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Introductory Address

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INTRODUCTORY ADDRESS

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Thank you. Let me express my thanks to United States Attorney Todd Jones, for his warm introduction. Thanks also to the University of St. Thomas Law School, for the gracious invitation to speak today. And thanks to Professor Greg Sisk—himself a Civil Division alum—for bringing us together today.

It's a pleasure to be here with you to talk about the Civil Division's work in defending the United States and federal employees in civil litigation. As many of you know, the Civil Division represents the United States in courts throughout the nation in a wide variety of matters. Essentially, we're the federal government's law firm, representing the president, the Cabinet, federal agencies, and the Congress; and with over 1000 lawyers and more than 400 support staff, we are the Justice Department's largest litigating component. Nearly every aspect of federal government operations and this Administration's domestic, foreign, and national security policy priorities finds its way through our doors at one time or another.

One of our primary duties in the Civil Division is to represent federal officials when they are sued in court, often in cases where there's been some accusation of official wrongdoing. And these cases run the spectrum from the federal employee who injures a bystander while driving a government vehicle to the lawsuit accusing a high-ranking government official of authorizing an unconstitutional targeted killing program overseas.

And as you probably know, these cases involving official wrongdoing or governmental liability fall into two basic buckets. The first contains lawsuits where the plaintiff is seeking damages or injunctive relief against the United States itself or against a federal agency for some action or decision of a federal official on the job. These "official capacity" claims are commonly brought under the Federal Tort Claims Act, or FTCA, which you'll hear much more about during the panel discussion later today.

The second broad category of government tort cases involves those where the claimant seeks money not from the Federal Treasury but from the official's own bank account. These "personal capacity" lawsuits put an individual federal employee's livelihood at stake. They usually involve alleged, tortious behavior that, although taken on the job and under color of law,

falls so far outside the ordinary, discretionary acts one might think reasonable for a government official to engage in such that they may give rise to personal liability. (For you law students in the audience, you'll recognize these as so-called *Bivens* cases.)

And increasingly, these cases—both official capacity and *Bivens* cases—arise in the context of national security where a plaintiff claims that a statute or policy intended to keep Americans safe has been misused by a federal official.

And the questions we confront in these cases are not easy: Can we represent a federal employee in her individual capacity given the available evidence and the array of arguments that may be raised in the litigation? Were the plaintiff's constitutional rights at issue so clearly established that the federal official involved should have known his actions were violating them? Does litigating the lawsuit risk disclosing some of the nation's most sensitive, highly classified secrets such that assertion of the state secrets privilege must be contemplated?

Of course, not every case in which we're called upon to defend against claims of official wrongdoing will involve these difficult issues. But these matters—cases that live at the intersection of national security, policy, and foreign affairs—I think present the Civil Division with some of the most challenging issues we confront; and there is tremendous pressure to get it right given that security and liberty interests, and often a federal employee's personal finances, are at stake. So I'd like to focus on those cases this morning and in particular two aspects of this type of litigation.

First, these cases arise in a context where there are a variety of different equities, where several executive branch interests and policy positions can be implicated by the positions we advance in court. So our litigation positions must account for these interests, and we'll spend some time identifying what some of those interests are and how they play out.

Second, in balancing these various interests, we are guided by some important principles—paramount among them is conducting the case in a manner that is consistent with the best interests of the United States.

So let's talk about each of these aspects in turn.

First, the various agency interests we face. Imagine a scenario in which you're an FBI agent deployed overseas on a mission to interview suspected terrorists in connection with a national security operation. (Now, while you may think you recognize some of these facts, let me assure you: this is just like the movies—any resemblance to cases living or dead is purely coincidental.)

Now, as you know, interrogating suspected terrorists can be difficult and perilous work. You're in a foreign country, maybe one that's not too friendly. You're often operating on limited information, and it's your job to fill in the blanks so that an accurate threat assessment can be made. Your

primary purpose is to gather information that will help support efforts to keep the American people safe.

And the federal department that employs you needs to maintain a very strong relationship of trust and support with you and the other agents it recruits to perform vital functions like the mission you're on. Part of doing that depends on the federal government's ability to reassure you and your colleagues that it will stand behind you in difficult and controversial circumstances.

So let's say one of those individuals you interrogated later accuses you of having mistreated him in some way. And suppose you soon find yourself as a named defendant in a *Bivens* action for damages, meaning you're being sued personally in your individual capacity.

If, after examining the available evidence, the FBI concludes that, in the course of carrying out your mission, you acted appropriately and made difficult judgment calls in good faith, it's a good bet the agency will ask our Civil Division lawyers to stake out an aggressive defensive litigation posture to secure dismissal of your case at the earliest stage.

