

Subject: NITRD Transmittal letter clearance for OSTP
From: "Merzbacher, Celia" <Celia_Merzbacher@ostp.eop.gov>
Date: 2/13/06, 6:00 PM
To: "Kavanaugh, Brett M." <Brett_M._Kavanaugh@who.eop.gov>
CC: "Sokul, Stanley S." <Stanley_S._Sokul@ostp.eop.gov>, "Romine, Charles H." <Charles_H._Romine@ostp.eop.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Mar 29 15:20:52 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: NITRD Transmittal letter clearance for OSTP
From: "Merzbacher, Celia" <Celia_Merzbacher@ostp.eop.gov>
Date: 2/13/06, 10:20 PM
To: "Staff Secretary" <StaffSecretary@eopds.eop.gov>
CC: "Kavanaugh, Brett M." <Brett_M._Kavanaugh@who.eop.gov>, "Sokul, Stanley S." <Stanley_S._Sokul@ostp.eop.gov>, "Romine, Charles H." <Charles_H._Romine@ostp.eop.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Mar 29 15:20:53 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Barwatch Bulletin: Special Report
From: "The Federalist Society" <lisab@fed-soc.org>
Date: 2/16/06, 5:43 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:28:17 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

From: "Drouin, Lindsey E."
Date: 2/23/06, 12:59 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:28:18 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: [Fwd: Feinstein Q&A]
From: "Miers, Harriet"
Date: 2/23/06, 4:32 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:28:19 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P3,b(3),P5

Notes:

50 USC 3605
50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: [Fwd: [Fwd: Feinstein Q&A]]
From: [b3 50 USC 3024 (m)(1)]
Date: 2/23/06, 5:11 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:28:20 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P3,b(3),P5

Notes:

50 USC 3605
50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: [Fwd: [Fwd: Feinstein Q&A]]
From: "Kavanaugh, Brett M."
Date: 2/23/06, 5:16 PM
To: "Slaughter, Kristen K."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:28:20 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

From: <Steve.Bradbury@usdoj.gov>

To:

Cc:

b3 50 USC 3024 (m)(1)

b3 50 USC 3605

Subject: DOJ letters to hill

Received(Date): Wed, 1 Mar 2006 09:32:31 -0500

[2.28.06.AG responses to 2.6.QFRs.pdf](#)

[2.28.06.response to Feinstein pre-hearing questions.pdf](#)

[Responses to Sen. Feinstein's Questions \(2 28 06\).pdf](#)

Attached are the letters and QFR responses on the TSP that DOJ sent to the Senate Judiciary Committee yesterday. There are numerous additional QFRs that we are working on, and we will circulate drafts of those responses shortly.



The Attorney General
Washington, D.C.

February 28, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Specter:

I write to provide responses to several questions posed to me at the hearing on "Wartime Executive Power and the National Security Agency's Surveillance Authority," held Monday, February 6, 2006, before the Senate Committee on the Judiciary. I also write to clarify certain of my responses at the February 6th hearing.

Except when otherwise indicated, this letter will be confined to addressing questions relating to the specific NSA activities that have been publicly confirmed by the President. Those activities involve the interception by the NSA of the contents of communications in which one party is outside the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the "Terrorist Surveillance Program").

Additional Information Requested by Senators at February 6th Hearing

Senator Leahy asked whether the President first authorized the Terrorist Surveillance Program after he signed the Authorization for Use of Military Force of September 18, 2001 ("Force Resolution") and before he signed the USA PATRIOT Act. 2/6/06 Unofficial Hearing Transcript ("Tr.") at 50. The President first authorized the Program in October 2001, before he signed the USA PATRIOT Act.

Senator Brownback asked for recommendations on improving the Foreign Intelligence Surveillance Act ("FISA"). Tr. at 180-81. The Administration believes that it is unnecessary to amend FISA to accommodate the Terrorist Surveillance Program. The Administration will, of course, work with Congress and evaluate any proposals for improving FISA.

Senator Feinstein asked whether the Government had informed the Supreme Court of the Terrorist Surveillance Program when it briefed and argued *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Tr. at 207. The question presented in *Hamdi* was whether the military had validly detained Yaser Esam Hamdi, a presumed American citizen who was captured in Afghanistan during the combat operations in late 2001, whom the military had concluded to be an enemy combatant who should be detained in

connection with ongoing hostilities. No challenge was made concerning electronic surveillance and the Terrorist Surveillance Program was not a part of the lower court proceedings. The Government therefore did not brief the Supreme Court regarding the Terrorist Surveillance Program.

Senator Feinstein asked whether “any President ever authorized warrantless surveillance in the face of a statute passed by Congress which prohibits that surveillance.” Tr. at 208. I recalled that President Franklin Roosevelt had authorized warrantless surveillance in the face of a contrary statute, but wanted to confirm this. To the extent that the question is premised on the understanding that the Terrorist Surveillance Program conflicts with any statute, we disagree with that premise. The Terrorist Surveillance Program is entirely consistent with FISA, as explained in some detail in my testimony and the Department’s January 19th paper. As for the conduct of past Presidents, President Roosevelt directed Attorney General Jackson “to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States.” Memorandum from President Roosevelt (May 21, 1940), reproduced in *United States v. United States District Court*, 444 F.2d 651, 670 (6th Cir. 1971) (Appendix A). President Roosevelt authorized this activity notwithstanding the language of 47 U.S.C. § 605, a prohibition of the Communications Act of 1934, which, at the time, provided that “no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.” President Roosevelt took this action, moreover, despite the fact that the Supreme Court had, just three years earlier, made clear that section 605 “include[s] within its sweep federal officers.” *Nardone v. United States*, 302 U.S. 379, 384 (1937). It should be noted that section 605 prohibited interception followed by divulging or publishing the contents of the communication. The Department of Justice took the view that interception without “divulg[ing] or publish[ing]” was not prohibited, and it interpreted “divulge” narrowly to allow dissemination within the Executive Branch.

Senator Feingold asked, “[D]o you know of any other President who has authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?” Tr. at 217. The laws of the United States, both before and after FISA’s enactment, have long permitted various forms of foreign intelligence surveillance, including the use of wiretaps, outside the procedures of FISA. If the question is limited to “electronic surveillance” as defined in FISA, however, we are unaware of any such authorizations.

Senator Feingold asked, “[A]re there other actions under the use of military force for Afghanistan resolution that without the inherent power would not be permitted because of the FISA statute? Are there any other programs like that?” Tr. at 224. I understand the Senator to be referring to the Force Resolution, which authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons” responsible for the attacks of September 11th in order to prevent further terrorist attacks on the United States, and which by its terms is not limited to action

against Afghanistan or any other particular nation. I am not in a position to provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefing of the oversight committees and congressional leadership.

Senator Feingold noted that, on September 10, 2002, then-Associate Deputy Attorney General David S. Kris testified before the Senate Judiciary Committee. Senator Feingold quoted Mr. Kris's statement that "[w]e cannot monitor anyone today whom we could not have monitored this time last year," and he asked me to provide the names of individuals in the Department of Justice and the White House who reviewed and approved Mr. Kris's testimony. Tr. at 225-26. Mr. Kris's testimony was addressing the Government's appeal in 2002 of decisions of the Foreign Intelligence Surveillance Court to the Foreign Intelligence Surveillance Court of Review. In the course of that discussion, Mr. Kris explained the effects of the USA PATRIOT Act's amendments to FISA, and, in particular, the amendment to FISA requiring that a "significant purpose" of the surveillance be the collection of foreign intelligence information. Mr. Kris explained that that amendment "will not and cannot change who the government may monitor." Mr. Kris emphasized that under FISA as amended, the Government still needed to show that there is probable cause that the target of the surveillance is an agent of a foreign power and that the surveillance has at least a significant foreign intelligence purpose. In context, it is apparent that Mr. Kris was addressing only the effects of the USA PATRIOT Act's amendments to FISA. In any event, his statements are also accurate with respect to the President's Terrorist Surveillance Program, because the Program involves the interception of communications only when there is probable cause ("reasonable grounds to believe") that at least one party to the communication is an agent of a foreign power (al Qaeda or an affiliated terrorist organization). Please note that it is Department of Justice policy not to identify the individual officials who reviewed and approved particular testimony.

Senators Biden and Schumer asked whether the legal analysis underlying the Terrorist Surveillance Program would extend to the interception of purely domestic calls. Tr. at 80-82, 233-34. The Department believes that the Force Resolution's authorization of "all necessary and appropriate force," which the Supreme Court in *Hamdi* interpreted to include the fundamental and accepted incidents of the use of military force, clearly encompasses the narrowly focused Terrorist Surveillance Program. The Program targets only communications in which one party is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. The Program is narrower than the wartime surveillances authorized by President Woodrow Wilson (*all* telephone, telegraph, and cable communications into and out of the United States) and President Franklin Roosevelt ("*all . . . telecommunications traffic* in and out of the United States"), based on their constitutional authority and general force-authorization resolutions like the Force Resolution. The Terrorist Surveillance Program fits comfortably within this historical precedent and tradition. The legal analysis set forth in the Department's January 19th paper does not address the interception of purely domestic communications.

The Department believes that the interception of the contents of domestic communications would present a different question from the interception of international communications, and the Department would need to analyze that question in light of all current circumstances before any such interception would be authorized.

Senator Schumer asked me whether the Force Resolution would support physical searches within the United States without complying with FISA procedures. Tr. at 159. The Terrorist Surveillance Program does not involve physical searches. Although FISA's physical search subchapter contains a provision analogous to section 109 of FISA, *see* 50 U.S.C. § 1827(a)(1) (prohibiting physical searches within the United States for foreign intelligence "except as authorized by statute"), physical searches conducted for foreign intelligence purposes present issues different from those discussed in the Department's January 19th paper addressing the legal basis for the Terrorist Surveillance Program. Thus, we would need to consider that issue specifically before taking a position.

Senator Schumer asked, "Have there been any abuses of the NSA surveillance program? Have there been any investigations arising from concerns about abuse of the NSA program? Has there been any disciplinary action taken against any official for abuses of the program?" Tr. at 237-38. Although no complex program like the Terrorist Surveillance Program can ever be free from inadvertent mistakes, the Program is the subject of intense oversight both within the NSA and outside that agency to ensure that any compliance issues are identified and resolved promptly on recognition. Procedures are in place, based on the guidelines I approved under Executive Order 12333, to protect the privacy of U.S. persons. NSA's Office of General Counsel has informed us that the oversight process conducted both by that office and by the NSA Inspector General has uncovered no abuses of the Terrorist Surveillance Program, and, accordingly, that no disciplinary action has been needed or taken because of abuses of the Program.

Clarification of Certain Responses

I would also like to clarify certain aspects of my responses to questions posed at the February 6th hearing.

First, as I emphasized in my opening statement, in all of my testimony at the hearing I addressed—with limited exceptions—only the legal underpinnings of the Terrorist Surveillance Program, as defined above. I did not and could not address operational aspects of the Program or any other classified intelligence activities. So, for example, when I testified in response to questions from Senator Leahy, "Sir, I have tried to outline for you and the Committee what the President has authorized, and that is all that he has authorized," Tr. at 53, I was confining my remarks to the Terrorist Surveillance Program as described by the President, the legality of which was the subject of the February 6th hearing.

Second, in response to questions from Senator Biden as to why the President's authorization of the Terrorist Surveillance Program does not provide for the interception of domestic communications within the United States of persons associated with al

Qaeda, I stated, “That analysis, quite frankly, had not been conducted.” Tr. at 82. In response to similar questions from Senator Kyl and Senator Schumer, I stated, “The legal analysis as to whether or not that kind of [domestic] surveillance—we haven’t done that kind of analysis because, of course, the President—that is not what the President has authorized,” Tr. at 92, and “I have said that I do not believe that we have done the analysis on that.” Tr. at 160. These statements may give the misimpression that the Department’s legal analysis has been static over time. Since I was testifying only as to the legal basis of the activity confirmed by the President, I was referring only to the legal analysis of the Department set out in the January 19th paper, which addressed that activity and therefore, of course, does not address the interception of purely domestic communications. However, I did not mean to suggest that no analysis beyond the January 19th paper had ever been conducted by the Department. The Department believes that the interception of the contents of domestic communications presents a different question from the interception of international communications, and the Department’s analysis of that question would always need to take account of all current circumstances before any such interception would be authorized.

Third, at one point in my afternoon testimony, in response to a question from Senator Feinstein, I stated, “I am not prepared at this juncture to say absolutely that if the AUMF argument does not work here, that FISA is unconstitutional as applied. I am not saying that.” Tr. at 209. As set forth in the January 19th paper, the Department believes that FISA is best read to allow a statute such as the Force Resolution to authorize electronic surveillance outside FISA procedures and, in any case, that the canon of constitutional avoidance requires adopting that interpretation. It is natural to approach the question whether FISA might be unconstitutional as applied in certain circumstances with extreme caution. But if an interpretation of FISA that allows the President to conduct the NSA activities were not “fairly possible,” and if FISA were read to impede the President’s ability to undertake actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict against an enemy that has already staged the most deadly foreign attack in our Nation’s history, there would be serious doubt about the constitutionality of FISA as so applied. A statute may not “impede the President’s ability to perform his constitutional duty,” *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (emphasis added); see also *id.* at 696-97, particularly not the President’s most solemn constitutional obligation—the defense of the Nation. See also *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (explaining that “FISA could not encroach on the President’s constitutional power”). I did not mean to suggest otherwise.

Fourth, in response to questions from Senator Leahy about when the Administration first determined that the Force Resolution authorized the Terrorist Surveillance Program, I stated, “From the very outset, before the program actually commenced.” Tr. at 184. I also stated, “Sir, it has always been our position that the President has the authority under the authorization to use military force and under the Constitution.” Tr. at 187. These statements may give the misimpression that the Department’s legal analysis has been static over time. As I attempted to clarify more generally, “[i]t has always been the [Department’s] position that FISA cannot be

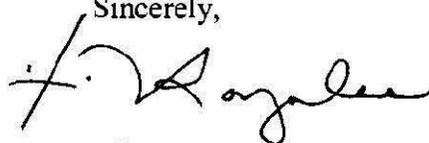
interpreted in a way that infringes upon the President's constitutional authority, that FISA must be interpreted, can be interpreted" to avoid that result. Tr. at 184; *see also* Tr. at 164 (Attorney General: "It has always been our position that FISA can be and must be read in a way that it doesn't infringe upon the President's constitutional authority."). Although the Department's analysis has always taken account of both the Force Resolution and the Constitution, it is also true, as one would expect, that the Department's legal analysis has evolved over time.

Fifth, Senator Cornyn suggested that the Terrorist Surveillance Program is designed to address the problem that FISA requires that we already know that someone is a terrorist before we can begin coverage. Senator Cornyn asked, "[T]he problem with FISA as written is that the surveillance it authorizes is unusable to discover who is a terrorist, as distinct from eavesdropping on known terrorists. Would you agree with that?" I responded, "That would be a different way of putting it, yes, sir." Tr. at 291. I want to be clear, however, that the Terrorist Surveillance Program targets the contents of communications in which one party is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Although the President has authorized the Terrorist Surveillance Program in order to provide the early warning system we lacked on September 11th, I do not want to leave the Committee with the impression that it does so by doing away with a probable cause determination. Rather, it does so by allowing intelligence experts to respond agilely to all available intelligence and to begin coverage as quickly as possible.

Finally, in discussing the FISA process with Senator Brownback, I stated, "We have to know that a FISA Court judge is going to be absolutely convinced that this is an agent of a foreign power, that this facility is going to be a facility that is going to be used or is being used by an agent of a foreign power." Tr. at 300. The approval of a FISA application requires only probable cause to believe that the target is an agent of a foreign power and that the foreign power has used or is about to use the facility in question. 50 U.S.C. § 1805(a)(3). I meant only to convey how cautiously we approach the FISA process. It is of paramount importance that the Department maintain its strong and productive working relationship with the Foreign Intelligence Surveillance Court, one in which that court has come to know that it can rely on the representations of the attorneys that appear before it.

I hope that the Committee will find this additional information helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "A. R. Gonzales", written in a cursive style.

Alberto R. Gonzales

cc: The Honorable Patrick Leahy
Ranking Member



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 28, 2006

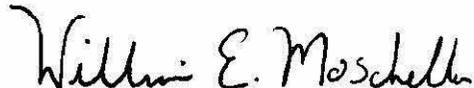
The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Feinstein:

Please find attached responses to your letter, dated January 30, 2006, which posed questions to Attorney General Gonzales prior to his appearance before the Senate Committee on the Judiciary on February 6, 2006. The subject of the hearing was, "Wartime Executive Power and the National Security Agency's Surveillance Authority."

We trust you will find this information helpful. If we may be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,


William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Chairman, Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Minority Member

RESPONSES TO QUESTIONS FROM SENATOR FEINSTEIN

1. I have been informed by former Majority Leader Senator Tom Daschle that the Administration asked that language be included in the “*Joint Resolution to Authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*” (P.L. 107-40) (hereinafter “the Authorization” or “AUMF”) which would add the words “in the United States” to its text, after the words “appropriate force.”

- **Who in the Administration contacted Senator Daschle with this request?**
- **Please provide copies of any communication reflecting this request, as well as any documents reflecting the legal reasoning which supported this request for additional language.**

The Congressional Research Service recently concluded that the account of Senator Daschle to which your question refers “is not reflected in the official record of the legislative debate” on the Authorization for Use of Military Force (hereinafter “Force Resolution”). See Richard F. Grimmet, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History* at 3 n.5 (Jan. 4, 2006). We do not recall such a discussion with former Senator Daschle and are not aware of any record reflecting such a conversation. In any event, a private discussion cannot change the plain meaning and evident intent of the Force Resolution, which clearly confirms and supplements the President’s authority to take military action within the United States.

In the Force Resolution, Congress expressly recognized that the September 11th attacks “render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both *at home* and abroad.” Force Resolution pmbl. (emphasis added). Congress concluded that the attacks “continue to pose an unusual and extraordinary threat to the national security.” *Id.* Congress affirmed that “the President has authority under the Constitution to take action to deter and prevent actions of international terrorism *against the United States.*” *Id.* (emphasis added). Accordingly, Congress authorized the President “to use all necessary and appropriate force against those” associated with the attacks “in order to prevent future acts of international terrorism *against the United States.*” *Id.* (emphasis added).

The plain language of the Force Resolution clearly encompasses action within the United States. In addition, when Congress passed the Force Resolution on September 14, 2001, the World Trade Center was still burning, combat air patrols could be heard over many American cities, and there was great concern that another attack would follow shortly. Further, the attacks of September 11th were launched on United States soil by foreign agents who had been living in this country. Given this context and the plain meaning of the Force Resolution, Congress must be understood as having ratified the President’s authority to use force within the United States. A crucial responsibility of the President—charged by the Force Resolution and the Constitution to defend our Nation—

was and is to identify and disable those enemies, *especially if they are in the United States*, waiting to stage another strike.

2. Did any Administration representative communicate to any Member of Congress the view that the language of the Authorization as approved would provide legal authority for what otherwise would be a violation of the criminal prohibition of domestic electronic collection within the United States?

- **If so, who in the Administration made such communications?**
- **Are there any contemporaneous documents which reflect that view within the Administration?**

Although your question does not indicate what timeframe it covers, we understand it to ask whether, contemporaneous with the passage of the Force Resolution, Administration officials told Members of Congress that the Force Resolution would provide legal authorization for interception of the international communications of members and agents of al Qaeda and affiliated terrorist organizations. We are not aware of any specific communications between the Administration and Members of Congress during the three days between the September 11th attacks and the passage of the Force Resolution involving the particular issue of electronic surveillance—or, for that matter, any of the other fundamental incidents of the use of military force encompassed within the Force Resolution (such as the detention of U.S. citizens who are enemy combatants, which has since been upheld by the Supreme Court).

Although we are not aware of any specific discussion of what incidents of force would be authorized by a general authorization of force, the Supreme Court has explained that Congress must be understood to have authorized “fundamental and accepted” incidents of waging war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion); *see id.* at 587 (Thomas, J., dissenting). Consistent with this traditional understanding, other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force authorization resolutions to permit warrantless surveillance to intercept suspected enemy communications. *Cf. generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2091 (2005) (explaining that, with the Force Resolution, “Congress intended to authorize the President to take at least those actions permitted by the laws of war”).

The understanding at the time of the passage of the Force Resolution was that it was important to act quickly and to invest the President with the authority to use “all necessary and appropriate force” against those associated with the September 11th attacks and to prevent further terrorist attacks on the United States. Congress could not have cataloged every possible aspect of the use of military force it intended to endorse. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad and powerful terms, to use the fundamental and accepted incidents of the use of military force and to determine how best to identify and to engage the enemy in the current armed conflict. That is traditionally how Congress has acted at the outset of armed conflict: “because of the changeable and

explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.” *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *cf. Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (“Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take.”).

3. According to Assistant Attorney General William Moschella’s letter of December 22, 2005, and the subsequent “White Paper,” it is the view of the Department of Justice that the Authorization “satisfies section [FISA section] 109’s requirement for statutory authorization of electronic surveillance.”¹

- **Are there other statutes which, in the view of the Department, have been similarly affected by the passage of the Authorization?**
- **If so, please provide a comprehensive list of these statutes.**
- **Has the President, or any other senior Administration official, issued any order or directive based on the AUMF which modifies, supersedes or alters the application of any statute?**

Five members of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Force Resolution satisfies 18 U.S.C. § 4001(a)’s prohibition on detention of U.S. citizens “except pursuant to an Act of Congress,” and thereby authorizes the detention even of Americans who are enemy combatants. The Foreign Intelligence Surveillance Act of 1978 (“FISA”) contains a similar provision indicating that it contemplates that electronic surveillance could be authorized in the future “by statute.” Section 109 of FISA prohibits persons from “engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*” 50 U.S.C. § 1809(a)(1) (emphasis added). Just as the Force Resolution satisfies the restrictions imposed by section 4001(a), it also satisfies the statutory authorization requirement of section 109 of FISA.

We have not sought to catalog every instance in which the Force Resolution might satisfy a statutory authorization requirement contained in another statute, other than FISA and section 4001(a), the provision at issue in *Hamdi*. We have not found it necessary to determine the full effect of the Force Resolution to conclude that it authorizes the terrorist surveillance program described by the President, which involves the interception of the contents of communications where one end of the communication is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the “Terrorist Surveillance Program”).

¹ Letter, Assistant Attorney General Williams Moschella to Senator Pat Roberts, et al., December 22, 2005, at p. 3 (hereinafter “Moschella Letter”).

4. The National Security Act of 1947, as amended, provides that “[a]ppropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if . . . (1) those funds were specifically authorized by the Congress for use for such activities . . .”² It appears that the domestic electronic surveillance conducted within the United States by the National Security Agency was not “specifically authorized,” and thus may be prohibited by the National Security Agency of 1947.

- **What legal authority would justify expending funds in support of this program without the required authorization?**

The General Counsel of the National Security Agency has assured the Department of Justice that the Terrorist Surveillance Program complies with section 504 of the National Security Act of 1947, the provision quoted in your question.

5. The Constitution provides that “[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law.”³ Title 31, Section 1341 (the Anti-Deficiency Act) provides that “[a]n officer or employee of the United States Government . . . may not – make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,” and Section 1351 of the same Title adds that “an officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating sections 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.” In sum, the Constitution prohibits, and the law makes criminal, the spending of funds except those funds appropriated in law.

- **Were the funds expended in support of this program appropriated?**
- **If yes, which law appropriated the funds?**
- **Please identify, by name and title, what “officer or employee” of the United States made or authorized the expenditure of the funds in support of this program?**

As stated above, the General Counsel of the National Security Agency has assured the Department of Justice that the applicable statutory standard has been satisfied.

6. Are there any other intelligence programs or activities, including, but not limited to, monitoring internet searches, emails and online purchases, which, in the view of

² National Security Act of 1947, as amended, Section 504, codified at 50 U.S.C. 414.

³ U.S. Constitution, Article I, Section 7.

the Department of Justice, have been authorized by law, although kept secret from some members of the authorizing committee?

- **If so, please list and describe such programs.**

The National Security Act of 1947 contemplates that the Intelligence Committees of both Houses would be appropriately notified of intelligence programs and the Act specifically contemplates more limited disclosure in the case of exceptionally sensitive matters. Title 50 of the U.S. Code provides that the Director of National Intelligence and the heads of all departments, agencies, and other entities of the Government involved in intelligence activities shall keep the Intelligence Committees fully and currently informed of intelligence activities “[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” 50 U.S.C. §§ 413a(a), 413b(b). It has long been the practice of both Democratic and Republican administrations to inform the Chair and Ranking Members of the Intelligence Committees about exceptionally sensitive matters. The Congressional Research Service has acknowledged that the leaders of the Intelligence Committees “over time have accepted the executive branch practice of limiting notification of intelligence activities in some cases to either the Gang of Eight, or to the chairmen and ranking members of the intelligence committees.” See Alfred Cumming, *Statutory Procedures Under Which Congress is to be Informed of U.S. Intelligence Activities, Including Covert Actions*, Congressional Research Service Memorandum at 10 (Jan. 18, 2006). This Administration has followed this well-established practice by briefing the leadership of the Intelligence Committees about intelligence programs or activities as required by the National Security Act of 1947.

7. Are there any other expenditures which have been made or authorized which have not been specifically appropriated in law, and which have been kept secret from members of the Appropriations Committee?

- **If so, please list and describe such programs.**

As stated above, the NSA has indicated that expenditures on the Terrorist Surveillance Program comply with the National Security Act and applicable appropriations law.

8. At a White House press briefing, on December 19, 2005, you stated that that the Administration did not seek authorization in law for this NSA surveillance program because “you were advised that that was not . . . something [you] could likely get” from Congress.

- **What were your sources of this advice?**
- **As a matter of constitutional law, is it the view of the Department that the scope of the President’s authority increases when he believes that the legislative branch will not pass a law he approves of?**

As the Attorney General clarified both later in the December 19th briefing that you cite and on December 21, 2005, it is not the case that the Administration declined to seek a specific authorization of the Terrorist Surveillance Program because we believed Congress would not authorize it. See Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act, available at <http://www.dhs.gov/dhspublic/display?content=5285>. Rather, as the Attorney General has testified, the consensus view in the discussions with Members of Congress was that it was unlikely, if not impossible, that more specific legislation could be enacted without compromising the Terrorist Surveillance Program by disclosing operational details, limitations, and capabilities to our enemies. Such disclosures would necessarily have compromised our national security.

9. The Department of Justice’s position, as explained in the Moschella Letter and the subsequent White Paper, is that even if the AUMF is determined not to provide the legal authority for conduct which otherwise would be prohibited by law, the President’s “inherent” powers as Commander-in-Chief provide independent authority.

- **Is this an accurate assessment of the Department’s position?**

As the Department has explained, the Force Resolution does provide legal authority for the Terrorist Surveillance Program. The Force Resolution is framed in broad and powerful terms, and a majority of the Justices of the Supreme Court concluded in *Hamdi v. Rumsfeld* that the Force Resolution authorized the “fundamental and accepted” incidents of the use of military force. Moreover, when it enacted the Force Resolution, Congress was legislating in light of the fact that past Presidents (including Woodrow Wilson and Franklin Roosevelt) had interpreted similarly broad resolutions to authorize much wider warrantless interception of international communications.

Even if there were some ambiguity regarding whether FISA and the Force Resolution may be read in harmony to allow the President to authorize the Terrorist Surveillance Program, the President’s inherent powers as Commander in Chief and as chief representative of the Nation in foreign affairs to undertake electronic surveillance against the declared enemy of the United States during an armed conflict would require resolving such ambiguity in favor of the President’s authority. Under the canon of constitutional avoidance, courts generally interpret statutes to avoid serious constitutional questions where “fairly possible.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). The canon of constitutional avoidance has particular importance in the realm of national security, where the President’s constitutional authority is at its highest. See *Department of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing “[s]uper-strong rule against congressional interference with the President’s authority over foreign affairs and national security”). Thus, we need not confront the question whether the President’s inherent powers in this area would authorize conduct otherwise prohibited by statute.

Even if the Force Resolution were determined not to provide the legal authority, it is the position of the Department of Justice, maintained by both Democratic and Republican administrations, that the President's inherent authority to authorize foreign-intelligence surveillance would permit him to authorize the Terrorist Surveillance Program. President Carter's Attorney General, Griffin Bell, testified at a hearing on FISA as follows: "[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution.*" Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence (Jan. 10, 1978) (emphasis added). Thus, in saying that President Carter agreed to follow the procedures of FISA, Attorney General Bell made clear that FISA could not take away the President's Article II authority. More recently, the Foreign Intelligence Surveillance Court of Review, the specialized court of appeals that Congress established to review the decisions of the Foreign Intelligence Surveillance Court, recognized that the President has inherent constitutional authority to gather foreign intelligence that cannot be intruded upon by Congress. The court explained that all courts to have addressed the issue of the President's inherent authority have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 (2002). On the basis of that unbroken line of precedent, the court "[took] for granted that the President does have that authority," and concluded that, assuming that is so, "*FISA could not encroach on the President's constitutional power.*" *Id.* (emphasis added).

10. Based on the Moschella Letter and the subsequent White Paper, I understand that it is the position of the Department of Justice that the National Security Agency, with respect to this program of domestic electronic surveillance, is functioning as an element of the Department of Defense generally, and as one of a part of the "Armed Forces of the United States," as referred to in the AUMF.

- **Is this an accurate understanding of the Department's position?**

As explained above, the Terrorist Surveillance Program is not a program of "domestic" electronic surveillance.

The NSA is within the Department of Defense, and the Director of the NSA reports directly to the Secretary of Defense. Although organized under the Department of Defense, the NSA is not part of the "Armed Forces of the United States," which consists of the Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. § 101(a)(4). The President has constitutional authority to direct that resources under his control (including assets that are not part of the Armed Forces of the United States) be used for military purposes. In addition, the Department would not interpret the Force Resolution to authorize the President to use only the Armed Forces in his effort to protect the Nation.

11. Article 8 of the Constitution provides that the Congress "shall make Rules for the Government and Regulation of the land and naval forces." It appears that the

Foreign Intelligence Surveillance Act (FISA), as applied to the National Security Agency, is precisely the type of “Rule” provided for in this section.

- **Is it the position of the Department of Justice that the President’s Commander-in-Chief power is superior to the Article 8 powers of Congress?**
- **Does the Department of Justice believe that if the President disagrees with a law passed by Congress as part of its responsibility to regulate the Armed Forces, the law is not binding?**

It is emphatically *not* the position of the Department of Justice that the President’s authority as Commander in Chief is superior to Congress’s authority set forth in Article I, Section 8 of the Constitution. As we have explained, the Terrorist Surveillance Program is fully consistent with FISA, because Congress authorized it through the Force Resolution. Nor is it the position of the Department of Justice “that if the President disagrees with a law passed by Congress as part of its responsibility to regulate the Armed Forces, the law is not binding.” No one is above the law.

The inherent authority of the President to conduct warrantless foreign intelligence surveillance is well established, and *every* court of appeals to have considered the question has determined that the President has such authority, even during peacetime. On the basis of that unbroken line of precedent, the Foreign Intelligence Surveillance Court of Review “[took] for granted that the President does have that authority” and concluded that, assuming that is so, “FISA could not encroach on the President’s constitutional power.” *In re Sealed Case*, 310 F.3d 717, 742 (2002).

The scope of Congress’s authority to make rules for the regulation of the land and naval forces is not entirely clear. The Supreme Court traditionally has construed this authority to provide for military discipline of members of the Armed Forces by, for example, “grant[ing] the Congress power to adopt the Uniform Code of Military Justice” for offenses committed by servicemembers, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960), and by providing for the establishment of military courts to try such cases, *see Ryder v. United States*, 515 U.S. 177, 186 (1995); *Madsen v. Kinsella*, 343 U.S. 341, 347 (1952); *see also McCarty v. McCarty*, 453 U.S. 210, 232-233 (1981) (noting enactment of military retirement system pursuant to power to make rules for the regulation of land and naval forces). That reading is consistent with the Clause’s authorization to regulate “Forces,” rather than the *use* of force. Whatever the scope of Congress’s authority, however, Congress may not “impede the President’s ability to perform his constitutional duty,” *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *see also id.* at 696-97, particularly not the President’s most solemn constitutional obligation—the defense of the Nation.

The potential conflict of Congress’s authority with the President’s in these circumstances would present a serious constitutional question, which, as described above, can and must be avoided by construing the Force Resolution to authorize the fundamental and accepted incidents of war, consistent with historical practice.

12. On January 24, 2006, during an interview with CNN, you said that “[a]s far as I’m concerned, we have briefed Congress . . . [t]hey’re aware of the scope of the program.”

- **Please explain the basis for the assertion that I was briefed on this program, or that I am “aware of the scope of the program.”**

The quotation to which your question refers is not from an interview on CNN, but is a quotation reported on the CNN Website that is attributed to the Attorney General’s remarks at Georgetown University on January 24, 2006. *See* <http://www.cnn.com/2006/POLITICS/01/24/nsa.strategy/index.html>. The prepared text of that speech accurately reflects that “[t]he *leadership of Congress, including the leaders of the Intelligence Committees of both Houses of Congress*, have been briefed about this program more than a dozen times since 2001.” *See* http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601242.html (emphasis added). Similarly, during a January 16, 2006, interview on CNN, the Attorney General accurately stated that “we have briefed *certain members of Congress* regarding the operations of these activities and have given examples of where these authorities, where the activities under this program have been extremely helpful in protecting America.” *See* <http://archives.cnn.com/TRANSCRIPTS/060116/lkl.01.html> (emphasis added). The Attorney General has not asserted that every Member of Congress was briefed on the Terrorist Surveillance Program, or that you specifically have been briefed on it. However, in accordance with long-standing practice regarding exceptionally sensitive intelligence matters, the Department believes that the briefing of congressional leaders satisfies the Administration’s responsibility to keep Congress apprised of the Terrorist Surveillance Program. This view is shared by the Administration and by the Chairmen of both the House and Senate Intelligence Committees. *See* Letter from the Honorable Peter Hoekstra, Chairman, House Permanent Select Committee on Intelligence, to Daniel Mulholland, Director, Congressional Research Service at 1-3 (Feb. 1, 2006); Letter from the Honorable Pat Roberts, Chairman Senate Committee on Intelligence, to the Honorable Arlen Specter and the Honorable Patrick Leahy at 16-17 (Feb. 3, 2006).

13. It appears from recent press coverage that Mr. Rove has been briefed about this program, which, as I understand it, is considered too sensitive to brief to Senators who are members of the Senate Intelligence Committee.

- **Who decided that Mr. Rove was to be briefed about the program, and what is his need-to-know?**
- **Is the program classified pursuant to Executive Order 12958, and if so, who was the classifying authority, and under what authority provided in Executive Order 12958 was the classification decision made?**
- **How many executive branch officials have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.**

- **How many individuals outside the executive branch have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.**

The Terrorist Surveillance Program remains classified, and we may discuss only those aspects of the Program that have been described by the President. In general, the identity of individuals who have been briefed into the Program is also classified. The Program was classified pursuant to sections 1.4(c) and (e) of Executive Order 12958, as amended by Executive Order 13292 (March 28, 2003).

14. The AUMF authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

- **What do you believe are the conditions under which the President’s authority to conduct the NSA program pursuant to the Authorization would expire?**

As you know, al Qaeda leaders repeatedly have announced their intention to attack the United States again. As recently as December 7, 2005, Ayman al-Zawahiri stated that al Qaeda “is spreading, growing, and becoming stronger,” and that al Qaeda is “waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders’ own homes.” Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). And just last month, Osama bin Laden warned that al Qaeda was preparing another attack on our homeland. After noting the deadly bombings committed in London and Madrid, he said:

The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you *will see them in your homes* the minute they are through (with preparations), with God’s permission.

Quoted at <http://www.breitbart.com/news/2006/01/19/D8F7SMRH5.html> (Jan. 19, 2006) (emphasis added). The threat from Al Qaeda continues to be real. Thus, the necessity for the President to take these actions continues today.

As a general matter, the authorization for the Terrorist Surveillance Program that is provided by the Force Resolution would expire when the “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” no longer pose a threat to the United States. The authorization that is provided by the Force Resolution also would expire if it were repealed through legislation. In addition, the Program by its own terms expires

approximately every 45 days unless it is reauthorized after a review process that includes a review of the current threat to the United States posed by al Qaeda and its affiliates.

15. The Department of Justice White Paper states that the program is used when there is a “reasonable basis” to conclude that one party is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.

- **Can the program be used against a person who is a member of an organization affiliated with al Qaeda, but where the organization has no connection to the 9/11 attacks themselves?**
- **Can you define the terms “reasonable basis” and “affiliated?” Are there any examples, for instance, from criminal law that can describe the “reasonable basis” standard that is being used for the NSA program? What about “affiliated?”**
- **Is it comparable to the “agent of” standard in FISA?**
- **Can the program be used to prevent terrorist attacks by an organization other than al Qaeda?**

The Terrorist Surveillance Program targets communications only where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. The “reasonable grounds to believe” standard is essentially a “probable cause” standard of proof. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“We have stated . . . that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”). The critical advantage offered by the Terrorist Surveillance Program compared to FISA is *who* makes the probable cause determination and how many layers of review will occur *before* surveillance begins. Under the Terrorist Surveillance Program, professional intelligence officers, who are experts on al Qaeda and its tactics (including its use of communication systems), with appropriate and rigorous oversight, make the decisions about which international communications should be intercepted. Relying on the best available intelligence, these officers determine before intercepting any communications whether there are “reasonable grounds to believe” that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. By contrast, even the most expedited traditional FISA process would involve review by NSA intelligence officers, NSA lawyers, Justice Department lawyers, and the Attorney General before even emergency surveillance would begin. In the narrow context of defending the Nation in this congressionally authorized armed conflict with al Qaeda, we must allow these highly trained intelligence experts to use their skills and knowledge to protect us.

Answering the rest of these questions would require discussion of operational aspects of the Program.

16. In addition to open combat, the detention of enemy combatants and electronic surveillance, what else do you consider being “incident to” the use of military force? Are interrogations of captives “incident to” the use of military force?

A majority of the Justices in *Hamdi v. Rumsfeld* concluded that the Force Resolution's authorization of "all necessary and appropriate force" includes fundamental and accepted incidents of the use of military force. See 542 U.S. 507, 518 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). As your question acknowledges, a majority of the Justices concluded that the detention of enemy combatants is a fundamental and accepted incident of the use of military force. As explained at length in our January 19th paper, signals intelligence is a fundamental and accepted incident of the use of military force. Consistent with that understanding, other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force-authorization resolutions to permit warrantless surveillance during wartime to intercept suspected enemy communications. In addition, we note that the Supreme Court has stated in a slightly different context that "[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex Parte Quirin*, 317 U.S. 1, 29 (1942).

In light of the strictly limited nature of the Terrorist Surveillance Program, we do not think it a useful or a practical exercise to engage in speculation about the outer limits of what kinds of military activity might be authorized by the Force Resolution. It is sufficient to note that, as discussed at length in the Department's January 19th paper, the use of signals intelligence to intercept the international communications of the enemy has traditionally been recognized as one of the core incidents of the use of military force.

17. The program is reportedly defined as where one party is in the U.S. and one party in a foreign country. Regardless of how the program is actually used, does the AUMF authorize the President to use the program against calls or emails entirely within the U.S.?

We believe that the Force Resolution's authorization of "all necessary and appropriate force," which the Supreme Court in *Hamdi* interpreted to include the fundamental and accepted incidents of the use of military force, clearly encompasses the narrowly focused Terrorist Surveillance Program. The Program targets only the communications where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Indeed, the Program is much narrower than the wartime surveillances authorized by President Woodrow Wilson (*all* telephone, telegraph, and cable communications into and out of the United States) and President Franklin Roosevelt ("*all . . . telecommunications traffic* in and out of the United States"), based on their constitutional authority and general force-authorization resolutions like the Force Resolution. The narrow Terrorist Surveillance Program fits comfortably within this precedent and tradition. Interception of the contents of domestic communications presents a different legal question which is not implicated here.

18. FISA has safeguard provisions for the destruction of information that is not foreign intelligence. For instance, albeit with some specific exceptions, if no FISA order is obtained within 72 hours, material gathered without a warrant is destroyed.

- **Are there procedures in place for the destruction of information collected under the NSA program that is not foreign intelligence?**
- **If so, what are the procedures?**
- **Who determines whether the information is retained?**

Procedures are in place to protect U.S. privacy rights, including applicable procedures from Attorney General guidelines issued pursuant to Executive Order 12333, that govern acquisition, retention, and dissemination of information relating to U.S. persons.

