PREPARED REMARKS TO THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY OF TODD HINNEN, DEPUTY ASSISTANT ATTORNEY GENERAL FOR LAW AND POLICY, NATIONAL SECURITY DIVISION, U.S. DEPARTMENT OF JUSTICE
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I'd like to thank the Washington Institute for hosting me today, for having me back some two years after I had the privilege of speaking with my friend and colleague Matt Levitt on Combating Terrorism Financing. It is an honor to speak as part of the Stein Program on Counterterrorism and Intelligence, a lecture series that has included, among others, Ken Wainstein, Donald Kerr, Charlie Allen, Juan Zarate, and Mike Leiter.

Before I address today's topic—national security, counterterrorism, and the rule of law—it is worth an aside to set forth the limits of my remarks and a brief digression to explain where I fit in the United States Government's organizational structure so that you have a sense of the perspective from which I approach this topic.

Caution in my remarks is advised by a number of factors, not the least of which are the complexity of the issue and the ongoing efforts across a number of fronts where law and counterterrorism intersect, so I intend my comments today to be as much the beginning of a discussion as the presentation of any concrete conclusion or solution. I look forward to continuing that discussion with you at the conclusion of my prepared remarks when I'll have the opportunity to hear your thoughts and try to address your questions.

As to perspective, I work in the Department of Justice's National Security Division, which was created in 2006 by the USA PATRIOT Reauthorization and Improvement Act. The NSD's fundamental purpose is to correct within the Department the strict division between law enforcement lawyers on the one hand and intelligence lawyers on the other. The NSD is in its bureaucratic infancy and is still growing into its role, but it has had by necessity an accelerated childhood and has quickly become the native home within the Department of Justice of the core national security functions: collecting and sharing intelligence; investigating threats to national security; supporting action against state and non-state adversaries; developing national security policy; prosecuting violations of our counterterrorism and national security laws; and working with foreign counterparts in each of these areas of activity.

As Deputy Assistant Attorney General for Law and Policy, I oversee a small (but growing) team of lawyers whose mission it is to do the 30,000 foot level strategic thinking, policy development, and legal analysis for the Department to support the operational intelligence collectors, investigators, and prosecutors who carry out this important work in cooperation with our partner agencies throughout the law enforcement, homeland security, and intelligence communities.

It will probably not surprise you, then, that I am predisposed to view the development of an appropriate legal framework as essential to effectively combating terrorism for reasons that are both principled and pragmatic.

It is essential on grounds of principle because the law has defined this nation, a nation of laws not of men, since its founding. "Reverence for the laws," as Abraham Lincoln observed, is the "political religion of the nation." It would by a Pyrrhic victory if, in our struggle to preserve this country against the threat of international terrorism we sacrificed so central a part of what this country stands for and why it has been a model for the rest of the world.

It is essential on grounds of pragmatism because a lawless response to terrorism—one for instance that includes torture, black site prisons, and indefinite detention without due process—undermines our moral credibility and standing abroad, weakens the coalitions with foreign governments that we need to effectively combat terrorism, and provides terrorist recruiters with some of their most effective recruitment material.

Our success in combating terrorism, then, depends in large part on the development of a comprehensive set of legal authorities that not only thwarts attacks, takes dangerous terrorists off the streets, and brings them to justice, but also strengthens international coalitions, engages the support of Muslim governments and populations around the world, and deprives terrorists of a recruitment narrative.

An effective legal framework must also be enduring and fundamental. It must be enduring in the sense that it needn't be abandoned to address exigencies. It must include within its purview carefully considered authorities that allow us to respond to the next opportunity to capture an al Qaeda operative somewhere in the world or, God forbid, the occurrence of another attack.

It must be fundamental in the sense that even while it is rooted deeply in our own legal traditions and Constitution, t must provide a common foundation on which we can engage foreign partners with different traditions and systems of law. For years, talks with foreign partners regarding how best to combat terrorism have foundered at a fundamental impasse because of the use of counterterrorism authorities outside of, and many felt, contrary to, the rule of law. Our framework should help us move past this impasse and provide grounds for constructive discussions with foreign partners and in multilateral organizations.

My goal today is to begin to sketch out the essential components of such a legal framework and to provide a brief overview with regard to where we stand with respect to each component. I begin with the fundamental proposition that an effective legal framework for combating terrorism must allow us to collect, share, and use intelligence; and either to kill the adversary in armed conflict or to capture, transfer, prosecute, and detain him.

Before I address each of these components, I want to observe some early indications that the development of such a legal framework is a priority for the new Administration. In his inaugural address, President Obama rejected what he called "the false choice between our safety and our ideals" and pledged not to abandon the rule of law for the sake of expedience.

