U.S. Department of Justice

Office of the Associate Attorney General

Principal Deputy Associate Attorney General

*Washington, D.C. 20530*

November 17, 2005

General Jay W. Hood
JTF-GTMO/CE
APO, AE 09360

Dear General Hood:

Thank you very much for allowing me to visit Guantanamo Bay last week. I was extraordinarily impressed. You and your colleagues have developed standards and imposed a degree of professionalism that the nation can be proud of, and being able to see first hand all that you have managed to accomplish with such a difficult and sensitive mission makes my job of helping explain and defend it before the courts all the easier.

Thank you again for taking so much time and trouble to make sure we received such a helpful and thorough briefing and tour.

Warm regards,

Neil M. Gorsuch

cc: William J. Haynes, II, Esquire
Frank Jimenez, Esquire

**U.S. Department of Justice**

Office of the Associate Attorney General

**Principal Deputy Associate Attorney General** *Washington, D.C. 20530*

November 17, 2005

Admiral James M. McGarrah
Department of Defense
Office of the Administrative Review of
the Detention of Enemy Combatants (OARDEC)
United States Naval Base
Guantanamo Bay Cuba
1000 Navy Pentagon
Washington, DC 20350-1000

Dear Admiral McGarrah:

Thank you very much for allowing me to visit Guantanamo Bay last week. I was extraordinarily impressed. You and your colleagues have developed standards and imposed a degree of professionalism that the nation can be proud of, and being able to see first hand all that you have managed to accomplish with such a difficult and sensitive mission makes my job of helping explain and defend it before the courts all the easier.

Thank you again for taking so much time and trouble to make sure we received such a helpful and thorough briefing and tour.

Warm regards,

Neil M. Gorsuch

cc: William J. Haynes, II, Esquire
Frank Jimenez, Esquire

**Gorsuch, Neil M**

**From:** Gorsuch, Neil M
**Sent:** Thursday, November 10, 2005 9:53 AM
**To:** Nichols, Carl (CIV); Henry, Terry (CIV); Hunt, Jody (CIV); Cohn, Jonathan (CIV); Keisler, Peter D. (CIV); Meron, Daniel (CIV)
**Cc:** McCallum, Robert (SMO); Bucholtz, Jeffrey (CIV); Frank Jimenez (E-mail); William J. Haynes (E-mail); Karen L. Hecker (E-mail)
**Subject:** GTMO trip

Three items came up during our trip yesterday that I wanted to share with you and solicit your thoughts about --

1. Camp X-Ray. It serves no current purpose, is overgrown and decaying. Gen Hood would understandably like to tear it down. Of course, there may be some evidentiary concerns with this, but can we at least tee this up for a prompt resolution? Eg - notify counsel of our intent to remove it, or seek advance court authorization?

2. Judges trip. If the DC judges could see what we saw, I believe they would be more sympathetic to our litigating positions. Even if habeas counsel objected to such a trip, that might not be a bad thing. What do they want to hide, a judge might ask? Habeas counsel have been eager to testify (sometimes quite misleadingly) about conditions they've witnesses; a visit, or even just the offer of a visit, might help dispel myths and build confidence in our representations to the Court about conditions and detainee treatment. Of course, there are countervailing considerations -- e.g., can judges come take a view under these circumstances? do any judicial ethical considerations exist? who bears the costs? if Gen Hood makes a presentation would habeas counsel have to be given a chance to do so? what other tricks might habeas counsel might seek to try during such a trip? I'd appreciate your thoughts on this question.

3. Priv team. Gen Hood seemed amenable to a walled off team. He is most anxious, however, that we move forward expeditiously with respect to the news information being shared with detainees. Where do we stand on this and how quickly can we tee the issue up?

**Gorsuch, Neil M**

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**From:** Gorsuch, Neil M
**Sent:** Monday, January 23, 2006 11:03 AM
**To:** [redacted]
**Subject:** RE: Elite Law Firm Pro Bono Work for Terrorists

Exactly

-----Original Message-----
From: [redacted] [mailto [redacted]
Sent: Monday, January 23, 2006 10:46 AM
To: Gorsuch, Neil M
Subject: RE: Elite Law Firm Pro Bono Work for Terrorists

The great fallacy here, of course, is that this work helps to protect the rights of Americans. By definition, the only rights at issue here are those of suspected alien terrorist enemies during time of war.

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Monday, January 23, 2006 9:54 AM
To: [redacted]
Subject: Elite Law Firm Pro Bono Work for Terrorists

I thought you mind find this of interest. It seems odd to me that more hasn't been made of this. See esp. list of firms below from Spectator blog.

Home Washington Whispers (USNEWS)
U.S. News and World Report, January 23, 2006 Pro Bono for the Gitmo Gang Legal and military sources tell us that some 57 American law firms are offering free legal advice to more than 150 "enemy combatants" held at the U.S. naval base at Guantanamo Bay, Cuba. A list provided to Whispers shows several prominent shops, many of which brag about their efforts on their websites. The pro bono service, organized by the Center for Constitutional Rights, is under the gun in conservative legal circles and some military offices that suggest it's bad form to help alleged terrorists while also working for clients involved in the war on terrorism like Boeing and General Dynamics. But don't hate lawyers just because they're helping accused terrorists. Thurston Moore, chairman of Hunton & Williams, says pro bono "is the right thing to do." Moore adds that firms like his aren't working a detainee's criminal case, only the legality of imprisonment at Guantanamo.
"If good lawyers did not take on engagements fundamental to our constitutional rights, our rights would be meaningless," he says.

Pro Bono Whose
Publico?<http://www.spectator.org/blogger_comments.asp?BlogID=1563>- Sunday, January 22, 2006 @ 7:28:04 > PM <http://www.spectator.org/blogger.asp#1563>

> It's a curious phenomenon of the law. The bigger the client and the > bigger the law firm, the less likely one really knows what the other is > doing. Take the business of *pro bono publico* (for the public's benefit) > representation, or "*pro bono*" in legal jargon. Lawyers ? even lawyers ?
> want to perform charitable acts. So many lawyers and many law firms donate a
> portion of their time every year to represent those who cannot afford > representation. They still get paid because their law firms are getting > paid for the rest of their work and the work of the lawyers who aren't doing
> their *pro bono* turn.
>
> So the law firms' other clients are picking up the tab for the *pro bono*work, and many take pride in what their lawyers do.
> But one wonders what clients would think of their lawyers doing *pro bono*work for terrorists?
>
> According to a Defense Department source, a long list of some of the > nation's largest law firms ? some who represent Fortune 500 companies and > some who represent 9-11 families ? are doing *pro bono* work for terrorist > detainees held at Guantanamo Bay, Cuba. Here's the list:
>
> Allen & Overy
> Baker & MacKenzie
> Carleton, Fields
> Covington & Burling
> Bingham, McCutcheon
> Blank Rome
> Bondurant, Mixson & Elmore
> Burke, McPheeters, Bordner
> Burns & Levinson
> Cleary, Gottleib Steen
> Clifford Chance
> Cohen, Milstein, Hausfeld
> Davis, Wright, Tremaine
> Debevoise & Plimpton
> Dechert
> Dickstein Shapiro
> Dorsey & Whitney
> Downs, Rachlin & Martin
> Esdaile, Barrett & Esdaile
> Foley Hoag
> Fredrikson & Byron
> Freedman, Boyd, Daniels
> Fulbright & Jaworski
> Garvey, Schubert Barer
> Gibbons, Del Deo and Dolan
> Holland & Hart
> Hunton & Williams
> Jenner & Block
> Keller & Heckman
> Kramer, Levin, Neftalis
> Lavin, O'Neal, Ricci
> Manatt, Phelps & Phillips
> Mayer, Brown, Rowe

> McCarter & English
> McDade Fogler
> Moore & Van Allen
> Nixon Peabody
> O'Riordan Bethel
> Orrick, Herrington & Sutcliffe
> Paul, Weiss, Rifkind
> Pepper Hamilton
> Perkins Coie
> Rodgers, Powers & Schwartz
> Ruprecht, Hart & Weeks
> Schnader, Harrison, Segal
> Schwabe, Williamson & Wyatt
> Shearman & Sterling
> Shook, Hardy Bacon
> Simpson, Thatcher & Bartlett
> Stradley, Ronon, Stevens
> Sullivan & Cromwell
> Sutherland, Asbill & Brennan
> Venable
> Weil, Gotshal & Manges
> Wilmer, Cutler & Pickering
>
> Most of these law firms are ? or were, before the Graham amendment ?
> litigating habeas corpus cases seeking the release of Gitmo detainees.
That
> is, they have been working for the release of enemy combatants, trying to > extend to them one of the key rights Americans have under the Constitution,
> and which those detainees wish so fervently to deny us. I wonder how > many of the clients of these firms ? and among the partners of these firms ?
> know what their lawyers and partners are doing. And how much they are > paying for it.
>
> *Pro bono publico*? So who's the *publico* they're benefiting?
>
>
> *Posted By: Jed Babbin*
>

[redacted]mail server made the following annotations on 01/23/06, 09:47:45:

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[redacted]

My direct telephone number and e-mail address will remain the same.

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IRS Circular 230 Disclosure: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication, including attachments, was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding any penalties that may be imposed on such taxpayer by the Internal Revenue Service. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addressed in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

**********



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**Gorsuch, Neil M**

**From:** Gorsuch, Neil M
**Sent:** Tuesday, November 15, 2005 11:36 AM
**To:** Shaw, Aloma A
**Subject:** RE: (Time Sensitive) SES Performance Appraisals and Accomplishments
**Attachments:** performance work plan.doc

-----Original Message-----
**From:** Shaw, Aloma A
**Sent:** Tuesday, November 15, 2005 11:31 AM
**To:** Gorsuch, Neil M
**Subject:** RE: (Time Sensitive) SES Performance Appraisals and Accomplishments

Send it to me.

-----Original Message-----
**From:** Gorsuch, Neil M
**Sent:** Monday, November 14, 2005 7:16 PM
**To:** Shaw, Aloma A
**Subject:** RE: (Time Sensitive) SES Performance Appraisals and Accomplishments

Finished mine; where does it go?

-----Original Message-----
**From:** Reyes, Luis (SMO)
**Sent:** Monday, November 07, 2005 3:01 PM
**To:** Henke, Tracy (SMO); McCallum, Robert (SMO); Gorsuch, Neil M; Swenson, Lily F; Kessler, Elizabeth A
**Cc:** McCallum, Robert (SMO); Gunn, Currie (SMO); Shaw, Aloma A
**Subject:** (Time Sensitive) SES Performance Appraisals and Accomplishments

Folks,
I know this isn't a fun assignment, but please get your self-appraisal/accomplishments info. to Robert by tonight or early tomorrow. The Performance Review Board is asking Robert for all of his appraisals (of direct reports and individuals on his staff), and other documents, asap as they were planning on meeting Thursday 11/10. I think they can push it back to early next week, but we should get Robert all that he needs to make his appraisals asap.

Robert, please let either Tracy, or Currie, or I, know if we can be of any assistance in walking through exactly what is required to send forward (i.e. the rack and stack, etc.).

Thanks everyone --LR

Accountability for Organizational Results

Helped coordinate litigation efforts involving a number of national security matters -- including the Darby photos litigation and FOIA case seeking a poll of Guantanamo Bay detainees -- with DOD, SDNY, NSC, White House Counsel, among others

Helped coordinate legislative effort on Graham Amendment within DOJ and in consultation with DOD and others

Drafted speeches on terrorism and national security efforts for the Attorney General

Appeared on behalf of ASG as required for speeches, conferences, meetings

Helped draft policy and legislation on avian flu and volunteer liability in national disasters

Helped draft motion to dismiss the first set of Bivens suits related to the war on terrorism consolidated before Judge Hogan

Assumed responsibility for Edmonds litigation

Chaired trade group and appeared on behalf of DOJ in other interagency working groups (e.g., BRAC)

Accountability for People/Workforce

Participated on committee reviewing the options for improving the Department's workforce structure for privacy and civil liberty related issues; helped write committee's draft report

Helped in recruiting efforts for OASG and new privacy office

Helped coordinate component management questions and concerns during ASG's tenure as Acting DAG

Accountability for Taxpayer Value

Assisted with immigration litigation overflow by assuming responsibility for an immigration appeal and drafting appellate brief

Assisted ASG in determining whether to approve settlements reached by components as wise expenditures of the government's resources

Helped coordinate with OMB on Indian water rights litigation issues, avian flu liability scheme, draft volunteer liability legislation, and other matters with a budget impact

Accountability for Confidential Policy Making

Provided confidential advice to the ASG and other senior leaders in the Department on litigation matters and ensured appropriate consultation with Administration leaders outside the Department on those matters

Resolved by negotiation a CRT employment investigation

Assisted in drafting of attorney-client waiver policy memo and subsequently advised USAO offices, as requested, on how to implement policy

Helped develop and coordinate new departmental policy with respect to bullet-proof vests

Provided timely updates on national security litigation issues to policy makers inside and outside DOJ

**Gorsuch, Neil M**

**From:** Gorsuch, Neil M
**Sent:** Thursday, September 15, 2005 9:27 AM
**To:** Moschella, William; Seidel, Rebecca
**Subject:** Detainee Legislation

OAG asked that we prepare -- internally -- comments on the various detainee bills being discussed on the Hill. The thought being that we should be prepared if/when this breaks.