19. The DOJ White Paper relies on broad language in the preamble that is contained in both the AUMF and the *Authorization for the Use of Military Force Against Iraq* as a source of the President’s authority.

- **Does the Iraq Resolution provide similar authority to the President to engage in electronic surveillance? For instance, would it have been authorized to conduct surveillance of communications between an individual in the U.S. and someone in Iraq immediately after the invasion?**

The Authorization for Use of Military Force Against Iraq, Pub. L. 107-243 (Oct. 16, 2002), provides that the “President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.” *Id.* § 3(a). Under appropriate circumstances, the Iraq Resolution would authorize electronic surveillance of enemy communications. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2093 (2005) (stating that the “generally accepted view” is “that a broad and unqualified authorization to use force empowers the President to do to the enemy what the laws of war permit”).

20. In a December 17, 2005, radio address the President stated, “I authorized the National Security Agency...to intercept the international communications of people with known links to al Qaeda and related terrorist organizations.”

- **What is the standard for establishing a link between a terrorist organization and a target of this program?**
- **How many such communications have been intercepted during the life of this program? How many disseminated intelligence reports have resulted from this collection?**
- **Has the NSA intercepted under this program any communications by journalists, clergy, non-governmental organizations (NGOs) or family**

members of U.S. military personnel? If so, for what purpose, and under what authority?

Before the international communications of an individual may be targeted for interception under the Terrorist Surveillance Program, there must be reasonable grounds to believe that the individual is a member or agent of al Qaeda or an affiliated terrorist organization. That standard of proof is appropriately considered as “a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotation marks omitted) (describing “probable cause” standard). We cannot provide more detail without discussing operational aspects of the Program.

21. In a December 17, 2005, radio address the President stated, “The activities I authorized are reviewed approximately every 45 days...The review includes approval by our Nation’s top legal officials, including the Attorney General and the Counsel to the President.”

- **As White House Counsel during the first 4 years this program was implemented, were you aware of this program and of the legal arguments supporting it when this Committee considered your nomination to be Attorney General?**
- **Who is responsible for determining whether to reauthorize this program, and upon what basis is this determination made?**

As an initial matter, the Department wishes to emphasize the seriousness with which this Administration takes these periodic reviews and reauthorizations of the Terrorist Surveillance Program. The requirement that the Terrorist Surveillance Program be reviewed and reauthorized at the highest levels of Government approximately every 45 days ensures that the Program will not be continued unless the al Qaeda threat to the United States continues to justify use of the Program.

The President sought legal advice prior to authorizing the Program and was advised that it is lawful. The Program has been reviewed by the Department of Justice, by lawyers at the NSA, and by the Counsel to the President. The Attorney General was involved in advising the President about the Program in his capacity as Counsel to the President, and he has been involved in approving the legality of the Program during his time as Attorney General. Since 2001, the Program has been reviewed multiple times by different counsel. The Terrorist Surveillance Program is lawful in all respects, as explained in the Justice Department paper of January 19, 2006.

The President is responsible for reauthorizing the Program. That determination is based on reviews undertaken by the Intelligence Community and Department of Justice, a strategic assessment of the continuing importance of the Program to the national security of the United States, and assurances that safeguards continue to protect civil liberties.

22. In a Press Briefing on December 19, 2005, you said that you “believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity [domestic surveillance].” This authority is further asserted in the Department of Justice White Paper of January 19, 2006.

- **Has the President ever invoked this authority, with respect to any activity other than the NSA surveillance program?**
- **Has any other order or directive been issued by the President, or any other senior administration official, based on such authority which authorizes conduct which would otherwise be prohibited by law?**

i. Can the President suspend (in secret or otherwise) the application of Section 503 of the National Security Act of 1947 (50 U.S.C. 413(b)), which states that “no covert action may be conducted which is intended to influence United States political processes, public opinion, policies or media?”

1. If so, has such authority been exercised?

ii. Can the President suspend (in secret or otherwise) the application of the Posse Comitatus Act (18 U.S.C. 1385)?

1. If so, has such authority been exercised?

iii. Can the President suspend (in secret or otherwise) the application of 18 U.S.C. 1001, which prohibits “the making the false statements within the executive, legislative, or judicial branch of the Government of the United States.”

1. If so, has such authority been exercised?

The Terrorist Surveillance Program targets for interception *international* communications of our enemy in the armed conflict with al Qaeda. As Congress expressly recognized in the Force Resolution, “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” Force Resolution pmb., especially in the context of the current conflict. Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief, *see* U.S. Const. art. II, § 2, and authority over the conduct of the Nation’s foreign affairs. As the Supreme Court has explained, “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (internal quotation marks and citations omitted). In this way, the Constitution grants the President inherent power to protect the Nation from foreign attack, *see, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), and to protect national security information, *see, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

The President has used his constitutional authority to protect the Nation. Although no statute had yet authorized the use of military force, the President scrambled military aircraft during the attacks of September 11th to protect the Nation from further attack and continued those patrols for days before the Force Resolution was passed by Congress and signed by the President.

The Terrorist Surveillance Program is not, as your question suggests, “otherwise prohibited by law.” FISA expressly contemplates that in a separate statute Congress may authorize electronic surveillance outside FISA procedures. *See* 50 U.S.C. § 1809(a)(1) (FISA § 109, prohibiting any person from intentionally “engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*”) (emphasis added). That is what Congress did in the Force Resolution. As *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), makes clear, a general authorization to use military force carries with it the authority to employ the fundamental and accepted incidents of the use of force. That is so even if Congress did not specifically address each of the incidents of force; thus, a majority of the Court concluded that the Force Resolution authorized the detention of enemy combatants as a fundamental incident of force, and Justice O’Connor stated that “it is of no moment that the [Force Resolution] does not use specific language of detention.” *Id.* at 519 (plurality opinion). Indeed, a majority of Justices in *Hamdi* concluded that the Force Resolution satisfied a statute nearly identical to section 109 of FISA, 18 U.S.C. § 4001(a), which prohibits the detention of United States citizens “except pursuant to an Act of Congress.” As explained at length in the Department’s January 19th paper, signals intelligence is a fundamental and accepted incident of the use of military force. Consistent with this traditional practice, other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force-authorization resolutions to permit interception of suspected enemy communications. Thus, the President has not “authorize[d] conduct which would otherwise be prohibited by law.”

It would not be appropriate for the Department to speculate about whether various other statutes, in circumstances not presented here, could yield to the President’s constitutional authority. As Justice Jackson has written, the division of authority between the President and Congress should not be delineated in the abstract. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”); *see also Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981). Without a specific factual circumstance in which such a decision would be made, speculating about such possibilities in the abstract is not fruitful.

Nevertheless, we have explained that the Force Resolution provides authority for the fundamental incidents of the use of force. The Department does not believe that covert action aimed at affecting the United States political process or lying to Congress would constitute a fundamental incident of the use of force.

Finally, the Posse Comitatus Act generally prohibits using the Army or Air Force for domestic law enforcement purposes absent statutory authorization. That statute does

not address the use of military force for military purposes, including national defense, in the armed conflict with al Qaeda.

23. Had the Department of Justice adopted the interpretation of the AUMF asserted in the Moschella letter and subsequent White Paper at the time it discussed the USA-Patriot Act with members of Congress? That act substantially altered FISA, and yet, to my knowledge, there was no discussion of the legal conclusions you now assert – that the AUMF has triggered the “authorized by other statute” wording of FISA.

- **Please provide any communications, internal or external, which are contemporaneous to the negotiation of the USA-Patriot Act, which contain information regarding this question.**

As you know, on January 19th, the Department of Justice released a 42-page paper setting out a comprehensive explanation of the legal authorities supporting the Terrorist Surveillance Program. The paper reflects the substance of the Department’s legal analysis of the Terrorist Surveillance Program. We have always interpreted FISA not to infringe on the President’s constitutional authority to protect the Nation from foreign attacks. It is also true, as one would expect, that our legal analysis has evolved over time.

It would be inappropriate for us to reveal any confidential and privileged internal deliberations of the Executive Branch. The Department is not aware of communications with Congress in connection with the negotiation of the USA PATRIOT Act concerning the effect of the Force Resolution.

24. The USA-Patriot Act reauthorization bill is currently being considered by the Congress. Among the provisions at issue is Section 215, which governs the physical search authorization under FISA. Does the legal analysis proposed by the Department also apply to this section of FISA? If so, is the Department’s position that, regardless of whether the Congress adopts the pending Conference Report, the Senate bill language, or some other formulation, the President may order the application of a different standard or procedure based on the AUMF or his Commander-in-Chief authority?

- **If so, is there any need to reauthorize those sections of the USA-Patriot Act which authorize domestic surveillance?**

FISA remains an essential and invaluable tool for foreign intelligence collection both in the armed conflict with al Qaeda and in other contexts. In contrast to surveillance conducted pursuant to the Force Resolution, FISA is not limited to al Qaeda and affiliated terrorist organizations. In addition, FISA has procedures that specifically allow the Government to use evidence in criminal prosecutions and, at the same time, protect intelligence sources and methods. In short, there is an urgent need to reauthorize the USA PATRIOT Act.

The Terrorist Surveillance Program does not involve physical searches. FISA's physical search subchapter contains a provision analogous to section 109, *see* 50 U.S.C. § 1827(a)(1) (prohibiting physical searches within the United States for foreign intelligence "except as authorized by statute"). Physical searches conducted for foreign intelligence purposes present questions different from those discussed in the January 19th paper addressing the legal basis for the Terrorist Surveillance Program. Thus, we would need to consider that issue specifically before taking a position.

25. Public statements made by you, as well as the President, imply that this program is used to identify terrorist operatives within the United States. Have any such operatives in fact been identified? If so, have these individuals been detained, and if so, where, and under what authority? Have any been killed?

- **The arrest and subsequent detention of Jose Padilla is, to my knowledge, the last public acknowledgement of the apprehension of an individual classified as an "enemy combatant" within the United States. Have there been any other people identified as an "enemy combatant" and detained with the United States, and if so, what has been done with these individuals?**

With respect, we cannot answer these questions without revealing the operational details of the Terrorist Surveillance Program, other than to point to the testimony of General Hayden and Director Mueller at the February 2d Worldwide Threat Briefing. Specifically, General Hayden stated that "the program has been successful; . . . we have learned information from this program that would not otherwise have been available" and that "[t]his information has helped detect and prevent terrorist attacks in the United States and abroad." Director Muller stated that "leads from that program have been valuable in identifying would-be terrorists in the United States, individuals who were providing material support to terrorists."

26. Senator Roberts has stated that the program is limited to: "when we know within a terrorist cell overseas that there is a plot and that plot is very close to its conclusion or that plot is very close to being waged against America – now, if a call comes in from an Al Qaeda cell and it is limited to that where we have reason to believe that they are planning an attack, to an American phone number, I don't think we're violating anybody's Fourth Amendment rights in terms of civil liberties."⁴

- **Is the program limited to such imminent threats against the United States, or where an attack is being planned? Is this an accurate description of the program?**

As the Attorney General has explained elsewhere, the Terrorist Surveillance Program is an early warning system aimed at detecting and preventing another

⁴ Senator Pat Roberts, CNN Late Edition with Wolf Blitzer, January 29, 2006

catastrophic al Qaeda terrorist attack. It targets communications only when one party to the communication is outside of the country and professional intelligence experts have reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

Beyond that, it would be inappropriate to provide a more specific description of the Program, as the operational details remain classified and further disclosure would compromise the Program's effectiveness.

27. In a speech given in Buffalo, New York by the President, in April 2004, he said: "Now, by the way, any time you hear the United States government talking about wiretap, it requires – a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think Patriot Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution."⁵

- **Is this statement accurate?**

We believe that the statement is accurate when placed in context. As the text of your question itself indicates, in his Buffalo speech, the President was talking about the USA PATRIOT Act, certain provisions of which amended FISA to change the standard for obtaining electronic surveillance orders. In the paragraphs surrounding the portion you quoted, the President reiterated three times that he is discussing the PATRIOT Act. In particular, the President was speaking about the roving wiretap provision of the USA PATRIOT Act, noting that while such wiretaps previously were not available under FISA to intercept the communications of suspected terrorists, "[t]he Patriot Act changed that." When surveillance is conducted under FISA, as amended by the PATRIOT Act, generally we are—as the President said—"talking about getting a court order." The President's statement cannot be taken out of context. In a wide variety of situations, we do not (and at times cannot) get court orders. For example, there is no provision by which the Executive Branch can obtain court orders to conduct certain surveillances overseas.

28. According to press reports, the Administration at some point determined that the authorities provided in the FISA were, in their view, inadequate to support the President's Commander-in-Chief responsibilities.

- **At what point was this determination reached?**
- **Who reached this determination?**

⁵ **Information sharing, Patriot Act Vital to Homeland Security, Remarks by the President in a Conversation on the USA Patriot Act, Kleinshans Music Hall, Buffalo, New York, April 20, 2004**

- **If such determination had been reached, why did the Administration conceal the view that existing law was inadequate from the Congress?**

FISA itself permits electronic surveillance authorized by statute, and, as explained above, the Force Resolution satisfies FISA and provides the authorization required for the Terrorist Surveillance Program.

The determination was made, based on the advice of intelligence experts, that we needed an early warning system, one that could help detect and prevent the next catastrophic al Qaeda attack and that might have prevented the attacks of September 11th, had it been in place. As the Department has explained elsewhere, including our paper of January 19, 2006, speed and agility are critical here and “existing law” is *not* inadequate. The Force Resolution, combined with the President’s authority under the Constitution, amply supports the Terrorist Surveillance Program. Because “existing law” provides ample authority for the Terrorist Surveillance Program, the Administration did not choose to seek additional statutory authority to support the Program, in part because, as discussed above, the consensus in discussions with congressional leaders was that pursuing such legislation would likely compromise the Program.

It would be inappropriate for us to reveal the confidential and privileged internal deliberations of the Executive Branch, including who made specific recommendations.

29. Based upon press reports, it does not appear that the NSA surveillance program at issue makes use of any intelligence sources and methods which have not been briefed (in a classified setting) to the Intelligence Committees. Other than the adoption of a legal theory which allows the NSA to undertake surveillance which on its face would be prohibited by law, what about this program is secret or sensitive?

- **Is there any precedent for developing a body of secret law such as has been revealed by last month’s *New York Times* article about the NSA surveillance program?**

As explained above, the Terrorist Surveillance Program is fully consistent with all applicable federal law, including FISA. Although the broad contours of the Terrorist Surveillance Program have been disclosed, details about the operation of the Terrorist Surveillance Program remain highly classified and exceptionally sensitive. Thus, we must continue to strive to protect the intelligence sources and methods of this vital program. It is important that we not damage national security through revelations of intelligence sources and methods during these proceedings or elsewhere.

The legal authorities for the Terrorist Surveillance Program do not constitute a “body of secret law,” as your question suggests. The Force Resolution and its broad authorizing language are public. Nor is it a secret that five Justices of the Supreme Court concluded in *Hamdi v. Rumsfeld* that the Force Resolution authorizes the use of the “fundamental incidents” of war. The breadth of the Force Resolution also has been the subject of prominent law review articles. *See, e.g.*, Curtis A. Bradley & Jack L.

Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048 (2005); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 Const. Comment. 215, 252 (2002). It has long been public knowledge that other Presidents have concluded that their inherent powers under the Constitution, together with similarly broad authorizations of force, authorized the warrantless interception of international communications during armed conflicts. In short, all of the sources relied upon in the Department's January 19th paper to demonstrate that signals intelligence is a fundamental and accepted incident of the use of military force are readily available to the public.

30. At a public hearing of the Senate/House Joint Inquiry, then-NSA Director Hayden said: "My goal today is to provide you and the American people with as much insight as possible into three questions: (a) What did NSA know prior to September 11th, (b) what have we learned in retrospect, and (c) what have we done in response? I will be as candid as prudence and the law allow in this open session. If at times I seem indirect or incomplete, I hope that you and the public understand that I have discussed our operations fully and unreservedly in earlier closed sessions" (emphasis added).⁶

- **Under what, if any, legal authority did General Hayden make this inaccurate statement to the Congress (and to the public)?**

Although the Department cannot speak for General Hayden in this context, it does not appear that the statement was inaccurate. As discussed above, it has long been the practice of both Democratic and Republican administrations under the National Security Act of 1947 to limit full briefings of certain exceptionally sensitive matters to key members of the Intelligence Committees.

31. Were any collection efforts undertaken pursuant to this program based on information obtained by torture?

- **Was the possibility that information obtained by torture would be rejected by the FISA court as a basis for granting a FISA warrant a reason for undertaking this program?**

As the President has repeatedly made clear, the United States does not engage in torture and does not condone or encourage any acts of torture by anyone under any circumstances. In addition, we have already explained our reasons for establishing the

⁶ **Statement for the Record by Lieutenant General Michael V. Hayden, USAF, Director, National Security Agency/Chief, Central Security Service, Before the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, 17 October 2002, available at <http://intelligence.senate.gov/0210hrg/021017/hayden.pdf>.**

Terrorist Surveillance Program. It is an early warning system designed to detect and prevent another catastrophic terrorist attack on the United States.

32. If the President determined that a truthful answer to questions posed by the Congress to you, including the questions asked here, would hinder his ability to function as Commander-in-Chief, does the AUMF, or his inherent powers, authorize you to provide false or misleading answers to such questions?

Absolutely not. Congressional oversight is a healthy and necessary part of our democracy. This Administration would not under any circumstances countenance the provision of false or misleading answers to Congress. Under our system of government, no one—particularly not the Attorney General—is permitted to commit perjury. Nor is that something that the Force Resolution authorizes. We are not aware of any theory under which committing perjury before Congress is a fundamental and accepted incident of the use of force.

In those instances where the Administration believes that answering questions about certain intelligence operations would compromise national security, we would follow long-established principles of accommodation between the Branches, by, for example, informing the chairs and vice chairs of the Intelligence Committees, and the House and Senate leaders, as appropriate.

Subject: DOJ letters to hill

From: <Steve.Bradbury@usdoj.gov>

Date: 3/1/06, 2:32 PM

To: [b3 50 USC 3024 (m)(1)], "Allen, Michael", "Gerry, Brett C.", "Kavanaugh, Brett M.", "Miers, Harriet"

CC: [b3 50 USC 3024 (m)(1)m, 50 USC 3605]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:28:22 EDT 2019

Releasability: Withheld In Part

Reasons for Withholding:

P3,b(3)

Notes:

50 USC 3605

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: DOJ letters to hill

From: <Steve.Bradbury@usdoj.gov>

Date: 3/1/06, 2:32 PM

To: "Miers, Harriet", "Kavanaugh, Brett M.", [b3 50 USC 3605, 50 USC 3024 (m)(1)], "Gerry, Brett C.", "Allen, Michael"

CC: [b3 50 USC 3605, 50 USC 3024 (m)(1)]

THIS RECORD IS A WITHDRAWAL SHEET

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Notes:

50 USC 3605

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

From: <Steve.Bradbury@usdoj.gov>

b3 50 USC 3024 (m)(1)
b3 50 USC 3605

Subject: Draft DOJ responses to SJC QFRs re NSA hearing

Received(Date): Wed, 1 Mar 2006 14:43:39 -0500

[Joint Qs of SJC Democrats_3 1 06 v2.doc](#)

Attached is a draft of responses to post-hearing QFRs from SJC Democrats.

<<Joint Qs of SJC Democrats_3 1 06 v2.doc>>

**“Wartime Executive Power
And The National Security Agency’s Surveillance Authority”
Hearing Before The Senate Committee On The Judiciary
Written Questions From All Democratic Senators**

- 1. On January 27, 2006, members of this Committee wrote to you and asked that you provide relevant information and documents in advance of this hearing, including formal legal opinions of the Office of Legal Counsel (“OLC”) and contemporaneous communications regarding the 2001 Authorization for Use of Military Force (“AUMF”). Please provide those materials with your answers to these questions.**

As you know, on January 19, 2006, the Department of Justice released a 42-page paper setting out a comprehensive, though unclassified, explanation of the legal authorities supporting the interception by the NSA of the contents of communications in which one party is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the “Terrorist Surveillance Program”). That paper reflects the substance of the Department’s legal analysis of the Terrorist Surveillance Program. Any written legal opinions that the Department may have produced regarding the Terrorist Surveillance Program would constitute the confidential internal deliberations of the Executive Branch. In addition, the release of any document discussing the operational details of this highly classified program would risk compromising the Program and could help terrorists avoid detection. It would be inappropriate for us to reveal the confidential and privileged internal deliberations of the Executive Branch. We are not aware of communications with Congress in connection with the negotiation of the USA PATRIOT Act concerning the effect of the Force Resolution.

- 2. Since September 11, 2001, how many OLC memoranda or opinions have discussed the authority of the President to take or authorize action under either the AUMF or the Commander-in-Chief power, or both, that one could argue would otherwise be prohibited or restricted by another statute? Will you provide copies of those memoranda or opinions to the Committee? If not, please provide the titles and dates of those memoranda and opinions.**

The opinions of the Office of Legal Counsel constitute the confidential legal advice of the Executive Branch. We are not able to discuss the contents of that confidential legal advice.

- 3. When did the President first authorize warrantless electronic surveillance of U.S. persons in the United States outside the parameters of the Foreign Intelligence Surveillance Act (“FISA”)? What form did that authorization take?**

As explained in the January 19th paper, the Terrorist Surveillance Program is not “outside the parameters of [FISA].” Rather, FISA contemplates that Congress may enact a subsequent statute, such as the Authorization for the Use of Military Force (“Force Resolution”), that authorizes the President to conduct electronic surveillance without following the specific procedures of FISA.

The President first authorized the Terrorist Surveillance Program in October 2001.

4. When did the NSA commence activities under this program?

The NSA commenced the Terrorist Surveillance Program after the President authorized it in October 2001.

5. When did the Administration first conclude that the AUMF authorized warrantless electronic surveillance of U.S. persons in the United States? What contemporaneous evidence supports your answer, and will you provide it to the Committee? What legal objections were raised to that theory and by whom?

The Department has reviewed the legality of the Terrorist Surveillance Program on multiple occasions. Although we have always interpreted FISA not to infringe on the President’s constitutional authority to protect the Nation from foreign attacks, it is also true, as one would expect, that our legal analysis has evolved over time.

As to your specific questions regarding the identity of those who provided confidential legal advice and the content of that advice, and whether any legal objections were raised during internal discussions, those questions implicate the confidential internal deliberations of the Executive Branch.

6. How many U.S. persons have had their calls or e-mails monitored or have been subjected to any type of surveillance under the NSA’s warrantless electronic surveillance program?

Operational details about the scope of the Program are classified and cannot be discussed in this setting. Revealing information about the scope of the Program could compromise its value by facilitating terrorists’ attempts to evade it.

7. General Hayden has said that the NSA program does not involve data mining tools or other automated analysis of large volumes of domestic communications. Can you confirm that? Has the NSA program ever involved data mining or other automated analysis of large volumes of communications of any sort?

As General Hayden indicated, the Terrorist Surveillance Program is *not* a “data-mining” program. We cannot provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program. Consistent with long-standing

practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefing of the oversight committees and congressional leadership.

- 8. Are there other programs that rely on data mining or other automated analysis of large volumes of communications that feed into or otherwise facilitate either the warrantless surveillance program or the FISA warrant process?**

It would be inappropriate for us to discuss the existence (or non-existence) of specific intelligence activities or the operations of any such activities other than the Terrorist Surveillance Program described by the President. As noted above, consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefing of the oversight committees and congressional leadership.

- 9. Has the Justice Department issued any legal advice with regard to the legality or constitutionality of the NSA or other agencies in the Intelligence Community conducting data mining or other automated analysis of large volumes of domestic communications? If so, please provide copies.**

We cannot reveal confidential legal advice delivered within the Executive Branch or its internal deliberations. If each request for legal advice from Executive Branch officers or entities were subject to disclosure, those persons and entities would be reluctant to seek legal advice, and that disincentive would increase the risk of legal errors by the Executive Branch. Nor can we discuss the existence (or non-existence) of any specific intelligence activities. As explained above, in view of the sensitivity of such matters, consistent with long-standing practice, the Executive Branch notifies Congress of such activities through appropriate briefings of the oversight committees and congressional leadership.

- 10. What is the longest duration of a surveillance carried out without a court order under this warrantless electronic surveillance program? What is the average length?**

This question also calls for classified operational details of the Terrorist Surveillance Program that cannot be revealed here. Revealing information about the operational details of the Program could compromise its value by facilitating terrorists' attempts to evade it.

- 11. Did we understand correctly from your testimony that the NSA is only authorized to intercept communications when a "probable cause" standard is satisfied, and that it is "the same standard" as the one used under FISA? Has that been true since the inception of this program?**

As we have said, the Terrorist Surveillance Program targets communications only where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. This “reasonable grounds to believe” standard is essentially a “probable cause” standard of proof. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”). FISA also employs a “probable cause” standard.

12. What standard for intercepting communications without a warrant was the NSA applying when the program was first authorized? What standard was the NSA applying in January 2004?

We can discuss only the Terrorist Surveillance Program as publicly confirmed by the President. I cannot discuss the operational history or details of the Program or any other intelligence activities.

13. Did the standard change after there were objections from the FISA Court? Did the standard change after there were objections from senior Justice Department officials?

We can discuss only the Terrorist Surveillance Program. In addition, we cannot divulge the internal deliberations of the Executive Branch or the content of our discussions with the Foreign Intelligence Surveillance Court.

14. Who decides whether the “probable cause” standard has been satisfied? Who if anyone reviews this decision? Are records kept as to the satisfaction of this condition for each surveillance?

Under the Terrorist Surveillance Program, decisions about what communications to intercept are made by professional intelligence officers who are experts on al Qaeda and its tactics, including its use of communications systems. Relying on the best available intelligence and subject to appropriate and rigorous oversight by the NSA Inspector General and General Counsel, among others, these officers determine whether 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. Steps are taken to allow appropriate oversight of interception decisions.

15. Did we understand correctly from your testimony that, under this program, the NSA is authorized to intercept communications only when one party to the communication is outside the United States? Has that always been true? Describe the history and legal significance of that limitation.

The Terrorist Surveillance Program authorizes the interception of the contents of communications only where one party is outside the United States. It does not target domestic communications—that is, communications that both originate and terminate

within the United States. The targeting of international communications fits comfortably within this Nation's traditions. Other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force authorization such as the Force Resolution enacted by Congress to permit warrantless surveillance of international communications. *Cf. generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2091 (2005) (explaining that, with the Force Resolution, "Congress intended to authorize the President to take at least those actions permitted by the laws of war"). We are not able to discuss further the history or operational details of the Program.

16. What does this limitation mean with respect to e-mail communications? Must either the person sending the e-mail or one of persons to whom the e-mail is addressed be physically located outside the United States? Has that always been true?

As the President has stated, the Terrorist Surveillance Program authorizes interception only of communications where one party is outside the United States. We cannot reveal operational details about how the NSA determines that a communication meets that standard, which could compromise the Program's value by facilitating terrorists' attempts to evade it.

17. Who decides whether one party to a communication is outside the United States? Who if anyone reviews this decision? Are records kept as to the satisfaction of this condition for each surveillance?

Professional intelligence officers determine whether a communication meets the standards of the Terrorist Surveillance Program—that is, that one party to the communication is outside the United States and that there are "reasonable grounds to believe" that at least one party is a member of al Qaeda or a related terrorist organization. Appropriate records are kept and procedures are in place to ensure that decisions are reviewed by the NSA Office of General Counsel and the NSA Inspector General.

18. Does FISA under any circumstances require the government to obtain a court order to target and wiretap an individual who is overseas? Does it make a difference whether that targeted person who is overseas calls someone in the United States?

There are some situations in which FISA ordinarily would apply and require a court order where the target of the surveillance is outside the United States. FISA defines "electronic surveillance" to include the acquisition of the contents of "any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States." 50 U.S.C. § 1801(f)(2). Thus, provided that the actual acquisition occurred in the United States, FISA would ordinarily require a court order to intercept wire communications between a person in the United States and a person overseas. This definition of "electronic surveillance" does not apply where both parties to the communication are overseas.

- 19. Did we understand correctly from your testimony that under this program the NSA is authorized to intercept communications only when at least one party to the communication is “a member or agent of al Qaeda or an affiliate terrorist organization”? Has that always been true? Describe the history of that standard and if and how it has changed over time.**

Under the Terrorist Surveillance Program, the NSA is authorized to intercept international communications where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. We cannot discuss operational aspects of the Terrorist Surveillance Program, including how the Program may have evolved over time.

- 20. Who decides whether at least one party to a communication is “a member or agent of al Qaeda or an affiliate terrorist organization”? Who decides whether an organization is “an affiliate terrorist organization”? Who if anyone reviews these decisions? Are records kept as to the satisfaction of these conditions for each surveillance?**

Professional intelligence officers who are experts on al Qaeda and its tactics (including its use of communications systems), with appropriate and rigorous oversight, decide whether there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or a related terrorist organization. Appropriate records are kept and procedures are in place to ensure that decisions are reviewed by the NSA Office of General Counsel and the NSA Inspector General. There is also an extensive review process as to what constitutes a terrorist organization affiliated with al Qaeda.

- 21. Are the above standards and limitations (probable cause; one party is outside the United States; one party is al Qaeda or al Qaeda affiliate) contained in the President’s authorizations? Has that been true since the inception of the program? If these limitations have not always been contained in the President’s authorizations, how have they been communicated to the NSA?**

We can discuss only the Terrorist Surveillance Program. We cannot discuss the operational history of the Program or any other intelligence activities. Although we can assure you that the NSA has always been made aware of the limitations of the authority, we cannot reveal precisely how that has been accomplished.

- 22. What percentage of the communications intercepted pursuant to this program generate foreign intelligence information that is disseminated outside the NSA? How does that compare to the percentage of disseminable communications intercepted pursuant to FISA?**

As we have explained above and elsewhere, this type of operational information about the Terrorist Surveillance Program is classified and cannot be discussed here.

- 23. Under your interpretation of FISA’s Authorization During Time of War provision [50 U.S.C. § 1811], if Congress in September 2001 had not only authorized the use of “all necessary and appropriate force” against al Qaeda, but also formally declared war, would the 15-day limit on warrantless electronic surveillance have applied?**

Section 111 of FISA, 50 U.S.C. § 1811 provides an exception from FISA procedures for a 15-day period following a congressional declaration of war. As discussed in the January 19th paper, FISA’s legislative history makes clear that Congress provided this period to give Congress and the President an opportunity to produce legislation authorizing electronic surveillance during the war. And that is precisely what the Force Resolution does—it authorizes the use of electronic surveillance outside FISA procedures.

There is no reason why section 109(a) of FISA, 50 U.S.C. §1809(a)—which contemplates that future statutes might authorize further electronic surveillance—could not be satisfied by legislation authorizing the use of force. Under the hypothetical set forth in your question, we believe that both 50 U.S.C. § 1811 and the Force Resolution would have authorized the Terrorist Surveillance Program during the 15-day period after such a declaration of war, and that the Force Resolution would have authorized the Program thereafter.

- 24. Your analysis relies heavily on section 109(a)(1) of FISA, which provides criminal penalties for someone who intentionally “engages in electronic surveillance under color of law *except as authorized by statute.*” According to the legislative history of this provision, the term “except as authorized by statute” referred specifically to FISA and the criminal wiretap provisions commonly known as “title III”. The House Intelligence Committee report (p.96) states, “Section 109(a)(1) carries forward the criminal provisions of chapter 119 [title III] and makes it a criminal offense for officers or employees of the United States to intentionally engage in electronic surveillance under color of law *except as specifically authorized in chapter 119 of title III and this title.*” Similarly, both the Senate Intelligence Committee report (p.68) and the Senate Judiciary Committee report (p.61) explain that section 109 was “designed to establish the same criminal penalties for violations of this chapter [FISA] as apply to violations of chapter 119 [title III]. ... [T]hese sections will make it a criminal offense to engage in electronic surveillance *except as otherwise specifically provided in chapters 119 [title III] and 120 [FISA].*” In interpreting what Congress intended by the term “except as authorized by statute,” did the Justice Department know**

of the existence of this Committee Report language? If so, why did the Justice Department not feel compelled to discuss this clarifying language?

The Department was aware of this legislative history, but believes that it in no way alters our analysis of the relationship between the Force Authorization and FISA. To begin with, those passages of legislative history cannot be taken at face value because, as detailed at pages 22 and 23 of the Department's January 19th paper, at the time of FISA's enactment, provisions of law besides FISA and chapter 119 of title 18 authorized the interception of "electronic surveillance" and there is no indication that FISA purported to outlaw that practice. For example, in 1978, use of a pen register or trap and trace device constituted "electronic surveillance" under FISA. While FISA included a pen register provision, Chapter 119 of Title 18 did not. Thus, if the passages of legislative history cited in your question were to be taken at face value, the use of pen registers other than to collect foreign intelligence would have been illegal. That cannot have been the case, and no court has held that pen registers could not be authorized outside the foreign intelligence context. Moreover, it is perfectly natural that the legislative history would mention only FISA and chapter 119, since they were the principal statutes in 1978 that authorized electronic surveillance as defined in FISA.

What this legislative history demonstrates is that Congress knew how to make section 1809(a)(1)'s reference to "statute" more limited if it wished to do so. Indeed, it appears that Congress deliberately chose not to mimic the restrictive language of former 18 U.S.C. § 2511(1). By using the term "statute," Congress made clear that not only the existing authorizations for electronic surveillance in chapter 119 of title 18 and in title 50, but also those that might occur in future statutes, would satisfy FISA. And this flexibility was well-conceived, given that Congress was legislating for the first time in respect to constitutional authority that the President had theretofore exercised alone.

25. The Administration has argued that the NSA's activities do not violate the Fourth Amendment because they are reasonable. Are the intelligence officers who are deciding what calls to monitor the final arbiters of what is "reasonable" under the Fourth Amendment? Who makes the final determination as to what is constitutionally "reasonable"?

Intelligence officers are not making the determination of what is reasonable. The President has indicated that the Program is limited to communications where one party is outside the United States and there are "reasonable grounds to believe" that at least one party is a member or agent of al Qaeda or a related terrorist organization. In light of the paramount government interest in avoiding another catastrophic terrorist attack resulting in massive civilian deaths, this narrowly tailored program is clearly reasonable for purposes of the Fourth Amendment. That conclusion is underscored by the fact that the Terrorist Surveillance Program is subject to review every 45 days to determine whether it continues to be necessary. The role of the intelligence officials is not to revisit the legal conclusion that the program is reasonable, but instead to make a factual determination that the "reasonable grounds" standard is met in a particular instance. The fact that these intelligence officers are experts on al Qaeda, however, does help make the Terrorist

Surveillance Program reasonable. Their expertise minimizes any potential for unnecessary intrusion into the privacy interests of U.S. persons.

- 26. You indicated that “career attorneys” at NSA and Justice approved the program. It has been reported that non-career attorneys at these agencies did not agree. Please identify those who you say approved the program, those who did not approve of it, and the nature of the disagreement.**

This question asks for details about the internal deliberations of and the confidential legal advice delivered within the Executive Branch, and we are not in a position to provide such information.

- 27. How many people within the NSA, DOJ, the White House, or any other federal agency have been involved in the authorization, implementation, and review of the NSA program?**

The President, Vice-President, General Hayden, and the Attorney General have stated publicly that they were involved in the authorization, implementation, and review of the Terrorist Surveillance Program. We cannot provide further information, as it concerns internal deliberations of the Executive Branch and classified information about the program.

- 28. You have mentioned various people in the Intelligence Community who approved of these activities, including the NSA Inspector General. But you have not mentioned the person in that community statutorily assigned to review and assess all such programs -- the Civil Liberties Protection Officer for the Office of the Director of National Intelligence. Does your failure even to mention him mean that you were not aware of his role, that a decision was made not to inform him of the program, or that he was familiar with the program but did not approve of it?**

It may provide some context for this question to note that the Director of National Intelligence was created by statute in December 2004, and the Director position was filled only in April 2005. As stated above, we cannot reveal further details about who was cleared into this Program or the internal deliberations of the Executive Branch.

- 29. You have said that the NSA program is subject to internal safeguards and said it is reviewed approximately every 45 days. Who conducts those reviews? What are the questions they are asked to review and answer? Do they produce any written products? If so, please provide copies.**

The Terrorist Surveillance Program is subject to review by lawyers at the National Security Agency and the Department of Justice. In addition, with the participation of the Office of the Director of National Intelligence and the Department of Justice, the Program is reviewed every 45 days and a decision is made by the President to

reauthorize it. This review includes an evaluation of the Terrorist Surveillance Program's effectiveness and a thorough assessment of the current threat to the United States posed by al Qaeda. We cannot disclose documents generated by these reviews, which involve the internal deliberations and confidential legal advice of the Executive Branch and classified information.

- 30. Do the 45-day reviews include any determination of the effectiveness of the program and whether it has yielded results sufficiently useful to justify the intrusions on privacy? If so, are such determinations based on quantitative assessments of third parties or subjective impressions of the people involved in the surveillance activities?**

As noted above, the 45-day review does account for the effectiveness of the Terrorist Surveillance Program and privacy interests.

- 31. As part of this program, have any certifications been provided to telecommunications companies and Internet Service Providers that "no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required," as set out in 18 U.S.C. § 2511(2)(a)(ii)? If yes, how many were issued and to which companies?**

The question is directed at whether the United States obtains information for the Terrorist Surveillance Program through cooperation with telecommunications companies. We are not able to answer this question because any answer would reveal classified operational details about the Program.

- 32. Can information obtained through this warrantless surveillance program legally be used to obtain a warrant from the FISA Court or any court for wiretapping or other surveillance authority? Can it legally be used as evidence in a criminal case? Has it been used in any of these ways? Has the FISA court or any court ever declined to consider information obtained from this program and if so, why?**

The purpose of the Terrorist Surveillance Program is not to bring criminals to justice. Instead, the Program is directed at protecting the Nation from foreign attack by detecting and preventing plots by a declared enemy of the United States. Because the Program is directed at a "special need, beyond the normal need for law enforcement," the warrant requirement of the Fourth Amendment does not apply. *See, e.g., Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). Because collecting foreign intelligence information without a warrant does not violate the Fourth Amendment, there appears to be no legal barrier against introducing this evidence in a criminal prosecution. We are unable, however, to provide operational details of the Terrorist Surveillance Program, including how the information is used.

33. Are you aware of any other Presidents having authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?

The laws of the United States, both before and after FISA's enactment, have long permitted various forms of foreign intelligence surveillance, including the use of wiretaps, outside the procedures of FISA. If the question is limited to "electronic surveillance" as defined by FISA, however, we are unaware of such authorizations.

34. During the hearing, you have repeatedly qualified your testimony as limited to, e.g., "those facts the President has publicly confirmed," "the kind of electronic surveillance which I am discussing here today," "the program I am talking about," "the program which I am testifying about today," "the program that we are talking about today," "the program that I am here testifying about today," and "the terrorist surveillance program about which I am testifying today." Please explain what you meant by these qualifications. Aside from the program that you testified about on February 6, 2006, has the President secretly authorized any additional expansions or modifications of government surveillance authorities with respect to U.S. persons since September 11, 2001? If so, please describe them and the legal basis for their authorization.

The decision to reveal classified information about the Terrorist Surveillance Program rests with the President. *See Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988). The quoted statements reflect the fact that the Attorney General was authorized to discuss only the Terrorist Surveillance Program and the legal support for that program. He was not authorized to discuss any operational details of the Program or any other intelligence activity of the United States in an open hearing.

35. Has the President taken or authorized any other actions that would violate a statutory prohibition and therefore be illegal if not, under your view of the law, otherwise permitted by his constitutional powers or the Authorization for Use of Military Force? If so, please list and describe those actions, and provide a chronology for each.

Five members of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Force Resolution satisfies 18 U.S.C. § 4001(a)'s prohibition on detention of U.S. citizens "except pursuant to an Act of Congress," and thereby authorizes the detention even of Americans who are enemy combatants. FISA contains a similar provision indicating that it contemplates that electronic surveillance could be authorized in the future "by statute." Section 109 of FISA prohibits persons from "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*" 50 U.S.C. § 1809(a)(1) (emphasis added). Just as the Force Resolution satisfies the restrictions imposed by section 4001(a), it also satisfies the statutory authorization requirement of section 109 of FISA.

We have not sought to catalog every instance in which the Force Resolution or the Constitution might satisfy a statutory prohibition contained in another statute, other than FISA and section 4001(a), the provision at issue in *Hamdi*. We have not found it necessary to determine the full effect of the Force Resolution to conclude that it authorizes the Terrorist Surveillance Program.