On his second day of office, he directed the Attorney General, the Cabinet officer charged with enforcing the rule of law, to coordinate a review of the individuals detained at Guantanamo Bay, to Chair a Special Task Forces on Interrogation and Transfer Policy, and to co-chair with the Department of Defense a Special Task Force on Detention Policy. That review and those task forces are assembled with support from agencies across the government and are hard at work preparing us to make the hard decisions necessary to close the detention center at Guantanamo Bay and to place our future counterterrorism efforts on firm legal footing.

And in recent weeks, the Administration has made a clean break with the practices of the last Administration that were, to put this delicately, least amenable to existence as part of a principled and enduring legal framework. The Department of Justice has released and rejected a series of memoranda that are widely regarded as an effort to bend the rule of law to support conclusions which are fundamentally antagonistic to it.

One final cautionary note, before I turn to the components of a legal framework. The framework is premised on the concept that if it is well-designed and comprehensive it will not allow problems to arise to which it does not also offer a solution. It may be, however, that even such a legal framework will struggle to address some of the very difficult legacy issues that arose before it existed. Part of evolving toward such a legal framework is grappling with these legacy issues.

To begin with, an effective legal framework to combat terrorism must establish broad intelligence collection authorities that respect citizens' privacy and guard against abuse.

The comprehensive intelligence collection regime for signals intelligence provides an example of how such authorities must evolve to keep pace with changing terrorist tradecraft and emerging technologies. Under Executive Order 12333, agencies within the Intelligence Community are authorized to conduct foreign intelligence surveillance overseas. Traditional FISA – the Foreign Intelligence Surveillance Act passed in 1978 – allows the government to collect foreign intelligence surveillance from an agent of a foreign power in the United States.

And the FISA Amendments Act, passed last year, provides authority to conduct foreign intelligence surveillance against individuals reasonably believed to be overseas but who use communication facilities in the United States. Our collection of signals intelligence anywhere in the world fits within the Executive Order and the statutory framework and is subject to the safeguards and privacy protections that they contain.

Conducting interrogations of captured terrorists who may have valuable information is an essential part of collecting intelligence. On this score rather than offer my own thoughts, let me simply quote two warrior-philosophers who lived millennia apart. In approximately 500 BC, Sun Tzu wrote in the *Art of War* that it was imperative to "treat the captives well and care for them," noting that doing so would render them more cooperative, more governable, and would demonstrate the greatness of the leader who captured them.

Some 2,500 years later, General Petraeus wrote to the men and women of Multi-National Forces in Iraq as follows:

> Adherence to our values distinguishes us from our enemy. . . . Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone "talk;" however, what the individual says may be of questionable value. . . . What sets us apart from our enemies in this fight, however, is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also human beings.

As these two quotations suggest, we should use every lawful means to obtain accurate and reliable information from captured terrorists, but our law reflects the wisdom of Sun Tzu and the honor and integrity of General Petraeus. It clearly prohibits torture.

Intelligence is not collected for its own sake, but rather to guide our efforts to act against terrorist organizations. An effective legal framework must therefore also allow intelligence sharing—among our own law enforcement, homeland security, and intelligence officers and with foreign partners in the fight against terrorism. We have made great steps in this area in recent years to render intelligence actionable by ensuring that it is shared with those best positioned to use it.

The removal of the wall between law enforcement and intelligence agencies, the creation of intelligence fusion centers like the National Counterterrorism Center, and the synchronization and coordination of all of the members of the intelligence community under a single Director of National Intelligence increase our ability to share and use intelligence. Executive Order 12333 again ensures that such agencies retain or disseminate intelligence concerning United States persons only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General.

Briefly, and perhaps parochially, I want to mention a feature or our legal framework that allows us to use intelligence while at the same time protecting it—the

Classified Information Procedures Act (CIPA). CIPA creates comprehensive procedures to regulate the use of classified information in a criminal case. Generally speaking, CIPA allows the government to protect from disclosure classified information not relevant to the resolution of a criminal case, and to protect classified information that is relevant by allowing the government to substitute an unclassified summary of the evidence that preserves the defendants right to challenge it.

Any legal process for adjudicating the detainability or guilt of a terrorist suspect is likely to rely heavily on classified information gathered through means that must be protected. As our legal framework to combat terrorism develops, we may need to refine our use of CIPA to ensure that we achieve CIPA's tripartite objective of allowing the government to use intelligence, protecting important intelligence from public disclosure, and offering the subject of the legal proceedings a meaningful opportunity to contest the accuracy and reliability of the information on the basis of which he is being held or prosecuted.

An effective legal framework for combating terrorism will also allow us to act against the adversary, drawing on a full spectrum of authorities and, as the catchphrase now goes, leveraging all instruments of national power. The Supreme Court clarified in *Hamdan* that where our efforts to combat terrorism most closely parallel traditional armed conflict, Common Article 3 of the Geneva Conventions provides the legal framework in which we act.

