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LAW ENFORCEMENT AS A COUNTERTERRORISM TOOL

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P R O C E E D I N G S

MR. WITTES: (in progress) -- and then I'll be very brief because I'm sure that not a single one of you came to hear what -- to hear my voice.

It's great to welcome David Kris back to Brookings. I say "back" because he actually once spent some time as a nonresident fellow here before going back into government. David is a very rare thing in government, which is a sort of scholar practitioner who has, you know, as deep an academic understanding and background in the material that he works on as he does a kind of granular working understanding and working familiarity with the matter that he writes about.

He's here to talk about the subject of law enforcement as a counterterrorism tool. This is a subject that won't surprise you. He's been on a lot of people's minds of late either because of claimed inadequacies in the system or of claimed successes in the system. We all have our opinions one direction or another on aspects of that, but David's going to present the argument, the case, that we have undervalued law enforcement as a tool in our counterterrorism arsenal, and that it actually deserves a stronger pride of place, a stronger place than we've given it.

David has been Assistant Attorney General for National Security since -- almost since the beginning of this administration. He, before that, has served in various capacities in the Justice Department across several administrations. Among other things, he was the principal or one of the principal figures in the 2002 litigation that broke down the proverbial wall between intelligence and law enforcement. He's also in periods outside of government. He wrote a just monumental treatise on national security law which is, if you have the interest and time, it's really a wonderful, wonderful piece of work.

So I'm going to stop there and turn it over to him. Please welcome David Kris. (Applause)

MR. KRIS: Well, thank you. Thanks, Ben, for that very nice introduction, and I'm grateful to Brookings for hosting me and -- oh, it won't be nearly as good that way. (Laughter). How about now?

MR. WITTES: Yeah, good.

MR. KRIS: Okay. So thanks, Ben, for that introduction, and thank you, Brookings, for hosting, and thanks to all of you for coming out.

I have been asked to talk about the role of law enforcement, by which I mean arrest, interrogation, prosecution, and that kind of thing, as a tool for counterterrorism. And, as Ben was saying, this is kind of a timely subject. If you hang out inside the Beltway and you are at all conscious, you will have noticed some talk recently about whether and to what extent the federal courts should be used again international terrorists. And, you know, there are I think some pretty strongly held views on that subject.

There are those who think really, I think, law enforcement should be the main or maybe the only method by which we combat terrorism, and then there are also those who think we ought not to use law enforcement at all against terrorism. And I suspect that members of both camps are well and ably represented in this audience, which is great. And with my luck, the only thing you'll be able to agree on by the end of this is that whatever I say about it is clearly wrong.

So, nonetheless, I'm going to try to talk about this subject in four parts. First I'll review some of the recent history of our national counterterrorism strategy as I understand it. And I'll focus here a little bit on the origins and evolution of the National Security Division at DOJ, which I had -- knowing a little bit about NSD may be interesting to you. In any event, at least I sort of hope it will be. But it's also an important part of how the country came to a kind of a consensus, at least until recently, about the appropriate role of law enforcement as a counterterrorism tool.

Second, I'll try to sketch out a kind of a conceptual framework for thinking about the role of law enforcement in the current conflict. The idea here would be to try to identify the right questions, the right way of thinking about and approaching the policy debate that we are, as a nation right now, for better or worse, involved in. Identifying the right questions, I think, is not as easy as it sounds, but it is, as in many things, critically important.

And then in the third part of the talk, if anybody's still here, I'll try to answer these questions that I have identified. And to do this I'll briefly describe some of the empirical evidence about how law enforcement has been used to combat terrorism. And I'll try to offer a comparison between civilian law enforcement, prosecution in the federal courts on the one hand, and its two sort of major and I think comparable alternatives. That is, detention under the law of war and prosecution in a military commission.

Now, I mean, let me just give you fair warning right now: This comparison may be a little bit technical, but -- and it might be a bit boring, but it won't be nearly as detailed as what you would need, I think, to make really informed and intelligent decisions about public policy, let alone about particular cases. But I hope it will give you a sense of the major pros and cons of each system, at least as I see them, and again sort of reinforce the idea of how I approach and how I think we ought to approach the question.

And then finally, I'll conclude with some ideas on improving the effectiveness of law enforcement as a counterterrorism tool, and, more generally, improving the effectiveness of the government as a whole in using all available, lawful counterterrorism tools. And I'll talk to you briefly about this idea of possible legislation with respect to the public safety exception to Miranda that you have heard discussed of late.

Okay? So that's the plan. Cookies in the back of the room, I gather, if things get really grim. Here we go.

Okay, so to begin with recent history, we often hear -- I have often heard anyways -- that before September 11th the U.S. Government took a “law enforcement approach” to dealing with counterterrorism. And I think there’s some truth to that. But I also think it oversimplifies things a little bit.

If you look, say, at the 9-11 Commission Report, it found that before September 11th that the CIA was plainly the lead U.S. Government agency confronting al Qaeda; that law enforcement played a “secondary role”; and that military and diplomatic efforts, they were characterized as episodic. I was involved in national security both before and after September 11th as a member of the Clinton and then the Bush administrations, and, I mean, I think reasonable minds can differ on some of these details, but that doesn’t seem terribly far off the mark to me.

After September 11th, of course, all of our national security agencies dramatically ramped up their counterterrorism activities, and as our troops deployed to foreign battlefields and as the intelligence community expanded its operations, DOJ and the FBI also evolved. And we really began that evolution with an important legal change that Ben actually referred to in his introduction and that was tearing down this so-called FISA wall under which law enforcement and intelligence were largely separate enterprises and, as a result, law enforcement was correspondingly limited in its effectiveness, I think, as a counterterrorism tool.

Now, for those of you who don’t -- there may be four people in the room who don’t know what FISA is, and you should count yourselves lucky -- It’s a federal statute enacted by Congress in 1978 that governs electronic surveillance, wiretapping, and that sort of thing, and physical searches as well, regular old searches of foreign intelligence targets in the United States. It can’t be used against ordinary red-blooded American criminals, like Bonnie and Clyde or somebody like that, but it is designed and available for people like

Robert Hanssen, the spy, or Osama bin Laden, the terrorist.

And it is -- this is the critical point -- it's an extremely powerful and important investigative tool, and it's really vitally important to our security. If we couldn't do the kinds of things we do under FISA, I really -- I don't know what it would look like, but it would look very different, our counterterrorism posture.

But until the wall came down, the price of using that powerful tool, of using FISA or even of preserving your option to use it was a requirement to keep intelligence and law enforcement at arm's length. So tearing down that wall permitted intelligence and law enforcement to work together more effectively and allowed each of them to do better than they had done on their own. And I think this legal change, tearing down the wall, reflected but 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 to protect national security. But I do think in the years after 9-11 that we came to a kind of national consensus that law enforcement is one important way of protecting national security.

Certainly the Executive Branch, the Bush Administration when I was there, argued this position quite explicitly in public statements, in briefs that we filed and elsewhere. The FISA Court, for it's part of the FISA Court of Review, clearly and expressly endorsed the idea, and Congress certainly supported it on a bipartisan basis in a number of different pieces of legislation.

