

**Remarks prepared for delivery to the Harvard Law School
Heyman Fellowship Annual Dinner
The Honorable Matthew G. Olsen
Director, National Counterterrorism Center
Willard InterContinental Hotel
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I. Introduction

Good evening—Dean Minow, Ms. Heyman, this year’s Heyman Fellows, and distinguished guests. It is an honor to be here with you all this evening and to have the opportunity to participate in this event.

I want to join in congratulating this year’s group of Heyman Fellows. This is a tremendous program. It not only recognizes your contributions to the federal government, but also gives you the chance to mentor and assist others who may be interested in similar opportunities. You all should be really proud.

I thought I would spend a few minutes tonight talking about the current terrorism threat picture and the role of national security lawyers in the effort to combat that threat.

But before I go any further, I cannot resist the chance to talk for a minute about my own experience as a 1L—particularly because Professor Minow is here with us. Do the names Roger Thornhill, Eve Kendall, Phillip Vandamm mean anything to you all? No—of course not, and why should they? But if you were in Professor Minow’s Civil Procedure class in 1985 with me—these names would be etched into your memory. Every hypothetical throughout the year was based on these names—and other characters—from Alfred Hitchcock’s classic “North by Northwest.” Now, whenever I’m ever flipping through the channels and happen to come across this movie—it automatically triggers the same sense of anxiety and confusion I experienced that year. Strangely enough, I don’t remember too much about the rules of procedure, but I do remember the names from that movie.

Now, let me spend some time talking about the terrorism threats we face—and then share some thoughts about the role of the national security lawyers in the counterterrorism effort.

Here's my bottom line up front: We face a complex and dynamic terrorism threat. And over the past decade, government lawyers have been at the forefront of the efforts to protect the country. This is a good thing. We are stronger and safer as a nation because of the role government attorneys have played in ensuring that in this effort we adhere to our values and the rule of law.

II. Threat

First the threat—ten years after 9/11, where are we in our fight against al-Qa'ida?

Today, al Qa'ida's core organization is weaker than at any time in the last ten years. We have placed relentless counterterrorism pressure on al-Qa'ida and its leadership. The recent and rapid loss of key leaders—including Usama bin Laden and Atiyah abd al Rahman—has undermined al-Qa'ida's ability to plan attacks and its sense of security. We have denied the group safe havens, resources, and the ability to plot and train—especially in Afghanistan and Pakistan.

Just over a week ago, Anwar al-Aulaqi—a leader of al Qa'ida in the Arabian Peninsula—was killed in Yemen. Aulaqi planned and directed efforts to kill Americans, and repeatedly called on individuals in the United States and around the globe to commit acts of terror. His death has dealt a blow to al Qa'ida's most active affiliate.

But even with this progress, it is premature to declare al-Qa'ida defeated. A decade after the September 11th attacks, we remain at war with al-Qa'ida. It has proven to be a resilient and adaptive enemy—intent attacking us here and abroad. And we continue to face an evolving threat from its affiliates and adherents.

And to add to the threat from al-Qa'ida, just today two people were charged in a plot tied to the Iranian government to assassinate the Saudi ambassador in the United States.

I start every work day—like many government officials—with a detailed threat update. And I can tell you there's no shortage of threats. Just a month ago, on the 9/11 anniversary, there was a threat we deemed credible to carry out an attack inside the United States. We took this very seriously—in part because of the source of the information and also because al-Qa'ida continues to focus on opportunities to strike here. Today, a month later, we have not been able to

corroborate the details of the threat, but we have not been able to dismiss it either—it remains unresolved.

In thinking about the threat from al-Qa'ida, it is useful to divide the threat into three components: (1) al-Qa'ida's senior leadership or core; (2) al-Qa'ida's regional affiliates; and (3) homegrown U.S. extremists.

1. Al-Qa'ida Core

First, Al-Qa'ida core's capability to conduct attacks has been significantly reduced. Some have argued that it is close to operationally dismantled. There is a serious question whether the group that attacked us on 9/11 has the same capability to pull off such a sophisticated, complex attack.

