacks
- Information about plots to attack US targets

The intelligence community, including the National Counterterrorism Center (NCTC), believes that the criminal justice system has provided useful information. For example, NCTC has explained that it “regularly receives and regularly uses . . . valuable terrorism information obtained through the criminal justice system—and in particular federal criminal proceedings pursued by the FBI and Department of Justice. Increasingly close coordination between the Department of Justice and NCTC has resulted in an increase in both the intelligence value and quality of reporting related to terrorism.”

Having explained the basic affirmative case for law enforcement as a counter-terrorism tool, let me address some of the arguments on the other side. The first argument is that there's an inherent tension between national security and law enforcement. I think this argument confuses ends with means. The criminal justice system is a tool—one of several—for promoting national security, for protecting our country against terrorism. Sometimes it's the right tool; sometimes it's the

wrong tool. That is no different than saying sometimes the best way to protect national security is through diplomacy and sometimes it's through military action.

Another argument is that the criminal justice system is fundamentally incompatible with national security because it is focused on defendants' rights. But this argument suffers from two basic flaws. First, the criminal justice system is not focused solely on defendants' rights—it strikes a balance between defendants' rights and the interests of government, victims, and society. And whatever the balance that has been struck, the empirical fact is that when we prosecute terrorists we convict them around 90 percent of the time. To be sure, the criminal justice system has its limits, and in part because of those limits it is not always the right tool for the job. But when the executive branch concludes that it is the right tool—as it has more than 400 times since September 11—we in fact put steel on target almost every time.

The second flaw in the “fundamental incompatibility” argument is equally significant. The criminal justice system is not alone in facing legal constraints; all of the US government's activities must operate under the rule of law. For example, the US military operates under rules that require it to forego strikes against terrorists if they will inflict disproportionate harm on civilians. (It also has rules governing who may be detained, how detainees have to be treated, and how long they can be held.) These limits are real, and they are not trivial, but no one thinks they're a reason to abandon or forbid the use of military force against Al Qaeda. (By the way, the point of this argument is not to equate the legal constraints in the two systems; they are in fact very different. The point is only to emphasize that all of our counterterrorism tools have legal limits—this is the price of living under the rule of law—and those limits inform judgments about which tool is best in any given case.)

Ultimately, the worth of the criminal justice system is a relative thing. In other words, its value as a counterterrorism tool must be

compared to the value of other tools. Comparing the criminal justice system to the use of military force or diplomacy is difficult because it shares so little in common with them. But as a tool for disrupting and incapacitating terrorists and gathering intelligence, the criminal justice system is readily comparable with two others—detention under the law of war and prosecution in a military commission. So I will turn to that comparison now.

Before I focus on the differences between these systems, however, I want to acknowledge the similarities of the two prosecution systems. Whether you're in civilian court or a military commission, there is the presumption of innocence; a requirement of proof beyond a reasonable doubt; the right to an impartial decision-maker; similar processes for selecting members of the jury or commission; the right to counsel and choice of counsel; the right to qualified self-representation; the right to be present during proceedings; the right against self-incrimination; the right to present evidence, cross-examine the government's witnesses, and compel attendance of witnesses; the right to exclude prejudicial evidence; the right to exculpatory evidence; protections against double jeopardy; protections against *ex post facto* laws; and the right to an appeal. Both systems afford the basic rights most Americans associate with a fair trial.

As to the differences, an exhaustive comparison would require a longer discussion, but I have identified five relative advantages of our military authorities and five of the civilian system, viewed solely from the perspective of the government and their effectiveness in combating terrorism. I need to emphasize, however, that this is not nearly as detailed a comparison as you would need to make informed policy or operational judgments. The comparisons that really matter are far more granular and nuanced than anything that I can offer in this setting. Also, the extent and significance of the differences between the systems often turn on the facts of a particular case. There is no substitute for immersion in the details. With those important caveats, here are five general advantages that using military authorities rather

than civilian prosecution may offer to the government, depending on the facts.

1. Proof requirements. In military commissions, the burden of proof is the same as in civilian court—beyond a reasonable doubt—but in non-capital cases only two-thirds of the jurors (rather than all of them) are needed for conviction. Under the law of war, if it's tested through a habeas corpus petition, the government need only persuade the judge by a preponderance of the evidence that the petitioner is part of Al Qaeda or affiliated forces, though that is not always easy as our track record in the Guantánamo cases has shown.

2. Admissibility of confessions. In a military commission, unlike in federal court, *Miranda* warnings are not required to use the defendant's custodial statements against him. While the voluntariness test generally applies in the commissions as it does in federal court, there's an exception in the commissions for statements taken at the point of capture on or near a battlefield. For law-of-war detention, the test is reliability, which may in practical effect be pretty similar to a basic voluntariness requirement.

3. Closing the courtroom. While both federal trials and commission proceedings are generally open proceedings, compared to federal court, there may be some increased ability to close the courtroom in a military commission, and certain military commission trials have implemented a 45-second delay of the broadcast of statements to permit classified information to be blocked before it is aired in certain cases. There certainly is a greater ability to close the courtroom in a habeas corpus proceeding, and—unlike both military commission and civilian trials—the petitioner is not required to be present, which can help in dealing with classified information.

4. Admissibility of hearsay. The hearsay rules are somewhat more relaxed in military commissions than in federal prosecutions, and they are significantly more relaxed in habeas proceedings. This can be good for the government in some cases, particularly in protecting sensitive sources, but it can also help the defendant/petitioner in

some cases. In the Hamdan case [*Hamdan v. Rumsfeld*], for example, Hamdan used the hearsay rules more than the government did.

5. Classified evidence. The rules governing protection of classified information are very similar in the two prosecution forums—indeed, the military commission rules were modeled on the federal court rules. But the rules may be somewhat better in military commissions because they codify some of the federal case law and adopt lessons learned from litigating classified information issues in federal court. I would say the classified information rules in habeas proceedings over law-of-war detention are both more flexible and less certain.

Those are, in my view, the five main advantages that the government might enjoy in using military rather than civilian authorities. Now, here are the five main advantages of using federal courts rather than military commissions or law-of-war detention, subject to the same caveats as above.

1. Certainty and finality. The rules governing civilian prosecutions are more certain and well-established than those in the other two systems. This can speed the process, reduce litigation risk, promote cooperation and guilty pleas, and result in reliable long-term incapacitation. This is a very significant factor for now, but it will hopefully recede over time as we gain more experience in the commissions.

2. Scope. The civilian criminal justice system is much broader than the other two—it has far more crimes (covering everything from terrorism to tax evasion) and applies to everyone. Military commissions are not available for US citizens—folks like Anwar al-Awlaki and Faisal Shahzad—and neither commissions nor law-of-war detention apply to terrorists not related to Al Qaeda or the Taliban. Groups like Hamas, Hezbollah, or the FARC [Revolutionary Armed Forces of Colombia] are out of bounds, as are lone-wolf terrorists who may be inspired by Al Qaeda but are not part of it (like the two individuals I mentioned who allegedly tried to blow up buildings in Illinois and Texas last year).

3. Incentives for cooperation. The criminal justice system has more reliable and more extensive mechanisms to encourage cooperation. While the military commissions have borrowed a plea and sentencing agreement mechanism from the courts-martial system which could be used for cooperation—Rule 705—this system has not yet been tested in military commissions and its effectiveness is as yet unclear. In law-of-war detention, interrogators can offer detainees improvements in their conditions of confinement, but there is no “sentence” over which to negotiate and no judge to enforce an agreement. Detainees may have little incentive to provide information in those circumstances. On the other hand, in some circumstances law-of-war detainees may lawfully be held in conditions that many believe are helpful to effective interrogation.

4. Sentencing. In federal court, judges impose sentences based in large part on tough sentencing guidelines, while sentencing in the military commissions is basically done by the jury without any guidelines. What little experience we have with the commissions suggests that sentencing in that forum is less predictable—two of the three commission defendants convicted thus far (including Osama bin Laden’s driver) received sentences of five to six years, with credit for time served, and were released within months of sentencing. Under the law of war, of course, there is no sentence; if their detention is lawful, detainees may be held until the end of the conflict. But the Supreme Court has warned that if the circumstances of the current conflict “are entirely unlike those of the conflicts that informed the development of the law of war,” the authority to detain “may unravel.” As circumstances change, or if active combat operations are concluded, it is not clear how long the detention authority will endure.

Without going into too much detail, I should also say that there may be some advantages to bringing a capital case in federal court rather than in a military commission, in light of the different rules. The military commissions, for example, may not permit a capital sentence to be imposed following a guilty plea, at least for now.

5. International cooperation. Finally, the criminal justice system may help us obtain important cooperation from other countries. Unfortunately, some countries won't provide us with evidence we may need to hold suspected terrorists in law-of-war detention or prosecute them in military commissions. In some cases, they have agreed to extradite terrorist suspects to us only on the condition that they not be tried in military commissions. In such cases, use of federal courts may mean the difference between holding a terrorist and having him go free. This is not, of course, a plea to subject our counterterrorism efforts to some kind of global test of legitimacy; it is simply a hard-headed, pragmatic recognition that in some cases, where we need help from abroad, we will have to rely on law enforcement rather than military detention or prosecution.

To conclude, I think we cannot and should not immunize terrorists from prosecution any more than we should immunize them from the use of military strikes or our other counterterrorism tools. Law enforcement is too effective a weapon to discard.

Having said that, we do need to educate ourselves about all of the tools in the president's national security toolbox. Within the government, people who use hammers for a living need to know something about wrenches, and vice versa. If they don't, there is a danger of myopia: to a person holding a hammer, every problem begins to look like a nail. More generally, the American people need to understand, and have confidence in, all of the tools in the toolbox. That's part of why I came here today.

We also need to consider improving and sharpening our tools. Our adversaries are smart and adaptable, and we must be the same. For example, there has been some discussion recently about *Miranda* warnings in terrorism cases and the possibility of legislation on that score. Now, obviously, *Miranda* is a constitutional rule—we know that from the Supreme Court's decision in *Dickerson*—and it can't be overruled or even changed by statute. But the Supreme Court has recognized an exception to the *Miranda* rule. In 1984, in a case called

Quarles [*New York v. Quarles*], it said that questioning prompted by concerns about public safety need not be preceded by *Miranda* warnings. In other words, you can use the person's answers to public-safety questions to support his conviction and resulting incarceration.

Now, *Quarles* really did involve a common criminal—a man who committed an armed robbery and ran into a supermarket to escape the police. The question today is how the public-safety exception would apply in a very different context—modern international terrorism. The threat posed by terrorism today is more complex, sophisticated, and serious than the threat posed by ordinary crime. Correspondingly, therefore, there are arguments that the public safety exception should, likewise, permit more questioning where it's in fact designed to mitigate that threat.

We want to work with Congress to see if we can develop something that could help us—give us some more flexibility and clarity—in these narrow circumstances involving operational terrorists. The goal, always, is to promote and protect national security, and this may be one way to help do that.

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Appendix: Johnson–A

*Jeh C. Johnson, general counsel,
Department of Defense, “Jeh C. Johnson
Speech to the Heritage Foundation,”
Washington, D.C., October 18, 2011*

...

I am convinced that one of the other reasons our military is so revered and respected is that, for all its power, we place sharp limits on the military’s ability to intrude into the civilian life and affairs of our democracy. This is a core American value that is part of our heritage, dating back to before the founding of our country.

The Declaration of Independence listed among our grievances against the king the fact that he had “kept among us, in times of peace, Standing Armies without the Consent of our legislatures,” and had “quarter[ed] large bodies of armed troops among us.” This value is reflected in the Federalist Papers and the father of our Constitution, James Madison, wrote: “A standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense against foreign danger have been always the instruments of tyranny at home.”

This core value and this heritage are today reflected in such places as the Third Amendment, which prohibits the peacetime quartering of soldiers in private homes without consent, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a posse comitatus unless expressly authorized by Congress or the Constitution.

This brings me to the point of these remarks today.

There is danger in over-militarizing our approach to Al Qaeda and its affiliates. There is risk in permitting and expecting the US military to extend its powerful reach into areas traditionally reserved for civilian law enforcement in this country. Against an unconventional non-state actor that does not play by the rules, operates in secret, observes no geographic limits, constantly morphs and metastasizes, and continues to look for opportunities to export terrorism to our homeland, we must use every tool at our disposal. The military should not and cannot be the only answer.

Recent events remind us that broad assertions of military power can provoke controversy and invite challenge. Over-reaching with military power can result in litigation in which the courts intrude further and further into our affairs, and can result in national security setbacks, not gains—a point best illustrated by the question Donald Rumsfeld once asked my predecessor: “So I’m going to go down in history as the only secretary of defense to have lost a case to a terrorist?”

Particularly when we attempt to extend the reach of the military onto US soil, the courts resist, consistent with our core values and our heritage.

We have worked to make military detention, in particular, less controversial, not more. The overall goal should be to build a counterterrorism framework that is legally sustainable and credible and that preserves every lawful tool and authority at our disposal. This has meant, as the president’s counterterrorism adviser John Brennan said recently, an approach that is “pragmatic, neither a wholesale overhaul nor a wholesale retention of past practices.”

To build that less controversial, more credible and sustainable legal framework, we have in the last several years accomplished the following:

We have applied the standards of the Army Field Manual to all interrogations conducted by the federal government in the context of armed conflict.

Where appropriate, in the context of terrorist activity, we have invoked the “public safety” exception to the *Miranda* rule created by the Supreme Court in *New York v. Quarles*—ensuring that the opportunity to gather valuable intelligence is fully utilized and, at the same time, preserving the prosecution option.

We worked with the Congress to bring about a number of reforms reflected in the Military Commissions Act of 2009 and, following that, we issued a new *Manual for Military Commissions*. By law, use of statements obtained by cruel, inhuman, and degrading treatment—what was once the most controversial aspect of military commissions—is now prohibited.

We accomplished those reforms working with a bipartisan coalition in Congress and with the full support of the JAG [Judge Advocate General] leadership in the military.

We have appointed the highly respected former judge advocate general of the navy, retired Vice Admiral Bruce MacDonald, to be the convening authority for military commissions; appointed a recognized military justice expert, Marine Colonel Jeff Caldwell, to be chief defense counsel; and this month appointed Brigadier General Mark Martins, a West Point valedictorian, Harvard Law School graduate, and Rhodes Scholar to be the chief prosecutor. We are recruiting the “A team” for this system.

We have reformed the rules for press access to military commissions’ proceedings, established a new public website for the commissions system, and, in general, built what I believe is a credible, sustainable, and more transparent system.

In the habeas litigation brought by Guantánamo detainees, lawyers in the Department of Justice and the Department of Defense have worked hard to build credibility with the courts by conducting a thorough scrub of the evidence and the intelligence before we put forward our case for detention in the courts.

We have refined existing systems for periodic review for the cases of detainees at Guantánamo and at Bagram in Afghanistan.

Overall, the hard work of many civilian and military counterterrorism professionals, spanning both this administration and the last, is producing results.

First and foremost, we have been aggressive and focused in the fight against Al Qaeda. Where necessary, we have not hesitated to use lawful, lethal force against Al Qaeda and its affiliates and we are literally taking the fight to them, where they plot, where they meet, where they plan, and where they train to export terrorism to the United States. Counterterrorism experts state publicly that Al Qaeda senior leadership is today severely crippled and degraded.

Second, just as we brought justice to the man who ordered the attacks on 9/11, we seek to bring to justice KSM [Khalid Shaikh Mohammed] and the other alleged planners of 9/11, in reformed military commissions. New charges have also been referred in the case of the alleged Cole bomber, Hussayn Muhammed Al-Nashiri.

Third, the government is seeing consistent success in the habeas cases brought by Guantánamo detainees. The courts have largely recognized and accepted our legal interpretation of our detention authority, and the government has now prevailed at the District Court level in more than ten consecutive habeas cases brought by Guantánamo detainees. We are seeing similar good results in the D.C. Circuit.

In the D.C. Circuit, the Department of Justice successfully defended against an effort to extend the habeas remedy to detainees held in Afghanistan.

Fourth, through the interrogation of those captured by the United States and our partners overseas, we continue to collect valuable intelligence about Al Qaeda, its plans, and its intentions.

Fifth, this administration, like its predecessors, continues to successfully prosecute terrorists in our federal civilian courts.

As a former federal prosecutor, I know firsthand the strength, security, and effectiveness of our federal court system. . . . Given the reforms since 9/11, the federal court system is even more effective.

And, as a result of lengthy and mandatory minimum prison sentences authorized by Congress and the Federal Sentencing Guidelines, those convicted of terrorism-related offenses often face decades, if not life, in prison.

The results speak for themselves. Since 9/11, numerous individuals have been convicted of terrorism-related offenses. In the last two years alone, we have seen in our federal courts a guilty plea from the man who admitted plotting to bomb the New York subway system, a guilty plea from the man who tried to bomb the commercial aircraft over Detroit on Christmas Day 2009, a life sentence imposed on the individual who attempted to detonate a bomb in Times Square, and a life sentence imposed for participation in the 1998 bombing of our embassies in Kenya and Tanzania. Going back decades, the Department of Justice has successfully prosecuted hundreds of terrorism-related cases.

Despite our successes, we know that the fight is not over. We know there is still great danger. Though degraded and on the run, we know that, in this post–bin Laden period, Al Qaeda and its affiliates still remain determined to conduct terrorist attacks against the United States. We know also that while Al Qaeda’s core is degraded, it is a far more decentralized organization than it was ten years ago and relies on affiliates to carry out its terrorist aims. We know that Al Qaeda is likely to continue to metastasize and try to recruit affiliates to its cause.

These terrorist threats are increasingly complex and multifaceted, and defy easy labeling and categorization. Just within the last several months, we have seen terrorists who in my judgment:

- claim affiliations to more than one terrorist organization.
- belong to one terrorist organization and serve as the conduit to another.
- fit within our military detention authority but not our military commissions’ jurisdiction.

- fit within our military commissions' jurisdiction but not the military detention authority stemming from the 2001 Authorization for the Use of Military Force.
- fit within neither our military detention authority nor our commissions' jurisdiction, but can be prosecuted in our federal civilian courts.

On top of this are Al Qaeda's concerted efforts to recruit via the Internet, with a reach into the United States. Over and over again, we see individuals within the United States who self-radicalize and who find vindication for their hatred toward America in Al Qaeda's ideology and propaganda. In dealing with this category of people who are here in the United States—who have never trained at an Al Qaeda camp in Afghanistan or never sworn *bayat* [allegiance] to an Al Qaeda leader—we must guard against any impulse to label that person part of the congressionally declared enemy, to be dealt with by military force. There is no jurisdiction to try US citizens in military commissions, and our prior efforts in this conflict to put into military detention those arrested on US soil led to protracted litigation in which the government narrowly prevailed in the federal appellate courts.

As I said before, the military cannot always be the first and only answer. This is contrary to our heritage and, in the long run, will undermine our overall counterterrorism efforts.

In responding to threats and acts of terrorism, we must build a legally sustainable arsenal and have all the legally available tools in the arsenal—whether it is lethal force against a valid military objective, military detention, interrogation, supporting the counterterrorism efforts of other nations, or prosecution in federal court or by military commissions.

Against this backdrop, we confront a series of laws and pending legislation concerning detainees that limit the executive branch's and the military's counterterrorism options, complicate our efforts

to achieve continued success, and will make military detention more controversial, not less. Here are some specific examples:

Section 1032 of the 2011 Defense Authorization Act prohibits the use of Defense Department funds to transfer any Guantánamo detainee to the United States for any conceivable purpose, no waivers or exceptions, including federal prosecution or to be a cooperating witness in a federal prosecution. Given the lengthy prison sentences mandated by Title 18 and the sentencing guidelines and the range of offenses available for prosecution under Title 18, there are some instances in which it is simply preferable and more effective to prosecute an individual in our federal civilian courts.

Section 1033 of the same law requires that, before the government can transfer a Guantánamo detainee to a foreign country, my client, the secretary of defense, must personally certify to the Congress certain things about the detainee and the transferee country, unless there is a court order directing the detainee's release. After living with this provision now for almost a year, I will tell you that it is onerous and nearly impossible to satisfy. Not one Guantánamo detainee has been certified for transfer since this legal restriction has been imposed.