So this consensus that law enforcement is one way, not the only way, not the best way but one way, to protect national security led to not only legal change, but to structural change at both the Department of Justice and the FBI. At the Bureau, I think the story is pretty well known. It integrated intelligence and law enforcement functions with respect to counterterrorism, and it dramatically increased its resources and focus on

intelligence collection and analysis.

This legal change also led to the creation of the National Security Division, NSD, which I head, and it combines terrorism and espionage prosecutors on the one hand with intelligence lawyers and other intelligence professionals on the other. And they are united by a single shared and overriding mission, which is to protect against terrorism and other threats to the national security using all of the lawful methods that are available to us.

And it's easy to overstate this, but at some level, NSD approaches this indifferent to the particular lawful method consistent with our values that is used to neutralize a threat. We don't mind if it's a prosecution solution or an intelligence solution; we prefer the lawful appropriate method that's most effective under the circumstances. And I guess, I think from living through and having studied some of the history, that that more or less represents the crystallized consensus of our government and of the people of the United States in the aftermath of 9-11.

But just right now, today, I would say that that consensus is showing some signs of potentially unraveling -- huh, just a little? -- and that's why we live in interesting times. In particular, you know, there are some who say today 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 -- that is, non-FBI -- elements of the intelligence community or for the Defense Department. And, I mean, I don't want to oversimplify, but here as I understand it is the argument that is advanced, and it sort of comes in three parts:

First, we are at war. This is not a game. This is not some police action. It's a war.

Second, our enemies in this war are lethal, intelligent, and adaptable. They are not common criminals. They did not just rob the corner liquor store.

And third, because we are at war and because our enemy in the war is not

a bunch of common criminals, we should fight the enemy using military and intelligence methods and not law enforcement methods.

This is a simple in the sense of clear, and rhetorically, I think, very powerful argument. I mean, it's funny, even saying it to you sort of in character I find myself -- it's very attractive. In many ways it sounds good.

Huh, this is why I'm just not going to have a future in public speaking. But I've got to tell you, and I mean this with all due respect because I think it's, you know, I take the argument very seriously, but I have to say I don't agree with it, I think it's wrong, and I think it will, if it were adopted and implemented in public policy, make us less safe than we are now.

I don't want to be overly dramatic, but again, it's not the case that law enforcement is always the right tool for combating terrorism, but I think it's also not the case that it's never the right tool.

I mean the sort of middle ground I'm pushing for is that it's sometimes the right tool. And whether it's the right tool in any given case depends in large part on the specific facts of that case.

So in fairness, to try to sort of compare apples to apples, here's my version of that three part argument. First, we are at war, so in that respect, we start from a common base line. The President has said that many times, the Attorney General has said it many times, we are at war, and our enemy in this war is lethal, adaptable and intelligent. There are people who get up every morning and go to bed every night and they think of nothing else in between those two things than how many of us they can kill. Second, in a war with that kind of adversary, your goal must be to win; no other goal is acceptable in a war like that. And third, to win the war, we need to use all of the available

tools and weapons that we have if they are consistent with the rule of law and our basic values, selecting, in any case, the tool that is best under the circumstances.

In other words, we need to be more relentlessly pragmatic and empirical. I don't think we can afford to limit our options unduly in an artificial way or to yield to sort of preconceived a priory notions of suitability or correctness.

That's not to say that we don't need broad policy guidance within a legal framework, but only to say that that guidance has to be grounded in empirical experience. We have to look dispassionately at these facts that we're facing and then respond to them using the methods within our value structure that will best lead us to victory. So that's some fairly high falutent rhetoric, so let me sort of tone it down a bit, put it in little more concrete terms. What I'm really saying is, when we look at the tools that are available to us consistent with our values, we've got to use the tool that is designed best for the particular national security problem that we find ourselves facing. So if you go out and look and survey the field and you see a problem that looks like a nail, then we need to use a hammer. But when the problem looks like a bolt, then we need to use a wrench.

Hitting a bolt with a hammer makes a very loud noise and sparks will fly and it can, let's be honest, be satisfying in some visceral way. I know this from many failed attempts at home repair and improvement around my house.

But if you want to turn the bolt, you shouldn't use a hammer, it's just not effective and it's not smart. And if we want to win this war, then I think we need to be both effective and smart.

Now, how are we doing up there? There's a lot more to cover. If you take this idea that I've just described seriously, and I kind of hope you do given how much I'm putting into it, it complicates your strategic planning quite a bit because it requires you to have a much more detailed understanding of our various counterterrorism

tools. If you're a pragmatist, if you're focused relentlessly on winning, then you really can't make policy or operational decisions from 30,000 feet up, you've got to come down, get in the weeds and understand the details of how these tools work at the operational level. You may end up abstracting from that experience to make policy, but you've got to understand the reality.

And so in a way, that leads me to sort of the end of the second part of this four part speech and to this question. As compared to the viable alternatives, you know, 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 from the real war or maybe worse, an affirmative impediment?

And to put my cards on the table, in case you haven't guessed, I think law enforcement helps us win this war. And I want to make clear, because I'm giving this speech in a very particular context and in a very limited setting as part of a larger national conversation that I perceive, and in light of that conversation, in light of the nature of our current national debate, I want to make clear that when I say this, I am not primarily making a values based argument, that is, I am not saying, for these limited purposes in this particular context, that law enforcement helps us win, you know, in the sense that it is some bright, shining city on a hill that captures hearts and minds around the globe, although I do think our criminal justice system is widely respected.

Values are critically important, both in and of themselves and in their effect on us and our allies and our adversaries. But I am talking now in this very narrow limited context 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.

And in particular, I want to say law enforcement helps us do that in at least three ways. First, it can disrupt terrorist plots through arrest; second, it can incapacitate terrorists through incarceration that results from a successful prosecution; and third, it can gather intelligence through interrogation and recruitment of terrorists or their supporters by cooperation agreements.

So that's the pitch. Here's some of the evidence in support of that argument. Between September, 2001 and March, 2010, the Department of Justice convicted more than 400 defendants in terrorism related cases. Some of these convictions involve what I would call sort of per se terrorism offenses, crimes like providing material support to terrorists or using a weapon of mass destruction or the like. Some of them involve ordinary crime, document fraud, perjury or the like, where there's a particular factual nexus to terrorism.

Everybody knows about Najibullah Zazi, the guy from Colorado who went to New York, David Headley in Chicago, both of these guys have pleaded guilty and they're awaiting sentencing, and now most recently we've had Faisal Shahzad from Times Square. But there have been others over the years ranging from Ramzi Yousef, who was the first World Trade Center bomber, to the various East Africa Embassy bombers, to Richard Reid, to Ahmed Omar Abu Ali. All of these guys are now serving life sentences in federal prison.

And just in the past year we've had Wisam Dalai Lama, he was sentenced to 25 years for planting IED's, improvised explosive devices, in Iraq. Syed Haris and Ehsanul Sadequee were sentenced to 13 and 17 years for providing material support to Al Qaeda, and Oussama Kassir was sentenced to life for attempting to establish a jihad training camp in the United States. Last year we also picked up a couple of guys in separate, but very similar undercover operations after they allegedly

tried to blow up buildings, one in Dallas, Texas and the other in Springfield, Illinois, and the Texas guy, Hosam Smadi, has now pleaded guilty to that crime.

