JCJ Speech to the Heritage Foundation
October 18, 2011

Cully, thank you for that introduction, and thank you for the invitation to speak to this distinguished organization.

Someone once told me that at some point in the history of the Department of the Defense, the job of General Counsel was a relatively sleepy one. In fact, I came to the job with the belief, based on prior experience, that an agency general counsel should rarely if ever be publicly seen or heard. But when I returned to the Pentagon in February 2009, after being away for 8 years, I found a very different place.

The office of General Counsel of the Defense Department -- particularly in the post 9/11 world -- is in the middle of many difficult, front page issues: Guantanamo Bay, military commissions, operations in Libya, the legal contours of our counterterrorism efforts, Don't Ask, Don't Tell, Wikileaks, Bradley Manning, the state secrets privilege. Google search my name and you will even find a number of hits about the controversy I stirred when I sent a letter to Congress stating DoD's opposition to a bill to rename the "Department of the Navy" the "Department of the Navy and the Marine Corps."

On a regular basis now, when I read the newspaper in the morning, I discover a story or an op-ed with a public account of private legal advice I have supposedly offered in internal government deliberations.

Particularly as I look around this room at all the distinguished guests and journalists, I find that some people are actually interested in what the General Counsel of the Defense Department has to say.

Therefore, policy and politics aside, at every opportunity I have before civilian audiences, I devote part of my remarks to paying tribute to the sacrifices and dedication of the men and women in the U.S. military. It is the case that less than 1% of the U.S. population does the fighting for all the rest of us. These remarkable men and women in the post-9/11 military have volunteered out of a sense of public service, patriotism and selfless duty to a larger cause. Each time I read a list of those who pay the ultimate price, the most painful thing to read are the ages -- 20, 21, 22, not much older than my own teenage son. These young people gave their lives for their country before they ever really had a chance to

1 As delivered, minus the personal anecdote at the beginning.
know what life is all about—many will never know the joy of marriage, of parenting a son or daughter, and so many other experiences that a full life has to offer.

Then there are those who survive their injuries and must struggle on without an arm, a leg, or something else the rest of us take for granted.

Navy Lieutenant Brad Snyder is the nephew of one of my deputies. He was a member of an explosives ordnance disposal team in Afghanistan. On September 7 Lieutenant Snyder went into a mined area to clear a safe passage for a medic trying to get to others who had been wounded in action. An IED exploded in his face, severely injuring him and taking his eyesight, probably for the rest of his life. Despite his injuries and the loss of his sight, Lieutenant Snyder refused a stretcher and managed to guide the medic to those who were wounded.

One of the most remarkable things about those seriously wounded in action is the powerful sense of unit cohesion and dedication they retain even after they are injured and taken out of the fight. Within hours, they will frequently express an impatient desire to rejoin their buddies in their unit and continue service. I’ll never forget the amputee at Bethesda who asked me: “Mr. Johnson, do you think this will affect my ability to get a command?” When Lieutenant Snyder learned that the Secretary of Defense was about to visit him at Bethesda, Brad said to his mother: “I need to get out of bed and stand at attention, but I have no pants!”

For their sacrifice on behalf of the rest of us, and their dedication to our country, polls indicate that the U.S. military is the most respected and revered institution in America today.

I am convinced that one of the other reasons our military is so revered and respected is that, for all its power, we place sharp limits on the military’s ability to intrude into the civilian life and affairs of our democracy. This is a core American value that is part of our heritage, dating back to before the founding of our country.

The Declaration of Independence listed among our grievances against the King the fact that he had “kept among us, in times of peace, Standing Armies without the Consent of our legislatures,” and had “quarter[ed] large bodies of armed troops among us.” This value is reflected in the Federalist Papers, and the father of our Constitution, James Madison, wrote: “A standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense against foreign danger have been always the instruments of tyranny at home.”
This core value and this heritage is today reflected in such places as the Third Amendment, which prohibits the peacetime quartering of soldiers in private homes without consent, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a posse comitatus unless expressly authorized by Congress or the Constitution.

This brings me to the point of these remarks today:

There is danger in over-militarizing our approach to Al Qaeda and its affiliates. There is risk in permitting and expecting the U.S. military to extend its powerful reach into areas traditionally reserved for civilian law enforcement in this country. Against an unconventional non-state actor that does not play by the rules, operates in secret, observes no geographic limits, constantly morphs and metastasizes, and continues to look for opportunities to export terrorism to our Homeland, we must use every tool at our disposal. The military should not, and cannot be, the only answer.