Toward that end, could you send me copies of whatever draft bills are out there, in their current form? I received a draft of bills by Specter and Graham some time ago, but don't know if they've changed, or whether others have gotten into the fray. I will then coordinate with you to share the bills with various folks internally to get their thoughts and comments.

Many thanks,

NMG

From: Gorsuch, Neil M
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=ngorsuch>
To: Bradbury, Steve
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=sbradbury>
Cc:
Bcc:
Subject: RE: House leg options.wpd
Date: Tue Nov 08 2005 12:23:43 EST
Attachments:

That is exactly how I've sought to draft it, after consulting with DoD.

-----Original Message-----
From: Bradbury, Steve
Sent: Tuesday, November 08, 2005 12:22 PM
To: Gorsuch, Neil M
Subject: RE: House leg options.wpd

I agree that we should push first and foremost to eliminate jurisdiction across the board, including in the Hamdan itself, and then, as a fallback, limit jurisdiction only to post-conviction habeas review (and then only of compliance with authorized procedures). How about as a third option (second fallback) limiting jurisdiction to post-conviction review generally (i.e., no Hamdan pre-trial review but unlimited post-conviction habeas review)?

-----Original Message-----
From: Gorsuch, Neil M
Sent: Tuesday, November 08, 2005 12:18 PM
To: Bradbury, Steve
Subject: RE: House leg options.wpd

Thanks, Steve. Agree on (1) and have made the change. On (2), the language is DoD's and I don't know how willing they are to considering edits, but I will suggest deleting duress. On (3), DoD has expressed grave reluctance about letting Hamdan proceed, obtain a finding of unconstitutionality, and then leave DoD to argue that the holding applies to no other cases. That does seem a tough sell politically. Thoughts?

-----Original Message-----
From: Bradbury, Steve
Sent: Tuesday, November 08, 2005 12:12 PM
To: Gorsuch, Neil M
Subject: FW: House leg options.wpd

Neil: Some thoughts from John Elwood.

-----Original Message-----
From: Elwood, John
Sent: Tuesday, November 08, 2005 12:06 PM
To: Bradbury, Steve; Eisenberg, John; Marshall, C. Kevin; Boardman, Michelle; Prestes, Brian
Subject: RE: House leg options.wpd

Looks to me like the continuing issues with respect to the version we have now are:

(a) omission of "filed by or" in addition to "on behalf of"

(b) new standard for considering statements: whether statements were "obtained under duress resulting from physical or mental coercion." I don't know that there's any better established standard for what constitutes "duress" than there is for "undue coercion," and if anything, my instinct is that "duress" would be easier for a detainee to show.

(c) I'm in no rush to preserve Hamdan, but note the absence of any carve-out for that. Personally, I liked the proposal that grandfathered the cases existing on 11/7 the best of the ones I saw; were any of those Bivens actions or only habeas cases?

-----Original Message-----
From: Bradbury, Steve
Sent: Tuesday, November 08, 2005 11:43 AM
To: Marshall, C. Kevin; Boardman, Michelle; Elwood, John; Eisenberg, John; Prestes, Brian
Subject: FW: House leg options.wpd

Comments for Neil? Thx!

-----Original Message-----
From: Gorsuch, Neil M
Sent: Tuesday, November 08, 2005 11:37 AM
To: Bradbury, Steve; Nichols, Carl (CIV); Moschella, William
Cc: Sampson, Kyle; Elwood, Courtney
Subject: House leg options.wpd

Per discussions with Steve, Will, and DoD about concepts for the House authorization bill, attached is some draft language we might use in upcoming discussions with the Hous. Any/all comments appreciated. Given the time fuse on this, I'd like to share the attached with DoD this afternoon, so if you could pass along comments by 130, that would be especially helpful.

**Shaw, Aloma A**

| | |
|---|---|
| **Subject:** | Detainee Legislation Meeting |
| **Location:** | WH Sit Room |
| **Start:** | Tuesday, November 29, 2005 9:30 AM |
| **End:** | Tuesday, November 29, 2005 10:30 AM |
| **Recurrence:** | (none) |
| **Meeting Status:** | Accepted |
| **Organizer:** | Shaw, Aloma A |
| **Required Attendees:** | Gorsuch, Neil M; Bradbury, Steve |

When: Tuesday, November 29, 2005 9:30 AM-10:30 AM (GMT-05:00) Eastern Time (US & Canada).
Where: WH Sit Room

*~*~*~*~*~*~*~*~*~*~*

Purpose: to discuss proposed Rumsfeld letter to conferees on National Defense Authorization Act, as well as our broader legislative strategy on detainee legislation.

Proposed Attendees:
Harriet Miers, Mike Allen, Sandy Hodgkinson, Steve Slick, Steve Bradbury, Jim Haynes or designee, John Bellinger or designee, Jon Rizzo or designee, Corin Stone, David Addington.

Mr. Bradbury if you'd like to ride along with Neil to this meeting, his car will depart 10th St. gate at 9:15 am and return at 10:35 am.

(1) TO DO - Examples of Intell on GTMO

McCain

How can the Administration seriously oppose a law banning CID in interrogations?

Doesn't this make us look terrible with our allies that you claim in your speech are so vital to the War on Terror?

Doesn't this make us look terrible with the Muslim community across the world, whose hearts and minds we must win in order to succeed in the War on Terror, as you pointed out in your speech?

Is the VP driving this issue? Do you disagree with him? How about others in the Administration?

Do you consider our Geneva obligations to avoid CID to apply to foreign nationals held abroad? Didn't you say at your confirmation hearing that you thought our obligations to avoid CID don't apply to aliens abroad?

Graham

Why deny detainees access to the courts if you're so confident our procedures are sound and defensible?

> Wouldn't it enhance our credibility and prestige in the world to allow judicial review?

Doesn't holding detainees without charges indefinitely hurt our moral standing in the world? With our allies? With the Muslim community? Isn't this inconsistent with our effort to win hearts and minds?

How can we square our policy of holding detainees indefinitely when the UK is debating the propriety of holding suspects for just a few days or weeks before presenting criminal charges?

How can you defend the DoD procedures you outline when they don't even provide access to counsel, or any right to see classified evidence used against the individual?

How can you defend continuing to hold NLECs for years even after they've been found NOT to be enemy combatants? (Uighurs)

Are the reports true that you and others prevailed over the VP in agreeing to a deal with Sen. Graham?

Wouldn't the Graham legislation make the McCain prohibitions on CID nearly impossible to enforce in courts?

GTMO/AbuGharib/Torture Memos

Do you agree or disagree w/ the Bybee Memo that the torture statute only covers physical injuries that result in death or organ failure? Or psychological pain that results in the infliction of lasting harms like post traumatic stress disorder?

Do you agree with the Yoo Memo to Haynes that grave breaches under Geneva include only death or severe physical injury?

Do you agree with the SEC DEF that there's nothing wrong with requiring detainees to stand for 18 hours in stress positions?

What do you think about water boarding? Have you approved it?

Shouldn't we apply Geneva protections and the Army Field Manual to our enemies in order to ensure protection of our own troops? In order to ensure our moral standing in the world?

X Pcouldn't be clearer

legal eft –

Doesn't it undermine our efforts to convince the world that they should take human rights seriously when we interpret our obligations so narrowly?

Isn't all human life worth the same protection?

Is there a link between the torture memos coming out and then the atrocities at GTMO and Abu Gharib?

Did they create a "climate" or "tone at the top" in which you should've foreseen that torture would be applied?

How many detainees have died in US custody during or as a result of interrogations? Are you willing to say "none"? Why not?

Have the aggressive interrogation techniques employed by the Admin yielded any valuable intelligence? Have they ever stopped a terrorist incident? Examples?

X ① X CS
② Klussy.
③ Tellyn
Patrol –
Abu Ali,
Dregan –
④ Press R

Don't the experts in this field agree that torture doesn't yield useful intelligence? If so, why are we pushing the envelope in this area?

Why won't the USG release all of the photos of misconduct at Abu Gharib?

What assurances do you obtain before sending a detainee back to his home country? Do we just allow home governments to "do our torture for us"?

Black Sites

Do we use them?

What legal protections exist to ensure against torture or CID there?

Doesn't the use of such places – without any examination by courts, the ICRC, or others - undermine our moral authority in the war on terror? Doesn't it jeopardize our standing with allies? With the Muslim community?

Patriot Act

Why should we allow personal records from libraries, bookstores, doctor's offices, business, and other entities that are not connected to an international terrorist or spy to be obtained using either a secret order under the Foreign Intelligence Surveillance Act (FISA) or a "national security letter" (NSL) issued by an FBI official without any court oversight?

Why should we allow secret FISA orders and NSLs to bar a recipient from telling anyone (other than the recipient's lawyer) that records have been obtained? Isn't that a violation of the 1A?

How can we say that "sneak and peek" search warrants are appropriate even cases having nothing to do with terrorism?

Why should we make so many changes permanent, when the Admin keeps telling us we are winning the war on terrorism?

How can we endorse a death penalty provision even where the defendant had no intent to kill or to act in reckless disregard of human life (Sect 214)? Or reduce the number of jurors from 12? How do you square that with the 8A?

Padilla

Why did you wait so long to indict him?

Why didn't you indict him on the dirty bomb plot?

Isn't this -- and your speech -- a recognition that the criminal justice is the right way to go in combating terrorism at home? And that such a tactic can be quite successful?

Were you afraid of the Supreme Court review and just trying to hide from court scrutiny?

Why is the Administration generally so distrustful of courts reviewing its conduct in the War on Terror?

Iraq

What's the time table for withdrawal?

Why hasn't the Admin put in more troops?

What is "victory" in Iraq?

In your speech, you say we work well with our allies in the War on Terror. But why didn't we do a better job of working with our allies in the most important front – Iraq?

Defend the Admin's view on WMDs.

What are the true capabilities of the Iraqui police? Is DOJ doing anything to assist them? Same for Iraqui judiciary.

Miscellaneous

There were many raised threat alerts prior to the election, but few since then. What assurances do we have that they are not being used for political ends?

What is the status of the Rove investigation? Any comment on Libby's indictment? Is there a shakeup in the works at the WH?

Status of Abramoff investigation? Comment on Cunningham plea?

**Gorsuch, Neil M**

---

**From:** Gorsuch, Neil M
**Sent:** Thursday, December 29, 2005 5:11 PM
**To:** 'BellingerJB@state.gov'
**Subject:** RE: Draft Signing Statement

Thanks. Sounds like she needs to hear from us, otherwise this may wind up going the other way.

-----Original Message-----
From: BellingerJB@state.gov [mailto:BellingerJB@state.gov]
Sent: Thursday, December 29, 2005 5:05 PM
To: Gorsuch, Neil M
Subject: RE: Draft Signing Statement

I agree with your agreement with me and I sent Harriet a note to this effect.

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Thursday, December 29, 2005 4:57 PM
To: Steve.Bradbury@usdoj.gov; John.Elwood@usdoj.gov;
John_B._Wiegmann@nsc.eop.gov; jimenezf@dodgc.osd.mil;
Brett_C._Gerry@who.eop.gov; Raul_F._Yanes@omb.eop.gov; Bellinger, John
B(Legal)
Subject: RE: Draft Signing Statement

A signing statement along these lines seems to give us at least three advantages. First, it would aid State and others on the foreign/public relations front, as John's intimated, allowing us to speak about this development positively rather grudgingly. (And there can be little doubt that, for example, the Graham portion of the bill is very positive indeed for DoD and the Administration generally.) Second, while we all appreciate the appropriate limitations on the usefulness of legislative history (and, despite those limitations, the penchant some courts have for it), a signing statement would be of help to us litigators in the inevitable lawsuits we all see coming. Everyone has worked terribly hard to develop the best legislative history we can for the Executive under the circumstances we've faced and it would seem incongruous if we stopped working that front now, when we control the pen. Third, a statement along the lines proposed below would help inoculate against the potential of having the Administration criticized sometime in the future for not making sufficient changes in interrogation policy in light of the McCain portion of the amendment; this statement clearly, and in a formal way that would be hard to dispute later, puts down a marker to the effect that the view that McCain is best read as essentially codifying existing interrogation policies. No one could convincingly say they weren't on notice of the Administration's position to that effect, whereas without such a statement we leave ourselves perhaps more open to such a criticism.