And there are a bunch of others. I feel a little bad, can't go on forever here, obviously your pain tolerance will kick in, but I feel a little bit bad not mentioning Mohammad Wasami, and the Minnesota Al-Shabaab cases, and Colleen LeRose, better known as Jihad Jane, and, of course, from just a couple of days ago, Mr. Alessa and Mr. Almonty from New Jersey, there are a bunch of them.

Now, not all of these cases make the headlines and not all of these defendants that we've convicted were hard core terrorists or key terrorist operatives. As in traditional intelligence investigations, aggressive and wide ranging counterterrorism efforts may net a lot of smaller fish along with the big ones. I think that's a good thing because it means we may be disrupting plots before they're consummated and because it may give us a chance to recruit the smaller fish before they're fully radicalized and maybe get them working for us.

And, in fact, we have also used the criminal justice system to collect valuable intelligence. In effect, it has worked as what the intelligence community would call a humint collection platform, that is, a platform, a mechanism, a system for collecting human intelligence from and about terrorists. Because the fact is, when the government has a strong prosecution case in an Article 3 court, the defendant knows this, and he knows that he will spend a long time in a small cell, which creates powerful incentives for him to cooperate with us, not that those incentives always produce cooperation, just that, in the run of cases, they do do that quite a bit.

Now, there's a limit to what I can say publicly about this, as you can imagine, but let me give you some examples, and I've vetted these with the FBI and the community.

Terrorism suspects in the criminal justice system have given us information on things like this, telephone numbers and email addresses used by Al Qaeda, Al Qaeda recruiting, financing and geographical reach, terrorist trade craft used to avoid detection in the west, experiences at and the location of Al Qaeda training camps, Al Qaeda weapons programs and explosive training, the location of Al Qaeda safe houses, residential locations of senior Al Qaeda figures, Al Qaeda communications methods and security protocols, identification of operatives involved in past or planned attacks, and information about plots to attack U.S. interest. And I can tell you from my work with our intelligence community partners, and I have a pretty good relationship with a lot of these guys, including NCTC, the National Counterterrorism Center, for example, they believe that the criminal justice system has provided useful information that helps them do their jobs.

So I mean that's the basic outline of the affirmative argument and some of the evidence for it. And there's so much more that I could say, but I kind of want to move through this so that you don't all just leave before I'm done.

And I think what I'd like to do is, sort of having outlined the basic affirmative argument, let me take up some of what I perceive to be the arguments on the other side, that is, arguments against using law enforcement as a counterterrorism tool, it seems only fair.

The first argument that I've heard is, you know, there is some kind of inherent tension between national security and law enforcement, they just don't go together like, you know, oil and water. I guess I think this argument confuses ends with means. And I think it's important to sort of use this to clarify something. The criminal justice system is a tool; it's one of several tools that can be used to promote national security, to protect our country against terrorism.

Sometimes it is the right tool, other times it's the wrong tool, but at some conceptual level, that's really no different than saying sometimes the best way to protect national security is through diplomacy and other times the best way to protect national security is through military action. It just depends on what the tool can do measured against the problem that you're facing.

To put it a little bit differently, if you're looking at it in this particular way, from this angle, there's nothing special about law enforcement, it's a means to an end, and it's consistent with our values.

Another argument against using law enforcement goes like this, the criminal justice system is just fundamentally incompatible with national security because it's focused on defendant's rights, and national security is more important than that, and we can't use a system that is so focused on the individual rights of particular criminal defendants. I guess I think this argument has two flaws. First, just as a matter of fact, there's probably some criminal defense lawyers in the room, the criminal justice system is not focused solely on defendant's rights, it strikes a balance between those rights and the interest of government society victims.

And more importantly, look, I mean you can argue about how the balance should be struck and how it calibrated or recalibrated or whatever, but at the end of the day, given the balance that we have, the empirical fact is, when a decision is made to prosecute a terrorist in federal court, in fact, he gets convicted about 90 percent of the time.

So to be sure, the criminal justice system has its limits. Those limits are significant, they are not trivial. And in part because of those limits the criminal justice system is not always the right tool for the job. But when the Executive Branch concludes that it is the right tool, as we have more than 400 times since September 11th, we, in fact, put steel

on target almost every time.

The second flaw I think in this fundamental incompatibility argument is at least equally significant in my view. The criminal justice system does face a whole host of legal constraints, but it is not alone in facing those constraints. All of the U.S. Government's counterterrorism efforts operate under the rule of law.

So, I'll give you an example. The U.S. military operates under rules that require it to forego kinetic strikes against terrorists if those strikes will inflict unduly disproportionate harm on innocent civilians. That means you don't strike even when you could, operationally, in certain circumstances. These limits on the military as a result of the Law of War and associated rules are real, and they're not trivial, but they're not, I think, a reason to forbid altogether the use of military force against al Qaeda.

Now, just to guard against any misunderstandings, the point of this argument that I've just constructed is not to equate the limits in the two systems, because they're obviously in a whole host of ways very, very different. The point I'm trying to make is only that all of our counterterrorism tools have legal limits associated with them. That's what it means to live under the rule of law. And those limits, along with operational capabilities and a variety of other factors, should and do inform judgments about which tool is best in any given case.

Okay. So to me, ultimately the worth of the criminal justice system -- and again, I'm speaking here in a very narrow range in a particular -- sort of coming at this from a particular angle -- the worth of the criminal justice system is a relative thing. In other words, its value as a counterterrorism tool has to be compared to the value of other available tools. So, comparing the criminal justice system to the use of military force or diplomacy is kind of difficult, because it shares so little in common with them and you're very quickly into a sort of apples-and-oranges situation where it really just isn't a good comparison. But as a tool for

disrupting and incapacitating terrorists and gathering intelligence from and about them, I think the criminal justice system is readily comparable with two others: detention under the Law of War and prosecution in the military commission. So, I'm going to try to do a little comparison now between and among those three systems. And if you think it's been a little boring up till now, just wait and see, because it only gets worse.

Before I do the differences, remember there are cookies in the back in the room. Oh, God. Before I do the differences, I kind of -- I think I should do the similarities, particularly of the two prosecution systems, because I think there's been some potential misunderstanding on this. Whether you are the defendant in a civilian court or a military commission, let me tell you what you've got: presumption of innocence; requirement of proof beyond a reasonable doubt; right to an impartial decision maker; similar procedures for selecting members of the jury, or the commission in the military context; a right to counsel and choice of counsel; if you don't want counsel, then a qualified right to self-representation; a right to be present during the proceedings; a right against self-incrimination; a right to present evidence, cross examine the government's witnesses, and compel the attendance of favorable witnesses; a right to exclude prejudicial evidence; a right to have access to exculpatory evidence; a protection against double jeopardy; a protection against ex post facto laws; and a right to an appeal. I think both of these systems -- it's certainly the position of the Obama administration -- provide the basic rights that most Americans would associate with a fundamentally fair trial.

That doesn't mean there aren't a lot of differences, and as to the differences an exhaustive comparison would require a lot longer discussion than we're going to do today. I keep threatening you.

