Brennan's Remarks on Counterterrorism, September 2011

Speaker: John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism
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John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, gave these remarks at Harvard Law School on September 16, 2011.

Good evening. Thank you, Dan, for your very kind introduction and for your service to our nation, in both the judicial and executive branches. At the White House, Dan helped us navigate some of the most complex legal issues related to our efforts to keep the American people safe. I know that President Obama is grateful for his service. And I am grateful for having had the opportunity to sit through his many law tutorials during national security meetings in the White House Situation Room. I dare say that those tutorials were a tad less expensive than what some of you currently are paying for his pearls of wisdom.

It's a pleasure to be here at Harvard Law School, and I want to acknowledge Dean Minow and members of the staff and faculty who are here tonight.

I especially want to thank Professor Gabriella Blum and Benjamin Wittes of the Brookings Institution for being the driving force behind your new Program on Law and Security. The preservation of our national security and the laws that define us as the United States of America demand that we understand the intersection of the two—indeed, how they reinforce one another. So I commend you for your efforts, we look forward to your contributions, and I very much appreciate the opportunity to be here for your inaugural event.

It's wonderful to see a number of friends and colleagues who I've had the privilege to work with over many years—public servants who have devoted their lives to protecting our nation. And let me say what a thrill it is to see so many students here this evening. I just hope your choice to listen to me on a Friday night is not an indictment of your social lives.

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

Obviously, the death of Usama Bin Laden marked a strategic milestone in our effort to defeat al-Qa'ida. Unfortunately, Bin Laden's death, and the death and capture of many other al-Qa'ida leaders and operatives, does not mark the end of that terrorist organization or its efforts to attack the United States and other countries. Indeed, al-Qa'ida, its affiliates and its adherents remain the preeminent security threat to our nation.

The core of al-Qa'ida—its leadership based in Pakistan—though severely crippled, still retains the intent and capability to attack the United States and our allies. Al-Qa'ida's affiliates—in places like Pakistan, Yemen, and countries throughout Africa—carry out its murderous agenda. And al-Qa'ida adherents – individuals, sometimes with little or no contact with the group itself – have succumbed to its hateful ideology and work to facilitate or conduct attacks here in the United States, as we saw in the tragedy at Fort Hood.

Guiding principles

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

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

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

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

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

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

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

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

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

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

Nature and geographic scope of the conflict

First, our definition of the conflict. As the President has said many times, we are at war with al-Qa'ida. In an indisputable act of aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, al-Qa'ida seeks to attack us again. Our ongoing armed conflict with al-

Qa'ida stems from our right—recognized under international law—to self defense.

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

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

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the "hot" battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa'ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an "imminent" threat.

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define "imminence."

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

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

Privacy and transparency at home

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

As such, we have ensured that investigative techniques in the United States are conducted in a manner that

is consistent with our laws and subject to the supervision of our courts. We have also taken administrative steps to institute additional checks and balances, above and beyond what is required by law, in order to better safeguard the privacy rights of innocent Americans.

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

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

The President signed into law the first intelligence authorization act in over five years to ensure better oversight of intelligence activities. Among other things, the legislation revised the process for reporting sensitive intelligence activities to Congress and created an Inspector General for the Intelligence Community.

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

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

Detention and interrogation

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

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

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

particular situation—from exercising their best judgment as to what the most appropriate disposition is for each individual held there.

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

This Administration also undertook an unprecedented review of our detention and interrogation practices and their evolution since 2001, and we have confronted squarely the question of how we will deal with those we arrest or capture in the future, including those we take custody of overseas. Nevertheless, some have suggested that we do not have a detention policy; that we prefer to kill suspected terrorists, rather than capture them. This is absurd, and I want to take this opportunity to set the record straight.

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

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

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

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

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

Moreover, the Supreme Court has recognized a limited exception to *Miranda*, allowing statements to be admitted if the unwarned interrogation was "reasonably prompted by a concern for public safety." Applying this public safety exception to the more complex and diverse threat of international terrorism can be

complicated, so our law enforcement officers require clarity.

Therefore, at the end of 2010, the FBI clarified its guidance to agents on use of the public safety exception to *Miranda*, explaining how it should apply to terrorism cases. The FBI has acknowledged that this exception was utilized last year, including during the questioning of Faisal Shahzad, accused of attempting to detonate a car bomb in Times Square. Just this week in a major terrorism case, a federal judge ruled that statements obtained under the public safety exception *before* the defendant was read his *Miranda* rights are, in fact, admissible at trial.