On the other side of the equation, what's the downside? While perhaps not common, neither is it unprecedented to use signing statements in this fashion to advance the Executive's interests and, indeed, some statements have been cited by courts as persuasive sources of authority in efforts to divine statutory intent.

-----Original Message-----
From: Bradbury, Steve
Sent: Thursday, December 29, 2005 1:06 PM
To: 'BellingerJB@state.gov'; Elwood, John; John_B._Wiegmann@nsc.eop.gov;
Rosalyn_J._Rettman@omb.eop.gov; jimenezf@dodgc.osd.mil;
Brett_C._Gerry@who.eop.gov
Cc: Gorsuch, Neil M; David_S._Addington@ovp.eop.gov;
Shannen_W._Coffin@ovp.eop.gov; roberje@ucia.gov;
Michael_Allen@nsc.eop.gov; melodar@ucia.gov; Raul_F._Yanes@omb.eop.gov
Subject: RE: Draft Signing Statement

I agree with John's comments.

-----Original Message-----
From: BellingerJB@state.gov [mailto:BellingerJB@state.gov]
Sent: Thursday, December 29, 2005 1:00 PM
To: Elwood, John; John_B._Wiegmann@nsc.eop.gov;
Rosalyn_J._Rettman@omb.eop.gov; jimenezf@dodgc.osd.mil;
Brett_C._Gerry@who.eop.gov
Cc: Bradbury, Steve; Gorsuch, Neil M; David_S._Addington@ovp.eop.gov;
Shannen_W._Coffin@ovp.eop.gov; roberje@ucia.gov;
Michael_Allen@nsc.eop.gov; melodar@ucia.gov; Raul_F._Yanes@omb.eop.gov
Subject: RE: Draft Signing Statement

Although long, this version looks good to me.

I suggest two changes: 1) in para 1, I would replace the phrase "security and liberty" with the bolded language below, because foreign terrorists, unlike US nationals, do not have liberty interests; and 2) in para 2, I would add "and lawful" to make clear that we are only trying to protect "lawful" activities, not merely "authorized" activities.

I think the short version at the end is too short and does not do justice to what was achieved in the McCain-Graham compromise. Even though we may not be entirely happy with the final version, we want to declare victory, rather than sound grudging and make it sound like the Executive plans to interpret the law as we please no matter what Congress says.

-----Original Message-----
From: Wiegmann, John B. [mailto:John_B._Wiegmann@nsc.eop.gov]
Sent: Thursday, December 29, 2005 11:41 AM
To: John.Elwood@usdoj.gov; Rettman, Rosalyn J.; jimenezf@dodgc.osd.mil;
Gerry, Brett C.
Cc: Steve.Bradbury@usdoj.gov; Addington, David S.; Coffin, Shannen W.;
roberje@ucia.gov; Allen, Michael; Bellinger, John B(Legal);
melodar@ucia.gov; Neil.Gorsuch@usdoj.gov; Yanes, Raul F.
Subject: RE: Draft Signing Statement

OK, here is a revised version that attempts to incorporate the substance of most comments. I could not incorporate everything as there were conflicting comments, but I did my best. I have put this version into the formal OMB clearance process, so it should come around to everyone again through that route

for formal comment. David Addington has suggested a one-line signing statement, which is now the last line of this statement. I am interested in everyone's views on that approach -- this is now much longer than what we would traditionally do, but there are various objectives that people wanted to accomplish with this.
Thanks to everyone for the informal comments and quick turn-around.

Detainee operations are a critical part of the war on terror. The Administration is committed to treating all detainees held by the United States in a manner consistent with our Constitution and laws and our treaty obligations. Title X, the Detainee Treatment Act of 2005, addresses certain matters relating to the detention and interrogation of persons by the United States. This legislation strikes an appropriate balance, RESPECTING THE AUTHORITY OF THE PRESIDENT TO TAKE STEPS NECESSARY TO DEFEND OUR COUNTRY WHILE CLARIFYING STANDARDS OF TREATMENT AND COURT REVIEW RELATED TO DETENTION.

The provisions of Title X regarding the standards for treatment of detainees are an important statement reaffirming the values and principles we share as a Nation. U.S. law and policy already prohibit torture. Section 1003, which prohibits cruel, inhuman or degrading treatment or punishment, is intended to codify the Administration's existing policy of abiding by the substantive constitutional standard applicable to the United States under Article 16 of the Convention Against Torture in its treatment of detainees in U.S. custody anywhere.
As the sponsors of this legislation have stated, however, it does not create or authorize any private right of action for terrorists to sue anyone, including our men and women on the front lines in the war on terror. On the contrary, section 1004 provides additional protection for those engaged in authorized AND LAWFUL detention or interrogation of terrorists from any civil suit or criminal prosecution that might be brought under other provisions of law.

I appreciate the provisions in Title X that address the burden placed on the United States' conduct of the war on terror by the flood of claims brought in U.S. courts by terrorists detained at Guantanamo Bay, Cuba.
Section 1005 authorizes limited judicial review of the judgments of military commissions and of military detention decisions regarding these individuals. This grant of access to our courts is historically unprecedented for any nation at war, as are the processes already in place within the Department of Defense on these issues. Given the separation of powers concerns raised by judicial review in this area, the legislation prudently establishes a role for the courts that is narrow and limited in scope, and is deferential to the decisions made by military authorities in wartime pursuant to my authority as Commander-in-Chief. The legislation also eliminates altogether the hundreds of other claims brought by terrorists at Guantanamo that challenege many different aspects of their detention and that are now pending in our courts. On balance, all the procedures that have been established will help ensure that the United States can effectively fight the war on terror free of a debilitating litigation burden while upholding its commitment to the rule of law.

The executive branch shall construe Title X of the Act in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as commander in chief and consistent with the constitutional limitations on the judicial power.

-----Original Message-----
From: Wiegmann, John B.
Sent: Wednesday, December 28, 2005 8:33 PM
To: 'John.Elwood@usdoj.gov'; Bettman, Rosalyn J.;

To: John.Elwood@usdoj.gov ; Rettman, Rosalyn J.;
jimenezf@dodgc.osd.mil; Gerry, Brett C.
Cc: Steve.Bradbury@usdoj.gov; Addington, David S.; Coffin, Shannen W.
Subject: RE: Draft Signing Statement

See proposed edited version below. Still seems too long and I expect there is some that could be cut, but these edits are offered on the assumption for now that we may want to say all this.

-----Original Message-----
From: John.Elwood@usdoj.gov [mailto:John.Elwood@usdoj.gov]
Sent: Wednesday, December 28, 2005 7:02 PM
To: Wiegmann, John B.; Rettman, Rosalyn J.; jimenezf@dodgc.osd.mil;
Gerry, Brett C.
Cc: Steve.Bradbury@usdoj.gov
Subject: Draft Signing Statement

Below is a draft signing statement on the McCain and Graham amendments to National Defense Authorization Act (Title XIV in the most recent draft we've seen). Neil Gorsuch in the Associate A.G.'s office has reviewed this.

Thank you very much.

John P. Elwood
Deputy Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
(w): (202) 514-4132
(cell): (202) 532-5943

==========

The Administration is committed to treating all detainees held by the United States in the war on terror in a manner consistent with applicable law. Title X, the Detainee Treatment Act of 2005, addresses certain matters relating to the detention and interrogation of persons by the United States. The provisions of this title regarding the standards for treatment of detainees are an important statement reaffirming the values and principles we share as a nation. Section 1003, for example, is intended to codify the Administration's existing policy of abiding by the substantive constitutional standard applicable to the United States under Article 16 of the Convention Against Torture in its treatment of detainees. As the sponsors of this legislation have stated, however, it does not create or authorize any private right of action for terrorists to sue our men and women on the front lines in the war on terror. On the contrary, section 1004 provides additional protection for those engaged in authorized detention or interrogation of terrorists from any civil suit or criminal prosecution that might be brought under other provisions of law. [All existing legal defenses are also preserved, and the United States may compensate its personnel for any legal expenses they may incur in connection with such suits or prosecutions, in the United States or abroad.]

Title X addresses an area that involves core presidential responsibilities regarding national security and the conduct of war and in which, as a result, Congress traditionally has avoided attempts to regulate. The Constitution makes the President the Commander-in-Chief of the Armed Forces, a grant that includes the authority -- and duty -- to protect Americans effectively from attacks by our enemies, including the terrorists with whom we are now at war, and to bring those enemies to justice. I

therefore shall construe this title in a manner that is consistent with this vital constitutional responsibility to protect the safety of the Nation.

This legislation authorizes judicial review of the judgments of military commissions and of military detention decisions regarding terrorists detained at Guantanamo Bay, Cuba that is historically unprecedented for any nation at war. In light of the serious separation of powers concerns raised by such review, the legislation necessarily establishes a narrow and strictly limited role for the courts in reviewing decisions made by military authorities in wartime pursuant to my authority as Commander-in-Chief. It also eliminates altogether the flood of claims brought by these terorists that challenge many different aspects of their detention and that are now pending in our courts. On balance, this legislation will help to ensure that the United States can continue to effectively fight the global war on terror free of a crippling litigation burden.

**Gorsuch, Neil M**

**From:** Gorsuch, Neil M
**Sent:** Friday, December 16, 2005 4:55 PM
**To:** Brett Gerry (E-mail)
**Attachments:** BanTortureArticle.pdf

Brett, In case (as it seemed) you need cheering up about the legislation this week, see below. The Administration's victory is not well known but its significance shouldn't be understated. And I have lit a fire in CIV. Memo will be finished over the weekend if need be and you will have a definitive answer (whatever it is) on Monday. NMG

http://www.cbsnews.com/stories/2005/12/05/opinion/main1096782.shtml
http://www.aclu.org/legislative/index.html

CBS NEWS

# Ban Torture Or Protect Torturers?

By Jeremy Brecher & Brendan Smith December 5, 2005 at 10:22 AM

Thousands of well-meaning people are mobilizing to pressure Congress to pass legislation banning torture. But the Bush Administration is maneuvering to turn it into legislation that would instead protect the torturers by eliminating a basic legal right. To stop them, torture opponents will need to be not just as innocent as doves but also as cunning as foxes.

When Congress returns to Washington on Monday, a campaign will unfold in support of Senator John McCain's legislation banning torture, which is attached to a defense bill. But McCain's amendment is accompanied by one from Senator Lindsey Graham that bans the appeals that prisoners at Guantánamo have used to take their cases to civilian courts.

In the 2004 case Rasul v. Bush, brought on behalf of Guantánamo captives, the Supreme Court established the right of foreigners held by the United States to habeas corpus, the 800-year-old legal procedure grounded in the Magna Carta and enshrined in the U.S. Constitution, which requires government officials to explain to a court why they are holding someone in captivity. Graham's amendment strips courts of the power to hear such cases.

Graham sprang his amendment on the Senate in the closing days of the session with no hearings and little debate. A firestorm of criticism forced Graham to accept a compromise--negotiated with Democratic Senator Carl Levin--that allows captives limited appeals to civilian courts. (Newsweek has reported that Attorney General Alberto Gonzales and White House Counsel Harriet Miers were also in on the negotiations.) But the Graham compromise still strips federal courts of jurisdiction to hear applications for habeas corpus brought by Guantánamo prisoners.

The Senate passed the compromise amendment 84 to 14. Republican Senator Arlen Specter, chair of the Senate Judiciary Committee, described it as "a sophisticated, blatant attempt at court-stripping."

Bill Goodman, legal director for the Center for Constitutional Rights, which brought the first habeas corpus cases for Guantánamo captives, says the Graham amendment "will formalize the lawless policies of the Bush Administration that allow the Department of Defense to hold prisoners indefinitely without any requirement that it show any reason for doing so." That has and will continue to result in "torture of U.S. prisoners."

The Graham amendment bans habeas corpus appeals against conditions of confinement. The consequence, according to Michael Dorf, the Sovern Professor of Law at Columbia University, is that "a prisoner cannot get into federal court by claiming (or presenting evidence) that he is being subject to torture or otherwise degrading treatment."

Deviously, the Graham amendment has been packaged with McCain's anti-torture amendment. But the package will make things worse, not better, for Guantánamo captives unless Graham's amendment banning habeas corpus is removed. As Bill Goodman points out, while the pair of amendments "profess to ban torture," without the right to judicial oversight, they are "defanged." They are "a right without a remedy and, as such, meaningless."