We are not in a position to provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program, though our inability to respond should not be taken to suggest that there are such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through briefing the appropriate oversight committees and, in certain circumstances, congressional leadership.

Subject: Draft DOJ responses to SJC QFRs re NSA hearing

From: <Steve.Bradbury@usdoj.gov>

Date: 3/1/06, 7:43 PM

To: [b3 50 USC 3605, 50 USC 3024 (m)(1)]

CC: [b3 50 USC 3605, 50 USC 3024 (m)(1)]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:25:14 EDT 2019

Releasability: Withheld In Part

Reasons for Withholding:

b(3),P3

Notes:

50 USC 3605

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: NSA Terrorist Surveillance Program Panel Discussion
From: "The Federalist Society" <fedsoc@radix.net>
Date: 3/6/06, 8:49 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:25:15 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: WP – Ex–Justice Lawyer Rips Case for Spying
From: "Kavanaugh, Brett M."
Date: 3/9/06, 6:49 AM
To: "Bartlett, Dan", "McClellan, Scott", "Wallace, Nicolle", "Perino, Dana M."

Interesting that he only talks about one of our two [alternative](#) arguments (the statutory argument and not the constitutional), yet the headline implies that he has attacked both arguments. See the below line in the article.

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From: White House News Update [mailto:News.Update@WhiteHouse.Gov]
Sent: Thursday, March 09, 2006 6:37 AM
To: Kavanaugh, Brett M.
Subject: WP - Ex-Justice Lawyer Rips Case for Spying

Ex–Justice Lawyer Rips Case for Spying White House's Legal Justifications Called Weak

By Dan Eggen and Walter Pincus, Washington Post

A former senior national security lawyer at the Justice Department is highly critical of some of the Bush administration's key legal justifications for warrantless spying, saying that many of the government's arguments are weak and unlikely to be endorsed by the courts, according to documents released yesterday.

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The criticism represents an unusual public dissent by a former administration official over the legality of the domestic spying program, which allows the NSA to intercept international communications involving U.S. citizens and residents without warrants. The program, approved by President Bush in October 2001, was first revealed publicly in media reports in December and has been the focus of furious political battles since then.

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"Numerous lawyers with knowledge of the terrorist surveillance program have concluded that the program is being conducted in accordance with the law," Roehrkasse said.

Kris acknowledged in his paper that many facts about the program are not known, suggesting that he was not briefed on the NSA program despite his senior position at Justice during the first two years of its existence. But he says that many of the key arguments made by the Justice Department in favor of the program's legality do not hold up under scrutiny.

"In sum, I do not believe the statutory law will bear the government's weight," Kris wrote in his paper, dated Jan. 25. ". . . I do not think Congress can be said to have authorized the NSA surveillance."

Kris refrains from passing final judgment on the government's constitutional argument, however, saying that more facts need to be known to reach a conclusion. The Justice Department says in its own "white paper" that the Foreign Intelligence Surveillance Act, which governs clandestine surveillance within the United States, must be unconstitutional if it conflicts with the president's inherent authority during war.

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Subject: Re: WP – Ex–Justice Lawyer Rips Case for Spying
From: "Perino, Dana M."
Date: 3/9/06, 6:50 AM
To: "Kavanaugh, Brett M."

Do you know if he was political appointee or career?

-----Original Message-----

From: Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>
To: Bartlett, Dan <Dan_Bartlett@who.eop.gov>; McClellan, Scott <Scott_McClellan@who.eop.gov>; Wallace, Nicolle <Nicolle_Wallace@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>

Sent: Thu Mar 09 06:49:35 2006
Subject: FW: WP – Ex–Justice Lawyer Rips Case for Spying

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Sent: Thursday, March 09, 2006 6:37 AM
To: Kavanaugh, Brett M.
Subject: WP – Ex–Justice Lawyer Rips Case for Spying

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Subject: RE: WP – Ex–Justice Lawyer Rips Case for Spying
From: "Kavanaugh, Brett M."
Date: 3/9/06, 7:10 AM
To: "Perino, Dana M."

Not sure. I have known him for a pretty long time (we both clerked for different judges on 9th Circuit in 1991–92), but I am not sure what his political affiliation is and I am not sure whether this position was political or career.

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RE: WP - Ex-Justice Lawyer Rips Case for Spying

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Subject: Terrorism Surveillance: The Legal Limits
From: "The Federalist Society" <fedsoc@radix.net>
Date: 3/9/06, 7:37 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:25:16 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: A Federalist Society Panel Discussion: 03/14/06, The NSA's Terrorist Surveillance Program

From: "Cato Institute" <rsvp@fed-soc.org>

Date: 3/10/06, 7:01 PM

To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Mon Apr 08 17:25:17 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Terrorism Surveillance Panel Tomorrow
From: "The Federalist Society" <fedsoc@radix.net>
Date: 3/13/06, 3:08 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Apr 09 17:12:33 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: Providence Journal – Chafee refuses to rule out voting to censure Bush
From: "Gottesman, Blake"
Date: 3/16/06, 9:34 AM
To: "Kavanaugh, Brett M."

[glad he's sitting 8 seats down from potus in the cabinet rm right now ...](#)

"Chafee said he does not rule out an eventual decision to back the censure resolution, introduced Monday."

From: White House News Update [mailto:News.Update@WhiteHouse.Gov]
Sent: Thursday, March 16, 2006 9:22 AM
To: Gottesman, Blake
Subject: Providence Journal - Chafee refuses to rule out voting to censure Bush

Chafee refuses to rule out voting to censure Bush

Like the Democratic senator who initiated the proposal, the Rhode Island Republican believes the president's decision to initiate wiretaps without court orders was illegal and says he looks forward to the debate on the program that will likely ensue.

BY JOHN E. MULLIGAN, PROVIDENCE JOURNAL

WASHINGTON -- Sen. Lincoln D. Chafee, who cast a protest vote against President Bush's reelection in 2004, says he won't rule out support for what he calls the "drastic" penalty of a formal Senate censure of Mr. Bush.

Chafee agrees with Sen. Russell D. Feingold that the president acted illegally when he launched an antiterrorism program of warrantless wiretaps of some U.S. citizens, he said Tuesday. But Chafee, a Republican, currently does not support the Wisconsin Democrat's proposal to punish the president with a censure, he said.

"Everything should occur in steps," Chafee said in an interview citing, for instance, the Senate Judiciary Committee's hearings on the wiretapping program.

Chafee was asked whether those steps might lead to a censure of Mr. Bush that he would support. "I know you want me to go there," Chafee said, but he did not answer the question directly.

However, Chafee said he does not rule out an eventual decision to back the censure resolution, introduced Monday. He also welcomed the public argument that Feingold has spurred about the surveillance program. "You just don't hear it -- any outrage, or questioning of it, or even support," Chafee said, referring to what he considers to be a dearth of debate in Rhode Island about the wiretapping.

Chafee has jumped into a debate that Feingold's fellow Democrats have treated with uneasiness at a moment when polls show most Americans supporting the wiretap program -- even as they give Mr. Bush low approval ratings overall.

Some of Chafee's fellow Republicans, meanwhile, have treated Feingold's measure as a chance to portray the maverick liberal as a politically driven presidential hopeful -- and his party as so inimical toward Mr. Bush that it goes to extremes.

Mr. Bush's secret National Security Agency program eavesdrops without court permission on overseas phone calls and emails involving U.S. citizens and persons suspected of terrorist activities. The program became public late last year.

Senate Majority Leader Bill Frist sought Monday to capitalize on the Democrats' discomfort with Feingold's resolution by calling for an immediate vote. But Democratic leaders blocked the potentially embarrassing tally. Censure -- a symbolic Senate resolution of condemnation -- has been invoked against only one president, Andrew Jackson.

Chafee, a maverick liberal who faces a primary challenge from Cranston Mayor Stephen P. Laffey, votes against Mr. Bush more than any Senate Republican. He was the only Senate Republican to oppose the congressional resolution in 2002 authorizing Mr. Bush to use force against Iraqi dictator Saddam Hussein.

Chafee also wavered in his support of Mr. Bush's reelection, endorsing the president, then withdrawing his endorsement and, finally, announcing that he had cast his ballot in the November 2004 election for former President George H.W. Bush as a symbolic protest.

Chafee drew some national attention when he said Monday that Feingold's censure resolution would be " 'positive' if it fueled debate over the legality of some policies in the war on terrorism," according to the Milwaukee Journal-Sentinel.

After that report was published Tuesday, Chafee spokesman Stephen Hourahan said the senator's comment was taken out of context. Chafee's Senate reelection campaign issued a statement from the senator that said in part:

"As I travel around Rhode Island, I am surprised by the lack of discussion on the proper balance between civil liberties and national security. While I do not agree with Senator Feingold's motion to censure the president, I believe in the need for a vigorous dialogue about this proper balance."

The Wisconsin newspaper said its tape recording of Chafee's remarks Monday went as follows:

"At least it's accomplishing getting it into the public awareness. Because nobody, in Rhode Island anyway, is talking about the issue. And I think that's positive. The American public -- if they're going to make a decision to allow illegal activity because we're in a war on terror, then I think that's an important debate we should be having," said Chafee in reference to the Bush administration.

Laffey said yesterday in a statement: "Let's be clear: it's a very bad idea to censure the president over a policy dispute, and it's a very bad thing for Rhode Island to have a senator who switches his position on such a basic issue within 24 hours."

When Chafee was interviewed in January about the wiretaps program, he criticized it but said he would draw no conclusions about its legality or constitutionality until the Senate Judiciary Committee

completed its inquiry.

Why, Chafee was asked Tuesday, has he come to the conclusion that the program is illegal, with the committee's inquiry still under way?

Chafee answered by reiterating his initial criticism of the program. "From what I've seen," he said, the wiretap program "is outside the parameters" of the Constitution's ban on unreasonable searches and existing law governing such programs.

Chafee also said that he believes Senate Judiciary Committee Chairman Arlen Specter, another Republican who sometimes votes against his party leadership, is keeping censure of Mr. Bush on the table as an option.

Specter told reporters yesterday that Feingold's censure resolution will be referred to his committee today and "held over" without any action.

"It's out of line," Specter said of the censure resolution, "it's over the top, it's out of bounds."

jmulligan@belo-dc.com / (202) 661-8423

Online at: http://www.projo.com/news/content/projo_20060316_chafee16.180d8471.html

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Subject: interesting read
From: "Gottesman, Blake"
Date: 3/18/06, 3:57 PM
To: "Kavanaugh, Brett M.", "Michel, Christopher G.", "Bartlett, Dan"

(i figure you get these, but not sure if you delete or skim them all.)

From: White House News Update [mailto:News.Update@WhiteHouse.Gov]
Sent: Saturday, March 18, 2006 3:55 PM
To: Gottesman, Blake
Subject: AP - Bush Using Straw-Man Arguments in Speeches

Bush Using Straw-Man Arguments in Speeches

By JENNIFER LOVEN

WASHINGTON (AP) – "Some look at the challenges in Iraq and conclude that the war is lost and not worth another dime or another day," President Bush said recently.

Another time he said, "Some say that if you're Muslim you can't be free."

"There are some really decent people," the president said earlier this year, "who believe that the federal government ought to be the decider of health care ... for all people."

Of course, hardly anyone in mainstream political debate has made such assertions.

When the president starts a sentence with "some say" or offers up what "some in Washington" believe, as he is doing more often these days, a rhetorical retort almost assuredly follows.

The device usually is code for Democrats or other White House opponents. In describing what they advocate, Bush often omits an important nuance or substitutes an extreme stance that bears little resemblance to their actual position.

He typically then says he "strongly disagrees" – conveniently knocking down a straw man of his own making.

Bush routinely is criticized for dressing up events with a too-rosy glow. But experts in political speech say the straw man device, in which the president makes himself appear entirely reasonable by contrast to supposed "critics," is just as problematic.

Because the "some" often go unnamed, Bush can argue that his statements are true in an era of blogs and talk radio. Even so, "'some' suggests a number much larger than is actually out there," said Kathleen Hall Jamieson, director of the Annenberg Public Policy Center at the University of Pennsylvania.

A specialist in presidential rhetoric, Wayne Fields of Washington University in St. Louis, views it as "a bizarre kind of double talk" that abuses the rules of legitimate discussion.

"It's such a phenomenal hole in the national debate that you can have arguments with

nonexistent people," Fields said. "All politicians try to get away with this to a certain extent. What's striking here is how much this administration rests on a foundation of this kind of stuff."

Bush has caricatured the other side for years, trying to tilt legislative debates in his favor or score election-season points with voters.

Not long after taking office in 2001, Bush pushed for a new education testing law and began portraying skeptics as opposed to holding schools accountable.

The chief opposition, however, had nothing to do with the merits of measuring performance, but rather the cost and intrusiveness of the proposal.

Campaigning for Republican candidates in the 2002 midterm elections, the president sought to use the congressional debate over a new Homeland Security Department against Democrats.

He told at least two audiences that some senators opposing him were "not interested in the security of the American people." In reality, Democrats balked not at creating the department, which Bush himself first opposed, but at letting agency workers go without the usual civil service protections.

Running for re-election against Sen. John Kerry in 2004, Bush frequently used some version of this line to paint his Democratic opponent as weaker in the fight against terrorism: "My opponent and others believe this matter is a matter of intelligence and law enforcement."

The assertion was called a mischaracterization of Kerry's views even by a Republican, Sen. John McCain of Arizona.

Straw men have made more frequent appearances in recent months, often on national security – once Bush's strong suit with the public but at the center of some of his difficulties today. Under fire for a domestic eavesdropping program, a ports-management deal and the rising violence in Iraq, Bush now sees his approval ratings hovering around the lowest of his presidency.

Said Jamieson, "You would expect people to do that as they feel more threatened."

Last fall, the rhetorical tool became popular with Bush when the debate heated up over when troops would return from Iraq. "Some say perhaps we ought to just pull out of Iraq," he told GOP supporters in October, echoing similar lines from other speeches. "That is foolhardy policy."

Yet even the speediest plan, as advocated by only a few Democrats, suggested not an immediate drawdown, but one over six months. Most Democrats were not even arguing for a specific troop withdrawal timetable.

Recently defending his decision to allow the National Security Agency to monitor without subpoenas the international communications of Americans suspected of terrorist ties, Bush has suggested that those who question the program underestimate the terrorist threat.

"There's some in America who say, 'Well, this can't be true there are still people willing to attack,'" Bush said during a January visit to the NSA.

The president has relied on straw men, too, on the topics of taxes and trade, issues he hopes will work against Democrats in this fall's congressional elections.

Usually without targeting Democrats specifically, Bush has suggested they are big-spenders who want to raise taxes, because most oppose extending some of his earlier tax cuts, and protectionists who do not want to open global markets to American goods, when most oppose free-trade deals that lack protections for labor and the environment.

"Some people believe the answer to this problem is to wall off our economy from the world," he said this month in India, talking about the migration of U.S. jobs overseas. "I strongly disagree."

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Subject: Fwd: Yale Speech

From: "Calabresi Steve" <s-calabresi@law.northwestern.edu>

Date: 3/22/06, 4:25 AM

To: "Cass Sunstein" <csunstei@uchicago.edu>, "William Eskridge" <william.eskridge@yale.edu>, <ekagan@law.harvard.edu>

CC: "Kavanaugh, Brett M.", <csunstei@uchicago.edu>, <camara@stanford.edu>, <paul@paultopia.org>, <sprakash@sandiego.edu>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Apr 09 17:12:35 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

From: "Kavanaugh, Brett M."
Date: 3/22/06, 7:42 PM
To: "Ed Whelan" <ewhelan@eppc.org>

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Date created: Tue Apr 09 17:12:35 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

PRM

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Denver Post EDITORIAL re: President is not above the law
From: "Mamo, Jeanie S."
Date: 4/3/06, 1:01 PM
To: "Gerry, Brett C.", "Dixton, Grant", "Kavanaugh, Brett M."

Is there anyone who could respond to this? any third parties?

President is not above the law

April 2, 2006

Maybe being president just goes to your head. Why else is George Bush signing bills into law accompanied by statements suggesting he can ignore certain provisions if he chooses?

The president's latest "signing statement" came March 9 with renewal of the Patriot Act, the law that provides government with broad surveillance powers. Patriot II was enacted by Congress after a long battle with the White House over expanded law enforcement powers. To obtain passage, the administration agreed to oversight provisions that included reporting to Congress.

On signing the bill, however, Bush quietly issued a statement asserting that he had the authority to ignore the oversight rules. He said he'd construe the act "in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative process of the executive, or the performance of the executive's constitutional duties."

Last year, Congress passed a law outlawing the torture of detainees in U.S. custody. Bush signed the legislation even though Congress did not include a provision he wanted giving the president the power to waive the torture ban. But never mind. His signing statement suggested he could bypass the law anyway, prompting Senate Democratic leader Harry Reid to say, "President Bush continues to believe he's above the law and above the Constitution ... \[that the\] unitary executive president can pick and choose which laws he will follow."

This calls to mind the current debate on the National Security Agency eavesdropping on domestic calls. Bush has declared that he can authorize such surveillance without court warrants mandated by law.

Signing statements are not new. Past presidents have issued them on occasion. While the Constitution doesn't mention them, it does say the president "shall take care that the laws be faithfully executed." It doesn't say the president has the power to ignore provisions he doesn't like.

This president has taken signing statements to a new level, issuing more than 100 statements challenging more than 500 provisions of bills passed by Congress and signed into law. Instead

of signing statements, Bush should be vetoing bills he objects to, or working with Congress to make changes in legislation he doesn't like. Bush has never vetoed a bill.

And where is Congress? Lawmakers so far have responded with only a whimper, refusing to defend the concept of checks and balances and the constitutionality of their role as a co-equal branch of government. They need to step up and assure that the presidency does not operate above the law.

From: "Brown, Jamie E."
Date: 4/27/06, 3:21 PM
To: "Kavanaugh, Brett M.", "Kristi Remington \"(Kristi.L.Macklin@usdoj.gov)\"
<Kristi.R.Macklin@usdoj.gov>

Attached is the unofficial transcript of today's Committee Business Meeting. I'm sorry that the transcript will not reflect Leahy's dramatic pauses and other rhetorical flourishes.

— Attachments: —

0427SJUX.RTF

108 KB

COMMITTEE BUSINESS

- - -

THURSDAY, APRIL 27, 2006

United States Senate,
Committee on the Judiciary,
Washington, D.C.

The Committee met, pursuant to notice, at 9:35 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Kyl, DeWine, Sessions, Graham, Brownback, Leahy, Kohl, Feinstein, Feingold, and Durbin.

Chairman Specter. It is 9:35. Senator Durbin has just arrived. Would the staffers of the other Senators please call their principals and ask them to come so we can have our quorum.

[Pause.]

Chairman Specter. It is 9:40. We have four Senators present. Would staffers notify your principals? We need to get Senators here so we can transact business. Senator Durbin and I have wasted 10 minutes. Senator Feinstein and Senator Leahy have waited 7 minutes.

Senator Leahy. There are three others out in the outer office trying to get people to come. That is why we have three times more Democrats here than Republicans.

[Laughter.]

Senator Leahy. Those 3 minutes I was on the phone.

Chairman Specter.I am glad your majority is limited to just attendees of this meeting.

Senator Leahy.I do agree, for whatever it is worth on this side of the aisle, I agree with the Chairman.We can get a lot done if people show up, and I know he has his cutoff in a few minutes and we will leave.

Chairman Specter.The Ranking Members asks how long I am going to wait before leaving.I am going to wait 7 more minutes, and if we do not have a quorum, I am going to disband the meeting.

Senator Leahy.Can I make a couple comments in that time?

Chairman Specter.Sure.

Senator Leahy.I would note with some sadness that Helaine Greenfeld is leaving our Judiciary Committee staff.She thinks it would be more fun to be with her children than with us.But she has served as our senior nominations counsel for 5 very busy years with extraordinary activities on judicial and executive nominations, including three recent Supreme Court nominations. I know that I speak for the members of the Committee on both sides of the aisle when I offer our thanks for a job well done.

Chairman Specter.Let me interrupt you, Patrick, just for a minute so the staffers can notify their principals that if we do not have a quorum by 10 of, I am going to extend the 5-minute rule from quarter of to 10 of.If we do not have a quorum by 10 of, we are going to recess the Executive Committee meeting.

Senator Leahy.Thank you, Mr. Chairman.

We are going to miss Helaine's leadership on issues important to the Committee and the Nation. She is a consummate professional. She brought her experience, her good judgment, her humanity to these matters. She came here having already served 7 years at the Department of Justice working in the Office of Policy Development. She joined our staff in 2001 during a volatile period that Senator Daschle describes in his book, "Like No Other Time."

We have been productive and fair with her help. I know when I chaired the Committee over 17 months, the Senate confirmed 100 lifetime appointments to our Federal courts. We broke through the longstanding logjams on a number of circuit courts. And we proceeded to reduce vacancies to the lowest level in decades.

Most of all, I will miss the qualities she possesses in unusual abundance--her judgment and quick wit--which have helped navigate the often partisan shoals of the confirmation process. I appreciate all her efforts. I wish her continued success and happiness. She and Richard and Jake and Abby are a delight. We consider them part of our extended Leahy family. Helaine's work has contributed to the fabric but also the history of the Senate and this Committee.

So, Helaine, I thank you very, very much.

[Applause.]

Chairman Specter. I had hoped to debate and vote out the legislation on the Oil and Gas Industry Antitrust Act of 2006, obviously a very pressing issue which Congress ought to be acting

on. It has a number of very important provisions. And I had wanted to vote out the NSA bills, although there is some thought that that is premature. And we have five judges who are available for reporting out without controversy. So we have a considerable amount of business to transact.

Senator Durbin has asked about the Prosecutors and Defenders Incentive Act of 2005, which I would like to get to as well. It is not at the top of the agenda, but when we move on other matters which are higher on the agenda, it gives us room to move on Senator Durbin's bill, which I favor, as well as some other bills which are stacked up.

Senator Leahy. Mr. Chairman, the Oil and Gas Industry Antitrust Act is extremely important. When--

Chairman Specter. Senator Leahy, we now have seven members here, so we can start to talk about that.

Senator Leahy. Thank you. Mr. Chairman, I would like to say--
Chairman Specter. We have enough to vote now.

Senator Leahy. It is a NOPEC legislation. It has been previously reported by this Committee three times. It has been passed by the Senate. During the years that we have been seeking action to make OPEC oil cartel's anti-competitive behavior accountable, the other body has refused to act. But these provisions would allow the Justice Department to crack down on illegal price manipulation by oil cartels.

Now, I do not think anyone doubts that the price of a gallon

of gas on Main Street in any of our communities we represent is affected by such conduct. I know it is. And certainly when I go home, when I am filling up my own car at the gas pump, I hear from a lot of other people who are filling up theirs how they feel. And I understand how extremely frustrated they are. Our bill would allow the Federal Government to take legal action against any foreign state, including members of OPEC, for price fixing and other anti-competitive activities. This is a tangible, meaningful step that we can take today--not 5 years from now--that can help deter OPEC from withholding oil supplies and lower the price of gasoline at our pumps.

When President Bush took office, Americans could fill their cars, heat their homes, and run their businesses on gasoline that cost \$1.45 per gallon. In less than 6 years, the fuel prices have skyrocketed more than 100 percent. Over the years I have warned about a gallon of gasoline costing \$2.50 or \$3. Now we can \$4-a-gallon gasoline.

Earlier this week, Senator Kohl and I sent the President a letter, urging him to join with us to enact the NOPEC bill and curtail anti-competitive behavior by the oil cartels. It is time to join in a bipartisan coalition to say "No" to OPEC. President Bush promised back in the 2000 election to "jawbone OPEC." I think now we need a lot more than friendly talk, not just hand-holding. We need action. I would ask that a copy of our letter be made part of the record.

Chairman Specter. Without objection, it will be made a part of the record.

Senator Leahy. I would hope that we might get it on the Senate floor and enacted along with Senator Cantwell's bill against price gouging and Senator Dorgan's bill regarding a windfall profits tax. I have more that I will say. I will put the rest of my statement in the record.

I was on a talk show this morning in Vermont. This is the issue on people's minds, but I suspect it would be the same thing in Illinois or Pennsylvania or Ohio or anywhere else.

[The prepared statement of Senator Leahy follows:]

Chairman Specter. I will in a moment recognize Senator DeWine, Chairman of the Antitrust Subcommittee, but first, since we have ten here, I want to act on the agenda which requires a quorum. At the request of Senator Feinstein, we will not take up the nomination of Norman Smith for the Ninth Circuit. There is an issue as to Idaho versus California, and Senator Feinstein has said she would be relatively satisfied if we take it up next week as opposed to this week.

Senator Feinstein. I do not want you to misunderstand me. Satisfaction is "like not to happen."

[Laughter.]

Senator Feinstein. But gratitude is profound for the week's delay.

Chairman Specter. Well, let me state the proposition with more specificity. Senator Feinstein raised the issue on the merits, and I said, well, let's take it up and decide it. She does not want to take it up. "Can we postpone it?" I said, "Will it make you happy if we postpone it for a week?" And she said, "I wouldn't say it would make me happy." I said, "Well, would you be satisfied if we postponed it for a week?" And I think I got an affirmative answer to that.

Senator Feinstein. You got a smile.

[Laughter.]

Chairman Specter. With Senator Feinstein, that is worth a lot. We will hold it over for one week, but we will take it up

next week.

We are ready to move on the nominations of Michael Barrett, Brian Cogan, Tom Golden, Timothy Junker, and Patrick Smith. Any objection?

Senator Leahy. Mr. Chairman, we would have no objection to those being done en banc and with a voice vote.

Chairman Specter. All in favor, say aye?

[A chorus of ayes.]

Chairman Specter. Opposed, no?

[No response.]

Chairman Specter. The ayes appear to have it. The ayes do have it.

As to the nomination of Brett Kavanaugh for the D.C. Circuit, there had been a request for an additional hearing, and I said that I would be agreeable to an additional hearing if it would do any good. But if we are going to have a party-line vote on it, I am not inclined to have an additional hearing on it. And it appears to me we are heading for a party-line vote on Committee. Senator Leahy?

Senator Leahy. Mr. Chairman, on Mr. Kavanaugh, a number of troublesome things have happened since he came up here before. One, we had a number of members of this Committee who were not here when the first hearing was held, and under a normal practice, we would have a second hearing unless people take the attitude that if the President nominates somebody, they simply rubber

stamp it. You know, instead of advise and consent, it is nominate and rubber stamp. In that case, of course, the die is cast and actually our Committee becomes totally irrelevant. But he took 7 months to answer questions before, and then I think by any fair statement, he did not answer the questions that were submitted to him.

The ABA has downgraded his rating. Certainly that--I can think of only one other time that comes to mind over 30 years when that has happened. When it did happen, the person was not confirmed. And I worry that he is not getting the kind of careful attention he should. He did not give complete and forthright answers to the Committee. As I said, he delayed providing any answers at all to written questions for 7 months.

New and significant questions have arisen that deserve answers relating to his knowledge and involvement in the President's illegal domestic spying program and the detainee policies, and some of the recent scandals plaguing the White House. We have asked twice for a second hearing on this.

We initially made the request in a letter on May 11, 2005. After we sent that letter, his nomination was returned by the Senate to the White House at the end of the first session of this Congress. We had hoped the President would consult with Senators and local officials in the District of Columbia before sending somebody. That did not happen. We made these requests because of the invasive, incomplete answers, the 7-month delay, and so on.

As Associate White House Counsel and staff secretary, he has been there in the inner circle. We want to know what was his role in connection with the warrantless spying on Americans. What about the detainee treatment and interrogation? What was his involvement in connection with military tribunals, torture, and secret rendition of prisoners to other countries so that they could be tortured? What kind of a role did he have in connection with the actions of Jack Abramoff or Michael Scanlan or David Safavian? These are people he worked with. I think before we give a lifetime position, I think it is legitimate to ask him just what was his involvement, but ask him under oath. We know the last time he wouldn't answer questions.

I think now in light of the ABA downgrading him, we ought to at least have him come in and ask him, okay, you were in the inner circle working with these people who have been indicted or in some cases convicted. You were in there involved in the rendition of people by the United States to be sent to other countries so they could be tortured.

These are the kind of questions that especially when some of these issues are going to come before that very same court, we ought to at least ask him to what extent he was involved in torture and issues like that. I mean, this is the United States of America. We stand for much higher principles than that. And before we put somebody on the second highest court of the land, we ought to know what he did in those areas, especially if he

may be involved in ruling on those areas. So I really think we should have a second hearing.

Now, some people feel they just make up their mind and the President nominates and you vote, you do not even have to have a hearing. That is not the tradition of this Committee. That is not the way it should be. As I mentioned, the 17 months that I was Chairman with the Bush administration, I moved more judges faster than at any other time, Bush administration nominees. I broke the logjam that had been created by the Republicans during the Clinton years. I broke that. I tried to show my bona fides. But I expected to at least have hearings on them.

I think Mr. Kavanaugh has serious questions to answer before we give him a lifetime appointment to the second most important court in this Nation.

Chairman Specter. Thank you, Senator Leahy. The issues which you have raised have been inquired into by this Committee. You talk about something like NSA. You had the Attorney General in. The answers weren't satisfactory, in my opinion, but Mr. Kavanaugh is not going to shed any light on that subject. You talk about the issue of torture. Again, we had the Attorney General subjected to those questions.

I am perfectly willing to have an additional hearing for Mr. Kavanaugh if there is any indication that there would be a listening, if there is any point in it. The arguments which you raise I respect, and I would expect to hear them before you

cast a no vote on Brett Kavanaugh. We just have too many things to do to engage in hearings which are futile. That is my view. I may be wrong, but the lines are hard as to Kavanaugh because of his White House background and because he was on Ken Starr's staff. Let's face the facts. And the ultimate question we are going to see is what is going to happen on the floor.

We just have too much work to do that is too important to have futile hearings, so we will hold over Brett Kavanaugh and you and I will discuss it further. We do not often disagree.

Senator Leahy. No, we do not, and you know I have a great deal of not only respect but affection for you. We have been friends long before either one of us came to the Senate. But I do worry--I mean, it is an extraordinary thing, the lowering of the ABA standard, the things that have come to light about the rendition of people for torture, Abramoff. All these are new things. He was at the inner circle on every one of these issues. I think it is legitimate to ask him. You know, he might be a very nice, personable young man. But he has been downgraded by the ABA. He has been involved in the inner circle on torture and other issues. I think for the sake of the Committee and the sake of the Senate we should ask. But you are the Chairman, and, of course, I will respect whatever decision you make.

Chairman Specter. Well, I agree with you about the need for inquiries into rendition and also as to Abramoff, but I do not think that relates here. But as I say, we will talk about it some

more, but for the moment he is held over.

Senator Durbin. Mr. Chairman, may I ask a question, please?

Chairman Specter. Yes, you may.

Senator Durbin. A very brief question. So is it my understanding that we will have an additional hearing on Mr. Kavanaugh?

Chairman Specter. No, that is not what we are going to do. My inclination is not to, but I am going to talk to the Ranking Member about it further.

Senator Durbin. Thank you. I might ask the Chairman, in light of the uncertainty, I am going to prepare some questions for Mr. Kavanaugh that address some of the issues that have been raised here. So I do not know if others want to avail themselves of the same opportunity. But perhaps--

Chairman Specter. Senator Durbin, I think if you have additional questions for him, that would be entirely appropriate to prepare the questions and submit them. I think that is an appropriate thing to do.

Senator DeWine, we are returning to the legislation on antitrust as to the oil and gas industry. You are recognized.

Senator DeWine. Mr. Chairman, I will be very brief. I know we have a long agenda today. I want to talk very briefly on S. 2557, which is the bill that you have introduced and I have cosponsored and others have cosponsored, the Oil and Gas Industry Antitrust Act of 2006.

First, a general comment. I believe that we need in this

country to develop alternative fuels so that we can limit our dependence on foreign oil. That clearly means developing more fuel cells, biomass, wind power, solar, clean coal as well. If we can improve our alternative energy sources and increase our conservation efforts, we are certainly going to make progress and offer much needed relief to consumers at the pump.

But in the meantime, I am pleased to be a cosponsor of this bill. This bill has in it something that Senator Kohl and I first introduced, I believe, Senator Kohl, in 2000, June of 2000. So we had this idea and others had this idea a long time ago. This is something this Committee passed out I think a couple times. It is something that the Senate passed once, so we have the Senate behind it, and this is what you referenced, Mr. Chairman, a moment ago, which is the NOPEC bill. And it makes it--it is pretty simple. It simply makes it clear that the Justice Department has the authority to prosecute members of OPEC for their flagrant violation of the antitrust laws. It does not require the Justice Department to do this. I want to make that very clear. It does not require Justice to do it. It just clarifies any ambiguity in the law and says that the Justice Department can, in fact, do that.

If companies in the United States were doing what OPEC is doing today, they could be hauled into court, and they are in clear violation of the law. You cannot set prices; you cannot fix prices; you cannot conspire to set prices. That is what OPEC is doing. And for some reason we tolerate that. We tolerate that.

We tolerate that under the theory that they are acting in a governmental fashion. You know, go back to law school where you make the distinction between governmental action and proprietary action.

Well, clearly they are not acting as a government when they go about fixing prices. They are in the business. And so what this bill does is it simply makes that distinction very clear and says to the Justice Department you can go after them.

I think just the deterrent effect, Mr. Chairman, of having this into law would be very significant. Day after day, right in the open, in public meetings and press releases, OPEC nations illegally fix prices on crude oil. Day after day, those fixed prices means that American consumers pay higher prices for gas and home heating oil than they should. We managed to pass the NOPEC bill last year in the Senate, but unfortunately it was removed from the energy bill in conference.

I just congratulate you, Mr. Chairman, for putting it in your bill. I look forward to working with my colleagues here on this Committee to getting your bill passed.

Chairman Specter. Thank you very much, Senator DeWine.

I have some extensive comments to make in support of the bill, which I am going to withhold. I would like to turn now in the interest of moving the agenda--there are other items I would like to get to and turn to anyone who is opposing the bill. The bill has quite a number of cosponsors. It has six cosponsors on

the Committee, and I would like to pass it out as soon as we can, if that is to be the will of the Committee. So I would like to turn to anybody who wants to speak in opposition.

Senator Leahy. Mr. Chairman, I am not going to speak in opposition. I have polled our side. We are all prepared to vote for it today and move it out of Committee, all the Democrats are.

Chairman Specter. With no one stepping forward to speak in opposition, does anyone else want to speak?

Senator Sessions. Mr. Chairman?

Chairman Specter. Senator Sessions?

Senator Sessions. I absolutely agree with Senator DeWine that something is amiss and there has been some sort of disconnect in our policy for decades now in dealing with a cartel. This cartel meets and, in effect, it decides how much it is going to tax the American consumer. Much of the oil produced in the Middle East and OPEC nations can be produced for \$5 or less a barrel. And so now we are \$70-plus a barrel.

How much of that is due to their refusal to produce more oil for political or price reasons, and how much is due to a surge in demand and some lag time in production, I am not prepared to say. But it does strike me that we have a political and a national interest in confronting a cartel that is setting prices. It not only affects the American consumers but really consumers all over the world, poor nations, developing nations that have a

very hard time getting by.

I also am very concerned and sincerely believe that economic forces are such that we do not have the level of competition we need in our domestic oil companies. Consolidation has continued apace. I think it is very worthwhile for us to study whether or not they have sufficient interest in bringing on new sources of energy, oil and gas. One reason they are not doing so is because the Congress continues to block it. We blocked Alaska. We blocked the Gulf Coast. We blocked a lot of other areas that should have been produced, and the world would be a lot different today had that not happened.

However, I am not sure that those companies under the present market structure would do better by bringing on more sources of oil or just to continue to sell their existing reserves at extraordinarily high prices. I mean, I do not know. It is a complex matter.

I saw in the legislation--

Chairman Specter. Senator Sessions, may I interrupt you? We have ten members here, so I am anxious to move ahead.

Senator Sessions. Well, I am just going to say, Mr. Chairman, the only thing--I am not sure that I object to the bill, but it has some breathtaking language in it in dealing with this subject. It says it is unlawful for anyone to sell or export or divert existing supplies of petroleum with the intention of increasing prices. I mean, that is what the futures market is

all about. So my only concern in asking that we take a look at the language in the bill was a concern over does that language have the effect of eliminating a futures market, which I think most economists think probably is a net plus for economic production as a whole. And some of the breadth of the language there was a concern to me, and I have not had a chance to look at it. I think for that reason we ought to study it and move forward.

But I do share the concern that something is amiss here in both our inability to confront OPEC and I am concerned for reasons that I could not begin to fully articulate, we do not have enough competition domestically, and that has a tendency to adversely impact the price to the American consumer. And I think our primary responsibility is to maintain an open, competitive playing field so that the consumer has the best possible chance to get the lowest price.

Chairman Specter. Senator Sessions, the provisions you refer to would require proof of an intent to raise prices. It would not affect people who are on the market who engage in futures. But I think you raise a valid point, and this language will be studied, and I would be glad to sit down with you and work it through. The Majority Leader is anxious to have the bill on the floor, and we all know what is happening in America today, what is on the front page of the Washington Post. Some of the best-looking Senators, five of them, are on the front page of the Post in front of an Exxon sign.

[Laughter.]

Chairman Specter. And I think America would like to see us move this bill out of Committee and would like--

Senator Sessions. If you and the Majority Leader feel like it is important to move the bill forward--

Chairman Specter. Yes, he does.

Senator Sessions.--I do support the concept behind it, and we will discuss the language. I just have not had a chance to look at it, and I would withdraw my objection.

Senator Durbin. Mr. Chairman?

Chairman Specter. Senator Durbin, briefly.

If the President is right and we are addicted to oil, then what we are doing here is complaining about price-fixing by the drug dealers instead of addressing the addiction itself. And I am also concerned that to vent our frustration over oil prices, we are focusing a lot of attention on OPEC that should be focused as well on American oil companies.

Between 1991 and 2000, there were over 2,600 mergers, acquisitions and joint ventures in the U.S. petroleum industry. We are now down to the big five when it comes to oil companies. Exxon acquired Mobil in 1999. British Petroleum and Amoco formed BP-Amoco in 1998 and then acquired ARCO. In 2001, Chevron-Texaco was formed. It appears that the Antitrust Division at the Department of Justice was asleep at the switch, as we saw this concentration of ownership take place in America.

So I am glad that we address these issues. I think we are venting our frustration. I don't believe that OPEC is going to change their policies simply because we pass this law. They will just fight us in court forever while we continue to show this addiction to oil and really shirk our responsibilities in changing our energy policy. I support the bill, but I hope we will do a lot more.

Senator Feinstein. Mr. Chairman?

Chairman Specter. All those in favor of the bill, say--

Senator Feinstein. Mr. Chairman, may I say just one thing quickly?

Chairman Specter. One thing.

Senator Feinstein. Senator Durbin correctly raised the 2,600 mergers. I think it has to be said that the GAO studied these mergers, eight of them, since 1991. In a majority of them, gas prices went up after the merger. So what you have today is an oligopoly, effectively, and I think it is disastrous for the American people.

I just want to commend you for taking this step, Mr. Chairman. I think it is very important.

Chairman Specter. Thank you very much, Senator Feinstein.

All in favor of the bill, say aye.

[A chorus of ayes.]

Chairman Specter. Opposed, no.

[No response.]

Chairman Specter. The eyes appear to have it. The eyes do have it.

We are in a position to move S. 2292 by agreement, a bill to provide for the relief of the Federal judiciary from excessive rent charges. Let me just note here that this is a bill pushed by Judge Becker, who has worked with us on the asbestos issue. Let me also note that Judge Becker is not too well at the moment. If anybody has a spare telephone call, I will give you his number.

Let us now move--and I am going to recognize Senator Hatch first for comments on S. 2453, S. 2455 and S. 2468, which all relate to the electronic surveillance of NSA. I do not believe we are going to move to the extent of being able to vote on these matters today, although I would like to be wrong.

I got a letter this week dated the day before yesterday purportedly signed by all of the Democrats on the Committee asking that action not be taken by the Committee on the NSA bills. And I was a little querulous because I talked to a number of Senators about the bill and they had wanted to move forward. So I talked to a number--I shall not disclose the precise number--of Senators whose names appear on the letter who knew nothing about the letter--very active autopennery, which is not uncommon in the United States Senate. But a number of Senators didn't know anything about the letter.

I thought to my old days as a prosecutor of if you are authorized to sign somebody's name and it is not a forgery; if you are not,

it is a forgery. Maybe this is a jury issue. Maybe it goes to mitigation of a fellow prosecutor. But I am toying with the idea of asking in the future that letters come notarized, so that as Chairman I have some knowledge as to whether they were signed.

