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REMARKS AS PREPARED FOR DELIVERY BY ASSISTANT ATTORNEY GENERAL DAVID KRIS AT THE BROOKINGS INSTITUTION

WASHINGTON, D.C.

Thank you for inviting me here today.

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, 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, 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 counter-terrorism 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 <u>always</u> the right tool for combating terrorism. But it's also not the case that it's <u>never</u> the right tool. The reality, I think, is that it's <u>sometimes</u> the right tool. And whether it's the right tool in any given case depends on the specific facts of that case.

Here's <u>my</u> 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 <u>win</u> – 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 pre-conceived 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 25 years for planting IEDs in Iraq, Syed Harris and Ehsanul Sadequee were sentenced to 13 and 17 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 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;
· their experiences at and the location of al Qaeda training camps;
· al Qaeda weapons programs and explosives training;
· the location of al Qaeda safehouses (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; and
· information about plots to attack U.S. 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% 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 U.S. government's activities must operate under the rule of law. For example, the U.S. 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 Guantanamo 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, 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 U.S. citizens – folks like Anwar 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, Hizbollah, or the FARC 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 5-6 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 hardheaded, 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*, 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.

Thanks for listening.

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