The Bush Administration is now negotiating with Graham and others to make the legislation even more restrictive. A Justice Department spokesperson told Newsweek, "We definitely agree with the principle behind the current bill, though there are still some concerns that the language may need to be improved." White House spokesman Trent Duffy also told Newsweek that the White House is positive about the Graham bill and is "working with Senator Graham on technical aspects" of the legislation.

Attorney General Alberto Gonzales has talked with Senator Graham about the bill at least twice. The Justice Department spokesperson told Newsweek Gonzales was "particularly focused on thwarting some of the 160 habeas lawsuits filed by Gitmo detainees." (Gonzales was the author of the notorious 2002 memo advising the President that the Geneva Conventions did not apply in order to provide "a solid defense to any future prosecution" of U.S. officials under the War Crimes Act. Gonzales's personal role in laying the groundwork for torture is sufficient for professor Marjorie Cohn, now president-elect of the National Lawyers Guild, to have drafted an indictment of Gonzales for violating the War Crimes Act.)

The Bush Administration is apparently divided. Despite the role of the White House in preparing the Graham compromise amendment, Vice President Cheney opposed it. Indeed, Cheney has fought any legislation that would eliminate the government's right to torture, though he seems willing to compromise on language that leaves the CIA, but not the military, free to torture. In the past, President Bush has threatened to veto the entire defense bill if McCain's anti-torture amendment is included.

Both the Graham and McCain amendments are attached to a defense bill that now goes to a Senate-House conference. Graham and Levin plan to demand that the final legislation include both.

The conference committee will undoubtedly be the focus of pressure from those who want to preserve the right of habeas corpus. A statement by Habeas Counsel, the coalition of prestigious attorneys representing Guantánamo captives, says, "To legislate this way is disgraceful. It is also completely unnecessary. This is not an emergency situation. The Graham-Levin amendment should be stripped out in conference. The genuine deliberation required by the gravity of the issue can then begin."

Representative Edward Markey of Massachusetts, a member of the Progressive Caucus and an outspoken opponent of torture and "extraordinary rendition" (a k a government-run kidnapping), describes the task facing cunning progressive foxes:

"If the U.S. wants to demonstrate that we are a nation committed to justice and the rule of law, we should adopt the McCain amendment barring torture and drop the Graham amendment suspending habeas corpus rights for those detained at Guantánamo Bay. If persons held by the US lack the right to challenge their detention or their treatment, the McCain amendment's protections against torture and other forms of cruel or humiliating treatment may turn out to be illusory."

Only nine of the more than 500 Guantánamo captives have even been charged with crimes, and their trials are being prolonged year after year. This is exactly the situation habeas corpus is designed to remedy. And without it, the captives can rot in prison forever and possibly be subject to torture and inhumane treatment that the courts are unable even to learn about.

Graham and the Bush Administration oppose rights for Guantánamo detainees in part on the grounds that they are terrorists who deserve no better. They refuse to face the very real possibility of innocent people caught up in

the system, acknowledged by the military's own commanders at Guantánamo. According to the Wall Street Journal:

"American commanders acknowledge that many prisoners shouldn't have been locked up here in the first place because they weren't dangerous and didn't know anything of value. 'Sometimes, we just didn't get the right folks,' says Brig. Gen. Jay Hood, Guantánamo's current commander."

Graham's original proposal to eliminate habeas corpus for foreign captives was met by extraordinary condemnation. Ten retired military leaders endorsed a letter from Rear Adm. John Hutson calling the restriction on habeas corpus a "momentous" change. "The practical effects of such a bill would be sweeping and negative." Signers included Army Lieut. Gen. Robert Gard, Marine Maj. Gen. Fred Haynes and other senior officers.

Eugene Fidell, president of the National Institute of Military Justice, the organization of military lawyers, said the Graham amendment would sanction "unreviewable executive detention that cannot be harmonized with the nation's longstanding adherence to the rule of law."

The American Bar Association has urged the Senate to reconsider and defeat the original Graham amendment. Michael Greco, president of the association, gave a stirring defense of habeas corpus, which "cannot and should not" be replaced by the "extremely limited review" provided by the Graham amendment, which "would undermine the very principles that distinguish us from our enemies."

Does Congress have the power to tell the Supreme Court what cases it can or cannot hear? In American law, courts have the power to review the constitutionality of legislation passed by Congress, but they tend to defer to the other branches of government, especially where national security issues are involved.

Both Graham's original amendment and his compromise amendment directly conflict with the Supreme Court's decision in Rasul v. Bush that Guantánamo captives have the right to habeas corpus. The Supreme Court recently agreed to hear Hamdan v. Rumsfeld, a challenge to the constitutionality of the Bush Administration's military tribunals for Guantánamo captives.

No one knows how the Court would respond to an instruction from Congress to reverse its interpretation of the Constitution. Indeed, the conflict over the power of courts to hear prisoners' appeals is plunging the country into an ongoing constitutional crisis in which all three branches of government are involved.

Since treatment of captives held by the United States has included well-documented cases of torture, brutality and even treatment leading to death, the Graham amendment would erect a screen behind which such crimes may be conducted with impunity. Opponents of torture need to make sure they are not inadvertently helping to pass an amendment that would protect torturers.

*Reprinted with permission from the The Nation*

# Ban Torture. Period.

It should have been unmitigated good news yesterday when President Bush finally announced that he would back Senator John McCain's proposal to ban torture and "cruel, inhuman or degrading" treatment at United States prison camps. Nothing should be more obvious for an American president than to support a ban on torture.

But this is the president who scrapped the rules on the decent treatment of prisoners in the first place and whose lawyers concocted memos on legalizing torture. On further reflection, the feeling of relief faded fast.

Mr. McCain's amendment is attached to a malignant measure — introduced by Senator Lindsey Graham, Republican of South Carolina, and now cosponsored by Senator Carl Levin of Michigan, the top Democrat on the Senate Armed Services Committee — that would do grievous harm to the rule that the government cannot just lock you up without showing cause to a court. This fundamental principle of democratic justice must not be watered down so the Bush administration does not have to answer for the illegal detentions of hundreds of men at Guantánamo Bay and other prison camps.

Mr. Graham's original measure would at least have barred the use of coerced confessions from prisoners like those at Guantánamo. But the current version actually appears to allow coerced evidence. Lawmakers were also discussing language that would strip United States courts, including the Supreme Court, of the power to review detentions. Bruce Ackerman, a professor of law at Yale University, said that Congress had not attacked the courts in this fashion since Reconstruction.

Mr. Bush had barely announced his deal with Mr. McCain before Attorney General Alberto Gonzales made it crystal clear that the administration would define torture any way it liked. He said on CNN that torture meant the intentional infliction of severe physical or mental harm, and repeated the word "severe" twice. He would not even say whether that included "waterboarding" — tormenting a prisoner by making him think he is being drowned.

Then Duncan Hunter, chairman of the House Armed Services Committee, announced that he would oppose the McCain measure unless the White House guaranteed in writing that it would have no effect on intelligence-gathering. Mr. Hunter's legitimate concerns have already been addressed with a provision that would allow C.I.A. agents to defend themselves against torture charges by saying they were following legal orders. That protection is already provided to uniformed soldiers. The latest objections by Mr. Hunter, who has helped Vice President Dick Cheney try to block Mr. McCain's amendment, are just a smokescreen.

What is at stake here, and so harmful to America's reputation, is the routine mistreatment of prisoners swept up in the so-called war on terror. The Senate voted 90 to 9 for the McCain measure without the extra baggage. And the House passed a nonbinding resolution supporting it. Both should stand firm. The nation and its fighting men and women need moral clarity, not more legalistic wiggle room.

**Gorsuch, Neil M**

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**From:** Gorsuch, Neil M
**Sent:** Friday, December 16, 2005 5:00 PM
**To:** Reyes, Luis (SMO); McCallum, Robert (SMO)
**Subject:**
**Attachments:** BanTortureArticle.pdf

Some more have begun to catch on to the Administration's upside in this week's legislation...

http://www.cbsnews.com/stories/2005/12/05/opinion/main1096782.shtml
http://www.aclu.org/legislative/index.html

**Gorsuch, Neil M**

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**From:** Gorsuch, Neil M
**Sent:** Monday, January 16, 2006 10:45 AM
**To:** 'Brett_C._Gerry@who.eop.gov'
**Subject:** RE: USA Today update

I just put a draft out there for Robert's consideration and hardly control the pen, but I will be sure to pass this along. That said, I am not sure I see the issue. The draft I passed along says the Pres. "believes that the Amendment reflects our Nation's values and his policies, and he is committed to it." Not sure what "faithfully executes" adds here except a legal veneer on the same idea. Am I missing something (as is often the case)?

-----Original Message-----
From: Brett_C._Gerry@who.eop.gov [mailto:Brett_C._Gerry@who.eop.gov]
Sent: Monday, January 16, 2006 10:38 AM
To: Gorsuch, Neil M
Subject: Re: USA Today update

Neil-

Most of the edits here are good, but those to the section on the mccain-graham amendment remove language making clear that the president intends to faithfully execute the amendment The language in this paragraph was heavily scrutinized by the wh, and was intended to make clear beyond doubt that the president did not issue his signing statement for the purposes of creating a loophole allowing him to ignore the amendment's provisions. I'd strongly suggest going back to the original formulation, even though it would cost us a few words.

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov <Neil.Gorsuch@usdoj.gov>
To: Robert.McCallum@usdoj.gov <Robert.McCallum@usdoj.gov>; Kyle.Sampson@usdoj.gov <Kyle.Sampson@usdoj.gov>; William.Moschella@usdoj.gov <William.Moschella@usdoj.gov>; Tasia.Scolinos@usdoj.gov <Tasia.Scolinos@usdoj.gov>; Brian.Roehrkasse@usdoj.gov <Brian.Roehrkasse@usdoj.gov>
CC: John.Elwood@usdoj.gov <John.Elwood@usdoj.gov>; Addington, David S. <David_S._Addington@ovp.eop.gov>; Miers, Harriet <Harriet_Miers@who.eop.gov>; Gerry, Brett C. <Brett_C._Gerry@who.eop.gov>
Sent: Mon Jan 16 10:26:30 2006
Subject: RE: USA Today update

I must say that it's mighty tough to find any fat in John's excellent work. I have managed in the attached to eke some to get a three-subject version down to 377 words and pass it along for the group's consideration. It also seeks to incorporate Harriet's suggestions.
(Getting a two-subject version to 350 should be very easy, but it would be nice if we could touch on all three topics). NMG

-----Original Message-----
From: McCallum, Robert (SMO)
Sent: Monday, January 16, 2006 8:57 AM
To: Gorsuch, Neil M; Sampson, Kyle; Moschella, William; Scolinos, Tasia; Roehrkasse, Brian
Cc: 'Harriet_Miers@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; 'David_S._Addington@ovp.eop.gov'; Elwood, John
Subject: FW: USA Today update

Copying Neil, Kyle, Tasia, Brian and Will with these edits. Robt.

-----Original Message-----
From: Harriet_Miers@who.eop.gov [mailto:Harriet_Miers@who.eop.gov]
Sent: Monday, January 16, 2006 7:38 AM
To: McCallum, Robert (SMO); Elwood, John
Cc: David_S._Addington@ovp.eop.gov; Brett_C._Gerry@who.eop.gov
Subject: RE: USA Today update

I have three general comments to the drafts which are very good. First, I believe we should cite Hamdi as supporting the concept of incidents of the authorization to use military force. I also think there should be some transition between the two or three topics if possible. Finally, the use of the word "generously" seems a bit out of place. And if I understand the position of some in the Administration, that provision is one that may be challenged by an Administration in the future. So perhaps it is better just to observe that the law provides detainees the right to seek review after trial.

-----Original Message-----
From: Robert.McCallum@usdoj.gov [mailto:Robert.McCallum@usdoj.gov]
Sent: Sunday, January 15, 2006 10:24 PM
To: John.Elwood@usdoj.gov; Neil.Gorsuch@usdoj.gov; Kyle.Sampson@usdoj.gov; Gerry, Brett C.; Addington, David S.; William.Moschella@usdoj.gov; Perino, Dana M.; Miers, Harriet
Cc: Tasia.Scolinos@usdoj.gov; Brian.Roehrkasse@usdoj.gov
Subject: RE: USA Today update

As per prior email to various folks, I will be in the office tomorrow am and can be reached by email, by direct dial at 514-7850, or through the DOJ command center. I will be reviewing the draft and be back in touch tomorrow am. Robt.