Senator Leahy. God, I miss those days as a prosecutor. So do you.

Chairman Specter. Well, I am not serious, but I am not joking either. If I get a letter from members, I would like to know that it is from the members. We members have to guard our autopens. We have to have them used, but if you communicate with the Chairman, there ought to be some recognition of reliance.

Senator Feinstein. I don't think that is right, Mr. Chairman. I certainly knew. I approved it twice, as a matter of fact.

Chairman Specter. You not only knew, but you told me in person that you didn't think we ought to take it up.

Senator Feinstein. I am the only one that doesn't think we ought to take it up?

Chairman Specter. You are the only one who told me in person that we shouldn't take it up. You are the only one.

I didn't talk to everybody. I am not saying that they are all unauthorized autopens. I hadn't talk to Senator Feingold. He is nodding in the affirmative. I talked to Senator Durbin--

Senator Feingold. I was well aware of the letter. My staff consulted me and they did it entirely appropriately.

Senator Leahy. I think, Mr. Chairman, it probably does not

move this forward by belaboring this point. There are concerns about moving forward. I suspect that we should spend some time talking about this. I would be happy to discuss it with you, but I think everyone in this Committee is working extraordinarily hard. I applaud you for your leadership in keeping us moving forward, but we are all trying to do about 12 things at once.

There are concerns, legitimate concerns, about moving forward. They have been expressed. Some members have expressed them directly to you, and I think that we should realize that that is what we are going to do and then try to move forward. I understand your concern in this area. We all have similar concerns about what is going on with this spying program. Let us continue to work together.

Incidentally, I would like consent to put a statement in on 2292, the Specter-Leahy-Cornyn-Feinstein-Biden bill on the Federal judiciary.

Chairman Specter. Without objection, we will have your statement in the record.

[The prepared statement of Senator Leahy follows:]

Senator Leahy.And I should note again my praise of Senator Kohl for his work on the NOPEC bill.

Chairman Specter.I am prepared to move on it, not to belabor it.I have made my point.

Senator Hatch.

Senator Kyl.Mr. Chairman, I just had a question.

Chairman Specter.Yes, Senator Kyl.

Senator Kyl.You said a moment ago that we were prepared to take up, I believe, 2292, to provide relief from excessive rent charges for the Federal judiciary.

Chairman Specter.Right.

Senator Kyl.Are we going to take that up?

Chairman Specter.Yes, we are.

All in favor of that bill, say aye.

[A chorus of ayes.]

Chairman Specter.Opposed, no.

[No response.]

Chairman Specter.The ayes appear to have it.The ayes do have it.

Senator Hatch.

Senator Hatch.Well, Mr. Chairman, I certainly am going to support your efforts and your legislation on the surveillance matter and I urge my colleagues to do so.

If I could just make a few points, first, I am a member of the Intelligence Committee and, like Senators Feinstein and

DeWine, I am a member of the so-called subcommittee that has been briefed on the NSA program. While I cannot reveal any of the details of these briefings on the NSA program, I can tell you that I support the surveillance that the NSA is conducting in order to protect the American public from another terrorist attack.

I think the Bush administration has a good record in preventing a replay of 9/11. But make no mistake about it, or enemies want to hit us again. When I balance all of the factors, I come to the conclusion that the most constructive step we can take today is to report the Specter bill out of Committee. Although it may not be a perfect bill--few bills are--it is a good bill that provides both judicial review and congressional oversight of the type of surveillance program the National Security Agency is conducting. That is something I think many, many in the Senate, and maybe many, many in the House, would like to see happen.

Let me make clear that I think--and I hope that Senators Feinstein and DeWine agree with me on this--that the Intelligence Committee is doing a good job, a thorough job and a serious job in overseeing the NSA program, and I commend Chairman Roberts for seeing that that occurs.

Now, I am very concerned that we don't move ahead on this type of legislation. We are told by some that there is not enough information to make an informed decision about this legislation, but the fact of the matter is that the detailed information about

how this program operates will not and should not ever be made public. I think my colleagues would agree with me on that. Sometimes, you have to break an egg in order to make an omelette.

Senator Specter has put forward a bill that contains a judicial review component and contains explicit congressional oversight provisions. Anybody who can think this through at all knows that the current FISA language will not take care of allowing Congress and the courts to do what Congress and the courts, I think, generally would like to do.

When all is said and done, we have had four hearings on this subject that have touched on this, and this bill brings this NSA program and whatever similar programs exist today or will be devised in the future to protect the American public from terrorist attacks more clearly under the category of programs for which there is the type of explicit congressional authorization that Justice Jackson laid out in this connection in the steel seizure case.

Now, can the language be tweaked and improved? I suspect that it can. That is why we have markups. While I have been critical of the calls by some of our Democratic colleagues to delay action on this bill, I also want to send a signal to the administration that I share Senator Specter's frustration if it is true that the administration has not provided detailed comments on the bill. I don't think they have. I think they should.

Some members of the Committee appear to want to delay this

markup, and I hope and trust there is no political motivation behind their request because the root of this legislation involves critical matters of national security and separation of powers.

Now, for all of the complaining and criticizing that some of my colleagues have had about the way the NSA program was justified, you would think that there would be greater support, and I will be there will be in the end, for the Specter bill that goes a long, long way toward addressing precisely the concerns with respect to judicial review and congressional oversight that have been raised over the last several months.

Now, I will not be totally surprised that after I make these comments in support of the Specter bill that someone in the administration will contact me and say that they think the bill goes too far. If that happens, so be it. It only seems fair and proper that the administration tells us where this bill should be strengthened or changed, and we are certainly interested in that.

I think that the hearing at which the former Foreign Intelligence Surveillance Court judges testified convinced me of the advisability of adopting the approach of Senator Specter that gives the FISA court a programmatic review role.

Let me just quote some of the FISA judges. Judge Robertson writes--and I will just read part of it and I would ask that my whole description of their statements or quotes be put in the record at this point, Mr. Chairman.

Chairman Specter. Without objection, it will be made a part of the record.

Senator Hatch. Judge Robertson writes, "The Foreign Intelligence Surveillance Court is best situated to review the surveillance program." Judge Kornblum has an excellent statement. Judge Bratman--let me just quote him, and again I say I support, as do the other judges, the proposed amendment by Senator Specter in his draft.

Judge Keenan said, "FISA can be improved, and it should be improved to accommodate more modern technology which was not contemplated in 1978 when the original law was enacted. I believe your legislation, Senator Specter, with certain modifications, would improve FISA very much."

Judge Stafford said, "It is my judgment that these proposed amendments to the FISA statute strike a reasonable balance between the President's power to conduct foreign affairs, including electronic surveillance, and the Congress' power of oversight over the same."

The judges believe that this should be done. I personally believe it ought to be done. I think it would put a quietus on the politicization of these issues, and there ought to be every Senator in this body interested in making sure that these issues are not politicized, because the NSA is doing everything it can, as is the administration, to make sure we don't have another repeat of 9/11. And we know if there is, it is probably going

to be a very disastrous thing.

In short, the Specter bill moves the ball forward and does so in a manner that advances the interests of the American public with respect to counterterrorism activities. And it is consistent with the appropriate balance of power among the branches of Government.

I do not believe that the administration had to do this, but I believe the administration should cooperate, since there is legitimate concern on the part of members of Congress and the courts that it would be better to have all three of the separated powers together on these matters. I am not sure they are not together now.

Now, Senator Specter might be something of the man in the middle in this debate, but I certainly want to join him, rather than those who argue that the time is not right or the bill goes too far without telling us how they would fix it.

Frankly, this is just step one. We have got to then bring it to the Senate floor. We would have a lot of comments by then. By passing it out of the Committee, we would get the comments and the administration would have to come forward and tell us what they think needs to be changed or improved in the bill, as would others who may be very thoughtful in these areas.

So I think we ought to move this bill. I think it should be done in a bipartisan way. I think we ought to do it as quickly as we can so that there is less screaming and shouting about

what is going on, and, frankly, I think in the best interests of our country.

I really believe that most people agree that the FISA court, if it is involved and has the tools at its disposal to be able to resolve these problems, is a certainly decent, honorable way to go, and I believe we ought to go that way. I can just say personally that I am pretty impressed with what I have seen. I am glad that the NSA is doing this work. I believe they have helped protect this country in a variety of ways and that they will continue to protect our country, although nobody can guarantee in a day of suicide bombers that we won't have some discombobulation in the future.

But my gosh, we can't sit around as a Committee and keep putting this off. By passing the bill out of Committee, we will get it out there so it can be criticized, and rightly so in the eyes of some, and then we can debate it on the floor and hopefully perfect it even more.

But I want to compliment the Chairman for the guts to do this. He has been former Chairman of the Senate Intelligence Committee. He takes a tremendous interest in these matters. Frankly, I just believe that he has done what is right here, and I think he ought to have bipartisan support out of this Committee so that we can move this process forward because no matter what we do, it is going to take a few weeks or months to get this done and get it done in the best possible manner we can. But it

would bring the three separated powers completely together, it seems to me, and that is a very, very good step in the right direction.

I am sorry I took so long, but I just felt deeply about this.

Chairman Specter.Thank you, Senator Hatch.

Senator Feinstein.Mr. Chairman?

Chairman Specter.One moment and I will recognize you, Senator Feinstein, and then Senator DeWine, alternating.

It is my view ultimately to report out three measures relating to NSA--one is Senator DeWine's bill, another is Senator Schumer's bill, and a third is my bill--so they can come to the floor and be debated.I will have some comments to make in a few moments, but first I want to recognize other Senators who have sought recognition.

Senator Feinstein.

Senator Feinstein.Thank you very much, Mr. Chairman.I would like to make the opposition argument.

I also serve on the Intelligence Committee and on the subcommittee that has been given the right to be briefed on the program.We have not finished the briefings.As a matter of fact, we have a meeting at eleven o'clock.There is a substantial amount to go yet.To pass legislation now is like a doctor diagnosing a patient without seeing the patient or seeing the records of the patient, and I am strongly opposed to it.

Rarely do we have an issue where we are seeking to balance stakes that are so high on both sides--national security, on one hand, and the core privacy rights of innocent Americans on the other. I think history cautions us against rushing into this issue and getting it wrong.

Under our system of Government, America has two types of wiretaps. With criminal wiretaps, targets are notified once a wiretap ends. Not so with foreign intelligence wiretaps. They can remain secret forever. There are reasons for this distinction, but the net result is that foreign intelligence wiretaps create a real temptation to those who might abuse power.

In the 1970s, the Church Committee noted how some of our Government's worst civil rights violations--J. Edgar Hoover spying on Martin Luther King, Jr. and Vietnam-era enemies lists--emanated from domestic spying under the guise of foreign intelligence. That is why we created the FISA court to check such abuses of executive power, consistent, of course, with our ongoing national security needs.

Now, we are being asked to modify the careful balancing of national security and privacy interests that led to FISA. In the bills pending before us, FISA's longstanding specific warrant requirement would be replaced with generalized program warrants that would allow an unlimited number of wiretaps, not tied to individuals, but based on subject matter, for as long as 90 days.

These types of program warrants do not exist now. They have never been tried. They would be an entirely new animal. We do not know how these program warrants would work. We do not know if such general program warrants would even be constitutional. We do not even know who would be covered by such program warrants. Could purely domestic calls between United States citizens be wiretapped? How many people could be tapped under a single program warrant? How many hops would be allowed in establishing that a program is within the subject area of the program warrant?

The truth here, and my very real problem is that if we vote for any of the FISA bills now on the table, none of us would really know what it is we are authorizing. I understand and appreciate the Chairman's view that his bill would at least attempt to bring the President's foreign surveillance programs back under full judicial review.

I also understand that the administration, despite the FISA law, is apparently continuing to operate outside of FISA, and that Americans' privacy rights may continue to be violated every day that we wait to legislate. I understand all this, but there is no question that the bills on the table and the general warrants they would allow would fundamentally change the nature of what the FISA Court does, and they would arguably--and this is a point--authorize foreign intelligence wiretaps of the kind that are now being conducted, even before we fully understand the scope of what the administration is doing. Based on what I have

seen so far, the present FISA law could accommodate this program.

Let me repeat that. Based on what I have seen so far, the present FISA program could accommodate this program.

Perhaps at the end of the day we will decide that Senator Specter's new approach is the best we can do. I do not know yet. But we are not there yet. Our much-praised FISA system should not be thrown out so lightly. I believe we owe it to those who made the system work to see if our national security needs might be met within the existing paradigm, perhaps with some minor alteration, before we abandon a specific warrant process that has worked so well for over 25 years.

I do not think anything we do is as major as what we are doing here. We would change the entire way that an administration would seek warrants to domestically wiretap Americans, and we would be doing this without knowing what this President is effectively doing. Some of us are trying to do this. We have another aspect of the program at 11 o'clock. Then we have a third aspect of the program to look at, I hope next week. To take this action now--and I do not understand why. No one is crying for this bill. But this bill is monumental because it changes a system that protects the privacy rights of Americans in a very dramatic way. We do not know whether it is constitutional. It gives the program statutory authority. It is a very big step, and all I am trying to say is let's wait until at least some of us on this Committee have a handle on the full scope of the program and programs that

are now ongoing by the administration.

I feel this so strongly. I had the privilege of talking to the Chairman. I very much admire him. I admire what he is trying to do. But all I am trying to say is this is a dramatic change, and we have huge privacy rights to protect. And it is not just this President. It is every President, Democratic and Republican, who might be willing to set up a foreign intelligence program that deals with Americans.

If this bill passes, we will be able to get unidentified program warrants of who knows how many for how many hops, not just the foreign intelligence source calling an American, but an American making a multitude of other calls. We need to tread very carefully on this. And as I say, to date, I have seen nothing that would make the individual warrant unusable in this foreign intelligence surveillance program that we are looking at.

Chairman Specter. I am sorely tempted to respond, but I am going to yield to my colleagues. Senator DeWine? I will respond, but not right now.

Senator DeWine. Mr. Chairman, thank you very much--

Chairman Specter. And then I will recognize Senator Feingold, then I will recognize Senator Graham, and then I will recognize myself.

Senator DeWine. Mr. Chairman, I think we need to step back from these bills. First of all, we have three bills, Senator Feinstein, not just one. We have three bills in front of us. If

the reports in the paper are to be believed, surveillance has been going on for 4 years. It is time for Congress to be a part of that.

My concern is that the discussion in this Committee will result--going back and forth will result in no bill being reported, and this Congress will end up doing nothing. I do not think that is acceptable. My position has been pretty clear. I believe that the President had the right to start this program, in fact, had the obligation to start this program. I think any President who saw what this President saw would have done the same thing. But I also think that at some point Congress needs to weigh in. The President needs to go to Congress and get authorization to continue the program. I think that is where we are today.

So I believe that we should report these bills and get this matter to the Senate floor and let the Senate work its will.

The Subcommittee that my colleague from California is talking about I also serve on, and I also will be going at 11 o'clock, Mr. Chairman, to work on that. That Subcommittee, interestingly, came about after some of us had introduced our bill and our bill had called for a Subcommittee in the Committee. I think the Subcommittee is the right way to go. It complied with what the administration wants to do to compartmentalize the information, but also has begun at least to give us vigorous oversight, which this Congress had lacked, which I think is very, very important.

I would like to talk for a moment about the bill that Senator

Graham and Senator Hagel and Senator Snowe and I have introduced, which is in front of this Committee, which is S. 2455.

Chairman Specter.Senator DeWine, before we proceed, I ask, if possible, that the statements be limited to 5 minutes because we are going to adjourn--we are not going to have people here after 11 o'clock.

Senator DeWine.I will try to do that, Mr. Chairman.

Chairman Specter.And I would like to get my 5 minutes in. We have time for Senator Feingold, Senator--

Senator DeWine.You are not sending me a message that you are imposing that only since I am speaking, are you, Mr. Chairman?

Chairman Specter.I would not consider doing that, Senator DeWine.You have a record for brevity.

Senator DeWine.I am probably one of the most brief members of the Committee.I might go a minute longer today, though, Mr. Chairman.

Chairman Specter.We may cut it back to 4 if Senator Kyl wants recognition, too.

Senator DeWine.Well, I am sure you might give me one of the minutes from the last 10 years or something.

[Laughter.]

Senator DeWine.I will continue.

If you look at the bill, the bill is pretty simple, and it is always interesting just, you know, if all else fails, read the language of the bill.The President may authorize a program

of electronic surveillance without a court order for periods of up to 45 days if the President determines that the surveillance is necessary to protect the United States, its citizens, et cetera.

Two, there is probable cause to believe that one party is subject to surveillance as an agent or member of a group or organization, affiliated with a group or organization, or working in support of a group or organization on the list established by the President. This is an international call.

It then provides that basically the President make a list. He can submit this list to Congress. It provides that the program is reviewed every 45 days. At the end of the 45 days, the Attorney General reviews the surveillance of any individual targets under the program. So it is not just a program review but it is an individual review of the particular target. If at any time the Attorney General determines that he has sufficient evidence to obtain a FISA warrant, he must seek a FISA warrant. If the Attorney General determines that he does not have sufficient evidence to obtain a FISA warrant but, nonetheless, wants to continue surveillance, then he must certify in writing and under oath to the Terrorist Surveillance Subcommittees the following four things: one, that all previous surveillance complied with this Act; two, if there is insufficient evidence to obtain a warrant under FISA; three, that the President has determined that continued surveillance of the target without a court order is necessary to protect the United States, its citizens, or its interests and the continued surveillance is

being undertaken in a good-faith belief that it will result in the acquisition of foreign intelligence information.

This is very tightly drafted language. It puts the obligation on the Attorney General to show why he must continue it. It shove these matters into--I would point out to my colleague from California, if I could, that it does put these matters into the FISA Court unless there is some substantial reason not to. So it does use the framework of the FISA Court in this bill.

It also provides for very, very vigorous oversight by a Subcommittee of the Senate Intelligence Committee, and it lays out how this oversight will take place. So it involves Congress.

It is a bill, I think, Mr. Chairman, that gets the job done. I am going to abide by your time limit and stop. I will be interested in further debate as we continue on.

Chairman Specter. Thank you, Senator DeWine.

Senator Feingold?

Senator Feingold. I would like to say a few words about the NSA bills that are on the agenda.

I appreciate the concern behind these bills. We have a President who insists he has the power to ignore the Foreign Intelligence Surveillance Act and who says he plans to continue doing so. I would hope that we would all be uncomfortable with that situation.

Some members believe that the solution is to pass a new law making what the President is doing legal, and so we have two quite different legislative proposals before us, and we know

that the Ranking Member of the Intelligence Committee is in the process of crafting another that he has not yet completed.

The fact is, however, that this Committee is nowhere near ready to mark up these bills. First of all, we have no idea if the President will decide to abide by whatever law comes out of this process. It seems to me that Congress must face up to the constitutional crisis that the President has created by ignoring current law before we pass new legislation expanding his powers. Think about it. The President decides to ignore the law. He avoids congressional oversight with incomplete disclosure and carefully makes sure he takes no step that would allow the question of the legality of his conduct to come before the courts. And what is this Committee's response? Apparently to pass a law that expands his powers, to reward him for refusing to follow the laws that we pass by giving him additional authorities. And we would do this without any assurance that the President will abide by whatever we enact.

How will we even find out if the President is abiding by the new law? It seems to me that if we move forward on these bills, we could very well be wasting our time, at best, and, at worst abdicating our responsibilities to serve as a check on the Executive. Leaving aside that very basic question, there are a number of other problems with moving forward on these bills. Normally before we consider bills, we have hearings where we get the crucial information that we need to legislate appropriately. In particular,

we learn as much as we can about whether the proposed legislation is needed and how it can be best crafted to address the problem that has been identified.

Now, in this case, we have had several hearings in this Committee, but only one featured a witness who knows anything about the program that these bills are supposedly aimed at legalizing, and that witness, of course, was the Attorney General of the United States. But he was notably not forthcoming in answering our questions. Senator Leahy gets very exercised when he talks about this, and I do not blame him. I support him in that. It is very frustrating when the head of the United States Department of Justice is so unwilling to answer questions that the members of the Senate Judiciary Committee pose to him.

The White House has also prevented former DOJ officials who were involved in approving the NSA program from testifying. One central question that neither the Attorney General nor anyone in the administration has yet answered is what is wrong with the current law. You just heard Senator Feinstein. And I am a member of the Intelligence Committee, but she is a member of the Subcommittee that is getting special access to this information. She stated point-blank here that she sees no reason at this point that shows that it is necessary to amend the FISA law.

Why can't the administration do what it wants to do and abide by FISA? The proposed bills before us just guess at the answer to that question. Is it because FISA requires a case-by-case

determination of probable cause?The Constitution may very well require that, too, but that is another issue altogether.Or is it that the emergency exception to FISA is only for 72 hours?

We simply do not know what the administration thinks is wrong with FISA because the administration will not tell us. Even in the wake of 9/11, it did not come to Congress and ask us to change FISA to allow this surveillance program. But we certainly made a number of other very significant changes to FISA and the PATRIOT Act, changes that the administration pushed very hard for.

For some reason, the administration has never come to Congress and said, look, to protect the Nation, we want to engage in this wiretapping program, and we do not think FISA allows it, and here is why we think FISA should be changed, Mr. Chairman. They never said that. Instead, it did an end run around the law, and it kept its activities secret.

Now, nearly 5 years later, even after the existence of the NSA program has been reported in the press and confirmed, we sit here in the Senate Judiciary Committee apparently legislating in the dark.

Another problem, of course, is that we still do not know what the program is. How can we possibly create a legislative fix for this program under these circumstances. We have no idea if these bills are too broad or too narrow. Even the few members of the Intelligence Committee beyond the Chairman and the Vice

Chairman who the administration has finally agreed to brief--continuing, by the way, to violate the National Security Act, which requires the full Intelligence Committee to be briefed--have said that the process is not complete.

I for one think that the Judiciary Committee is entitled to more information than we have received so far before changing current law, recognizing, of course, that some operational details may need to be made available only to the Intelligence Committee.

Mr. Chairman, as you know, I believe the President broke the law and continues to break it to this day. I believe that Congress must hold him accountable for that. And I thank you for the hearing you held on the resolution of censure that I introduced. I hope that this Committee will consider my resolution. We know enough, we do know enough about what the President did to know that he broke the law. But we do not know enough about why he did it in order to responsibly consider changing the law.

I am not unalterably opposed to amending FISA. I believe that fighting terrorism must be the highest priority of the Congress and the country. But we cannot legislate in the dark. We cannot just guess about what tools may be needed to fight terrorism based on press reports or incomplete testimony or administration statements carefully crafted to reveal nothing new. We need much more information before we can even consider amending FISA to try to legalize the NSA program. I cannot say that strongly enough.

The President needs to come to us and make the case that

the current law is inadequate. Until he does that, I do not think we should consider changing the law.

I should also note that I have some serious substantive concerns with the breadth of these bills. The DeWine bill cuts entirely out of the picture the essential check that the judicial branch provides in domestic intelligence investigations. As you have said, Mr. Chairman, judicial review is a bedrock Americana. And while your bill has certainly improved since it was first introduced, it still embraces the concept of a program warrant about which I have some serious concerns.

But regardless of what I might think of these bills, the point is that we do not know enough to evaluate them fully. I understand the sentiment behind these bills, but I think it is entirely premature to legislate in this area at this time.

Thank you, Mr. Chairman.

Chairman Specter. Senator Graham?

Senator Graham. Well, thank you, Mr. Chairman. I think you have stepped up to the plate for the country. You have had every conceivable form of hearing to find out what the debate is about, the structural debate. The administration's inherent authority argument is one that is rooted in the role of the Commander-in-Chief, I think has been taken too far here. But it is clear that the Commander-in-Chief has the inherent authority during the time of war to capture prisoners and detain them on the battlefield. It is clear that the Commander-in-Chief in a time of war has

the ability to surveil the enemy without a warrant. And there are two things I think are important about what you are doing.

The inherent authority argument is being taken much too far. The Attorney General of the United States would not concede to me when I asked him, Does the Congress have the ability to pass the Uniform Code of Military Justice regulating the conduct of our military at peace or at war, does that invade the inherent authority of the Commander-in-Chief to run the military? He would not concede that we had the authority to pass the Uniform Code of Military Justice, which to me is breathtaking, application of the inherent authority doctrine and it needs to be checked.

And what you are trying to do, Mr. Chairman, is bundle this up and let the court take a look at it, and you are trying to provide the congressional oversight, and I applaud you. What I am trying to do with Senators DeWine, Hagel, and Snowe is institutionalize what I think is a good balance between checking the inherent authority argument and criminalizing a war. There is a constant effort by some people in this body to turn 9/11 into a crime, not a war. In war, the military determines who an enemy combatant is. We do not have a history in this country of taking every debate about who an enemy combatant might be and turning it into a Federal court trial. Federal judges, in my opinion, are not equipped to make those decisions. That is a military decision, and due process is required under the laws of armed conflict so the military can be checked and balanced, but we cannot criminalize

what I think is a real war with people shooting at each other and dying.

So I applaud you, Mr. Chairman. As to whether or not you have enough information to determine if the President broke the law, you should act on it. It is a mystery to me how you can know he broke the law but you do not want to fix the law. If you think he broke the law, there are many ways to correct that behavior. You can do what Senator Feingold has done, and I applaud him for the courage of his convictions. You can have him censured. You can defund a program that you think is illegal. Let's get on with that debate. Let's not use that as a reason not to talk about the structural differences that exist based on administration policy.

Mr. Chairman, you are doing the right thing. We know what the issues are, and we can together, if you pass these bills out, work through it. I know I want the President and every other President to find out what al Qaeda is up to and people like al Qaeda, and if there is an American citizen on the other end of the phone call, at an appropriate time I want to make sure that they are not being accused of something they did not do. If you are being listened in to as an American citizen and the other end of the call is a terrorist suspect, I want to make sure that your rights are protected. But if you are helping the enemy, I want to make sure you are eventually prosecuted. We can do that by having the courts involved and Congress involved.

So we need a collaborative process of judicial review, congressional oversight, and the flexibility of the Commander-in-Chief to wage war. And, Mr. Chairman, I think you have struck a good balance by allowing these bills to go forward. This is a healthy debate, and I applaud you, and let's get on with it.

Chairman Specter. Thank you very much, Senator Graham.

I am going to make just a few comments. Since the audience is so small among Committee members, I have not allocated the Chairman's powers very effectively today to leave myself in a position of speaking to such a small group, but I will speak very briefly in any event.

The bill that I have proposed does not authorize the President's surveillance program. It grants jurisdiction to the FISA Court to determine the constitutionality of the program. It is true that we do not know what the program is, and on the current state of the record, I do not believe we are going to find out what the program is. But there is a way to address constitutionality without having the Congress know what the program is, and that is to give it to the FISA Court, which has an impeccable record for secrecy and the expertise to determine constitutionality.

The President complains that the Congress leaks. Now we know that the executive branch leaks everywhere. And I am not going to press to find out what the program is for concern that the disclosure might be harmful to our national interests. But you

can accomplish the objectives, maintaining secrecy, and determining constitutionality through my bill.

In dealing with the letter which was purportedly signed by all Democrats asking me as Chairman not to go forward with the proceeding, they quote me as saying, "It is certainly true that we cannot approve a program that we do not understand and do not know what it is about. There is no doubt about that. I agree that it would be irresponsible for us to do that. We are not about to approve a program we do not understand."

Well, I have never said we are approving the program. The bill does not approve the program. Notwithstanding comments made this morning to the contrary, the bill authorizes the Court to determine constitutionality of the program.

There is one factor which concerns me over and above what has been said. Well, before I deal with that, very briefly, with other points of the letter about calling Attorney General Gonzales back. It is true that the letter he wrote after his testimony is extraordinarily disquieting. And I have talked to him about it, and I do not believe there would be any useful purpose served by calling Attorney General Gonzales back. And I am not about to engage in a futile act of doing so. We are going to call him back, but when we have some chance of finding something out. We do not have any chance, in my judgment, of finding anything out from Attorney General Gonzales.

I have talked to former Attorney General Ashcroft, and he

is not going to tell us anything. We could compel his appearance, but it would be futile. I have talked to former Deputy Attorney General James Comey, and he is not going to tell us anything. They are going to be bound by the President's instructions, which Attorney General Gonzales has stood by, and I am not going to undertake a futile act to call Mr. Comey in. If it ever appears useful, I am ready to have a fifth hearing. I am ready to have a sixth hearing. I am not shy about having hearings on these issues.

And there is another hearing which I have in mind on this subject. I am about to file an amendment, which I do not intend to seek a vote on, to withhold funding for the program. I want to discuss that issue because it is true that we have no assurance the President would follow any statute we enacted. And the ultimate power the Congress has is the power of the purse, and we have not had a vigorous action by the Congress to protect our constitutional prerogatives, and our system of Government, tripartite, functions by vigorous assertion of the congressional authority and the executive authority and the judicial authority. And right now we are not doing our job.

I have talked to the President about this directly, and I am going to speak more about that on the floor in a few minutes. And I have a very high regard for the President. I have gotten to know him very well, unusually well, because he went to Pennsylvania 40 times--44 times in 2004 when I was also a candidate. And I have seen a great deal of him, and his capacity is vastly

underestimated by his public appearances and by his public persona. And I have talked to him about the difference between the President and the Presidency. And institutionally, the Presidency is walking all over Congress at the moment, as is the Supreme Court, which I intend to talk about more on the floor, challenging our method of reasoning, treating us like schoolchildren, and we have taken it. It is high time we did something about that, too. And the first step is to televise the Court.

But I believe--and I have talked to some Members of Congress who are prepared to cosponsor a bill to withhold funding for the NSA. I would not vote for it myself, as I am about to say on the floor, but I think it is an issue which ought to be raised, because if we are to maintain our institutional prerogative, that may be the only way that we can do it.

Well, it is 2 minutes to 11:00. I promised an 11 o'clock adjournment, unless somebody else has something to say. Senator Leahy?

Senator Leahy. Mr. Chairman, I understand your reasons for not bringing back the Attorney General, but, you know, it is a sad commentary that we cannot have him back here because he will not answer legitimate questions. I have been here with a lot of Attorneys General. I have never seen such stonewalling in my life. I have never seen a case where an Attorney General comes in here and stonewalls throughout a hearing and then writes you a letter afterward and says, "I do not want my answers to

be misconstrued."It is hard to misconstrue "No comment."

I just will express--as Senator Feingold mentioned, I have expressed my frustration many times.I express it again.

I appreciate your comments.

Chairman Specter.We are adjourned.

[Whereupon, at 11:00 a.m., the Committee was adjourned.]

Subject: Fw: Questions for Kavanaugh
From: "Brown, Jamie E."
Date: 5/3/06, 5:22 PM
To: "Kavanaugh, Brett M."

-----Original Message-----

From: Jensen, Pete (Judiciary-Rep) <Pete_Jensen@judiciary-rep.senate.gov>
To: Kristi.R.Macklin@usdoj.gov <Kristi.R.Macklin@usdoj.gov>; Brown, Jamie E. <Jamie_E._Brown@who.eop.gov>
Sent: Wed May 03 17:15:23 2006
Subject: FW: Questions for Kavanaugh

<<...>>

-----Original Message-----

From: Zubrensky, Michael (Judiciary)
Sent: Wednesday, May 03, 2006 4:53 PM
To: Jensen, Pete (Judiciary-Rep); Keam, Mark (Judiciary); Zogby, Joseph (Judiciary)
Cc: Nunziata, Gregg (Judiciary-Rep)
Subject: RE: Questions for Kavanaugh

Hi Pete -- attached are the supplemental written questions that Sen. Durbin would like to submit to Brett Kavanaugh. We sincerely apologize for getting them in so late.

-----Original Message-----

From: Jensen, Pete (Judiciary-Rep)
Sent: Tuesday, May 02, 2006 4:57 PM
To: Zubrensky, Michael (Judiciary); Keam, Mark (Judiciary); Zogby, Joseph (Judiciary)
Cc: Nunziata, Gregg (Judiciary-Rep)
Subject: RE: Questions for Kavanaugh

Thanks, Mike. As far as I am aware, the Chairman has not changed his mind about moving forward on Thursday.

-----Original Message-----

From: Zubrensky, Michael (Judiciary)
Sent: Tuesday, May 02, 2006 4:38 PM
To: Jensen, Pete (Judiciary-Rep); Keam, Mark (Judiciary); Zogby, Joseph (Judiciary)
Cc: Nunziata, Gregg (Judiciary-Rep)
Subject: RE: Questions for Kavanaugh

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From: Jensen, Pete (Judiciary-Rep)
Sent: Tuesday, May 02, 2006 3:35 PM
To: Keam, Mark (Judiciary); Zubrensky, Michael (Judiciary); Zogby, Joseph (Judiciary)
Cc: Nunziata, Gregg (Judiciary-Rep)
Subject: Questions for Kavanaugh

Hey guys -

Are the questions that your boss said he had for Kavanaugh going to be coming in soon? We'd like to give him enough time to respond and enough time for us to digest his answers before we move to him on thursday.

Pete

Peter G. Jensen
Senate Judiciary Committee
224 Dirksen Building
Washington, DC 20150
(202) 224-3816
pete_jensen@judiciary.senate.gov

— Attachments: —

written followup questions.wpd – supp.wpd

37.3 KB

Subject: FW: Questions for Kavanaugh
From: "Kavanaugh, Brett M."
Date: 5/3/06, 5:24 PM
To: <Kristi.R.Macklin@usdoj.gov>

-----Original Message-----

From: Brown, Jamie E.
Sent: Wednesday, May 03, 2006 5:22 PM
To: Kavanaugh, Brett M.
Subject: Fw: Questions for Kavanaugh

-----Original Message-----

From: Jensen, Pete (Judiciary-Rep) <Pete_Jensen@judiciary-rep.senate.gov>
To: Kristi.R.Mac <<...>> klin@usdoj.gov <Kristi.R.Macklin@usdoj.gov>; Brown, Jamie E. <Jamie_E_Brown@who.eop.gov>
Sent: Wed May 03 17:15:23 2006
Subject: FW: Questions for Kavanaugh

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37.3 KB

Subject: FW: Questions for Kavanaugh
From: <Kristi.R.Macklin@usdoj.gov>
Date: 5/3/06, 5:29 PM
To: "Kavanaugh, Brett M."

-----Original Message-----

From: Pete_Jensen@judiciary-rep.senate.gov [mailto:Pete_Jensen@judiciary-rep.senate.gov]
Sent: Wednesday, May 03, 2006 5:15 PM
To: Macklin, Kristi R; Jamie_E._Brown@who.eop.gov
Subject: FW: Questions for Kavanaugh

-----Original Message-----

From: Zubrensky, Michael (Judiciary)
Sent: Wednesday, May 03, 2006 4:53 PM
To: Jensen, Pete (Judiciary-Rep); Keam, Mark (Judiciary); Zogby, Joseph (Judiciary)
Cc: Nunziata, Gregg (Judiciary-Rep)
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-Attachments:

written followup questions.wpd - supp.wpd

37.3 KB

Subject: RE: BK Moot
From: <Kristi.R.Macklin@usdoj.gov>
Date: 5/4/06, 9:56 PM
To: <Kristi.R.Macklin@usdoj.gov>, <Rachel.Brand@usdoj.gov>, <Elisebeth.C.Cook@usdoj.gov>, <Jamil.N.Jaffer@usdoj.gov>, <Kyle.Sampson@usdoj.gov>, "Rao, Neomi J.", "Gerry, Brett C.", <HBartolomucci@HHLAW.com>, <Brian.Benczkowski@mail.house.gov>, "Yanes, Raul F.", "Dixton, Grant"
CC: "Kavanaugh, Brett M.", "Kelley, William K."

I forgot the Durbin questions. Those are attached to this e-mail.

<<written followup questions.wpd – supp.wpd>>

From: Macklin, Kristi R
Sent: Thursday, May 04, 2006 9:38 PM
To: Brand, Rachel; Cook, Elisebeth C; Jaffer, Jamil N; Sampson, Kyle; 'Neomi_J._Rao@who.eop.gov'; Grant_Dixton@who.eop.gov; 'Brett_C._Gerry@who.eop.gov'; Chris Bartolomucci (HBartolomucci@HHLAW.com); 'Brian.Benczkowski@mail.house.gov'
Cc: 'William_K._Kelley@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: BK Moot

Attached is a chart with all the mooters and topic assignments, as well as a brief description of the various topics. I've also attached a pdf of Brett's hearing, which includes his questionnaire and written follow up questions. (It is a large file.) I also have attached Senator Durbin's written questions submitted this week. There are is a description of the moot protocol in the doc – it will be more like the Supreme Court moots. The moots will all be held at the White House, room TBD. For non-White House participants, please get me your clearance information and I'll forward it all together. Brett claims he can get drive in privileges over the weekend, so include your make, model, tag info (we shall see).

<< File: BK Moots.doc >> << File: hearing.pdf >>

Kristi
514-8356

—Attachments:—

written followup questions.wpd – supp.wpd

37.3 KB

Subject: Alito transcript on executive power

From: <Kristi.R.Macklin@usdoj.gov>

Date: 5/5/06, 6:26 PM

To: <Steve.Bradbury@usdoj.gov>, "Yanes, Raul F.", "Kavanaugh, Brett M.", "Gerry, Brett C."

From: Higginbotham, Ryan K (OLP)
Sent: Friday, May 05, 2006 6:26 PM
To: Macklin, Kristi R
Subject: RE:

— Attachments: —

Alito on Executive Authority.doc

216 KB

Judge Samuel Alito
Testimony before the Senate Judicial Committee
On his Nomination to the Supreme Court

Testimony Regarding Executive Authority

Chairman Specter. Judge Alito, I want to turn now to Executive power and to ask you first if you agree with the quotation from Justice Jackson's concurrence in the Youngstown steel seizure case about the evaluation of Presidential power that I cited yesterday.

Judge Alito. I do. I think it provides a very useful framework, and it has been used by the Supreme Court in a number of important subsequent cases, in the Dames and Moore, for example, involving the release of the hostages from Iran. And it doesn't answer every question that comes up in this area, but it provides a very useful way of looking at them.

Chairman Specter. Do you agree with Justice O'Connor's statement quoted frequently yesterday from Hamdi that, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," when she was citing the Youngstown case? Do you agree with that?

Judge Alito. Absolutely. That's a very important principle. Our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances.

Chairman Specter. You made a speech at Pepperdine where you said, in commenting about the decision of the Supreme Court in Ex Parte Milligan, that "The Constitution applies even in an extreme emergency." The Government made a "broad and unwise argument" that the Bill of Rights simply doesn't apply during wartime.

Do you stand by that statement?

Judge Alito. I certainly do, Senator. The Bill of Rights applies at all times, and it's particularly important that we adhere to the Bill of Rights in times of war and in times of national crisis, because that's when there's the greatest temptation to depart from them.

Chairman Specter. Steering clear, Judge Alito, of asking you how you would decide a specific case, I think it is very important to find out your jurisprudential approach in interpreting whether the September 14, 2001, congressional resolution authorizing the use of force constituted congressional authorization for the National Security Agency to engage in electronic surveillance where one party to the conversation was in the United States. Let me take just a moment to lay out the factual and legal considerations.

The Foreign Intelligence Surveillance Act of 1978 provides it "shall be the exclusive means by which electronic surveillance shall be conducted and the interpretation of domestic wire, oral, and electronic communications may be conducted."

The Government contends that the Foreign Intelligence Surveillance Act clause, "except as authorized by statute, opens the door to interpreting that resolution to authorize the surveillance."

Let me give you a series of questions. I don't like to put more than one on the table at a time, but I think they are necessary in this situation to give the structure as to where I am going.

First, in interpreting whether Congress intended to amend FISA by that resolution, would it be relevant that Attorney General Gonzales said we were advised that "that was not something we could likely get."

Second, if Congress had intended to amend FISA by the resolution, wouldn't Congress have specifically said so, as Congress did in passing the PATRIOT Act, giving the Executive greater flexibility in using roving wiretaps?

Third, in interpreting statutory construction on whether Congress intended to amend FISA by the resolution, what would the relevance be of rules of statutory construction that repeal or change by implication--that changes by--makes the repeal by implication or disfavor, and specific statutory language trumps more general pronouncements? How would you weigh and evaluate the President's war powers under Article II to engage in electronic surveillance with the warrant required by congressional authority under Article I in legislating under the Foreign Intelligence Surveillance Act? And let me start with the broader principles.

In approaching an issue as to whether the President would have Article II powers, inherent constitutional authority to conduct electronic surveillance without a wiretap, when you have the Foreign Intelligence Surveillance Act on the books, making that the exclusive means, what factors would you weigh in that format?