I've identified five relative advantages of our military authorities and five of the civilian system, and this is a little bit arbitrary, and importantly this is -- looking at it again

-- I keep emphasizing this -- solely from the perspective of the government and effectiveness in combating terrorism, and so I kind of want to run through those, or at least some of them, depending on the look of pain on your face. I need to emphasize that though really this is not nearly as detailed a comparison as you would need to make an informed judgment. I mean, this is really the equivalent of a stone skipping across the surface of a very, very deep body of water.

So, okay, with that caveat, let me lay out the five main advantages that I see from the government's perspective of using military authorities over civilian prosecution. It's really from the perspective of the prosecution, and I'll discuss each one or at least most of them, but let me just quickly list them: First, proof requirements; second, rules governing admissibility of confessions; third, rules governing closure of the courtroom; fourth, hearsay rules; and, fifth, classified evidence rules.

So, proof requirements. In military commissions, the burden of proof is the same as in civilian court. That's proof beyond a reasonable doubt. But in non-capital cases, only two-thirds of the jurors, rather than all of them, are needed for a conviction. Under the Law of War, if it's tested through a habeas petition, government needs to persuade only one person, and that's the judge, and only by a preponderance of the evidence that the petitioner, the prisoner, is part of al Qaeda or associated forces, although it turns out that's not always as easy as it might be as our -- we've had some tough results in the Gitmo cases.

Okay, you know, just at the risk of just really laying it on too thick, just to back up and emphasis the point about the stone skipping across the water and the sort of depth here, you know, it's true in a military commission that you only need two-thirds of the jurors in a non-capital case. And from the government's perspective, you know, that's an advantage.

But I just want to point out sort of the way you can unpack these things. In a military commission, if the jury votes, say, 7 to 5 in favor of conviction, that's an acquittal in a military commission, because you didn't get two-thirds -- unless my math is off. In a civilian court, by contrast, that vote results in a retrial. That is, the government gets a second bite of the apple. In fact, the government gets a second bite of the apple if it can convict -- if it can persuade 1 juror out of 12 to vote for a conviction. And in capital cases, even in the military commission, you do need a unanimous verdict for the death penalty, just as you do in federal court. But the verdict in a commission in a capital case has to come from what amounts to the entire jury veneer panel, which may be substantially larger than twelve persons. So, that ends up being harder for the government to get.

So, I still think the two-thirds rule is, you know, net, an advantage overall for the government in these commission cases. But I just sort of wanted to, at the risk of just really just going on way too long, just give you one example of how you can really just drill down into this and get into the weeds and how things start to flip around and turn around and get very complicated. I won't do that again, so don't panic.

Second, after proof requirements is admissibility of confessions. In a military commission, unlike a federal court, Miranda warnings aren't required to use the defendant's custodial statements against him, and while the same basic voluntariness test applies, there is also an exception for statements taken at the point of capture on or near a battlefield. And for Law of War detention, the test is reliability, which may be in effect, practicality speaking, pretty similar or at least something like the basic voluntariness requirement. Ben and Bobby Chesne and others who really have studied these might know better, but it seems to me not wildly different.

Third, closing the courtroom. Both federal trials and military commissions' proceedings I think will overwhelmingly be open affairs. That is certainly going to be the rule

rather than the exception. There may be some increased stability to close the courtroom in a military commission, and that can be helpful particularly when you're dealing with classified evidence. There's certainly greater ability to close the courtroom in a habeas proceeding, and unlike both commissions and federal prosecutions, the petitioner doesn't have to be there, which can be useful again when you're dealing with classified.

Fourth, admissibility of hearsay. The hearsay rules are somewhat more relaxed by statute and military commission than they are in federal prosecution, and they are significantly more relaxed in a habeas proceeding testing law of order tension. In fact, the D.C. Circuit had an opinion I think just this week sort of thing. Pretty much all the hearsay comes in. The only real question is what weight will the judge assign to it. This can be good for the government in some cases, particularly when you're talking about protecting sensitive sources. But, you know, what's good for the goose is also good for the gander, and if you look at, say, the Hamdan case -- this is Osama Bin Laden's driver -- he's one of the three guys prosecuted in a commission under a similar rule. You know, in fact, I'm told Hamdan used the hearsay rules to much greater effect in his military commission proceeding than did the government. So, you know, these rules are symmetrical, and they can cut both ways.

Finally, classified evidence. The rules governing protection of classified information are very similar in the two prosecution fora, and in both fora they're very good not only on the substance, but also as a matter of process in making sure the government can plan in advance and know, you know, sort of what information it's going to need to make the trial go forward. The rules are somewhat better in military commissions, because when we were asking for them, we asked Congress to codify some of the federal case law and adopt some lessons that we learned from litigating classified information issues in federal court.

And just to wrap it up, in habeas proceedings involving Law of War tension,

I would say the rules are both more flexible and less certain than they are in either of the other two senses.

So, those are the five main advantages as I see them, subject to all of these caveats that I laid out, which really are important. So, now, in order to sort of answer the mail, I've got to do the other side of the coin. And I will move as rapidly as I can.

Let me just list the five relative advantages of using civilian prosecution as I see it: first, certainty and finality; second, breadth of scope; third, incentives for cooperation; fourth, sentencing -- I've already talked about that a little bit; and, fifth, foreign support.

Certainty and finality. The rules governing civilian prosecutions are more certain, and they're better established than those in the other two systems, and this can speed the process, reduce litigation risk, promote cooperation and guilty pleas, and result in more reliable, long-term incapacitation. You know, I am now a waffle-bottom bureaucrat, and a proud one. I used to be a litigator, and I still hang out with some litigators, and I'll tell you from the perspective of a litigator the certainty, the finality of these rules is very important. It is very tough to operate in a new system. And I think this is a very significant factor right now, although hopefully it will recede over time as we gain more experience. But I think it would be wrong to discount it right now.

Second, scope. Civilian criminal justice system is much broader than the other two. It has, first of all, a lot more crimes you can commit. We cover everything from terrorism to tax evasion. And it applies to everybody. Military commissions at the outset are not available for U.S. citizens, so people like Faisal Shahzad and Anwar al-Awlaki -- you may have heard of him -- they're just not going to get prosecuted in a military commission. And neither commissions nor Law of War tension is available for terrorists who are not related to al Qaeda, the Taliban, or associated forces. So, we're talking about groups like Hamas, Hezbollah, the FARC, and lone wolves. Remember these two guys I talked about

who tried to blow up buildings in Illinois and Texas, and they thought that they were conspiring with al Qaeda? Turns out they were actually conspiring with the FBI; not nearly as effective. But they don't have, as a result of that, the actual requisite connection to a terrorist group, and so they're sort of out of bounds. So, the criminal justice system has a broader reach, and so in some cases it's what you're going to need to use.

Third, incentives for cooperation. Criminal justice system has more reliable and pretty well-developed mechanisms to encourage cooperation to get information and intelligence from somebody in exchange for changes to their conditions or duration of confinement. Military commissions have barred a plea and sentencing agreement mechanism from the court marshal systems as Rule 705, and I think this may, over time, work out and grow some pretty good mechanisms, but right now it really hasn't been tested. And, you know, this is a market system essentially. I mean, it's a little crass to describe it that way, but the Supreme Court has talked about it in that way, and those kinds of systems don't grow up over night.