Recent events remind us that broad assertions of military power can provoke controversy and invite challenge. Over-reaching with military power can result in litigation in which the courts intrude further and further into our affairs, and can result in national security setbacks, not gains – a point best illustrated by the question Donald Rumsfeld once asked my predecessor: “So I’m going to go down in history as the only secretary of defense to have lost a case to a terrorist?”

Particularly when we attempt to extend the reach of the military on to U.S. soil, the courts resist, consistent with our core values and our heritage.

We have worked to make military detention, in particular, less controversial, not more. The overall goal should be to build a counterterrorism framework that is legally sustainable and credible, and that preserves every lawful tool and authority at our disposal. This has meant, as the president’s counterterrorism advisor John Brennan said recently, an approach that is “pragmatic, neither a wholesale overhaul nor a wholesale retention of past practices.”

To build that less controversial, more credible and sustainable legal framework, we have in the last several years accomplished the following:

We have applied the standards of the Army Field Manual to all interrogations conducted by the federal government in the context of armed conflict.
Where appropriate, in the context of terrorist activity, we have invoked the “public safety” exception to the *Miranda* rule created by the Supreme Court in *New York v Quarles* – ensuring that the opportunity to gather valuable intelligence is fully utilized, and, at the same time, preserving the prosecution option.

We worked with the Congress to bring about a number of reforms reflected in the Military Commissions Act of 2009, and, following that, we issued a new Manual for Military Commissions. By law, use of statements obtained by cruel, inhuman and degrading treatment – what was once the most controversial aspect of military commissions – is now prohibited.

We accomplished those reforms working with a *bipartisan* coalition in Congress, and with the full support of the JAG leadership in the military.

We have appointed the highly respected former Judge Advocate General of the Navy, retired Vice Admiral Bruce Macdonald, to be the convening authority for military commissions, appointed a recognized military justice expert, Marine Colonel Jeff Caldwell, to be chief defense counsel, and this month appointed Brigadier General Mark Martins, a West Point valedictorian, Harvard Law School graduate, and Rhodes Scholar to be the chief prosecutor. We are recruiting the “A team” for this system.

We have reformed the rules for press access to military commissions proceedings, established a new public website for the commissions system, and in general, built what I believe is a credible, sustainable and more transparent system.

In the habeas litigation brought by Guantanamo detainees, lawyers in the Department of Justice and the Department of Defense have worked hard to build credibility with the courts, by conducting a thorough scrub of the evidence and the intelligence before we put forward our case for detention in the courts.

We have refined existing systems for periodic review for the cases of detainees at Guantanamo and at Bagram in Afghanistan.

Overall, the hard work of many civilian and military counterterrorism professionals, spanning both this Administration and the last, is producing results.

First and foremost, we have been aggressive and focused in the fight against Al Qaeda. Where necessary, we have not hesitated to use lawful, lethal force against Al Qaeda and its affiliates, and we are literally taking the fight to them, where they plot, where they meet, where they plan, and where they train to export terrorism to the United States. Counterterrorism experts state publicly that Al Qaeda senior leadership is today severely crippled and degraded.
Second, just as we brought justice to the man who ordered the attacks on 9/11, we seek to bring to justice KSM and the other alleged planners of 9/11, in reformed military commissions. New charges have also been referred in the case of the alleged Cole bomber, Hussayn Muhammed Al-Nashiri.

Third, the government is seeing consistent success in the habeas cases brought by Guantanamo detainees. The courts have largely recognized and accepted our legal interpretation of our detention authority, and the government has now prevailed at the District Court level in more than 10 consecutive habeas cases brought by Guantanamo detainees. We are seeing similar good results in the D.C. Circuit.

In the D.C. Circuit, the Department of Justice successfully defended against an effort to extend the habeas remedy to detainees held in Afghanistan.

Fourth, through the interrogation of those captured by the United States and our partners overseas, we continue to collect valuable intelligence about Al Qaeda, its plans and its intentions.

Fifth, this Administration, like its predecessors, continues to successfully prosecute terrorists in our federal civilian courts.