Rigid certification requirements reduce our ability to pursue the best options for national security in an evolving world situation and intrude upon the executive branch's traditional ability to conduct foreign policy—in this case, to determine when sending a detainee to another country for prosecution or reintegration would better serve our national security and foreign policy interests. Our nation is not the only one on Earth that can deal effectively with this issue. The other potential consequence of such a rigid certification requirement is that it incentivizes the executive branch to leave to the courts the hard work of determining who can and should remain at Guantánamo. We want the courts less involved in this business, not more.

Certain legislative proposals for the 2012 Defense Authorization Act are equally problematic.

Section 1039 of the House version of the bill prohibits the use of Department of Defense funds to transfer to the United States any non-US citizen the military captures anywhere in the world as part of the conflict against Al Qaeda and its affiliates—no waivers or exceptions. Within the national security community of the executive branch, we have determined that such an unqualified, across-the-board ban is not in the best interests of national security. Suppose the military captures a dangerous terrorist and doubts arise about our detention authority overseas? Suppose the military captures an individual who, it turns out, would be vital as a cooperating witness in a terrorist prosecution in the United States? Must the option to bring these individuals to a civilian courtroom in the United States be prohibited by law?

Likewise, Section 1046 of the House bill imposes an across-the-board requirement that, if military commissions' jurisdiction exists to prosecute an individual, we must use commissions, not the federal courts, for the prosecution of a broad range of terrorist acts. Decisions about the most appropriate forum in which to prosecute a terrorist should be left, case-by-case, to prosecutors and national security professionals. The considerations that go into those decisions include the offenses available in both systems for prosecuting a particular course of conduct, the weight and nature of the evidence, and the likely prison sentence that would result if there is a conviction. A flat legislative ban on the use of one system—whether it is commissions or the civilian courts—in favor of the other is not the answer.

Section 1036 of the House bill rewrites the periodic review process the president's national security team carefully crafted for Guantánamo detainees designated for continued law-of-war detention. The proposed congressional rewrite mandates the use of "military review panels," contrary to our best judgment. Our experience shows that interagency review is valuable and preferred, to take

advantage of the expertise and perspectives across the national security community in our government.

Finally, Section 1032 of the Senate version of the 2012 Defense Authorization bill includes what has come to be known as the “mandatory military custody” provision. Basically, it requires that certain members of Al Qaeda or its affiliates “be held in military custody pending disposition under the law of war” unless the secretary of defense, in writing, agrees to give them up.

For starters, the trigger for this requirement is unclear. Some of my friends on the Hill say that the provision is intended to apply only to those who have been “captured in the course of hostilities.” Read literally, the provision extends to individuals wherever they are taken into custody or brought under the control of the United States, who fit within our definition of an enemy combatant in the conflict against Al Qaeda and its affiliates—including those arrested in the United States by first responders in law enforcement. This would include an individual who, in the midst of an interrogation by an FBI or TSA officer at an airport, admits he is part of Al Qaeda. Must the agent stop a very revealing and productive interrogation and go call the Army to take the suspect away?

On top of all that, the provision adds that the individual must be a member or part of Al Qaeda or an “affiliated entity.” While we use the phrase “Al Qaeda and its affiliates” publicly to describe the contours of the conflict in non-legal terms, the term “affiliated entity” has no accepted legal meaning and has never been tested in court. Likewise, the phrase in the bill “a participant in the course of planning or carrying out an attack against the United States” has never been tested in court.

For this and future administrations, we will oppose efforts to make military detention more controversial and restrict the executive branch’s flexibility to pursue our counterterrorism mission. The executive branch, regardless of the administration in power, needs the

flexibility, case-by-case, to make well-informed decisions about the best way to capture, detain, and bring to justice suspected terrorists.

The conflict against Al Qaeda is complex and multifaceted. Congress must be careful not to micromanage, complicate, and impose across-the-board limits on our options. Both the Congress and the executive branch must be careful not to impose rules that make military detention more controversial, not less.

...

Appendix: Johnson–B

*Jeh C. Johnson, general counsel,
Department of Defense, “National Security Law,
Lawyers, and Lawyering in the Obama Administration,”
address at Yale Law School, February 22, 2012*

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

We have focused our efforts on Al Qaeda and put that group on a path to defeat. We found bin Laden. Scores of other senior members of Al Qaeda have been killed or captured. We have taken the fight to Al Qaeda: where they plot, where they meet, where they plan, and where they train to export terrorism to the United States. Though the fight against Al Qaeda is not over, and multiple arms of our government remain vigilant in the effort to hunt down those who want to do harm to Americans, counterterrorism experts state publicly that Al Qaeda senior leadership is today severely crippled and degraded.

Thanks to the extraordinary sacrifices of our men and women in uniform, we have responsibly ended the combat mission in Iraq.

We are making significant progress in Afghanistan and have begun a transition to Afghan-led responsibility for security there.

We have applied the standards of the Army Field Manual to all interrogations conducted by the federal government in the context of armed conflict.

We worked with the Congress to bring about a number of reforms to military commissions, reflected in the Military Commissions Act of 2009 and the new Manual for Military Commissions. By law, use of statements obtained by cruel, inhuman, and degrading treatment—what was once the most controversial aspect of military commissions—is now prohibited.

We are working to make that system a more transparent one by reforming the rules for press access to military commissions' proceedings [and by] establishing closed-circuit TV and a new public website for the commissions system.

We have ended “don't ask, don't tell,” which I discussed last time I was here.

Finally, we have, in these times of fiscal austerity, embarked upon a plan to transform the military to a more agile, flexible, rapidly deployable, and technologically advanced force that involves reducing the size of the active duty Army and Marine Corps, and the defense budget by \$487 billion over ten years.

Perhaps the best part of my job is I work in the national security field with, truly, some of the best and brightest lawyers in the country. In this illustrious and credentialed group, I often ask myself, “How did I get here?”

Many in this group are graduates of this law school: my special assistant and Navy reservist Brodi Kemp, who is here with me today (class of '04); Caroline Krass at OLC [Office of Legal Counsel] (class of '93); Dan Koffsky at OLC (class of '78); Marty Lederman, formerly of OLC (class of '88); Greg Craig, the former White House counsel (class of '72); Bob Litt, general counsel of ODNI [Office of the Director of National Intelligence] (class of '76); retired Marine Colonel Bill Lietzau (class of '89); Beth Brinkman at DOJ (class of '85);

Sarah Cleveland, formerly at State Legal (class of '92); David Pozen at State Legal (class of '08); Steve Pomper (class of '93); and my deputy, Bob Easton (class of '90). I also benefit from working with a number of Yale law students as part of my office's internship and externship programs.

Last but not least: your former dean. Like many in this room, I count myself a student of Harold Koh's. Within the administration, Harold often reminds us of many of the things Barack Obama campaigned on in 2007–08. As I wrote these remarks, I asked myself to settle on the one theme from the 2008 campaign that best represents what Harold has carried forward in his position as lawyer for the State Department. The answer was easy: "The United States must lead by the power of our example and not by the example of our power."

There have been press reports that, occasionally, Harold and I, and other lawyers within the Obama administration, disagree from time to time on national security legal issues. I confess this is true, but it is also true that we actually agree on issues most of the time.

The public should be reassured, not alarmed, to learn there is occasional disagreement and debate among lawyers within the executive branch of government.

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

awkward, but I'll never forget what Mayor Bloomberg said to us: "If you guys always agree, somebody's not doing their job."

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

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

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

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

Just before becoming president, Barack Obama told his transition team that the rule of law should be one of the cornerstones of national security in his administration. In retrospect, I believe that President Obama made a conscious decision three years ago to bring in to his administration a group of strong lawyers who would reflect

differing points of view. And, though it has made us all work a lot harder, I believe that over the last three years the president has benefited from healthy and robust debate among the lawyers on his national security team, which has resulted in carefully delineated, pragmatic, credible, and sustainable judgments on some very difficult legal issues in the counterterrorism realm—judgments that, for the most part, are being accepted within the mainstream legal community and the courts.

Tonight I want to summarize for you, in this one speech, some of the basic legal principles that form the basis for the US military's counterterrorism efforts against Al Qaeda and its associated forces. These are principles with which the top national security lawyers in our administration broadly agree. My comments are general in nature about the US military's legal authority, and I do not comment on any operation in particular.

First: in the conflict against an *unconventional* enemy such as Al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of statutory construction. Put another way, we must not make it up to suit the moment.

Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy, and invite challenge. As I told the Heritage Foundation last October, over-reaching with military power can result in national security setbacks, not gains. Particularly when we attempt to extend the reach of the military onto US soil, the courts resist, consistent with our core values and our American heritage—reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the

military as a posse comitatus unless expressly authorized by Congress or the Constitution.

Second: in the conflict against Al Qaeda and associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the Use of Military Force passed by the Congress one week after 9/11. The AUMF, as it is often called, is Congress's authorization to the president to "... use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

Ten years later, the AUMF remains on the books, and it is still a viable authorization today. In the detention context, we in the Obama administration have interpreted this authority to include "... those persons who were part of, or substantially supported, Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."

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

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

Nor is the concept of an “associated force” an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context, and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as Al Qaeda has, over the last ten years, become more decentralized, and relies more on associates to carry out its terrorist aims.

An “associated force,” as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside Al Qaeda and (2) is a co-belligerent with Al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with Al Qaeda; it must have also entered the fight against the United States or its coalition partners. Thus, an “associated force” is not any terrorist group in the world that merely embraces the Al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.

Third: there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the “hot” battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11 attacks—Al Qaeda and the Taliban—without a geographic limitation.

The legal point is important because, in fact, over the last ten years Al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.

However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe we are in any “global war on terror” or that we can use military force whenever we want, wherever we want. International legal principles, including respect for a state’s sovereignty and the laws of war, impose important limits on our ability

to act unilaterally and on the way in which we can use force in foreign territories.

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

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

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

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

Sixth: contrary to the view of some, targeting decisions are not appropriate for submission to a court. In my view, they are core functions of the executive branch and often require real-time decisions based on an evolving intelligence picture that only the executive branch may timely possess. I agree with Judge [John D.] Bates of the federal district court in Washington, who ruled in 2010 that the judicial branch of government is simply not equipped to become involved in targeting decisions.

As I stated earlier in this address, within the executive branch the views and opinions of the lawyers on the president’s national security team are debated and heavily scrutinized, and a legal review of the application of lethal force is the weightiest judgment a lawyer can make. (And, when these judgments start to become easy, it is time for me to return to private law practice.)

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

Appendix: Johnson–C

*Jeh C. Johnson, general counsel,
Department of Defense, “The Conflict against
Al Qaeda and Its Affiliates: How Will It End?”
Oxford Union, Oxford University, November 30, 2012*

...

It is the US military’s efforts against Al Qaeda and associated forces that has demanded most of my time, generated much public legal commentary, and presented for us what are perhaps the weightiest legal issues in national security. It is the topic I will spend the balance of my remarks on tonight.

The US government is in an armed conflict against Al Qaeda and associated forces, to which the laws of armed conflict apply. One week after 9/11, our Congress authorized our president “to use all necessary and appropriate force” against those nations, organizations, and individuals responsible for 9/11. President Obama, like President Bush before him, as commander-in-chief of our armed forces, has acted militarily based on that authorization. In 2006, our Supreme Court also endorsed the view that the United States is in an armed conflict with Al Qaeda. Therefore, all three branches of the United States government—including the two political branches elected by the people and the judicial branch appointed for life (and therefore not subject to the whims and political pressures of the voters)—have endorsed the view that our efforts against Al Qaeda may properly be viewed as an armed conflict.

But, for the United States, this is a new kind of war. It is an unconventional war against an unconventional enemy. And, given its unconventional nature, President Obama—himself a lawyer and a good one—has insisted that our efforts in pursuit of this enemy stay firmly rooted in *conventional* legal principles. For, in our efforts to destroy and dismantle Al Qaeda, we cannot dismantle our laws and our values, too.

The danger of Al Qaeda is well known. It is a terrorist organization determined to commit acts of violence against innocent civilians. The danger of *the conflict* against Al Qaeda is that it lacks conventional boundaries, against an enemy that does not observe the rules of armed conflict, does not wear a uniform, and can resemble a civilian.

But we refuse to allow this enemy, with its contemptible tactics, to define the way in which we wage war. Our efforts remain grounded in the rule of law. In this *unconventional* conflict, therefore, we apply *conventional* legal principles—conventional legal principles found in treaties and customary international law.

As in armed conflict, we have been clear in defining the enemy and defining our objective against that enemy.

We have made clear that we are not at war with an idea, a religion, or a tactic. We are at war with an organized, armed group—a group determined to kill innocent civilians.

We have publicly stated that our enemy consists of those persons who are part of the Taliban, Al Qaeda, or associated forces, a declaration that has been embraced by two US presidents, accepted by our courts, and affirmed by our Congress.

We have publicly defined an “associated force” as having two characteristics: (1) an organized, armed group that has entered the fight alongside Al Qaeda, and (2) is a co-belligerent with Al Qaeda in hostilities against the United States or its coalition partners.

Our enemy does not include anyone solely in the category of activist, journalist, or propagandist.

Nor does our enemy in this armed conflict include a “lone wolf” who, inspired by Al Qaeda’s ideology, *self-radicalizes* in the basement of his own home, without ever actually becoming part of Al Qaeda. Such persons are dangerous, but are a matter for civilian law enforcement, not the military, because they are not part of the enemy force.

And we have publicly stated that our goal in this conflict is to “disrupt, dismantle, and ensure a lasting defeat of Al Qaeda and violent extremist affiliates.”

Some legal scholars and commentators in our country brand the detention by the military of members of Al Qaeda as “indefinite detention without charges.” Some refer to targeted lethal force against known, identified individual members of Al Qaeda as “extra-judicial killing.”

Viewed within the context of law enforcement or criminal justice, where no person is sentenced to death or prison without an indictment, an arraignment, and a trial before an impartial judge or jury, these characterizations might be understandable.

Viewed within the context of conventional armed conflict—as they should be—capture, detention, and lethal force are traditional practices as old as armies. Capture and detention by the military are part and parcel of armed conflict. We employ weapons of war against Al Qaeda, but in a manner consistent with the law of war. We employ lethal force, but in a manner consistent with the law-of-war principles of proportionality, necessity, and distinction. We detain those who are part of Al Qaeda, but in a manner consistent with Common Article 3 of the Geneva Conventions and all other applicable law.

But, now that efforts by the US military against Al Qaeda are in their twelfth year, we must also ask ourselves: how will this conflict end? It is an unconventional conflict, against an unconventional enemy, and will not end in conventional terms.

Conventional conflicts in history tend to have had conventional endings.

Two hundred years ago, our two nations fought the War of 1812. The United States lost many battles, Washington, D.C., was captured, and the White House was set ablaze. By the winter of 1814 British and American forces had strengthened their forts and fleets and assumed that fighting would resume between them in the spring. But the war ended when British and American diplomats in Belgium came to a peace agreement on December 24, 1814. Diplomats from both sides then joined together in a Christmas celebration at Ghent Cathedral. Less than eight weeks later, the US Senate provided advice and consent to that peace treaty, which for the United States legally and formally terminated the conflict.

In the American Civil War, the Battle of Appomattox was the final engagement of Confederate General Robert E. Lee's great Army of Northern Virginia, and one of the last battles of that war. After four years of war, General Lee recognized that "[i]t would be useless and therefore cruel to provoke the further effusion of blood." Three days later the Army of Northern Virginia surrendered. Lee's army then marched to the field in front of Appomattox Court House and, division by division, deployed into line, stacked their arms, folded their colors, and walked home empty-handed.

The last day of the First World War was November 11, 1918, when an armistice was signed at 5:00 a.m. in a railroad carriage in France, and a cease-fire took effect on the eleventh hour of the eleventh day of the eleventh month of 1918.

The Second World War concluded in the Pacific theater in August 1945 with a ceremony that took place on the deck of the *USS Missouri*.

During the Gulf War of 1991, one week after Saddam Hussein's forces set fire to oil wells as they were driven out of Kuwait, US General [Norman] Schwarzkopf sat down with Iraqi military leaders under a tent in a stretch of the occupied Iraqi desert a few miles from the Kuwaiti border. General Schwarzkopf wanted to keep discussions simple; he told his advisers: "I just want to get my soldiers home

as fast as possible . . . I want no ceremonies, no handshakes.” In the space of two hours they had negotiated the terms of a permanent cease-fire to end the First Gulf War.

We cannot and should not expect Al Qaeda and its associated forces to all surrender, to all lay down their weapons in an open field, or to sign a peace treaty with us. They are terrorist organizations. Nor can we capture or kill every last terrorist who claims an affiliation with Al Qaeda.

I am aware of studies that suggest that many “terrorist” organizations eventually denounce terrorism and violence, and seek to address their grievances through some form of reconciliation or participation in a political process.

Al Qaeda is *not* in that category.

Al Qaeda’s radical and absurd goals have included global domination through a violent Islamic caliphate, terrorizing the United States and other Western nations [into] retreating from the world stage, and the destruction of Israel. There is no compromise or political bargain that can be struck with those who pursue such aims.

In the current conflict with Al Qaeda, I can offer no prediction about *when* this conflict will end or whether we are, as Winston Churchill described it, near the “beginning of the end.”

I do believe that on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of Al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that Al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.

At that point, we must be able to say to ourselves that our efforts should no longer be considered an “armed conflict” against Al Qaeda and its associated forces. Rather, [we have] a counterterrorism effort against *individuals* who are the scattered remnants of Al Qaeda, or are parts of groups unaffiliated with Al Qaeda, for which the law

enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community—with our military assets available in reserve to address continuing and imminent terrorist threats.

At that point we will also need to face the question of what to do with any members of Al Qaeda who still remain in US military detention without a criminal conviction and sentence. In general, the military's authority to detain ends with the "cessation of active hostilities." For this particular conflict, all I can say today is that we should look to conventional legal principles to supply the answer and that both our nations faced similar challenging questions after the cessation of hostilities in World War II and our governments delayed the release of some Nazi German prisoners of war.

For now, we must continue our efforts to disrupt, dismantle, and ensure a lasting defeat of Al Qaeda. Though severely degraded, Al Qaeda remains a threat to the citizens of the United States, the United Kingdom, and other nations. We must disrupt Al Qaeda's terrorist attack planning before it gets anywhere near our homeland or our citizens. We must counter Al Qaeda in the places where it seeks to establish safe haven and prevent it from reconstituting in others. To do this we must utilize every national security element of our government and work closely with our friends and allies like the United Kingdom and others.

Finally, it was a war-fighting four-star general who reminded me, as I previewed these remarks for him, that none of this will ever be possible if we fail to understand and address what attracts a young man to an organization like Al Qaeda in the first place. Al Qaeda claims to represent the interests of all Muslims. By word and deed, we must stand with the millions of people within the Muslim world who reject Al Qaeda as a marginalized, extreme, and violent organization that does *not* represent the Muslim values of peace and brotherhood. For, if Al Qaeda can recruit new terrorists to its cause faster than we can kill or capture them, we fight an endless, hopeless battle

that only perpetuates a downward spiral of hate, recrimination, violence, and fear.

“War” must be regarded as a finite, extraordinary, and unnatural state of affairs. War permits one man—if he is a “privileged belligerent,” consistent with the laws of war—to kill another. War violates the natural order of things, in which children bury their parents; in war, parents bury their children. In its twelfth year, we must not accept the current conflict, and all that it entails, as the “new normal.” Peace must be regarded as the norm toward which the human race continually strives.

Right here at Oxford you have the excellent work of the Changing Character of War program: leading scholars committed to the study of war, who have observed that analyzing war in terms of a continuum of armed conflict—where military force is used at various points without a distinct break between war and peace—is counterproductive. Such an approach, they argue, results in an erosion of “any demarcation between war and peace,” the very effect of which is to create uncertainty about how to define war itself.

I did not go to Oxford. I am a graduate of a small, all-male historically black college in the southern part of the United States, Morehouse College. The guiding light for every Morehouse man is our most famous alumnus, Martin Luther King, who preached the inherent insanity of all wars. I am therefore a student and disciple of Dr. King—though I became an imperfect one the first time I gave legal approval for the use of military force. I accepted this conundrum when I took this job. But I still carry with me the words from Dr. King: “Returning hate for hate multiplies hate, adding deeper darkness to a night already devoid of stars . . . violence multiplies violence, and toughness multiplies toughness in a descending spiral of destruction . . . The chain reaction of evil—hate begetting hate, wars producing more wars—must be broken, or we shall be plunged into the dark abyss of annihilation.”