Sentencing. I talked about this before. In federal court, you know, judges impose sentences based in large part on the sentencing guidelines. And in military commissions, sentencing is done by the jury, the members, without any guidelines. So we don't have a lot, a lot of experience with sentencing in the commissions, but what we do have suggests that maybe the sentence is going to be a little less predictable because two of the three commission defendants thus far, including this guy, Hamdan, Osama bin Laden's driver, got sentences of about five, six years, which mean that with credit for time served they were released within a few months, and they're at large.

Now, under the law of war, of course, there is no sentence, right. Law of war detention is designed to take people out of the fight for the duration of the conflict. So, if the detention is lawful, they can be held until the end of the war.

But in the Hamdi case, not to be confused with Hamdan, the Supreme Court warned that at some point if this war turns out to be unlike all the other ones that informed the development of the law of war, this authority to detain may unravel. That's the way the court put it. So, as circumstances change, if combat operations are concluded some day, it's not totally clear, at least to me, how long into the future that detention authority will endure.

Final point on the comparison, international cooperation. Unfortunately, some countries, including some of our allies, won't give us either the body or the evidence that we need to convict the terrorists unless we promise that we won't prosecute them in a commission or hold them under the law of war. Sometimes we have to agree to those conditions because it's the only way to go forward.

Now let me just hasten to add in case there's any risk of misunderstanding, this is not a plea to subject our counterterrorism efforts here in the United States to some kind of global test of legitimacy. This is just a hard-headed, pragmatic recognition that in some cases if we want and need help from abroad we're going to have to rely on law enforcement rather than military detention or prosecution to get the job done.

All right, thanks. I appreciate your not making a mass run for the exit during this. I know it was not the most exciting thing ever, but you can see that the basic point I was trying to make is that you have to do this. And believe me, it could have been a lot worse. So let me just try to wrap it up.

I think we can't and we shouldn't immunize terrorists from prosecution in our federal courts anymore than we ought to immunize them from the use of military strikes or any other of our counterterrorism tools, but I think there are a couple things we do need to do.

First, we need to educate ourselves about all of the tools in the President's national security toolbox. So, within the government say, people who use hammers for a living, they need to know something about wrenches, and vice versa. If they don't, there is a real danger of a kind of myopia because what I have seen is to a person whose job it is to use a hammer every problem starts to look like a nail.

We can't have people -- I'll just use prosecutors as an example, but it applies to everybody. You can't have prosecutors reflexively, thoughtlessly treating every national security threat as something that they and only they can deal with, without considering the other approaches, and that applies I think across the board. We want to consider all of the tools. And more generally, outside of the government, I think the American people should understand, and have confidence in, the tools that the policymakers have put in the tool box.

Those of you who know me know that this kind of public speaking is not exactly my thing, but it is a big part of why I came here today to talk about this.

And second point, as always, we need to consider improving and sharpening our tools. Our adversaries, as I mentioned, they're smart and they're adaptable, and we have to be the same.

So here's one example. Recently, there's been some discussion about whether Congress might adopt legislation that would be useful on the issue of Miranda warnings in terrorism cases.

Now, for all the legal scholars out there, obviously Miranda is a constitutional rule. We know that from the Dickerson decision of the Supreme Court. So it can't be changed or overruled by statute. That is just not how the federal legal hierarchy functions.

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

don't have to be preceded by Miranda warnings. In other words, you can use the person's answers to those questions to support his conviction and incarceration and incapacitation even if you didn't Mirandize him.

Now, Quarles really did involve a common criminal, a guy who committed an armed robbery, and then he ran from the policy into a supermarket, and they chased after him, and they found him, and he had a holster but no gun. They said, hey, where's the gun? And he said, it's over there. Indeed it was. That was not a smart thing for him to say.

And the Court said, well, we know that interrogation certainly was custodial and it was interrogation, and even though you didn't Mirandize him that statement can come in against him because it was prompted by a concern about public safety, which is we don't want guns lying around in supermarkets.

The question really now is how that public safety exception, recognized by the Supreme Court in 1984, would apply in a very different context, and that is the context of modern international terrorism because the threat posed by terrorism today is a lot more complex, sophisticated and serious than the threat posed by ordinary street corner crime.

Precisely because of that, I think there are some good arguments that the public safety exception should likewise permit a lot more questioning where it's in fact designed to mitigate that threat. We would like to try to work with Congress to see if we can develop something here that might help us, maybe give us a little more clarity and flexibility in these very narrow circumstances now, involving operational terrorists basically, because our goal always it so to promote and protect national security, consistent with the rule of law and our values. And I think it's possible. Anyway, it seems to me worth exploring, that this might be one way to help do that.

Okay. Thank you very much for listening, and now I think I'll be happy to take your questions.

(Applause)

MR. WITTES: Give us a moment up here to get David wired.

MR. KRIS: I think I come pre-wired.

MR. WITTES: So you've put a huge amount on the table, and what I'd like to do is spend a little bit of time posing some questions on my own and then go to the audience in a little bit, in a little while.

I'd like to start -- oh, before I begin, it's a disclaimer up front. David is not in a position, obviously, to address any pending cases or any operational matters. I am not going to raise any with him. If anybody in the audience does, I will glare at you and move on to the next questioner, and you'll be wasting everybody's time.

Sorry, Shane.

I'd like to start where you ended, with the Miranda question. In the wake of the Attorney General's comments on one of the talk shows or other, about this, there has been a lot of commentary to the effect that (A) Miranda doesn't pose a serious problem in this context. Some people, including me, have argued that the real issue is the necessity of presentment to a magistrate in a very short period of time, and some people have argued that none of them pose a serious problem.

I guess the question that I'd like you to address is to what extent is this really a Miranda issue, to what extent is it really a presentment issue and to what extent is it some hybrid of the two.

MR. KRIS: That's a good question. I guess let me try to take the Miranda piece in two parts, kind of corresponding to the approach I took in the speech. That is let me do a

little empirical groundwork and then sort of pull back and do a little sort of conceptual work, to at least identify how I think about it for what it's worth.

The empirical question on Miranda really is does it, in fact, have a bad effect on your intelligence collection? That is does it discourage people from talking who otherwise would talk?

There's a fair amount of social science that's been done on this. What there is suggests that Miranda really doesn't have a very profound effect, I think. There have been criticisms, studies pointing I guess a little bit in both directions and then studies criticizing the other studies, and so forth. But my sort of takeaway from looking through some of it was the studies didn't suggest it had a profound effect.

I got to say I'm a little bit more influenced by many, many, many, many conversations I've had with the professional interrogators who do this for a living at the Federal BI. These are guys who do a lot of interrogations preceded by Miranda warnings. I think what you get from talking to them, at least what I've gotten, is people who are going to talk are going to talk based on the skill of the interrogator, the situation they're in and so forth, and they're going to waive. And people, by and large, who don't waive and invoke -- we now know from the Supreme Court you've got to invoke -- probably aren't going to talk anyway in a voluntary-ist, constrained interview.

That doesn't mean that they don't have any effect, and I wouldn't go that far, but I think it's easy to overstate. Let me put it that way. But for purposes of just thinking about it, let's assume some inhibitory effect.