Some have argued that the United States should simply hold suspected terrorists in law of war detention indefinitely. It is worth remembering, however, that, for a variety of reasons, reliance upon military detention for individuals apprehended outside of Afghanistan and Iraq actually began to decline precipitously years *before* the Obama Administration came into office.

In the years following the 9/11 attacks, our knowledge of the al-Qa'ida network increased and our tools with which to bring them to justice in federal courts or reformed military commissions were strengthened, thus reducing the need for long-term law of war detention. In fact, from 2006 to the end of 2008, when the previous administration apprehended terrorists overseas and outside of Iraq and Afghanistan, it brought more of those individuals to the United States to be prosecuted in our federal courts than it placed in long-term military detention at Guantánamo.

Article III courts & reformed military commissions

When we succeed in capturing suspected terrorists who pose a threat to the American people, our other critical national security objective is to maintain a viable authority to keep those individuals behind bars. The strong preference of this Administration is to accomplish that through prosecution, either in an Article III court or a reformed military commission. Our decisions on which system to use in a given case must be guided by the factual and legal complexities of each case, and relative strengths and weaknesses of each system. Otherwise, terrorists could be set free, intelligence lost, and lives put at risk.

That said, it is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts. As they should be. Our military does not patrol our streets or enforce our laws—nor should it.

This is not a radical idea, nor is the idea of prosecuting terrorists captured overseas in our Article III courts. Indeed, terrorists captured beyond our borders have been successfully prosecuted in our federal courts on many occasions. Our federal courts are time-tested, have unquestioned legitimacy, and, at least for the foreseeable future, are capable of producing a more predictable and sustainable result than military commissions. The previous administration, successfully prosecuted hundreds of suspected terrorists in our federal courts, gathering valuable intelligence from several of them that helped our counterterrorism professionals protect the American people. In fact, every single suspected terrorist taken into custody on American soil—before and after the September 11th attacks—has first been taken into custody by law enforcement.

In the past two years alone, we have successfully interrogated several terrorism suspects who were taken into law enforcement custody and prosecuted, including Faisal Shahzad, Najibullah Zazi, David Headley, and many others. In fact, faced with the firm but fair hand of the American justice system, some of the most hardened terrorists have agreed to cooperate with the FBI, providing valuable information about al-Qa'ida's network, safe houses, recruitment methods, and even their plots and plans. That is the outcome that all Americans should not only want, but demand from their government.

Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system. There is bipartisan agreement that U.S. citizens should not be tried by military commission. Since 2001, two U.S. citizens were held in

military custody, and after years of controversy and extensive litigation, one was released; the other was prosecuted in federal court. Even as the number of U.S. citizens arrested for terrorist-related activity has increased, our civilian courts have proven they are more than up to the job.

In short, our Article III courts are not only our single most effective tool for prosecuting, convicting, and sentencing suspected terrorists—they are a proven tool for gathering intelligence and preventing attacks. For these reasons, credible experts from across the political spectrum continue to demand that our Article III courts remain an unrestrained tool in our counterterrorism toolbox. And where our counterterrorism professionals believe prosecution in our federal courts would best protect the full range of U.S. security interests and the safety of the American people, we will not hesitate to use them. The alternative—a wholesale refusal to utilize our federal courts—would undermine our values and our security.

At the same time, reformed military commissions also have their place in our counterterrorism arsenal. Because of bipartisan efforts to ensure that military commissions provide all of the core protections that are necessary to ensure a fair trial, we have restored the credibility of that system and brought it into line with our principles and our values. Where our counterterrorism professionals believe trying a suspected terrorist in our reformed military commissions would best protect the full range of U.S. security interests and the safety of the American people, we will not hesitate to utilize them to try such individuals. In other words, rather than a rigid reliance on just one or the other, we will use both our federal courts and reformed military commissions as options for incapacitating terrorists.

As a result of recent reforms, there are indeed many similarities between the two systems, and at times, these reformed military commissions offer certain advantages. But important differences remain—differences that can determine whether a prosecution is more likely to succeed or fail.

For example, after Ahmed Warsame—a member of al-Shabaab with close ties to al-Qa'ida in the Arabian Peninsula—was captured this year by U.S. military personnel, the President's national security team unanimously agreed that the best option for prosecuting him was our federal courts, where, among other advantages, we could avoid significant risks associated with, and pursue additional charges not available in, a military commission. And, if convicted of certain charges, he faces a mandatory life sentence.

In choosing between our federal courts and military commissions in any given case, this Administration will remain focused on one thing—the most effective way to keep that terrorist behind bars. The only way to do that is to let our experienced counterterrorism professionals determine, based on the facts and circumstances of each case, which system will best serve our national security interests.