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Appendix: Holder–A

*Eric Holder, Attorney General, Department of Justice,
Address at Northwestern University School of Law,
March 5, 2012*

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Since this country's earliest days, the American people have risen to this challenge—and all that it demands. But, as we have seen—and as President John F. Kennedy may have described best—“In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger.”

Half a century has passed since those words were spoken, but our nation today confronts grave national security threats that demand our constant attention and steadfast commitment. It is clear that, once again, we have reached an “hour of danger.”

We are a nation at war. And, in this war, we face a nimble and determined enemy that cannot be underestimated.

Like President Obama—and my fellow members of his national security team—I begin each day with a briefing on the latest and most urgent threats made against us in the preceding twenty-four hours. And, like scores of attorneys and agents at the Justice Department, I go to sleep each night thinking of how best to keep our people safe.

I know that—more than a decade after the September 11 attacks and despite our recent national security successes, including the operation that brought to justice Osama bin Laden last year—there

are people currently plotting to murder Americans, who reside in distant countries as well as within our own borders. Disrupting and preventing these plots—and using every available and appropriate tool to keep the American people safe—has been, and will remain, this administration’s top priority.

But just as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution—and must always be consistent with statutes, court precedent, the rule of law, and our founding ideals. Not only is this the right thing to do—history has shown that it is also the most effective approach we can take in combating those who seek to do us harm.

This is not just my view. My judgment is shared by senior national security officials across the government. As the president reminded us in 2009 at the National Archives where our founding documents are housed, “We uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset . . .” Our history proves this. We do not have to choose between security and liberty—and we will not.

Today, I want to tell you about the collaboration across the government that defines and distinguishes this administration’s national security efforts. I also want to discuss some of the legal principles that guide—and strengthen—this work as well as the special role of the Department of Justice in protecting the American people and upholding the Constitution.

Before 9/11, today’s level of interagency cooperation was not commonplace. In many ways, government lacked the infrastructure—as well as the imperative—to share national security information quickly and effectively. Domestic law enforcement and foreign intelligence operated in largely independent spheres. But those who attacked us on September 11 chose both military and civilian targets. They crossed borders and jurisdictional lines. And it immediately

became clear that no single agency could address these threats because no single agency has all of the necessary tools.

To counter this enemy aggressively and intelligently, the government had to draw on all of its resources and radically update its operations. As a result, today, government agencies are better positioned to work together to address a range of emerging national security threats. Now, the lawyers, agents, and analysts at the Department of Justice work closely with our colleagues across the national security community to detect and disrupt terrorist plots, to prosecute suspected terrorists, and to identify and implement the legal tools necessary to keep the American people safe. Unfortunately, the fact and extent of this cooperation are often overlooked in the public debate—but it's something that this administration, and the previous one, can be proud of.

As part of this coordinated effort, the Justice Department plays a key role in conducting oversight to ensure that the intelligence community's activities remain in compliance with the law and with the Foreign Intelligence Surveillance Court, in authorizing surveillance to investigate suspected terrorists. We must—and will continue to—use the intelligence-gathering capabilities that Congress has provided to collect information that can save and protect American lives. At the same time, these tools must be subject to appropriate checks and balances—including oversight by Congress and the courts, as well as within the Executive Branch—to protect the privacy and civil rights of innocent individuals. This administration is committed to making sure that our surveillance programs appropriately reflect all of these interests.

Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the attorney general and the director of national intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the

government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security. But the government may not use this authority intentionally to target a US person, here or abroad, or anyone known to be in the United States.

The law requires special procedures, reviewed and approved by the Foreign Intelligence Surveillance Court, to make sure that these restrictions are followed and to protect the privacy of any US persons whose non-public information may be incidentally acquired through this program. The Department of Justice and the Office of the Director of National Intelligence conduct extensive oversight reviews of section 702 activities at least once every sixty days, and we report to Congress on implementation and compliance twice a year. This law therefore establishes a comprehensive regime of oversight by all three branches of government. Reauthorizing this authority before it expires at the end of this year is the top legislative priority of the intelligence community.

But surveillance is only the first of many complex issues we must navigate. Once a suspected terrorist is captured, a decision must be made as to how to proceed with that individual in order to identify the disposition that best serves the interests of the American people and the security of this nation.

Much has been made of the distinction between our federal civilian courts and revised military commissions. The reality is that both incorporate fundamental due process and other protections that are essential to the effective administration of justice—and we should not deprive ourselves of any tool in our fight against Al Qaeda.

Our criminal justice system is renowned not only for its fair process; it is respected for its results. We are not the first administration to rely on federal courts to prosecute terrorists, nor will we be the last. Although far too many choose to ignore this fact, the previous administration consistently relied on criminal prosecutions in federal court to bring terrorists to justice. John Walker Lindh, attempted shoe bomber Richard Reid, and 9/11 conspirator Zacarias

Moussaoui were among the hundreds of defendants convicted of terrorism-related offenses—without political controversy—during the last administration.

Over the past three years, we've built a remarkable record of success in terror prosecutions. For example, in October we secured a conviction against Umar Farouk Abdulmutallab for his role in the attempted bombing of an airplane traveling from Amsterdam to Detroit on Christmas Day 2009. He was sentenced last month to life in prison without the possibility of parole. While in custody, he provided significant intelligence during debriefing sessions with the FBI. He described in detail how he became inspired to carry out an act of jihad and how he traveled to Yemen and made contact with Anwar al-Awlaki, a US citizen and a leader of Al Qaeda in the Arabian Peninsula. Abdulmutallab also detailed the training he received as well as Awlaki's specific instructions to wait until the airplane was over the United States before detonating his bomb.

In addition to Abdulmutallab, Faizal Shahzad, the attempted Times Square bomber; Ahmed Ghailani, a conspirator in the 1998 US embassy bombings in Kenya and Tanzania; and three individuals who plotted an attack against John F. Kennedy Airport in 2007 have also recently begun serving life sentences. And convictions have been obtained in the cases of several homegrown extremists, as well. For example, last year, United States citizen and North Carolina resident Daniel Boyd pleaded guilty to conspiracy to provide material support to terrorists and conspiracy to murder, kidnap, maim, and injure persons abroad; and US citizen and Illinois resident Michael Finton pleaded guilty to attempted use of a weapon of mass destruction in connection with his efforts to detonate a truck bomb outside of a federal courthouse.

I could go on—which is why the calls that I've heard to ban the use of civilian courts in prosecutions of terrorism-related activity are so baffling and, ultimately, are so dangerous. These calls ignore reality. And if heeded, they would significantly weaken—in fact, they would

cripple—our ability to incapacitate and punish those who attempt to do us harm.

Simply put, since 9/11, hundreds of individuals have been convicted of terrorism or terrorism-related offenses in Article III courts and are now serving long sentences in federal prison. Not one has ever escaped custody. No judicial district has suffered any kind of retaliatory attack. These are facts, not opinions. There are not two sides to this story. Those who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion—they are simply wrong.

But federal courts are not our only option. Military commissions are also appropriate in proper circumstances, and we can use them as well to convict terrorists and disrupt their plots. This administration's approach has been to ensure that the military commissions system is as effective as possible, in part by strengthening the procedural protections on which the commissions are based. With the president's leadership and the bipartisan backing of Congress, the Military Commissions Act of 2009 was enacted into law. And, since then, meaningful improvements have been implemented.

It's important to note that the reformed commissions draw from the same fundamental protections of a fair trial that underlie our civilian courts. They provide a presumption of innocence and require proof of guilt beyond a reasonable doubt. They afford the accused the right to counsel as well as the right to present evidence and cross-examine witnesses. They prohibit the use of statements obtained through torture or cruel, inhuman, or degrading treatment. And they secure the right to appeal to Article III judges—all the way to the United States Supreme Court. In addition, like our federal civilian courts, reformed commissions allow for the protection of sensitive sources and methods of intelligence gathering and for the safety and security of participants.

A key difference is that, in military commissions, evidentiary rules reflect the realities of the battlefield and of conducting investigations

in a war zone. For example, statements may be admissible even in the absence of *Miranda* warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle. But instead, a military judge must make other findings—for instance, that the statement is reliable and that it was made voluntarily.

I have faith in the framework and promise of our military commissions, which is why I've sent several cases to the reformed commissions for prosecution. There is, quite simply, no inherent contradiction between using military commissions in appropriate cases while still prosecuting other terrorists in civilian courts. Without question, there are differences between these systems that must be—and will continue to be—weighed carefully. Such decisions about how to prosecute suspected terrorists are core executive branch functions. In each case, prosecutors and counterterrorism professionals across the government conduct an intensive review of case-specific facts designed to determine which avenue of prosecution to pursue.

Several practical considerations affect the choice of forum.

First of all, the commissions only have jurisdiction to prosecute individuals who are a part of Al Qaeda, [who] have engaged in hostilities against the United States or its coalition partners, or have purposefully and materially supported such hostilities. This means that there may be members of certain terrorist groups who fall outside the jurisdiction of military commissions because, for example, they lack ties to Al Qaeda and their conduct does not otherwise make them subject to prosecution in this forum. Additionally, by statute, military commissions cannot be used to try US citizens.

Second, our civilian courts cover a much broader set of offenses than the military commissions, which can only prosecute specified offenses, including violations of the laws of war and other offenses traditionally triable by military commission. This means federal prosecutors have a wider range of tools that can be used to incapacitate suspected terrorists. Those charges, and the sentences they carry upon successful conviction, can provide important incentives to

reach plea agreements and convince defendants to cooperate with federal authorities.

Third, there is the issue of international cooperation. A number of countries have indicated that they will not cooperate with the United States in certain counterterrorism efforts—for instance, in providing evidence or extraditing suspects—if we intend to use that cooperation in pursuit of a military commission prosecution. Although the use of military commissions in the United States can be traced back to the early days of our nation, in their present form they are less familiar to the international community than our time-tested criminal justice system and Article III courts. However, it is my hope that, with time and experience, the reformed commissions will attain similar respect in the eyes of the world.

Where cases are selected for prosecution in military commissions, Justice Department investigators and prosecutors work closely to support our Department of Defense colleagues. Today, the alleged mastermind of the bombing of the *USS Cole* is being prosecuted before a military commission. I am proud to say that trial attorneys from the Department of Justice are working with military prosecutors on that case as well as others.

And we will continue to reject the false idea that we must choose between federal courts and military commissions, instead of using them both. If we were to fail to use all necessary and available tools at our disposal, we would undoubtedly fail in our fundamental duty to protect the nation and its people. That is simply not an outcome we can accept.

This administration has worked in other areas as well to ensure that counterterrorism professionals have the flexibility that they need to fulfill their critical responsibilities without diverging from our laws and our values. Last week brought the most recent step, when the president issued procedures under the National Defense Authorization Act. This legislation, which Congress passed in December,

mandated that a narrow category of Al Qaeda terrorist suspects be placed in temporary military custody.

Last Tuesday, the president exercised his authority under the statute to issue procedures to make sure that military custody will not disrupt ongoing law enforcement and intelligence operations—and that an individual will be transferred from civilian to military custody only after a thorough evaluation of his or her case, based on the considered judgment of the president’s senior national security team. As authorized by the statute, the president waived the requirements for several categories of individuals where he found that the waivers were in our national security interest. These procedures implement not only the language of the statute but also the expressed intent of the lead sponsors of this legislation. And they address the concerns the president expressed when he signed this bill into law at the end of last year.

Now, I realize I have gone into considerable detail about tools we use to identify suspected terrorists and to bring captured terrorists to justice. It is preferable to capture suspected terrorists where feasible—among other reasons, so that we can gather valuable intelligence from them. But we must also recognize that there are instances where our government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force.

This principle has long been established under both US and international law. In response to the attacks perpetrated—and the continuing threat posed—by Al Qaeda, the Taliban, and associated forces, Congress has authorized the president to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the president to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national

self-defense. None of this is changed by the fact that we are not in a conventional war.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts have limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, Al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.

This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.

Furthermore, it is entirely lawful—under both United States law and applicable law-of-war principles—to target specific senior operational leaders of Al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto—the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway—and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

Some have called such operations “assassinations.” They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the US government's use of lethal force in self-defense against a leader of Al Qaeda or an associated force who presents an imminent threat of violent attack

would not be unlawful—and therefore would not violate the executive order banning assassination or criminal statutes.

Now, it is an unfortunate but undeniable fact that some of the threats we face come from a small number of US citizens who have decided to commit violent attacks against their own country from abroad. Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during this current conflict, it's clear that US citizenship alone does not make such individuals immune from being targeted. But it does mean that the government must take into account all relevant constitutional considerations with respect to US citizens—even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment's due process clause, which says that the government may not deprive a citizen of his or her life without due process of law.

The Supreme Court has made clear that the due process clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. In cases arising under the due process clause—including in a case involving a US citizen captured in the conflict against Al Qaeda—the court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat.

Here, the interests on both sides of the scale are extraordinarily weighty. An individual's interest in making sure that the government does not target him erroneously could not be more significant. Yet it is imperative for the government to counter threats posed by senior operational leaders of Al Qaeda and to protect the innocent people whose lives could be lost in their attacks.

Any decision to use lethal force against a US citizen—even one intent on murdering Americans and who has become an operational

leader of Al Qaeda in a foreign land—is among the gravest that government leaders can face. The American people can be—and deserve to be—assured that actions taken in their defense are consistent with their values and their laws. So, although I cannot discuss or confirm any particular program or operation, I believe it is important to explain these legal principles publicly.

Let me be clear. An operation using lethal force in a foreign country, targeted against a US citizen who is a senior operational leader of Al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the US government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law-of-war principles.

The evaluation of whether an individual presents an “imminent threat” incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. As we learned on 9/11, Al Qaeda has demonstrated the ability to strike with little or no notice and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military—wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the president to delay action until some theoretical end-stage of planning when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail and that Americans would be killed.

Whether the capture of a US citizen-terrorist is feasible is a fact-specific and, potentially, time-sensitive question. It may depend on, among other things, whether capture can be accomplished in the

window of time available to prevent an attack and without undue risk to civilians or to US personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen-terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.

Of course, any such use of lethal force by the United States will comply with the four fundamental laws-of-war principles governing the use of force. The principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets—such as combatants, civilians directly participating in hostilities, and military objectives—may be targeted intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally, the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.

These principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations and that the risk of civilian casualties can be minimized or avoided altogether.

Some have argued that the president is required to get permission from a federal court before taking action against a US citizen who is a senior operational leader of Al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The conduct and management of national security operations are core functions of the executive branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments—all of which depend on expertise and immediate access

to information that only the executive branch may possess in real time. The Constitution's guarantee of due process is ironclad, and it is essential. But, as a recent court decision makes clear, it does not require judicial approval before the president may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war—even if that individual happens to be a US citizen.

That is not to say that the executive branch has—or should ever have—the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the executive branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against US citizens.

Now, these circumstances are sufficient under the Constitution for the United States to use lethal force against a US citizen abroad. But it is important to note that the legal requirements I have described may not apply in every situation—such as operations that take place on traditional battlefields.

The unfortunate reality is that our nation will likely continue to face terrorist threats that—at times—originate with our own citizens. When such individuals take up arms against this country and join Al Qaeda in plotting attacks designed to kill their fellow Americans, there may be only one realistic and appropriate response. We must take steps to stop them—in full accordance with the Constitution. In this hour of danger, we simply cannot afford to wait until deadly plans are carried out—and we will not.

This is an indicator of our times—not a departure from our laws and our values. For this administration—and for this nation—our values are clear. We must always look to them for answers when we face difficult questions, like the ones I have discussed today. As the president reminded us at the National Archives, “our Constitution has endured through secession and civil rights, through world war

and cold war, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way.”

Our most sacred principles and values—of security, justice, and liberty for all citizens—must continue to unite us, to guide us forward, and to help us build a future that honors our founding documents and advances our ongoing—uniquely American—pursuit of a safer, more just, and more perfect union. In the continuing effort to keep our people secure, this administration will remain true to those values that inspired our nation’s founding and, over the course of two centuries, have made America an example of strength and a beacon of justice for all the world. This is our pledge.

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Appendix: Preston–A

*Stephen W. Preston, general counsel,
Central Intelligence Agency, “CIA and the Rule of Law,”
address at Harvard Law School, April 10, 2012*

For those working at the confluence of law and national security, the president has made clear that ours is a nation of laws and that an abiding respect for the rule of law is one of our country’s greatest strengths, even against an enemy with only contempt for the law. This is so for the Central Intelligence Agency no less than any other instrument of national power engaged in the fight against Al Qaeda and its militant allies or otherwise seeking to protect the United States from foreign adversaries. And that is the central point of my remarks this afternoon: just as ours is a nation of laws, the CIA is an institution of laws and the rule of law is integral to agency operations.

Before we get to the rule of law, I want to spend a moment on the business of the CIA.

I will start off with two observations that I think are telling.

First, the number of significant national security issues facing our country may be as great today as it has ever been. Just think of what the president and his national security team confront every day: the ongoing threat of terrorist attack against the homeland and US interests abroad; war in Afghanistan and, until recently, Iraq; complex relations with countries like Pakistan and India; the challenges presented by Iran and North Korea; the emergence of China and its growing economic and military power; the growing number

of computer network attacks originating outside the United States; profound change in the most volatile area of the world, the greater Middle East, with new regimes in Tunisia, Egypt, and Libya, and continuing violence in Syria; the financial challenges faced by countries in the euro zone; and the violence associated with drug trafficking in this hemisphere. And the list could go on.

Second, the national security issues facing our country today tend to be intelligence-intensive. Intelligence is fundamental to the efforts of policymakers to come to grips with nearly all of the issues I have just listed—whether international terrorism, the proliferation of weapons of mass destruction, the conduct of non-state actors and rogue states outside the community of nations, cyber-security, or the rise of new powers. The nation’s leaders cannot fully understand these issues or make informed policy on these issues without first-rate intelligence.

Putting these two dynamics together—the multitude of different national security issues and the fact that intelligence is critical to almost all of them—it may be that intelligence has never been more important than it is today. At the very least, the intel business is booming.

So what does the CIA do? Our work boils down to three jobs. To quote from the National Security Act of 1947:

- Agency operators “collect intelligence through human sources and by other appropriate means.” This is also referred to as foreign intelligence collection or, at times, espionage.
- Agency analysts “correlate and evaluate intelligence related to the national security and provide appropriate dissemination of such intelligence.” This is also referred to as all-source analysis and national intelligence reporting, and it requires that the products of all intelligence disciplines be integrated.
- And the agency performs such other functions and duties as the president may direct, which may include activities to influence conditions abroad, “where it is intended that the role of

the US government will not be apparent or acknowledged publicly.” In other words, covert action.

If that is, in essence, the business of the CIA, what about the rule of law? And, in particular, why do I say that the rule of law is integral to agency operations? The answer is that all intelligence activities of the agency must be properly authorized pursuant to, and must be conducted in accordance with, the full body of national security law that has been put in place over the six-plus decades since the creation of the CIA. And all such activities are subject to strict internal and external scrutiny. This breaks down into three propositions.

First, all intelligence activities of the agency must be properly authorized pursuant to the law. In this respect, the constraints on the agency exceed those on virtually any organization in the private sector. A business enterprise is free to do whatever it wants in pursuit of profit, shareholder value, or what have you, provided it does not violate the proscriptions of positive law. By contrast, the CIA cannot do anything without an affirmative grant of legal authority to engage in that activity. In some cases, such as foreign intelligence collection, the grant may be broad; in others, such as covert action, the grant of authority might be quite narrow and specific, and subject to numerous conditions. In any event, before any step is taken, the threshold question asked when considering a contemplated activity is, do we have the legal authority to act?

Second, all intelligence activities of the agency must be conducted in accordance with the law. Assuming there is legal authority to act in the first place, all steps taken must comply with applicable prohibitions and limitations embodied in the United States Constitution, federal statutes, executive orders and other presidential directives, and agency regulations. To single out some of them:

- The First, Fourth, and Fifth amendments to the Constitution, which protect the rights of American citizens and certain others.