> -----Original Message-----
> From: Elwood, John
> Sent: Sunday, January 15, 2006 10:20 PM
> To: ' (Harriet_Miers@who.eop.gov)'; McCallum, Robert (SMO); Gorsuch,
> Neil M; Sampson, Kyle; 'Brett_C._Gerry@who.eop.gov';
> 'David_S._Addington@ovp.eop.gov'; 'Dana_M._Perino@who.eop.gov';
> Moschella, William
> Cc: Scolinos, Tasia; Roehrkasse, Brian
> Subject: USA Today update
>
> If USA Today winds up covering only the NSA wiretaps and the Detainee

> Treatment Act signing statement (they indicated the third issue was
> just a possibility), I have gotten the two-issue version of the op-ed
> down to the current target (350 words).
>
> I've gotten the three-issue version of the op-ed down to 403 words.
> We're checking to see whether USA Today will extend the word count in
> view of the number and complexity of issues. If not, I'll find
> another 53 words that don't need to be said.
>
> I've attached copies of the two- and three-issue op-eds to this
> e-mail. In case you're reading this on blackberry, I've cut and
> pasted the three-issue version into the body of the e-mail below. This

> incorporates all comments I've received so far.
>
> Thanks! << File: USA Today op-ed (v2.8) (2-subject).doc >> << File:
> USA Today op-ed (v2.8) (3-subject).doc >>
>
> DRAFT OP-ED==========
>
> After September 11, 2001, President Bush pledged to use "every tool of

> intelligence ... and every necessary weapon of war" to defeat the
> terrorists and prevent another attack. The President has taken
> decisive action against the terrorists, but every tool used in the war

> on terror has been lawful and consistent with the actions of past
> Presidents.
>
> President Bush has authorized the interception of international calls
> of people linked to al Qaeda. That program has foiled deadly plots.
> From World War II to the Clinton Administration (which searched a
> spy's home without court approval), Presidents have recognized that
> their constitutional authority to protect the Nation permits
> surveillance of foreign agents without court order, and every
> appellate court to consider the matter has agreed. Congressional
> leaders were repeatedly advised of this program. Moreover, Congress
> authorized the use of "all necessary and appropriate" force against
> the terrorists. Similar past force authorizations have been
> understood to permit the use of all traditional tools of
> warfare-including electronic surveillance-to find and attack the > enemy. Although Congress has placed restrictions on wiretapping, the > law permits surveillance "authorized by statute." The congressional
> authorization is such a statute.
>
> When President Bush recently signed a law requiring that detainees not

> be treated cruelly, he issued a statement saying he would construe the

> law in a manner consistent with his constitutional authority. The
> claim that this reflects an intent to "ignore" that law is unfounded

> claim that this reflects an intent to "ignore" that law is unfounded.
> The President has said that the law reflects our Nation's policies and

> values, and he is committed to faithfully executing it. Because the
> Constitution makes the President the Commander in Chief and gives him
> broad authority over foreign affairs, presidents often have issued
> such signing statements when Congress legislates in these areas.
> Presidents Reagan, George H.W. Bush, and Clinton together issued
> hundreds of such statements.
>
> The same law also provides that "no court, ... shall have jurisdiction

> to hear" lawsuits of Guantanamo detainees challenging their detention.
> That law clearly indicates that such lawsuits now in the courts must
> be dismissed, but generously permits detainees to seek court review
> later, after trial by military commission. The Supreme Court has long

> said that laws removing jurisdiction take effect immediately. That
> interpretation is echoed by Senators Graham and Kyl, who sponsored the

> legislation. We want the brave men and women serving our country to
> be able to focus on doing their jobs, not on defending themselves
> against baseless lawsuits.

**Gorsuch, Neil M**

**From:** Gorsuch, Neil M
**Sent:** Thursday, July 7, 2005 10:39 AM
**To:** Letter, Douglas (CIV)
**Cc:** Keisler, Peter D. (CIV); Meron, Daniel (CIV); Katsas, Gregory (CIV); Nichols, Carl (CIV); Yanes, Raul
**Subject:** RE: Policy question

This seems a legitimate concern, with respect to citizens especially. If due process requires that we share the most sensitive intel info we have with counsel for non-citizen detainees at Gitmo who were captured on a battlefield (not a conclusion I endore, but one we now seemingly must live with), can we suggest due process doesn't compel the govt to inform inquiring citizens who whether or not they are on the no-fly list?

-----Original Message-----
**From:** Letter, Douglas (CIV)
**Sent:** Thursday, July 07, 2005 8:14 AM
**To:** Letter, Douglas (CIV); Keisler, Peter D. (CIV); Meron, Daniel (CIV); Katsas, Gregory (CIV); Nichols, Carl (CIV); Rowan, Patrick; Bianco, Joseph F.; Yanes, Raul; Elwood, Courtney; Wiggins, Mike; Gorsuch, Neil M; Nielson, Howard; Brand, Rachel
**Subject:** Policy question

Raul/Courtney, Rachel etc.:

Francine Kerner, the TSA General Counsel, called me about a policy issue -- she wanted to know if something communicated to her about FBI's views is indeed a policy decision made by appropriate levels at DOJ.

In the Intelligence Reform Act, Congress required TSA to work on a new air travel passenger security system -- Secure Flight. As part of that, Congress required TSA to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because [the new security system] determined that they might pose a security threat, to appeal such determination and correct information contained in the system." In addition, the statute says that TSA "shall establish a timely and fair process for individuals identified as a threat * * * to appeal to TSA the determination and correct any erroneous information."

TSA has been working on regs to implement this statutory requirement. The agency was told by the FBI that the Bureau insists that this system NOT provide any notice to a person that he/she is on a No-Fly list. Apparently, an atty from OLP (Eric Gormsen) was at a meeting with TSA where this policy was communicated.

This means that TSA is promulgating regs under which an aggrieved person can contact the agency and provide information to try to remedy problems that the individual has been having in getting on board an airplane. But TSA will never tell the person that he is actually on a No-Fly list. The person just submits the information blind, and TSA then processes it internally and decides what, if anything, to do for relief.

Francine strongly wonders if this makes sense and is consistent with the statutory requirements. In addition, she asks if this is consistent with due process requirements, given that some on the No-Fly list are citizens. Francine says that in other areas, such as licenses for transmitting hazardous materials, TSA will notify a person if they are on a list and are thus barred, so that the person has an oppty to challenge the correctness of that fact.

I told Francine that I would check and we would consider this issue. So, do you know if this is simply something that FBI has stated at this point, or was it a considered DOJ policy? If the former, do we agree with FBI? I can certainly see courts being very unhappy with a policy that won't let citizens know what they are challenging, even though they have a statutory right to challenge (especially given that TSA reveals presence on a barred list in other circumstances). Thus, I think the policy that has been communicated to TSA has substantial litigation risks.

I promised to get back to Francine as soon as possible because TSA is trying to finalize its regs. Thank you.

**Gorsuch, Neil M**

**From:** Gorsuch, Neil M
**Sent:** Wednesday, July 12, 2006 5:17 PM
**To:** Katsas, Gregory (CIV)
**Subject:** FW: Draft Hamdan Legislation
**Attachments:** Enemy Combatant Detention Act_Draft15.doc; Legislative Options4.doc

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**From:** Engel, Steve
**Sent:** Wednesday, July 05, 2006 4:44 PM
**To:** Sampson, Kyle; Elwood, Courtney; McNulty, Paul J; Rowan, Patrick (ODAG); Clement, Paul D; Garre, Gregory G; Elston, Michael (ODAG); Moschella, William; Keisler, Peter D (CIV); Nichols, Carl (CIV); Hertling, Richard; McIntosh, Brent; Katsas, Gregory (CIV); Letter, Douglas (CIV)
**Cc:** Bradbury, Steve; Gorsuch, Neil M; Elwood, John; Marshall, C. Kevin; Eisenberg, John; Sobota, Luke
**Subject:** Draft Hamdan Legislation

I attach a draft memorandum detailing legislative options on Hamdan as well as the latest draft of the proposed legislation.

Per the WH's request, we intend to circulate drafts to the NSC this evening. Comments before then are particularly welcome.

Thanks,

Steve

*NMG Draft 2/3/06*

# PREPARED ORAL STATEMENT FOR ATTORNEY GENERAL ALBERTO R. GONZALES AT THE SENATE JUDICIARY COMMITTEE HEARING

## WASHINGTON, D.C. MONDAY, FEBRUARY 6th, 2006

Good morning Chairman Specter, Senator Leahy, and members of the Committee. I'm pleased to have this opportunity to speak with you and thank you for it. When all the facts and law are considered, I believe you will conclude, as I have, that the President's terrorist surveillance program is justified by the nature of the threat we face and consistent with the laws of the United States and the Constitution we all cherish.

* * *

As leaders of our government, you know that the enemy remains deadly dangerous. Only in the last few days, both Osama bin Laden and his deputy have emerged from their caves to threaten new attacks.

Speaking of recent bombings in Europe, bin Laden warned that the same is in store for us. He claimed, quote, "the operations are under preparation and you will see them in your homes."

Bin Laden's deputy, Ayman al-Zawahiri, added that the American people are – and again I quote – "destined for a future colored by blood, the smoke of explosions, and the shadows of terror."

None of us can afford to shrug off warnings like this or forget that we remain a nation at war.

Nor can we forget that this is a war against a radical and unconventional enemy. Our enemy knows no boundaries, has no government and no standing army. Yet our enemy has a fanatic desire to wreak death and destruction on our shores. And they have sought to fight us not just with bombs and guns. They are trained in the most sophisticated communications, counter intelligence, and counter surveillance techniques – and their tactics are constantly changing in response to our tactics and what they learn. Indeed, they fight in ways different from any other enemy we have faced, using our own technologies to their advantage: video tapes and worldwide television networks to communicate with their forces; e-mail, the Internet, and cell phone calls to direct their operations; and even our own schools in which to learn English and how to fly our most sophisticated aircraft as suicide-driven missiles. We underestimate this enemy at our peril.

To fight this war, some say that we should close our society and isolate ourselves from the world. But America has always rejected the path of isolationism. And I know you agree that following this course would sacrifice the core freedoms essential to the promise of this great nation.

In order to fight this war while remaining open, democratic and vibrantly engaged with the world, we must search out the terrorists abroad and pinpoint their cells here at home. And we must do all this *before* they can hurt us. To succeed in such a challenging mission against an amorphous and amoral enemy we must deploy not just soldiers, sailors, airmen and marines.

We must also depend on intelligence analysts and surveillance experts and the nimble use of our technological strengths. The President made this clear just after 9-11 when he assured the American people that he would use every tool in his power to protect this country. He said that some of these tools would be visible and obvious, while others would necessarily have to remain secret.

Imagine what a program like the terrorist surveillance program might have accomplished *before* 9-11. Terrorists were clustered in cells throughout the United States preparing their assault. We know from the 9-11 Commission Report that they communicated with their al Qaeda superiors abroad using e-mail, the Internet, and cell phones. What might New York and Washington and, really, the whole world look like today if we had intercepted a communication revealing their plans? Of course, we cannot answer that question. But I am convinced that the terrorist surveillance program instituted after 9-11 has helped us disrupt terror plots and save American lives. I am also convinced that its continuation in the future is essential if we are to avoid another attack.

***

In assessing the lawfulness of the terrorist surveillance program, we must bear in mind the reality of 9-11 and the ongoing threat against us. In a democracy, the law can never be left to be decided by elites in a moral vacuum or based only on abstractions. Justice Oliver Wendell Holmes put the point best when he said, "the life of the law . . . has been Experience." The experience of 9-11 – an appreciation for how it changed all of our lives irrevocably – is essential to any sound legal analysis. [I like this, though I am still a little concerned that this could

leave the impression that we need to appeal to something beyond the law.]

Immediately after 9-11, the President was duty bound as Commander in Chief under our Constitution to do everything he could to protect the American people. Like you, he took an oath to preserve, protect, and defend the Constitution. He told you and the American people that, to carry out this solemn responsibility, he would use every lawful means at his disposal to prevent another attack, and he demanded ideas from his staff.

One of the ideas presented to the President was the terrorist surveillance program. It involved the National Security Agency, then led by General Michael Hayden. To the extent I can talk about the details of this classified program today, I am limited to the facts that the President has confirmed publicly. No one is above the law and I feel duty bound not to compromise operational details that remain classified. To reveal further classified information would be a gift to our enemy who, we all know, is listening carefully to this discussion and will adapt to what it learns.

After agreeing to authorize the terrorist surveillance program of international communications, the President imposed several critical safeguards. These safeguards were specifically designed to protect the privacy and civil liberties of all Americans – and to do so zealously.