In the end, the Obama Administration's approach to detention, interrogation and trial is simple. We have established a practical, flexible, results-driven approach that maximizes our intelligence collection and preserves our ability to prosecute dangerous individuals. Anything less—particularly a rigid, inflexible approach—would be disastrous. It would tie the hands of our counterterrorism professionals by eliminating tools and authorities that have been absolutely essential to their success.

Capacity building abroad

This brings me a final area where upholding the rule of law strengthens our security—our work with other nations. As we have seen from Afghanistan in the 1990s to Yemen, Somalia and the tribal areas of Pakistan today, al-Qa'ida and its affiliates often thrive where there is disorder or where central governments lack the ability to effectively govern their own territory.

In contrast, helping such countries build a robust legal framework, coupled with effective institutions to enforce them and the transparency and fairness to sustain them, can serve as one of our most effective weapons against groups like al-Qa'ida by eliminating the very chaos that organization needs to survive. That is why a key element of this Administration's counterterrorism strategy is to help governments build their capacity, including a robust and balanced legal framework, to provide for their own security.

Though tailored to the unique circumstances of each country, we are working with countries in key locations to help them enact robust counterterrorism laws and establish the institutions and mechanisms to effectively enforce them. The establishment of a functioning criminal justice system and institutions has played a key role in the security gains that have been achieved in Iraq. We are working to achieve similar results in places like Afghanistan, Iraq, Yemen, Pakistan, and elsewhere.

These efforts are not a blank check. As a condition of our funding, training, and cooperation, we require that our partners comply with certain legal and humanitarian standards. At times, we have curtailed or suspended security assistance when these standards are not met. We encourage these countries to build a more just, more transparent system that can gain the respect and support of their own people.

As we are seeing across the Middle East and North Africa today, courageous people will continue to demand one of the most basic universal rights—the right to live in a society that respects the rule of law. Any security gains will be short-lived if these countries fail to provide just that. So where we see countries falling short of these basic standards, we will continue to support efforts of people to build institutions that both protect the rights of their own people and enhance our collective security.

Flexibility—critical to our success

In conclusion, I want to say again that the paramount responsibility of President Obama, and of those of us who serve with him, is to protect the American people. To save lives. Each of the tools I have discussed today, and the flexibility to apply them to the unique and complicated circumstances we face, are critical to our success.

This President's counterterrorism framework provides a sustainable foundation upon which this Administration and its successors, in close cooperation with our allies and partners overseas, can effectively deal with the threat posed by al-Qa'ida and its affiliates and adherents. It is, as I have said, a practical, flexible, result-driven approach to counterterrorism that is consistent with our laws, and in line with the very values upon which this nation was founded. And the results we have been able to achieve under this approach are undeniable. We divert from this path at own peril.

Yet, despite the successes that this approach has brought, some—including some legislative proposals in Congress—are demanding that we pursue a radically different strategy. Under that approach, we would never be able to turn the page on Guantánamo. Our counterterrorism professionals would be compelled to hold all captured terrorists in military custody, casting aside our most effective and time-tested tool for bringing suspected terrorists to justice—our federal courts. *Miranda* warnings would be prohibited, even though they are at times essential to our ability to convict a terrorist and ensure that individual remains behind bars. In sum, this approach would impose unprecedented restrictions on the ability of experienced professionals to combat terrorism, injecting legal and operational uncertainty into what is already enormously complicated work.

I am deeply concerned that the alternative approach to counterterrorism being advocated in some quarters would represent a drastic departure from our values and the body of laws and principles that have always made this country a force for positive change in the world. Such a departure would not only risk rejection by our courts and the American public, it would undermine the international cooperation that has been critical to the national security gains we have made.

Doing so would not make us safer, and would do far more harm than good. Simply put, it is not an approach we should pursue. Not when we have al-Qa'ida on the ropes. Our counterterrorism professionals—regardless of the administration in power—need the flexibility to make well-informed decisions about where to prosecute terrorist suspects.

To achieve and maintain the appropriate balance, Congress and the Executive Branch must continue to work together. There have been and will continue to be many opportunities to do so in a way that strengthens our

ability to defeat al-Qa'ida and its adherents. As we do so, we must not tie the hands of our counterterrorism professionals by eliminating tools that are critical to their ability to keep our country safe.

As a people, as a nation, we cannot—and we must not—succumb to the temptation to set aside our laws and our values when we face threats to our security, including and especially from groups as depraved as al-Qa'ida. We're better than that. We're better than them. We're Americans.

Thank you all very much.