But the group has advanced several unsuccessful smaller-scale Western plots in the past two years. These plots highlight its ability to continue attack preparations—even while under sustained pressure. We therefore remain concerned that al-Qa'ida has the ability to plot and carry out an attack against the United States at home or overseas.

In addition, since al-Qa'ida's relocation to Pakistan, it has consistently encouraged its local militant allies to expand their operational agendas to include U.S. and Western targets—both within the region and overseas. For example, Faisal Shahzad's May 2010 attempted bombing in Times Square is a stark reminder that al-Qa'ida allies—such as the Pakistani Taliban—continue to threaten the United States.

Moreover, the group remains the ideological leader of the global extremist movement. And it continues to influence extremists through public media statements. The group's leadership continues to seek openings for its destructive narrative—even while successful non-violent efforts of the Arab Spring demonstrators—in places like Egypt and Tunisia—are a repudiation of al-Qa'ida message and approach. Since January AQ has prepared at least 12 propaganda messages related to the Arab Spring, making it a key theme of their media strategy.

2. AQ Affiliates

Beyond al Qa'ida's core organization, we face a much more diffuse and diversified threat ten years after 9/11. Al-Qa'ida's regional affiliates have increased the scope of their operations, seeking to strike some U.S. and Western

targets both inside and outside of their respective regions. These groups include al-Qa‘ida in the Arabian Peninsula and al-Shabab in Somalia.

Yemen in particular remains a key battleground and regional base of operations for AQAP. Yemen faces significant governing challenges outside its capital, Sana’a.

AQAP has launched two attacks against the homeland—the attempted airliner attack in December 2009, and its attempt to down two U.S.-bound cargo planes in October 2010. These attacks demonstrate that it is a determined enemy capable of adjusting tactics to achieve its goals.

Aulaqi’s death is a major blow to AQAP’s homeland plotting. But it does not end the threat from AQAP. We are still concerned about the group’s intent to attack Western targets and its propaganda efforts designed to inspire like-minded Western extremists. And we are monitoring how the loss of Aulaqi will affect AQAP’s propaganda machine.

3. Homegrown Extremists

Finally, a key element of the evolution the terrorist threat since 9/11 is the rise of homegrown violent extremists. These individuals are inspired by al-Qa‘ida’s global extremist agenda. And the growth of online English-language extremist content during the past three years has fostered greater cohesion among HVEs.

A key feature of this trend has been the development of a narrative that addresses the unique concerns of U.S.-based extremists. This narrative includes a blend of al-Qa‘ida inspiration, perceived victimization, and glorification of past homegrown plotting. The challenge for us is that extremists who independently plan attacks with no direction from associates in the U.S. or overseas are difficult to detect and disrupt. They operate under our radar and can advance plotting with little or no warning.

III. Role of National Security Lawyers

Now, in light of this ongoing and evolving threat, I’d like to turn to the role of the national security lawyer in shaping our response and in ensuring that our actions are consistent with the Constitution and uphold the rule of law.

Our counterterrorism efforts continue to present difficult and complex legal issues. These issues arise in a variety of contexts—including surveillance law, interrogation, detention, and the trial of suspected terrorists. As Jack Goldsmith observed a few years ago, “[N]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.” This observation remains true today.

And working as a national security lawyer can be challenging for a number of reasons.

First, and foremost, the stakes could not be higher. In our daily work, national security lawyers confront questions of law and policy that are among the most important questions we face as a nation. How can we defend the country from terrorists? How can we do so in ways that also protect our freedoms and uphold the rule of law? Every day, we wrestle with issues that implicate these fundamental questions.

And, as national security lawyers, we have demanding clients—and rightly so. The leaders and decision makers, analysts and war fighters, who we represent, carry the burden of securing the nation. Because of that responsibility, General Hayden, who served as the Director of NSA and CIA, famously stated: He would always play in fair territory, but “there would be chalk dust on my cleats.” This approach—taking full advantage of all lawful authority—may well be necessary to protect the nation. But it also makes our jobs as lawyers quite difficult—because we are called upon to discern and describe legal limits with precision, clarity and decisiveness.

To complicate matters, the legal rules in this area often are unclear or not well-adapted to the questions we face. The Constitution does not clearly define the limits of executive power, and statutes typically speak in general terms and often do not provide clear answers.