- The National Security Act of 1947 and the Central Intelligence Agency Act of 1949, which establish the CIA, define its missions, and delineate its role within the intelligence community—including the so-called law enforcement proviso, which bars the agency from exercising law enforcement powers or performing internal security functions.
- Executive Order 12333, attorney general–approved guidelines, and internal agency regulations, which contain a host of restrictions on intelligence activities in general and those of the CIA in particular, including the assassination ban in Executive Order 12333. These directives include numerous provisions intended to protect privacy and civil liberties, including a prohibition against collection in the United States for the purpose of acquiring information on the domestic activities of US persons; limitations on acquisition, retention, and use of information about US persons; conditions on arrangements with US institutions of higher learning; and conditions on unwitting use of US persons in intelligence activities and undisclosed participation in organizations in the United States.
- And, finally, the Foreign Intelligence Surveillance Act and the FISA Amendments Act, which govern certain activities in the nature of electronic surveillance and physical searches.

Beyond all these, international law principles may be applicable, as well, and I will come back to this later.

Third, all intelligence activities of the agency are subject to strict internal and external scrutiny.

It is true that a lot of what the CIA does is shielded from public view, and for good reason: much of what the CIA does is a secret! Secrecy is absolutely essential to a functioning intelligence service, and a functioning intelligence service is absolutely essential to national security, today no less than in the past. This is not lost on

the federal judiciary. The courts have long recognized the state secrets privilege and have consistently upheld its proper invocation to protect intelligence sources and methods from disclosure. Moreover, federal judges have dismissed cases on justiciability or political question grounds, acknowledging that the courts are, at times, institutionally ill-equipped and constitutionally incapable of reviewing national security decisions committed to the president and the political branches.

While public and judicial scrutiny may be limited in some respects, it simply does not follow that agency activities are immune from meaningful oversight. First, there is direct supervision by the National Security Council and the president, who, after all, not only is constitutionally responsible for keeping the American people safe but also “shall take Care that the Laws be faithfully executed.” Beyond that, consider this catalog of agency overseers:

- The intelligence oversight committees of the Senate and House of Representatives. We are bound by statute to ensure that these two committees are kept “fully and currently informed” with respect to the entire range of intelligence activities, including covert action. They are afforded visibility into agency operations that far exceeds the usual scope of congressional oversight of federal agencies. Think about this: during the last Congress, the agency made, on average, more than two written submissions and two live appearances per day, 365 days a year.
- The Foreign Intelligence Surveillance Court, comprised of Article III judges, provides judicial supervision with respect to certain activities in the nature of electronic surveillance and physical searches.
- The President’s Intelligence Advisory Board, an independent component of the Executive Office of the President, reviews and assesses the performance of the CIA and other elements of the intelligence community.

- The Intelligence Oversight Board is a committee of the President's Intelligence Advisory Board to which the CIA reports apparent legal violations and other significant or highly sensitive matters that could impugn the integrity of the intelligence community.
- The Office of the Director of National Intelligence and, new within the past year, the inspector general for the intelligence community.
- And the agency's own statutorily independent inspector general—the only other agency official, after the director and the general counsel, nominated by the president and confirmed by the Senate.
- Last, but by no means least, there is the US Department of Justice, to which the CIA is required to report all possible violations of federal criminal laws by employees, agents, liaison, or anyone else.

OK, I have described the legal regime in which CIA operates. Now I would like to illustrate how the law is applied in practice, by reference to a hypothetical case.

Suppose that the CIA is directed to engage in activities to influence conditions abroad, in which the hand of the US government is to remain hidden—in other words, covert action—and suppose that those activities may include the use of force, including lethal force. How would such a program be structured so as to ensure that it is entirely lawful? Approaches will, of course, vary depending on the circumstances—there is no single, cookie-cutter approach—but I conceive of the task in terms of a very simple matrix. First is the issue of whether there is legal authority to act in the first place. Second, there is the issue of compliance with the law in carrying out the action. For each of these issues, we would look first and foremost to US law. But we would also look to international law principles. So envision a four-box matrix with “US law” and “inter-

national law” across the top and “authority to act” and “compliance in execution” down the side. With a thorough legal review directed at each of the four boxes, we would make certain that all potentially relevant law is properly considered in a systematic and comprehensive fashion.

Now, when I say “we,” I don’t mean to suggest that these judgments are confined to the agency. To the contrary, as the authority for covert action is ultimately the president’s, and covert action programs are carried out by the director and the agency at and subject to the president’s direction, agency counsel share their responsibilities with respect to any covert action with their counterparts at the National Security Council. When warranted by circumstances, we—CIA and NSC—may refer a legal issue to the Department of Justice. Or we may solicit input from our colleagues at the Office of the Director of National Intelligence, the Department of State, or the Department of Defense, as appropriate.

Getting back to my simple matrix . . .

(1) Let’s start with the first box: authority to act under US law.

First, we would confirm that the contemplated activity is authorized by the president in the exercise of his powers under Article II of the US Constitution, for example, the president’s responsibility as chief executive and commander-in-chief to protect the country from an imminent threat of violent attack. This would not be just a one-time check for legal authority at the outset. Our hypothetical program would be engineered so as to ensure that, through careful review and senior-level decision-making, each individual action is linked to the imminent threat justification.

A specific congressional authorization might also provide an independent basis for the use of force under US law.

In addition, we would make sure that the contemplated activity is authorized by the president in accordance with the covert action procedures of the National Security Act of 1947, such that Congress is properly notified by means of a presidential finding.

(2) Next we look at authority to act with reference to international law principles.

Here we need look no further than the inherent right of national self-defense, which is recognized by customary international law and, specifically, in Article 51 of the United Nations Charter. Where, for example, the United States has already been attacked, and its adversary has repeatedly sought to attack since then and is actively plotting to attack again, then the United States is entitled as a matter of national self-defense to use force to disrupt and prevent future attacks.

The existence of an armed conflict might also provide an additional justification for the use of force under international law.

(3) Let's move on to compliance in execution under US law.

First, we would make sure all actions taken comply with the terms dictated by the president in the applicable finding, which would likely contain specific limitations and conditions governing the use of force. We would also make sure all actions taken comply with any applicable executive order provisions, such as the prohibition against assassination in 12333. Beyond presidential directives, the National Security Act of 1947 provides, quote, “[a] Finding may not authorize any action that would violate the Constitution or any statute of the United States.” This crucial provision would be strictly applied in carrying out our hypothetical program.

In addition, the agency would have to discharge its obligation under the congressional notification provisions of the National Security Act to keep the intelligence oversight committees of Congress “fully and currently informed” of its activities. Picture a system of notifications and briefings—some verbal, others written; some periodic, others event-specific; some at a staff level, others for members.

(4) That leaves compliance in execution with reference to international law principles.

Here, the agency would implement its authorities in a manner consistent with the four basic principles in the law of armed conflict governing the use of force: necessity, distinction, proportionality, and

humanity. Great care would be taken in the planning and execution of actions to satisfy these four principles and, in the process, to minimize civilian casualties.

So there you have it: four boxes, each carefully considered with reference to the contemplated activity. That is how an agency program involving the use of lethal force would be structured so as to ensure that it satisfies applicable US and international law.

Switching gears, let us consider a real world case in point: the operation against Osama bin Laden in Abbottabad, Pakistan, on May 2 [local time]. My purpose is not to illustrate our hypothetical program, but to show that the rule of law reaches the most sensitive activities in which the agency is engaged.

The bin Laden operation was, of course, a critically important event in the fight against Al Qaeda. Much has been said and written about the operation in this regard, and I won't dwell on it now. Rather, I want to focus on the legal aspect of the operation. But if you will indulge me, there are a few other aspects of this historic event that warrant mention up front.

First, finding bin Laden was truly a triumph of intelligence. It's a long story—too long to tell here—but it begins nine years earlier, with the nom de guerre of an Al Qaeda courier. Through painstaking collection and analysis over several years, the agency and its partners in the intelligence community determined his true name. Finding the courier and then his residence in Abbottabad took another year of hard work. Instead of a small house from which the agency hoped to follow him to bin Laden, the Abbottabad compound suggested immediately the possibility that bin Laden was living there. Extraordinarily high walls, barbed wire, no telephone or Internet service, trash burned instead of put out for collection like everybody else's, children not going to school. Then we learned that an additional family matching the expected profile of bin Laden's family in flight was living at the compound, never left it, and was unknown to the neighbors. And we learned that the courier was, nine years later, still working for Al Qaeda.

It all added up—the only conclusion that made sense of it all was that bin Laden was there. But there was no positive ID.

Which leads to the next point: this was also an example of difficult and momentous presidential decision-making. There was strong circumstantial evidence that bin Laden was there, but not one iota of direct evidence. No eyes-on identification. And the risks and potential consequences of conducting an operation deep inside Pakistan were enormous, particularly if the operation failed. The president made a sound decision and, in my mind, a gutsy decision.

And, finally, the operation itself was a great triumph for our military. More dramatic than any work of fiction: the tension at the outset, the sickening feeling when one of the helos went down, the seeming eternity waiting to find out if the objective was achieved, and the relief when the last helo lifted off with the force unharmed. My hat's off to these Special Unit operators—incredibly professional. When the helo went down, they didn't skip a beat. They had trained for all contingencies and slipped right into Plan B. Then there's the guy first in the room with bin Laden. Charged by two young women. Trained to expect suicide bombers in these circumstances. He grabbed them, shoved them into a corner and threw himself on top of them, shielding them from the shooting and shielding the guys behind him from the blast if they detonated. His quick thinking, and raw bravery, saved two lives that did not have to end that night.

I am sure the role of the lawyers is not the first thought to come to mind when you think of the bin Laden operation. Admittedly, it may not be the most fascinating aspect, but it is illustrative of the careful attention to the law brought to bear on our country's most sensitive counterterrorism operations.

Because of the paramount importance of keeping the possibility that bin Laden had been located a secret and then of maintaining operational security as the Abbottabad raid was being planned, there were initially very few people in under the tent. So I cannot say the

operation was heavily lawyered, but I can tell you it was thoroughly lawyered. From a legal perspective, this was like other counterterrorism operations in some respects. In other respects, of course, it was extraordinary. What counsel concentrated on were the law-related issues that the decision-makers would have to decide, legal issues of which the decision-makers needed to be aware, and lesser issues that needed to be resolved. By the time the force was launched, the US government had determined with confidence that there was clear and ample authority for the use of force, including lethal force, under US and international law and that the operation would be conducted in complete accordance with applicable US and international legal restrictions and principles.

As a result, the operation against bin Laden was not only militarily successful and strategically important, but also fully consistent with all applicable law.

...

When I talk about CIA and the rule of law, I speak of the business of the agency and sometimes draw an analogy between the agency and a regulated business—a rule-bound and closely watched business at that. But I have to admit that the analogy is seriously flawed in at least one respect: the CIA is not a business enterprise. It is, of course, a secret intelligence service charged with protecting the United States against foreign adversaries. It operates at the very tip of the spear in the fight against Al Qaeda and its affiliates and adherents. The work of the CIA is not measured in dollars. Too often the measure is taken in lives lost—like the seven officers killed a little more than a year ago at a forward operating base in eastern Afghanistan and others whose stars consecrate our Memorial Wall. But the measure is also taken in lives saved, which are countless. As I stand before you, I am deeply grateful for what the good men and women who are the CIA do every day—literally, the sacrifices they make—to keep you and me, and our families, safe and secure. All of us should be.

...

Appendix: Brennan–A

John O. Brennan, assistant to the president for homeland security and counterterrorism, “Strengthening Our Security by Adhering to Our Values and Laws,” address at Harvard Law School, September 16, 2011

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Now, I am not a lawyer, despite Dan’s best efforts. I am the president’s senior adviser on counterterrorism and homeland security. And in this capacity—and during more than thirty years working in intelligence and on behalf of our nation’s security—I’ve developed a profound appreciation for the role that our values, especially the rule of law, play in keeping our country safe. It’s an appreciation, of course, understood by President Obama, who, as you may know, once spent a little time here. That’s what I want to talk about this evening—how we have strengthened, and continue to strengthen, our national security by adhering to our values and our laws.

Obviously, the death of Osama bin Laden marked a strategic milestone in our effort to defeat Al Qaeda. Unfortunately, bin Laden’s death and the death and capture of many other Al Qaeda leaders and operatives do not mark the end of that terrorist organization or its efforts to attack the United States and other countries. Indeed, Al Qaeda, its affiliates, and its adherents remain the preeminent security threat to our nation.

The core of Al Qaeda—its leadership based in Pakistan—though severely crippled, still retains the intent and capability to attack the

United States and our allies. Al Qaeda’s affiliates—in places like Pakistan, Yemen, and countries throughout Africa—carry out its murderous agenda. And Al Qaeda adherents—individuals, sometimes with little or no contact with the group itself—have succumbed to its hateful ideology and work to facilitate or conduct attacks here in the United States, as we saw in the tragedy at Fort Hood.

Guiding principles

In the face of this ongoing and evolving threat, the Obama administration has worked to establish a counterterrorism framework that has been effective in enhancing the security of our nation. This framework is guided by several core principles.

First, our highest priority is—and always will be—the safety and security of the American people. As President Obama has said, we have no greater responsibility as a government.

Second, we will use every lawful tool and authority at our disposal. No single agency or department has sole responsibility for this fight because no single department or agency possesses all the capabilities needed for this fight.

Third, we are pragmatic, not rigid or ideological—making decisions not based on preconceived notions about which action seems “stronger,” but based on what will actually enhance the security of this country and the safety of the American people. We address each threat and each circumstance in a way that best serves our national security interests, which includes building partnerships with countries around the world.

Fourth—and the principle that guides all our actions, foreign and domestic—we will uphold the core values that define us as Americans, and that includes adhering to the rule of law. And when I say “all our actions,” that includes covert actions, which we undertake under the authorities provided to us by Congress. President Obama has directed that all our actions—even when conducted out of public view—remain consistent with our laws and values.

For when we uphold the rule of law, governments around the globe are more likely to provide us with intelligence we need to disrupt ongoing plots, they're more likely to join us in taking swift and decisive action against terrorists, and they're more likely to turn over suspected terrorists who are plotting to attack us, along with the evidence needed to prosecute them.

When we uphold the rule of law, our counterterrorism tools are more likely to withstand the scrutiny of our courts, our allies, and the American people. And when we uphold the rule of law it provides a powerful alternative to the twisted worldview offered by Al Qaeda. Where terrorists offer injustice, disorder, and destruction, the United States and its allies stand for freedom, fairness, equality, hope, and opportunity.

In short, we must not cut corners by setting aside our values and flouting our laws, treating them like luxuries we cannot afford. Indeed, President Obama has made it clear: we must reject the false choice between our values and our security. We are constantly working to optimize both. Over the past two and a half years, we have put in place an approach—both here at home and abroad—that will enable this administration and its successors, in cooperation with key partners overseas, to deal with the threat from Al Qaeda, its affiliates, and its adherents in a forceful, effective, and lasting way.

In keeping with our guiding principles, the president's approach has been pragmatic—neither a wholesale overhaul nor a wholesale retention of past practices. Where the methods and tactics of the previous administration have proven effective and enhanced our security, we have maintained them. Where they did not, we have taken concrete steps to get us back on course.

Unfortunately, much of the debate around our counterterrorism policies has tended to obscure the extraordinary progress of the past few years. So with the time I have left, I want to touch on a few specific topics that illustrate how our adherence to the rule of law advances our national security.

Nature and geographic scope of the conflict

First, our definition of the conflict. As the president has said many times, we are at war with Al Qaeda. In an indisputable act of aggression, Al Qaeda attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, Al Qaeda seeks to attack us again. Our ongoing armed conflict with Al Qaeda stems from our right—recognized under international law—to self-defense.

An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against Al Qaeda as being restricted solely to “hot” battlefields like Afghanistan. Because we are engaged in an armed conflict with Al Qaeda, the United States takes the legal position that—in accordance with international law—we have the authority to take action against Al Qaeda and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.

That does not mean we can use military force whenever we want, wherever we want. International legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the “hot” battlefields. As such, they argue that, outside of these two active theaters, the United States can only act in self-defense against [members of] Al Qaeda when they are planning, engaging in, or threatening an armed attack against US interests if it amounts to an “imminent” threat.

In practice, the US approach to targeting in the conflict with Al Qaeda is far more aligned with our allies’ approach than many assume.

This administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of Al Qaeda and its associated forces. Practically speaking, then, the question turns principally on how you define “imminence.”

We are finding increasing recognition in the international community that a more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. After all, Al Qaeda does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an “imminent” attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.

The convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies—who, in ways public and private, take great risks to aid us in this fight. But their participation must be consistent with their laws, including their interpretation of international law. Again, we will never abdicate the security of the United States to a foreign country or refrain from taking action when appropriate. But we cannot ignore the reality that cooperative counterterrorism activities are a key to our national defense. The more our views and our allies' views on these questions converge, without constraining our flexibility, the safer we will be as a country.

Privacy and transparency at home

We've also worked to uphold our values and the rule of law in a second area: our policies and practices here at home. As I said, we will use all lawful tools at our disposal, and that includes authorities under the renewed Patriot Act. We firmly believe that our intelligence-gathering tools must enable us to collect the information we need to protect the American people. At the same time, these tools must be subject to appropriate oversight and rigorous checks and balances that protect the privacy of innocent individuals.

As such, we have ensured that investigative techniques in the United States are conducted in a manner that is consistent with our laws and subject to the supervision of our courts. We have also taken administrative steps to institute additional checks and balances, above and beyond what is required by law, in order to better safeguard the privacy rights of innocent Americans.

Our democratic values also include—and our national security demands—open and transparent government. Some information obviously needs to be protected. And since his first days in office, President Obama has worked to strike the proper balance between the security the American people deserve and the openness our democratic society expects.

In one of his first acts, the president issued a new executive order on classified information that, among other things, reestablished the principle that all classified information will ultimately be declassified. The president also issued a Freedom of Information Act Directive mandating that agencies adopt a presumption of disclosure when processing requests for information.

The president signed into law the first intelligence authorization act in over five years to ensure better oversight of intelligence activities. Among other things, the legislation revised the process for reporting sensitive intelligence activities to Congress and created an inspector general for the intelligence community.

For the first time, President Obama released the combined budget of the intelligence community and reconstituted the Intelligence Oversight Board, an important check on the government's intelligence activities. The president declassified and released legal memos that authorized the use, in early times, of enhanced interrogation techniques. Understanding that the reasons to keep those memos secret had evaporated, the president felt it was important for the American people to understand how those methods came to be authorized and used.

The president, through the attorney general, instituted a new process to consider invocation of the so-called “state secrets privilege,” where the government can protect information in civil lawsuits. This process ensures that this privilege is never used simply to hide embarrassing or unlawful government activities. But it also recognizes that its use is absolutely necessary in certain cases for the protection of national security. I know there has been some criticism of the administration on this. But by applying a stricter internal review process, including a requirement of personal approval by the attorney general, we are working to ensure that this extraordinary power is asserted only when there is a strong justification to do so.

Detention and interrogation

We've worked to uphold our values and the rule of law in a third area—the question of how to deal with terrorist suspects, including the significant challenge of how to handle suspected terrorists who were already in our custody when this administration took office. There are few places where the intersection of our counterterrorism efforts, our laws, and our values come together as starkly as they do at the prison at Guantánamo. By the time President Obama took office, Guantánamo was viewed internationally as a symbol of a counterterrorism approach that flouted our laws and strayed from our values, undercutting the perceived legitimacy—and therefore the effectiveness—of our efforts.

Aside from the false promises of enhanced security, the purported legality of depriving detainees of their rights was soundly and repeatedly rejected by our courts. It came as no surprise, then, that before 2009 few counterterrorism proposals generated as much bipartisan support as those to close Guantánamo. It was widely recognized that the costs associated with Guantánamo ran high, and the promised benefits never materialized.

That was why—as Dan knows so well—on one of his first days in office, President Obama issued the executive order to close the prison at Guantánamo. Yet, almost immediately, political support for closure waned. Over the last two years Congress has placed unprecedented restrictions on the discretion of our experienced counterterrorism professionals to prosecute and transfer individuals held at the prison. These restrictions prevent these professionals—who have carefully studied all of the available information in a particular situation—from exercising their best judgment as to what the most appropriate disposition is for each individual held there.

The Obama administration has made its views on this clear. The prison at Guantánamo Bay undermines our national security, and our nation will be more secure the day when that prison is finally and responsibly closed. For all of the reasons mentioned above, we will not send more individuals to the prison at Guantánamo. And we continue to urge Congress to repeal these restrictions and allow our experienced counterterrorism professionals to have the flexibility they need to make individualized, informed decisions about where to bring terrorists to justice and when and where to transfer those whom it is no longer in our interest to detain.