First, the only communications intercepted under the terrorist surveillance program are *international* communications – that is, communications between this country and a foreign country. Communications that begin and end only within our borders are *not* involved. The President has repeatedly

underscored that he has not authorized electronic surveillance for domestic purposes. [not sure what this means. He does authorize electronic surveillance here by FISA and title III. Perhaps: underscored that the program does not target domestic communications.]

Second, the program authorized by the President targets communications only if there are reasonable grounds to believe that one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist organization . As the President said during his State of the Union, if you're talking with al Qaeda, you better believe we want to know what you're saying. But if you're just a typical American going about your business this program is specifically designed *not* to intercept your calls.

Third, in order to protect the privacy of American citizens even further, the President's program includes strict limits on how information concerning U.S. persons can be collected, retained, and disseminated. These limits – or minimization requirements – are similar to requirements imposed by other foreign intelligence programs conducted by the NSA and briefed to members of Congress. [olc – correct? We need to let nsa see this] So, for example, if the NSA inadvertently collects the name of a person in the United States who is not relevant, that person many not be mentioned in any intelligence report by name.

Fourth, this program is administered by career civil servants at NSA and it has been reviewed and approved by NSA lawyers and monitored by the independent Inspector General there. I have been personally assured that no NSA foreign intelligence program has received a more thorough review.

Fifth, the program expires by its own terms approximately every 45 days. Under the terms of the program, it may be reauthorized only on the recommendation of intelligence professionals. And it may be reauthorized only after a finding that al Qaeda continues to pose a threat to America, based on the latest intelligence. Each time the program is reauthorized, lawyers also must reassess whether the President continues to have the legal authority to conduct the program.

Finally, the President instructed Executive Branch officials to inform leading members of Congress -- both Republican and Democratic -- about this program. The President do so in the spirit of national unity and bipartisanship following 9-11. As a result, the bipartisan leadership of both the House and Senate has known of this program for *years*. So have the bipartisan leaders of the House and Senate Intelligence Committees. Not one of these leaders has asked the President to discontinue the program. The recent claims of shock and horror we hear from some quarters about this program come as something as a surprise to me given the consultation the President provided the bipartisan leadership of Congress.

Another claim that rings hollow is the notion advanced by a few that the terrorist surveillance program is somehow like the partisan political spying we witnessed in the 1960s or 1970s. Nothing could be farther from the truth. The President and all Americans denounce the inappropriate use of our intelligence capabilities against domestic political opponents. But leaders of Congress have known since the outset of this program that it is no partisan snooping expedition. Instead, it is surgically aimed at those foreign terrorists who have repeatedly announced their intention to see our future, in Zawahiri's recent words, "colored by blood, the smoke of explosions, and the shadows of terror."

***

From a legal perspective, any analysis of the President's program has to begin with the Constitution. Article II designates the President the Commander in Chief with authority over the conduct of war. Article II also gives makes the President, in the words of the Supreme Court, "the sole organ [of government] in the field of international relations."

These authorities are vested in the President by the Constitution and they are inherent to the office. They cannot be diminished or legislated away by other co-equal branches of government. And these authorities include the power to spy on enemies like al Qaeda without prior approval from other branches of government through a judicial warrant or a FISA application. Now, let me make clear, this isn't just my opinion or President Bush's. The courts have uniformly upheld this principle in case after case.

Fifty-five years ago in *Johnson v Eisentrager*, the Supreme Court explained that the President's inherent constitutional authority expressly includes -- quote -- "the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns."

More recently, the FISA Court of Review [in full, it is the Foreign Intelligence Surveillance Court of Review] explained that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain intelligence information." The court went on to add, quote, *"We take for granted that the President does have that authority and, assuming that it is so, FISA could not*

***encroach on the President's constitutional powers."*** It is significant that this ruling stressing the constitutional limits of FISA came from the very court Congress established to oversee the FISA court.

Yet another federal appellate court in *US v. Truong* held that, even during peacetime, a "uniform warrant requirement ... would unduly frustrate the President in carrying out his foreign affairs responsibilities."

Nor is this just the view of the courts. Presidents throughout our history -- from President Washington to President Clinton -- have authorized the warrantless surveillance of foreign enemies operating on our soil. And they have done so in ways far more aggressive and sweeping than the narrowly targeted program President Bush authorized against al Qaeda.

General Washington, for example, instructed his army to find ways to intercept letters between British operatives, copy them, and then allow those communications to go on their way.

President Lincoln used warrantless wiretapping of telegraph communications during the Civil War in order to discern the movements and intentions of opposing troops.

President Wilson in World War I authorized the military to intercept *all* telephone and telegraph traffic going into or out of the United States. That's *each and every* call and cable crossing our Nation's borders.

During World War II, President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States. He also gave the military the authority to

access and review, without warrant, *all* telecommunications, quote, "passing between the United States and any foreign country." Some scholars estimate that the use of signals intelligence as a whole helped shorten the Second World War by as much as two years.

Nor have Presidents used warrantless searches only in times of foreign crisis and war.

President Clinton's Administration, for example, ordered several warrantless searches on the home and property of the spy Aldrich Ames. His Administration also authorized the warrantless search of the Mississippi home of a suspected terrorist financier. The Clinton Justice Department authorized these searches because it was the judgment of Deputy Attorney General Jamie Gorelick that – and I quote –

> [T]he President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. . . [and] the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.

As you can see from this brief overview, every court and every President throughout our history to decide the question has agreed that the Commander-in-Chief may conduct secret searches of enemy communications in this country without the prior approval of the other co-equal branches. And president after president has authorized programs far more sweeping than the narrow and targeted program that President Bush has authorized against al Qaeda.

* * *

Some have suggested that the passage of the Foreign Intelligence Surveillance Act changed everything, diminishing the President's inherent authority to intercept enemy communications. After all, the argument goes, Congress has the power under Article I of Constitution to declare war, raise armies, and make regulations concerning our forces. And in a time of war there is no question that both of the elected branches have critical roles to play in the protection of the American people.

But there are some flaws in this argument as well. As I've already outlined, nothing in FISA or any other statute can *diminish* the President's inherent authorities granted by Article II of the Constitution. Likewise, of course, nothing the President orders can diminish the powers of the Congress under Article I of the Constitution. The Constitution speaks to the inherent power of *every* co-equal branch.

But we do not need to get into a debate over competing constitutional authorities to resolve the legal question here. Even if we assume that interceptions made under the terrorist surveillance program qualify as "electronic surveillance" subject to the FISA statute, the President's program is fully compliant with that law.

This is so because, by its plain terms, FISA prohibits persons from intentionally engaging in electronic surveillance under color of law "*except as authorized by statute.*"

Those words – except as authorized by statute – are important and they are no accident of drafting. The Congress that passed FISA in 1978 in the aftermath of Watergate deliberately included those words in order to leave room for future Congresses to modify or eliminate the FISA requirement without having to amend or repeal FISA itself. Congress did so because it knew that the only thing certain about foreign threats is that they change over time and do so in unpredictable ways. As you know, too, Congress doesn't always include exceptions like this when it legislates in other more stable areas.

The Resolution Authorizing the Use of Military Force is exactly the sort of statutory exception contemplated by FISA. Just as the 1978 Congress envisioned, a new Congress in 2001 found itself facing radically new circumstances and it legislated to recognize that new reality. In 2001, we were no longer living the aftermath of the Watergate, but in the aftermath of the World Trade Center. And in that new environment, Congress did two critical things when it passed the Force Resolution.

First, Congress included language expressly recognizing the President's inherent authority under the Constitution to combat al Qaeda and its affiliates. And these inherent authorities, as I explained earlier, have always included the right to conduct surveillance of foreign enemies operating within this country.

Second, Congress *supplemented* the President's inherent authority by granting? him the *additional* authority to -- and I quote -- "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." Many distinguished scholars have observed that this is a broad grant

of authority, and, we believe, one that includes electronic surveillance of those associated with al Qaeda. After all, we agree that it is a "necessary and appropriate" use of force to fire bullets and mortars at al Qaeda strongholds. Given this, how can anyone say that we can't also listen to al Qaeda phone calls? The term "necessary and appropriate force" must allow the President to spy on our enemies, not just shoot at them blindly hoping we might hit the right target.

In fact, other presidents have used statutes like the Force Resolution as a basis for authorizing even broader intelligence surveillance. President Wilson in World War I cited not just his inherent constitutional authority as Commander in Chief to intercept telecommunications coming into and out of this country. He also expressly relied on a congressional resolution authorizing the use of force against Germany. And the language of that resolution parallels the Force Resolution in both tone and tenor. President Bush is doing nothing new here, but yet again following longstanding precedent. [can we work in again the point that this is much more narrow?]

I have heard a few Members of Congress say that they *personally* did not intend the Force Resolution to allow for the electronic surveillance of al Qaeda communications. I don't doubt this is true. But we are a nation governed by written laws, not the intentions of any individual. What matters is the plain meaning of the words *approved by both chambers of Congress and signed by the President.* And those plain words could not be clearer. They do not say that the President is authorized to use only certain particular tactics against al Qaeda. Instead, they authorize the use of *all* necessary and appropriate force. Nor does the Force Resolution require the President to fight al Qaeda only in foreign countries. Far from it. In passing the

Force Resolution, Congress was responding to threat from *within our own borders.* Al Qaeda infiltrated our homeland and attacked us where we live. Plainly, Congress expected the President to address that threat within our borders -- and to do so with all appropriate force.

It is important to underscore that Supreme Court has already interpreted the plain language of the Force Statute in just the way I've outlined. In 2004, the Supreme Court faced the *Hamdi* case. There, the question was whether the President had the authority to detain an American citizen as an enemy combatant for the duration of the hostilities. The Supreme Court held [still don't think that's quite right] that the language of the Force Resolution gave the President the authority to employ the traditional incidents of waging war. Justice O'Connor also explained that these traditional powers included the power to detain enemy combatants for the duration of hostilities – and to do so even if the combatants is an American citizen. If the detention of an American al Qaeda combatants is authorized by the Force Resolution as an appropriate incident of waging war, how can one seriously suggest that merely listening to their phone calls to prevent and disrupt their attacks doesn't also qualify? Can one really argue that, while the Supreme Court says it's okay under the Force Resolution to keep enemy combatants at Guantanamo Bay, we may not listen if they try to call terror cells in the United States with orders to execute an attack? Members of the Committee, I respectfully submit that cannot be the law.

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Even though the President has the authority to conduct the terrorist surveillance program under the Constitution and the

Force Resolution, some have asked whether he just as easily could have obtained the same intelligence using the tools afforded by FISA itself.

Let me assure you that we *are* using FISA in our war efforts. And let me assure you that FISA remains vitally important to national security. But, the "why not use FISA?" argument depends on a misconception about how that statute works.

When FISA was written, it included a so-called "emergency exception." That exception now allows the government to file applications 72 hours after surveillance begins. But this is simply too cumbersome for us to be successful in tracking a crafty and technologically astute enemy in the current environment. To put the point bluntly: al Qaeda terrorists do not operate on lawyer time.

As you know, even an emergency surveillance under FISA cannot be approved without assurance, *in advance,* that the requirements and conditions for a regular application will be satisfied. And in order to assure that the government will be able to comply with FISA, a great deal must be done.

To begin, the lawyers at NSA must review the evidence assembled from their intelligence officers and conclude that it satisfies FISA's requirements. Then, lawyers in the Department of Justice have to review the request and reach the same judgment or insist on additional evidence or analysis when necessary. Finally, as Attorney General, I have to review their submission and make the determination. After all that, within three days we must follow up with a formal FISA application. And that itself entails significant additional burdens. The

government must prepare a legal document and supporting declarations laying out all the relevant facts and law. It must obtain the approval of a Cabinet-level officer as well as a certification from the National Security Adviser, the Director of the FBI, or a designated Senate-confirmed officer. And, finally, of course, it must win the approval of an Article III judge.

Simply put, the FISA process doesn't move in real time the way our enemies do – and the way we must if we are to stop them. Just as we can't demand that our soldiers bring lawyers onto the battlefield to tell them when they are allowed to shoot under military law (let alone await instructions from the Attorney General), it would be a mistake to "lawyer up" career intelligence officers who are trying desperately to track secretive al Qaeda operatives in real time. The terrorism surveillance program allows the real experts to make intelligence surveillance decisions rather than layer after layer of lawyers.

* * *

Mr. Chairman, members of the Committee, the President chose to act to prevent the next attack with every lawful tool at his disposal, rather than wait until it is too late. It is hard to imagine any responsible President who would not do the same.