I guess the way I think about Miranda, in keeping with the approach that I've talked about here and in the particular context of our current national conversation, right, if you assume that Miranda warnings reduce somewhat your ability to get intelligence from somebody -- it's an assumption, but let's make it -- on the other side of the balances, they

obviously enhance your capacity to detain and incapacitate the terrorists because they give you evidence that you can use, that's admissible in court, that leads to prosecution, that leads to conviction, that leads to incarceration.

Both intelligence collection and incapacitation are national security values. Both are good. Both need to be promoted. And there are situations, if you indulge this assumption, where you may have to strike a balance between them, or their intention.

By the way, this is not unique to the criminal justice system. I have friends at DoD. I talk to them.

If you're in the Defense Department in the military, and you're thinking about what to do with a terrorist whom you identified somewhere abroad, on the battlefield or elsewhere, you can basically do a couple of different things. You can do a straight operation to kill him, assuming this is all legal and in gauge and within the law of war. That is relatively low risk compared to the other option; it may have a higher chance of success than a capture operation, which is the main alternative. By and large, it's easier and lower risk to kill him than it is to put people in and try to capture him.

The kill operation will have a higher chance of success in incapacitating this enemy combatant/terrorist, but obviously you won't be doing any interrogation and intelligence collection. So that's one option.

If you try the capture approach, you will possibly get both. You'll capture him, and he'll be incapacitated through detention rather than death. But he'll also be available for you to interrogate, and that might give you intelligence collection.

So this is an approach that an economist, as well as a war fighter, can understand. You've got one opportunity which is sort of low risk and potentially low yield. You've got a higher risk option with a potentially higher yield.

Well, you can think about it in a purely pragmatic perspective right now, which is not the only way that we could or should think about this, but it is the way I'm talking about it for purposes of today. Think about Miranda in a similar way. If you Mirandize somebody and you get him to talk, you get both the intelligence and the capacity to detain him using those statements. If you don't, you may get the intelligence, but you won't get the enhanced detention option.

And we ought to be clear. There will be cases in which a Mirandized confession is all that stands between detaining the guy and letting him go. Now those cases may not come up every day, but they will come in.

So I mean I think that at least is the way I think about it, in this pragmatic approach, and that's why this public safety exception is an appealing one, because it would allow us to do unwarned interrogation. So, if there is a concern about the inhibitory effect of Miranda, it wouldn't be present, and yet the statements would be admissible.

In terms of presentment, the rule really is that you present him to a magistrate without unnecessary delay, under Rule 5 of the Rules of Criminal Procedure. That generally means within a number of hours or overnight, sometimes on the weekends, it'll be the next day. It's not a long, long time, but in the time between the arrest and the presentment, we have had pretty good luck, I think -- and it's not just luck -- in getting information. And in some cases we can get people to waive not only their Miranda rights, but also their presentment. And so, I do think both factors are in play. I would say neither, you know, makes the criminal justice system unusable, and we are always looking for ways to tune up and improve the system as much as we can, but right now all we're really talking about so far is the public safety thing and not the presentment piece.

MR. WITTES: Talk a little bit about the current threat environment. We tend to focus, for obvious reasons, dramatically more on these issues when we've recently

had a near miss case or we have reason to think that there's increased activity. Are we -- you know, the DHS code is always orange no matter what happens. So, what kind of environment are we in?

MR. KRIS: You know, I start every morning with the Attorney General and the Director of the FBI and a number of other people getting all the overnight intel and the threat picture, and it is -- and it's really a terrible way to start your day. I remember when Condoleezza Rice was being interviewed after leaving and she was asked whether she missed being in the government, and she said, no, and I particularly do not miss starting off with a threat briefing every morning.

You're right that these near misses or in some cases hits, I mean, they do have a certain tendency to concentrate the mind. I guess it has been a very dynamic and very, very busy year for us in the national security community. And I think if I try to abstract back from sort of the trees to sort of see the forest, I guess I see maybe three or four things going on, which I would put under the heading that the threat is evolving in a way that, to me at least, makes it look more diverse and maybe also that geography is becoming less relevant. So, I'm not, by the way, an intelligence analyst, so, I mean, take this with a grain of salt. I've described sort of what I see every morning, but there are professionals who do this for a living.

I guess I think we've got a couple of new nodes beyond sort of the Fatah region and that area. We've got AQAP operating in Yemen, and we know Umar Farooq Abdul Mutalib came out of that. And now we seem to have TTP, the Pakistani Taliban, going. So we've got some new nodes that can produce externally directed terrorists.

We've got U.S. person recruits -- Zazi, Headley, others -- rather than sort of what you saw maybe earlier which was people coming in from outside and infiltrating or penetrating. In fact, what you've got is actually in David Headley, a kind of a weird situation -

- weird is not the right word -- but sort of, I think, unusual, which is a U.S. person here, physically here, but externally directed outside of the United States for attacks with an AQ affiliate. So, that kind of turns things on its head.

And then fourth, I think we've seen, you know, in this area of life as in all others, you know, the increasing relevance of the Internet which does not respect geographic boundaries. So, that's -- I mean, that's my sort of amateur assessment of the threat environment. I do think it's a very serious environment. I meant what I said when I was standing there before, which is I think there are a lot of people out there who wake up every morning and go to bed every night and think about how to kill us in between those two things. I mean, I think the threat is real. Maybe some people don't agree with that, but I think it's a real threat and I think it's becoming more diverse.

MR. WITTES: So, on that point, there's a weird effect in the counterterrorism arena, which is that the more successful you guys are the less people tend to believe the threat is real. It's the sort of, you know, it's like Keyser Söze, you know, kind of convince you that he doesn't exist and then -- and that obviously affects people's willingness to use a robust palate of tools to address the problem, their willingness to believe in the problem.

When you have these two near misses in six months people tend to believe in the problem, at least for purposes of believing the administration mishandled it. But I'm curious, I mean, how does that affect the ability to have a stable set of tools over time and an appropriate set of tools over time, when there's a sort of waxing and waning of intensity of belief in the problem?

MR. KRIS: You know, it's interesting, I mean, first of all, I would be more than happy to be a victim of our own success in that regard and we are, you know, flat out to stop every one of these cold and so -- I mean, I think the -- if you pull the camera back, I

talked a little bit about history. If you sort of follow our national conversation in this area, it's a lot -- it's a lot like development of policy, I think, in other areas, which is there's a backing and forthing that occurs and some of that is natural. It isn't just sort of a linear, rational, intelligent progression that sort of -- where the plan is adopted and then it's executed seamlessly for ten years. It is a backing and forthing and that's part of the American political system. And it is, I think, also part of the changing perceptions about the threat environment and changing reactions to the threat environment. But as I said, what we do really, first and foremost, is try to protect against these threats as best as we can, and then we leave the implications of that and the conclusions people want to draw, you know, where they may. I mean, I've obviously commented on things like that, so I don't mean to say that we just do it and then forget it. But I do want to emphasize, whatever tool set that we are given, and there are real questions about that -- values-based questions and other questions -- we'll use them as well as we can consistent with the guidance to prevent every single one of these things.

MR. WITTES: So the -- you know, on that point, there are two -- you know, you hear these two totally divergent narratives of the last several months. One of them, the public one that you hear particularly in conservative circles goes we went for many years without a successful attack on the homeland. There were in the last several months two near misses that failed only because of luck, and this is connected in some sense to a retreat from a war paradigm and back toward a law enforcement paradigm.