This administration also undertook an unprecedented review of our detention and interrogation practices and their evolution since 2001, and we have confronted squarely the question of how we will deal with those we arrest or capture in the future, including those we take custody of overseas. Nevertheless, some have suggested that we do not have a detention policy; that we prefer to kill suspected

terrorists, rather than capture them. This is absurd, and I want to take this opportunity to set the record straight.

As a former career intelligence professional, I have a profound appreciation for the value of intelligence. Intelligence disrupts terrorist plots and thwarts attacks. Intelligence saves lives. And one of our greatest sources of intelligence about Al Qaeda, its plans, and its intentions has been the members of its network who have been taken into custody by the United States and our partners overseas.

So I want to be very clear—whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people. This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this administration.

Now, there has been a great deal of debate about the best way to interrogate individuals in our custody. It's been suggested that getting terrorists to talk can be accomplished simply by withholding Miranda warnings or subjecting prisoners to so-called "enhanced interrogation techniques." It's also been suggested that prosecuting terrorists in our federal courts somehow impedes the collection of intelligence. A long record of experience, however, proves otherwise.

Consistent with our laws and our values, the president unequivocally banned torture and other abusive interrogation techniques, rejecting the claim that these are effective means of interrogation. Instead, we have focused on what works. The president approved the creation of a High-Value Detainee Interrogation Group, or HIG, to bring together resources from across the government—experienced interrogators, subject-matter experts, intelligence analysts, and linguists—to conduct or assist in the interrogation of those terrorists with the greatest intelligence value both at home and overseas. Through the HIG, we have brought together the capabilities that are essential to

effective interrogation and ensured they can be mobilized quickly and in a coordinated fashion.

Claims that Miranda warnings undermine intelligence collection ignore decades of experience to the contrary. Yes, some terrorism suspects have refused to provide information in the criminal justice system, but so have many individuals held in military custody, from Afghanistan to Guantánamo, where Miranda warnings were not given. What is undeniable is that many individuals in the criminal justice system have provided a great deal of information and intelligence—even after being given their Miranda warnings. The real danger is failing to give a *Miranda* warning in those circumstances where it's appropriate, which could well determine whether a terrorist is convicted and spends the rest of his life behind bars or is set free.

Moreover, the Supreme Court has recognized a limited exception to Miranda, allowing statements to be admitted if the unwarned interrogation was “reasonably prompted by a concern for public safety.” Applying this public safety exception to the more complex and diverse threat of international terrorism can be complicated, so our law enforcement officers require clarity.

Therefore, at the end of 2010, the FBI clarified its guidance to agents on use of the public safety exception to Miranda, explaining how it should apply to terrorism cases. The FBI has acknowledged that this exception was utilized last year, including during the questioning of Faisal Shahzad, accused of attempting to detonate a car bomb in Times Square. Just this week in a major terrorism case, a federal judge ruled that statements obtained under the public safety exception before the defendant was read his Miranda rights are, in fact, admissible at trial.

Some have argued that the United States should simply hold suspected terrorists in law-of-war detention indefinitely. It is worth remembering, however, that, for a variety of reasons, reliance upon military detention for individuals apprehended outside of Afghanistan and Iraq actually began to decline precipitously years before the Obama administration came into office.

In the years following the 9/11 attacks, our knowledge of the Al Qaeda network increased and our tools with which to bring them to justice in federal courts or reformed military commissions were strengthened, thus reducing the need for long-term law-of-war detention. In fact, from 2006 to the end of 2008, when the previous administration apprehended terrorists overseas and outside of Iraq and Afghanistan, it brought more of those individuals to the United States to be prosecuted in our federal courts than it placed in long-term military detention at Guantánamo.

Article III courts and reformed military commissions

When we succeed in capturing suspected terrorists who pose a threat to the American people, our other critical national security objective is to maintain a viable authority to keep those individuals behind bars. The strong preference of this administration is to accomplish that through prosecution, either in an Article III court or a reformed military commission. Our decisions on which system to use in a given case must be guided by the factual and legal complexities of each case, and relative strengths and weaknesses of each system. Otherwise, terrorists could be set free, intelligence lost, and lives put at risk.

That said, it is the firm position of the Obama administration that suspected terrorists arrested inside the United States will, in keeping with long-standing tradition, be processed through our Article III courts—as they should be. Our military does not patrol our streets or enforce our laws—nor should it.

This is not a radical idea, nor is the idea of prosecuting terrorists captured overseas in our Article III courts. Indeed, terrorists captured beyond our borders have been successfully prosecuted in our federal courts on many occasions. Our federal courts are time-tested, have unquestioned legitimacy, and, at least for the foreseeable future, are capable of producing a more predictable and sustainable result than military commissions. The previous administration successfully prosecuted hundreds of suspected terrorists in our federal courts, gathering

valuable intelligence from several of them that helped our counterterrorism professionals protect the American people. In fact, every single suspected terrorist taken into custody on American soil—before and after the September 11 attacks—has first been taken into custody by law enforcement.

In the past two years alone, we have successfully interrogated several terrorism suspects who were taken into law enforcement custody and prosecuted, including Faisal Shahzad, Najibullah Zazi, David Headley, and many others. In fact, faced with the firm but fair hand of the American justice system, some of the most hardened terrorists have agreed to cooperate with the FBI, providing valuable information about Al Qaeda's network, safe houses, recruitment methods, and even their plots and plans. That is the outcome that all Americans should not only want but demand from their government.

Similarly, when it comes to US citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system. There is bipartisan agreement that US citizens should not be tried by military commissions. Since 2001, two US citizens were held in military custody and, after years of controversy and extensive litigation, one was released; the other was prosecuted in federal court. Even as the number of US citizens arrested for terrorist-related activity has increased, our civilian courts have proven they are more than up to the job.

In short, our Article III courts are not only our single most effective tool for prosecuting, convicting, and sentencing suspected terrorists—they are a proven tool for gathering intelligence and preventing attacks. For these reasons, credible experts from across the political spectrum continue to demand that our Article III courts remain an unrestrained tool in our counterterrorism toolbox. And where our counterterrorism professionals believe prosecution in our federal courts would best protect the full range of US security interests and the safety of the American people, we will not hesitate to

use them. The alternative—a wholesale refusal to utilize our federal courts—would undermine our values and our security.

At the same time, reformed military commissions also have their place in our counterterrorism arsenal. Because of bipartisan efforts to ensure that military commissions provide all of the core protections that are necessary to ensure a fair trial, we have restored the credibility of that system and brought it into line with our principles and our values. Where our counterterrorism professionals believe trying a suspected terrorist in our reformed military commissions would best protect the full range of US security interests and the safety of the American people, we will not hesitate to utilize them to try such individuals. In other words, rather than a rigid reliance on just one or the other, we will use both our federal courts and reformed military commissions as options for incapacitating terrorists.

As a result of recent reforms, there are indeed many similarities between the two systems, and at times, these reformed military commissions offer certain advantages. But important differences remain—differences that can determine whether a prosecution is more likely to succeed or fail.

For example, after Ahmed Warsame—a member of al-Shabaab with close ties to Al Qaeda in the Arabian Peninsula—was captured this year by US military personnel, the president’s national security team unanimously agreed that the best option for prosecuting him was our federal courts where, among other advantages, we could avoid significant risks associated with, and pursue additional charges not available in, a military commission. And, if convicted of certain charges, he faces a mandatory life sentence.

In choosing between our federal courts and military commissions in any given case, this administration will remain focused on one thing—the most effective way to keep that terrorist behind bars. The only way to do that is to let our experienced counterterrorism professionals determine, based on the facts and circumstances of each case, which system will best serve our national security interests.

In the end, the Obama administration's approach to detention, interrogation, and trial is simple. We have established a practical, flexible, results-driven approach that maximizes our intelligence collection and preserves our ability to prosecute dangerous individuals. Anything less—particularly a rigid, inflexible approach—would be disastrous. It would tie the hands of our counterterrorism professionals by eliminating tools and authorities that have been absolutely essential to their success.

Capacity building abroad

This brings me to a final area where upholding the rule of law strengthens our security: our work with other nations. As we have seen from Afghanistan in the 1990s to Yemen, Somalia, and the tribal areas of Pakistan today, Al Qaeda and its affiliates often thrive where there is disorder or where central governments lack the ability to effectively govern their own territory.

In contrast, helping such countries build a robust legal framework, coupled with effective institutions to enforce them and the transparency and fairness to sustain them, can serve as one of our most effective weapons against groups like Al Qaeda by eliminating the very chaos that organization needs to survive. That is why a key element of this administration's counterterrorism strategy is to help governments build their capacity, including a robust and balanced legal framework, to provide for their own security.

Though tailored to the unique circumstances of each country, we are working with countries in key locations to help them enact robust counterterrorism laws and establish the institutions and mechanisms to effectively enforce them. The establishment of a functioning criminal justice system and institutions has played a key role in the security gains that have been achieved in Iraq. We are working to achieve similar results in places like Afghanistan, Iraq, Yemen, Pakistan, and elsewhere.

These efforts are not a blank check. As a condition of our funding, training, and cooperation, we require that our partners comply with

certain legal and humanitarian standards. At times, we have curtailed or suspended security assistance when these standards were not met. We encourage these countries to build a more just, more transparent system that can gain the respect and support of their own people.

As we are seeing across the Middle East and North Africa today, courageous people will continue to demand one of the most basic universal rights—the right to live in a society that respects the rule of law. Any security gains will be short-lived if these countries fail to provide just that. So where we see countries falling short of these basic standards, we will continue to support efforts of people to build institutions that both protect the rights of their own people and enhance our collective security.

Flexibility—critical to our success

In conclusion, I want to say again that the paramount responsibility of President Obama, and of those of us who serve with him, is to protect the American people, to save lives. Each of the tools I have discussed today, and the flexibility to apply them to the unique and complicated circumstances we face, are critical to our success.

This president's counterterrorism framework provides a sustainable foundation upon which this administration and its successors, in close cooperation with our allies and partners overseas, can effectively deal with the threat posed by Al Qaeda and its affiliates and adherents. It is, as I have said, a practical, flexible, result-driven approach to counterterrorism that is consistent with our laws and in line with the very values upon which this nation was founded. And the results we have been able to achieve under this approach are undeniable. We diverge from this path at our own peril.

Yet, despite the successes that this approach has brought, some—including some legislative proposals in Congress—are demanding that we pursue a radically different strategy. Under that approach, we would never be able to turn the page on Guantánamo. Our counterterrorism professionals would be compelled to hold all captured ter-

rorists in military custody, casting aside our most effective and time-tested tool for bringing suspected terrorists to justice: our federal courts. Miranda warnings would be prohibited, even though they are at times essential to our ability to convict a terrorist and ensure that individual remains behind bars. In sum, this approach would impose unprecedented restrictions on the ability of experienced professionals to combat terrorism, injecting legal and operational uncertainty into what is already enormously complicated work.

I am deeply concerned that the alternative approach to counterterrorism being advocated in some quarters would represent a drastic departure from our values and the body of laws and principles that have always made this country a force for positive change in the world. Such a departure would not only risk rejection by our courts and the American public, it would undermine the international cooperation that has been critical to the national security gains we have made.

Doing so would not make us safer, and would do far more harm than good. Simply put, it is not an approach we should pursue. Not when we have Al Qaeda on the ropes. Our counterterrorism professionals—regardless of the administration in power—need the flexibility to make well-informed decisions about where to prosecute terrorist suspects.

To achieve and maintain the appropriate balance, Congress and the executive branch must continue to work together. There have been and will continue to be many opportunities to do so in a way that strengthens our ability to defeat Al Qaeda and its adherents. As we do so, we must not tie the hands of our counterterrorism professionals by eliminating tools that are critical to their ability to keep our country safe.

As a people, as a nation, we cannot—and we must not—succumb to the temptation to set aside our laws and our values when we face threats to our security, including and especially from groups as depraved as Al Qaeda. We're better than that. We're better than them. We're Americans.

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Appendix: Brennan–B

*John O. Brennan, assistant to the president for
homeland security and counterterrorism,
“The Ethics and Efficacy of the President’s
Counterterrorism Strategy,”
Woodrow Wilson International Center for Scholars,
Washington, D.C., April 30, 2012*

...
The death of bin Laden was our most strategic blow yet against Al Qaeda. Credit for that success belongs to the courageous forces who carried out that mission, at extraordinary risk to their lives; to the many intelligence professionals who pieced together the clues that led to bin Laden’s hideout; and to President Obama, who gave the order to go in.

One year later, it’s appropriate to assess where we stand in this fight. We’ve always been clear that the end of bin Laden would neither mark the end of Al Qaeda nor our resolve to destroy it. So along with allies and partners, we’ve been unrelenting. And when we assess the Al Qaeda of 2012, I think it is fair to say that, as a result of our efforts, the United States is more secure and the American people are safer. Here’s why.

In Pakistan, Al Qaeda’s leadership ranks have continued to suffer heavy losses. This includes Ilyas Kashmiri, one of Al Qaeda’s top operational planners, killed a month after bin Laden. It includes Atiyah Abd al-Rahman, killed when he succeeded Ayman al-Zawahiri as Al Qaeda’s deputy leader. It includes Younis al-Mauritani, a planner of attacks against the United States and Europe—until he was captured by Pakistani forces.

With its most skilled and experienced commanders being lost so quickly, Al Qaeda has had trouble replacing them. This is one of the many conclusions we have been able to draw from documents seized at bin Laden's compound, some of which will be published online for the first time this week by West Point's Combating Terrorism Center. For example, bin Laden worried about—and I quote—"the rise of lower leaders who are not as experienced and this would lead to the repeat of mistakes."

Al Qaeda leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer places to train and groom the next generation of operatives. They're struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, Al Qaeda is losing badly. And bin Laden knew it. In documents we seized, he confessed to "disaster after disaster." He even urged his leaders to flee the tribal regions and go to places "away from aircraft photography and bombardment."

For all these reasons, it is harder than ever for the Al Qaeda core in Pakistan to plan and execute large-scale, potentially catastrophic attacks against our homeland. Today, it is increasingly clear that—compared to 9/11—the core Al Qaeda leadership is a shadow of its former self. Al Qaeda has been left with just a handful of capable leaders and operatives, and with continued pressure is on the path to its destruction. And for the first time since this fight began, we can look ahead and envision a world in which the Al Qaeda core is simply no longer relevant.

Nevertheless, the dangerous threat from Al Qaeda has not disappeared. As the Al Qaeda core falters, it continues to look to its affiliates and adherents to carry on its murderous cause. Yet these affiliates continue to lose key commanders and capabilities as well. In Somalia, it is indeed worrying to witness Al Qaeda's merger with al-Shabaab, whose ranks include foreign fighters, some with US passports. At the

same time, al-Shabaab continues to focus primarily on launching regional attacks, and ultimately this is a merger between two organizations in decline.

In Yemen, Al Qaeda in the Arabian Peninsula, or AQAP, continues to feel the effects of the death last year of Anwar al-Awlaki, its leader of external operations who was responsible for planning and directing terrorist attacks against the United States. Nevertheless, AQAP continues to be Al Qaeda's most active affiliate and it continues to seek the opportunity to strike our homeland. We therefore continue to support the government of Yemen in its efforts against AQAP, which is being forced to fight for the territory it needs to plan attacks beyond Yemen.

In north and west Africa, another Al Qaeda affiliate, Al Qaeda in the Islamic Maghreb, or AQIM, continues its efforts to destabilize regional governments and engages in kidnapping of Western citizens for ransom activities designed to fund its terrorist agenda. And in Nigeria, we are monitoring closely the emergence of Boko Haram, a group that appears to be aligning itself with Al Qaeda's violent agenda and is increasingly looking to attack Western interests in Nigeria in addition to Nigerian government targets.

More broadly, Al Qaeda's killing of innocents—mostly Muslim men, women, and children—has badly tarnished its image and appeal in the eyes of Muslims around the world. Even bin Laden and his lieutenants knew this. His propagandist, Adam Gadahn, admitted that they were now seen “as a group that does not hesitate to take people's money by falsehood, detonating mosques, [and] spilling the blood of scores of people.” Bin Laden agreed that “a large portion” of Muslims around the world “have lost their trust” in Al Qaeda.

So damaged is Al Qaeda's image that bin Laden even considered changing its name. And one of the reasons? As bin Laden said himself, US officials “have largely stopped using the phrase ‘the war on terror’ in the context of not wanting to provoke Muslims.” Simply calling them Al Qaeda, bin Laden said, “reduces the feeling of Muslims that

we belong to them.” To which I would add, that is because Al Qaeda does not belong to Muslims. Al Qaeda is the antithesis of the peace, tolerance, and humanity that is at the heart of Islam.

Despite the great progress we’ve made against Al Qaeda, it would be a mistake to believe this threat has passed. Al Qaeda and its associated forces still have the intent to attack the United States. And we have seen lone individuals, including American citizens—often inspired by Al Qaeda’s murderous ideology—kill innocent Americans and seek to do us harm.

Still, the damage that has been inflicted on the leadership core in Pakistan, combined with how Al Qaeda has alienated itself from so much of the world, allows us to look forward. Indeed, if the decade before 9/11 was the time of Al Qaeda’s rise, and the decade after 9/11 was the time of its decline, then I believe this decade will be the one that sees its demise.

This progress is no accident. It is a direct result of intense efforts over more than a decade, across two administrations, across the US government, and in concert with allies and partners. This includes the comprehensive counterterrorism strategy being directed by President Obama, a strategy guided by the president’s highest responsibility: to protect the safety and security of the American people.

In this fight, we are harnessing every element of American power—intelligence, military, diplomatic, development, economic, financial, law enforcement, homeland security, and the power of our values, including our commitment to the rule of law. That’s why, for instance, in his first days in office, President Obama banned the use of enhanced interrogation techniques, which are not needed to keep our country safe.

Staying true to our values as a nation also includes upholding the transparency upon which our democracy depends. A few months after taking office, the president travelled to the National Archives, where he discussed how national security requires a delicate balance between secrecy and transparency. He pledged to share as much

information as possible with the American people “so that they can make informed judgments and hold us accountable.” He has consistently encouraged those of us on his national security team to be as open and candid as possible as well.

Earlier this year, Attorney General Holder discussed how our counterterrorism efforts are rooted in, and are strengthened by, adherence to the law, including the legal authorities that allow us to pursue members of Al Qaeda—including US citizens—and to do so using “technologically advanced weapons.”

In addition, Jeh Johnson, the general counsel at the Department of Defense, has addressed the legal basis for our military efforts against Al Qaeda. Stephen Preston, the general counsel at the CIA, has discussed how the agency operates under US law. These speeches build on a lecture two years ago by Harold Koh, the State Department legal adviser, who noted that “US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”

Given these efforts, I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification. Still, there continues to be considerable public and legal debate surrounding these technologies and how they are sometimes used in our fight against Al Qaeda.

Now, I want to be very clear. In the course of the war in Afghanistan and the fight against Al Qaeda, I think the American people expect us to use advanced technologies, for example, to prevent attacks on US forces and to remove terrorists from the battlefield. We do, and it has saved the lives of our men and women in uniform.

What has clearly captured the attention of many, however, is a different practice, beyond hot battlefields like Afghanistan: identifying specific members of Al Qaeda and then targeting them with lethal force, often using aircraft remotely operated by pilots who can

be hundreds if not thousands of miles away. This is what I want to focus on today.

Jack Goldsmith—a former assistant attorney general in the administration of George W. Bush and now a professor at Harvard Law School—captured the situation well. He wrote:

The government needs a way to credibly convey to the public that its decisions about who is being targeted—especially when the target is a US citizen—are sound. . . . First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions . . . The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of its legal ones. All of this information can be disclosed in some form without endangering critical intelligence.

Well, President Obama agrees. And that is why I am here today.

I stand here as someone who has been involved with our nation's security for more than thirty years. I have a profound appreciation for the truly remarkable capabilities of our counterterrorism professionals—and our relationships with other nations—and we must never compromise them. I will not discuss the sensitive details of any specific operation today. I will not, nor will I ever, publicly divulge sensitive intelligence sources and methods. For when that happens, our national security is endangered and lives can be lost.

At the same time, we reject the notion that any discussion of these matters is to step onto a slippery slope that inevitably endangers our national security. Too often, that fear can become an excuse for saying nothing at all—which creates a void that is then filled with myths and falsehoods. That, in turn, can erode our credibility with the American people and with foreign partners, and it can undermine the public's understanding and support for our efforts. In contrast, President Obama believes that—done carefully, deliberately, and responsibly—we can be more transparent and still ensure our nation's security.