The terrorist surveillance program is necessary and it is narrowly tailored to the threat we face. It is lawful, and it respects the civil liberties Americans have cherished for generations. It is well within the mainstream of what courts and prior Presidents have authorized. It is subject to careful constraints, and Congressional leaders have known of its operation since 2001. Accordingly, as the President has explained, he intends to continue to the program as long as al Qaeda poses a threat to our national security. To succumb to

media criticisms or political polls and end the program now would be a grave mistake, affording our enemy dangerous and potentially deadly new room for operation within our own borders.

Mr. Chairman, I have tried to outline the highlights of the program and its legal authority as best I can in an open hearing and in the brief time allotted. I look forward to your questions and will do the best I can to answer them. At the same time, I know you appreciate that there are serious constraints on what I can say without compromising information that remains classified. As you know, the Director of National Intelligence testified last week that public leaks about this program have inflicted very severe damage. I do not want to disclose anything further; that would make me complicit in aiding the enemy's efforts or, God forbid, another attack. Our enemy is listening. And they are probably laughing – laughing at the thought that anyone would leak such a sensitive program in the first place, and laughing at the prospect that we might unilaterally disarm ourselves of a key tool in the war on terror.

Finally, I want to thank you again for giving me this opportunity to speak. This is an important issue and I hope I have contributed to the Committee's understanding of the program's legal basis and precedent. Mr. Chairman, I also hope and trust that our continued dialogue in this hearing will be distinguished by the civility and bipartisanship that I know you always exhibit and the American people deserve when it comes to matters so critical to their nation's defense. Thank you.

**Clement, Paul D**

**From:** Clement, Paul D
**Sent:** Saturday, February 04, 2006 8:43 AM
**To:** Gorsuch, Neil M; Bradbury, Steve
**Subject:** RE:

I think Neil has done a terrific job on this speech -- both generally and, in particular, writing around my concern that we not equate the President's inherent authority with his inherent and exclusive authority. The only thing I would propose adding is a sentence in the paragraph on the bottom of page 3 that discusses what the AG is and is not discussing. After the sentence that says I am not here to discuss the operational details of that program. I would propose adding another sentence: Nor am I here to discuss any other classified programs.

Other than that, if there is a need to discuss the limits on Congress' authority to intrude on the President's authority, I would propose a paragraph along the following lines (at the top of page 10):

Certainly Congress could pass a law that unconstitutionally intrudes on the President's inherent authority to gather foreign intelligence. If Congress enacted a law purporting to prohibit all electronic surveillance -- with or without a warrant -- that would clearly exceed Congress' authority to intrude on the President's Article II authority. Likewise, FISA could be unconstitutional in some applications: for example, if an attack on Congress itself prohibited Congress from recovening for 15 days after declaring war, FISA restrictions presumably would be unconstitutional on the 16th day. But fortunately, we do not need to consider such hypotheticals here, because even if we assume [continue with last two sentence in the first full paragraph on page 10].

That said, I think the approach reflected in Neil's current draft is great.

-----Original Message-----
From: Gorsuch, Neil M
Sent: Friday, February 03, 2006 9:48 PM
To: Clement, Paul D; Bradbury, Steve
Subject: Fw:

Gentlemen, tonight Paul expressed the concern that the draft circulated earlier today suggested a certain realm of responsibilities exclusiviely belonging to the president upon which congress may not encroach (and vice versa), and Paul found this proposition unconvincing. Based on at least my read of the white paper I suspect at least some may feel differently, but I don't know. Paul likewise thought olc might see things differently. In any event, I am but the scrivener looking for language that might please everyone and I have tried to accomplish that in the attached latest draft. I intend to circulate this to everyone tomorrow am but thought I'd give you two an advance peek. I do hope I have managed to find a course here acceptable to everyone. Many thanks for your patience with me and this project. NMG

-----Original Message-----
From: ngorsuch@hotmail.com <ngorsuch@hotmail.com>
To: Gorsuch, Neil M <Neil.Gorsuch@SMO.IMD.USDOJ.gov>

To: Gorsuch, Neil M. <Neil.Gorsuch@SMOMD.USDOJ.gov>
Sent: Fri Feb 03 21:26:00 2006
Subject:

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*NMG Draft 2/3/06*

# PREPARED ORAL STATEMENT FOR ATTORNEY GENERAL ALBERTO R. GONZALES AT THE SENATE JUDICIARY COMMITTEE HEARING WASHINGTON, D.C. MONDAY, FEBRUARY 6th, 2006

Good morning Chairman Specter, Senator Leahy, and members of the Committee. I'm pleased to have this opportunity to speak with you and thank you for it. When all the facts and law are considered, I believe you will conclude, as I have, that the President's terrorist surveillance program is justified by the nature of the threat we face and consistent with the laws of the United States and the Constitution we all cherish.

* * *

As leaders of our government, you know that the enemy remains deadly dangerous. Only in the last few days, both Osama bin Laden and his deputy have emerged from their caves to threaten new attacks.

Speaking of recent bombings in Europe, bin Laden warned that the same is in store for us. He claimed, quote, "the operations are under preparation and you will see them in your homes."

Bin Laden's deputy, Ayman al-Zawahiri, added that the American people are – and again I quote – "destined for a future colored by blood, the smoke of explosions, and the shadows of terror."

None of us can afford to shrug off warnings like this or forget that we remain a nation at war.

Nor can we forget that this is a war against a radical and unconventional enemy. Al Qaeda has no boundaries, no government, no standing army. Yet they have a fanatic desire to wreak death and destruction on our shores. And they have sought to fight us not just with bombs and guns. Our enemies are trained in the most sophisticated communications, counter intelligence, and counter surveillance techniques – and their tactics are constantly changing in response to our efforts and what they learn. Indeed, this enemy fights in ways different from any other enemy we have faced, using our own technologies to their advantage: video tapes and worldwide television networks to communicate with their forces; e-mail, the Internet, and cell phone calls to direct their operations; and even our own schools in which to learn English and how to fly our most sophisticated aircraft as suicide-driven missiles. We underestimate this enemy at our peril.

To fight this war, some say that we should close our society and isolate ourselves from the world. But America has always rejected the path of isolationism. And I know you agree that following this course would sacrifice the core freedoms essential to the promise of this great nation.

In order to fight this war while remaining open, democratic and vibrantly engaged with the world, we must search out the terrorists abroad and pinpoint their cells here at home. And we must do all this *before* they can hurt us. To succeed in such a challenging mission against an amorphous and amoral enemy we must deploy not just soldiers, sailors, airmen and marines. We must also depend on intelligence analysts and surveillance

experts and the nimble use of our technological strengths. The President made this clear just after 9-11 when he assured the American people that he would use every lawful tool to protect this country. He said that some of these tools would be visible and obvious, while others would necessarily have to remain secret.

Imagine what a program like the terrorist surveillance program might have accomplished *before* 9-11. Terrorists were clustered in cells throughout the United States preparing their assault. We know from the 9-11 Commission Report that they communicated with their al Qaeda superiors abroad using e-mail, the Internet, and cell phones. What might New York and Washington and, really, the whole world look like today if we had intercepted a communication revealing their location and plans? Of course, we cannot answer that question. But General Hayden has disclosed publicly that the terrorist surveillance program instituted after 9-11 has helped us detect and prevent terror plots both in the United States and abroad. The President's program is, in a very real sense, the early warning radar system of the 21st century.

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At the outset, I should make explain what I can discuss, and what I cannot discuss. I am here to discuss the Department's assessment that the President's terrorist surveillance program is lawful. I am not here to reveal the operational details of that program. The President has described the outlines of the program in response to certain leaks, and my discussion in this forum must be limited to those facts already publicly confirmed. No one is above the law, and I feel duty bound not to compromise operational details that

remain classified. To reveal further classified information would only be a gift to our enemy who, we all know, is listening carefully to this discussion and will adapt to what it learns.

In assessing the lawfulness of the terrorist surveillance program, we must bear in mind the reality of 9-11 and the ongoing threat against us. The law cannot be decided in a moral vacuum or based only on abstractions. Justice Oliver Wendell Holmes put the point best when he said, "the life of the law . . . has been Experience." Any sound legal analysis of the President's program must be grounded in the experience of 9-11 – and an appreciation for how it changed all of our lives irrevocably.

Immediately after 9-11, the President was duty bound as Commander in Chief under our Constitution to do everything he could to protect the American people. Like you, he took an oath to preserve, protect, and defend the Constitution. He told you and the American people that, to carry out this solemn responsibility, he would use every lawful means at his disposal to prevent another attack, and he demanded ideas from his staff.

One of the ideas presented to the President was the terrorist surveillance program. It involved the National Security Agency, then led by Air Force General Michael Hayden. As the President has explained, he approved this program but imposed several important safeguards. These safeguards are carefully and thoughtfully designed to protect the privacy and civil liberties of all Americans – and to do so zealously.

First, the only communications authorized for interception under the terrorist surveillance program are *international* communications – that is, communications between this country

and a foreign country. The interception of communications beginning and ending only within our borders is *not authorized.*

Second, the program targets communications only if there are reasonable grounds to believe that one of the parties involved is associated with al Qaeda or an affiliated terrorist organization. As the President said during his State of the Union address, if you're talking with al Qaeda, you better believe we want to know what you're saying. But if you're just a typical American going about your business, this program is specifically designed ***not*** to intercept your calls.

Third, in order to protect the privacy of American citizens even further, the NSA employs strict safeguards to minimize unnecessary collection and dissemination of information about U.S. persons. These safeguards are similar to limits the NSA enforces on other foreign intelligence programs familiar to members of Congress. [nsa confirm] So, for example, if the NSA inadvertently collects the name of an innocent American who is not relevant, that person many not be mentioned in any intelligence report by name.

Fourth, this program is administered by career civil servants at NSA. Expert intelligence analysts with access to the best available information make the decisions to initiate surveillance. The operation of the program is reviewed and approved by NSA lawyers, and day-to-day oversight is provided by the Inspector General of the NSA. I have been personally assured that no NSA foreign intelligence program has received a more thorough review. [nsa confirm]

Fifth, the program expires by its own terms approximately every 45 days. Under the terms of the program, it may be

reauthorized only on the recommendation of intelligence professionals. And it may be reauthorized only after a finding that al Qaeda continues to pose a grave threat to America, based on the latest intelligence. Each time the program is reauthorized, lawyers must also affirm that the President continues to have the legal authority to conduct the program.

Finally, the President instructed Executive Branch officials to inform leading members of Congress -- both Republican and Democrat– about this program. The President did so in the spirit of national unity and bipartisanship following 9-11. As a result, the bipartisan leadership of both the House and Senate has known of this program for *years*. So have the bipartisan leaders of the House and Senate Intelligence Committees. Not one of these leaders has asked the President to discontinue the program.

The recent claims of shock and horror we hear from some quarters about this program come as something of a surprise to me given the consultation the President provided the bipartisan leadership of Congress. Leaders of Congress have known since the outset of this program that it is not about "domestic spying on Americans." The terrorist surveillance program is nothing like the improper partisan spying tactics we witnessed in this country in the 1960s or 1970s. Instead, this program is surgically aimed at those foreign terrorists -- individuals who have repeatedly announced their intention to see our future, in Zawahiri's recent words, "colored by blood, the smoke of explosions, and the shadows of terror."

***

Mr. Chairman, this program is lawful in all respects. To begin, it is entirely consistent with the Constitution. Article II expressly designates the President the Commander in Chief with authority over the conduct of war and imposes on him the responsibility of protecting this country from attack. Article II also makes the President, in the words of the Supreme Court, "the sole organ [of government] in the field of international relations."

These inherent authorities vested in the President by the Constitution include the power to spy on enemies like al Qaeda without prior approval from other branches of government. Now, let me make clear, this isn't just my opinion or President Bush's. The courts have uniformly upheld this principle in case after case.

Fifty-five years ago in *Johnson v Eisentrager*, the Supreme Court explained that the President's inherent constitutional authority expressly includes -- quote -- "the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns."

More recently, the FISA Court of Review explained that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain intelligence information." The court went on to add, quote, *"We take for granted that the President does have that authority and, assuming that it is so, FISA could not encroach on the President's constitutional powers."* It is significant that this ruling stressing the constitutional limits of FISA came from the very court that Congress established to oversee the FISA process.

Yet another federal appellate court in *US v. Truong* held that, even during peacetime, a "uniform warrant requirement ... would unduly frustrate the President in carrying out his foreign affairs responsibilities."

Nor is this just the view of the courts. Presidents throughout our history -- from President Washington to President Clinton -- have authorized the warrantless surveillance of foreign enemies operating on our soil. And they have done so in ways far more aggressive and sweeping than the narrowly targeted program President Bush authorized against al Qaeda.