On the other hand, the sense you get when you troll around the Justice Department, for example, is people really have a sense that there have been enormous operational successes and, you know, you hear phrases that the President can say on television, but I can't say on television, in terms of kicking parts of the enemy's anatomy. I'm curious how you assess your -- you know, how you assess it. I'm not asking for any

operational details, but how do you see how it's gone?

MR. KRIS: So I was in DOJ from '00 to '03 doing national security work, then I went out for a while and then I came back. I got back in about March of '09. It's been for us an extremely busy, very hectic, very challenging little more than a year now and we've done -- and I started reciting names and maybe some of you haven't heard of all of them, but we've done a lot of cases, and those represent successes. And we've worked hard to sharpen our tools and improve our synergy, take advantage of the structure that the National Security Division has, and the tearing down of the FISA wall to let intelligence and law enforcement work effectively together. And, I mean, you've got to take this with a grain of salt given what I do and where I work, but I am extremely proud and very gratified by the work that NSD, which I know best, and DOJ had done in this area, and I think we've done a lot of things extremely well. We can always do better. We're always thinking about improving things. But I would say the threat is evolving and it is, in many ways, becoming more challenging and there does seem to be, I think -- I mean, your views on this might be just as well-qualified as mine -- there's a lot of activity in this space right now.

So, I think we've done a lot. We've sharpened our tools a lot, we've improved our processes, and we've learned when we don't do things right, and I think we need to keep learning because this is not something that you sort of fire and forget. This is an iterative process where you have to be constantly moving. I said the enemy was intelligent and adaptable, and they are, and we need to be intelligent and adaptable in response if we want to keep up.

MR. WITTES: Why don't we take some questions from the audience? Yes?

SPEAKER: Thanks, I'm Aaron. I'm a student at U. Mass Amherst. I don't know if you read the recent Bruce Hoffman article in "National Interest" about arguing that al

Qaeda is winning the war on ideological grounds and is, you know, more successful because they're able to sort of win more recruits over, replenish their ranks. I was wondering what tools are in the toolbox in terms of winning the ideological war and what place law enforcement has in that area of counterterrorism?

MR. KRIS: So, I haven't read the article, but maybe I should. In terms of, you know, dealing with the supply of terrorists, as it were, as well as from the demand side, obviously DOJ, you know, is an intelligence law enforcement agency and so, you know, we are very focused on stopping them, catching them, preventing, protecting. We also, you know, want to do outreach to communities to make sure that, you know, they'll tell us when they see things and we don't want to have an endless supply of these things -- of terrorists coming forward. And I guess it gives me an opportunity sort of, without going way outside my lane and sort of getting into the turf and the area of the State Department, say, or something in that realm, sort of make a much narrower point, which is, you know, in this conversation that we've been having thus far and the speech I gave, I was pretty explicit about saying that I was coming at this from a pragmatic point of view; sort of saying, look, put the tools in the toolbox that you think are consistent with our values, give us some guidance about how to use them consistent with our values, and then let us try to make specific assessments about which tool is best. That's in part because of the kind of conversation we're having as a nation right now.

But your question, I guess, gives me an opportunity to say, you know, values are important, as I mentioned, and they do have an effect, not only on us and how we see ourselves, but how our allies see us and how they'll cooperate with us and how our adversaries see us. And I think you can be pragmatic in your outlook, that is, you can be focused on winning and still think about values as something that helps you win. They're good in themselves, but they're also good in depriving your adversary of what it might

consider to be the moral high ground or of recruitment tools that might allow them to get more people. And so we need to be conscious of that as we go forward and try to reduce their supply of recruits as much as we can.

MR. WITTES: Yes?

MR. MARCUS: Thank you. Dan Marcus, I'm teaching at American University's law school. I want to ask a question, David, about the intersection of your talk today with the problem of closing Guantanamo.

If I'm -- if my memory serves me right, none of the people have been prosecuted successfully in U.S. courts are Guantanamo detainees. And the -- obviously a major setback that the administration's had so far, perhaps not a permanent one, is the inability to close Guantanamo and transfer the detainees to the United States.

How much of a problem for using the law enforcement model where we should use it is that creating for you and the Justice Department? And how much has that problem been exacerbated by the reaction to the plans to try KSM and the other high level detainees in New York?

MR. KRIS: So, I'll try to avoid, I guess, comment on particular cases other than to say there is one, Ghailani, in the Southern District. He was an East Africa bomber from the original incitement.

You know, Gitmo is a very vexing problem. It was a vexing problem for the last administration and it's a vexing problem for this administration. And I don't think that -- well, let me put it this way. You know, there's a conversation going on. There's a political conversation going on and a policy debate going on about how to deal with and what tools ought to be available for dealing with the Gitmo detainees, which is kind of a subset of a larger conversation that I've been talking about, which is how to deal with all terrorist detainees. And so my perspective on it, you know, is we ought to make available to the

operational folks all of the tools that we think are appropriate and consistent with our values. And people can disagree about that. There's a lot of room for disagreement here.

I do think, as I've tried to argue today, that, you know, depending on the facts, law enforcement can be very effective in protecting national security and incapacitating terrorists for the long run, and in gathering intelligence from and about them. But, you know, ultimately I'm reactive to the tools that are put in the box. So whatever we have, with the guidance that comes with it, we'll use it to the best of our ability. And I think that's about as far as I can go with that one.

MR. WITTES: This is just a follow-up on that. You know, when --

MR. KRIS: I just said it's as far as I can go. (Laughter)

MR. WITTES: I know. I'm going to redirect it a little bit. You know, when you say -- you know, you give -- it's very hard to disagree in principle with the idea that the government should use all the tools in its arsenal directed at, you know, however you define all the -- you know, whatever those tools are. But --

MR. KRIS: Great. (Laughter)

MR. WITTES: But there's -- you know, but one consequence of that is that if you don't have a set of sort of known principles, if it's a highly fact-specific inquiry related to this individual -- which box he's going to go in, what tools you're going to array against him -- is that it inevitably comes out looking like the answer to the question what tools you use as a matter of the whim and convenience of the government at any given time. And, you know, we had the -- there was a lot of criticism in the last administration of the fact that of the 3 alleged 20th hijackers, they ended up in 3 different systems, right. So Moussawi ends up in criminal court, one of -- Kahtani ends up in military detention. You know, you have very different outcomes that seem to have no guiding principle to them. And I'm curious, you know, so you advocate, you know, using all the tools at our disposal, but what then looks like

a principle in how a given case gets disposed of?

MR. KRIS: Yeah, that's an excellent question. So, look, I mean, I think you can think of values or sort of other factors in at least two different stages. First is kind of threshold determination, which I've mostly been talking about, which is deciding what tools will be made available. And you can simply say at the outset certain tools not in the box, not consistent with our values, you know, not going to do it.

There's a second order -- way in which values or other factors beyond just sort of, you know, the path of least resistance or something can inform judgments. President Obama's speech, for example, at the National Archives last May, 2009, I mean, he talked about five categories of detainees, the fifth category of which were people who, you know, we thought were dangerous, couldn't be released, couldn't be prosecuted for a number of reasons, and, therefore, would be held in Law of War detention. That's not your first resort as I read that speech and the policy that goes with it. It's available, but it's not the first resort. So there can be, based on something other than just raw pragmatism, a kind of an ordering or some policy guidance that goes into the use of these tools.

