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JUSTICE NEWS

Attorney General Eric Holder Speaks at Northwestern University School of Law

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As prepared for delivery

Thank you, Dean [Daniel] Rodriguez, for your kind words, and for the outstanding leadership that you provide – not only for this academic campus, but also for our nation's legal community. It is a privilege to be with you today – and to be among the distinguished faculty members, staff, alumni, and students who make Northwestern such an extraordinary place.

For more than 150 years, this law school has served as a training ground for future leaders; as a forum for critical, thoughtful debate; and as a meeting place to consider issues of national concern and global consequence. This afternoon, I am honored to be part of this tradition. And I'm grateful for the opportunity to join with you in discussing a defining issue of our time – and a most critical responsibility that we share: how we will stay true to America's founding – and enduring – promises of security, justice and liberty.

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

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

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

Like President Obama – and my fellow members of his national security team – I begin each day with a briefing on the latest and most urgent threats made against us in the preceding 24 hours. And, like scores of attorneys and agents at the Justice Department, I go to sleep each night thinking of how best to keep our people safe.

I know that – more than a decade after the September 11th attacks; and despite our recent national security successes, including the operation that brought to justice Osama bin Laden last year – there are people currently plotting to murder Americans, who reside in distant countries as well as within our own borders. Disrupting and preventing these plots – and using every available and appropriate tool to keep the American people safe – has been, and will remain, this Administration's top priority.

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

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

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

Before 9/11, today's level of interagency cooperation was not commonplace. In many ways, government lacked the infrastructure – as well as the imperative – to share national security information quickly and effectively. Domestic law enforcement and foreign intelligence operated in largely independent spheres. But those who attacked us on September 11th chose both military and civilian targets. They crossed borders and jurisdictional lines. And it immediately became clear that no single agency could address these threats, because no single agency has all of the necessary tools.

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

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

Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the Attorney General and the Director of National Intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security. But the government may not use this authority intentionally to target a U.S. person, here or abroad, or anyone known to be in the United States.

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

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

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

Our criminal justice system is renowned not only for its fair process; it is respected for its results. We are not the first Administration to rely on federal courts to prosecute terrorists, nor will we be the last. Although far too many choose to ignore this fact, the previous Administration consistently relied on criminal prosecutions in federal court to bring terrorists to justice. John Walker Lindh, attempted shoe bomber Richard Reid, and 9/11 conspirator Zacarias Moussaoui were among the hundreds of defendants convicted of terrorism-related offenses – without political controversy – during the last administration.

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

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

I could go on. Which is why the calls that I've heard to ban the use of civilian courts in prosecutions of terrorism-related activity are so baffling, and ultimately are so dangerous. These calls ignore reality. And if heeded, they would significantly weaken – in fact, they would cripple – our ability to incapacitate and punish those who attempt to do us harm.

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

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

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

A key difference is that, in military commissions, evidentiary rules reflect the realities of the battlefield and of conducting investigations in a war zone. For example, statements may be admissible even in the absence of Miranda warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle. But instead, a military judge must make other findings – for instance, that the statement is reliable and that it was made voluntarily.

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

Several practical considerations affect the choice of forum.

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

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

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

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

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

This Administration has worked in other areas as well to ensure that counterterrorism professionals have the flexibility that they need to fulfill their critical responsibilities without diverging from our laws and our values. Last week brought the most recent step, when the President issued procedures under the National Defense Authorization Act. This legislation, which Congress passed in December, mandated that a narrow category of al Qaeda terrorist suspects be placed in temporary military custody.

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

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

This principle has long been established under both U.S. and international law. In response to the attacks perpetrated — and the continuing threat posed — by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.

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

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

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

Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful — and therefore would not violate the Executive Order banning assassination or criminal statutes.

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

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

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

Any decision to use lethal force against a United States citizen — even one intent on murdering Americans and who has become an operational leader of al-Qaeda in a foreign land — is among the gravest that government leaders can face. The American people can be — and deserve to be — assured that actions taken in their defense are consistent with their values and their laws. So, although I cannot discuss or confirm any particular program or operation, I believe it is important to explain these legal principles publicly.

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

The evaluation of whether an individual presents an "imminent threat" incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice — and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military — wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution

does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.

Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.

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

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

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

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time. The Constitution’s guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.

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

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

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

This is an indicator of our times – not a departure from our laws and our values. For this Administration – and for this nation – our values are clear. We must always look to them for answers when we face difficult questions, like the ones I have discussed today. As the President reminded us at the National Archives, “our Constitution has endured through secession and civil rights, through World War and Cold War, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way.”

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

Thank you for inviting me to discuss these important issues with you today.