As a former federal prosecutor, I know firsthand the strength, security and effectiveness of our federal court system, and I know Cully agrees with me on this point. Given the reforms since 9/11, the federal court system is even more effective. And, as a result of lengthy and mandatory minimum prison sentences authorized by Congress and the Federal Sentencing Guidelines, those convicted of terrorism-related offenses often face decades, if not life, in prison.

The results speak for themselves. Since 9/11, numerous individuals have been convicted of terrorism-related offenses. In the last two years alone, we have seen in our federal courts a guilty plea from the man who admitted plotting to bomb the New York subway system, a guilty plea from the man who tried to bomb the commercial aircraft over Detroit on Christmas Day 2009, a life sentence imposed on the individual who attempted to detonate a bomb in Times Square, and a life sentence imposed for participation in the 1998 bombing of our embassies in Kenya and Tanzania. Going back decades, the Department of Justice has successfully prosecuted hundreds of terrorism-related cases.

Despite our successes, we know that the fight is not over. We know there is still great danger. Though degraded and on the run, we know that, in this post-Bin Laden period, Al Qaeda and its affiliates still remain determined to conduct
terrorist attacks against the United States. We know also that while Al Qaeda’s core is degraded, it is a far more decentralized organization than it was 10 years ago, and relies on affiliates to carry out its terrorist aims. We know that Al Qaeda is likely to continue to metastasize and try to recruit affiliates to its cause.

These terrorist threats are increasingly complex, multi-faceted, and defy easy labeling and categorization. Just within the last several months, we have seen terrorists who in my judgment:

- claim affiliations to more than one terrorist organization;
- belong to one terrorist organization and serve as the conduit to another;
- fit within our military detention authority but not our military commissions jurisdiction;
- fit within our military commissions jurisdiction but not the military detention authority stemming from the 2001 Authorization for the Use of Military Force; and
- fit within neither our military detention authority nor our commissions jurisdiction, but can be prosecuted in our federal civilian courts.

On top of this are Al Qaeda’s concerted efforts to recruit via the internet, with a reach into the United States. Over and over again, we see individuals within the United States who self-radicalize and who find vindication for their hatred toward America in Al Qaeda’s ideology and propaganda. In dealing with this category of people who are here in the United States – who have never trained at an Al Qaeda camp in Afghanistan, or never sworn bayat to an Al Qaeda leader - - we must guard against any impulse to label that person part of the congressionally-declared enemy, to be dealt with by military force. There is no jurisdiction to try U.S. citizens in military commissions, and our prior efforts in this conflict to put in to military detention those arrested on U.S. soil led to protracted litigation in which the government narrowly prevailed in the federal appellate courts.

As I said before, the military cannot always be the first and only answer. This is contrary to our heritage and, in the long run, will undermine our overall counterterrorism efforts.
In responding to threats and acts of terrorism, we must build a legally sustainable arsenal, and have all the legally available tools in the arsenal – whether it is lethal force against a valid military objective, military detention, interrogation, supporting the counterterrorism efforts of other nations, or prosecution in federal court or by military commissions.

Against this backdrop, we confront a series of laws and pending legislation concerning detainees, that limit the Executive Branch’s and the military’s counterterrorism options, complicate our efforts to achieve continued success, and will make military detention more controversial, not less. Here are some specific examples:

Section 1032 of the 2011 Defense Authorization Act prohibits the use of Defense Department funds to transfer any Guantanamo detainee to the United States for any conceivable purpose, no waivers or exceptions, including federal prosecution or to be a cooperating witness in a federal prosecution. Given the lengthy prison sentences mandated by Title 18 and the Sentencing Guidelines and the range of offenses available for prosecution under Title 18, there are some instances in which it is simply preferable and more effective to prosecute an individual in our federal civilian courts.

Section 1033 of the same law requires that, before the government can transfer a Guantanamo detainee to a foreign country, my client the Secretary of Defense must personally certify to the Congress certain things about the detainee and the transferee country, unless there is a court order directing the detainee’s release. After living with this provision now for almost a year, I will tell you that it is onerous and near impossible to satisfy. Not one Guantanamo detainee has been certified for transfer since this legal restriction has been imposed.