But, you know, on the flipside of that there are protocols by which federal prosecutors decide whether somebody should be prosecuted in federal court or in state court or in civilian court or a UCMJ if they are in the military and within that jurisdiction or within a U.S. court or a foreign court. And they're set out in the U.S. Attorney's manual, the big nasty policy book that governs prosecutors in the DOJ. And those factors start with the assumption that all of the systems that are available -- federal, state, military, UCMJ, and foreign -- are fair and are consistent with our values. And then they set out some factors. Some of them are pragmatic: Where are you going to be able to make the most effective case for the prosecution? Some of them are, you know, a little more abstract, like, you know, who's the victim? What's the nature of the offense? And where did the victims

reside, or something?

And so, you know, you have to decide at both levels how you're going to do that assessment. So I don't mean to suggest -- and I sort of appreciate the opportunity to clarify this in case there's any misunderstanding -- that it's just a one-level determination. You either rule it in or you rule it out and then you just get out of the way. That's not what I'm saying.

I am suggesting that there is multiple levels at which we can do that kind of sorting and prioritizing. But I do want to say that I think the policy guidance that's given should both be based on lessons learned from the operational reality. I have always felt -- always felt -- I have often felt that the best policy is derived from abstracted operational experience and the lessons of what really happens empirically, and that the policies that we adopt -- if we think all of the various tools are fair -- ought to leave a relatively large amount of discretion because I do think a lot turns on the particular facts. But it's not -- I don't want to go so far as to say just sort of give us, you know, what's in and then back up. There is obviously room for and we would welcome policy guidance within those bounds.

MR. WITTES: Shane Harris?

MR. HARRIS: Hi, David. Shane Harris with *Washingtonian* magazine.

I want to pivot a little bit off of the discussion of the Justice Department and ask a question that's arguably a bit self-interested. And since I take it you're not going to discuss the indictment of Thomas Drake or the subpoena that's been issued to James Risen, I'd like to know given what appeared to be an unusual number at least publicly disclosed cases of confidential, classified information being leaked through the press into the public, what is your opinion on whether or not journalists should have legal privilege that protects them from having to disclose the identity of their confidential sources?

MR. KRIS: I think law enforcement is an extremely effective method of

combating terrorism, Shane. (Laughter) And we'll be talking about that later. So credit where credit is due, those two cases you mentioned are the work of the department's Criminal Division, not its National Security Division.

I think leaks cases are challenging to prosecute for obvious reasons. I think under DOJ policy today, there are requirements -- as I'm sure you well know -- in that U.S. Attorney's manual for when it is you can go and get information from a reporter, and that goes above and beyond the constitutional protections that the Supreme Court has ruled on in *Brandsburg* and other cases. And there's obviously a conversation going on about the media shield and the like, and my goal here would be not to make any news on that issue.

MR. WITTES: Mike Isikoff?

MR. ISIKOFF: Mike Isikoff, *Newsweek.* You're the Justice Department. David, you have to care about the legal underpinnings of what you're doing. When you read your briefs, for everything you're doing that goes beyond the law enforcement mode, you rest everything on Law of War authority and that you invoke that based on the authorization to use military force in Afghanistan, which was passed a few weeks after 9-11, which specifically talked about retaliating against the people who attacked us on 9-11. Here we are nine years later, as you point out the threat is evolving. One of the new nodes you talked about, the TTP, Pakistani Taliban, didn't exist at the time of 9-11.

And how would you respond to people who say we're already at the point where you're stretching it by using everything based on that authorization to use military force? And, you know, more broadly, thinking down the road, at some point soon don't you have to find a new legal basis for conducting the kind of operations we're conducting around the world?

MR. KRIS: I'll give you a process-based answer to that and then a substantive answer to it and then a little look down the road to sort of validate, at least a little

bit, the premise of the question.

In terms of process, you know, we are relying on the AUMF and sort of a definition of who may be detained that we first promulgated on March 13, 2009, in the context of all of these habeas cases. And, you know, the definition -- as I'm sure you know -- relies on pretty venerable principles of the Law of War, which, after all, was developed over a long period of time with respect to, you know, al Qaeda, the Taliban, and associated forces under this principle of co-belligerency. So I think there's a relatively well-developed -- not perfectly developed and I guess it develops further every day -- but there's a good solid body of law underneath that. And so I do think it's -- this was not just something that was made up to deal with a short-term crisis.

Having said that, I mean, I mentioned in the speech, in the *Hamdi* case, the Supreme Court said, you know, we know from the Court that the AUMF includes detention authority as sort of an accoutrement of using military force because it's part of the use of military force to detain people whom you capture in that context. The Court also said, you know, pretty explicitly, if this conflict endures for a period of time that makes it unlike the other conflicts that informed the development of the Law of War, then the understanding that you may detain for the duration of hostilities might unravel.

So in terms of process, we are in court. We are subject to judicial review. We're not just deciding this on our own in a lot of cases. There is habeas testing.

In terms of substance, I think it is based on solid Law of War principles.

But third, the Court has said at some point it may unravel if this one turns out to be very different than all the others. And at that point, we would obviously need to -- we'd like to be able to anticipate that and get out in front of it, I would think, and certainly, you know, deal with that before it happens.

MR. ISIKOFF: Are we getting out?

MR. KRIS: You know, we still have combat troops deployed abroad and in Afghanistan, and that is one of the big factors that the Court identified. So I think not right now, but you can't ignore altogether a statement like that from the Supreme Court. You need to be on the lookout for it.

MR. WITTES: We have time for one more question.

MR. PRESS: Hi. Evan Press from the *Wall Street Journal.*

The Shahzad case in which your court filings have suggested that there was -- obviously there was waiver of Miranda for several days of questioning, suggests that perhaps you don't need any changes to Miranda. I mean, it seems to have worked just fine. Can you perhaps address, you know, what questions might be arising from that?

MR. KRIS: Yeah. So I won't talk about Shahzad, per se, but I'll use it as a jumping-off point. I made the -- I think at some point during this affair I talked about Miranda, I think in response to one of Ben's first questions. And so the first thing I did was try to do the empirical piece and does it, in fact, inhibit intelligence collection. Well, as I said, I think there are a lot of cases in which people do, in fact, waive their rights and talk voluntarily. And the agents in the FBI whom I've dealt with say, you know, if they're going to talk, they're probably going to waive. I don't want to overstate it and say absolutely always and Miranda never has any effect, you know? But I do think there have been a lot of cases -- and according to what you said, you know, Shahzad is one of them -- where we have been able to get intelligence despite Miranda.

So I wouldn't want to leave the impression that, you know, Miranda prevents us from gathering intelligence. You know, nonetheless, you don't absolutely know a priori in every case that that's going to happen. And so, again, that's part of what drives the interest in that public safety exception.

MR. WITTES: Thank you very much. This has been illuminating in every

respect. And we hope you'll do it again sometime.

MR. KRIS: Thanks, Ben. Thanks, everybody. (Applause)

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CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

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