So let me say it as simply as I can. Yes, in full accordance with the law—and in order to prevent terrorist attacks on the United States and to save American lives—the US government conducts targeted strikes against specific Al Qaeda terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

Broadly speaking, the debate over strikes targeted at individual members of Al Qaeda has centered on their legality, their ethics, the wisdom of using them, and the standards by which they are approved. With the remainder of my time today, I would like to address each of these in turn.

First, these targeted strikes are legal. Attorney General Holder, Harold Koh, and Jeh Johnson have all addressed this question at length. To briefly recap, as a matter of domestic law, the Constitution empowers the president to protect the nation from any imminent threat of attack. The Authorization for Use of Military Force—the AUMF—passed by Congress after the September 11 attacks authorizes the president “to use all necessary and appropriate force” against those nations, organizations, and individuals responsible for 9/11. There is nothing in the AUMF that restricts the use of military force against Al Qaeda to Afghanistan.

As a matter of international law, the United States is in an armed conflict with Al Qaeda, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

Second, targeted strikes are ethical. Without question, the ability to target a specific individual—from hundreds or thousands of miles away—raises profound questions. Here, I think it's useful to consider

such strikes against the basic principles of the laws of war that govern the use of force.

Targeted strikes conform to the principle of necessity—the requirement that the target have definite military value. In this armed conflict, individuals who are part of Al Qaeda or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we targeted enemy leaders in past conflicts, such as German and Japanese commanders during World War II.

Targeted strikes conform to the principle of distinction—the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an Al Qaeda terrorist and innocent civilians.

Targeted strikes conform to the principle of proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.

For the same reason, targeted strikes conform to the principle of humanity, which requires us to use weapons that will not inflict unnecessary suffering. For all these reasons, I suggest to you that these targeted strikes against Al Qaeda terrorists are indeed ethical and just.

Of course, even if a tool is legal and ethical, that doesn't necessarily make it appropriate or advisable in a given circumstance. This brings me to my next point.

Targeted strikes are wise. Remotely piloted aircraft in particular can be a wise choice because of geography, with their ability to fly hundreds of miles over the most treacherous terrain, strike their targets

with astonishing precision, and then return to base. They can be a wise choice because of time, when windows of opportunity can close quickly and there may be just minutes to act.

They can be a wise choice because they dramatically reduce the danger to US personnel, even eliminating the danger altogether. Yet they are also a wise choice because they dramatically reduce the danger to innocent civilians, especially considered against massive ordnance that can cause injury and death far beyond its intended target.

In addition, compared against other options, a pilot operating this aircraft remotely—with the benefit of technology and with the safety of distance—might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision—the ability, with laser-like focus, to eliminate the cancerous tumor called an Al Qaeda terrorist while limiting damage to the tissue around it—that makes this counterterrorism tool so essential.

There's another reason that targeted strikes can be a wise choice: the strategic consequences that inevitably come with the use of force. As we've seen, deploying large armies abroad won't always be our best offense. Countries typically don't want foreign soldiers in their cities and towns. In fact, large, intrusive military deployments risk playing into Al Qaeda's strategy of trying to draw us into long, costly wars that drain us financially, inflame anti-American resentment, and inspire the next generation of terrorists. In comparison, there is the precision of targeted strikes.

I acknowledge that we—as a government—along with our foreign partners, can and must do a better job of addressing the mistaken belief among some foreign publics that we engage in these strikes casually, as if we are simply unwilling to expose U.S. forces to the dangers faced every day by people in those regions. For, as I'll describe today, there is absolutely nothing casual about the extraordinary care

we take in making the decision to pursue an Al Qaeda terrorist, and the lengths to which we go to ensure precision and avoid the loss of innocent life.

Still, there is no more consequential a decision than deciding whether to use lethal force against another human being—even a terrorist dedicated to killing American citizens. So in order to ensure that our counterterrorism operations involving the use of lethal force are legal, ethical, and wise, President Obama has demanded that we hold ourselves to the highest possible standards and processes.

This reflects his approach to broader questions regarding the use of force. In his speech in Oslo accepting the Nobel Peace Prize, the president said that “all nations, strong and weak alike, must adhere to standards that govern the use of force.” And he added:

“Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength.”

The United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict. Other nations also possess this technology. Many more nations are seeking it, and more will succeed in acquiring it. President Obama and those of us on his national security team are very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.

If we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well. We cannot expect of others what we will not do ourselves. President

Obama has therefore demanded that we hold ourselves to the highest possible standards—that, at every step, we be as thorough and deliberate as possible.

This leads me to the final point I want to discuss today: the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of Al Qaeda outside the “hot” battlefield of Afghanistan. What I hope to do is to give you a general sense, in broad terms, of the high bar we require ourselves to meet when making these profound decisions today. That includes not only whether a specific member of Al Qaeda can legally be pursued with lethal force, but also whether he should be.

Over time, we’ve worked to refine, clarify, and strengthen this process and our standards, and we continue to do so. If our counterterrorism professionals assess, for example, that a suspected member of Al Qaeda poses such a threat to the United States as to warrant lethal action, they may raise that individual’s name for consideration. The proposal will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for decision.

First and foremost, the individual must be a legitimate target under the law. Earlier, I described how the use of force against members of Al Qaeda is authorized under both international and US law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of Al Qaeda, the Taliban, and associated forces. If, after a legal review, we determine that the individual is not a lawful target, end of discussion. We are a nation of laws, and we will always act within the bounds of the law.

Of course, the law only establishes the outer limits of the authority in which counterterrorism professionals can operate. Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn’t necessarily mean we should. There are, after all, liter-

ally thousands of individuals who are part of Al Qaeda, the Taliban, or associated forces—thousands. Even if it were possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism resources.

As a result, we have to be strategic. Even if it is lawful to pursue a specific member of Al Qaeda, we ask ourselves whether that individual's activities rise to a certain threshold for action and whether taking action will, in fact, enhance our security.

For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to US interests. This is absolutely critical, and it goes to the very essence of why we take this kind of exceptional action. We do not engage in lethal action in order to eliminate every single member of Al Qaeda in the world. Most times, and as we have done for more than a decade, we rely on cooperation with other countries that are also interested in removing these terrorists with their own capabilities and within their own laws. Nor is lethal action about punishing terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat—to stop plots, prevent future attacks, and save American lives.

And what do we mean by a significant threat? I am not referring to some hypothetical threat—the mere possibility that a member of Al Qaeda might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of Al Qaeda or one of its associated forces. Or perhaps the individual is himself an operative—in the midst of actually training for or planning to carry out attacks against US interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plots and plans before they come to fruition.

In addition, our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama administration somehow prefers killing Al Qaeda members rather than capturing them. Nothing could be further from the truth. It is our preference to capture suspected terrorists whenever feasible.

For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way. In fact, the members of Al Qaeda that we or other nations have captured have been one of our greatest sources of information about Al Qaeda, its plans, and its intentions. And once in US custody, we often can prosecute them in our federal courts or reformed military commissions—both of which are used for gathering intelligence and preventing terrorist attacks.

You see our preference for capture in the case of Ahmed Warsame, a member of al-Shabaab who had significant ties to Al Qaeda in the Arabian Peninsula. Last year, when we learned that he would be traveling from Yemen to Somalia, US forces captured him en route and we subsequently charged him in federal court.

The reality, however, is that since 2001 such unilateral captures by US forces outside of “hot” battlefields, like Afghanistan, have been exceedingly rare. This is due in part to the fact that in many parts of the world our counterterrorism partners have been able to capture or kill dangerous individuals themselves.

Moreover, after being subjected to more than a decade of relentless pressure, Al Qaeda’s ranks have dwindled and scattered. These terrorists are skilled at seeking remote, inhospitable terrain—places where the United States and our partners simply do not have the ability to arrest or capture them. At other times, our forces might have the ability to attempt capture, but only by putting the lives of our personnel at too great a risk. Oftentimes, attempting capture could subject civilians to unacceptable risks. There are many reasons why capture might not be feasible, in which case lethal force might

be the only remaining option to address the threat and prevent an attack.

Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose constraints. The United States of America respects national sovereignty and international law.

Those are some of the questions we consider—the high standards we strive to meet. And in the end, we make a decision—we decide whether a particular member of Al Qaeda warrants being pursued in this manner. Given the stakes involved and the consequence of our decision, we consider all the information available to us, carefully, responsibly.

We review the most up-to-date intelligence, drawing on the full range of our intelligence capabilities. And we do what sound intelligence demands—we challenge it, we question it, including any assumptions on which it might be based. If we want to know more, we may ask the intelligence community to go back and collect additional intelligence or refine its analysis so that a more informed decision can be made.

We listen to departments and agencies across our national security team. We don't just hear out differing views, we ask for them and encourage them. We discuss. We debate. We disagree. We consider the advantages and disadvantages of taking action. We also carefully consider the costs of inaction and whether a decision not to carry out a strike could allow a terrorist attack to proceed and potentially kill scores of innocents.

Nor do we limit ourselves narrowly to counterterrorism considerations. We consider the broader strategic implications of any action, including what effect, if any, an action might have on our relationships with other countries. And we don't simply make a decision and

never revisit it again. Quite the opposite. Over time, we refresh the intelligence and continue to consider whether lethal force is still warranted.

In some cases—such as senior Al Qaeda leaders who are directing and planning attacks against the United States—the individual clearly meets our standards for taking action. In other cases, individuals have not met our standards. Indeed, there have been numerous occasions where, after careful review, we have, working on a consensus basis, concluded that lethal force was not justified in a given case.

Finally, as the president's counterterrorism adviser, I feel that it is important for the American people to know that these efforts are overseen with extraordinary care and thoughtfulness. The president expects us to address all of the tough questions I have discussed today. Is capture really not feasible? Is this individual a significant threat to US interests? Is this really the best option? Have we thought through the consequences, especially any unintended ones? Is this really going to help protect our country from further attacks? Is it going to save lives?

Our commitment to upholding the ethics and efficacy of this counterterrorism tool continues even after we decide to pursue a specific terrorist in this way. For example, we only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing. This is a very high bar. Of course, how we identify an individual naturally involves intelligence sources and methods which I will not discuss. Suffice it to say, our intelligence community has multiple ways to determine, with a high degree of confidence that the individual being targeted is indeed the Al Qaeda terrorist we are seeking.

In addition, we only authorize a strike if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances. The unprecedented advances we have made in technology provide us greater proximity to targets for a longer period of time, and as a result allow us to better understand what is

happening in real time on the ground in ways that were previously impossible. We can be much more discriminating and we can make more informed judgments about factors that might contribute to collateral damage.

I can tell you today that there have indeed been occasions when we have decided against conducting a strike in order to avoid the injury or death of innocent civilians. This reflects our commitment to doing everything in our power to avoid civilian casualties—even if it means having to come back another day to take out that terrorist, as we have done. And I would note that these standards—for identifying a target and avoiding the loss of innocent civilians—exceed what is required as a matter of international law on a typical battlefield. That’s another example of the high standards to which we hold ourselves.

Our commitment to ensuring accuracy and effectiveness continues even after a strike. In the wake of a strike, we harness the full range of our intelligence capabilities to assess whether the mission in fact achieved its objective. We try to determine whether there was any collateral damage, including civilian deaths. There is, of course, no such thing as a perfect weapon, and remotely piloted aircraft are no exception.

As the president and others have acknowledged, there have indeed been instances when—despite the extraordinary precautions we take—civilians have been accidentally injured or, worse, killed in these strikes. It is exceedingly rare, but it has happened. When it does, it pains us and we regret it deeply, as we do any time innocents are killed in war. And when this happens we take it seriously. We go back and review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life. This too is a reflection of our values as Americans.

Ensuring the ethics and efficacy of these strikes also includes regularly informing appropriate members of Congress and the committees

who have oversight of our counterterrorism programs. Indeed, our counterterrorism programs—including the use of lethal force—have grown more effective over time because of congressional oversight and our ongoing dialogue with members and staff.

This is the seriousness, the extraordinary care, that President Obama and those of us on his national security team bring to this weightiest of questions—whether to pursue lethal force against a terrorist who is plotting to attack our country.

When that person is a US citizen, we ask ourselves additional questions. Attorney General Holder has already described the legal authorities that clearly allow us to use lethal force against an American citizen who is a senior operational leader of Al Qaeda. He has discussed the thorough and careful review, including all relevant constitutional considerations, that is to be undertaken by the US government when determining whether the individual poses an imminent threat of violent attack against the United States.

To recap, the standards and processes I've described today—which we have refined and strengthened over time—reflect our commitment to ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to US interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that innocent civilians will not be harmed; and, of course, engaging in additional review if the Al Qaeda terrorist is a US citizen.

Going forward, we'll continue to strengthen and refine these standards and processes. As we do, we'll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities. As the president said at Oslo, in the conduct of war America must be the standard bearer.

This includes our continuing commitment to greater transparency. With that in mind, I have made a sincere effort today to address

some of the main questions that citizens and scholars have raised regarding the use of targeted lethal force against Al Qaeda. I suspect there are those, perhaps some in this audience, who feel we have not been transparent enough. I suspect there are those—both inside and outside our government—who feel I have been perhaps too open. If both groups feel a little unsatisfied, then I've probably struck the right balance.

Again, there are some lines we simply will not and cannot cross because, at times, our national security demands secrecy. But we are a democracy. The people are sovereign. And our counterterrorism tools do not exist in a vacuum. They are stronger and more sustainable when the American people understand and support them. They are weaker and less sustainable when the American people do not. As a result of my remarks today, I hope the American people have a better understanding of this critical tool—why we use it, what we do, how carefully we use it, and why it is absolutely essential to protecting our country and our citizens.

I would just like to close on a personal note. I know that for many people—in our government and across the country—the issue of targeted strikes raises profound moral questions. It forces us to confront deeply held personal beliefs and our values as a nation. If anyone in government who works in this area tells you they haven't struggled with this, then they haven't spent much time thinking about it. I know I have, and I will continue to struggle with it as long as I remain involved in counterterrorism.

But I am certain about one thing. We are at war. We are at war against a terrorist organization called Al Qaeda that has brutally murdered thousands of Americans—men, women, and children—as well as thousands of other innocent people around the world. In recent years, with the help of targeted strikes we have turned Al Qaeda into a shadow of what it once was. They are on the road to destruction.

Until that finally happens, however, there are still terrorists in hard-to-reach places who are actively planning attacks against us. If

given the chance, they will gladly strike again and kill more of our citizens. And the president has a constitutional and solemn obligation to do everything in his power to protect the safety and security of the American people.

Yes, war is hell. It is awful. It involves human beings killing other human beings, sometimes innocent civilians. That is why we despise war. That is why we want this war against Al Qaeda to be over as soon as possible, and not a moment longer. And over time, as Al Qaeda fades into history and as our partners grow stronger, I'd hope that the United States would have to rely less on lethal force to keep our country safe.

Until that happens, as President Obama said here five years ago, if another nation cannot or will not take action, we will. And it is an unfortunate fact that to save many innocent lives we are sometimes obliged to take lives—the lives of terrorists who seek to murder our fellow citizens.

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Appendix: Brennan–C

John O. Brennan, assistant to the president for homeland security and counterterrorism, “US Policy toward Yemen,” Council on Foreign Relations, New York City, August 8, 2012

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When the subject of Yemen comes up, it’s often through the prism of the terrorist threat that is emanating from within its borders. And for good reason: Al Qaeda in the Arabian Peninsula, or AQAP, is Al Qaeda’s most active affiliate. It has assassinated Yemeni leaders, murdered Yemeni citizens, kidnapped and killed aid workers, targeted American interests, encouraged attacks in the United States and attempted repeated attacks against US aviation. Likewise, discussion of Yemeni and American counterterrorism efforts tends to focus almost exclusively on the use of one counterterrorism tool in particular: targeted strikes.

At the White House, we have always taken a broader view, both of Yemen’s challenges and of US policy. Two months ago, however, a number of experts on Yemen wrote an open letter to President Obama arguing that there is a perception that the United States is singularly focused on AQAP to the exclusion of Yemen’s broader political, economic, and social ills. Among their recommendations: that US officials publicly convey that the United States is making a sustained commitment to Yemen’s political transition, economic development, and stability. And it is in that spirit that I join you here

today, both in my official capacity and as someone who has come to know and admire Yemen and its people over the last three decades.

I want to begin with a snapshot of where Yemen is today. Since assuming office, President [Abdu Rabbu Mansour] Hadi and his administration have made progress toward implementing two key elements of the Gulf Cooperation Council [GCC] agreement that ended the rule of Ali Abdullah Saleh and provided a road map for political transition and reform.

As part of a military reorganization, powerful commanders, including some of the former president's family and supporters, have been dismissed or reassigned, and discussions are under way to bring the military under unified civilian command. And just two days ago President Hadi took the important step of issuing a decree that reassigns several brigades from under the command of Saleh's son as well as leading Saleh rival Ali Mohsen al-Ahmar.

In addition, to organize the national dialogue, President Hadi has appointed a committee with representatives from political parties, youth groups, women's organizations, the southern movement, and Houthi oppositionists in the north. And that committee met for the first time this week.

On the security front, government forces have achieved important gains against AQAP. Today AQAP's black flag no longer flies over the city centers of Ja'ar, Loudur, or Zinjibar. As one resident said, after AQAP's departure from these areas in June, "it is like seeing darkness lifted from our lives after a year."

Elsewhere in Yemen, checkpoints are being removed, businesses are reopening, public services have resumed in major cities, and public servants are getting paid. The energy infrastructure is slowly but surely being restored, including the Marib pipeline, which supplies half of Yemen's domestic oil.

At the same time, Yemen continues to face extraordinary challenges. Violence remains a tragic reality for many Yemenis. We saw this again in last week's clashes at the Ministry of Interior in Sana'a

and in an outrageous suicide attack in Ja'ar on Saturday that killed dozens of innocent Yemenis.

Moreover, Yemen remains one of the poorest countries on earth, and conditions have only been compounded by last year's upheaval. Most Yemenis still lack access to basic services, including electricity and functioning water systems. Unemployment is as high as 40 percent. Chronic poverty is now estimated at 54 percent. Ten million people, nearly half of Yemen's population, go to bed hungry every night. One in ten children does not live to the age of five.

President Obama understands that Yemen's challenges are grave and intertwined. He has insisted that our policy emphasize governance and development as much as security and focus on a clear goal to facilitate a democratic transition while helping Yemen advance political, economic, and security reforms so it can support its citizens and counter AQAP.

You see our comprehensive approach in the numbers. This year alone, US assistance to Yemen is more than \$337 million. Over half this money, \$178 million, is for political transition, humanitarian assistance, and development. Let me repeat that. More than half of the assistance we provide to Yemen is for political transition, humanitarian assistance, and development. In fact, this is the largest amount of civilian assistance the United States has ever provided to Yemen. So any suggestion that our policy toward Yemen is dominated by our security and counterterrorism efforts is simply not true.

Today I want to walk through the key pillars of our approach.

First, the United States has been and will remain a strong and active supporter of the political transition in Yemen. That's why President Obama called on then-President Saleh to step down shortly after unrest erupted last year. Having consistently advocated for an orderly, peaceful transfer of power, despite claims by some that doing so would jeopardize counterterrorism operations, we've worked hard to help sustain the transition, facilitate elections, and promote an inclusive national dialogue. This past May President Obama

issued an executive order authorizing sanctions against those who threaten the transition.

Going forward, we'll continue to push for the timely, effective, and full implementation of the GCC agreement. During this delicate transition, we call on all Yemenis, especially Ali Abdullah Saleh, Ali Mohsen al-Ahmar, Hamid al-Ahmar, and Ahmed Ali Saleh, to show that they will put Yemen's national interests ahead of parochial concerns and abide by the letter and the spirit of the GCC agreement so that Yemen can move toward a more inclusive democracy.

As we support the transition, our comprehensive approach has a second pillar: helping to strengthen governance and institutions upon which Yemen's long-term progress depends. Despite decades of rule by one man, Yemen has a foundation on which it is building. The country has a tradition of opposition political parties, a vibrant civil society, independent media, and leaders who place the larger national interests above politics, religion, sect, or tribe.