General Washington, for example, instructed his army to find ways to intercept letters between British operatives, copy them, and then allow those communications to go on their way.

President Lincoln used warrantless wiretapping of telegraph communications during the Civil War in order to discern the movements and intentions of opposing troops.

President Wilson in World War I authorized the military to intercept *all* telephone and telegraph traffic going into or out of the United States. That's *each and every* call and cable crossing our Nation's borders.

During World War II, President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States. He also gave the military the authority to access and review, without warrant, *all* telecommunications, quote, "passing between the United States and any foreign country." Some scholars estimate that the use of signals intelligence as a whole helped shorten the Second World War by as much as two years.

Nor have Presidents used warrantless searches only in times of foreign crisis and war.

President Clinton's Administration, for example, ordered several warrantless searches on the home and property of the spy Aldrich Ames. The Clinton Administration also authorized the warrantless search of the Mississippi home of a suspected terrorist financier. The Clinton Justice Department authorized these searches because it was the judgment of Deputy Attorney General Jamie Gorelick that – and I quote –

> [T]he President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. . . [and] the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.

As you can see from this brief overview, every court and every President throughout our history to decide the question has agreed that the Commander in Chief may conduct secret searches of enemy communications in this country without the prior approval of the other co-equal branches. And president after president has authorized programs far more sweeping than the narrow and targeted program that President Bush has authorized against al Qaeda.

* * *

Some have suggested that the passage of the Foreign Intelligence Surveillance Act diminished the President's inherent

authority to intercept enemy communications in a time of conflict. After all, the argument goes, Congress has the power under Article I of Constitution to declare war, raise armies, and make regulations concerning our forces. Others contest whether and to what degree the Legislative Branch may extinguish core Executive Branch power.

But in a time of war we can all agree that *both* of the elected branches have critical roles to play in protecting the American people. And we simply do not need to get into a protracted debate over the competing constitutional powers of the Executive and Legislative branches to resolve the legal question before us. Even if we assume that interceptions made under the terrorist surveillance program qualify as "electronic surveillance" subject to the FISA statute, the President's program is fully compliant with that law. And this is especially so in light of the cardinal principle that statutes should be read to avoid grave constitutional questions.

By its plain and unambiguous terms, FISA prohibits persons from intentionally engaging in electronic surveillance under color of law "*except as authorized by statute.*"

Those words – except as authorized by statute – are important and they are no accident of drafting. They are instead a far-sighted safety valve. The Congress that passed FISA in 1978 in the aftermath of Watergate deliberately included those words in order to afford future Congresses critical flexibility to address unforeseen challenges. By including these words, the 1978 Congress afforded future lawmakers the ability to modify or eliminate the need for a FISA application *without* having to amend or repeal the FISA statute itself. Congress provided this safety valve because it knew that the only thing certain about

foreign threats is that they will change over time and do so in unpredictable ways. It is telling that Congress doesn't always include exceptions like this when it legislates in other, more stable areas of law.

Mr. Chairman, the Resolution Authorizing the Use of Military Force is exactly the sort of future statutory authorization contemplated by FISA's safety valve provision. Just as the 1978 Congress foresaw, a new Congress in 2001 found itself facing radically new circumstances and it legislated to recognize that new reality. In 2001, we were no longer living the aftermath of the Watergate, but in the aftermath of the World Trade Center. And in that new environment, Congress did two critical things when it passed the Force Resolution.

First, Congress included language expressly recognizing the President's inherent authority under the Constitution to combat al Qaeda and its affiliates. And these inherent authorities, as I explained earlier, have always included the right to conduct surveillance of foreign enemies operating within this country.

Second, Congress confirmed and *supplemented* the President's inherent authority by authorizing him to -- and I quote -- "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." Many distinguished scholars have observed that this is a broad authorization. And it is one that clearly includes communications intelligence focused on those closely associated with al Qaeda. After all, we all agree that it is a "necessary and appropriate" use of force to fire bullets and missiles at al Qaeda strongholds. Given this, how can anyone

say that it isn't "necessary and appropriate" to intercept al Qaeda phone calls? The term "necessary and appropriate force" must allow the President to spy on our enemies, not just shoot at them blindly, hoping we might hit the right target.

In fact, other presidents have used statutes like the Force Resolution as a basis for authorizing even broader intelligence surveillance. President Wilson in World War I cited not just his inherent constitutional authority as Commander in Chief to intercept telecommunications coming into and out of this country. He also expressly relied on a congressional resolution authorizing the use of force against Germany. And the language of that resolution parallels the Force Resolution in both tone and tenor. President Bush's terrorist surveillance program is therefore nothing new, though the surveillance he has authorized is far more narrowly targeted than it has been in prior wars.

I have heard a few Members of Congress say that they *personally* did not intend the Force Resolution to allow for the electronic surveillance of al Qaeda communications. I don't doubt this is true. But we are a nation governed by written laws, not the unwritten intentions of any individual. What matters is the plain meaning of the words *approved by both chambers of Congress and signed by the President*. And those plain words could not be clearer. They do not say that the President is authorized to use only certain particular tactics against al Qaeda. Instead, they authorize the use of *all* necessary and appropriate force. Nor does the Force Resolution require the President to fight al Qaeda only in foreign countries. Far from it. The preamble to the Force Resolution expressly acknowledged the continuing threat – quote – "*at home* and abroad." More fundamentally, Congress passed the Force Resolution in

response to a threat from *within our own borders*. Al Qaeda infiltrated our homeland and attacked us where we live. Plainly, Congress expected the President to address that threat within our borders to prevent another 9-11 -- and to do so with all appropriate force.

It is important to underscore that the Supreme Court has already interpreted the plain language of the Force Resolution in just the way I've outlined. In 2004, the Supreme Court faced the *Hamdi* case. There, the question was whether the President had the authority to detain an American citizen as an enemy combatant for the duration of the hostilities. A majority of the Justices of the Supreme Court concluded that the language of the Force Resolution gave the President the authority to employ the traditional incidents of waging war. Justice O'Connor explained that these traditional powers include the power to detain enemy combatants for the duration of the hostilities – and to do so even if the combatant is an American citizen. If the detention of al Qaeda combatants is authorized by the Force Resolution as an appropriate incident of waging war, how can one seriously suggest that merely listening to their phone calls to prevent and disrupt their attacks doesn't also qualify? Can one really argue that, while the Supreme Court says it's okay under the Force Resolution to keep enemy combatants at Guantanamo Bay, we may not listen if they try to call terror cells in the United States with orders to execute an attack? Members of the Committee, I respectfully submit that cannot be the law.

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Even though the President has the authority to conduct the terrorist surveillance program under the Constitution and the Force Resolution, some have asked whether he just as easily

could have obtained the same intelligence using the tools afforded by FISA itself.

Let me assure you that we *are* using FISA in our war efforts. And let me assure you that FISA remains vitally important to national security. But, the "why not use FISA?" argument depends on a misconception about how that statute works.

When FISA was written, it included a so-called "emergency authorization." That authorization now allows the government to file applications 72 hours after surveillance begins. And that rule is appropriate in most circumstances. As you know, FISA was written to apply not just to calls coming from abroad but also to purely domestic calls. Likewise, FISA was not targeted at al Qaeda and its affiliates but was written generically for use with all foreign agents. The general rule it creates, while useful, is far too cumbersome to succeed as an early warning device against a crafty and technologically astute enemy that declared war against us on 9-11. To put the point bluntly: al Qaeda terrorists do not operate on lawyer time.

As you know, even an emergency surveillance application under FISA cannot be approved without assurance, *in advance,* that all of the requirements for a regular application will be satisfied. And in order to assure that the government will be able to comply with all of those requirements, a great deal must be done.

To begin, the lawyers at NSA must review the evidence assembled from their intelligence officers and conclude that it satisfies each of FISA's conditions. Then, lawyers in the Department of Justice have to review the request and reach the

same judgment or insist on additional evidence or analysis when necessary. Finally, as Attorney General, I have to review their submission and make the determination. After all that, we must follow up with a formal FISA application within three days. And that process entails significant additional burdens. The government must prepare a legal document and supporting declarations laying out all the relevant facts and law. It must obtain the approval of a Cabinet-level officer as well as a certification from the National Security Adviser, the Director of the FBI, or a designated Senate-confirmed officer. And, finally, of course, it must receive the approval of an Article III judge.

FISA is appropriate and useful for general foreign intelligence collection, but it cannot provide the sort of early warning system we need in the war against al Qaeda. Simply put, the FISA process doesn't move in real time the way our enemies do – and the way we must if we are to stop them. Just as we can't demand that our soldiers bring lawyers onto the battlefield to tell them when they are allowed to shoot under military law, it would be a mistake to "lawyer up" career intelligence officers who are striving valiantly to provide a first line of defense by tracking secretive al Qaeda operatives in real time. The terrorism surveillance program allows the real experts to provide us information about the enemy's intentions -- and to do so *before* an attack.

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Mr. Chairman, members of the Committee, the President chose to act to prevent the next attack with every lawful tool at his disposal, rather than wait until it is too late. It is hard to imagine any responsible President who would not do the same.

The terrorist surveillance program is necessary and it is narrowly tailored to the threat we face. It is lawful, and it respects the civil liberties Americans have cherished for generations. It is well within the mainstream of what courts and prior Presidents have authorized. It is subject to careful constraints, and Congressional leaders have known of its operation since 2001. Accordingly, as the President has explained, he intends to continue the program as long as al Qaeda poses a continuing threat to our national security. To succumb to media criticisms or political polls and end the program now would be a grave mistake, affording our enemy dangerous and potentially deadly new room for operation within our own borders.

Mr. Chairman, I have tried to outline the highlights of the program and its legal authority as best I can in an open hearing and in the brief time allotted. I look forward to your questions and will do the best I can to answer them. At the same time, I know you appreciate that there are tight constraints on what I can say without compromising information that remains classified. As you know, the Director of National Intelligence testified last week that public leaks about this program have inflicted severe damage. I do not want to be responsible for disclosing anything further. That could make me complicit in aiding the enemy's efforts or, God forbid, another attack. Our enemy is listening. And they are probably laughing at us – laughing at the thought that anyone would damage such a sensitive program by leaking its existence in the first place, and laughing at the prospect that we might now disclose even more or perhaps even unilaterally disarm ourselves of a key tool in the war on terror.

**Finally, I want to thank you again for giving me this opportunity to speak. This is an important issue and I very much hope that I have contributed to the Committee's understanding of the program's legal basis and precedent. Mr. Chairman, I also hope and trust that our continued dialogue in this hearing will be distinguished by the civility and bipartisanship that I know you always exhibit and the American people deserve when it comes to matters so critical to their nation's defense. Thank you.**

**Todd, Gordon (SMO)**

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**From:** Todd, Gordon (SMO)
**Sent:** Wednesday, May 3, 2006 8:59 AM
**To:** Gorsuch, Neil M
**Subject:** RE: nij conf

Neil - Of course you can do it if Rbt can't. In fact, since you handle all OASG terror litigation, that makes ample sense. But, I had a strategic reason for getting Robert scheduled even if someone else was going to do it. I'll explain in person.

G.

-----Original Message-----
From: Gorsuch, Neil M
Sent: Wednesday, May 03, 2006 8:44 AM
To: Tzitzon, Nicholas
Cc: Todd, Gordon (SMO)
Subject: nij conf

Gordon mentioned that you'd like Robt for a June 12 conf and he's checking on his availability. If he can't go and it'd be helpful I'm happy to go (though am not lobbying to do so).

**Elwood, Courtney**

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|---|---|
| **From:** | Elwood, Courtney |
| **Sent:** | Friday, May 19, 2006 9:10 AM |
| **To:** | Keisler, Peter D (CIV); Nichols, Carl (CIV); Bucholtz, Jeffrey (CIV); Gorsuch, Neil M; McCallum, Robert (SMO) |
| **Subject:** | FW: |
| **Attachments:** | tmp.htm |

Some well-deserved praise from Mr. Addington . . . . you and your team did an outstanding job.

Courtney Simmons Elwood
Deputy Chief of Staff and
Counselor to the Attorney General
U.S. Department of Justice
(w) 202.514.2267
(c) 202.532.5202
(fax) 202.305.9687

-----Original Message-----
From: David_S._Addington@ovp.eop.gov [mailto:David_S._Addington@ovp.eop.gov]
Sent: Friday, May 19, 2006 8:41 AM
To: Elwood, Courtney
Subject:

CSE:

Your department did a great job with El-Masri v. Tenet, No. 1:05cv1417 (EDVA) in protecting the ability of the institution of the Presidency to protect the American people under the Constitution in the war on terror.
Well done.