Even where there are laws on point, the rules may be ill-suited to address the facts at hand. For example, many of the laws governing surveillance were enacted before the advent of the Internet. Similarly, the array of rules governing detention and trial were developed well before the onset of the current, open-ended threat we face from al Qaeda and other terrorist groups.

So, to put this in terms of General Hayden’s metaphor, it’s one thing to say we should go right up to the line—that “We should have chalk marks on our

cleats.” But what if the out-of-bounds line is really hard to see or doesn’t exist at all? What if the line is moving or open to interpretation? How do we make sure—as we absolutely must—that we stay inbounds and don’t cross the line?

As if these challenges weren’t enough, we all know that the advice we give may be second-guessed down the road. And this second-guessing will not take place late at night in a command center—where actual decisions are often made. But rather our actions will be viewed with the perfect, and unfair, vision of hindsight.

So, given all of these challenges, what can we do to make sure we are doing our jobs? I would offer a few suggestions.

First, national security lawyers have to establish partnerships with those on the front lines. When I was at NSA, that meant working in partnership with the engineers and analysts who harnessed the technology and make sense of the information we gathered. Similarly, at FBI and CIA and every intelligence agency, as well as at the Department of Justice, national security lawyers have to *strive* to be essential members of the teams that carry out the missions of each agency.

By “strive” I mean to suggest that this requires effort. As I said earlier, our agencies are right to be demanding of us. We, as lawyers, have to understand the specific needs of operators and then translate the language of legal rules and procedures to meet those needs. We have to demonstrate that we can be effective advisors and advocates; that our role primarily is to facilitate, not to oversee; that we can be trusted to find ways to get the job done. But it is also a two-way street—it means that agents and analysts communicate with us—particularly at the early stages of a problem. And it requires that they understand that, at times, our job will be to say no.

This is a lesson I learned years ago as a prosecutor working with homicide detectives. The detectives were skilled investigators, but when we—investigator and prosecutor—worked together from the beginning of a case, we were able to anticipate factual and legal issues and put together cases that were much more likely to lead to convictions.

Next, we have to provide clear advice on the law. And that means distinguishing between questions of law and questions of policy. Again, going back to General Hayden’s chalk lines, we have to be committed to providing

advice on precisely what the law permits—where the boundary lines are—and that includes being steadfast and resolute in saying what the law *does not* permit.

This is not to say that we have no role in questions of policy. In fact, lawyers often are able to provide sound advice on the wisdom of a particular decision. But we must be precise in explaining legal rules and transparent in describing our views of good policy choices. In this way, we can avoid imposing what the WMD Commission criticized as legal restrictions that were “either myths that overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications.”

Third, we have to be advocates. Once a decision is made to pursue an action or policy, our role as national security lawyers shifts from providing advice to being advocates. Our duty then is to argue for the government’s position—forcefully within the bounds of our ethical obligations. We should embrace our role as advocates—in the words of the Supreme Court, “strike hard blows” when it is the fair and right thing to do—and then see that justice is done.

IV. Why This Matters

This brings me to my last point—why does this matter? Two years ago, at the National Archives, the President said that, “We 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.”

As government lawyers, we have a unique role in putting that statement into action. When our counterterrorism efforts uphold our values and the rule of law, they have legitimacy. They are more likely to receive the support of the American people and to withstand the scrutiny of our courts and of Congress.

When we uphold the rule of law, governments around the world are more likely to join with us in taking swift action against terrorists, to share intelligence, and turn over suspected terrorists for trial.

And when we uphold the rule of law, we provide a powerful alternative to the twisted worldview offered by al-Qa’ida. Where terrorists stand for injustice and violence, the United States stands for freedom, tolerance, and fairness.

The debate over our counterterrorism tools continues. And as the threat evolves, we must be innovative and flexible in adapting to the threat. There are many challenges—both operational and legal—ahead.

As lawyers, we can help make sure that our operators have the tools they need to protect the country. We also can help ensure that, in responding to the threat of terrorism, we remain true to our values and who we are as Americans.

Thank you.