President Hadi is one such leader. This year I've met with him twice in Yemen and spoken to him numerous times. I've been impressed with his commitment to his nation, his integrity, and his willingness to make difficult decisions to move his country forward, even at great risk to himself. The Yemeni people are indeed very fortunate to have President Hadi as their leader. We are helping to strengthen Yemeni government institutions so that they become more responsive, effective, and accountable to the people. We are partnering with ministries to expand essential services, improve efficiency, combat corruption, and enhance transparency. We will support the reform of law enforcement and judicial institutions to strengthen the rule of law.

Beyond government, we're proud to continue our long tradition of helping to strengthen the role of civil society to conduct parliamentary oversight, raise public awareness on electoral reforms and Yemen's transition, empower women, provide leadership and advocacy training,

and build the capacity of political parties to engage in peaceful democratic discourse.

Of course lasting political and economic progress is impossible so long as half of Yemenis are malnourished and struggling to survive another day. That is why the third pillar of our approach is immediate humanitarian relief. This year the United States is providing nearly \$110 million in humanitarian assistance to Yemen, most of it through the UN's Humanitarian Response Plan. This makes the United States the single largest provider of humanitarian assistance to Yemen.

These funds are allowing our UN and NGO partners to provide food and food vouchers, improved sanitation, safe drinking water, and basic health services to help meet other urgent needs. USAID is providing more than \$74 million for food security and nutrition programs, enabling UNICEF to rapidly scale up its assistance for starving children. With US support, UNICEF and the World Health Organization completed a large-scale immunization campaign, which may have successfully halted a polio outbreak that began last year.

Yet even with these efforts, so many Yemenis remain in desperate need. We commend the European Union for doubling its humanitarian aid to Yemen and urge other donors to follow suit by contributing more to the UN Humanitarian Response Plan, which is less than 50 percent funded. This will provide critical and lifesaving relief to millions of Yemenis.

As we help address immediate humanitarian needs, we're partnering with Yemen in a fourth area, the economic reforms and development necessary for long-term progress. In fact, the \$68 million in transition assistance and economic development that we are providing this year includes vital assistance to improve the delivery of basic services, including health, education, and water.

We are helping Yemen address its staggering health gaps by renovating health clinics, providing medical equipment, training

midwives and doctors in maternal and child health, and supporting community health education.

We are helping to introduce farmers to more productive techniques and provide youth with skills training, job placement, and entrepreneurial programs.

We are helping Yemen rebuild infrastructure and promote micro-finance and small businesses. We are encouraging efforts to stabilize the economy and undertake reforms that will help raise living standards and promote a more diversified economy.

And following Yemen's success against AQAP in the south, USAID is supporting the Yemeni government's efforts to repair war-torn infrastructure and to rehabilitate communities.

For its part, Yemen must have a plan to address unemployment and poverty, as well as develop, diversify, and reform its economy, including by combating corruption so that government revenues and donor funds are not diverted to private interests at the expense of the Yemeni people.

International donors want to know that their contributions aren't misappropriated and that the projects they fund are part of a comprehensive plan. Providing a vision of where Yemen's leaders plan to take the country will help its friends invest wisely.

This brings me to the final pillar of our comprehensive approach to Yemen: improving security and combating the threat of AQAP. Put simply, Yemen cannot succeed politically, economically, socially so long as the cancerous growth of AQAP remains.

Ultimately, the long-term battle against AQAP in Yemen must be fought and won by Yemenis. To their great credit, President Hadi and his government, including Defense Minister [Muhammad Nasir Ahmad] Ali, Chief of Army Staff [Ahmed Ali] Ashwal, and Interior Minister [Abd al-Qadir] Qahtan, have made combating AQAP a top priority and have forced AQAP out of its stronghold in southern Yemen.

So long as AQAP seeks to implement its murderous agenda, we will be a close partner with Yemen in meeting this common threat. And just as our approach to Yemen is multidimensional, our counterterrorism approach involves many different tools—diplomatic, intelligence, military, homeland security, law enforcement, and justice. With our Yemeni and international partners, we have put unprecedented pressure on AQAP. Recruits seeking to travel to Yemen have been disrupted. Operatives deployed from Yemen have been detained. Plots have been thwarted. And key AQAP leaders who have targeted US and Yemeni interests have met their demise, including Anwar al-Awlaki, AQAP's chief of external operations.

Of course, the tension has often focused on one counterterrorism tool in particular, targeted strikes, sometimes using remotely piloted aircraft, often referred to publicly as drones. In June the Obama administration declassified the fact that in Yemen, our joint efforts have resulted in direct action against AQAP operatives and senior leaders. This spring, I addressed the subject of targeted strikes at length and why such strikes are legal, ethical, wise, and highly effective.

Today I'd simply say that all our CT efforts in Yemen are conducted in concert with the Yemeni government. When direct action is taken, every effort is made to avoid any civilian casualty. And contrary to conventional wisdom, we see little evidence that these actions are generating widespread anti-American sentiment or recruits for AQAP. In fact, we see the opposite: our Yemeni partners are more eager to work with us. Yemenese citizens who have been freed from the hellish grip of AQAP are more eager, not less, to work with the Yemeni government. In short, targeted strikes against the most senior and most dangerous AQAP terrorists are not the problem, they are part of the solution.

Even as we partner against the immediate threat posed by AQAP, we're helping Yemen build its capacity for its own security. We are

spearheading the international effort to help reform and restructure Yemen's military into a professional, unified force under civilian control. In fact, of the \$159 million in security assistance we are providing to Yemen this year, almost all of it is for training and equipment to build capacity. We are empowering the Yemenese with the tools they need to conduct precise intelligence-driven operations to locate operatives and disrupt plots and the training they need to ensure counterterrorism operations are conducted lawfully in a manner that respects human rights and makes every effort to avoid civilian casualties.

Finally, I'd note that our approach to Yemen is reinforced by broad support from the international community. Throughout the last year, the Gulf Cooperation Council, especially Saudi Arabia, the G-10, the Friends of Yemen, the United Nations, and the diplomatic community in Sana'a have come together to push for a peaceful solution of the crisis and to facilitate a successful transition. The international community has threatened UN sanctions against those who would undermine the transition, provided humanitarian relief, and offered assistance for the national dialogue and electoral reform. International partners, including the UK, Germany, China, Russia, India, the EU, and the UAE have pledged aid. Saudi Arabia alone offered \$3.25 billion on top of the significant fuel grants it gave Yemen to offset the losses caused by attacks against oil infrastructure. As such, close coordination with our international partners will be critical in the years ahead.

These are the pillars of our comprehensive approach to Yemen: supporting the transition, strengthening governance and institutions, providing humanitarian relief, encouraging economic reform and development, and improving security and combatting AQAP. Taken together, our efforts send an unmistakable message to the Yemeni people: the United States is committed to your success. We share the vision that guides so many Yemenese, a Yemen where all its citizens—Shia and Sunni, northerner and southerner, man and woman, rural

villager and city dweller, old and young—have a government that is democratic, responsive, and just.

But we are under no illusions. Given the tremendous challenges that Yemen continues to face, progress toward such a future will take many, many years. Yet, if we've learned anything in the past two years, it's that we should not underestimate the will of the Yemeni people. Despite the seemingly insurmountable obstacles in front of them, hundreds of thousands of men and women took to the streets and engaged in political and social movements for the first time in their lives, and in so doing helped pave the way for change that just a few years ago would have seemed unimaginable.

That Yemen did not devolve into an all-out civil war is a testament to the courage, determination, and resilience of the Yemeni people. It showed that Yemen's future need not be determined by violence. The people of Yemen have a very long and hard road ahead of them. But they've shown that they are willing to make the journey, even with all the risk that it entails. As they go forward in pursuit of the security, prosperity, and dignity they so richly deserve, they will continue to have a partner in the United States of America.

Appendix: Litt—A

Robert S. Litt, general counsel with the Office of the Director of National Intelligence, “Privacy, Technology, and National Security: An Overview of Intelligence Collection,” address at the Brookings Institution, Washington, D.C., July 19, 2013

I. Introduction

I wish that I was here in happier times for the intelligence community. The last several weeks have seen a series of reckless disclosures of classified information about intelligence activities. These disclosures threaten to cause long-lasting and irreversible harm to our ability to identify and respond to the many threats facing our nation. And because the disclosures were made by people who did not fully understand what they were talking about, they were sensationalized and led to mistaken and misleading impressions. I hope to be able to correct some of these misimpressions today.

My speech today is prompted by disclosures about two programs that collect valuable foreign intelligence that has protected our nation and its allies: the bulk collection of telephony metadata and the so-called PRISM program. Some people claim that these disclosures were a form of whistle-blowing. But let’s be clear. These programs are not illegal. They are authorized by Congress and are carefully overseen by the congressional intelligence and judiciary committees. They are conducted with the approval of the Foreign Intelligence Surveillance Court and under its supervision. And they are subject to extensive, court-ordered oversight by the executive branch. In short, all three branches of government knew about these

programs, approved them, and helped to ensure that they complied with the law. Only time will tell the full extent of the damage caused by the unlawful disclosures of these lawful programs.

Nevertheless, I fully appreciate that it's not enough for us simply to assert that our activities are consistent with the letter of the law. Our government's activities must always reflect and reinforce our core democratic values. Those of us who work in the intelligence profession share these values, including the importance of privacy. But security and privacy are not zero-sum. We have an obligation to give full meaning to both: to protect security while at the same time protecting privacy and other constitutional rights. But although our values are enduring, the manner in which our activities reflect those values must necessarily adapt to changing societal expectations and norms. Thus, the intelligence community continually evaluates and improves the safeguards we have in place to protect privacy, while at the same time ensuring that we can carry out our mission of protecting national security.

So I'd like to do three things today. First, I'd like to discuss very briefly the laws that govern intelligence collection activities. Second, I want to talk about the effect of changing technology, and the corresponding need to adapt how we protect privacy, on those collection activities. And third, I want to bring these two strands together, to talk about how some of these laws play out in practice—how we structure the intelligence community's collection activities under FISA (Foreign Intelligence Surveillance Act) to respond to these changes in a way that remains faithful to our democratic values.

II. Legal framework

Let me begin by discussing in general terms the legal framework that governs intelligence collection activities. And it is a bedrock concept that those activities are bound by the rule of law. This is a topic that has been well addressed by others, including the general counsels of the CIA and NSA (National Security Agency), so I will make this

brief. We begin, of course, with the Constitution. Article II makes the president the commander in chief and gives him extensive responsibility for the conduct of foreign affairs. The ability to collect foreign intelligence derives from that constitutional source. The First Amendment protects freedom of speech. And the Fourth Amendment prohibits unreasonable searches and seizures.

I want to make a few points about the Fourth Amendment. First, under established Supreme Court rulings a person has no legally recognized expectation of privacy in information that he or she gives to a third party. So obtaining those records from the third party is not a search as to that person. I'll return to this point in a moment. Second, the Fourth Amendment doesn't apply to foreigners outside of the United States. Third, the Supreme Court has said that the "reasonableness" of a warrantless search depends on balancing the "intrusion on the individual's Fourth Amendment interests against" the search's "promotion of legitimate governmental interests."¹

In addition to the Constitution, a variety of statutes govern our collection activities. First, the National Security Act and a number of laws relating to specific agencies, such as the CIA Act and the NSA Act, limit what agencies can do, so that, for example, the CIA cannot engage in domestic law enforcement. We are also governed by laws such as the Electronic Communications Privacy Act, the Privacy Act, and, in particular, the Foreign Intelligence Surveillance Act, or FISA. FISA was passed by Congress in 1978 and significantly amended in 2001 and 2008. It regulates electronic surveillance and certain other activities carried out for foreign intelligence purposes. I'll have much more to say about FISA later.

A final important source of legal restrictions is Executive Order 12333. This order provides additional limits on what intelligence agencies can do, defining each agency's authorities and responsibilities. In particular, section 2.3 of EO 12333 provides that elements of

1. *Vernonia School Dist. v. Acton*, 515 US 646, 652-3 (1995).

the intelligence community “are authorized to collect, retain, or disseminate information concerning United States persons only in accordance with procedures . . . approved by the attorney general . . . after consultation with” the director of national intelligence. These procedures must be consistent with the agencies’ authorities. They must also establish strict limits on collecting, retaining or disseminating information about US persons, unless that information is actually of foreign intelligence value, or in certain other limited circumstances spelled out in the order, such as to protect against a threat to life. These so-called US person rules are basic to the operation of the intelligence community. They are among the first things that our employees are trained in, and they are at the core of our institutional culture.

It’s not surprising that our legal regime provides special rules for activities directed at US persons. So far as I know, every nation recognizes legal distinctions between citizens and noncitizens. But as I hope to make clear, our intelligence collection procedures also provide protection for the privacy rights of noncitizens.

III. Impact of changing societal norms

Let me turn now to the impact of changing technology on privacy. Prior to the end of the nineteenth century there was little discussion about a “right to privacy.” In the absence of mass media, photography, and other technologies of the industrial age, the most serious invasions of privacy were the result of gossip or Peeping Toms. Indeed, in the 1890 article that first articulated the idea of a legal right to privacy, Louis Brandeis and Samuel Warren explicitly grounded that idea on changing technologies:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right “to be let alone.” Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical

*devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-top.”*²

Today, as a result of the way digital technology has developed, each of us shares massive amounts of information about ourselves with third parties. Sometimes this is obvious, as when we post pictures on social media or transmit our credit card numbers to buy products online. Other times it is less obvious, as when telephone companies store records listing every call we make. All in all, there’s little doubt that the amount of data that each of us provides to strangers every day would astonish Brandeis and Warren—let alone Jefferson and Madison.

And this leads me to what I consider to be the key question. Why is it that people are willing to expose large quantities of information to private parties but don’t want the government to have the same information? Why, for example, don’t we care if the telephone company keeps records of all of our phone calls on its servers, but we feel very differently about the prospect of the same information being on NSA servers? This does not seem to me to be a difficult question: we care because of what the government could do with the information.

Unlike a phone company, the government has the power to audit our tax returns, to prosecute and imprison us, to grant or deny licenses to do business, and many other things. And there is an entirely understandable concern that the government may abuse this power. I don’t mean to say that private companies don’t have a lot of power over us. Indeed, the growth of corporate privacy policies, and the strong public reaction to the inadvertent release or commercial use of personal information, reinforces my belief that our primary privacy concern today is less with who has information than with what they do with it. But there is no question that the government, because of its powers, is properly viewed in a different light.

2. Samuel D. Warren & Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4 (5) (1890) 193, 195.

On the other hand, just as consumers around the world make extensive use of modern technology, so too do potentially hostile foreign governments and foreign terrorist organizations. Indeed, we know that terrorists and weapons proliferators are using global information networks to conduct research, to communicate, and to plan attacks. Information that can help us identify and prevent terrorist attacks or other threats to our security is often hiding in plain sight among the vast amounts of information flowing around the globe. New technology means that the intelligence community must continue to find new ways to locate and analyze foreign intelligence. We need to be able to do more than connect the dots when we happen to find them; we need to be able to find the right dots in the first place.

One approach to protecting privacy would be to limit the intelligence community to a targeted, focused query looking for specific information about an identified individual based on probable cause. But from the national security perspective, that would not be sufficient. The business of foreign intelligence has always been fundamentally different from the business of criminal investigation. Rather than attempting to solve crimes that have happened already, we are trying to find out what is going to happen before it happens. We may have only fragmentary information about someone who is plotting a terrorist attack, and need to find him and stop him. We may get information that is useless to us without a store of data to match it against, such as when we get the telephone number of a terrorist and want to find out who he has been in touch with. Or we may learn about a plot that we were previously unaware of, causing us to revisit old information and find connections that we didn't notice before—and that we would never know about if we hadn't collected the information and kept it for some period of time. We worry all the time about what we are missing in our daily effort to protect the nation and our allies.

So on the one hand there are vast amounts of data that contain intelligence needed to protect us not only from terrorism, but from cyber-attacks, weapons of mass destruction, and good old-fashioned

espionage. And on the other hand, giving the intelligence community access to this data has obvious privacy implications. We achieve both security and privacy protection in this context in large part by a framework that establishes appropriate controls on what the government can do with the information it lawfully collects, and appropriate oversight to ensure that it respects those controls. The protections depend on such factors as the type of information we collect, where we collect it, the scope of the collection, and the use the government intends to make of the information. In this way we can allow the intelligence community to acquire necessary foreign intelligence while providing privacy protections that take account of modern technology.

IV. FISA collection

In showing that this approach is in fact the way our system deals with intelligence collection, I'll use FISA as an example for a couple of reasons. First, because FISA is an important mechanism through which Congress has legislated in the area of foreign intelligence collection. Second, because it covers a wide range of activities and involves all three sources of law I mentioned earlier: constitutional, statutory, and executive. And third, because several previously classified examples of what we do under FISA have recently been declassified, and I know people want to hear more about them.

I don't mean to suggest that FISA is the only way we collect foreign intelligence. But it's important to know that, by virtue of Executive Order 12333, all of the collection activities of our intelligence agencies have to be directed at the acquisition of foreign intelligence or counterintelligence. Our intelligence priorities are set annually through an interagency process. The leaders of our nation tell the intelligence community what information they need in the service of the nation, its citizens, and its interests, and we collect information in support of those priorities.

I want to emphasize that the United States, as a democratic nation, takes seriously this requirement that collection activities

have a valid foreign intelligence purpose. We do not use our foreign intelligence collection capabilities to steal the trade secrets of foreign companies in order to give American companies a competitive advantage. We do not indiscriminately sweep up and store the contents of the communications of Americans, or of the citizenry of any country.

We do not use our intelligence collection for the purpose of repressing the citizens of any country because of their political, religious, or other beliefs. We collect metadata—information about communications—more broadly than we collect the actual content of communications, because it is less intrusive than collecting content and in fact can provide us information that helps us more narrowly focus our collection of content on appropriate targets. But it simply is not true that the United States government is listening to everything said by every citizen of any country.

Let me turn now to FISA. I'm going to talk about three provisions of that law: traditional FISA orders, the FISA business records provision, and section 702. These provisions impose limits on what kind of information can be collected and how it can be collected, require procedures restricting what we can do with the information we collect and how long we can keep it, and impose oversight to ensure that the rules are followed. This sets up a coherent regime in which protections are afforded at the front end, when information is collected; in the middle, when information is reviewed and used; and at the back end, through oversight, all working together to protect both national security and privacy. The rules vary depending on factors such as the type of information being collected (and in particular whether or not we are collecting the content of communications), the nature of the person or persons being targeted, and how narrowly or broadly focused the collection is. They aren't identical in every respect to the rules that apply to criminal investigations, but I hope to persuade you that they are reasonable and appropriate in the very different context of foreign intelligence.

So let's begin by talking about traditional FISA collection. Prior to the passage of FISA in 1978, the collection of foreign intelligence was essentially unregulated by statutory law. It was viewed as a core function of the executive branch. In fact, when the criminal wiretap provisions were originally enacted, Congress expressly provided that they did not "limit the constitutional power of the president . . . to obtain foreign intelligence information . . . deemed essential to the national security of the United States."³ However, ten years later, as a result of abuses revealed by the Church and Pike committees, Congress imposed a judicial check on some aspects of electronic surveillance for foreign intelligence purposes. This is what is now codified in Title I of FISA, sometimes referred to as "traditional FISA."

FISA established a special court, the Foreign Intelligence Surveillance Court, to hear applications by the government to conduct electronic surveillance for foreign intelligence purposes. Because traditional FISA surveillance involves acquiring the content of communications, it is intrusive, implicating recognized privacy interests; and because it can be directed at individuals inside the United States, including American citizens, it implicates the Fourth Amendment. In FISA, Congress required that to get a "traditional" FISA electronic surveillance order, the government must establish probable cause to believe that the target of surveillance is a foreign power or an agent of a foreign power, a probable cause standard derived from the standard used for wiretaps in criminal cases. And if the target is a US person, he or she cannot be deemed an agent of a foreign power based solely on activity protected by the First Amendment—you cannot be the subject of surveillance merely because of what you believe or think.

Moreover, by law the use of information collected under traditional FISA must be subject to minimization procedures, a concept

3. 82 Stat. 214, formerly codified at 18 US C. § 2511(3).

that is key throughout FISA. Minimization procedures are procedures, approved by the FISA Court, that must be “reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.”⁴ For example, they generally prohibit disseminating the identity of a US person unless the identity itself is necessary to understand the foreign intelligence or is evidence of a crime. The reference to the purpose and technique of the particular surveillance is important. Minimization procedures can and do differ depending on the purpose of the surveillance and the technique used to implement it. These tailored minimization procedures are an important way in which we provide appropriate protections for privacy.