Judge Alito. Well, probably the first consideration would be to evaluate the statutory question, and you outlined some of the factors and the issues that would arise in interpreting the statute, what is meant by the provision of FISA that you quoted regarding FISA--the Foreign Intelligence Surveillance Act--being the exclusive means for conducting surveillance. And then, depending on how one worked through that statutory question, then I think one might look to Justice Jackson's framework. And he said that he divided cases in this area into three categories where the President acts with explicit or implicit congressional approval, where the President acts and Congress has not expressed its view on the matter one way or the other, and the final category where the President exercises Executive power and Congress--and that is in the face of an explicit or implicit congressional opposition to it. And depending on how one worked through the statutory issue, then the case might fall into one of those three areas.

But these questions that you pose are obviously very difficult and important and complicated questions that are quite likely to arise in litigation, perhaps before my own court or before the Supreme Court.

Chairman Specter. Before pursuing that further--and we will have a second round--I want to broach one other issue with you. My time is almost up. That is, in the memorandum you wrote back on February 5, 1986, about the President's power to put a signing statement on to influence interpretation of the legislation, you wrote this: "Since

the President's approval is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress."

Is that really true when you say the President's views are as important as Congress'? The President can express his views by a veto and then gives Congress the option of overriding a veto, which Congress does not have if the President makes a signing declaration and seeks to avoid the terms of the statute. And we have the authority from the Supreme Court that the President cannot impound funds, cannot pick and choose on an appropriation. We have the line item veto case where the President cannot strike a provision even when authorized by Congress.

Well, I have got 10 second left. I guess when my red light goes on, it does not affect you. You can respond. Care to comment?

[Laughter.]

Judge Alito. I do, Senator. I think the most important part of the memo that you are referring to is a fairly big section that discussed theoretical problems, and it consists of a list of questions, and many of the questions are the questions that you have just raised. In that memo, I said this is an unexplored area, and here are the theoretical questions that--and, of course, they are of more than theoretical importance--that arise in this area.

That memo is labeled a rough first effort at stating the position of the administration. I was writing there on behalf of a working group that was looking into the question of implementing a decision that had already been made by the Attorney General to issue signing statements for the purpose of weighing in on the meaning of statutes. And in this memo--as I said, it was a rough first effort, and the biggest part of it, to my mind, was the statement there are difficult theoretical interpretive questions here and here they are. And had I followed up on it--and I don't believe I had the opportunity to pursue this issue further during my time in the Justice Department--it would have been necessary to explore all those questions.

* * * * *

Senator Leahy. You survived yesterday listening to us. Now we have a chance to listen to you. I will have further questions on the memo that Senator Specter spoke of, but it gets beyond theoretical. The last few weeks, we have seen it well played out in the press where the President and Senator John McCain negotiated rather publicly an amendment, which passed overwhelmingly in the House and the Senate, outlawing the use of torture by United States officers, yet the President in a signing statement implies that it will not apply to him or to those under his command as commander-in-chief. Doesn't that get well beyond a theoretical issue there?

Judge Alito. It is, and I think I said in answering the Chairman that there are theoretical issues but they have considerable practical importance. But the theoretical

issues really have to be explored and resolved. I don't believe the Supreme Court has done that up to this point. I have not had occasion in my 15-plus years on the Third Circuit to come to grips with the question of what is the significance of a Presidential signing statement in interpreting a statute.

Senator Leahy. Let me follow on sort of a related thing. In the Supreme Court, I feel one of the most important functions of the Court is to stop our Government from intruding into Americans' privacy or our freedom or our personal decisions. In my State of Vermont, we value our privacy very, very much. I think most Americans do automatically, and many times they have to go to the courts to make sure that the Government does not--whatever the Government is, whatever administration it might be, that they do not overreach in going into that privacy.

Three years ago, the Office of Legal Counsel at the Justice Department--and you are familiar with that; you worked there years ago. They issued a legal opinion, which they kept very secret, in which they concluded that the President of the United States had the power to override domestic and international laws outlawing torture. It said the President could override these laws outlawing torture.

They tried to redefine torture, and they asserted, I quote, "that the President enjoys complete authority over the conduct of war," and they went on further to say that if Congress passed criminal law prohibiting torture "in a manner that interferes with the President's direction of such core matters as detention and interrogation of enemy combatants," that would be unconstitutional. They seemed to say that the President could immunize people from any prosecution if they violated our laws on torture. And that stayed as what was the legal basis in this administration until somebody apparently at the Justice Department leaked it to the press and it became public. Once it became public, with the obvious reaction of Republicans, Democrats, everybody saying this is outrageous, it is beyond the pale, the administration withdrew that as its position. The Attorney General even said in his confirmation that this no longer--no longer--represented Bush administration policy.

What is your view--and I ask this because the memo has been withdrawn. It is not going to come before you. What is your view of the legal contention in that memo that the President can override the laws and immunize illegal conduct?

Judge Alito. Well, I think the first thing that has to be said is what I said yesterday, and that is that no person in this country is above the law, and that includes the President and it includes the Supreme Court. Everybody has to follow the law, and that means the Constitution of the United States and it means the laws that are enacted under the Constitution of the United States.

Now, there are questions that arise concerning Executive powers, and those specific questions have to be resolved, I think, by looking to that framework that Justice Jackson set out that I mentioned earlier.

Senator Leahy. Well, let's go into one of those specifics. Do you believe the President has the constitutional authority as commander-in-chief to override laws enacted by Congress that immunize people under his command from prosecution if they violate these laws passed by Congress?

Judge Alito. Well, if we were in--if a question came up of that nature, then I think you'd be in where the President is exercising Executive power in the face of a contrary expression of congressional will through a statute or even an implicit expression of congressional will. You would be in what Justice Jackson called "the twilight zone," where the President's power is at its lowest point, and I think you would have to look at the specifics of the situation. These are the gravest sort of constitutional questions that come up, and very often they don't make their way to the judiciary or they are not resolved by the judiciary. They are resolved by the other branches of the government.

Senator Leahy. But, Judge, I am a little bit troubled by this because you suggested, and I completely agreed with what you said, that no one is above the law and no one is beneath the law. You are not above the law, I am not, the President is not. But are you saying that there are chances where the President not only could be above the law passed by Congress, but could immunize others, thus putting them above the law?

I mean, listen to what I am speaking to specifically. We pass a law outlawing certain conduct. The President in his Bybee memo, which has now been withdrawn, was saying but that won't apply to me or people that I authorize. Doesn't that place not only the President but anybody he wants above the law?

Judge Alito. Senator, as I said, the President has to follow the Constitution and the laws and, in fact, one of the most solemn responsibilities of the President--and it is set out expressly in the Constitution--is that the President is to take care that the laws are faithfully executed, and that means the Constitution, it means statutes, it means treaties, it means all of the laws of the United States.

But what I am saying is that sometimes issues of Executive power arise and they have to be analyzed under the framework that Justice Jackson set out. And you do get cases that are in this twilight zone and it is--they have to be decided when they come up based on the specifics of the situation.

Senator Leahy. But is that saying that there could be instances where the President could not only ignore the law, but authorize others to ignore the law?

Judge Alito. Well, Senator, if you are in that situation, you may have a question about the constitutionality of a congressional enactment. You have to know the specifics of--

Senator Leahy. Let's assume there is not a question of the constitutionality of the enactment. Let's make it an easy one. We pass a law saying it is against the law to murder somebody here in the United States. Could the President authorize somebody, either from an intelligence agency or elsewhere, to go out and murder somebody and escape prosecution or immunize the person from prosecution, absent a presidential pardon?

Judge Alito. Neither the President nor anybody else, I think, can authorize someone to--can override a statute that is constitutional. And I think you are in this--when you are in the third category, under Justice Jackson, that is the issue which you are grappling with.

Senator Leahy. But why wouldn't it be constitutional for the--or wouldn't it be constitutional for the Congress to outlaw Americans from using torture?

Judge Alito. And Congress has done that, and it is certainly an expression of a very deep value of our country.

Senator Leahy. And if the President were to authorize somebody or say that he would immunize somebody from doing that, he wouldn't have that power, would he?

Judge Alito. Well, Senator, I think the important points are that the President has to follow the Constitution and the laws, and it is up to Congress to exercise its legislative power. But as to specific issues that might come up, I really need to know the specifics. I need to know what was done and why it was done, and hear the arguments on the issue.

Senator Leahy. Let's go to some specifics. Senator Specter mentioned FISA and your role with FISA, the Foreign Intelligence Surveillance Act. Certainly, you have to be involved with it, and appropriately so, when you were a U.S. Attorney. This came in after the abuses of the 1960s and 1970s. We had had President Nixon's enemies list, with breaking into doctors' offices and wiretapping of innocent Americans, and so on. After that, the Congress in a strong bipartisan effort passed the FISA legislation. We have that court that they can handle applications in secret for wiretaps or surveillance, if necessary, for national security.

Now, we have just learned that the President has chosen to ignore the FISA law and the FISA court. He has issued secret orders, and according to the press and the President's own press conference, time after time after time secret orders for domestically spying on American citizens without obtaining a warrant.

Do you believe the President can circumvent the FISA law bypass the FISA court to conduct warrantless spying on Americans?

Judge Alito. The President has to comply with the Fourth Amendment and the President has to comply with the statutes that are passed. This is an issue I was speaking about with Chairman Specter that I think is very likely to result in litigation in the Federal courts. It could be in my court. It certainly could get to the Supreme Court and there may be statutory issues involved--the meaning of the provision of FISA that you mentioned, the meaning certainly of the authorization for the use of military force--and those would have to be resolved.

And in order to resolve them, I would have to know the arguments that are made by the contending parties. On what basis is it claimed that there is a violation? On what basis would the President claim that what occurred fell within the authorization of the authorization for the use of military force? And then if you got beyond that, there could be constitutional questions about the Fourth Amendment, whether it was a violation of the Fourth Amendment, whether it was the valid exercise of Executive power.

Senator Leahy. But wouldn't the burden be on the Government to prove that it wasn't a violation of the Fourth Amendment if you were spying on Americans without a warrant, especially when you have courts set up--in this case the FISA court, which sets up a very easy procedure to get the warrant--wouldn't the burden be on the Government in that case?

Judge Alito. Well, Senator, I think the in first instance the Government would have to come forward with its theory as to why the actions that were taken were lawful. I think that is correct.

Senator Leahy. Well, let me ask you another one. How does anybody even--you are talking about this may come before the Third Circuit or could come before the Supreme Court and I will accept that. But how does somebody even get there? If you are having illegal secret spying on the person, how are they even going to know? Where are they going to get the standing to sue?

Judge Alito. Certainly, if someone is the subject of a search and they claim that the search violates a statute or it violates the Constitution, then they would have standing to sue and they could sue in a Federal court that had jurisdiction.

Senator Leahy. And I am not asking these as hypothetical questions, Judge. People are getting very concerned about this. We just found out, again not because the Government told us, but because the press found out about it--and thank God that we do have a free press because so much of the stuff that is supposed to be reported to Congress never is and we first hear about it when it is in the press.

But we found out that the Department of Defense was going around--and this makes me think of COINTELPRO during the Vietnam War--they are going around the country photographing and spying on people who are protesting the war in Iraq. They went, according to the press, and spied on Quakers in Vermont.

Now, I don't know why they spent all that money to do that. If they want to find a Vermonter protesting the war, turn on C-SPAN. I do it on the Senate floor all the time. But I know some of these Quakers. I mean, in the Quaker tradition, they have been protesting war throughout this country's history.

Now, I worry about this culture we are getting and I just want to make sure the courts--the Congress is not going to stand up and say no and the administration certainly is authorizing this. I want to make sure that the courts are going to say we will respect your privacy, we will respect your Fourth Amendment rights.

You know, if you have somebody who has been spied on, would you agree--and I think you did, but I want to make sure I am correct on this--do you agree that they should have a day in court?

Judge Alito. Certainly. If someone has been the subject of illegal law enforcement activities, they should have a day in court and that is what the courts are there for, to protect the rights of individuals against the government and to--or anyone else who violates their rights. And they have to be absolutely independent and treat everybody equally.

Senator Leahy. And those Fourth Amendment rights are pretty significant, are they not?

Judge Alito. They are very significant.

Senator Leahy. I think they set us apart from most other countries in the world, to our betterment. And you were a prosecutor, I was a prosecutor. I think we can agree even looking in our past professions that it protects us.

Judge Alito. I agree, Senator. I tried to follow what the Fourth Amendment required when I was a prosecutor and I regard it as very important.

Senator Leahy. Well, let me go back to the last time we saw Government excesses like this before FISA. When you worked in the Reagan administration, you argued to the Supreme Court that President Nixon's Attorney General should have absolute immunity for domestic spying without a warrant even in the case of willful misconduct. In your memo you said, I do not question that the Attorney General should have immunity, but for tactical reasons I would not raise the issue here. Do you believe today that the Attorney General would be absolutely immune from civil liability for authorizing warrantless wiretaps?

Judge Alito. No, he would not. That was settled in that case. The Supreme Court held that the Attorney General does not have--

Senator Leahy. But you did believe so then?

Judge Alito. Actually, I recommended that that argument not be made. It was made and I think it is important to understand the context of that. First of all-- Senator Leahy. You did say in the memo, I do not question that the Attorney General should have this immunity.

Judge Alito. That is correct, and the background of that, if I could just explain very briefly--

Senator Leahy. Sure.

Judge Alito. --is that we were--there, we were not just representing the Government; we were representing former Attorney General Mitchell in his individual capacity. He was being sued for damages and we were, in a sense, acting as his private attorney. And this was an argument that he wanted to make. This was an argument that had been made several times previously by the Department of Justice during the Carter administration and then just a couple of years earlier in Harlow v. Fitzgerald in the Reagan administration. And I said I didn't think it was a good idea to make the argument in this case, but I didn't dispute that it was an argument that was there.

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Senator Kennedy. Judge, in just the past month, the Americans have learned that the President instructed the National Security Agency to spy on them at home, and

they have seen an intense public debate over when the FBI can look at their library records, and they have heard the President announce that he has accepted the McCain amendment barring torture. But then just days later, as he signed it into law, the President decided he still could order torture whenever he believed it was necessary, no check, no balance, no independent oversight. So, Judge, we all want to protect our communities from terrorists, but we do not want our children and grandchildren to live in an America that accepts torture and eavesdropping on an American citizen as a way of life. We need an independent and vigilant Supreme Court to keep that from happening, to enforce the constitutional boundaries on presidential power and blow the whistle when the President goes too far.

Congress passes laws, but this President says that he has the sole power to decide whether or not he has to obey those laws. Is that proper? I do not think so. But we need Justices who can examine this issue objectively, independently and fairly, and that is what our Founders intended and what the American people deserve.

So, Judge, we must know whether you can be a Justice who understands how to strike that proper balance between protecting our liberties and protecting our security, a Justice who will check even the President of the United States when he has gone too far.

Chief Justice Marshall was that kind of Justice when he told President Jefferson that he had exceeded his war-making powers under the Constitution. Justice Jackson was that kind of Justice, when he told President Truman that he could not use the Korean War as an excuse to take over the Nation's steel mills. Chief Justice Warren Burger was that kind of Justice when he told President Nixon to turn over the White House tapes. And Justice O'Connor was that kind of Justice when she told President Bush that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.

I have serious doubts that you would be that kind of Justice. Your record shows time and again that you have been overly deferential to Executive power, whether exercised by the President, the Attorney General or law enforcement officials. And your record shows that even over the strong objections of other Federal judges, other Federal judges, you bend over backwards to find even the most aggressive exercise of Executive power reasonable. But perhaps most disturbing is the almost total disregard in your record for the impact of these abuses of powers on the rights and liberties of individual citizens.

So, Judge Alito, we need to know whether the average citizen can get a fair shake from you when the Government is a party, and whether you will stand up to a President, any President who ignores the Constitution and uses arguments of national security to expand executive power at the expense of individual liberty, whether you will ever be able to conclude that the President has gone too far.

Now, in 1985, in your job application to the Justice Department you wrote, "I believe very strongly in the supremacy of the elected branches of Government." Those are your words; am I right?

Judge Alito. They are, and that's a very inapt phrase, and I--

Senator Kennedy. Excuse me?

Judge Alito. It's an inapt phrase, and I certainly didn't mean that literally at the time, and I wouldn't say that today. The branches of Government are equal. They have different responsibilities, but they are all equal, and no branch is supreme to the other branch.

Senator Kennedy. So you have changed your mind?

Judge Alito. No, I haven't changed my mind, Senator, but the phrasing there is very misleading and incorrect. I think what I was getting at is the fact that our Constitution gives the judiciary a particular role, and there are instances in which it can override the judgments that are made by Congress and by the Executive, but for the most part our Constitution leaves it to the elected branches of Government to make the policy decisions for our country.

Senator Kennedy. So just looking at your writings and speeches, Judge Alito, you have endorsed the supremacy of the elected branch of government. You have clarified that today. You argued that the Attorney General should have the absolute immunity, even for actions that he knows to be unlawful or unconstitutional. You suggested that the Court should give a President's signing statement great deference in determining the meaning and the intent of the law and argued as a matter of your own political and judicial philosophy for an almost all-powerful Presidency. Time and again, even in routine matters involving average Americans, you give enormous, almost total deference to the exercise of governmental power. So I want to ask you about some of the possible abuses of the executive power and infringement on individual rights that we are facing in the country today.

Judge Alito, just a few weeks ago, by a vote of 90 to nine, the Senate passed a resolution sponsored by Senator John McCain to ban the torture, whether it be here at home or abroad, and as a former POW in Vietnam, John McCain knows a thing or two about torture. For a long time, the White House threatened to veto the legislation, and finally, Senator McCain met with the President and convinced him to approve the anti-torture law. Two weeks after that, the President issued a signing statement, no publicity, no press release, no photo op, where he quietly gutted his commitment to enforce the law banning torture. The President stated, in essence, that whatever the law of the land might be, whatever Congress might have written, the executive branch has the right to authorize torture without fear of judicial review.

Now, I raise this issue with you, Judge, I raise this with you because you were among the early advocates of these so-called Presidential signing statements when you were a Justice Department official. You urged President Reagan to use the signing statements to limit the scope of laws passed by Congress, even though Article I of the Constitution vests all legislative powers in the Congress. You urged the President to adopt what you described as a novel proposal, to issue statements aimed at undermining the Court's use of legislative history as a guide to the meaning of the law. You wrote these words. The President's understanding of the bill should be just as important as that of Congress.

With respect to the statement issued by President Bush reserving his right to order torture, is that what you had in mind when you said or wrote, the President's understanding of the bill should be just as important as that of Congress?

Judge Alito. When I interpret statutes, and that's something that I do with some frequency on the Court of Appeals, where I start and often where I end is with the text of the statute. And if you do that, I think you eliminate a lot of problems involving legislative history and also with signing statements. So I think that's the first point that I would make.

Now, I don't say I'm never going to look at legislative history, and the role of signing statements in the interpretation of statutes is, I think, a territory that's been unexplored by the Supreme Court and it certainly is not something that I have dealt with as a judge.

This memo was a memo that resulted from a working group meeting that I attended. The Attorney General had already decided that as a matter of policy, the administration, the Reagan administration, would issue signing statements for interpretive purposes and had made an arrangement with the West Publishing Company to have those published. And my task from this meeting was to summarize where the working group was going and where it had been, and I said at the beginning of the meeting that this was a rough--at the beginning of the memo that this was a rough first effort to outline what the administration was planning to do and I was a lawyer for the administration at the time. Then I had a big section of that memo saying, and these are the theoretical problems and some of them are the ones that you mentioned. And that's where I left it, and all of that would need to be explored to go any further.

Senator Kennedy. Well, Judge Alito, in the same signing statement undermining the McCain anti-torture law, the President referred to his authority to supervise the unitary executive branch. That's an unfamiliar term to most Americans, but the Wall Street Journal describes it as the foundation of the Bush administration's assertion of power to determine the fate of enemy prisoners, jailing U.S. citizens as enemy combatants without charging them. President Bush has referred to this doctrine at least 110 times, while Ronald Reagan and the first President Bush combined used the term only seven times. President Clinton never used it.

Judge Alito, the Wall Street Journal reports that officials of the Bush administration are concerned that current judges are not buying into its unitary executive theory, so they are appointing new judges more sympathetic to their executive power claims. We need to know whether you are one of those judges.

In 2000, in the year 2000, in a speech soon after the election, you referred to the unitary executive theory as the gospel and affirmed your belief in it. So, Judge Alito, the President is saying he can ignore the ban on torture passed by Congress, that the courts cannot review his conduct. In light of your lengthy record on the issues of executive power, deferring to the conduct of law enforcement officials even when they are engaged in conduct that your judicial colleagues condemn, Judge Chertoff, Judge Rendell, subscribing to the theory of unitary executive, which gives the President complete power over the independent agencies, the independent agencies that protect our health and safety, believing that the true independent special prosecutors who investigate

executive wrongdoing are unconstitutional, referring to the supremacy of the elected branches over the judicial branch and arguing that the court should give equal weight to a President's view about the meaning of the laws that Congress has passed, why should we believe that you will act as an independent check on the President when he claims the power to ignore the laws passed by Congress?

Judge Alito. Well, Senator, let me explain what I understand the idea of the unitary executive to be, and I think it's--there's been some misunderstanding, at least as to what I understand this concept to mean. I think it's important to draw a distinction between two very different ideas. One is the scope of executive power, and often Presidents or occasionally Presidents have asserted inherent executive powers not set out in the Constitution. And we might think of that as how big is this table, the extent of executive power.

And the second question is when you have a power that is within the prerogative of the executive, who controls the executive? And those are separate questions. And the issue of, to my mind, the concept of unitary executive doesn't have to do with the scope of executive power. It has to do with who within the executive branch controls the exercise of executive power, and the theory is the Constitution says the executive power is conferred on the President.

Now, the power that I was addressing in that speech was the power to take care that the laws are faithfully executed, not some inherent power but a power that is explicitly set out in the Constitution.

Senator Kennedy. Would that have any effect or impact on independent agencies?

Judge Alito. The status of independent agencies, I think, is now settled in the case law. This was addressed in Humphrey's Executor way back in 1935 when the Supreme Court said that the structure of the Federal Trade Commission didn't violate the separation of powers. And then it was revisited and reaffirmed in Wiener v. United States in 1958--

Senator Kennedy. So your understanding of any unitary Presidency, that they do not therefore have any kind of additional kind of control over the independent agencies that has been agreed to by the Congress and signed into law at--

Judge Alito. I think that Humphrey's Executor is a well-settled precedent. What the unitary executive, I think, means now, we would look to Morrison, I think, for the best expression of it, and it is that things cannot be arranged in such a way that interfere with the President's exercise of his power on a functional, taking a functional approach.

Senator Kennedy. I want to just mention this signing of the understanding of the legislation that we passed banning torture, what the President signed onto. The executive branch shall construe the Title X in Division A relating to detainees in a matter with the constitutional authority of the President to supervise the unitary executive branch as the commander in chief, and consistent with the constitutional limitations on judicial power. Therefore, it is the warning that the courts are not going to be able to override the judgments and decisions. That is certainly my understanding of those

words, which will assist in achieving the shared objective of the Congress and the President.

That statement there, in terms of what was agreed to by Congress 19-to-nothing, by John McCain, by President Bush, and then we have this signing document which effectively just undermines all of that, is something that we have to ask ourselves whether this is the way that we understand the way the laws are to be made. It is very clear in the Constitution who makes the laws, and Congress and the Senate makes it. The President signs it, and that is the law. That is the law. These signing statements and recognizing these signing statements and giving these value in order to basically undermine that whole process is a matter of enormous concern.

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Senator Grassley. I am now getting to a question that I want to ask you about executive power. Some of your critics have questioned your ability, and we have just heard it recently, to be independent from the executive branch. They pointed principally to your work as a lawyer for the Department of Justice 20 years ago, suggesting that you would just rubber-stamp administration policy. I would like to give you an opportunity to address this. So, Judge Alito, do you believe that the executive branch should have unchecked authority?

Judge Alito. Absolutely not, Senator.

Senator Grassley. Judge Alito, you do understand that under the doctrine of separation of powers, the Supreme Court has an obligation to make sure that each branch of government does not co-opt authority reserved to the coordinate branch, and do you understand that where constitutionally-protected rights are involved, the courts have an important role to play in making sure that the executive branch does not trample those rights?

Judge Alito. I certainly do, Senator. Each branch has very important individual responsibilities and they should all perform their responsibilities.

Senator Grassley. So clarify for me. Do you believe that the President of the United States is above the law and the Constitution?

Judge Alito. Nobody in this country is above the law, and that includes the President.

Senator Grassley. Judge Alito, would you have any difficulty ruling against the executive branch of the Federal Government if it were to overstep its authority in the Constitution?

Judge Alito. I would not, Senator. I would judge the cases as they come up and I think that I believe very strongly in the independence of the judiciary. I have been a member of the judiciary now for the past 15-and-a-half years and I understand the role that the judiciary has to play, and one of its most important roles is to stand up and defend the rights of people when they are violated.

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Senator Kyl. Mr. Chairman, let me begin by just asking the witness if you would like to comment again on the unitary Executive. I have this specifically in mind because while I think I understood your explanation of it, Senator Biden just referred to it and I thought maybe it would be useful to draw the distinction that I heard you draw with respect to your discussion of the unitary Executive power, if you could do that, please.

Judge Alito. Yes, certainly, Senator. As I understand the concept, it is the concept that the President is the head of the executive branch. The Constitution says that the President is given the Executive power and the idea of the unitary Executive is that the President should be able to control the executive branch, however big it is or however small it is, whether it is as small as it was when George Washington was President or whether it is as big as it is today or even bigger.

It has to do with control of whatever the executive is doing. It doesn't have to do with the scope of executive power. It does not have to do with whether the Executive power that the President is given includes a lot of unnamed powers or what is often called inherent power. So it is the issue--it is the difference between scope and control. And as I understand the idea of the unitary Executive, it goes just to the question of control. It doesn't go to the question of scope.

Senator Kyl. Of who eventually has the last say about Executive power, which would be the President?

Judge Alito. Right.

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Senator Feinstein. I'd like to quickly just switch subjects for a moment just to clarify something you said this morning, and this has to do with electronic surveillance of Americans. As you know, in 1978, the Congress, after a lot of introspection, passed a bill called the Foreign Intelligence Surveillance Act, which we call FISA, which essentially set up the parameters for all electronic surveillance within the United States. It's very specific, if you read it. There is a great concern right now because of what's been happening with respect to electronic surveillance, quite possibly involving Americans as well as foreigners.

You said something interesting this morning. You said, generally, there has to be a warrant issued by a neutral and detached magistrate before a search can be carried out.

Now, with respect to the FISA law, the Committee report, Birch Bayh was the Chairman of the Intelligence Committee at the time. He spells out this covers all surveillance in the United States. And then President Carter, when he signed the law, said this covers all surveillance within the United States. So there is a burgeoning question as to whether the President now has the authority to wiretap Americans without going to the FISA court.

When you said, generally, there has to be a warrant, what that said to me was you were providing for an exception. Is that correct? Are you providing for an exception?

Judge Alito. I think that what I was addressing when I said that was what the Fourth Amendment means, the general principle that is set out in the Fourth Amendment, and the case law under the Fourth Amendment says that a warrant is generally required, but there are well-recognized situations in which a search can be carried out without a warrant. Exigent circumstances is a situation that comes immediately to mind if--

Senator Feinstein. Well, let me stop you here. Do you recognize Justice Jackson's comment in the 1952 steel case where he set up that tripartite framework--

Judge Alito. I do--

Senator Feinstein. --of Presidential authority and when it is at its weakest is when Congress has legislated? And in 1978, Congress did legislate and covered the horizon, so to speak?

Judge Alito. Yes, Senator, I recognize that and I think that's a very useful framework for addressing issues of executive power. Now, there is a question about what the meaning of what Congress did, and that would be a statutory question. What is the meaning of the provision of FISA in question, and maybe there's no substantial argument about what was meant there, but maybe there would be an issue about what was meant there, and certainly there could be an issue about the meaning of the authorization on the use of military force. How far was that intended to go?

And so the statutory question, I think, would--that certainly would be an issue that could come up in this situation and probably you would need to--I think you would have to resolve the statutory question before you could figure out which of the three categories that Justice Jackson set out the case fell into.

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Senator Feingold. There has already been a lot of discussion of this topic today, but I would like to be sure I understand your opinion about whether the President, as Commander in Chief, can ignore or disobey an express prohibition that Congress has passed. The Torture Statute is one example, but, obviously, I could imagine a variety of others as well, as I am sure you could.

So here is the question: what are the limits, if any, on the President's power to do what he thinks is necessary to protect national security regardless of what laws Congress passes?

Judge Alito. Well, when you say regardless of what laws Congress passes, I think that puts us in that third category that Justice Jackson outlined, the twilight zone, where according to Justice Jackson, the President has whatever constitutional powers he has under--he possesses under Article II, minus what is taken away by whatever Congress has done, by an implicit expression of opposition or the enactment of a statute. And to go beyond that point, I think we need to know the specifics of the case. We need to know the constitutional power that the President--the type of Executive power the President is asserting and the situation in which it's being asserted, and exactly what Congress has done.

Senator Feingold. Then let us take a more concrete example. Does the President, in your opinion, have the authority, acting as Commander in Chief, to authorize warrantless searches of Americans' homes and wiretaps of their conversations in violation of the criminal and Foreign Intelligence Surveillance statutes of this country?

Judge Alito. That's the issue that's been framed by the developments that have been in the news over the past few weeks, and as I understand the situation, it can involve statutory questions, the interpretation of FISA, and the provision of FISA that says that no wiretapping may be done except as authorized by FISA or otherwise authorized by law, and the meaning of the authorization for the use of military force, and then constitutional questions. And those would be--those are issues, as I said this morning, that may well result in litigation. They could come before me on the Court of Appeals for the Third Circuit. They certainly could come before the Supreme Court. And before--those are weighty issues involving two of the most important considerations that can arise in constitutional law, the protection of a country and the protection of people's fundamental rights, and I would have to know the specifics and the arguments that were made.

Senator Feingold. They are indeed important questions, and that is why it is so important for me to try to figure out where you would be heading on this kind of an issue, and in fact, the question I just asked you was not something I formulated right now. It is the question that I asked word for word of the Attorney General of the United States at his confirmation hearing in January 2005. He answered as follows: "Senator, the August 30th memo--that's the memo that we sometimes refer to as the torture memo--has been withdrawn. It has been rejected, including that section regarding the Commander in Chief authority to ignore the criminal statutes. So it's been rejected by the executive branch. I categorically reject it. And in addition to that, as I've said repeatedly today, this administration does not engage in torture and will not condone torture. And so what you're really discussing is a hypothetical situation," was the end of his quotation.

Well, we now know, of course, that it was not a hypothetical situation at all, and when the Attorney General said he categorically rejected the torture memo, including the section regarding the Commander in Chief's authority to ignore criminal statutes, he was

also not being straight with this Committee. So I would like you to try to answer this question. Can the President violate or direct or authorize others to violate the criminal laws of the United States?

Judge Alito. The President has the obligation, under Article II of the Constitution, to take care that the laws are faithfully executed. And the laws mean, first and foremost, the Constitution of the United States. That applies to everybody. It applies to the President. And the President, no less than anybody else, has to abide by the Constitution. And it also means that the President must take care that the statutes of the United States that are consistent with the Constitution are complied with, and the President has an obligation to follow those statutes as well.

Those are the important general principles, and the application of them in a particular case depends on the facts of the case and the arguments, and a judge needs to know the arguments that are being made on both sides before reaching a conclusion about the result. Those are the overriding considerations.

Senator Feingold. I take that answer--and, obviously, you may not be able to comment on it because of the possibility of it coming before you--I take that to be a pretty serious answer in terms of the President's responsibilities to uphold and make sure that the laws are followed, including the criminal laws of the United States. So given the fact that this interpretation of the FISA law may well come before you at some point, I take it, as you have indicated, that would not only be an initial part of your analysis, but an awfully important analysis of whether the President has the power to override these criminal statutes. I certainly want to say for the record I do not believe the President has the ability to do that in this case, and in fact, I think, it would be almost impossible to interpret the FISA law in any other way than it clearly states, that it is the exclusive authority with regard to wiretapping outside of the criminal law.

You said earlier today, Judge, in response to Senator Leahy, that these types of gravely important constitutional questions very often do not end up being resolved by the judiciary, but rather by the other two branches. So what is the proper role of the judiciary in resolving a dispute over the President's power to disobey an express statutory prohibition?

Judge Alito. Well, the judiciary has the responsibility to decide cases and controversies that are presented to the judiciary, and that means that there has to be a concrete dispute between parties, and the parties have to have standing under the Constitution, and there's a whole doctrine that's called the Political Question Doctrine, but it's a very misleading term for people who are not lawyers. It doesn't mean that a dispute has something to do with politics or anything like that, it means that the dispute--in the sense in which people usually use the term "politics"--it means that it's a kind of dispute that the Supreme Court has outlined as being not a proper dispute to be resolved by the judiciary, involving a constitutional issue that should be resolved often between the branches of Government.

And I was talking earlier about some things that the President does that are not reviewable, vetoes, pardons, et cetera. There are things that Congress does that are not reviewable, impeachment, et cetera. In Baker v. Carr, Justice Brennan's opinion outlined a whole list of factors that inform the analysis of whether something is a justiciable

dispute, and sometimes these disputes between the branches of Government are held by the Supreme Court to fall into that category of being disputes that can't properly be resolved by the courts.

Senator Feingold. Do you expect that this matter of the warrantless searches is likely to be resolved with regard to the initial political question doctrine, or do you think it would be likely to be resolved on the merits with regard to the statute and the Constitution?

Judge Alito. I don't think I could answer that without providing sort of an advisory opinion about something that could well come up. If this does come up in litigation, then the courts have an obligation to decide whether it's a justiciable dispute.

The Political Question Doctrine, this doctrine of issues that are not justiciable, often involves conflicts between the branches of the Government, and when a person is asserting the person's individual rights are violated, that is the type of case that is often resolved, I mean typically resolved by the judiciary.

Senator Feingold. Judge, are we not going to be in kind of a tough spot if we find out the Supreme Court cannot help us figure out whether the FISA law is an exclusive authority or not? Is that not going to be hard to resolve between the Executive and the Congress?

Judge Alito. Well, Senator, when I was--when I referred--when I said in reference to Senator Leahy's question that often disputes between the two branches are resolved without resorting to the courts, I don't think I was referring specifically to this issue, and if I gave that impression, that was a false impression.

I think I was--what I meant to say, and what I hope that I did say, was that separation powers disputes in general sometimes fall within this doctrine.

Senator Feingold. Thank you, Judge. I want to come back to Mitchell v. Forsythe, which you participated in the Solicitor General's Office. As we have already heard, that case considered the Government's argument that President Nixon's Attorney General, John Mitchell, should be granted absolute immunity for authorizing warrantless wiretaps, and you signed the Government's brief, making that argument. The Supreme Court rejected the claim of absolute immunity, noting that the Attorney General, acting in the inherently secretive national security context, has few built-in restraints. Justice White, writing for the Court in Mitchell, said, "The danger that high Federal officials will disregard constitutional rights in their zeal to protect national security is sufficiently real to counsel against affording such officials an absolute immunity."

Now, that statement still has a lot of relevance today, does it not?

Judge Alito. Yes, it does. Absolute immunity is quite restricted under our legal system, but there are some high-ranking officials in all three branches of the Government, who do have absolute immunity just from civil damages, not from criminal liability or from impeachment, or removal from office, but for--or for injunctive relief,

they can be ordered to comply with the Constitution, but as far as civil damages are concerned.

Senator Feingold. But when you were at the Solicitor General's Office you wrote this memo about the case, saying, "I do not question the Attorney General should have this immunity for authorizing warrantless wiretap." Why did you not question the Attorney General's absolute immunity?

Judge Alito. First of all, because it was the position that our client, whom we represented in an individual capacity, and it was his money that was at stake here, wanted to make. So we had an obligation that was somewhat akin to the obligation of a private attorney representing a client.

Secondly, it was an argument to which the Department was committed. It has been made in Kissinger v. Halperin in the Carter administration. It was repeated in Harlow v. Fitzgerald in the Reagan administration. In Harlow v. Fitzgerald, the Supreme Court, while rejecting the idea that cabinet officers in general should have absolute immunity from civil damages, had said something like, and I'm not going to be able to provide an exact quote, but something like, but the situation could well be different for people who are involved in sensitive national security matters or foreign matters.

Senator Feingold. But you said in your memo that, quote, "I do not question the Attorney General's absolute immunity." You did not say it is, quote, "it is the position of our office," or as you were just saying, this administration has argued this in the past. You, in effect, injected yourself into the statement. Clearly, you were expressing your personal opinion on this legal issue, were you not?

Judge Alito. Senator, I actually don't think I was expressing a personal opinion. I was saying that in my capacity as the writer of this memo who was recommending that the argument not be made, even though it was one that our client wanted to have made, I wasn't disputing the general argument to which the Department was committed. But I thought that we should take a different approach, that we should just argue the issue of appealability. But that was not the approach that was taken.

Senator Feingold. Let us go on to the Solicitor General's brief in the Mitchell case, which you signed. That brief argues strongly for the need for absolute immunity, arguing that it is far more important to give the Attorney General as much latitude as possible in the national security context than to, as the brief puts it, quote, "defer the occasional malevolent official," from violating the law. Now, I find this statement particularly troubling today in light of the current administration's warrantless wiretapping in the name of national security. Do you agree with that statement in the brief, that broad deference is warranted even if some Attorneys General may abuse their power?

Judge Alito. I think the issue of the scope of the immunity that the Attorney General has is now settled by Mitchell v. Forsythe. That is the law. It was considered-- the argument was considered by the Supreme Court and they decided the question.

Judges have absolute immunity for their judicial decisions. Members of Congress and their staff have absolute immunity for things that they do that are integral

to the legislative process. The President has absolute immunity from civil damages for the President's official acts. But absolute immunity is used very sparingly because of just the considerations that you're referring to. But the consideration on the other side is that people who are involved in lots of things that make other people angry--judges deciding cases, members of Congress passing legislation, Presidents doing all sorts of things--would otherwise be subjected to the threat of so many political reprisals that they would be driven from office. It's a policy judgment that our law has made that some people should have absolute immunity, but it's used very sparingly.

Senator Feingold. I find your comments interesting because, of course, the argument is often fairly made that after 9/11, we have to recognize the important role that our executive plays in protecting the American people. But I would also argue that it is a particularly compelling time to make sure there isn't undue deference, given the types of powers that the executive may seek to use in trying to fight this threat.

In your class notes from a seminar you gave at Pepperdine Law School on "Civil Liberties in Times of Emergency," you repeatedly raised the question of whether the judiciary has the capability to review certain types of determinations made by the executive branch in national security cases in particularly factual issues, and we have recently seen an example of a court evidently expressing its frustration at a national security case when the facts presented to it by the executive, which it had accepted, apparently did not hold up. Of course, I am talking about the Fourth Circuit's serious concern it hadn't been told that Jose Padilla needed to be held militarily as an enemy combatant because he had plotted to use a dirty bomb in the United States, and then finding out that three-and-a-half years later, the Justice Department wanted to transfer him to law enforcement authorities to stand trial for entirely different and much less serious crimes. In Padilla, the Fourth Circuit was originally willing to defer to the executive's assertion that it needed to hold Padilla militarily. It was quite upset, and justifiably, I think, to find out that it might not have deserved such deference.

I am not going to ask you about that case because I know that case is coming before the Supreme Court, but I do want you to say something about the role of the judiciary in evaluating the facts presented to it in national security cases by the executive branch. How does a court decide whether to rely on the facts presented to it by the executive in a national security case?

Judge Alito. What I was doing in that talk at Pepperdine was framing that question, and it's a lot easier to frame the question and to ask students to think about it and give me their reactions than it is to answer it. We've had examples of instances in which the judiciary in the past has had to confront this issue of reviewing factual presentations of the executive in times of national crisis and there have been instances in which the judiciary has accepted--and I'm thinking of the Japanese internment cases, has accepted, which were one of the great constitutional tragedies that our country has experienced--has accepted factual presentations by the political--by the executive branch that turned out not to be true, and from my reading of what went on, were not believed to be true by some high-ranking executive officials at the time.

But there is the problem of judicial fact finding, which I was talking about earlier, and the context of things that may be taking place on the battlefield, for example,

or things that are taking place in wartime probably are more difficult for the judiciary to evaluate than other factual questions. So that's the dilemma and I can't say that I can provide a clear answer to it.

Senator Feingold. I do appreciate your referencing the Korematsu case and the problem there and how this is going to become an even more serious issue.