Rigid certification requirements reduce our ability to pursue the best options for national security in an evolving world situation, and intrude upon the Executive Branch’s traditional ability to conduct foreign policy – in this case, to determine when sending a detainee to another country for prosecution or reintegration would better serve our national security and foreign policy interests. Our Nation is not the only one Earth that can deal effectively with this issue. The other potential consequence of such a rigid certification requirement is that it incentivizes the Executive Branch to leave to the courts the hard work of determining who can and should remain at Guantanamo. We want the courts less involved in this business, not more.

Certain legislative proposals for the 2012 Defense Authorization Act are equally problematic.
Section 1039 of the House version of the bill prohibits the use of Department of Defense funds to transfer to the United States any non-U.S. citizen the military captures anywhere in the world as part of the conflict against Al Qaeda and its affiliates -- no waivers and exceptions. Within the national security community of the Executive Branch, we have determined that such an unqualified, across-the-board ban is not in the best interests of national security. Suppose the military captures a dangerous terrorist, and doubts arise about our detention authority overseas? Suppose the military captures an individual who, it turns out, would be vital as a cooperating witness in a terrorist prosecution in the United States? Must the option to take bring these individuals to a civilian courtroom in the U.S. be prohibited by law?

Likewise, Section 1046 of the House bill imposes an across-the-board requirement that, if military commissions jurisdiction exists to prosecute an individual, we must use commissions, not the federal courts, for the prosecution of a broad range of terrorist acts. Decisions about the most appropriate forum in which to prosecute a terrorist should be left, case-by-case, to prosecutors and national security professionals. The considerations that go into those decisions include the offenses available in both systems for prosecuting a particular course of conduct, the weight and nature of the evidence, and the likely prison sentence that would result if there is a conviction. A flat legislative ban on the use of one system -- whether it is commissions or the civilian courts -- in favor of the other is not the answer.

Section 1036 of the House bill rewrites the periodic review process the President's national security team carefully crafted for Guantanamo detainees designated for continued law of war detention. The proposed congressional rewrite mandates the use of "military review panels," contrary to our best judgment. Our experience shows that interagency review is valuable and preferred, to take advantage of the expertise and perspectives across the national security community in our government.

Finally, Section 1032 of the Senate version of the 2012 Defense Authorization bill includes what has come to be known as the "mandatory military custody" provision. Basically, it requires that certain members of Al Qaeda or its affiliates "be held in military custody pending disposition under the law of war," unless the Secretary of Defense, in writing, agrees to give them up.

For starters, the trigger for this requirement is unclear. Some of my friends on the Hill say that the provision is intended to apply only to those who have been "captured in the course of hostilities." Read literally, the provision extends to individuals wherever they are taken in to custody or brought under the control of the United States, who fit within our definition of an enemy combatant in the
conflict against al Qaeda and its affiliates – including those arrested in the U.S. by first responders in law enforcement. This would include an individual who, in the midst of an interrogation by an FBI or TSA officer at an airport, admits he is part of Al Qaeda. Must the agent stop a very revealing and productive interrogation and go call the Army to take the suspect away?

On top of all that, the provision adds that the individual must be a member or part of Al Qaeda or an “affiliated entity.” While we use the phrase “Al Qaeda and its affiliates” publicly to describe the contours of the conflict in non-legal terms, the term “affiliated entity” has no accepted legal meaning and has never been tested in court. Likewise, the phrase in the bill “a participant in the course of planning or carrying out an attack against the United States” – has never been tested in court.

For this and future Administrations, we will oppose efforts to make military detention more controversial, and restrict the Executive Branch’s flexibility to pursue our counterterrorism mission. The Executive Branch, regardless of the administration in power, needs the flexibility, case-by-case, to make well-informed decisions about the best way to capture, detain and bring to justice suspected terrorists.

The conflict against Al Qaeda is complex and multi-faceted. Congress must be careful not to micromanage, complicate and impose across-the-board limits on our options. Both the Congress and the Executive Branch must be careful not to impose rules that make military detention more controversial, not less.

I have spoken today about ways to legally solidify and improve armed conflict, not end it. This should not be the natural order of things. But war is sometimes necessary to secure peace. You heard me describe the tragic but heroic story of a young naval officer who lost his eyesight to an IED. Martin Luther King, the man for whom we dedicated a national memorial on Sunday, said that in the end, an eye for an eye leaves everybody blind. No matter how much longer this conflict will go on, we should all continue to believe that the arc of the human experience on Earth is long, but it bends toward peace.

Thank you for listening.