So let me explain in general terms how traditional FISA surveillance works in practice. Let’s say that the FBI suspects someone inside the United States of being a spy or a terrorist, and they want to conduct electronic surveillance. While there are some exceptions spelled out in the law, such as in the case of an emergency, as a general rule they have to present an application to the FISA Court establishing probable cause to believe that the person is an agent of a foreign power, according to the statutory definition. That application, by the way, is reviewed at several levels within both the FBI and Department of Justice before it is submitted to the court. Now, the target may have a conversation with a US person that has nothing to do with the foreign intelligence purpose of the surveillance, such as talking to a neighbor about a dinner party.

Under the minimization procedures, an analyst who listens to a conversation involving a US person that has no foreign intelligence value cannot generally share it or disseminate it unless it is evidence

4. See, e.g., 50 US C. §§ 1801(h)(1) & 1821(4)(A).

of a crime. Even if a conversation has foreign intelligence value—let’s say a terrorist is talking to a confederate—that information may only be disseminated to someone with an appropriate need to know the information pursuant to his or her mission.

In other words, electronic surveillance under FISA’s Title I implicates the well-recognized privacy interest in the contents of communications, and is subject to corresponding protections for that privacy interest—in terms of the requirements that it be narrowly targeted and that it have a substantial factual basis approved by the court, and in terms of the limitations imposed on use of the information.

Now let me turn to the second activity, the collection of business records. After FISA was passed, it became apparent that it left some significant gaps in our intelligence collection authority. In particular, while the government had the power in a criminal investigation to compel the production of records with a grand jury subpoena, it lacked similar authority in a foreign intelligence investigation. So a provision was added in 1998 to provide such authority and was amended by section 215 of the USA-PATRIOT Act passed shortly after 9/11. This provision, which is generally referred to as section 215, allows us to apply to the FISA Court for an order requiring production of documents or other tangible things when they are relevant to an authorized national security investigation. Records can be produced only if they are the type of records that could be obtained pursuant to a grand jury subpoena or other court process—in other words, where there is no statutory or other protection that would prevent use of a grand jury subpoena. In some respects this process is more restrictive than a grand jury subpoena. A grand jury subpoena is issued by a prosecutor without any prior judicial review, whereas under the FISA business records provision we have to get court approval. Moreover, as with traditional FISA, records obtained pursuant to the FISA business records provision are subject to court-approved minimization procedures that limit the retention and

dissemination of information about US persons—another requirement that does not apply to grand jury subpoenas.

Now, of course, the FISA business records provision has been in the news because of one particular use of that provision. The FISA Court has repeatedly approved orders directing several telecommunications companies to produce certain categories of telephone metadata, such as the number calling, the number being called, and the date, time, and duration of the call. It's important to emphasize that under this program we do not get the content of any conversation; we do not get the identity of any party to the conversation; and we do not get any cell site or GPS locational information.

The limited scope of what we collect has important legal consequences. As I mentioned earlier, the Supreme Court has held that if you have voluntarily provided this kind of information to third parties, you have no reasonable expectation of privacy in that information. All of the metadata we get under this program is information that the telecommunications companies obtain and keep for their own business purposes. As a result, the government can get this information without a warrant, consistent with the Fourth Amendment.

Nonetheless, I recognize that there is a difference between getting metadata about one telephone number and getting it in bulk. From a legal point of view, section 215 only allows us to get records if they are “relevant” to a national security investigation, and from a privacy perspective people worry that, for example, the government could apply data mining techniques to a bulk data set and learn new personal facts about them—even though the underlying set of records is not subject to a reasonable expectation of privacy for Fourth Amendment purposes.

On the other hand, this information is clearly useful from an intelligence perspective: it can help identify links between terrorists overseas and their potential confederates in the United States. It's important to understand the problem this program was intended to

solve. Many will recall that one of the criticisms made by the 9/11 Commission was that we were unable to find the connection between a hijacker who was in California and an Al Qaeda safe house in Yemen. Although NSA had collected the conversations from the Yemen safe house, they had no way to determine that the person at the other end of the conversation was in the United States, and hence to identify the homeland connection. This collection program is designed to help us find those connections.

In order to do so, however, we need to be able to access the records of telephone calls, possibly going back many years. However, telephone companies have no legal obligation to keep this kind of information, and they generally destroy it after a period of time determined solely by their own business purposes. And the different telephone companies have separate datasets in different formats, which makes analysis of possible terrorist calls involving several providers considerably slower and more cumbersome. That could be a significant problem in a fast-moving investigation where speed and agility are critical, such as the plot to bomb the New York City subways in 2009.

The way we fill this intelligence gap while protecting privacy illustrates the analytical approach I outlined earlier. From a subscriber's point of view, as I said before, the difference between a telephone company keeping records of his phone calls and the intelligence community keeping the same information is what the government could do with the records. That's an entirely legitimate concern. We deal with it by limiting what the intelligence community is allowed do with the information we get under this program—limitations that are approved by the FISA Court:

- First, we put this information in secure databases.
- Second, the only intelligence purpose for which this information can be used is counterterrorism.

- Third, we allow only a limited number of specially trained analysts to search these databases.
- Fourth, even those trained analysts are allowed to search the database only when they have a reasonable and articulable suspicion that a particular telephone number is associated with particular foreign terrorist organizations that have been identified to the court. The basis for that suspicion has to be documented in writing and approved by a supervisor.
- Fifth, they're allowed to use this information only in a limited way, to map a network of telephone numbers calling other telephone numbers.
- Sixth, because the database contains only metadata, even if the analyst finds a previously unknown telephone number that warrants further investigation, all she can do is disseminate the telephone number. She doesn't even know whose number it is. Any further investigation of that number has to be done pursuant to other lawful means and, in particular, any collection of the contents of communications would have to be done using another valid legal authority, such as a traditional FISA.
- Finally, the information is destroyed after five years.

The net result is that although we collect large volumes of metadata under this program, we only look at a tiny fraction of it, and only for a carefully circumscribed purpose—to help us find links between foreign terrorists and people in the United States. The collection has to be broad to be operationally effective, but it is limited to non-content data that has a low privacy value and is not protected by the Fourth Amendment. It doesn't even identify any individual. Only the narrowest, most important use of this data is permitted; other uses are prohibited. In this way, we protect both privacy and national security.

Some have questioned how collection of a large volume of telephone metadata could comply with the statutory requirement that business records obtained pursuant to section 215 be “relevant to an authorized investigation.” While the government is working to determine what additional information about the program can be declassified and disclosed, including the actual court papers, I can give a broad summary of the legal basis. First, remember that the “authorized investigation” is an intelligence investigation, not a criminal one. The statute requires that an authorized investigation be conducted in accordance with guidelines approved by the attorney general, and those guidelines allow the FBI to conduct an investigation into a foreign terrorist entity if there is an “articulable factual basis . . . that reasonably indicates that the [entity] may have engaged in . . . international terrorism or other threat to the national security,” or may be planning or supporting such conduct.⁵ In other words, we can investigate an organization, not merely an individual or a particular act, if there is a factual basis to believe the organization is involved in terrorism. And in this case, the government’s applications to collect the telephony metadata have identified the particular terrorist entities that are the subject of the investigations.

Second, the standard of “relevance” required by this statute is not the standard that we think of in a civil or criminal trial under the rules of evidence. The courts have recognized in other contexts that “relevance” can be an extremely broad standard. For example, in the grand jury context, the Supreme Court has held that a grand jury subpoena is proper unless “there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury’s investigation.”⁶ And in civil discovery, relevance is “construed broadly to encompass any

5. Attorney General’s Guidelines for Domestic FBI Operations (2008), 23.

6. *United States v. R. Enterprises, Inc.*, 498 US 292, 301 (1991).

matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”⁷

In each of these contexts, the meaning of “relevance” is sufficiently broad to allow for subpoenas or requests that encompass large volumes of records in order to locate within them a smaller subset of material that will be directly pertinent to, or actually be used in, furtherance of the investigation or proceedings. In other words, the requester is not limited to obtaining only those records that actually are potentially incriminating or pertinent to establishing liability, because to identify such records it is often necessary to collect a much broader set of the records that might potentially bear fruit by leading to specific material that could bear on the issue.

When it passed the business records provision, Congress made clear that it had in mind such broad concepts of relevance. The telephony metadata collection program meets this relevance standard because, as I explained earlier, the effectiveness of the queries allowed under the strict limitations imposed by the court—the queries based on “reasonable and articulable suspicion”—depends on collecting and maintaining the data from which the narrowly focused queries can be made. As in the grand jury and civil discovery contexts, the concept of “relevance” is broad enough to allow for the collection of information beyond that which ultimately turns out to be important to a terrorist-related investigation. While the scope of the collection at issue here is broader than typically might be acquired through a grand jury subpoena or civil discovery request, the basic principle is similar: the information is relevant because you need to have the broader set of records in order to identify within them the information that is actually important to a terrorism investigation. And the reasonableness of this method of collection is reinforced by all of the stringent limitations imposed by the court to ensure that the data is used only for the approved purpose.

7. *Oppenheimer Fund, Inc. v. Sanders*, 437 US 340, 351 (1978).

I want to repeat that the conclusion that the bulk metadata collection is authorized under section 215 is not that of the intelligence community alone. Applications to obtain this data have been repeatedly approved by numerous judges of the FISA Court, each of whom has determined that the application complies with all legal requirements. And Congress reauthorized section 215 in 2011, after the intelligence and judiciary committees of both houses had been briefed on the program and after information describing the program had been made available to all members. In short, all three branches of government have determined that this collection is lawful and reasonable—in large part because of the substantial protections we provide for the privacy of every person whose telephone number is collected.

The third program I want to talk about is section 702, part of the FISA Amendments Act of 2008. Again, a little history is in order. Generally speaking, as I said before, Title I of FISA, or traditional FISA, governs electronic surveillance conducted within the United States for foreign intelligence purposes. When FISA was first passed in 1978, Congress did not intend it to regulate the targeting of foreigners outside of the United States for foreign intelligence purposes.

This kind of surveillance was generally carved out of coverage under FISA by the way Congress defined “electronic surveillance.” Most international communications in 1978 took place via satellite, so Congress excluded international radio communications from the definition of electronic surveillance covered by FISA, even when the radio waves were intercepted in the United States, unless the target of the collection was a US person in the United States.

Over time, that technology-based differentiation fell apart. By the early twenty-first century, most international communications travelled over fiber optic cables and thus were no longer “radio communications” outside of FISA’s reach. At the same time, there was a dramatic increase in the use of the Internet for communications purposes, including by terrorists. As a result, Congress’s original

intention was frustrated; we were increasingly forced to go to the FISA Court to get individual warrants to conduct electronic surveillance of foreigners overseas for foreign intelligence purposes.

After 9/11, this burden began to degrade our ability to collect the communications of foreign terrorists. Section 702 created a new, more streamlined procedure to accomplish this surveillance. So section 702 was not, as some have called it, a “defanging” of the FISA Court’s traditional authority. Rather, it extended the FISA Court’s oversight to a kind of surveillance that Congress had originally placed outside of that oversight: the surveillance, for foreign intelligence purposes, of foreigners overseas. This American regime imposing judicial supervision of a kind of foreign intelligence collection directed at citizens of other countries is a unique limitation that, so far as I am aware, goes beyond what other countries require of their intelligence services when they collect against persons who are not their own citizens.

The privacy and constitutional interests implicated by this program fall between traditional FISA and metadata collection. On the one hand we are collecting the full content of communications; on the other hand we are not collecting information in bulk and we are only targeting non-US persons for valid foreign intelligence purposes. And the information involved is unquestionably of great importance for national security: collection under section 702 is one of the most valuable sources of foreign intelligence we have. Again, the statutory scheme and the means by which we implement it are designed to allow us to collect this intelligence while providing appropriate protections for privacy. Collection under section 702 does not require individual judicial orders authorizing collection against each target. Instead, the FISA Court approves annual certifications submitted by the attorney general and the director of national intelligence that identify categories of foreign intelligence that may be collected, subject to court-approved targeting procedures and minimization procedures.

The targeting procedures are designed to ensure that we target someone only if we have a valid foreign intelligence purpose; that we

target only non-US persons reasonably believed to be outside of the United States; that we do not intercept wholly domestic communications; and that we do not target any person outside the United States as a backdoor means of targeting someone inside the United States. The procedures must be reviewed by the court to ensure that they are consistent with the statute and the Fourth Amendment. In other words, the targeting procedures are a way of minimizing the privacy impact of this collection both as to Americans and as to non-Americans by limiting the collection to its intended purpose.

The concept of minimization procedures should be familiar to you by now: they are the procedures that limit the retention and dissemination of information about US persons. We may incidentally acquire the communications of Americans even though we are not targeting them—for example, if they talk to non-US persons outside of the United States who are properly targeted for foreign intelligence collection. Some of these communications may be pertinent; some may not be. But the incidental acquisition of non-pertinent information is not unique to section 702. It is common whenever you lawfully collect information, whether it's by a criminal wiretap (where the target's conversations with his friends or family may be intercepted) or when we seize a terrorist's computer or address book, either of which is likely to contain non-pertinent information. In passing section 702, Congress recognized this reality and required us to establish procedures to minimize the impact of this incidental collection on privacy.

How does section 702 work in practice? As of today, there are certifications for several different categories of foreign intelligence information. Let's say that the intelligence community gets information that a terrorist is using a particular e-mail address. NSA analysts look at available data to assess whether that e-mail address would be a valid target under the statute—whether the e-mail address belongs to someone who is not a US person, whether the person with the e-mail address is outside the United States, and whether targeting

that e-mail address is likely to lead to the collection of foreign intelligence relevant to one of the certifications. Only if all three requirements of the statute are met and validated by supervisors will the e-mail address be approved for targeting. We don't randomly target e-mail addresses or collect all foreign individuals' e-mails under section 702; we target specific accounts because we are looking for foreign intelligence information. And even after a target is approved, the court-approved procedures require NSA to continue to verify that its targeting decision is valid based on any new information.

Any communications that we collect under section 702 are placed in secure databases, again with limited access. Trained analysts are allowed to use this data for legitimate foreign intelligence purposes, but the minimization procedures require that if they review a communication that they determine involves a US person or information about a US person, and they further determine that it has no intelligence value and is not evidence of a crime, it must be destroyed. In any case, conversations that are not relevant are destroyed after a maximum of five years. So under section 702, we have a regime that involves judicial approval of procedures that are designed to narrow the focus of the surveillance and limit its impact on privacy. I've outlined three different collection programs, under different provisions of FISA, which all reflect the framework I described. In each case, we protect privacy by a multilayered system of controls on what we collect and how we use what we collect, controls that are based on the nature and intrusiveness of the collection, but that take into account the ways in which that collection can be useful to protect national security. But we don't simply set out a bunch of rules and trust people to follow them. There are substantial safeguards in place that help ensure that the rules are followed.

These safeguards operate at several levels. The first is technological. The same technological revolution that has enabled this kind of intelligence collection and made it so valuable also allows us to place relatively stringent controls on it. For one thing, intelligence agencies

can work with providers so that they provide the information we are allowed to acquire under the relevant order, and not additional information. Second, we have secure databases to hold this data, to which only trained personnel have access. Finally, modern information security techniques allow us to create an audit trail tracking who uses these databases and how, so that we have a record that can enable us to identify any possible misuse. And I want to emphasize that there's no indication so far that anyone has defeated those technological controls and improperly gained access to the databases containing people's communications. Documents such as the leaked secondary order are kept on other NSA databases that do not contain this kind of information, to which many more NSA personnel have access.

We don't rely solely on technology. NSA has an internal compliance officer, whose job includes developing processes that all NSA personnel must follow to ensure that NSA is complying with the law. In addition, decisions about what telephone numbers we use as a basis for searching the telephone metadata are reviewed first within NSA and then by the Department of Justice. Decisions about targeting under section 702 are reviewed first within NSA and then by the Department of Justice and by my agency, the Office of the Director of National Intelligence, which has a dedicated civil liberties protection officer who actively oversees these programs. For Title I collection, the Department of Justice regularly conducts reviews to ensure that information collected is used and disseminated in accordance with the court-approved minimization procedures. Finally, independent inspectors general also review the operation of these programs. The point is not that these individuals are perfect; it's that as you have more and more people from more and more organizations overseeing the operation of the programs, it becomes less and less likely that unintentional errors will go unnoticed or that anyone will be able to misuse the information.

But wait, there's more. In addition to this oversight by the executive branch, there is considerable oversight by both the FISA Court

and the Congress. As I've said, the FISA Court has to review and approve the procedures by which we collect intelligence under FISA to ensure that those procedures comply with the statute and the Fourth Amendment. In addition, any compliance matter, large or small, has to be reported to the court. Improperly collected information generally must be deleted, subject only to some exceptions set out in the court's orders, and corrective measures are taken and reported to the court until it is satisfied.

And I want to correct the erroneous claim that the FISA Court is a rubber stamp. Some people assume that because the FISA Court approves almost every application, it does not give these applications careful scrutiny. In fact, the exact opposite is true. The judges and their professional staff review every application carefully and often ask extensive and probing questions, seek additional information, or request changes before the application is ultimately approved. Yes, the court approves the great majority of applications at the end of this process; but before it does so, its questions and comments ensure that the application complies with the law.

Finally, there is the Congress. By law, we are required to keep the intelligence and judiciary committees informed about these programs, including detailed reports about their operation and compliance matters. We regularly engage with them and discuss these authorities, as we did this week, to provide them information to further their oversight responsibilities. For example, when Congress reauthorized section 215 in 2009 and 2011 and section 702 in 2012, information was made available to every member of Congress, by briefings and written material, describing these programs in detail.

* * *

In short, the procedures by which we implement collection under FISA are a sensible means of accounting for the changing nature of privacy in the information age. They allow the intelligence community to collect information that is important to protect our nation and

its allies while protecting privacy by imposing appropriate limits on the use of that information. Much is collected, but access, analysis, and dissemination are subject to stringent controls and oversight. This same approach—making the extent and nature of controls over the use of information vary depending on the nature and sensitivity of the collection—is applied throughout our intelligence collection.

And make no mistake, our intelligence collection has helped to protect our nation from a variety of threats—and not only our nation, but the rest of the world. We have robust intelligence relationships with many other countries. These relationships go in both directions, but it is important to understand that we cannot use foreign intelligence to get around the limitations in our laws, and we assume that other countries similarly expect their intelligence services to operate in compliance with their own laws. By working closely with other countries, we have helped ensure our common security. For example, while many of the details remain classified, we have provided the Congress a list of fifty-four cases in which the bulk metadata and section 702 authorities have given us information that helped us understand potential terrorist activity and even disrupt it, from potential bomb attacks to material support for foreign terrorist organizations. Forty-one of these cases involved threats in other countries, including twenty-five in Europe. We were able to alert officials in these countries to these events, and help them fulfill their mission of protecting their nations, because of these capabilities.

I believe that our approach to achieving both security and privacy is effective and appropriate. It has been reviewed and approved by all three branches of government as consistent with the law and the Constitution. It is not the only way we could regulate intelligence collection, however. Even before the recent disclosures, the president said that we welcomed a discussion about privacy and national security, and we are working to declassify more information about our activities to inform that discussion. In addition, the Privacy and Civil Liberties Oversight Board—an independent body charged by law with

overseeing our counterterrorism activities—has announced that it intends to provide the president and Congress a public report on the section 215 and 702 programs, including the collection of bulk metadata. The board met recently with the president, who welcomed their review and committed to providing them access to all materials they will need to fulfill their oversight and advisory functions. We look forward to working with the board on this important project.

This discussion can, and should, have taken place without the recent disclosures, which have brought into public view the details of sensitive operations that were previously discussed on a classified basis with the Congress and in particular with the committees that were set up precisely to oversee intelligence operations. The level of detail in the current public debate certainly reflects a departure from the historic understanding that the sensitive nature of intelligence operations demanded a more limited discussion. Whether or not the value of the exposure of these details outweighs the cost to national security is now a moot point. As the debate about our surveillance programs goes forward, I hope that my remarks today have helped provide an appreciation of the efforts that have been made—and will continue to be made—to ensure that our intelligence activities comply with our laws and reflect our values.

Thank you.