Our success in combating terrorism stems in part from the fact that we complement strength of arms with a number of other authorities for disrupting terrorist networks, and I want to mention two of them briefly. I know this audience will be familiar, because of the great work of Matt Levitt and Mike Jacobson, with our ability to isolate and deprive terrorists and terrorist organizations of resources by designating them for sanctions.

By designating a terrorist organization, we make it a crime to offer any material support to that organization, we prevent it from raising and transferring funds, we ask foreign partners to prohibit its members' travel, and we prohibit them from possessing certain arms. I know you are familiar with our successes in this area, both domestically and working through the United Nations, due to the vision and hard work of Juan Zarate and others at the Treasury Department and across the government, and I won't dwell further on them.

Another effective, but seldom discussed legal authority for combating terrorism, is export control of military and dual use items to state sponsors of terrorism. The National Security Division works with Immigration and Customs Enforcement, the Federal Bureau of Investigation, the Department of Commerce, and the Department of Defense to expand export control training for investigators and prosecutors around the country, enhance guidance on export control enforcement for federal prosecutors nationwide, create counter-proliferation task forces in federal districts across the country,

and coordinate with export licensing agencies to facilitate greater communication among the agencies.

This initiative has led to a steady rise in the number of export control cases prosecuted by the Justice Department, including a recent guilty plea by a defendant to conspiring to export military aircraft parts to Iran and indictment of an Iranian man and his company for an international scheme to supply Iran with helicopter engines and advanced aerial cameras for fighter bombers.

These are just two of the broad spectrum of legal authorities we use to fight terrorism. We should continue to develop, refine, and incorporate into our legal framework a full spectrum of options for acting against terrorists and terrorist networks.

The legal framework must also include the ability to take those we or our foreign partners have authority to prosecute or detain into custody and transfer them to face justice. We must continue to develop a rendition program governed by law.

The practice of rendition—taking an individual into custody in one foreign country and transferring him to the United States—was first addressed by the Supreme Court in 1886 when members of the Pinkerton Detective Agency kidnapped a criminal fugitive in Peru and forcibly returned him to the United States to stand trial. The Court held that the fugitive could not claim any violation of the laws or Constitution of the United States as a means of avoiding prosecution. The Court reached a similar conclusion when in 1990 DEA agents arranged for bounty hunters to abduct and bring to trial in the United States a Mexican physician involved in the torture and murder of a DEA agent by a Mexican drug cartel.

Rendition has been used to bring terrorists to justice in American courts as well. Mir Amal Kansi was captured in Afghanistan and rendered to the United States to face justice for shooting two CIA employees in 1993 as they sat in their cars awaiting entry into CIA headquarters. Omar Mohammed Ali Rezaq, who was released by Malta after serving only 7 years for the 1985 hijacking of EgyptAir Flight 648 that resulted in 60 deaths, was captured in Nairobi and rendered to the United States to stand trial. He was sentenced to life in prison.

The United States has used extraordinary rendition as well, the transfer of a terrorist captured in one foreign country to another foreign country rather than to the United States to stand trial. According to Michael Scheuer, then the head of the CIA's Bin Laden Unit, the extraordinary rendition program against Al Qaeda and other violent Islamic extremists began in 1995.

He has testified that the original goals of the program were to take dangerous terrorists off the street and exploit the intelligence value of documents in their possession. Interrogation was not one of the original objectives, because the CIA viewed as unreliable interrogation by a foreign intelligence service that might use coercive methods. Scheuer further testified that originally international terrorists were rendered only to

countries where they had been charged with a crime.

Rendition, even extraordinary rendition, can be an effective means of capturing terrorists and transferring them from failed or uncooperative states to states where they will face justice. Our legal framework for combating terrorism, then, might establish a process and system of safeguards that allows for rendition to justice, but prohibits rendition for the sole purpose of interrogation or detention without according the subject some measure of due process.

An effective legal framework for combating terrorism will also include some adjudicative framework for verifying that the individual is in fact a terrorist and, whenever possible, trying him for his crimes. Here, I want to focus briefly on Military Commissions and the possibility of trial in federal criminal court.

Three individuals have been convicted in the Military Commission system at Guantanamo Bay. Australian national David Hicks pled guilty in 2007 and was returned to Australia where he served the remaining nine months of his seven-year sentence. Salim Hamdan was convicted on material support of terrorism charges, but acquitted on conspiracy to commit terrorism charges and sentenced essentially to time served. He was transferred to his home country of Yemen in November 2008 and released in January 2009. Yemeni national Ali Hamza Ahmad Suliman al Bahlul was convicted, after boycotting his trial before a military commission in November 2008, of providing material support to Al Qaida and soliciting murder. He was sentenced to life in prison.