Other federal government agencies, however, while supporting the general goal of a strong defensive posture, might raise other issues that need to be taken into account, such as the impact certain arguments we make in court might have on the international reputation of the United States and ongoing diplomatic efforts or sensitive relationships with foreign officials or foreign countries—oftentimes covert relationships vital to our overall national security mission that have been developed over many years.

How might these interests play out in litigation? Let's say there's a videotape of the entire episode of your interrogation, and let's suppose it conclusively demonstrates that you behaved appropriately throughout the entire interaction. But suppose it was recorded not by you or a member of your American team, but by one of our foreign liaisons with whom you were cooperating. Producing that tape in litigation may exonerate you—so there's clearly litigation value in releasing it—but revealing its existence may also expose or damage our relationship with that foreign official or government. Indeed, revealing the existence or nature of a foreign liaison relationship could jeopardize the positions of foreign officials or even constitute a danger to their lives.

Now, one of our responsibilities at the Civil Division is to analyze, weigh, and align as best we can all of these various interests to determine how best to defend against claims of wrongdoing by federal employees. And as I mentioned earlier, we are guided by some important principles to help us accomplish that task.

First, there is the strong presumption that the Justice Department will defend federal employees whenever it reasonably appears they were attempting to perform their federal functions in good faith, even if they made

mistakes in the process. We believe extending such legal representation is essential to the efficient functioning of the federal government.

Otherwise, fear of litigation could chill federal officials from taking aggressive—but appropriate—action where necessary to protect the public and serve the public interest.

Think about it: the last thing we want is for you, that federal agent deployed overseas, to second-guess your career choice because you're worried about becoming a "lightning-rod" for litigation.

Second, we're always mindful of the important reputational interests at stake. Even in the FTCA context, where any payment of a settlement or judgment comes not from the employee's pocket but from the Federal Treasury, much more than money is at issue when a federal employee's conduct is called into question.

A third guiding principle we follow in the Civil Division is to recognize that the morale of the federal workforce requires us to support and defend the lawful and appropriate conduct of federal employees against unfair challenge. We will do this even in cases where settlement might appear to be less controversial or more expedient than litigation.

Yet, as I mentioned earlier, there is one overriding principle to which we must adhere: the Justice Department must serve the highest interest of the United States by pursuing justice in all matters. Accordingly, when we evaluate whether to extend representation to federal employees accused of serious wrongdoing, we first must satisfy ourselves that such allegations are not supported by credible evidence.

Take, for example, claims of torture or other types of extreme abuse of prisoners abroad by a federal official. We commonly defend federal officials against such charges. But if it reasonably appeared, based on the available information, that a federal official was involved in prisoner abuse he should have known was unlawful, not only would that violate the policies and values of this Administration, it would also constitute a federal crime if the allegations were proven. In such an instance, we would not extend or continue representation because the highest interests of the United States are best served by pursuing serious transgressions by federal officials when substantiated by the evidence.

And even where there is absolutely no credible allegation of wrongdoing, there are rare instances—although we employ our best efforts to avoid them—where a federal employee's litigation interests collide with the overall legal or policy interests of the United States. In such cases, we will represent the United States and not the individual—a conclusion that is mandated by the governing Justice Department regulations found at Title 28 of the Code of Federal Regulations section 50.15.

But, importantly, when these rare instances do occur, the individual employee is not normally abandoned to her own financial resources; gener-

ally, the federal government will pay for private counsel to assume representation of the employee.

At the end of the day, I believe we strike the right balance in these cases—we litigate them in a manner that provides a robust defense for federal officials accused of wrongdoing while making well-reasoned arguments that reflect consensus within the executive branch.

Let me close with an observation. Representing the United States in these cases is a great privilege and one we take very seriously in the Civil Division. And with all this talk about government shutdowns and furloughs of federal employees these days, I just have to say I think we've been able to litigate these cases in a way that is consistent with our Constitution and our values—consistent with the best interests of the United States—primarily because of the excellent work of career DOJ employees—lawyers, paralegals, and staff. These folks exemplify something I learned over 15 years ago when I was a young DOJ lawyer. Back then, I had the good fortune to do much of my work for then-Attorney General Janet Reno.

Just before I left Main Justice to return to my home state of California to serve as an Assistant U.S. Attorney, Attorney General Reno asked to see me, one-on-one.

And during that meeting, she showed me the inscription on the wall just outside her private office, which reads, and I'm paraphrasing: "The government wins its case when justice is done."

And she told me that my job as a prosecutor wasn't to win as many cases as I could but to do justice in every case I handled. I've seen that same spirit in the Department of Justice lawyers who deal with these difficult and challenging cases day in, day out.

And while, notwithstanding our best efforts, we may not always get it exactly right, I can promise you we'll always try to do what's right. And that, I believe, makes the critical difference.

I'm thankful for that opportunity, and I appreciate being with you this morning.

Thank you very much.