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Senator Graham. I particularly enjoyed Senator Feingold's questions about executive power and I will pick up on that.

Number one, from a personal point of view, do you believe the attacks on 9/11 against our nation were a crime or an act of war?

Judge Alito. That is a hard question to answer and--

Senator Graham. Good.

Judge Alito. That is a way of buying 30 seconds while I think about the answer. Senator, I think that what I think personally about this is really not something that would be--that would inform anything that I would have to do as a judge.

Senator Graham. Well, Judge, I guess I disagree because I think we are at war and the law of armed conflict in a wartime environment is different than dealing with domestic criminal enterprises. Do you agree with that?

Judge Alito. It certainly is.

Senator Graham. We have laws on the books that protect us, the Fourth Amendment included, from our own law enforcement agencies coming against our own citizens. But we also have laws on the books during a time of war to protect our country from being infiltrated by foreign powers and bodies who wish to do harm to us. That is a totally different legal concept. Is that correct?

Judge Alito. I am reluctant to get into this because I think that things like act of war can well have particular legal meanings in particular contexts and, you know, under the Constitution.

Senator Graham. Do you doubt that our Nation has been in an armed conflict with terrorist organizations since 9/11, that we have been in an undeclared state of war?

Judge Alito. In a lay sense, certainly we have been in a conflict with terrorist organizations. I am just concerned that in the law all these phrases can have particular meanings that are defined by the cases.

Senator Graham. That is very important, and let's have a continuing legal education seminar here about the law of armed conflict in the Hamdi case. The Hamdi case is precedent. Is that correct? It is a decision of the Supreme Court.

Judge Alito. It certainly is, yes.

Senator Graham. And it tells us at least two to three things. Number one, it tells us something that I find reassuring that the Bill of Rights, the Constitution, survive even in a time of war.

Judge Alito. That is certainly true.

Senator Graham. So there is a holding in that case that I want to associate myself with, and I think Senator Feingold does, that even during a time of war when your values are threatened by an enemy who does not adhere to those values, they will not be threatened by your Government unless there is a good reason. Do you agree with that?

Judge Alito. Senator, I agree that the Constitution was meant to deal with all of the contingencies that our country was going to face. And I think the Framers hoped that we would not get involved in many wars, but they were students of history and I am sure they realized that there would be wars. They provided for war powers for the President and for Congress, and the structure is meant to apply both in peace and in war.

Senator Graham. And you said in your previous testimony that no political figure in this country is above the law, even in a time of war.

Judge Alito. That is correct.

Senator Graham. There is another aspect of the Hamdi case that no one has picked up upon, but I will read to you. "In light of these principles, it is of no moment that the authorization to use military force does not use specific language of detention, because detention to prevent a combatant's return to the battle field is a fundamental incident of waging war. In permitting the use of necessary and appropriate force, Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here, and those circumstances were a person alleged by the executive branch to be an enemy combatant."

And one of the principles we found from the Hamdi case is that because we are, in my opinion, at war and Congress has authorized the President to use force against our enemies, the executive branch, according to the Hamdi case, inherent to his power of being commander-in-chief, can detain people who have been caught on the battle field.

Does that make sense to you? Do you agree that is the principle of the Hamdi case?

Judge Alito. That is the principle of the Hamdi case.

Senator Graham. And it makes perfect sense because if we catch someone in Afghanistan or Iraq or any other place in the world who is committing acts of violence against our troops or our forces, or we catch people here in the United States who have infiltrated our country for the purpose of sabotaging our Nation, there is no requirement in the law to catch and release these people, is there?

Judge Alito. Well, Hamdi speaks to the situation of an individual who was caught on the battle field.

Senator Graham. In the history of our Nation, when we captured German and Japanese prisoners, was there ever a legal requirement anybody advanced that after a specific period of time you have to let them go?

Judge Alito. It is my understanding that the prisoners of war who were taken in World War II were held until the conflict was over.

Senator Graham. It would be an absurd conclusion for a court or anyone else to tell the executive branch that if you caught somebody legitimately engaged in hostile activities against the United States that you have to let them go and go back and fight us again. That makes no sense, does it?

Judge Alito. Well, I explained what my understanding is about how this matter of holding prisoners was handled in prior wars. This issue was addressed in Hamdi, in what was discussed in Hamdi in the context of--

Senator Graham. In the Padilla case, they held an American citizen who was engaged in hostile activities against the United States allegedly as an enemy combatant and the Fourth Circuit said the President, during a time of hostility, has the ability to do that.

Do you agree that that is a part of our jurisprudence?

Judge Alito. That was the holding in Padilla.

Senator Graham. Yes.

Judge Alito. Yes, that was the holding of the lower court in--of Padilla, yes.

Senator Graham. Now, the point I am trying to make is that when you are engaged in hostilities, there are some things that we assume the President will do. If we don't kill the enemy, we capture the enemy. The President, as the Commander-in-Chief, will make sure they don't go back to the battle.

Number two, if we catch someone and there is a question to their status, whether or not you are prisoner of war under the Geneva Convention, are you enemy combatant, who traditionally in our constitutional democracy determines whether or not--the status of a person engaged in hostilities?

Judge Alito. Well, Padilla--I am sorry--Hamdi said that a person who is being detained, an unlawful person who is asserted to be an unlawful combatant and who is being detained, has the right--has due process rights. And the issue of the type of tribunal--and they explained to some degree how that would be handled, but the identity of the particular tribunal that would be required to adjudicate that was not an issue that was decided in Hamdi or any of the other cases.

Senator Graham. Can you show me an example in American jurisprudence where the question of status, whether a person was a lawful combatant or an unlawful combatant, was decided by a court and not the military?

Judge Alito. I can't think of an example. I can't say that I am able to survey the whole history of this issue, but I can't think of one.

Senator Graham. Can you show me a case in American jurisprudence where an enemy prisoner held by our military was allowed to bring a lawsuit against our own military regarding their detention?

Judge Alito. I am not aware of such a case.

Senator Graham. Is there a constitutional right for a foreign non-citizen enemy prisoner to have access to our courts to sue regarding their condition of confinement under our Constitution?

Judge Alito. Well, I am not aware of a precedent that addresses the issue.

Senator Graham. Do you know of any case where an enemy prisoner of war brought a habeas petition in World War II objecting to their confinement to our Federal judiciary?

Judge Alito. There may have been a lower court case. I am trying to remember the exact status of the individual and it was--

Senator Graham. Well, let me help you. There were two cases. One of them involved six saboteurs, the In Re Quirin--

Judge Alito. Quirin case, yes.

Senator Graham. Would you agree with me that that case stood for the proposition that in a time of war or declared hostilities, an illegal combatant, even though they may be an American citizen--the proper forum for them to be tried in is a military tribunal and they are not entitled to a jury trial as an American citizen in a non-wartime environment?

Judge Alito. Well, those were a number of German saboteurs who landed by submarine in the United States and they were taken into custody and they were tried before a military tribunal and the case went up to the Supreme Court. The Supreme Court sustained their being tried before a military tribunal. At least one of them claimed to be an American citizen, and most of them--I think all but one or two actually were executed.

Senator Graham. And our Supreme Court said that is the proper forum during a wartime environment to try people who are engaged in illegal combat activities against our country. Is that correct?

Judge Alito. Well, they sustained what was done under the circumstances that I described.

Senator Graham. Well, that would be a precedent, then, wouldn't it?

Judge Alito. It is the precedent, yes.

Senator Graham. Okay. There was a case involving six German soldiers captured in Japan and transferred to Germany, and they brought a habeas petition to be released in the Eisen--I can't remember the--

Judge Alito. Eisentrager.

Senator Graham. Well, you know it. Tell me what the court decided there.

Judge Alito. Well, they were--as I recall, they were Germans who were found in China assisting the Japanese--

Senator Graham. China and not Japan. You are right.

Judge Alito. --assisting the Japanese after the termination of the war with Germany, and they were unsuccessful in their habeas petition. And that was interpreted prior to the Supreme Court's decisions a couple of years ago to mean that there was a lack of habeas jurisdiction over them because they were being held in territory that was not U.S. territory.

Senator Graham. For those who are watching who are not lawyers, generally speaking in all of the wars that we have been involved in, we don't let the people trying to kill us sue us, right? And we're not going to let them go at an arbitrary time period if we think they are still dangerous because we don't want to go have to shoot at them again or let them shoot at us again.

Is that a good summary of the law of armed conflict?

Judge Alito. The precedent--I don't know whether I would put it quite that broadly, Senator.

[Laughter.]

Judge Alito. The precedent that you--Johnson v. Eisentrager, of course, has been substantially modified, if not overruled. Ex Parte Quirin, of course, is still a precedent. There was a lower court precedent involving someone who fought with the Italian army and I can't remember the exact name of it, and that was the case that I thought you were referring to when you first framed the question. But those are the precedents in the area.

Then if you go back to the Civil War, there is Ex Parte Milligan and a few others. Now, in Hamdi--

Senator Graham. We don't have to go back that far.

Judge Alito. Well, in this area I think it is actually instructive to do it. But in Hamdi, the Court addressed this question of how long the detention should take place and they said--because they were responding to the argument that this situation is not like the wars of the past which had a more or less fixed--it was not anticipated that they would go on for a generation and they said we will get to that if it develops that way.

Senator Graham. Who is better able to determine if an enemy combatant, properly held, has ongoing intelligence value to our country? Is it the military or a judge?

Judge Alito. On intelligence matters, I would think that is an area where the judiciary doesn't have expertise. But we do get into this issue I was discussing with Senator Feingold about the degree to which--the balance between the judiciary's performing its function in cases involving individual rights and its desire not to intrude into areas where it lacks expertise particularly in times of war and national crisis.

Senator Graham. So having said that, if we have a decision to make as a country when to let someone go who is an enemy combatant, I guess we have got two

choices: we can have court cases, or we can allow the military to make a determination if that person still presents a threat to the United States, and whether or not that person has an intelligence value by further confinement.

Do you feel the courts possess the capabilities and the competence to make those two decisions better than the military?

Judge Alito. The courts do not have expertise in foreign affairs or in military affairs, and they certainly should recognize that. And that is one powerful consideration in addressing legal issues that may come up in this context. But there is the other powerful consideration that it is the responsibility of the courts to protect individual rights in cases that are properly before the Court, cases where they have jurisdiction in one way or another, cases that are fit for judicial resolution.

Senator Graham. I totally understand that, but our courts have not by tradition gotten involved in running military jails during time of war. I can't think of one time where a prisoner of war housed in the United States during World War II, a German Nazi or a Japanese prisoner was able to go and sue our own troops about their confinement. I think there is a reason there is none of those cases. It would lead to chaos.

Now, when it comes to treating detainees and how to treat them, I think the Congress has a big, big role to play, and I think that the courts have a big role to play. Are you familiar with the Geneva Convention?

Judge Alito. I have some familiarity with it.

Senator Graham. Do you believe it has been good for our country to be a signatory to that convention?

Judge Alito. I think it has, but it's not really my area of authority. That's Congress' area of authority.

Senator Graham. Well, just as an American citizen, are you proud of the fact that your country has signed up to the Geneva Convention and that we have laid out a system of how we treat people who fall into our hands and how we will engage in war?

Judge Alito. I think the Geneva Convention--and I'm not an expert on the Geneva Conventions, but I think they express some very deep values of the American people, and we have been a signatory of them for some time, and I think that--

Senator Graham. Now, let's go back to the legal application of the Geneva Convention. If someone was captured by an American force and detained, either at home or abroad, would the Geneva Convention give that detainee a private cause of action against the United States Government?

Judge Alito. Well, that's an issue, I believe, in the Hamdan case, which is an actual case that's before the Supreme Court. It goes to the question of whether a treaty is self-executing or not. Some treaties are self-executing.

Senator Graham. Has there ever been an occasion in all the war we have fought where the Geneva Convention was involved whether the courts treated the

Geneva Convention as a private cause of action to bring a lawsuit against our own troops?

Judge Alito. I'm not familiar with such a case, but I can't say whether there might be some case or not.

Senator Graham. Now, when it comes to what authority the Executive has during a time of war, we know the Supreme Court has said it is implicit from the force resolution that you can detain people captured on the battlefield. Hamdi stands for that proposition. Is that correct?

Judge Alito. That's what was involved in Hamdi.

Senator Graham. The problem that Senator Feingold has and I have and some of the rest of us have is does that force resolution--does it have the legal effect of creating the exception to the FISA court? And I know that may come before you, but let's talk about generally how the law works.

You say that the President has to follow every statute on the books unless the statute allows an exception for the President. Is that a fair statement? Just being President, you cannot set aside the law.

Judge Alito. The President has to follow the law, and that means the Constitution and the laws that are enacted consistent with the Constitution.

Senator Graham. There is a statute that we have on the books against torture. Are you familiar with that statute?

Judge Alito. The Convention Against Torture, well, the statutes implementing the Convention Against Torture.

Senator Graham. And the statute provides the death penalty for somebody who violates the conventions as a possible punishment.

Judge Alito. That's right. If death results, the death penalty is available.

Senator Graham. So this idea that Senator McCain somehow banned torture is not quite right. The Convention on Torture and the statute that we have implementing that convention were on the books long before this year. Is that correct?

Judge Alito. Yes, they were.

Senator Graham. Do you believe that any President, because we are at war, could say, "The statute on torture gets in the way of my ability to defend the United States, therefore, I don't have to comply with it"?

Judge Alito. The President has to comply with the Constitution and the laws of the United States that are enacted consistent with the Constitution. That is the principle. The President is not above the Constitution and the laws.

Senator Graham. Now, if there is a force resolution that Congress passes to allow any President to engage in military activity against someone trying to do us harm, and the force resolution says the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned,

authorized, committed, or aided the terrorist attacks on September 11, 2001, or just make it generic, if someone argued that that declaration by Congress was a blanket exemption to the warrant requirement under FISA, would that be a product of strict constructionist legal reasoning?

Judge Alito. I think that a strict constructionist, as you understand it, would engage in a certain process in evaluating that question, and a strict constructionist, a person who interprets the law--and that's how I would put it. A person who interprets the law would look at the language of the authorization for the use of military force and legislative history that was informative, maybe past practices--were there prior enactments that are analogous to that? What was the understanding of those? And a host of other considerations that might go into the interpretive process.

Senator Graham. I guess what I am saying, Judge, is I can understand when the Court ruled that the President has it within his authority to detain people on the battlefield under this force resolution, that makes sense. I understand why the President believes he has the ability to surveil the enemy at a time of war. And the idea that our President or this administration took the law in their own hands and ignored precedent of other Presidents or case law and just tried to make a power grab I don't agree with. But this is really not about you, so you don't have to listen. I am talking to other people right now.

[Laughter.]

Senator Graham. The point I am trying to make is what Justice Jackson made, that when it comes to issues like this, when we surveil our enemy and we cross our own borders and we have information about our own people, we need, in my opinion, Judge, to have the President at the strongest. And that would be when Congress through collaboration with the President comes up with a method of dealing with that situation, and that it could be very dangerous in the long run if we overinterpret war resolutions, because I have got a problem with that. And I believe that if we don't watch it and we overinterpret these resolutions, we will have a chilling effect for the next President. The next President who wants to use force to protect us in a justifiable manner may be less likely to get that resolution approved if we go too far.

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Senator Cornyn. Let me ask you now--we could leave this sitting up here for a minute, but I have a few more minutes left. Another thing you have been criticized for is your unlimited view of Presidential power, is the way it has been phrased, the suggestion that somehow you are always going to defer to the President and the executive branch when the legislative branch and the executive branch vie for authority, whether it is in the intelligence gathering area, the National Security Agency and this electronic eavesdropping, really an early-warning system to try to identify terrorists so we can protect ourselves against another 9/11, or other acts of Presidential power.

Now, you and I think Senator Graham talked a little bit about the Hamdi decision, where the United States Supreme Court said that the use of force authorization that was issued by Congress after the 9/11 attack authorizing the President to use necessary force to defeat the Taliban and al Qaeda, the supposed perpetrators of the 9/11 attacks, the question came up whether that included an authorization by Congress to detain terrorists without charging them with a crime. My understanding is in that case that the Supreme Court, it was fractured, but the plurality opinion that Justice O'Connor joined said that that authorization of use of force was a Congressional act which trumped the statutory limitation that Congress had previously passed about detaining American citizens without charging them with a crime. Did I get that roughly correct?

Judge Alito. Yes, that's exactly correct. Eighteen U.S.C. 4001, which is called the anti-detention statute, says that nobody may be detained without authorization, and in Hamdi, Justice O'Connor's opinion concluded that the authorization for the use of military force constituted statutory authorization to detain a person who had been taken prisoner as an unlawful combatant in Afghanistan.

Senator Cornyn. Well, I appreciate your pointing out that one of the other important statements in Hamdi was that people who are detained have certain due process rights and that the President cannot exercise his powers as Commander in Chief without judicial review or without anyone else looking at it, including a court or military tribunal under appropriate circumstances, but the fact is, Justice O'Connor took a view of Presidential power there that some might consider to be rather broad, the power to detain an American citizen who is a suspected terrorist without actually charging them with a crime for the reasons that Senator Graham stated, that if that person who was actually captured in Afghanistan and brought to Guantanamo Bay, if they were released, then they likely would return to the battlefield and plot and plan and execute lethal attacks on American citizens.

Interestingly, people like to characterize judges as conservative, liberal. One interesting thing to me about that is Justice Scalia, who you have been likened to, actually dissented and held that it was unconstitutional for the President to detain these individuals without charging them with some crime, like treason or something else, isn't that correct, sir?

Judge Alito. Yes, that's correct. This is a case where Justice O'Connor's view of the scope of executive power was broader, considerably broader, than Justice Scalia's. Justice Scalia's position was that unless habeas corpus is suspended, and there are only limited circumstances in which that can take place, then there would have to be a criminal trial.

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Senator Leahy. Judge Alito, welcome back. If the past is any prologue, you probably do not have more than another day or so of this to go through. I am concerned. I want to just state this right out, concerned that you may be retreating from part of your record. I think that some of the answers that--I have expressed this concern, mentioned to the Chairman I am concerned that some of your answers were inconsistent with past statements. All of us want to know your legal and constitutional philosophy.

So let's go back to the questions that I was asking yesterday about checking presidential power, and we spoke about Justice Jackson's opinion in Youngstown. Justice Jackson, as you know, is a hero of mine, and I point often to the Youngstown case. But when Congress acts to strain the President's power, as we did with the anti-torture statutes and the Foreign Intelligence Surveillance Act, I believe the President's power then is at its lowest ebb. You seemed to be saying yesterday that fell into the second category of Jackson, the twilight zone. Actually, I believe you were mistaken on that. Justice Jackson spoke of the twilight zone area, or as he said, zone of twilight, where Congress had not acted.

So let us go to the landmark decision in Hamdi, and Justice O'Connor's decision. That is whether there was due process required a U.S. citizen, can have a meaningful chance to challenge his detention by the Government.

Now, Justice O'Connor wrote that the President does not have a blank check even in time of war. Yesterday you told Senator Specter that you agreed with Justice O'Connor's general statement. A very different view was in the dissent. Justice Thomas would have upheld the extreme claims with the all powerful and essentially unchecked President. He argued the Government's powers could not be balanced away by the Court, and there is no occasion to balance a competing interest. Which one is right, Justice O'Connor or Justice Thomas? They are quite a bit different.

Judge Alito. Justice O'Connor wrote the opinion of the Court. The first question that she addressed in Hamdi was whether it was lawful to detain Hamdi, and it was a statutory question, and it was a question whether--it was whether he was being detained in violation of what is often referred to as the anti-detention statute, which was passed to prevent a repetition of the Japanese internment that occurred during World War II, and she concluded that the authorization for the use of military force constituted authorization for detention. And then she went on to the issue of the constitutional procedures that would have to be followed before someone could be detained, and she looked to standard procedural due process law in this area, and identified some of the requirements that would have to be followed before someone could be detained.

And now issues have arisen about the identity of the tribunal that is to make a determination about detaining people who are taken into custody during the war on terrorism, and that's one of the issues that's working its way through the court system.

Senator Leahy. No, I am not talking about things working, but just on Hamdi that has been decided. Would you say that Justice O'Connor basically applied the Jackson test, not the twilight zone test, but the test of where the President's power is at its lowest ebb?

Judge Alito. In addressing the statutory question I don't think she had any need to get into Justice Jackson's framework as well.

Senator Leahy. Would you say it would be consistent with what Justice Jackson said?

Judge Alito. I think it certainly is consistent with what Justice Jackson said.

Senator Leahy. Which decision do you personally agree with, hers or the dissent by Justice Thomas?

Judge Alito. I think that the war powers are divided between the executive branch and Congress. I think that's a starting point to look at in this area. The President is the Commander in Chief, and he has authority in the area of foreign affairs, and is recognized in Supreme Court decisions as the sole organ of the country in conducting foreign affairs.

Senator Leahy. But you are not going to say which of the two decisions you agree with.

Judge Alito. Well, I'm trying to explain my understanding of the division of authority in this area, and I think that it's divided between the executive and the Congress. I certainly don't think that the President has a blank check in time of war. He does have the responsibility as the Commander in Chief, which is an awesome responsibility.

Senator Leahy. And we all understand that and appreciate that. I understand, listening to Chief Justice Roberts, when he was here sitting where you are, that he felt that Justice O'Connor's decision most clearly tracked the Jackson standards in Youngstown.

But I want to get more into this unitary Executive theory because I really had questions listening to you yesterday. You have said as recently as five years ago, that you believe the unitary Executive theory best captures the constitutional role of presidential power. You were a sitting judge when you said that. And do you still adhere to that constitutional view that you were expressing five years ago?

Judge Alito. I think that the considerations that inform the theory of the unitary Executive are still important in determining, in deciding separation of powers issues that arise in this area. Of course, when questions come up involving the power of removal, which was the particular power that I was talking about in the talk that you're referring to, those are now governed by a line of precedents from Myers going through Humphrey's Executor and Wiener and Morrison, where the Court held 8-1 that the removal restrictions that were placed on an independent counsel under the Independent Counsel Act did not violate separation of powers principles. So those would be applied. Those would be the governing precedents on the question of removal, but my point in the talk was that the considerations that underlie this theory are relevant, should inform decisionmaking in the area going beyond the narrow question of removal.

Senator Leahy. But in the past you criticized Morrison. Are you saying now that you are comfortable with Morrison, that you accept it?

Judge Alito. Morrison is a settled--is a precedent of the Court. It was an 8-1 decision. It's entitled to respect under stare decisis. It concerns the Independent Counsel Act, which no longer is in force.

Senator Leahy. So do you hold today that the Independent Counsel statute was beyond the congressional authority to authorize--to enact?

Judge Alito. No. I don't think that was ever my position.

Senator Leahy. All right. Under the theory of unitary Executive that you have espoused, what weight and relevance should the Supreme Court give to a presidential signing statement? I ask that because these are real issues. I mean we passed the McCain-Warner, et al. statute against torture, when the President did a separate--after he signed it into law, did not veto it. He had the right and, of course, the ability to veto it. He did not veto it. He signed it into law, and then he wrote a sidebar, a signing statement basically saying that it will not apply to him or those acting under his order if he does not want it to.

Under unitary theory of Government, one could argue that he has an absolute right to ignore a law that Congress has written. What kind of weight do you think should be given to signing statements?

Judge Alito. I don't see any connection between the concept of a unitary Executive and the weight that should be given to signing statements in interpreting statutes. I view those as entirely separate questions. The question of the unitary Executive, as I was explaining yesterday, does not concern the scope of Executive powers. It concerns who controls whatever power the Executive has. You could have an Executive with very narrow powers and still have a unitary Executive. So those are entirely different questions.

The scope of Executive power gets into the question of inherent Executive power.

Senator Leahy. Let's go into that a little bit because back in the days when I was a prosecutor, I mean I was very shocked what happened in the Saturday Night Massacre. A President orders certain things to be done. The Attorney General says, no, I won't do it. Fires him. The Deputy Attorney General, said, "Okay, you do it," and Deputy Attorney General would not, saying it violated the law. Fires him. They keep on going down to finally find one person, a person you have praised, Robert Bork, who says, "Fine, I'll fire him. I'll do what the President says."

You have criticized Congress for allowing these independent agencies to refine and apply policies passed by Congress. You said that insofar as the President is the Chief Executive, he should follow their policies, not Congress.

So let's take one, for example, the Federal Election Commission, independent agency. They make policies. Suppose the President, whoever was the President, did not like the fact they were investigating somebody who had contributed to him. Could he order them to stop that investigation?

Judge Alito. Senator, I don't think I have ever said that--I don't think I've ever challenged the constitutionality of independent agencies. My understanding--

Senator Leahy. No, but you have said--my understanding is that you chastised Congress for giving so much power to them when the power should be in the President or in the Executive.

Judge Alito. Senator, I don't think I've ever said that either. I said that I thought that there was merit to the theory of the unitary Executive, and I tried to explain how I thought that should play out in the post-Morrison world, accepting Morrison as the Supreme Court's latest decision in a resounding 8-1 decision on the issue of removal. How should the issue of--how should the concept of the unitary Executive play out in the post-Morrison world?

On the issue of removal, my understanding of where the law stands now is that Myers established that there are certain officers of the executive branch whom the President has the authority to remove as he sees fit. There are--and there are those--

Senator Leahy. Of course, he could fire his whole cabinet today if he wanted to. We all accept that.

Judge Alito. Well, that was the issue that was presented by the Tenure in Office Act that led to the impeachment of the first President Johnson, and in Myers, Chief Justice Taft, although the act of that controversy was long past, Chief Justice Taft opined that the Tenure in Office Act had been unconstitutional.

Senator Leahy. But let us not go off the subject of these independent agencies that we have set up. Use as an example the FEC, the Federal Election Commission. Could the President, if he did not like somebody they were investigating, a contributor or something, could he order them to stop?

Judge Alito. What Morrison says is that Congress can place restrictions on the removal of inferior officers, provided that those removal restrictions don't interfere with the President's exercise of Executive authority. So they adopted a functional approach, and that was the Court's latest word on this question. They looked back to Humphrey's Executor, and Wiener, which had talked about categories, and they--categories of quasi-judicial and quasi-legislative officers, and they reformulated this as a functional approach, and that's the approach that would now be applied.

Senator Leahy. Do you believe the President has the power to curtail investigations, for example, by the Department of Justice?

Judge Alito. I don't think--

Senator Leahy. The Department of Justice is under him.

Judge Alito. I don't think the President is above the law, and the President is the head of the executive branch, and I've explained my understanding of the removal restrictions that can and cannot be placed on officers of the executive branch.

Senator Leahy. But could he order them to stop an investigation?

Judge Alito. Well, you'd have to look at the facts of the case and the particular officer that we're talking about.

Senator Leahy. Could he order the FBI to conduct surveillance in a way not authorized by statute?

Judge Alito. The President is subject to constitutional restrictions, and he cannot lawfully direct the FBI or anybody in the Justice Department or anybody else in the executive branch to do anything that violates the Constitution.

Senator Leahy. Could he--I am speaking now of statute--could he order our intelligence agencies to do something that was specifically prohibited by statute?

Judge Alito. My answer to that is the same thing. He has to follow the Constitution and the laws of the United States. He has to take care that the laws are faithfully executed. If a statute is unconstitutional, then the President--then the Constitution would trump the statute. But if a statute is not unconstitutional then the statute is binding on the President and everyone else.

Senator Leahy. Does the President have unlimited power just to declare a statute, especially if it is a statute that he had signed into law, to then declare it unconstitutional or he is not going to follow it?

Judge Alito. If the matter is later challenged in court, of course, the President isn't going to have the last word on that question, that's for sure. And the courts would exercise absolutely independent judgment on that question. It's emphatically the duty of the courts to say what the law is when constitutional questions are raised in cases that come before the courts.

Senator Leahy. That is an answer I agree with. Thank you. In other areas, SEC, can he order them to stop an investigation if it is somebody he does not want investigated?

Judge Alito. Well, the independent agencies are governed by Humphrey's Executor and cases that follow that, and there have been restrictions placed on the removal of commissioners of the independent agencies, and they have been sustained by the Supreme Court. That's where the Supreme Court precedent on the issue stands.

Senator Leahy. Is that settled law?

Judge Alito. It is a line of precedent that culminated, I would say--there have been a few additional cases relating to this, the Edmond case and the Freitag case, but I would look to Morrison, which was an 8-1 decision involving a subject of considerable public controversy, the removal of an independent counsel, removal of restrictions on that independent counsel.

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Senator Durbin. You have made it clear that when you spoke to the Federalist Society in 2000, you were not talking about scope, but you were talking instead as to whether or not he would have control over the executive branch. I hope I am characterizing your statement correctly.

Judge Alito. That is exactly correct, and I think in the speech I said there is a debate about the scope of what is meant by the executive power, but there isn't any debate that the President has the power to take care that the laws are faithfully executed, and that was the scope of the power that I was discussing.

Senator Durbin. So my question to you is this: What about those who do argue the unitary Executive scope theory? Do you agree with their analysis, do you disagree? Would you be joining Justices Scalia and Thomas--Justice Thomas, in particular, in his dissent in Hamdi--in arguing that in this situation a President has more power than the law expressly gives him?

Judge Alito. I don't think that the unitary Executive has anything to do with that. Let me just say that at the outset. I think that--and if other people use that term to mean the scope of executive power, that certainly isn't the way that I understand--

Senator Durbin. That is not your point of view?

Judge Alito. That is not my point of view.

Senator Durbin. You don't accept that point of view?

Judge Alito. No. I think--

Senator Durbin. If an argument is made that that is how they are going to expand the power of the President, as you testify today, that is not your position or your feeling? Say it in your own words.

Judge Alito. It is not my--the unitary--when I talk about the unitary Executive, I am talking about the President's control over the executive branch, no matter how big or how small, no matter how much power it has or how little power it has.

To me, the issue of the scope of executive power is an entirely different question and it goes to what can you read into simply the term "executive." That is part of it and, of course, there are some other powers that are given to the President in Article II, the commander-in-chief power, for example. And there can be a debate, of course, about the scope of that power, but that doesn't have to do with the unitary Executive.

Senator Durbin. So when Hamdi draws that line and Justice O'Connor makes that statement about no blank check for a President in times of war when it comes to the rights of American citizens and there is a dissent from Justice Thomas, who argues unitary Executive, scope of powers, more power to the President, you are coming down on the majority side and not on the Thomas side of that argument. Is that fair to say?

Judge Alito. Well, I am not coming down--I don't recall that Justice Thomas uses the term "unitary Executive" in his dissent. It doesn't stick out in my mind that he did. If he did, he is using it there in a sense that is different from the sense in which I was using the term.

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Senator Leahy. This will be my last, and I appreciate the courtesy of the Chairman, who, I might say, has run this hearing with total fairness, as he always does. I may have some follow-up questions in writing, but this will be last chance to ask you anything.

Under your theory of unitary Executive, are citizen suit provisions, such as those in our environmental laws, allowing citizens to act basically as private attorneys general and sue polluters, are they constitutional?

Judge Alito. I don't see a connection between the unitary Executive theory and that issue, and I think Congress has the authority to create a private cause of action for anyone that Congress chooses to create such a cause of action for, subject only to whatever limitations are imposed by the Constitution. But we often grapple with the issue of whether Congress intended to create a private cause of action for a particular class of plaintiffs. That's a difficult issue that comes up with some frequency in Federal litigation. But where Congress speaks directly to the question and says that people with- and defined the category of cases, the category of plaintiffs who can bring a suit, a citizen suit, or whatever it is, then that's definitive, of course, subject only to whatever limitations the Constitution imposes.

Senator Leahy. Judge, that is an answer--the substance of what you said is something obviously I would like, but I am still troubled by it because in November 2000, right after the Presidential election, you came and spoke to a meeting of the Annual Federalist Society Lawyers Convention about the powers of the President. And when you discussed your theory of unitary Executive, you criticized the Supreme Court's upholding the independent counsel statute, among other things. Is your answer today different than what you were saying then?

Judge Alito. What I said in that speech was that the Congress--I'm sorry, the Constitution confers the Executive power on the President, and when we are dealing with something that is within the President's Executive power, without getting into the scope of Executive power, and there I was focusing on the President's duty to take care that the laws are faithfully executed. That's explicitly set out in the Constitution, so there can't be any debate about whether or not the President has that power.

When we're dealing with something that is within the scope of the President's Executive power, the President should have the authority to control the executive branch, and the latest expression of the Supreme Court on that issue at the time was the Morrison decision, and the Morrison decision formulated the governing standard in what I would call functional terms. And it said that Congress has the ability to--has the authority to place restrictions on the President's ability to remove inferior executive officers, provided that in doing so Congress does not take away the President's authority to control the executive branch. And I was talking about the importance of maintaining the principle that the President is the head of the executive branch and should control the executive branch.

Senator Leahy. But you did at that time criticize the Supreme Court's upholding the independent counsel statute, did you not?

Judge Alito. I said that it was inconsistent with what you could call the pure theory of the unitary Executive. But at the time, of course, Morrison had been decided, and it was a resounding 8-1 decision, and it is a very important precedent of the Court.

Senator Leahy. If you had been there, it might have been 7-2? Is that what you are suggesting?

Judge Alito. Well, if it comes up before me, if I am confirmed, then Morrison is a strong expression of the view of the Supreme Court on the question, and an 8-1 precedent on an issue that was important and controversial at the time when it came up before the Court, and it was very clear and, as I said, a resounding decision by the Supreme Court on the question.

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Senator Kennedy. Just to initially follow up on the last area of questioning by Senator Leahy about a unitary Presidency, I have asked you questions about this earlier in the week. My colleagues have. I am not going to get back into the speech that you gave at the Federalist Society. Well, I will mention just the one part of it that is of concern.

If the administrative agencies are in the Federal Government, which they certainly are, they have to be in one of those branches, legislative, executive, judicial, and the logical candidate is the executive branch. The President has the power and the duty to supervise the way in which the--to which subordinate executive branch officials exercise the President's power, carrying Federal law into execution.

So we asked you about that power and that authority and you responded, as I think you just repeated here, that the Humphrey's case was the dominating case on this issue. Am I roughly correct? I am trying to get through some material. Is it--

Judge Alito. Yes. It was the leading case that was followed up by the Morrison case.

Senator Kennedy. Followed up by the Morrison case as the controlling case on these administrative agencies. But what you haven't mentioned to date is your dissent from the Morrison case. We have been trying to gain your view about the unitary Presidency. Most people believe we have an executive, legislative, and judicial, and now we have this unitary Presidency which many people don't really kind of understand and it sounds a little bizarre. You have indicated support for it. You have commented back and forth about it. You have indicated the controlling cases that establish the administrative agencies. You refer to the Morrison case as being guiding the authority.

But then in your comments about Morrison, you then proceed to outline a legal strategy for getting around Morrison. This is what you said. "Perhaps Morrison decision can be read in a way that heeds if not the constitutional text that I mention, at least the objective for setting up a unitary executive. That could lead to a fairly strong degree of Presidential control over the workings of the administrative agencies in the area of policy making."

Our question in this hearing is what is your view of the unitary Presidency. You have responded to a number of our people, but we are interested in your view and your comments on the Morrison case, which you say is controlling, but we want to know your view and it includes these words, "that could lead to a fairly strong degree of Presidential control over the workings of the administrative agencies in the area of policy making." Now, that would alter and change the balance between the Congress and the President in a very dramatic and significant way, would it not?

Judge Alito. I don't think that it would, Senator. The administrative agencies--the term "administrative agencies" is a broad term and it includes the Federal Reserve--it includes agencies that are not regarded as so-called independent agencies. It includes agencies that are within--that are squarely within the executive branch under anybody's understanding of the term, agencies where they are headed by a Presidential appointee whose term of office is at the pleasure of the President, and that's principally what I'm talking about there, the ability of the President to control the structure of the executive branch, not agencies--the term "administrative agencies" is not synonymous with agencies like the FTC, which was involved in the Humphrey's Executor case, where the agency is headed by a commission and the commissioners are appointed by the President for a term of office and there are conditions placed on the removal of the commissioners.

Senator Kennedy. The point, Judge, the answer you gave both to my colleagues Senator Leahy, Durbin, and to me, and the quote, "the concept of a unitary executive does not have to do with the scope of executive power" really was not accurate. You are admitting now that it has to do with the administrative agencies and this would have a dramatic and important reconsideration of the balance between the executive and the Congress. I haven't got the time to go through, but we are talking about the Federal Reserve, Consumer Product Safety, the Federal Trade Commission, a number of the agencies that would be directly considered and that have very, very important independent strategy.

Judge Alito. Senator, as to the agencies that are headed by commissions, the members of which are appointed for terms, and there are limitations placed on removal, the precedents--the leading precedent is Humphrey's Executor and that is reinforced, and I would say very dramatically reinforced, by the decision in Morrison, which did not involve such an agency. It involved an officer who was carrying out what I think everyone would agree is a core function of the executive branch, which is the enforcement of the law, taking care that the laws are faithfully executed, and yet--

Senator Kennedy. But the point here is that you take exception to Morrison. You are very clear. We are interested in your views. We understand the Humphrey's and Morrison are the guiding laws, but we talked about stare decisis and other precedents. But you have a different view with regards to the role of the executive now, an enhanced role, what they call the unitary Presidency, and that has to do, as well, with the balance between the executive and the Congress in a very important way in terms of these administrative agencies.

I haven't got the time to go all the way through, but we did have some discussion about those agencies and how it would alter the balance of authority and power between the Congress and the executive. That is very important. It is enormously interesting.

We have had Professor Calabrese from Harvard University spelled this out in great detail now, and I know you have separated yourself a bit from his thinking, to the extent that he would go in terms of administrative agencies. The point is, there would be a different relationship if your view was the dominant view in the Supreme Court between the executive and the Congress and that is really the point.

Judge Alito. But Senator Kennedy, what I have tried to say is that I regard this as a line of precedent that is very well developed and I have no quarrel with it and it culminates in Morrison, in which the Supreme Court said that even as to an inferior officer who is carrying out the core executive function of taking care that the laws are faithfully executed, it is permissible for Congress to place restrictions on the ability of the President to remove such an officer, provided that in doing so, there is no interference with the President's authority, and they found no interference with that authority there. That is an expression of the Supreme Court's view on an issue where the claim for--where the claim that there should be no removal restrictions imposed is far stronger than it is with respect to an independent agency like the one involved in Humphrey's Executor.

Senator Kennedy. The point is that you differed with Morrison and outlined a different kind of a strategy.

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Senator Biden. [L]et me go to an area that I hope you will engage me in and it goes to executive power. I have had the dubious distinction because of my role in the Judiciary Committee and on the Foreign Relations Committee in the last three or four times forces have been used by a President to be the guy in charge of, at least on my side of the aisle, drafting or negotiating the drafting of the authority to use force, whether it was President Clinton, before that President Bush, and even before that, the discussion back on Lebanon with President Reagan, et cetera. So it is something I have dealt with a lot. It doesn't mean I am right about it, but I have thought a lot about it.

Now, there is a school of thought that is emerging within the administration that is making not illegitimate an intellectually thought out claim that the power of the executive in times of war exceed that of what I would argue a majority of the constitutional scholarship has suggested. The fellow, who is a very bright guy, who is referred to as the architect of the President's memorandum on the ability of Presidents to conduct military operations against terrorists and nations supporting them is Professor Yoo. He has written a book called, *The Power of War and Peace*, and he makes some claims that are relatively new among the constitutional scholars in his book and he urges, and he had urged when he was at the administration, the President had these authorities.

For example, he says that the framing generation well understood that declarations of war were obsolete. He goes on to say, given this context, it is clear that

Congress' power to declare war does not constrain a President's independent and plenary right and constitutional authority over the use of force. And he goes on and he argues, as you well know this argument, I mean, not from your court, just as an informed, intelligent man, there is a great debate now of whether the administration's internal position is correct, and that is the President has the authority to go to war absent Congressional authorization. It was a claim made by Bush I and then dropped. Bush I dropped that the only reason the "declare war" provision is in the Constitution is to give the President the authority to go to war if the President didn't want to. That was the claim made. A similar claim is made here.

So I want to ask you a question. Do you think the President has the authority to invade Iran tomorrow without getting permission from the people, from the United States Congress, absent him being able to show there is an immediate threat to our national security?

Judge Alito. Well, that is a question that I don't think is settled by--the whole issue of the extent of the President's authority to authorize the use of military force without Congressional approval has been the subject of a lot of debate. The Constitution divides the powers relating to making war between the President and the Congress. It gives Congress the power to declare war, and obviously, that means something. It gives Congress the power of the purse, and obviously military operations can't be carried out for any length of time without Congressional appropriations. Congress is given the power to raise and support an army, to maintain a navy, to make the rules for governing the land and the naval forces. The President has the power of the Commander in Chief. I think there has been general agreement, and the Prize cases support the authority of the President to take military action on his own in the case of an emergency, when there is not time for Congress to react--

Senator Biden. Is that the deciding question, that the Congress does not have the time to act?