President Obama described the military commission system as it currently exists as "flawed" and suspended all further proceedings before the Commissions on January 22, 2009. One of the questions facing us as we strive to implement the President's Executive Orders is whether the military commission system can be reformed to provide a fair forum for prosecution.

We have had significant success using federal courts to try those who violate United States terrorism laws, and we have worked over the years to ensure that those laws are broad in scope, encompassing acts taken in support of or preparation for terrorism, and long in reach, applying extraterritorially. Blind Sheikh Omar Abdel-Rahman and al Qaida lieutenant Ramzi Youssef were sentenced to life in prison for their role in the 1993 World Trade Center Bombings.

Four individuals were sentenced to life in prison for the 1998 American embassy bombings in Dar Es Salaam, Tanzania and Nairobi, Kenya. Ahmed Ressam, the "Millennium Bomber," who plotted to blow up the Los Angeles International Airport, was convicted and sentenced in 2005 to 22 years. Shoe Bomber Richard Reid, Twentieth Hijacker Zacarious Moussauoi, and Taliban recruiter Ali al-Timimi were all tried for their crimes, and all sentenced to life in prison.

These individuals are no longer a threat to the United States. They've been taken out of the equation. Al Qaida doesn't use them to recruit or rally to their cause, and their

imprisonment doesn't drive a wedge between us and the foreign partners we need to effectively combat terrorism. Trial in a federal criminal court may not always be possible, but where it is, it is an effective and essential part of our legal framework for combating terrorism.

Detention

As I mentioned earlier, the President has also directed a special interagency task force to examine the last facet of our legal framework—the authority to detain terrorists. I will not presume to prejudge the work of the task force by offering my own prescription in this area, and will limit myself instead to observing some of the legal guideposts.

In a government pleading in the litigation regarding those detained at Guantanamo Bay, the government recently abandoned the term "enemy combatant" as the touchstone for detention and tied detention authority firmly and directly to the Authorization to Use Military Force passed by Congress in the wake of September 11. Under its terms, the President has the authority to detain those who planned, authorized, committed or aided in the September 11 attacks or those who are part of, or substantially support, the Taliban or al Qaida. This authority, the government asserted, exists not just in what might traditionally be thought of as active zones of conflict; rather, it extends to those who are part of or provide substantial support to al Qaida in other parts of the world as well.

The Supreme Court has made clear that, except for detention in an active conflict zone following capture, it will scrutinize the legal basis for detention. Last year, the Supreme Court clarified in *Boumediene* that individuals detained at Guantanamo Bay have a constitutional right to contest their detention in federal court, and this spring a federal court in the District of Columbia extended that right as well to three individuals allegedly captured outside of Afghanistan but transferred for detention to the American-run prison at Bagram.

The district court, applying the multi-factor test set forth by the Supreme Court in *Boumediene*, held that an Afghan citizen captured elsewhere and transferred for detention to Bagram was not entitled to *habeas corpus*. The government has sought a stay of this decision, to prevent the three habeas cases from proceeding, and asked that the court certify it for interlocutory appeal. The principle reflected in these cases would appear to be that an individual captured in one foreign country and transferred to U.S. detention in another foreign country of which he is not a citizen is entitled to challenge his detention in federal court.

Both as a result of the work of the Special Task Force and as a result of the ongoing litigation regarding the legal bases for detention, it is clear that we will see further developments in this facet of the legal framework in the coming year.

Conclusion

This is a brief overview of our progress in developing a legal framework for effectively combating terrorism. We have work yet to do to develop and refine this framework and to encourage our foreign partners to develop their own so that terrorist organizations cannot hide anywhere in the world from the power of the rule of law.

Our further efforts to ensure that our framework is principled and pragmatic, enduring and fundamental might be informed by the guidance offered by another American President as the country faced another defining challenge.

On December 7, 1941, Japan launched without warning an unprovoked attack on American naval forces at anchor in Pearl Harbor. It was the deadliest single day for Americans in more than two generations, with more than 2,400 dead (at the battle of Antietam during the Civil War more than 4,700 were killed in a single day). On December 8, 1941, President Franklin Delano Roosevelt delivered his famous "Day that will live in infamy" speech as he sought from Congress a declaration of war.

Only two days after the attack at Pearl Harbor, faced with the enormity of war, he offered the country in a fireside chat a guiding principle that might serve us as well today as we fight terrorism as it served the country then in its fight to defeat fascism. He said "When we resort to force, as now we must, we are determined that this force shall be directed toward ultimate good as well as against immediate evil." We would be well-advised to keep those words in mind as we continue to develop a legal framework to combat terrorism.

Thank you again to the Washington Institute for hosting me today. Thank you for attending. I look forward to your comments and your questions.