Judge Alito. Well, the Prize cases, I think, go--are read to go as far as to say that in that limited circumstance, the President can act without Congressional approval. A lot of scholars say that what is important as far as Congressional approval is not the form, it is not whether it is a formal declaration of war or not, it is whether there is authorization in one form or another. The War Powers Resolution was obviously an expression of the view on the part of Congress--

Senator Biden. If I can interrupt, Judge, since I am not going to have much time, the War Powers Resolution is a legislative act. I don't want to get into that. I am talking about the war clause. The administration argues and Yoo argues that, quote, "I do not think the President is constitutionally required to get legislative authorization for launching military hostilities." That is a pretty central question. That means the President, if that interpretation is taken, the President could invade--and maybe there is good reason to--invade Iraq--I mean, invade Syria tomorrow, or invade Iran tomorrow without any consultation with the United States Congress. That is a pretty big deal. Up to now, Fisher and Hencken and most of the scholarship here has said, no, no, no, the President's authority falls into the zone where he needs it for emergency purposes, where he doesn't have time to consult with the Congress.

But you seem to be agreeing with the interpretation of the President--Professor Yoo that says, no, the President has the authority if he thinks it is necessary to move from a state of peace to a state of war without any Congressional authorization. Am I--

Judge Alito. I hope I am not giving you that impression, Senator--

Senator Biden. Oh, okay. Maybe you can clarify.

Judge Alito. --because I didn't mean to. I didn't mean to say that. I have not read Professor Yoo's book or anything that he or anyone else has written setting out the theory that you described. I have been trying to describe what I understand the authorities to say in this area.

Generally, when this issue has come up, or variations of this issue have come up in relation to a number of recent wars--there were a number of efforts to raise issues relating to this in relation to the war in Vietnam. There was an effort to raise it in relation to our military operations in the former Yugoslavia. In most of those instances, they didn't--most of those instances were the cases were dismissed by the lower courts under the so-called political question doctrine--

Senator Biden. As you and I know, that is a different issue. The political question doctrine is a different issue than whether or not you think that--I am asking you as a citizen whether you think that, as the administration is arguing--for example, it argues that the case is made, and I am quoting, that "the Constitution permits the President to violate international law when he is engaged in war." It just states that, flatly, that is what the memorandum of the Justice Department states flatly. The President has that sole authority. He argues that the Congress could have that authority, as well, just violate international law. He goes on to argue, as does the memorandum argue, this is this administration's position, so that is why it is relevant. It says that the President may use his Commander in Chief and executive power to use military force to protect a nation subject only to the Congressional appropriations. That means that the argument the administration is making is the only authority that Congress has is to cut off funds.

Let us say we didn't want the President to invade Iran. The administration argues, we could pass a resolution saying, "You have no authority to invade Iran," and the President could say and the next day invade Iran. Our only recourse would be to cut off appropriations. But as you know, there is no way to cut off specific appropriations. You would have to cut off appropriations for the entire military, which means it is a totally useless tool for the Congress in today's world. You can't say, well, I am going to cut off only the money for the oil that allows the steaming of the ships to get from the East Coast to the Mediterranean Sea and/or to the Persian Gulf.

So it is really kind of important whether or not you think the President does not need the authority of the United States Congress to wage a war where there is not an imminent threat against the United States, and that is my question.

Judge Alito. And Senator, if I am confirmed and if this comes before me, or perhaps it could come before me on the court of appeals, the first issue would be the political question doctrine that I have described. But if we were to get beyond that, what I can tell you is that I don't have--I have not studied these authorities and it is not my

practice to just express an opinion on a constitutional question, including particularly one that is as momentous as this. I set out my understanding of what the Congress--what the Constitution does in allocating powers relating to war between the executive and Congress and what some of the leading authorities have said on this question. But beyond that--and I haven't read Professor Yoo's book or anything that he has written on this issue--I would have to study the question.

Senator Biden. My time is almost gone. I have a few minutes left. I would like to try to get quickly to another area here, if I may, that you have been questioned on, this whole notion of unitary executive and the questions referencing Morrison and the dissent of Scalia, et cetera.

As I reach and teach the dissent of Scalia, he--and I won't take the time, in the interest of time, to read his exact language--he has a very scathing and intellectually justifiable, many would argue, criticism of the test employed by the majority in that case as to determine whether separation of powers has been breached. He argues there are very bright lines, that there can be no sharing of any of the power. If it is an executive power, it is an executive power and it is executive power. He would argue that the alphabet agencies, the FDA, the FCC, the EPA, they are really not constitutionally permissible because the FDA makes a legislative judgment, it makes a judicial judgment, and it imposes fines and penalties, so therefore it does all three things and is sort of the bastard child.

But the majority of the Justices say that as long as the power one branch is using does not unduly trench upon the power of the other branch, or it does not substantially affect its ability to carry out its powers, then that is permissible. Which school of thought do you fall into?

Judge Alito. Different issues are presented in different factual situations--

Senator Biden. That is why I didn't give you a specific issue.

Judge Alito. Well, I think you need a specific issue in order to answer it. For example--

Senator Biden. Okay, the FDA. Is it constitutional, the Food and Drug Administration?

Judge Alito. I don't know that there are--I don't know whether there are statutory restrictions on the removal of the FDA Commissioner.

Senator Biden. No, but there are. The FDA does exercise judicial power. It makes judgments. You, Drug Company A, violated the law--

Judge Alito. And I don't know any constitutional objection to that.

Senator Biden. Well, Scalia.

Judge Alito. I don't know that he would have a constitutional objection to that. My understanding is that he would not have a constitutional objection to their doing that, but I could be mistaken, and I wouldn't want to prejudge any constitutional question that might be presented to me. But I am not aware of a constitutional--if there isn't any limitation on removal, then there obviously isn't a removal issue there. As to the agencies where there are restrictions on the removal of commissioners who are appointed for a term, that issue was dealt with within Humphrey's Executor and Wiener and in Morrison, and Morrison was eight-to-one and the other cases would be sort of a *fortiori* from Morrison.

Senator Biden. My time is up, and hopefully, someone will pursue this unitary executive issue about private suits, because I think what you explained was a little inconsistent, or I don't understand it, but I will let someone else do that. Thank you very much.

* * * * *

Senator Feinstein. I want to begin a conversation, hopefully. Let me try to set the precedent for it because others have discussed this as well. You said, and I think everybody agrees, that nobody is above the law, and nobody is beneath the law, and you made comment about the balance of powers, that all branches of Government are equal. There are three of us on this Committee, Senator Hatch, Senator DeWine and myself, that also serve on the Intelligence Committee, and Intelligence has the duty to provide the oversight for the 15 different agencies that relate to America's intelligence activities. So this question of presidential authority at a time of crisis, not necessarily a full declaration of war state to state, but a time of crisis becomes very prescient right now. And I wanted to talk to you a little bit about the President's plenary authorities as Commander in Chief, plenary meaning unrestrained and unrestrainable, his plenary authorities to defend the United States, and whether it is true that no law passed by congress binds him if he determines that it interferes with his Commander in Chief role.

Now, we have explicit powers, as you have said, under the Constitution, and in section 8 we have the explicit power to raise and support armies, to provide and maintain a Navy, to make rules for the Government, and regulation of the land and naval forces, and the National Security Administration, known as the NSA, is within the Department of Defense. It is headed by a general. So it would seem to me that there is an explicit power for the Congress to be able to pass the rules that govern the procedures of the National Security Administration.

Now, again to the Jackson test. When the President's power is the least is when the Congress has legislated, and this is where the Foreign Intelligence Surveillance Act, known as FISA, comes in. FISA is very explicit, and let me read a part of it to you. "Procedures in this chapter and the Foreign Intelligence Surveillance Act, known as FISA, shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted." It does provide--you used the word "general." It does provide two

exigent circumstances: one, following a declaration of war, the President has 15 days in which he can wiretap; the second exigent circumstance is an emergency provision that if he needs emergency authority, the Attorney General can authorize it, provided they go to the FISA Court within 72 hours.

I was concerned--there are two questions in this one statement. The first question is: if we have explicit authority under the Constitution to pass a law, and we pass that law, is the President bound by that law, or does his plenary authority supersede that law?

Judge Alito. The President, like everybody else, is bound by statutes that are enacted by Congress unless the statutes are unconstitutional, because the Constitution takes precedence over a statute. But in general, of course, the President and everybody else, is bound by a statute. There's no question about that whatsoever. And the President is explicitly given the obligation, under Article II, to take care that the laws are faithfully executed. So he is given the responsibility of making sure that the laws are carried out.

Senator Feinstein. Let me press you on unconstitutional, and a very few of us on this Committee are not lawyers. I am one of them, so let me just speak in common everyday terms. There are two resolutions that were passed, one authorizing the use of military force involving Iraq, and one involving use of terrorism. Never was there any indication that domestic wiretapping of Americans was involved in anything that was done. As a matter of fact, the former minority leader just wrote an Op-Ed piece, in which he said he was approached by the administration shortly before the second resolution was passed, and asked to add certain words that essentially--added the words "deter and preempt any future acts of terrorism or aggression against the United States," and he refused to do it.

Mr. Chairman, if I could place this statement in to record. Since we are going to be having hearings on what has happened, I think this is an appropriate bit of legislative history. I would like to place it in the record.

Chairman Specter. Thank you, **Senator Feinstein.** It will be made a part of the record without objection.

Senator Feinstein. Thank you.

So bottom line, two resolutions passed, no consideration by the Congress or any member that I know of, no legislative history to indicate that we included in these authorizations, authorization to wiretap Americans. The question then comes, I guess, does the plenary power of the President supersede this?

Judge Alito. I think there are two questions. Maybe there are more than two questions, but there are at least two questions. The first question, to my mind, is a question of statutory interpretation, what is the scope of the authorization of the use of military force? I don't know whether that will turn out to be an easy question or whether it will turn out to be a difficult question, but it is a question of statutory interpretation like any other. Of course, there's a great deal at stake, and maybe a lot more at stake than is involved in a lot of issues of statutory interpretation. But if I were required to decide that, I would approach it in essentially the same way I approach any other

question of statutory interpretation, what does the word of the law--what does the law say? Are there terms in there that carry a special meaning because of the subject matter that's being dealt with? And I think legislative history can be appropriately consulted. And I would have to decide that in the context of the whole process of deciding legal questions, as I said, like any other issue of statutory interpretation.

Once a decision was reached on the issue of statutory interpretation, it might be necessary to go further, depending on, I guess, the answer to that question.

I would also say in connection with this that we have a little bit of guidance as to the interpretation of the authorization of the use of military force in the Hamdi case, where the Court interpreted that enactment, and determined that the detention of an individual who was captured on the battlefield in Afghanistan fell within the scope of that, and they relied there, I think, on customary practices in the conduct of warfare in determining what fell within the scope of the authorization.

Senator Feinstein. Let me stop you right here, because now--that is right, because detention is a necessary following of an authorization of military force. So detention is logical. When you have a specific statute that covers all electronic surveillance, the question comes, is that statute nullified, and does it necessarily follow that the wiretapping of Americans without--and I am not saying there is not a reason to do this. What I am saying is that we set up a legal procedure by which you do it, and we set two exigent circumstances to excuse a President from having to do it, therefore, doesn't that law prevail?

Judge Alito. Well, as I said, I think the threshold question is interpreting the scope of that, and it might turn out to be an open and shut argument, it might turn out to be a very complicated argument. I wouldn't presume to issue--to voice an opinion on the question here, in particular because I haven't studied it to the depth that I would have to study it before reaching a judicial decision on the matter. Then depending on how that issue was resolved, it might be necessary to go on to the constitutional question, and I think you've exactly outlined where that would fall under Justice Jackson's method of analyzing these questions. This would be in the category in which--well, if it was determined that there wasn't statutory authorization, then--

Senator Feinstein. There was.

Judge Alito. Well, if it was determined that there was--

Senator Feinstein. No statutory authorization to wiretap, right.

Judge Alito. If it was determined that there was statutory authorization, then I don't know what the constitutional would--

Senator Feinstein. But if there was not?

Judge Alito. There would still potentially be--there might be a constitutional issue. Let me stop there. There would be a Fourth Amendment issue, obviously. If you went beyond--if you determined that there wasn't statutory authorization, then as far as whether--then as far as the issue of presidential power is concerned, you would be in Justice Jackson's scheme in the category where the President--you would have to determine, if this is the argument that's made, whether the President's power, inherent

powers, the powers given to the President under Article II, are sufficient, even taking away congressional authorization, the area where the President is asserting a power to do something in the face of explicit, an explicit congressional determination to the contrary.

Senator Feinstein. Now, in my lay mind, the way I interpret that--and correct me if I am wrong--is that you essentially have a conflict, and that it has not been decided whether one trumps the other.

Judge Alito. I think that's close to the point that I was trying to make. The way Justice Jackson described it was that you have whatever Executive power the President has, minus what Congress has taken away by enacting the statute.

Senator Feinstein. Even though you have a statutory prohibition, even a criminal prohibition?

Judge Alito. Well, I'm not suggesting how the determination would come out. I think it's--that it is implicit in the way Justice Jackson outlined this that presidential--well, he said it expressly--presidential power is at its lowest in this situation, where the President is claiming the authority to do something that Congress has prohibited.

* * * * *

Senator Feingold. Thank you, Mr. Chairman. Good morning, Judge. It is nice to talk to you in the morning for once, and thank you, Mr. Chairman, for the opportunity to ask a third round of questions. I do appreciate the latitude on the time, if it is necessary.

First, Judge, I want to thank you for arranging to have put together the list of people who participated in your practice sessions. I want to say that I am still somewhat troubled by the idea that you were prepared for this hearing by some lawyers who are very much involved in promoting the purported legal justification for the NSA wiretapping program, and obviously this issue of Presidential power is so central to this hearing. In fact, my first questions will also be about this, as well.

I note, for example, that one of the people that participated in these sessions was Benjamin Powell. He recently advised President Bush on intelligence matters and was just given a recess appointment as General Counsel to the National Intelligence Director. I also see the name of White House Counsel Harriet Miers on the list, and she obviously is involved in the President's position on this matter.

So I am just going to continue to think about this issue and I hope that you and the Department will, too. I think you would agree that at some point in a situation like this, an ethical issue could arise.

Let me go back, though, to what many Senators have asked you about, including most recently Senator Feinstein. I want to try again to clarify this issue, the constitutional authority of the President to violate a criminal statute. You have said

repeatedly that the President is not above the law, but you have also been very careful to qualify this statement by saying that the President must always follow the Constitution and laws that are consistent with the Constitution, and that statement sounds good until you look at it real closely. After all, everyone agrees that the President must follow constitutional law. The question is whether Presidents can claim inherent powers under the Constitution that allow them in certain cases to violate a criminal law, and your formulation seems to leave open the possibility that the President can assert inherent authority to violate the criminal law and still be following, to use your words, the Constitution and laws that are consistent with the Constitution.

So I would like to ask you, assuming that you have already done phase one, step one, the statutory analysis, in your view, just because a law is constitutional as it is written, like a murder statute or FISA, that doesn't actually answer the question of whether the President can violate it, does it?

Judge Alito. I don't think I would separate the constitutional questions into categories. I think it follows from the structure of our Constitution that the Constitution trumps the statute. That was the issue in Marbury v. Madison. It would be a rare instance in which it would be justifiable for the President or any member of the executive branch not to abide by a statute passed by Congress. It would be a very rare—

Senator Feingold. But it is possible, based on your answer, that a statute that has been determined standing on its own to be constitutional could, in theory, run into some conflict with an inherent, as you would say, constitutional power of the President, which in theory, even under Justice Jackson's test, could trump the seemingly constitutional criminal statute, is that correct?

Judge Alito. Well, I'm not sure what standing on its own means there. Somebody gave an example in a law review article I remember reading of a statute that said that a particular named individual was to be immediately taken into custody by Federal law enforcement agents and taken immediately to a certain place to be executed. Would the President be bound to, under his responsibility to take care that the laws are faithfully executed, would the President be legally obligated to do that, even though it flies in the face of some of the most fundamental guarantees in the Constitution, and I think we would all say in a situation like that, no, the Constitution trumps the statutory enactment.

Senator Feingold. But it is possible under your construct that an inherent constitutional power of the President could, under some analysis or in some case, override what people believe to be a constitutional criminal statute—

Judge Alito. Well, I don't want to—I want to be very precise on this. What I have said, and I don't think I can go further than to say this, is that that situation seems to be exactly what is—to fall exactly within that category that Justice Jackson outlined, where the President is claiming the authority to do something and the thing that he is claiming the authority to do is explicitly—has been explicitly disapproved by Congress.

So his own taxonomy contemplates the possibility that says that there is this category and cases can fall in this category, and he seems to contemplate the possibility that that might be justified.

But I don't want to even say that there could be such a case. I don't know. I would have to be presented with the facts of the particular case and consider it in the way I would consider any legal question. I don't think I can go beyond that.

Senator Feingold. I understand that has been your position. I have heard the repeated references to Justice Jackson's test. But all that test says in the end is that the President's power is at the lowest ebb at that point, and I understand and obviously have enormous regard for Justice Jackson and that opinion in particular. But I think in this time it leaves me troubled.

I am concerned that if we are simply going to rely on that in the end without getting a better sense of where you might come down on these kind of matters, it really goes to the very heart of our system of government. And if somehow that--even if the President's power is at a very low ebb at that point, I think it still leaves open the possibility of enough ambiguity and vagueness that could alter the basic balance between the Congress and the Presidential power in a way that could affect our very system of government.

Judge Alito. Well, Senator, this is a momentous constitutional issue and it is the kind of constitutional issue that generally is not resolved--well, let me say this, that it is often--it often comes up in a context that is not justiciable. But I think it would be irresponsible for me to say anything on the substance of the question here, and by not saying it, I don't mean to suggest in any way how I would come out on the question. I don't mean to suggest that there could be a case where it would be justified or not, particularly on an issue of this magnitude. I think anybody in my position can say no more than this is the framework that the Supreme Court precedents have provided for us, and when the issue comes up, if it comes up, if it comes before me, if it is justiciable, I will analyze it thoroughly, and that's all I can say.

* * * * *

Senator Schumer. I think some of my old questions, ones I have asked before, should bother you. They bother me.

But in any case, I do have a few other issues that I do want to talk to you about. The first is just a general question on presidential power. Let's just assume that it was found that the President's right to wiretap people, the way we are discussing it now in terms of the recent NSA revelations, was found constitutional. Would there be a different standard if, say, the President--does that necessarily allow the President to then go ahead and go into people's homes here in America, American citizens, without a warrant? Does the one necessarily lead to the other?

Judge Alito. I would have to understand the--I would have to see the ground for holding the wiretapping or the electronic surveillance constitutional before seeing whether it would apply in the case of other searches and seizures.

Senator Schumer. But let's assume it is constitutional.

Judge Alito. I'd have to know what the arguments were made about it and on what ground it was found to be constitutional.

Senator Schumer. So it could follow, but might not; is that what you would say?

Judge Alito. It very well might not. I would have to know the constitutional ground for the decision relating to the wiretapping, and I have no idea what that would be. It might well not extend to things like physical searches of homes.

Senator Schumer. Is there a difference? Is there a constitutional difference between a wiretap and an actual physical search of the home on Fourth Amendment grounds? Is there any that you know in cases—

Judge Alito. There are differences, yes, there certainly are.

Senator Schumer. Thank you.

Judge Alito. Wiretapping is subject to--general criminal wiretapping is subject to all the rules that are set out in Title III, which are thought to be based in large part on Fourth Amendment requirements. And the warrant requirement is very strong in the area of electronic surveillance. When you're talking about other types of searches, the searches can take place in a variety of places for a variety of reasons.

Senator Schumer. But if it can be done under the inherent power that the President has for the one, why could it not be done for the other? I am not asking about the statute.

Judge Alito. There's also a Fourth Amendment issue. Any search—

Senator Schumer. In both cases.

Judge Alito. In both cases, and the Fourth Amendment could play out very differently in those two contexts.

Close Hold to be staffed (Monday statement)

Subject: Close Hold to be staffed (Monday statement)

From: "Drouin, Lindsey E."

Date: 5/5/06, 11:07 PM

To: "Kavanaugh, Brett M.", "Burck, Bill"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Tue Apr 09 17:12:36 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Hayden Fact Sheet
From: "Saliterman, Robert W."
Date: 5/7/06, 7:03 PM
To: "Sherzer, David"
CC: "Martin, Catherine", "Burck, Bill", "Kavanaugh, Brett M."

The Hayden Fact Sheet is attached for close hold staffing tonight. As Cathie said, we would like to release this as soon as the President begins speaking tomorrow morning.

Thanks,
Rob
6-4537 Phone
6-0165 Fax

— Attachments: —

5.8.06 Hayden Fact Sheet.doc	55.5 KB
5.8.06 Hayden Fact Sheet.doc	55.5 KB

General Michael V. Hayden: The Right Leader For The CIA

Key Reasons General Hayden Is The Right Pick:

General Hayden Is One Of The Most Qualified Candidates Ever To Be Nominated To Head The CIA.

- **After More Than 21 Years Experience In The Intelligence Business, General Hayden Has Extensive Experience As Both A Producer And Consumer Of Intelligence.**
- **General Hayden Has Broad And Deep Experience In Both Human Intelligence And Technical Intelligence.** He served as the Commander of the Air Force Intelligence Agency and as Director of the Joint Command and Control Warfare Center – both positions required a comprehensive understanding of intelligence collection and analysis.
- **During President George H.W. Bush's Administration, General Hayden Worked In The National Security Council As Director For Defense Policy.** He also served in U.S. Embassy in the People's Republic of Bulgaria during the Cold War, where he trained with the CIA and collected human intelligence.

General Hayden Is A Reformer Who Can Fulfill The President's And Congress' Mandate To Reform The Intelligence Community And The CIA.

- **After September 11, General Hayden Quickly Understood The National Security Agency Needed To Reform To Meet The New Threats Of The 21st Century.** He launched a series of reforms to get more analysts trained in languages used by the enemy and overhauled our capabilities to help prevent future attacks.
- **As The Deputy Director Of National Intelligence, Mike Has Helped Enact The Far-Reaching And Necessary Reforms While Also Meeting The Daily Threats Our Country Still Faces.**

General Hayden's Broad Experience And Leadership Qualities Will Help Integrate And Unite The CIA.

- **As Principal Deputy Director Of National Intelligence, General Hayden Is Responsible For Overseeing The Day-To-Day Activities Of The National Intelligence Program.** In this role, he has a clear understanding of the entire intelligence community and how best to integrate their distinct capabilities.
- **General Hayden Is Described As An Independent Thinker And A "Nonconformist" Despite His Military Background.** He also thrived as a manager – leading a large and complex organization like the NSA as he set out to overhaul the communications interception service and move into the 21st Century.

Background On General Michael V. Haden

General Michael V. Hayden, USAF, Was Appointed Principal Deputy Director Of National Intelligence (PDDNI) By President George W. Bush On April 21, 2005. He is the first person to ever serve in this position. As the PDDNI, General Hayden is responsible for overseeing the day-to-day activities of the national intelligence program. With this appointment, General Hayden received his fourth star, making him the highest-ranking military intelligence officer in the Armed Forces.

General Hayden Entered Active Duty In 1969 After Earning A Bachelor's Degree In History In 1967 And A Master's Degree In Modern American History In 1969, Both From Duquesne University. He is a distinguished graduate of the Reserve Officer Training Corps program. The General has served as Commander of the Air Intelligence Agency and Director of the Joint Command and Control Warfare Center, both headquartered at Kelly Air Force Base, TX. He has also served in senior staff positions in the Pentagon; Headquarters U.S. European Command, Stuttgart, Germany; the National Security Council, Washington, DC; and the U.S. Embassy in the People's Republic of Bulgaria, and Deputy Chief of Staff for United Nations Command and U.S. Forces Korea, Yongsan Army Garrison. Prior to his current assignment, he served as Director, National Security Agency/Chief, Central Security Service (NSA/CSS), Fort George G. Meade, MD.

Subject: 5/8 Announcement of New CIA Director #5 – for the President's review
From: "Drouin, Lindsey E."
Date: 5/7/06, 11:28 PM
To: "Burck, Bill"
CC: "Kavanaugh, Brett M.", "Thiessen, Marc A.", "Michel, Christopher G.", "McGurn, William J.", "Bartlett, Dan", "Wallace, Nicole", "Ward, Frank P.", "Carson, Melissa M.", "Drouin, Lindsey E."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 15:47:54 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: 5/8 UPDATED: Announcement of New CIA Director #6 – for the President's review
From: "Drouin, Lindsey E."
Date: 5/8/06, 12:07 AM
To: "Burck, Bill"
CC: "Kavanaugh, Brett M.", "Thiessen, Marc A.", "Michel, Christopher G.", "McGurn, William J.", "Bartlett, Dan", "Wallace, Nicolle", "Ward, Frank P.", "Carson, Melissa M.", "Drouin, Lindsey E."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 15:47:58 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: CIA Director Nom Remarks

From: "Burck, Bill"

Date: 5/8/06, 1:20 AM

To: "COSJBB", "Dick, Denise Y.", "Weinstein, Jared B.", "Kaplan, Joel", "Dryden, Logan E.", <kr@georgewbush.com>, "Rove, Karl C.", "Hughes, Taylor A.", "Haenle, Paul T.", "Bartlett, Dan", "Wallace, Nicolle", "Miers, Harriet", "Morgan, Derrick D.", "Baker, Grey D."

CC: "Kavanaugh, Brett M.", "Sherzer, David"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 15:48:00 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: 5/8 UPDATED: Announcement of New CIA Director #10 – for the President's review
From: "Drouin, Lindsey E."
Date: 5/8/06, 1:22 PM
To: "Burck, Bill"
CC: "Sherzer, David", "Kavanaugh, Brett M.", "Thiessen, Marc A.", "Michel, Christopher G.", "McGurn, William J.", "Bartlett, Dan", "Wallace, Nicolle", "Ward, Frank P.", "Carson, Melissa M.", "Drouin, Lindsey E."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:31 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Annotated...

From: "Ward, Frank P."

Date: 5/8/06, 2:23 AM

To: "Burck, Bill", "Kavanaugh, Brett M."

CC: "Thiessen, Marc A.", "Michel, Christopher G.", "Carson, Melissa M.", "Merkley, Brendon A.", "Candrian, Brittany S.", "Drouin, Lindsey E."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 15:48:02 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Durbin Questions

From: <Jamil.N.Jaffer@usdoj.gov>

Date: 5/9/06, 6:39 PM

To: "Kavanaugh, Brett M."

CC: <Kristi.R.Macklin@usdoj.gov>, <Elisebeth.C.Cook@usdoj.gov>

Brett,

Kristi asked us to forward these Durbin questions to you.

Best,

JJ

Jamil N. Jaffer

Counsel – Office of Legal Policy

(202) 307-0120 (direct)

From: Macklin, Kristi R

Sent: Thursday, May 04, 2006 9:57 PM

To: Macklin, Kristi R; Brand, Rachel; Cook, Elisebeth C; Jaffer, Jamil N; Sampson, Kyle;

'Neomi_J._Rao@who.eop.gov'; 'Grant_Dixton@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; 'Chris Bartolomucci (HBartolomucci@HHLAW.com)'; 'Brian.Benczkowski@mail.house.gov'; 'Raul_F._Yanes@omb.eop.gov'

Cc: 'William_K._Kelley@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'

Subject: RE: BK Moot

I forgot the Durbin questions. Those are attached to this e-mail.

From: Macklin, Kristi R

Sent: Thursday, May 04, 2006 9:38 PM

To: Brand, Rachel; Cook, Elisebeth C; Jaffer, Jamil N; Sampson, Kyle; 'Neomi_J._Rao@who.eop.gov';

Grant_Dixton@who.eop.gov; 'Brett_C._Gerry@who.eop.gov'; Chris Bartolomucci (HBartolomucci@HHLAW.com); 'Brian.Benczkowski@mail.house.gov'

Cc: 'William_K._Kelley@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'

Subject: BK Moot

Attached is a chart with all the mooters and topic assignments, as well as a brief description of the various topics. I've also attached a pdf of Brett's hearing, which includes his questionnaire and written follow up questions. (It is a large file.) I also have attached Senator Durbin's written questions submitted this week. There are is a description of the moot protocol in the doc – it will be more like the Supreme Court moots. The moots will all be held at the White House, room TBD. For non-White House participants, please get me your clearance information and I'll forward it all together. Brett claims he can get drive in privileges over the weekend, so include your make, model, tag info (we shall see).

<< File: BK Moots.doc >> << File: hearing.pdf >>

Kristi

514-8356

—Attachments:—

written followup questions.wpd – supp.wpd

37.3 KB

Subject: Durbin
From: <Kristi.R.Macklin@usdoj.gov>
Date: 5/10/06, 2:16 AM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:33 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Draft written responses for quick review (I am still proofing but wanted to get to you) ...

From: "Kavanaugh, Brett M."

Date: 5/10/06, 5:04 PM

To: <Kristi.R.Macklin@usdoj.gov>, "Gerry, Brett C.", "Rao, Neomi J.", "Dixton, Grant"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:34 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: Kavanaugh responses
From: <Kristi.R.Macklin@usdoj.gov>
Date: 5/10/06, 6:03 PM
To: "Kavanaugh, Brett M."

From: Best, David T
Sent: Wednesday, May 10, 2006 5:51 PM
To: Macklin, Kristi R
Subject: Kavanaugh responses

FYI – Responses, which were faxed to SJC, are attached.

David T. Best
Nominations Counsel
Office of Legal Policy
United States Department of Justice
Room 4229 Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
voice: 202-514-1607
fax: 202-616-3180

– Attachments: –

BK follow up Durbin 5 10 06 FINAL.pdf	47.8 KB
BK follow up Feingold 5 10 06 FINAL.pdf	20.1 KB

**Responses of Brett Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit
to the Written Questions of Senator Durbin**

1. A draft January 25, 2002 memorandum to the President from then-White House Counsel Alberto Gonzales recommends that the President reject then-Secretary of State Colin Powell’s recommendation that the President reconsider his determination that the Geneva Conventions do not apply to the conflict with the Taliban and Al Qaeda. The memorandum also states that the Geneva Conventions’ “strict limitations on questioning of enemy prisoners” are “obsolete.”

A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in writing the draft memorandum and any previous and/or subsequent drafts, and your involvement in shaping the conclusions and recommendations of such memoranda.

Response: I had no involvement in writing the draft memorandum or in writing any previous or subsequent drafts. I had no involvement in shaping the conclusions or recommendations of such memorandums.

B. When did you first learn about such memoranda’s conclusions and recommendations? When did you first review any such memoranda?

Response: I was not aware of this draft memorandum until news stories about it appeared in 2004, and I did not review it until some time later in 2004.

C. Do you agree with the draft January 25, 2002 memorandum’s conclusions and recommendations? Please explain.

Response: As an executive branch official and as a judicial nominee, it would not be appropriate for me to discuss my agreement or disagreement with conclusions or recommendations in this draft memorandum to the President.

2. On February 2, 2002, the President issued a memorandum stating, among other things, that the Geneva Conventions do not apply to the conflict with Al Qaeda and do not apply to Al Qaeda and Taliban detainees.

A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in drafting the memorandum and shaping the policy reflected therein.

Response: I had no involvement in drafting the memorandum. I had no involvement in shaping the policy reflected in it.

B. When did you first learn about the policy reflected in the memorandum?

When did you first review the memorandum?

Response: I was not aware of this memorandum until after news stories about it appeared in 2004, and I did not review it until some time later in 2004.

- C. The memorandum states, “As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with Geneva.” How do you define “humane treatment”?**

Response: I had no role in drafting the memorandum and was not aware of it until after news stories about it appeared in 2004. As an executive branch official not involved in this issue and as a judicial nominee, it would not be appropriate for me to attempt to define terms in this memorandum.

- D. Has the White House provided any guidance to the U.S. Armed Forces regarding the meaning of humane treatment? Please explain.**

Response: I have not been involved in this issue in the course of performing my responsibilities at the White House; as a result, I do not have personal knowledge of what memorandums or guidance, if any, have been issued on this topic.

- E. The directive to treat all detainees humanely applies only to the U.S. Armed Forces. Are U.S. personnel other than members of the U.S. Armed Forces required to treat all detainees humanely? Please explain.**

Response: See response to 2C.

- F. The President’s memorandum states, “our values” call for us to treat detainees humanely, including those who are not legally entitled to such treatment. It also states that the U.S. Armed Forces shall treat detainees humanely “as a matter of policy.” Which detainees is the United States not legally required to treat humanely? Can the President determine, as a matter of policy, that U.S. personnel are not required to treat detainees humanely? Please explain.**

Response: See response to 2C.

- 3. On August 1, 2002, the Justice Department’s Office of Legal Counsel (OLC) issued an opinion entitled, “Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A (“OLC torture memo”).**

- A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about the OLC torture memo.**

Response: I was not aware of and had no meetings, briefings, and/or other discussions about the August 1, 2002, memorandum before I read news stories about the memorandum in the summer of 2004.

B. When did you first learn about the OLC torture memo? When did you first review it?

Response: I first learned about the August 1, 2002, memorandum in 2004 after news stories about it.

C. Do you believe that the OLC torture memo's analysis of the torture statute is correct? Please explain.

Response: The Administration has repealed the August 1, 2002, memorandum, and I agree with that decision. As I stated at my hearing, I do not agree with the legal analysis in the memorandum, including with respect to the definition of torture.

4. The OLC torture memo concludes that the torture statute does not apply to interrogations conducted under the President's Commander-in-Chief authority.

A. Do you agree with this conclusion? Please explain.

Response: I do not agree with the legal analysis or conclusions in the August 1, 2002, memorandum. I am not aware of any claim that there are constitutional deficiencies in 18 U.S.C. 2340-2340A or that there are applications of that statute that would be unconstitutional. The President has a responsibility under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress.

B. In your opinion would the torture statute be unconstitutional if it conflicted with an order issued by the President as Commander-in-Chief? Please explain.

Response: The President has a constitutional duty under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress. I am not aware of a claim that 18 U.S.C. 2340-2340A is unconstitutional or that there are applications of the statute that would be unconstitutional. If such a claim were made, it would be analyzed under the three-part framework set forth by Justice Jackson in his concurring opinion in *Youngstown Steel* and followed by the Supreme Court since then. In referring to what is called category 3, Justice Jackson explained that "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be

scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”

- 5. The OLC torture memo argues that in order for abuse to constitute torture under the torture statute, “The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.” Do you agree with this conclusion? Please explain.**

Response: The Administration has repealed the August 1, 2002, memorandum, and I agree with that decision because I believe the legal analysis in the memo is flawed, including with respect to the definition of torture.

- 6. The Justice Department has acknowledged that OLC has also issued at least one opinion on the legality of specific interrogation techniques. According to media reports, OLC issued one such opinion in August 2002, during the same time frame as the OLC torture memo. It reportedly authorizes the use of specific abusive interrogation methods, including mock execution and “waterboarding” or simulated drowning.**

- A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about this and/or other OLC opinions dealing with interrogation policies and practices.**

Response: I have no knowledge of such an opinion. To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

- B. When did you first learn about OLC’s analysis of specific abusive interrogation techniques?**

Response: I have no knowledge of such an opinion. To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

- C. Do you believe that OLC’s analysis of the legality of specific interrogation techniques is correct? Please explain.**

Response: I have no knowledge of such an opinion. To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

- D. In your opinion, is it legally permissible for U.S. personnel to torture a detainee?**

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148.

E. In your opinion, is it legally permissible for U.S. personnel to subject a detainee to waterboarding? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

F. In your opinion, is it legally permissible for U.S. personnel to subject a detainee to mock execution? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

G. In your opinion, is it legally permissible for U.S. personnel to physically beat a detainee? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

H. In your opinion, is it legally permissible for U.S. personnel to force a detainee into a painful stress position for a prolonged time period? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

7. Beginning in 2001, the President has authorized the National Security Agency

(NSA) to eavesdrop on Americans in the United States without court approval. The President has stated that this warrantless surveillance program is reviewed every 45 days, and that this review includes the Counsel to the President.

- A. During this time period, you have served as Associate Counsel to the President, Senior Counsel to the President, and Assistant to the President and Staff Secretary. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about the NSA surveillance program, and your involvement, if any, in shaping the program and the legal justification for the program.**
- B. When did you first learn about the President's authorization of the program?**

Response: I did not learn of the existence of this program until after a *New York Times* story about it appeared on the Internet late on the night of Thursday, December 15, 2005. I had no involvement in meetings, briefings, or other discussions in shaping the program or the legal justification for the program. Since December 16, 2005, the President has spoken publicly about the program on numerous occasions, and I have performed my ordinary role as Staff Secretary with respect to staffing the President's public speeches.

- 8. One premise of the NSA surveillance program appears to be that FISA is unconstitutional to the extent it conflicts with the President's authorization of the program. For example, a Justice Department memo issued on January 19, 2006 entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" states: "Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation – to defend the United States against foreign attack."**

- A. Do you believe FISA is unconstitutional to the extent it conflicts with the President's authorization of the NSA program? Please explain.**

Response: The question of FISA's interaction with the Authorization for the Use of Military Force and the President's Article II authority is being analyzed by the Committee and is the subject of litigation in the federal courts. As a judicial nominee, it would not be appropriate for me to provide an opinion on that question.

- B. Can Congress place any limits on the President's exercise of his Commander-in-Chief power? For example, can the President, pursuant to his Commander-in-Chief power, authorize actions that would otherwise violate the War Crimes Act of 1996, 18 U.S.C. 2441, if he determines such actions are necessary to combat a terrorist threat?**

Response: The President has a constitutional duty under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress. I am not aware of any claim that the War Crimes Act of 1996 either is unconstitutional on its face or could be unconstitutional as applied. Any such claim would be analyzed under category 3 of the three-part framework set forth by Justice Jackson in his concurring opinion in *Youngstown Steel* and subsequently followed by the Supreme Court. In this category, the President's authority is at its "lowest ebb."

9. **According to recent press reports, a concerted effort has been made by the Bush White House to utilize presidential signing statements to bypass and manipulate laws passed by Congress, without resorting to vetoes. President Bush has issued over 750 such statements "a record high" and is the first president since Thomas Jefferson to serve so long in office without issuing a single veto. Phillip Cooper, a scholar on executive power, has said: "There is no question that this administration has been involved in a very carefully thought-out, systemic process of expanding presidential power at the expense of the other branches of government. This is really big, very expansive, and very significant."**

A. **Please describe in detail the role you have played in this effort.**

Response: Signing statements are generally drafted and reviewed by Department of Justice attorneys, Office of Management and Budget (OMB) attorneys, White House attorneys, and other Administration attorneys whose agencies are affected by a bill's provisions. This process is usually coordinated by OMB. After the signing statement has been drafted and cleared through the OMB process, it comes to the Staff Secretary's office for White House senior staffing and Presidential review and signature. I have been Staff Secretary since July 2003; the Staff Secretary's office staffs signing statements before they are reviewed and signed by the President.

Like Presidents before him, President Bush has issued signing statements to identify legislative provisions that implicate certain constitutional requirements -- for example, the Recommendations Clause, Presentment Clause, Opinions Clause, and Appointments Clause.

B. **Please provide a list of all signing statements you have drafted or reviewed.**

Response: I have been Staff Secretary since July 2003. The Staff Secretary's office reviews all Presidential signing statements and ensures that drafts of them are staffed to the White House senior staff and cleared by the White House Counsel's office and the Department of Justice, among other offices.

10. **Do you know Jack Abramoff? Please describe any meetings, discussions, or other interactions between you and Mr. Abramoff from 2001 to the present.**

Response: No. None.

- 11. Concerns have been raised about your lack of legal experience regarding the issues that are litigated before the D.C. Circuit. According to a report by the Federal Judicial Center, half of the D.C. Circuit docket involves administrative appeals, and of those appeals, over 70% come from the Environmental Protection Agency, Federal Energy Regulatory Commission, and Federal Communications Commission. In addition, the D.C. Circuit ranks first among all circuit courts in the country in the percent of National Labor Relations Board cases heard by the court.**

Please identify all cases or matters on which you have worked involving the Environmental Protection Agency, Federal Energy Regulatory Commission, Federal Communications Commission, and National Labor Relations Board, and briefly describe the nature of your work in each case or matter. Please give specific information; Senator Kennedy asked you a similar written question in 2004 which you declined to answer with specificity. You do not need to identify cases in which you worked as a law clerk.

Response: In private practice, I represented Verizon and worked on the “open access” issue. This issue involved the question whether cable companies must allow consumers to obtain the Internet Service Provider of their choice when the cable company provides high-speed Internet access – in other words, whether cable companies should be regulated under the same regulatory regime as traditional telephone companies with respect to broadband access. I worked on this issue in connection with FCC regulation of the subject and also on an antitrust suit that was filed in the Western District of Pennsylvania. *See also* [Fight for Internet Access Creates Unusual Alliance](#), *New York Times* (August 12, 1999).

For Verizon, I also worked on statutory and regulatory issues arising out of the Telecommunications Act of 1996.

As Staff Secretary to the President since July 2003, I have helped coordinate the speechwriting process with the speechwriters and relevant policy offices. The President has given numerous speeches on energy policy, labor policy, communications policy, and environmental policy since I became Staff Secretary. The President also has made a variety of public decisions and policy proposals related to those subjects that also have come through the Staff Secretary’s office for review and clearance. The Staff Secretary’s office also helps review and clear final drafts of the President’s Budget, which has sections dealing with energy, labor, communications, and environmental policy.

- 12. You have spent your entire legal career working for either President Bush or Ken Starr. You co-authored the Starr Report. You worked for President Bush’s 2000 campaign and went to Florida to participate in President Bush’s recount activities. The federal judge recusal policy set forth at 28 U.S.C. 455 requires federal judges to disqualify themselves “in any proceeding in which his impartiality might reasonably be questioned.” Many people believe your impartiality will reasonably be**

questioned in any case involving policies of President Bush or matters litigated by the Republican Party.

If confirmed, would you be willing to disqualify yourself in all cases involving a challenge to a policy of the George W. Bush Administration?

If confirmed, would you be willing to disqualify yourself in all cases in which the Republican Party was a party (including *amicus*) before the court?

Response: If confirmed, I would carefully examine recusal obligations under 28 U.S.C. 455 and all other applicable laws and rules, and I would consult precedents and my colleagues as appropriate. I have a full appreciation for the importance of statutory recusal obligations and understand that I may have to recuse from certain cases. At this point, without knowing the facts, circumstances, and parties involved in a particular case and before I have done the work and research necessary, I cannot identify the particular cases that might require or justify recusal.

13. At their nomination hearings, Chief Justice John Roberts, Jr. and Justice Samuel Alito, Jr. testified in opposition to the use of foreign legal opinions and international norms. Chief Justice Roberts testified that he opposed the use of foreign law because it “allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they’re finding precedent in foreign law, and use that to determine the meaning of the Constitution.” Justice Alito testified that “I don’t think foreign law is helpful in interpreting the Constitution.” Do you agree with these statements? Why or why not?

Response: As a general matter, I do not think foreign law is a useful guide for interpreting the United States Constitution. If confirmed as a judge on the U.S. Court of Appeals for the D.C. Circuit, I would follow the precedents of the Supreme Court. To the extent that the Supreme Court has used or uses foreign law to help resolve particular questions or issues, I would be bound to follow that Supreme Court precedent, and I would do so fully and faithfully.

14. Justice Kennedy, for whom you once served as a law clerk, has cited foreign legal opinions and international norms in some of his opinions. Do you believe it was inappropriate for him to cite foreign legal opinions and international norms in his opinions in *Lawrence v. Texas* (which struck down state sodomy laws) and *Roper v. Simmons* (which struck down state death penalty laws for children)? Why or why not?

Response: The cases cited in this question are precedents of the Supreme Court. If confirmed as a judge on the U.S. Court of Appeals for the D.C. Circuit, I would follow these precedents fully and faithfully. As a nominee to a court of appeals, it would not be appropriate for me to express my agreement or disagreement with the results or reasoning of these decisions.

15. The American Bar Association recently downgraded their rating of your

nomination from “Well Qualified” to “Qualified,” but it did not provide an explanation for its decision.

- A. Based on information the ABA may have provided to you, and based on your extensive experience working with the ABA when you helped evaluate judicial nominees in the White House Counsels’ office, what do you believe is the basis for the ABA’s lowering of their rating of your nomination?**
- B. According to a May 3, 2006 article in the *Washington Post*, a White House spokesperson said that the ABA’s revised rating of your nomination “resulted from changes in the ABA panel’s personnel, not from new findings.” Do you agree with this assertion? If so, please explain the basis for that belief and set forth the exact changes in the ABA panel’s personnel that led to the lower rating of your nomination.**

Response: The American Bar Association provided an explanation of its most recent “qualified/well-qualified” rating on Monday, May 8, 2006, in written and oral testimony to the Committee. I am aware that all 42 individual reviews conducted by ABA Committee Members over three years have found that I am well-qualified or qualified to serve on the D.C. Circuit.

- 16. Many of the written answers you submitted in November 2004 were evasive or nonresponsive. Other judicial nominees have provided direct and candid answers to some of these same questions. Please submit more responsive and complete answers to the following written questions I sent to you in 2004: Questions 3, 10A, 10B, 10D, 10E, 13A, and 13B.**

Response:

3. Membership in the Federalist Society is not a necessary qualification to be a judicial nominee, and preference is not given to members of the Federalist Society. As far as I am aware, the majority of President Bush’s judicial nominees have not been members of the Federalist Society.

10A: President Bush has sought to appoint judges who will interpret the law and not legislate from the bench. He has successfully appointed two Supreme Court Justices and numerous court of appeals and district court judges who have stated their agreement with this general judicial approach.

10B: In a book, speeches, and cases, Justice Scalia has explained his judicial philosophy is one primarily of original meaning and textualism. Justice Thomas also has explained his judicial philosophy in a variety of constitutional and statutory cases since he assumed his seat on the Supreme Court.

10D: If confirmed, I would seek to adhere to the following judicial philosophy: I would interpret

the law as written and not impose my own policy preferences; I would exercise the judicial power prudently and with restraint; I would follow Supreme Court precedent fully and faithfully; and I would maintain the absolute independence of the Judiciary. Strict constructionism does not have a single defined meaning as I understand the term; strict constructionism is sometimes defined to mean interpreting the law as written.

10E: If confirmed, I would follow all binding Supreme Court precedent, including *Brown v. Board*, *Miranda v. Arizona*, and *Roe v. Wade*.

There has been public debate in the last three decades about the reasoning and results of *Miranda* and *Roe*, including in the dissents in those two cases. Both cases have been reaffirmed by the Supreme Court – for example, *Miranda* was reaffirmed in *Dickerson v. United States* and *Roe v. Wade* was reaffirmed in *Planned Parenthood v. Casey*. Issues relating to or arising out of those two cases continue to come before the courts, and as a judicial nominee, it would not be appropriate for me to describe my agreement or disagreement with the two cases.

13B: The Supreme Court has decided a number of cases with respect to affirmative action. If confirmed, I would follow those precedents fully and faithfully. I do not have an agenda with respect to affirmative action, or any other policy issues, that I would seek to advance as a judge if I am confirmed.

17. In early May 2004, following your first hearing before the Senate Judiciary Committee, you were sent written followup questions from several members of the Committee. You did not submit answers to these questions until late November 2004, after the presidential election. Why did you wait seven months to answer these questions?

Response: After my hearing in April 2004, my understanding was that no further action would occur on my nomination that year and that I should submit written answers to the follow-up written questions before the end of the Congressional session so that the record of my 2004 hearing would be complete were I to be re-nominated in 2005. I met that timeline and submitted the answers in November 2004 before the end of the Congressional session. There may have been a miscommunication or misunderstanding, for which I take responsibility, and I was pleased to have the opportunity to appear at the hearing on May 9, 2006, to answer additional questions from the Members of the Committee.

18. Would you be willing to come before the Senate Judiciary Committee and testify at a second hearing?

Response: Yes, during the week of May 1, I told Chairman Specter and Senator Schumer that I would be pleased to appear at a second hearing, and I was happy to have the opportunity to do so on May 9.

**Responses of Brett M. Kavanaugh
to the Written Questions of Senator Feingold**

3. During the Senate’s consideration of Judge Charles Pickering’s nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: “Judge Pickering’s solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. . . . The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited.”

Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

Response: I was not the associate counsel in the White House Counsel’s office assigned to Judge Pickering’s nomination.

I am not aware of facts and circumstances surrounding any effort by Judge Pickering to obtain letters of recommendation. I do not believe that I learned about any such allegations or suggestions until they were raised in the news media or by the Senate.

Do you believe that Judge Pickering’s conduct in this instance is consistent with the ethical obligations of a federal judge?

Response: It would not be appropriate for me to comment whether a judge’s conduct violated the Code of Conduct for United States Judges.

Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

Response: As a general matter, I believe that certain requests by a judge to lawyers appearing in cases before the judge can raise questions because the lawyers (and their clients) may believe they have no choice but to accede to the judge’s request.

4. During the Senate’s consideration of Judge D. Brook Smith’s nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club’s discriminatory membership policies.

When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

Response: I was not the associate counsel in the White House Counsel's office assigned to Judge Smith's nomination.

I am not aware of the facts and circumstances surrounding Judge Smith's promise at his 1988 hearing. I do not believe I became aware of any issue relating to the Spruce Creek Rod and Gun Club until questions were raised by the news media or the Senate.

Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

Response: I did not work with Judge Smith on his response to questions about this issue, nor did I review his responses before they were submitted to the Committee.

Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

Response: It would not be appropriate for me to comment whether a judge's conduct violated the Code of Conduct for United States Judges.

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black*, and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black*. Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

Response: I was not the associate counsel in the White House Counsel's office assigned to Judge Smith's nomination. I do not recall a controversy regarding *SEC v. Black* and *United States v. Black*.

Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

Response: It would not be appropriate for me to comment whether a judge's conduct violated the judicial disqualification statute or the Code of Conduct for United States Judges.

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed “junkets for judges” -- free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment (“FREE”). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

Do you agree with Judge Smith’s interpretation of Advisory Committee Opinion No. 67?

Response: I am not familiar with Judge Smith’s written responses.

If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

Response: If confirmed, I will not accept free trips from organizations that sponsor judicial education seminars such as FREE and the Law and Economics Center.

7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, “right now, I’m running for state representative.” Indeed, he admits that he was actively campaigning for office, stating “I go to functions, go block walking, that sort of thing.” The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

Were you involved in discussions about the timing of Judge Clark’s commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

Response: I was not the associate counsel in the White House Counsel’s office assigned to Judge Clark’s nomination.

My best recollection at this time is that Judge Clark’s commission was signed promptly after the White House Counsel’s office learned of his statement in the news article you cite, thereby resolving the issue. It would not be appropriate for me to disclose internal deliberations or discussions about this matter. If I am confirmed, I will resign my current government position promptly.

Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush?

Response: It would not be appropriate for me to comment whether a judge’s conduct violated ethics obligations. If I am confirmed, I will resign my current government position promptly.

Subject: new drafts for review ...
From: "Kavanaugh, Brett M."
Date: 5/10/06, 6:40 PM
To: <Kristi.R.Macklin@usdoj.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:35 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: final review on Durbin ...
From: "Kavanaugh, Brett M."
Date: 5/10/06, 7:33 PM
To: "Gerry, Brett C.", "Rao, Neomi J."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:36 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: RE: Fax number
From: "Kavanaugh, Brett M."
Date: 5/10/06, 8:10 PM
To: <David.T.Best@usdoj.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:37 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

From: "Kavanaugh, Brett M."
Date: 5/10/06, 8:52 PM
To: <David.T.Best@usdoj.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:37 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

From: "Kavanaugh, Brett M."
Date: 5/10/06, 9:10 PM
To: "Kavanaugh, Brett M.", <David.T.Best@usdoj.gov>

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:33:38 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

tp's for potus

Subject: tp's for potus
From: "Bartlett, Dan"
Date: 5/11/06, 10:28 AM
To: "Kavanaugh, Brett M."

at potus direction, i drafted these points. Harriet's office and DOJ cleared. I'm waiting on DNI clearance, which i will get at a 10:30am meeting. I don't expect too many changes.

— Attachments: —

Talking Points.USAToday.doc

24.5 KB

Talking Points:

After 9-11, I vowed to the American people that our government would do everything within the law to protect them from another terrorist attack.

As a part of this effort, I authorized the National Security Agency to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. In other words, if al Qaeda or their associates are making calls into the United States from overseas, we want to know what they are saying.

Today, there are new allegations about other ways we are tracking down al Qaeda to prevent attacks on America. Let me be clear about what our government is doing... and not doing:

First, these intelligence activities strictly target al Qaeda and their known affiliates. If al Qaeda or their associates are making calls into the United States, we want to know why -- if you don't communicate with known terrorists or their associates, you should not be concerned.

Second, the government does not listen to domestic phone calls without court approval.

Third, all of our activities are lawful and have been briefed to the appropriate members of Congress...both Republican and Democrat.

Fourth, the privacy of ordinary Americans is fiercely protected in all of our activities. We are not "mining" or "trolling" through the personal lives of millions of innocent Americans to detect suspicious patterns or activities. Our efforts are focused only on links to al Qaeda and their known affiliates.

Conclusion: So far, we've been very successful in preventing another attack on our soil. But every time sensitive intelligence is leaked to the press, we hurt our ability to defeat the enemy...

From: "Kavanaugh, Brett M."

Date: 5/11/06, 11:07 AM

To: "Sherzer, David"

— Attachments: —

CincoDeMayo04May2006#10notecards.doc

28.5 KB

Thursday, May 11, 2006

Draft #X2

After September the 11th, I vowed to the American people that our government would do everything within the law to protect them from another terrorist attack.

As a part of this effort, I authorized the National Security Agency to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. In other words, if al Qaeda or their associates are making calls into the United States from overseas, we want to know what they are saying.

Today, there are new claims about other ways we are tracking down al Qaeda to prevent attacks on America. Let me make some important points about what our government is doing ... and not doing:

First, our intelligence activities strictly target al Qaeda and their known affiliates. If al Qaeda or their associates are making calls into the United States, we want to know why.

Second, the government does not listen to domestic phone calls without court approval.

Third, the intelligence activities I have authorized are lawful and have been briefed to the appropriate members of Congress...both Republican and Democrat.

Fourth, the privacy of ordinary Americans is fiercely protected in all of our activities. We are not “mining” or “trolling” through the personal lives of millions of innocent Americans. Our efforts are focused on links to al Qaeda and their known affiliates.

Conclusion: So far, we've been very successful in preventing another attack on our soil. As a general matter, every time sensitive intelligence is leaked to the press and published, we hurt our ability to defeat the enemy...

FW:

Subject: FW:
From: "Sherzer, David"
Date: 5/11/06, 11:25 AM
To: "Kavanaugh, Brett M."

From: Kavanaugh, Brett M.
Sent: Thursday, May 11, 2006 11:07 AM
To: Sherzer, David
Subject:

— Attachments: —

CincoDeMayo04May2006#10notecards.doc

28.5 KB

Subject: reuters -- bk
From: "Sherzer, David"
Date: 5/11/06, 2:21 PM
To: "Kavanaugh, Brett M."

Senate panel clears way for White House court pick

Reuters

WASHINGTON – The Senate Judiciary Committee approved White House aide Brett Kavanaugh for an appeals-court seat on Thursday, clearing the way for a likely confirmation vote by the full Senate.

Kavanaugh won approval from the committee on a 10–8 party-line vote as Democrats said he was too partisan and inexperienced for the job.

Democratic senators had asked for an unusual second hearing on his nomination to question his involvement in White House policies on like eavesdropping on U.S. citizens' telephone calls without obtaining warrants and torture of detainees.

USA Today reported on Thursday that the National Security Agency has been secretly collecting records of the telephone calls of tens of millions of Americans.

Kavanaugh must be approved by the full Senate, where Republicans hold 55 of 100 seats, before joining the influential U.S. Court of Appeals for the District of Columbia.

Democrats are unlikely to muster the 60 votes necessary to block his nomination. Senate Majority Leader Bill Frist says he intends to schedule a vote before the late-May Memorial Day recess.

In his second appearance before the Judiciary Committee, Kavanaugh told the committee he knew nothing of warrantless domestic surveillance or torture of military detainees, and never met Jack Abramoff, the lobbyist at the center of a corruption scandal.

He failed to win over committee Democrats. "This nomination is a triumph of cronyism over credentials," Massachusetts Democratic Sen. Edward Kennedy said. Kavanaugh, 41, has been a White House aide since 2001.

Republicans said it was only natural Bush would nominate candidates who agreed with his conservative philosophy.

Kavanaugh has won the tentative support of at least one Democrat, Nebraska's Ben Nelson, one of a bipartisan group of 14 senators who have the power to block a vote on any judicial nominee.

Prospects for another Bush appeals-court pick, District Judge Terrence Boyle, are more uncertain.

Several Democrats called on Boyle to withdraw after published reports he held stock in companies that appeared before him, which would violate federal ethics law.

Nelson and six other moderate Democrats have asked for a second hearing to explore the allegations, but Judiciary Committee Chairman Arlen Specter, a Pennsylvania Republican, told reporters he would not hold another hearing on Boyle.

Specter declined to say whether he thought Boyle should withdraw his nomination. "I'm studying the details on the allegations of the conflict of interest," he said.

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Subject: Current text of statement

From: "Kavanaugh, Brett M."

Date: 5/11/06, 3:16 PM

To: "Bartlett, Dan", "Miers, Harriet", "Kaplan, Joel", "Kelley, William K.", "COSJBB", <kr@rove.com>, "Haenle, Paul T.", "Naranjo, Brian R.", "Morgan, Derrick D."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:35:33 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: RE: Current text of statement
From: "Miers, Harriet"
Date: 5/11/06, 3:24 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:53:54 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: Current text of statement
From: "Kavanaugh, Brett M."
Date: 5/11/06, 3:25 PM
To: "Gottesman, Blake"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:53:54 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: RE: Current text of statement
From: "Kavanaugh, Brett M."
Date: 5/11/06, 3:30 PM
To: "Kavanaugh, Brett M.", "Gottesman, Blake"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:53:56 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: RE: Current text of statement
From: "Miers, Harriet"
Date: 5/11/06, 3:40 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:53:57 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Radio with your and dan's edits
From: "Green, Anneke E."
Date: 5/11/06, 11:49 PM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:53:58 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: compare with your edits
From: "Green, Anneke E."
Date: 5/12/06, 12:47 AM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 16:53:59 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Radio post-staffing (let me know of any changes before 6:45 a.m.)

Subject: Radio post-staffing (let me know of any changes before 6:45 a.m.)

From: "Kavanaugh, Brett M."

Date: 5/12/06, 12:58 AM

To: "Miers, Harriet", "Kelley, William K.", "Gerry, Brett C.", "Kaplan, Joel", "Morgan, Derrick D.", [b3 50 USC 3024 (m)(1)]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:13:03 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P3,b(6),b(3),P5,P6

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Re: Radio post-staffing (let me know of any changes before 6:45 a.m.)

Subject: Re: Radio post-staffing (let me know of any changes before 6:45 a.m.)
From: "Kaplan, Joel"
Date: 5/12/06, 1:03 AM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:13:34 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,P3,b(6),b(3),P5

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

FW: Radio post-staffing (let me know of any changes before 6:45 a.m.)

Subject: FW: Radio post-staffing (let me know of any changes before 6:45 a.m.)
From: "Kavanaugh, Brett M."
Date: 5/12/06, 1:25 AM
To: "Addington, David S.", "Morgan, Derrick D."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:13:40 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,P3,b(3),b(6),P6

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Re: Radio post-staffing (let me know of any changes before 6:45 a.m.)

Subject: Re: Radio post-staffing (let me know of any changes before 6:45 a.m.)
From: "Morgan, Derrick D."
Date: 5/12/06, 1:26 AM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:13:46 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),P3,b(3),P5,P6

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

RE: Radio post-staffing (let me know of any changes before 6:45 a.m.)

Subject: RE: Radio post-staffing (let me know of any changes before 6:45 a.m.)
From: "Miers, Harriet"
Date: 5/12/06, 1:52 AM
To: "Kavanaugh, Brett M."

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:13:52 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,P3,b(6),b(3),P6

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

RE: Radio post-staffing (let me know of any changes before 6:45 a.m.)

Subject: RE: Radio post-staffing (let me know of any changes before 6:45 a.m.)
From: "Kavanaugh, Brett M."
Date: 5/12/06, 2:06 AM
To: "Miers, Harriet"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:14:46 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(6),b(3),P6,P5,P3

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Fwd: [Fwd: Radio post-staffing (let me know of any changes before...

Subject: Fwd: [Fwd: Radio post-staffing (let me know of any changes before 6:45 a.m.)]
From: "L. Pfeiffer"
Date: 5/12/06, 3:33 AM
To: "Kavanaugh, Brett M."
CC: "Miers, Harriet", "Kelley, William K.", "Gerry, Brett C.", "Kaplan, Joel", [b3 50 USC 3024 (m)(1)]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:15:40 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(3),P3,b(6),P6

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Re: Fwd: [Fwd: Radio post-staffing (let me know of any changes b...

Subject: Re: Fwd: [Fwd: Radio post-staffing (let me know of any changes before 6:45 a.m.)]
From: "Kavanaugh, Brett M."
Date: 5/12/06, 3:52 AM
To: [P6/b6]
CC: "Miers, Harriet", "Kelley, William K.", "Gerry, Brett C.", "Kaplan, Joel", [b3 50 USC 3024 (m)(1)]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:15:53 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P3,P5,P6,b(6),b(3)

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

RE: Lee: when have we said this before?

Subject: RE: Lee: when have we said this before?
From: "Bockhorn, Lee"
Date: 5/12/06, 7:25 AM
To: "Kavanaugh, Brett M.", "Drouin, Lindsey E."

In the televised Radio address on Dec. 17, after the TSP story broke:

<http://www.whitehouse.gov/news/releases/2005/12/20051217.html>

"The authorization I gave the National Security Agency after September the 11th helped address that problem in a way that is fully consistent with my constitutional responsibilities and authorities. **The activities I have authorized make it more likely that killers like these 9/11 hijackers will be identified and located in time.** And the activities conducted under this authorization have helped detect and prevent possible terrorist attacks in the United States and abroad."

From: Kavanaugh, Brett M.
Sent: Friday, May 12, 2006 7:25 AM
To: Bockhorn, Lee; Drouin, Lindsey E.
Subject: Lee: when have we said this before?

This terrorist surveillance program makes it more likely that killers like the 9/11 hijackers will be identified and located in time.

Re: [Fwd: Radio post-staffing (let me know of any changes before ...

Subject: Re: [Fwd: Radio post-staffing (let me know of any changes before 6:45 a.m.)]
From: "L. Pfeiffer"
Date: 5/12/06, 10:40 AM
To: "Kavanaugh, Brett M."
CC: "Miers, Harriet", "Kelley, William K.", "Gerry, Brett C.", "Kaplan, Joel", [b3 50 USC 3024 (m)(1)]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:16:53 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

b(3),P6,P3,b(6),P5

Notes:

50 USC 3024 (m)(1)

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: Radio latest ...
From: "Kavanaugh, Brett M."
Date: 5/12/06, 11:53 AM
To: "Hervey, Tina", "Snow, Tony"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:02:35 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P6,b(6),P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: RADIO ADDRESS TRANSCRIPT (WITH AUDIO) FOR BRETT'S APPROVAL
From: "Mamo, Jeanie S."
Date: 5/12/06, 3:11 PM
To: "Kavanaugh, Brett M."
CC: "Burck, Bill", "Sherzer, David", "Bohn, Trey"

THE WHITE HOUSE

Office of the Press Secretary

Embargoed Until Delivery

At 10:06 A.M. EDT

Saturday, May 13, 2006

RADIO ADDRESS BY THE PRESIDENT

TO THE NATION

THE PRESIDENT: Good morning. This week I nominated General Mike Hayden to be the next Director of the Central Intelligence Agency. The work of the CIA is essential to the security of the American people. The enemies who struck our nation on September the 11th, 2001, intend to attack us again, and to defeat them, we must have the best possible intelligence. In Mike Hayden, the men and women of the CIA will have a strong leader who will support them as they work to disrupt terrorist attacks, penetrate closed societies, and gain information that is vital to protecting our nation.

General Hayden is supremely qualified to lead the CIA. For the last year, he's been our nation's first Deputy Director of National Intelligence, and has played a critical role in our efforts to reform America's intelligence capabilities to meet the threats of a new century. He has more than 20 years of experience in the intelligence field. He served for six years as Director of the National Security Agency, and has a track record of success in leading and transforming that large intelligence agency. He also has held senior positions at the Pentagon and the National Security Council, and he served behind the Iron Curtain in our embassy in Bulgaria during the Cold War.

Mike knows our intelligence community from the ground up. He's been both a producer and a consumer of intelligence, and has overseen both human and technical intelligence activities, as well as the all-source analysis derived from those activities. Mike was unanimously confirmed by the Senate last year for his current post, and this week members of both parties have praised his nomination. I urge the Senate to confirm him promptly as the next Director of the CIA.

During General Hayden's tenure at the NSA, he helped establish and run one of our most vital intelligence efforts in the war on terror -- the terrorist surveillance program. As the 9/11 Commission and others have noted, our government failed to "connect the dots" in the years before the attacks of September the 11th. We now know that two of the hijackers in the United States made phone calls to al Qaeda operatives overseas, but we did not know about their plans until it was too late.

So to prevent another attack, I authorized the National Security Agency -- consistent with the Constitution and laws -- to intercept international communications in which one party has known links to al Qaeda and related terrorist groups. This terrorist surveillance program makes it more likely that killers like the 9/11 hijackers will be identified and located in time. It has helped prevent possible terrorist attacks in the United States and abroad, and it remains essential to the security of America. If there are people inside our country who are talking with al Qaeda, we want to know about it. We will not sit back and wait to be attacked again.

This week, new claims have been made about other ways we are tracking down al Qaeda to prevent attacks on America. It is important for Americans to understand that our activities strictly target al Qaeda and its known affiliates. Al Qaeda is our enemy, and we want to know their plans. The intelligence activities I have authorized are lawful and have been briefed to appropriate members of Congress, both Republican and Democrat. The privacy of all Americans is fiercely protected in all our activities. The government does not listen to domestic phone calls without court approval. We are not trolling through the personal lives of millions of innocent Americans. Our efforts are focused on links to al Qaeda terrorists and its affiliates who want to harm the American people.

Americans expect their government to do everything in its power under our laws and Constitution to protect them and their civil liberties. That is exactly what we are doing. And so far, we have been successful in preventing another attack on our soil. The men and women of the CIA are working around the clock to make our nation more secure. I am confident that General Hayden will strengthen the CIA and integrate its vital work with our other intelligence agencies, so we can defeat the terrorists of the 21st century.

Thank you for listening.

END

— Attachments: —

2006-05-12-eng-edit.mp3

3.7 MB

Subject: RE: RADIO ADDRESS TRANSCRIPT (WITH AUDIO) FOR BRETT'S APPROVAL
From: "Sherzer, David"
Date: 5/12/06, 3:56 PM
To: "Mamo, Jeanie S.", "Kavanaugh, Brett M."
CC: "Burck, Bill", "Bohn, Trey", "Sherzer, David"

Jeanie,

The transcript below includes a few minor edits. This is good to go, per Bill.

Thanks,
David

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Thank you for listening.

END

Subject: RE: RADIO ADDRESS TRANSCRIPT (WITH AUDIO) FOR BRETT'S APPROVAL
From: "Mamo, Jeanie S."
Date: 5/12/06, 4:11 PM
To: "Sherzer, David", "Kavanaugh, Brett M."
CC: "Burck, Bill", "Bohn, Trey"

Thank you!!

From: Sherzer, David
Sent: Friday, May 12, 2006 3:56 PM
To: Mamo, Jeanie S.; Kavanaugh, Brett M.
Cc: Burck, Bill; Bohn, Trey; Sherzer, David
Subject: RE: RADIO ADDRESS TRANSCRIPT (WITH AUDIO) FOR BRETT'S APPROVAL

Jeanie,

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Thank you for listening.

END

re Hayden nom.

Subject: re Hayden nom.
From: "Saunders, G. Timothy"
Date: 5/23/06, 4:56 PM
To: "Kavanaugh, Brett M."
CC: "Sherzer, David"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:08:17 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5,b(6),P6

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: FW: AP – Senate panel approves new head for struggling CIA
From: "Sherzer, David"
Date: 5/23/06, 7:59 PM
To: "Kavanaugh, Brett M."

From: White House News Update [mailto:News.Update@WhiteHouse.Gov]
Sent: Tuesday, May 23, 2006 5:25 PM
To: Sherzer, David
Subject: AP - Senate panel approves new head for struggling CIA

Senate panel approves new head for struggling CIA

By KATHERINE SHRADER

WASHINGTON (AP) Gen. Michael Hayden moved a step closer Tuesday to becoming the nation's 20th CIA chief, where he will take over a spy agency looking for a leader to steer it through troubles ranging from al-Qaida to Washington politics.

The Senate Intelligence Committee recommended confirmation, 12–3, with three of the panel's seven Democrats voting against him. If the Senate approves him before Memorial Day, as expected, Hayden could be sworn in by the end of the week.

“We think he is an outstanding choice to head the CIA,” committee chairman Pat Roberts, R-Kan., said after the vote. “He is a proven leader and a supremely qualified intelligence professional.”

Hayden, the former National Security Agency chief who became the nation's No. 2 intelligence official last year, has emerged as a leading advocate of the Bush administration's warrantless surveillance program.

That defense has raised his profile as the Senate has considered his nomination as CIA chief. It has not seemed to harm his prospects, though Democrats say the program is on shaky legal footing.

Sen. Russ Feingold, D-Wis., joined Democratic Sens. Ron Wyden of Oregon and Evan Bayh of Indiana to vote against Hayden. “General Hayden directed an illegal program that put Americans on American soil under surveillance without the legally required approval of a judge,” Feingold said in a statement.

At or near the top of the U.S. spy apparatus for nearly a decade, Hayden is no stranger to controversies. The CIA has a knack for attracting them.

A career Air Force officer, Hayden climbed the ladder to four-star general from the Reserved Officer Training Corps at Duquesne University. He was stationed in Guam as a junior intelligence officer at the end of the Vietnam War.

In 1999, Hayden took over the world's largest spy agency, the NSA, as it struggled to keep

up with communications technology from wireless phones to instant messenger programs.

Hayden brought in a new deputy William Black who had retired from the NSA two years earlier. As he prepares to take over the CIA, Hayden earned respect from many CIA veterans when he indicated he hopes to hire the former deputy director of the CIA's clandestine service, Stephen Kappes, who retired after an unusually public dispute with aides to outgoing Director Porter Goss.

Hayden and Kappes will have to get the CIA's work force back on track. Agency veterans have grumbled that they have wrongly shouldered the blame for mistakes in the run-up to Sept. 11, 2001, even though they say the agency was one of few aggressively going after al-Qaida.

The CIA also faces more adjustments than any other spy agency to a new mission following Congress' December 2004 intelligence reform law. And dozens of intelligence professionals have departed, often over frustrations with Goss' leadership.

When Hayden arrived at the NSA in 1999, a number of people left in what has been described as a purge. It's an open question whether the CIA can afford more departures.

John Brennan, the former director of the National Counterterrorism Center, acknowledges Hayden "broke some china" at the tradition-bound NSA. But Brennan sees that as a sign of an innovator. At the CIA, Brennan said, "there is still some clearing out that needs to be done."

Few overlook the mistakes Hayden made on major government purchases while he ran the NSA, including the Trailblazer program, which was intended to modernize the NSA's information technology systems. All told, two knowledgeable government officials, who spoke on condition of anonymity, say the programs cost roughly a couple billion dollars, but never quite worked. Exact dollar figures and details on the programs are classified.

If there is a silver lining for taxpayers, the officials note that the CIA does not spend big on costly technology, since spies are cheaper than satellites and computer servers.

"We were throwing deep, and we should have been throwing short passes," Hayden said of the Trailblazer program last week. "We were trying to do too much all at once."

It's an open question whether Hayden will remain one of the most visible intelligence officials in government once he moves into the seventh-floor executive suite at CIA.

Hardly afraid of a camera, Hayden opened up the super-secret NSA in limited ways by letting reporters come to NSA family day and inviting reporters to other types of sessions to explain in the broadest of terms how the agency works.

Hayden told the Senate he wants the CIA out of the news "as source or subject." Yet he said he wants to win back public confidence in America's best-known spy agency. Hayden didn't explain how he will square the contradicting notions.

Hayden himself has become a source of controversy over the warrantless surveillance program. But, to date, no full-blown investigations have been launched into the program.

On Monday, Federal Communications Commission Chairman Kevin Martin wrote a senior

Democratic congressman to say his office could not investigate the NSA's alleged collection of phone records on millions of Americans because of legal protections for the NSA's classified operations.

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Subject: Cabinet Report for the Week of June 19, 2006

From: "McDonald, Brian"

Date: 6/16/06, 10:18 PM

To: "McDonald, Brian", "Addington, David S.", "Barrales, Ruben S.", "Bartlett, Dan", "Bennett, Melissa S.", "Beyer, Todd W.", "Connaughton, James", "Gambatesa, Linda M.", "Gerson, Michael J.", "Hadley, Stephen", "Hennessey, Keith", "Hubbard, Allan B.", "Johnson III, Clay", "Kavanaugh, Brett M.", "Keenum, Rhonda N.", "Marburger, John H.", "Martin, Catherine", "McBride, Anita B.", "McConnell, John P.", "McGurn, William J.", "Miers, Harriet", "Rapuano, Kenneth", "Sayle, Desiree T.", "Smith, Heidi M.", "Taylor, Sara M.", "Townsend, Frances F.", "Wallace, Nicolle", "Walters, John P.", "Wehner, Peter H.", "Wolff, Candida P.", "Wright, Liza"

CC: "OCL – Cabinet Liaison"

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:22:56 EDT 2019

Releasability: Withheld In Full

Reasons for Withholding:

P5

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

From: "Scott McClellan"

P6/b6

To: "Deckard"

P6/b6

Subject: RE: ENZO

Received(Date): Mon, 5 Mar 2007 09:40:59 -0500

Kind of like Deckard:

In most of the official White House and State Department diplomatic pictures, Ensenat is off to the side or in the background. He was always on the edge of the limelight, but rarely in it.

From: Deckard, Josh [mailto:Josh_Deckard@who.eop.gov]

Sent: Monday, March 05, 2007 6:40 AM

P6/b6

Subject: Enzo

-----Original Message-----

From: Weinstein, Jared B.

To: Recher, Jason; Hagin, Joseph W; Meyers, John M.; Beyer, Todd W.; Bennett, Melissa S.; Keller, Karen E.; Haines, Mary A.; Newton, Julia K.; Sherzer, David; Deckard, Josh; Draper, Eric; Morse, Paul L; Perino, Dana M.; Carroll, Carlton F.; Edwards, Chris

Sent: Mon Mar 05 06:01:53 2007

Subject: times-picayune: bush's chief of protocol bows out

<<@StoryAd?x>>

Bush's chief of protocol bows out

New Orleanian held key White House job

Friday, March 02, 2007

By Bill Walsh

Washington bureau

WASHINGTON -- Donald Ensenat, who recently left the job as U.S. chief of protocol, likes to tell people that the position dates to ancient Greece.

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The term "proto" meant first and "collon" meant glued, a reference to the written summaries Greek diplomats attached to the outside of their dispatches. In six years in the job, Ensenat gave the old term a new twist: More than any other protocol chief in memory, Ensenat was glued to the president's side.

"I think he was very respected in the diplomatic community because they knew how close he and the president were," said Tom Kuhn, a Yale University classmate and president of the leading electric company trade group, the Edison Electric Institute. "It enabled him to be very effective."

Bush has shown he highly prizes friendship and loyalty, and Ensenat, 60, a New Orleans native, rates high marks in each. The two met at Yale where they were fraternity brothers and lived together in a Texas apartment afterward. Bush's father appointed him as ambassador to the Kingdom of Brunei. Ensenat and the younger Bush have been friends for more than four decades.

When he left the job Feb. 16, "Enzo," as the president calls him, was the second-longest serving protocol chief behind Selwa "Lucky" Roosevelt, who held the position during President Reagan's two terms.

"Washington being what it is, I think I would hire a close friend in a job like that, too," said John Weinmann, a fellow New Orleanian who was chief of protocol in the first Bush administration.

Post is misunderstood

Ensenat, who held the rank of ambassador, said the post is widely misunderstood. He said it bears little resemblance to the 1984 comedy "Protocol," starring Goldie Hawn, who plays a comely blond waitress co-opted by the State Department in a scheme to persuade a Middle Eastern emir to allow a U.S. military base in his country.

In most of the official White House and State Department diplomatic pictures, Ensenat is off to the side or in the background. He was always on the edge of the limelight, but rarely in it.

Ensenat said that two-thirds of the job involved arranging the nuts and bolts of visits by foreign dignitaries from the moment their planes touch down through a meet-and-greet with Bush to the farewell handshake on the tarmac.

"During the visit, I'm the face of the administration," Ensenat said.

When Ensenat, a New Orleans lawyer, accepted the job, he had every reason to believe it would be relatively light duty. It was no secret that candidate Bush didn't travel much outside the United States and also wasn't much for formal entertaining.

Not long after Bush took office in 2001, the two found themselves standing next to each other awaiting the first meeting with Russian President Vladimir Putin in Slovenia. With the international press corps poised to record every moment, Bush leaned over to his former frat brother and whispered, "Enzo, this is a long way from DKE House, isn't it?"

9/11 changed all

No one could have predicted what an understatement that would be. Later that year, terrorists attacked the United States and threw diplomatic relations into overdrive. The ensuing five years would see a surge in diplomatic visits to the White House. Ensenat counted 2,172 in all, a record pace.

"9/11 changed everything," he said. "Terrorism jumped to the head of the agenda. There were increased visits. Security ramped up tremendously. The motorcades were bigger and the logistics were bigger."

Logistics are the core of the protocol chief's job. Besides shepherding foreign dignitaries through the White House, Ensenat was responsible for overseeing the details of Bush's foreign trips, a total of 30 to 80 countries, each with a three-month planning lead time.

Ensenat said he was part of the "traveling squad" of advisers that stuck close to the president. Among other things, it fell to Ensenat and his 60-person staff to make sure that everyone got introduced by the correct title and the right order according to their diplomatic rank.

"Everyone has a pecking order," he said. "It's useful in making sure no one gets their nose out of joint and there is no diversion from the business at hand."

By 2003, the outpouring of international empathy the United States enjoyed after 9/11 had morphed into angry protests across the globe against the imminent invasion of Iraq. Ensenat said he saw little change on the diplomatic front.

Even from the French, who led the opposition to the war?

"The French are a special case," Ensenat said diplomatically.

Odd gifts to president

Ensenat's diplomacy seems to be a character trait. Asked about the strangest gift Bush received from a foreign dignitary, Ensenat described a seashell portrait of the president, but declined to identify the gift giver. He also demurred in saying who gave Bush a rare breed of dog, a breach of international protocol that you don't give animals to heads of state. The dog was holed up at the National Security Agency for two days before being adopted.

Ultimately, after six years the demands of protocol wore thin. Ensenat said he was leaving because of the "great sacrifice" it has put on him and his family. His wife, Taylor, divided time between Washington and New Orleans, but the time apart took a toll. He used to tell people that he would be lucky if by the end of his term he wasn't divorced or broke.

As it turned out, he is neither. Back in New Orleans, he has gone into business with fellow Bush loyalist Joe Canizaro, a developer, banker and venture capitalist. Ensenat said he may open up a Washington lobbying office, too.

He also hopes to keep up with his old friend the president. It shouldn't be hard. The two are neighbors. Four years ago, Ensenat and Canizaro bought a 600-acre ranch about five miles from Crawford, Texas, where Bush makes his home.

.....

Subject: Enzo
From: "Deckard, Josh"
Date: 3/5/07, 11:40 AM
To: [P6/b6]

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Date created: Fri Apr 12 17:23:22 EDT 2019

Releasability: Withheld In Part

Reasons for Withholding:

P6,b(6)

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: RE: Enzo
From: "Scott McClellan"
Date: 3/5/07, 2:40 PM
To: "Deckard, Josh", [P6/b6]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:23:48 EDT 2019

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Reasons for Withholding:

b(6),P6

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:

Subject: RE: Enzo
From: "Deckard, Josh"
Date: 3/5/07, 2:44 PM
To: "Scott McClellan"[P6/b6]

THIS RECORD IS A WITHDRAWAL SHEET

Date created: Fri Apr 12 17:23:57 EDT 2019

Releasability: Withheld In Part

Reasons for Withholding:

b(6),P6

Notes:

Case ID: gwb.2018-0258-F.3

Additional Information:
